

Freudian slip: the FOI Act that never was

**Paul Gibbons aka FOIMan,
discusses the FOI Act
that never was — the
Official Information Bill**

In my library, I have a fascinating little book. It once belonged to the former Mayor of London, Ken Livingstone, but that is not what fascinates. The book is entitled 'Secrecy, Or The Right To Know? A study of the feasibility of Freedom of Information for the United Kingdom.' It was published in 1980 by the Library Association for the Freedom of Information Campaign (which is not the same as the Campaign for Freedom of Information, which didn't exist in 1980).

The book consists of a series of essays by politicians, journalists and academics, explaining the benefits primarily of freedom of information, but also the need for privacy and data protection legislation. It includes comparative studies of then existing overseas legislation, specifically that of the USA and Canada.

Perhaps of most interest to me are the Appendices, which contain copies of the USA's Freedom of Information and Privacy Acts, the Canadian Freedom of Information Bill then about to become law and — the richest of all these riches — a copy of the Official Information Bill 1978-9: an early attempt to introduce freedom of information to the UK, 22 years before the current Act received Royal Assent.

The Official Information Bill

We have become accustomed to the idea that public authorities can, and mostly should, disclose information that they hold on request. However, in the 1970s it was illegal for civil servants to do this. The Official Secrets Act 1911 still regulated the use of information held by government departments. In particular, section 2 of the Act prohibited disclosure of government information of any kind. Any attempt to introduce freedom of information would need to address this.

The Official Information Bill's ('OI Bill') long title was 'A Bill to Repeal section 2 of the Official Secrets Act 1911, to create a public right of access to official information, and to make new provision in respect of the wrongful communication and handling of official information, and for purposes connected therewith.'

The right to access information was secondary in importance to the need to

reform the Official Secrets Act — fundamentally it was impossible to have the former without the latter.

The Bill was a Private Members Bill proposed by the Liberal MP Clement Freud (eventually to become Sir Clement Freud). In later years, Mr Freud was better known as a contributor to panel shows such as *Just a Minute*, where he engaged in witty banter with comedians such as Paul Merton. He of course was one of the Freud dynasty — grandson of Sigmund Freud, brother to the artist Lucian Freud, and father to Emma, the broadcaster and Matthew, the well connected PR executive. His Bill had in fact been drafted by the Outer Circle Policy Unit think-tank.

Private Members Bills have an interesting and noteworthy process and status. Once a year, MPs can put forward their name for a ballot. Their names are in effect pulled out of a hat. Those whose names are drawn first will stand the best chance of getting parliamentary time to debate their Bill. Only once they've got their slot do they have to decide what Bill they want to propose.

Even Bills near the top of the ballot stand a small chance of becoming law unless they have government support. More Private Members Bills were successful in the 1970s than today, but even so Clement Freud's Bill was unlikely to be enacted unless the government of the time supported it.

The government didn't support it. Neither did the opposition front bench. The Bill faced opposition in Parliament from the left — who were critical of the fact that it only covered central government — and from the right, who were unconvinced by freedom of information in any form. In retrospect, it was doomed to fail.

However, there was a chance that it might have become law after all, and that its enactment might have had an intriguing side-effect.

Speaking to the journalist Duncan Campbell for his 1987 BBC documentary *Secret Society*, Freud described how the Callaghan government sought to persuade him to miss his train to London in order that he might miss the

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confidence vote scheduled for 28th March 1979. In return, the government would seek to make his Bill law. Freud explains that he was distrustful that this promise would be fulfilled and refused. In the event, the Callaghan government lost the confidence motion by a single vote. A general election was called and in May, a new Prime Minister took office. Her name was Margaret Thatcher.

Certainly with the collapse of the Labour government, the OIB was lost forever. Freedom of information would have to wait another two decades.

OIB v FOIA

Despite the difficulties that the Bill faced, it was seen as a serious attempt to introduce freedom of information. What would have been different if it had become the Official Information Act? How did the Bill compare with the Freedom of Information Act ('FOIA') passed by the next Labour government 21 years later?

Firstly, as alluded to above, the Bill would only have applied to central government departments and health authorities. This is obviously significantly different from the local authorities, GPs, pharmacists, schools, universities, broadcasters and other organisations that are expected to comply with the FOIA. Nowadays, there are complaints that FOI does not extend to companies or charities that are involved in delivering public services.

Another difference was that the Bill would have provided access to documents rather than information. What

practical difference this would have made we can only speculate. Most case law today appears to blur the distinction between 'information' and 'document'.

Today, people often complain about having to wait up to 20 working days

practicable'. Failure to respond within two months was to be taken as a refusal.

There are similarities, too. Departments were expected to publish 'a statement...specifying the documents of which copies are ...available and the place or places where copies may be inspected and may be purchased...'. This was to be updated annually. The 2000 Act gave these statements a name: Publication Schemes.

There would have been no Information Commissioner, but complaints would have been made to the Parliamentary Commissioner who had powers to investigate decisions taken by government departments.

The exemptions

Like its 2000 counterpart, the Official Information Bill protected certain categories of information. This was done in different ways. First of all, Part II of the Act established that disclosure of information in some cases would in fact be an offence.

The responsible Minister was to have established a classification scheme and all documents relating to defence, security, or intelligence, were to be assessed on the basis of whether their disclosure would be likely to cause 'injury to the interests of the nation' or 'endanger the life or safety of any British subject'. Disclosure of such classified documents would have been an offence.

In addition, the disclosure of information 'likely to impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders', or confidential information relating to an individual or a company, would also constitute an offence, liable to either imprisonment or fine.

A Comparison of the Exemptions in the Official Information Bill 1978-79 and the Freedom of Information Act 2000

OIB 1978-79	FOIA 2000
Disclosure might impair the defence or security of the UK or relations with other states or governments, or would divulge a confidence of another state	Very similar to the wording of sections 26 and 27, and also encompasses the coverage of sections 23 and 24.
Any document which could not be disclosed without contravening a prohibition	Prohibition on disclosure section 44 of FOIA.
Documents relating to 'law enforcement or the investigation of crime', but only where disclosure 'would or might endanger' safety or impede prevention or detection of offences.	The exemptions at sections 30 and 31.
Legal professional privilege	Equivalent to section 42.
Documents relating to an identifiable individual which might amount to breach of confidence or invasion of privacy (interestingly the definition of 'individual' here specifically includes 'a deceased person').	The forebear to section 40 (and possibly 41).
Cabinet documents, including Cabinet Committees, were to be exempt from disclosure for 10 years.	Today these documents would be protected by sections 35 or 36 of the Act, and despite a public interest test, it is unlikely we will see very many current Cabinet papers for at least 20 years.

for a response under FOIA. The Official Information Act would have allowed two months for a response, though just as today's public bodies are expected to respond 'promptly', officials in a post-OI Act world would have had to respond 'as soon as

There were also exemptions setting out the reasons why requests could be refused in a similar way to the current Act. There are only six, but the wording and coverage seem rather familiar (see the grey box). In addition to the exemptions, responses to requests for documents relating to 'policy formation' could have been deferred until a later date 'where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices.'

Looking back

It is fascinating to look back at proposals for an FOI Act made almost forty years ago. On the one hand, it is surprising how many similarities there are between that Bill and the Act that was eventually passed. For example, aspects such as publication schemes that survived the intervening years and became law, and the similarity of the exemptions that made it through, reflecting the remarkable consistency of civil servants' objections to freedom of information.

On the other hand, we can see how much has changed. The idea of a FOI Act which detailed the offences that might be committed by a public official if they disclosed information seems an anathema now. It wasn't necessary to set these out in the 2000 Act because the 1911 Official Secrets Act had already been amended in 1989 to limit the circumstances in which officials might face action. Civil servants and others can still be prosecuted in rare circumstances involving defence or security disclosures, but such consequences are at least not spelt out alongside the right to know as they had to be in 1978. The limitation of FOI to central government seems similarly unimaginable today.

Despite its limited scope, the OIB was viewed by many as a radical departure from the existing state of regulation. A contemporary civil service report into FOI overseas concluded that FOI legislation would be unsuitable for the UK, claiming that it would undermine the conven-

tions of ministerial responsibility, civil service impartiality, and be generally 'inappropriate to the British system of democratic Parliamentary and Cabinet government'.

With our current FOI Act once again under review, it is clear that some in government still feel that way. Nevertheless, it is edifying to look back and see how far freedom of information in the UK has come.

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