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The Freedom of Information Act 2000: An updated literature review (2009-2011)

This article examines the new challenges concerning the Freedom of Information Act 2000 (FOIA) in the United Kingdom since 2009 and the publication of the article *The impact of the Freedom of Information on Records Management and Record Use in Local government: a literature review*¹. It identifies three new approaches to the FOIA: the reconsideration of the efficiency of the FOIA on transparency and access, the means of access to public information, and the need to re-think recordkeeping in the digital era. It concludes that the FOIA has changed how public information and records are considered. The access to public documents does not matter as much as the access to public information. An interesting comparison can be drawn between the French case of access and re-use of public information and that of the United Kingdom. It underlines ethical questions which have not been dealt with in the previous literature.

Introduction

Since the full implementation of the Freedom of Information Act (FOIA) 2000 in 2005, the UK government has had the responsibility to give greater access to information. The impact of the FOIA on records management services in public authorities was assessed to consider how the law affected the management of records and the work of public authorities in the UK. In 2008, Dr. Elizabeth Shepherd, Dr. Alice Stevenson and Dr. Andrew Flinn examined its impact on recordkeeping and the access to public records particularly in local authorities. Part of their research is an extensive literature review focusing on the United Kingdom. A number of various studies focusing on the problems raised by the implementation of 2005 have been published since 2008. This paper will provide an update of the literature review published in 2009 and highlight some new issues raised by the FOIA to understand the transition from theory to reality. The analysis of the references (2009-2011) emphasizes three major topics in which new issues emerged. One of the main aims of the FOIA is to increase transparency and give the government the opportunity to make public information more accessible. Transparency and access are two significant aspects of the FOIA

¹ SHEPHERD, E., STEVENSON, A., FLINN A., 2009. The impact of the Freedom of Information on Records Management and Record Use in Local government: a literature review, *Journal of the Society of Archivists*, vol. 30, n°2, October 2009, p. 227-248.

as underlined in the previous literature review². But studies now focus on public trust and participation – rather than on open access and accountability. They underline the need for privacy protection in the era of digital recordkeeping and access via websites. Like Ben Worthy, we may wonder: “More open but not more trusted³?” The second part of the study highlights a more practical issue concerning the FOIA – the means of access. Official websites, social media and new ways of communication were not originally designed for FOIA. How can the government give access to public information without changing how it interacts with citizens? Eventually it reveals the major issue of these new studies – the need for good recordkeeping. Recordkeeping is essential for the UK government which requires immediate access to its records. Digital recordkeeping is a real issue when a long-term access to information is required. How may the FOIA change the culture of recordkeeping? How can it be more efficient?

This updated literature review will examine and sum up the methodology of this study, and the three general topics concerning the FOIA 2000. With a comparison with France, it will conclude by addressing the ethical questions dealing with the re-use and access to public information.

Methodology

When analysing new references about the FOIA 2000, I had to face some methodological difficulties. The official literature – articles by journalists, political advisers, or records managers – gives an insight into the new issues of the FOIA, though it underlines the limits of the literature review. This study has been limited to new articles, UK official documents and other publications in English issued between 2009 and 2011. An overview of the French case was added, because of the latest evolution of the law and the new issues linked to the re-use of public information.

The analysis of the data from the new publications was carried out using the resources of University College London Library, starting with electronic databases (Metalib, Scopus), a wide range of other databases linked to the first two, and the catalogue of its libraries. Research was conducted on different topics: the Freedom of Information Act 2000, freedom of information, transparency and access to documents, e-government, public information, accountability, trustworthiness, secrecy, records management and recordkeeping. All the

² SHEPHERD, E., STEVENSON, A., FLINN A., 2009. The impact of the Freedom of Information..., p. 227-228: “The Act imposes significant duties and responsibilities on public authorities to give access to information.”

³ WORTHY, B., 2010. More open but not more trusted? The effect of the freedom of information act 2000 on the United Kingdom central government, *Governance*, **23**(4), pp. 561-582.

terms were combined to provide cross-references. The articles which are listed have been read several times in order to understand the new issues related to the subject, to improve the accuracy of the results, and to remain focused on the United Kingdom. Research has also been conducted with new term combinations: accountability of public authorities, quality of policy-making, public participation, public trust, personal privacy, social media, journalism and FOIA, information quality, political results. The references were refined once again in order to give the most relevant update of the literature published since 2008.

To draw a comparison with France where the re-use of public information is recent, official documents were essential, for very few articles have been published since 2010. Regarding access to public information, the attitude of the French government has changed – laws and decrees intended to give access to such information have been adopted. On 21 February 2011, a decree was issued to create a government website with public information similar to the UK's www.data.gov.

Transparency and access with FOIA: trusted or not?

Toby Mendel has worked on the access to information regimes around the world. He underlines that the questions of transparency and access are involved to a certain extent – the access to legislation and the public participation⁴. The question of a greater access provided by the government is a major challenge. “These values of access and exchange served the development of a participatory democracy well [...] to have free expression⁵.” Verne Harris wrote: there is “no political power without control of the archives⁶.” The balance between freedom of information and political interest is difficult to achieve. Journalists and citizens worry about the phenomenon called “paper shuffling”, which is growing in democratic societies. The decree on access is “determined by the contours of privilege⁷”, which is what the FOIA would ban. This notion is also called the “chilling-effect⁸” in the literature. It sums up the limits of access and transparency, and emphasizes the fact that all the information is not online because of government secrecy and the war on terrorism. This feeling is promoted

⁴ MENDEL, TOBY, 2008. Freedom of Information: a comparative legal survey, 2nd ed., Paris: UNESCO, p. 141. (Available online http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf. Accessed 23/02/2011.)

⁵ JAEGER, P.T., BERTOT, J.C., 2010. Transparency and technological change: Ensuring equal and sustained public access to government information, *Government Information Quarterly*, 27, p. 371.

⁶ HARRIS, Verne, 2011. Archons, aliens and angels: power and politics in the archive, *The future of archives and recordkeeping. A reader*, ed. Jennie Hill, London: Facet publishing, p. 104.

⁷ *Ibid.*, p. 106.

⁸ WORTHY, B., 2010. More open but not more trusted?..., p. 570.

by the media and the use of public information by journalists. The media “play a key role in FOI⁹.” It is “also the primary means through which the public perceives FOI and information disclosed by it¹⁰.” In addition to unveiling the workings of decision-making within the government, the FOIA reveals the hidden face of government processes. In Ireland in 2009, *The Sunday Tribune*, following FOI¹¹ requests, reported the expenses of John O’Donoghue, a former Minister for Tourism and speaker of the Dail. He had to resign to stop the battle¹². The right of the media and the freedom of the press were not, at first, taken seriously. But, even though some public authorities are still “excluded from the legislation¹³” – i.e. the Royal family, and the security and intelligence services – the FOIA 2000 brought changes. The law established “a fundamental right to information¹⁴”, “where before there was grace and favor¹⁵.”

Means of access: the limits of the e-government?

Beyond the democratic purpose of the law and the mechanisms which facilitate the accountability of public authorities, the studies underline the decrease of effectiveness because of the protection of personal privacy. In the United Kingdom, in addition to the FOIA, the revised Data Protection Act came into force in 1998. It preserves the “processing of personal data about individuals and setting safeguards for such processing¹⁶.” Even if access to information is a right, the right to privacy must be respected. It is not easy for the public to understand how difficult it is for the government to implement such a law. Moreover, citizens remain suspicious because of the use of computer media, which they regard as a threat. They do not consider digital records as reliable. Access to public data means that you take into account the public’s needs and desires, even if the reality of government data is really different from the re-use of public information. The efficiency of the FOIA is linked to public participation and public trust. But it also changes the archivists’

⁹ WORTHY, B., 2010. More open but not more trusted?..., p. 565.

¹⁰ *Ibid.*, p. 566.

¹¹ In the Republic of Ireland, the Freedom of Information Act 1997 came into effect in April 1998. It has been amended in 2003 (Available online: <http://www.irishstatutebook.ie/2003/en/act/pub/0009/index.html>. Accessed 10/03/2011).

¹² WORTHY, B., 2010. More open but not more trusted?..., p. 569.

¹³ BIRKINSHAW, P., 2010. Freedom of information and its impact in the United Kingdom, *Government Information Quarterly*, 27(4), p. 313.

¹⁴ *Ibid.*, p. 315.

¹⁵ *Ibid.*, p. 315.

¹⁶ *Ibid.*, p. 315.

philosophy and state of mind. For the first time, they do not control “how collections are catalogued, described and accessed¹⁷.” This new flexibility stresses the evolution of the perceptions of archival materials and of archivists themselves. David Weinberger said: “Transparency is the new objectivity¹⁸.”

To respect the legal right to request access to specific information, the government uses official websites and social media. New technologies are the “new means of access to government information¹⁹.” But it raises new questions about access to government information. Some information is not provided online. Social media are not designed for official information. These two findings underline the limits of access to information. Government information was not originally designed for public access. E-government is not designed for users²⁰ who use Google for their research on the Web. Eventually the use of new technologies reveals the problem of equal access to information. Using websites to promote the archives and public information is relevant, but it creates a barrier linked to the access to new technologies. For instance, in the United States, “nearly 40% of homes lack internet access²¹.” How could the government be transparent and accessible without a general access to information? In their analyses, Jaeger and Bertot underline that “all of these issues will require a considerable reassessment of many of the current approaches to e-government²².”

Access to records or access to information?

Recordkeeping is essential for the information which has to be available in the long term. Analyses of the local government reveal weaknesses in the management of records. Records management responsibility was given to temporary staff or to part-time consultants. One facet of the issue is the quality of information. This requires control of the version of a document. A good recordkeeping system relies on the ability to retain information, which

¹⁷ THEIMER, KATE, Interactivity, flexibility and Transparency: social media and Archives 2.0., *The future of archives and recordkeeping. A reader*, ed. Jennie Hill, London: Facet publishing, p. 135.

¹⁸ WEINBERGER, DAVID, 2009. Transparency is the new objectivity, *Joho The Blog*, 19 July. (Available online: <<http://www.hyperorg.com/blogger/2009/07/19/transparency-is-the-new-objectivity>> . Accessed 01/03/2011.)

¹⁹ JAEGER, P.T., BERTOT, J.C., 2010. Transparency and technological change: Ensuring equal and sustained public access to government information, *Government Information Quarterly*, 27, p. 372.

²⁰ JAEGER, P.T., BERTHOT J.C., 2010, Designing, implementing and evaluating user-centered and citizen-centered e-government, *International Journal of Electronic Government Research*, 6(2), pp. 1-17.

²¹ JAEGER, P.T., BERTOT, J.C., 2010. Transparency and technological change..., p. 373.

²² *Ibid.*, p. 373.

may be “based on a person not a system²³.” The government’s response to FOI simply provides information and context; it does not necessarily provide the records²⁴. Once more, the archivist in 2011 has to face new challenges. Even if the archivists remain the guardians of the records and of the information, their discretion is not relevant in a society which promotes transparency. Jacques Derrida once wrote: there is “nothing outside context²⁵” in the Archives. The archivist’s role is essential to codify a praxis which provides guidance against the intrusion of politics²⁶. The ethical standards are “determined by the imperative to open the archive in a fundamental way to those alienated in it and by it²⁷.” Since 2009, in addition to the challenge of re-thinking archival science and the archivist’s place in society, the FOIA focuses the debate on the ethical question. How can the archivists respect the ethics and work for politicians to keep their memory alive? This question of ethics is one of the major issues raised by the re-use of public information in France last summer. Is this debate relevant for the United Kingdom?

The re-use of public information and French policy: the ethical question?

In France, the law of 1978²⁸ about the re-use of public information has never been enforced. The 2008 law on archives²⁹ has recently modified access and communication. In summer 2010, new requests from the public sector forced the *Archives départementales* – the archives of local authorities – to develop a licensing policy to re-use public information. The debate has become an ethical question which has caught political attention³⁰. For French politicians and officials, the internet is a powerful tool which is in contradiction with the right of privacy. By using internet tools, anyone can cross reference family origins, political or religious views from public documents sold by local authorities to private companies. The private sector is aware of the economic issues. With the lobby group of genealogists,

²³ SHEPHERD, E., STEVENSON, A., FLINN, A., 2010. Information governance, records management, and freedom of information: A study of local government authorities in England, *Government Information Quarterly*, 27(4), p. 343.

²⁴ *Ibid.*, p. 344.

²⁵ HARRIS, VERNE, 2011. Archons, aliens and angels..., p. 117.

²⁶ *Ibid.*, p. 117-118.

²⁷ *Ibid.*, p. 118.

²⁸ Act N° 78-753 of 17 July 1978 on improving relations between the administration and the public.

²⁹ Act N °2008-696 of 15 July 2008 on archives.

³⁰ For more information on the re-use of public information, you may read these two statements from the *Association des Archivistes Français (AAF)* : “La réutilisation des données nominatives ? : gare au fichage des individus !”, 6 July 2010 (<http://www.archivistes.org/La-reutilisation-des-donnees>), and “Revue française de généalogie : droit de réponse à Bruno Ory-Lavollée, 13th October 2010 (<http://www.archivistes.org/Revue-francaise-de-genealogie>).

companies could provide subscription tools online to make money and participate in the rise of the digital economy³¹, with the help of the government and its *Plan Numérique 2012*³². In 2010, 450 million Euros were released for the cultural sector to help institutions digitize their contents.

Since February 2011, the French government has established a national direction for state information and communication systems and has set up a specific mission “Etalab” (21 February 2011)³³, which will be in charge of a national portal with public information. The only way for it to be effective is to promote the role of archivists and records managers. It reminds me of the speech of David Ferriero, the archivist of the United States in March 2010: “the backbone of a transparent and accountable government is good records management³⁴.” In fact, transparency and access to public information can be promoted by technologies (e-government, the internet, social media), but it cannot work without records managers, who are skilled in securing the “human dimensions on transparency³⁵.”

³¹ Since 2008, the notion of digital economy has been developed to include Information Technology (IT) in the economy of France. The French government has launched its “*passport pour l'économie numérique*” (<http://www.econumerique.pme.gouv.fr/>) and also released 4,5 billion Euros to help local companies develop IT tools (<http://www.gouvernement.fr/gouvernement/des-investissements-d-avenir-pour-construire-la-france-de-demain-0>). 750 million Euros are dedicated to the digitization of educational, scientific and cultural contents.

³² BESSON (Eric), *Plan numérique 2012. Plan de développement de l'économie numérique*, Paris, La documentation française, 2008, 81 p.

³³ FRANCE. Decree n°2011-193 portant sur la création d'une direction interministérielle des systèmes d'information et de communication de l'Etat. Decree n°2011-194 portant sur la création d'un portail unique interministériel des données publiques.

³⁴ FERRIERO, D., 2010. *Removing the shroud of secrecy: making government more transparent and accountable – testimony of the Archivist of the United States David Ferriero*, Washington D.C., NARA (Available online: <http://www.archives.gov/about/speeches/2010/3-23-2010.html>). Accessed 23/02/2011.

³⁵ JAEGER, P.T., BERTOT J.C., 2010. Transparency and technological change..., p. 375.

Conclusion

Updating the UK FOIA literature review of 2008-2009 is really helpful to understand how the theory is connected to the practice. The aims set by the FOIA are to find a way to respect the public right of access to information. Transparency is the new motto of the archivists who must change their habits to respect the law and to meet the expectations of the requesters. Even if the development of e-government changes the way the public considers the Archives, access to information becomes the most relevant factor in redefining a new policy in terms of recordkeeping. This flexibility highlights the question of ethics: how can the archivists work in transparency and control the success of e-government? How can they find a new position in the 21st-century society? Creativity, professionalism and expertise are the key assets to meet the challenges posed by the Freedom of Information Act.

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