

Opening Doors: The Role of Freedom-of-Information Laws in Protecting and Expanding  
Democracy

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*“Publicity is the greatest and most effective check against arbitrary action. This is one of the fundamental rights of the subject. Further, publicity stimulates the interests of local persons in local government. That is very important. The paramount function of this House (of Commons) is to safeguard civil liberties, rather than to think that administrative convenience should take priority in law.” — Margaret Thatcher<sup>1</sup>*

The democratic state faces a conundrum with regard to how it handles information. On the one hand, democratic values require openness: Citizens must have access to information in order to act effectively. On the other, secrecy can be a powerful tool of statecraft for which there is no substitute. Thus official secrecy creates a tension within the democratic state between the imperatives of democracy and those of statecraft. That tension is most acute in cases in which official secrecy is seen as indispensable to the functioning of the state. It is one thing for the state to discard a useful but expendable tool in the name of greater democracy, but it is quite another dispense with a vital one that may even be necessary for state survival. In Westminster-style systems, supporters of official secrecy have historically pointed to the constitutional requirements of their systems as imposing a unique need for secrecy. This paper outlines and refutes those arguments and in pointing out the democratic costs of official secrecy, along with the benign experience with greater openness in Australia, Canada and New Zealand, makes the case that the major challenge presented by freedom of information laws is not mitigating the damage they cause to the state but in maximizing their benefits to citizens.

Indeed justifications of official secrecy, when they are articulated at all, tend to be couched in terms of state survival, either with regard to military or police effectiveness or

with regard to ensuring officials receive candid advice and are able to deliberate effectively.<sup>2</sup> A primary justification for secrecy is national security, for obvious reasons. No matter how open and democratic the society, it would be unwise to make public the planned time and place of a military offensive or the movement of troop ships during wartime. A state that did so would likely find its offensive effectively countered and its ships resting on the seabed. Unfortunately, once a rationale for official secrecy has been established, there is a tendency to invoke that rationale as broadly as possible. In the United States, the courts have been notably reluctant to force the executive branch to disclose information if it is said to be withheld for national security purposes. This reluctance is so extreme that for all practical purposes the phrase “national security” amounts to an incantation the executive can invoke without fear of challenge. What results is frequently absurdity. While Great Britain, hardly a bastion of openness, and Canada routinely make public their total annual intelligence budgets, the American Central Intelligence Agency continues to insist that releasing its total annual allocation would endanger national security and reveal the agency’s “sources and methods.” The courts have accepted that argument, not only for current appropriations, but also for historical figures for 1947 and 1948, as if releasing those numbers would cause American power to tumble down like a house of cards.

### **The case for deliberative secrecy**

Of greater concern here is a second common justification for official secrecy: safeguarding the integrity of deliberation. According to this argument, sound decision

making depends of officials being able to receive candid advice and to shift their positions in the light of ongoing discussion. It takes little imagination to understand how publicity can inhibit candor, or how an official might reasonably fear that a change in position could be read as a sign of inconsistency or hypocrisy, rather than the result of serious thought in a deliberative setting. Taken to its logical conclusion, this argument can be seen as justifying extremely tight official controls over information.

While it will be demonstrated here that freedom of information laws and Westminster-style democracy can coexist quite comfortably, it has been argued that certain features of these systems make official secrecy particularly important. According to this argument, the conventions of collective Cabinet responsibility and ministerial responsibility require secrecy, for without it, the exposure of internal dissent and discussion would reveal those conventions to be mythical.

Anthony Wedgwood Benn<sup>3</sup> (1979) explains (and rejects) the logic that holds official secrecy to be a bulwark of collective Cabinet responsibility:

Under this doctrine the myth of Cabinet unity on all matters discussed is fostered. Cabinets are, of course, rarely united in their views. Indeed, were it so there would be no Cabinet discussion at all. Why then is this myth fostered? In its origins it was a protection for the Sovereign's principal advisers against attempts, by the Sovereign, to pick out those Ministers who were ring-leaders of advice unacceptable to the Crown. It must simultaneously have been clear that Parliament and the populace could best be kept quiescent if they were told that the Cabinet was solidly behind every policy announced by H.M.G.; and thus dissatisfied groups could not nourish the hope of a change in policy based on the knowledge that their view was being advocated in the highest councils of the State (p. 18)

Collective Cabinet responsibility may still have utility, but it is obviously not the same utility that led to its institution.

Using similar logic, the doctrine of ministerial responsibility, which holds ministers solely and entirely responsible for actions taken by their ministries, is said to require official secrecy. Revelation of debates within the civil service could be seen as undermining ministerial responsibility and put too much putting too much power in the hands of unaccountable bureaucrats, much as revelation of Cabinet debates undermines the seeming unity that might be argued as central to collective Cabinet responsibility. Conversely, it could have the equally negative effect of making civil servants unwilling to offer candid advice, for fear of negative public reaction. Mitchell Sharp (1986) says he left Canadian public service in 1958 in part because of Prime Minister John George Diefenbaker's decision to release a report Sharp had signed as deputy minister of trade and commerce for the previous Liberal government: "If documents like this were to become accessible, one of two things would happen. Either the civil servants would ask the ministers what they wanted by way of advice so as to avoid a public conflict, or the advice would be given orally" (p. 72).

In a critical account, Ridley (1986) explains the principle of ministerial responsibility in the British system:

All executive power is vested in individual ministers: in law any action taken by the ministry is theirs and they alone are answerable to parliament, the main channel through which government is supposedly controlled. The same applies, a fortiori, to policy making. Civil servants are thus no more than advisers of their ministers. ... Facelessness is the theoretical corollary of ministerial responsibility. The emphasis on ministers as the lynchpin of our system of parliamentary-cabinet government allows civil servants no other role, save ministerial collaborators (p. 439).

Under this understanding of the ministerial role, revelation of policy alternatives considered by the civil service would constitute either a violation of this "facelessness" or an unacceptable diminution of ministerial power, in favor of a form that is not similarly

accountable to parliament. In practice, however, “the executive mentality inverts the principles of ministerial responsibility, making it an accountability shield, rather than a sword” (Flinders 2000, p. 422).

There are additional reasons of political expediency that make official secrecy an attractive adjunct to ministerial responsibility. As A.P. Tant (1990) explains, according to this principle, ministers should be prepared to resign upon disclosure of serious mistakes:

But note that it is when serious mistakes are “disclosed” rather than when they are *discovered*. Thus undisclosed mistakes, though of course unfortunate, present no constitutional dilemma. The obvious inference is that a minister has a clear incentive to keep tight control of information. Those close to the minister and ministerial business who become aware of the undisclosed matter that they feel the public has a right to know, must therefore stifle their own morality and remain silent, or risk not only their job, in the case of a civil servant for example, but also legal sanction if they choose to publicize “unauthorized” information (p. 480, italics in original).

To the extent that official secrecy is accepted as a vital underpinning of collective Cabinet responsibility and ministerial responsibility, there is a compelling case for its practice. However, official secrecy turns out not to be a central pillar supporting Westminster-style systems, and experience now shows that those systems function perfectly well with freedom of information laws in place. More emphatically, Westminster-style systems, like any other form of democratic states, *should* value and protect freedom of information as a foundational principle of democracy. Official secrecy is fundamentally anti-democratic, and any serious consideration of its practice must begin with that in mind.

### **Damage to democracy**

While proponents of official secrecy may point to hypothetical harms caused by freedom of information to parliamentary-cabinet government, there is demonstrable damage to democracy whenever the state keeps secrets from its citizens — even when circumstances leave no alternative. Among other things, official secrecy subverts accountability, diminishes citizen autonomy and undermines the legitimacy of the state. It creates an environment in which corruption can flourish, which is why contemporary anti-corruption campaigns place such an emphasis on transparency (Warren 2004). It encourages paranoid-style thought and discourse, as well as lending undeserved credibility to conspiracy theories (Ellington 2003). In creating a class of information to which citizens are forbidden access, official secrecy limits their ability to make the decisions best for their own private interests, as well as for the common good. This is true for thinner minimalist accounts of democracy, as well as for thicker, more participatory models. In practice, Westminster-style systems are no more immune than other states to the damage official secrecy causes to democracy.

Official secrecy violates at least two of Robert A. Dahl's (1989) criteria for polyarchy: effective participation and enlightened understanding, neither of which is possible unless citizens have access to the information they need for decision making. Effective participation requires that citizens "have adequate and equal opportunities for placing questions on the agenda and for endorsing one outcome rather than another" (p. 109). When information is shielded by official secrecy, citizens may be unaware of the possible outcomes of the decision-making process or their full implications, thus distorting their participation or thwarting it altogether. As for enlightened understanding, which holds, "Each citizen ought to have adequate and equal opportunities for

discovering and validating (within the time permitted by the need for a decision) the choice on the matter to be decided that would serve the citizen's interests," (p. 112, parentheses in original) — without sufficient information, it is impossible for citizens to determine with any confidence what best serves their interests or the common good.

In limiting the ability of citizens to participate at all phases of the political process, official secrecy represents a fundamental denial of their autonomy. Therefore, even when it is undertaken with the purest of motives, official secrecy is *prima facie* undemocratic. This is a cost that sometimes must be borne, but it is not one to be taken lightly, as neither experts nor representatives standing in for citizens can ever fully compensate for their exclusion.

### **Deliberative secrecy reconsidered**

The case for freedom of information becomes stronger when one considers evidence that not only is official secrecy anti-democratic, but that its relationship to deliberations is more complex than suggested by arguments for secrecy as a safeguard for candor. In fact, official secrecy poses a risk of diminishing the quality of deliberations, because it limits input to insiders alone and may create an atmosphere hostile to criticism and an echo-chamber effect, in which only proponents of a particular course of action have a voice (Bok 1984, p. 196).

The failure of the Bay of Pigs invasion offers a well-known example of a successful effort keeping secrets leading to disastrous consequences — as well a failure to reach policy objectives. Truth be told, the secrecy surrounding the impending invasion



of Cuba was not as complete as U.S. officials would have liked. The New York Times actually discovered the invasion plans ahead of time but was persuaded by the Kennedy administration not to publish a story for the sake of American national interests. Had the newspaper not given in, it could have scuttled the ill-conceived project (Pontuso 1990), although it is doubtful the officials involved would have greeted the revelation with gratitude, deprived as they would have been of an understanding of the disaster that awaited.

Secrecy damaged the Kennedy administration's planning process, as it limited the range and type of information available to decision makers. According to Morton H. Halperin (1975): "Cutting off many officials from the Bay of Pigs operation meant not only that officials knowledgeable about the Cuban scene were unable to comment and warn the President that the kind of uprising on which the plan depended was unlikely, but also the narrow circle meant that the President was not confronted with advice from those who could have pointed out the limitations of the different ways by which the presumed threat from the Castro regime could be contained."

The use of secrecy in this kind of situation also tends to privilege secret information over that contained in open sources, no matter how valuable open-source materials may be. Moynihan (1998) writes that in the Bay of Pigs invasion, a bias against open-source information contributed directly to an inadvisable decision to go ahead with the invasion, despite evidence that the popular uprising planners were counting on was unlikely to occur.

The Bay of Pigs debacle could have been avoided if foreign policy experts in the United States had but paid attention to published research already available to them. In the spring of 1960, Lloyd A. Free of the Institute for International Social Research at Princeton had carried out an

extensive public opinion survey in Cuba. ... The Cubans reported that they were hugely optimistic about the future; many dreaded the return of Castro's predecessor, the dictator Fulgencio Batista. Free's report ended on an unambiguous note: Cubans "are unlikely to shift their present overwhelming allegiance to Fidel Castro. ... Free's report, published July 18, 1960, was readily available in Washington. (Indeed, the Cuban embassy sent for ten copies.) It is difficult not to think that the information in the public opinion survey might have had more influence had it been secret. In a culture of secrecy, that which is not secret is easily disregarded or dismissed (pp. 222-223).

In practice, secrecy frequently damages the quality of deliberation and decision making, particularly when it comes to making decisions about covert operations, but certainly not just in that realm. Halperin (1975) identifies pathologies that have afflicted the decision-making process for covert action: Proposals tend to come from the organizations that will be responsible for programs if they are approved, and consultation is limited to a narrow circle of advisers, again an ideal environment for sycophancy and an echo-chamber effect.

Halperin addresses a kind of worst-case scenario for official deliberation. Nevertheless, three decades later, his comments continue to be relevant. When significant policy decisions must be made in secret, there are costs. Conscientious officials may try to minimize those costs, and indeed some institutional arrangements are more useful than others in accounting for them, but in the end, the impact of official secrecy cannot be entirely eliminated. Protecting secrets requires minimizing the number of people on the "inside," which, as Halperin notes can lead to sycophancy and groupthink, not to mention potentially depriving decision makers of vital information, analysis or perspectives.

As Schattschneider (1960) explains, who is allowed to participate in a conflict goes a long way to determining how that conflict is resolved.

Every fight consists of two parts: (1) the few individuals who are actively engaged at the center and (2) the audience that is irresistibly attracted to the scene. The spectators are as much a part of the over-all situation as are the over combatants. The spectators are an integral part of the situation, for, likely as not, the *audience* determines the outcome of the fight. The crowd is loaded with portentousness because it is apt to be a hundred times as large as the fighting minority, and the relations of the audience and the combatants are highly unstable. Like all other chain reactions, a fight is difficult to contain. To understand any conflict it is necessary, therefore, to keep constantly in mind the relations between the combatants and the audience because the audience is likely to do the kinds of things that determine the outcome of the fight. This is true because the audience is overwhelming; it is never really neutral; the excitement of the conflict communicates itself to the crowd. *This is the basic pattern of all politics* (p. 2, italics in original).

Limiting the scope of conflict is especially likely to create an echo-chamber effect if insiders are generally agreed on a favored course of action and dissenters are generally excluded. Even more significantly, it can ensure that those who have superior insight or information are excluded and their proposals discounted. In simple terms, what this means is that official secrecy poses a significant threat of leading policy makers to choose risky courses of action when those who hold the power do not fully understand the risks and those who understand the risks do not hold the power. At worst, what happens is like the Bay of Pigs invasion, where even the most staunch partisans of invading Cuba must have wished afterward that they had been a position to be forced to pay greater attention to analysis suggesting that the operation could not have worked as planned. Thus, at the highest levels, official secrecy is especially likely to lead to bad policy outcomes when the “myth of Cabinet unity” to which Benn (1979) refers is in fact a reality.

Understanding the risk of bad decision making posed by official secrecy does not provide officials with easy answers. There is a real trade-off between increasing access and effectively protecting necessary secrets. But at the very least, understanding how

secrecy can negatively affect the quality of decisions can at least help officials guard against overconfidence, as well as to think carefully about how desirable secrecy may be and what benefits increased openness might hold. Encouraging officials to take this perspective does not offer any guarantees and is certainly no substitute for true openness, but it is a far superior approach to one that holds that secrecy and good government are synonymous.

To be sure, secrecy does offer some benefits for deliberation, but it is not the unalloyed good that is sometimes portrayed. And even looking strictly at Westminster-style systems, the case for secrecy is not as watertight as supporters might suppose. First of all, governments are rarely as effective at keeping secrets as they would like. Furthermore, the idea of secrecy as a vital constitutional underpinning rests on an understanding of citizenship that is simply unsustainable in a democratic system.

Benn (1979) offers a strong criticism of the idea that ironclad secrecy is necessary to sustain collective Cabinet responsibility:

Common sense and ordinary personal loyalty must require defeated minorities to accept the majority decision and to explain and defend it. But there is no reason whatsoever why this necessary and sensible practice should be extended to the necessarily false pretence that no alternative policies were considered, no real debate took place, and that everyone present was convinced of the merits of the majority view and that as such it should be supported. The narrow interpretation of collective Cabinet responsibility denies citizens essential knowledge of the processes by which their government reaches its decisions (pp. 18-19).

While there is clear political expedience in the ability to control information flows, Benn argues, such expedience is a slender thread upon which to hang a radical exclusion of the public from the affairs of their government. Constitutional necessity might trump an argument based on democratic values, but political expedience cannot. Besides everyone

*knows* that collective Cabinet responsibility is not synonymous with unanimity of opinion.

Tant (1995) goes further:

There is ample evidence that ministerial and Cabinet responsibility are more myth than reality these days. The huge growth of government executive agencies under the day-to-day management of chief executives bears testimony that nobody really believes a minister can oversee all that goes on in a modern government department, as does the fact that even when a minister *is* found clearly to be at fault resignation rarely follows. Similarly, there have been numerous incidents in recent years demonstrating that Cabinet responsibility is at best now a doctrine inconsistently applied and more usually employed to gag unhappy ministers and/or to enforce centralised decision-making even within the dominant executive (p. 203, italics in original).

Even holding onto the ideas of ministerial and Cabinet responsibility, it is still clear that leaking is in fact a common practice, and that the distinction between briefing and leaking is often a political one. Leaking may be constitutionally improper, but it also can be very much in the public interest (as when Winston Churchill, prior to World War II, leaked information about the inadequacy of British air defenses in order to get them strengthened) (Tant 1995).

Not only secrecy less complete under the Westminster model than commonly supposed, but the notion that it is necessary is based on an assumption that is unsustainable in all but the narrowest, thinnest models of democracy. According to this idea, “[G]overnment — whatever the form or ideological justification — is the sole arbiter of the national interest/public good. This idea survives in the reformed Official Secrets Act of 1989. That is why the government would not accept the inclusion of a ‘public interest’ defence” (Tant 1990, p. 481). Nevertheless, the public does have a genuine interest in the actions of its officials, and a system that recognizes that and

encourages citizen engagement is more democratic — and offers more robust accountability — than one that leaves Parliament and the occasional election as the sole institutions for holding the government accountable.

Therefore we must conclude that “disloyalty” to the government can be in the public interest. To accept this only requires the belief that governments can sometimes be seriously wrong. Conversely, then, the idea that leaking must *always* be wrong implies that government can *never* be seriously wrong (Tant 1995, p. 200, italics in original).

Clearly, governments can be wrong, but their errors are much more likely to be corrected — and much more quickly — when the citizens have the opportunity to uncover them. Freedom of information laws allow for this, and happily, also make for a more democratic system. Furthermore, experience shows that Westminster-style systems are not so fragile as to be endangered by a little exposure to sunshine.

### **Experience with freedom of information**

Freedom of information laws have a fairly short history. In the “Funeral Oration,” Pericles names openness as one of the virtues of democratic Athens (Harding 1973), but it was not until 1766 that Sweden became the first country to guarantee by statute access to state-held information (Relyea 1986). The U.S. Freedom of Information Act was passed in 1966 but was not especially robust until major amendments were passed in 1974. By 1990, only 14 countries had enacted freedom of information legislation, but the decade that followed saw another 24 countries guarantee citizens access to information, including 14 that included that right in their constitutions (Grigorescu 2003) Today, according to Freedominfo.org, an organization supported by the Open Society Institute,

the National Security Archive at George Washington University and the Ford foundation, the number of countries with freedom of information laws has grown to more than 50.

While it is absolutely vital that citizens have access to the information they need to make informed decisions, it is unsurprising that freedom of information has only recently become an especially salient issue. The state today is a vast repository and prolific creator of a great deal of information for which it is the exclusive source, but this is largely a 20th-century development and one that particularly gained momentum after World War II (Feinberg 1986). Prior to this development, with relevant information mainly held in private hands, protecting the institutions of free speech and a free press was sufficient to maximize the likelihood that citizens would act in an informed manner. Understandably, democratic theory historically has focused on those areas rather than on access to state-held information. It is only now that democratic theory and legal practice are catching up to the radical changes to the information environment in which the contemporary state operates.

Some Westminster-style democracies were in fact among the first states to adopt freedom of information laws, and their experience is most instructive. Australia, Canada and New Zealand all adopted freedom of information laws in 1982, and all of Canada's subnational jurisdictions now guarantee citizens access to information, although every law does exempt some classes of information. These laws have not delivered on every promise, and there has been some movement backward in how they are administered. However, the greatest lesson of the last 22 years is that Westminster-style democracy does not require excessive secrecy to survive, a crucial finding at a time when access to state-held information is more important than ever.

While 1982, was a seminal year for freedom of information, as Australia, Canada and New Zealand all enacted legislation in a kind of “Commonwealth *Zeitgeist*” (Hazell 1989), these actions were not taken without anxiety. Les Cleveland (1983) outlined what he considered the likely (and unwanted) consequences of New Zealand’s Official Information Act:

- 1) A further weakening of the doctrine of ministerial responsibility;
- 2) The possible politicization of the state services with factions emerging more openly; much more playing to the gallery of public opinion by careerists; and more open campaigning by different groups in the services for the public support of policies and for the allocation of resources to implement them;
- 3) The risk that specific officials can be singled out publicly as targets for blame or criticism by ministers, the political opposition, pressure groups and perhaps media journalists.

Any higher visibility of state services officials as a result of open information procedures will expose them to all these consequences, but just how much depends on the discretion with which the new regime is actually operated (p. 14).

In short, the constitutional underpinnings of the Westminster system were to be undermined. These anxieties were not borne out.

Robert Hazell (1989) examined the impact of the new information regimes in its early years in the three countries, finding that ministerial responsibility did not suffer at all under freedom of information.

Even on a purist view of the doctrine, ministers remain fully accountable. When policy papers are disclosed, the press and public are not interested in the identity of the author, but in the response of the minister. Accountability continues to rest where it always has, on ministers (p. 197).

Prior to their implementation, much of the discussion of the new laws centered on their likely impact on Westminster constitutions, but that concern evaporated so thoroughly that official postmortems did not even mention this concern — in the report of the



Attorney General's Department to the Australian Senate, constitutional compatibility does not rate so much as a mention even in the section on "Past concerns" (Hazell 1989).

While the new laws certainly made major changes in how Australia, Canada and New Zealand handle information, they were not as radical as might be expected. Not one of the countries repealed its existing laws on official secrecy, and New Zealand was the only one even to amend its Official Secrets Act (Tant 1990). In leaving their official secrets acts intact, these countries have set up a system in which disclosure of information is made under the authority of the freedom of information law, while information that is leaked without authorization can still expose the leaker to criminal sanctions (Hazell 1989). This is still a much more conservative approach than that of the U.S. system, which generally does not provide for criminal penalties for leaking except in cases in which actual espionage is involved.<sup>4</sup> To be sure, leakers may still be exposed to administrative penalties, but the threat of having one's employment terminated pales in comparison to that of a prison sentence.

Additionally, Australia, Canada and New Zealand, in a nod to ministerial responsibility, all included some form of a "ministerial veto" in their legislation, allowing ministers to shield specific documents from review or to ignore a recommendation that documents be released. In practice, the ministerial veto has not been used a great deal, and Canadian experience at the subnational level strongly suggests that such a measure is not needed to make freedom of information compatible with a Westminster-style system. Ontario's provincial law, for instance, makes no provision for a ministerial veto of disclosure (Hazell 1989).

However, freedom of information legislation *could* have gone further without causing any constitutional damage. Officials Westminster-style systems may have a legitimate need for candid information from trusted advisers, information that can only be obtained by providing a shield of secrecy. However, this is not a unique feature of these states, nor is it even a need that is particularly pronounced. The U.S. Freedom of Information Act exempts from disclosure internal government communications using precisely the same logic. The law distinguishes between general communications about the policy-making process, which are exempt from disclosure from “purely factual information,” which is not. Obviously, the practical application of this exemption is complex, but the broader point here is simple: It is possible to have a very open information regime and still properly shield deliberations from exposure. Whether the U.S. Freedom of Information Act does that as well as possible is yet another question. But it is clear that this is an issue that does not hinge on whether the system in question closely follows the British model of parliamentarism.

While freedom of information has not been the disaster its opponents feared, it has delivered fully on its promises.

FOI has been something of a disappointment to the public interest groups who campaigned for its introduction. It has not increased participation in the processes of government; nor has it had any significant impact on government decision-making. Its successes have been altogether more modest. It has led to small improvements in decision-making, but in casework rather than policy work; its impact on policy has been minimal (much less, for example, than the Canadian Charter of Rights and Freedoms). It has led to greater accountability, but again on a small scale: greater scrutiny of ministers’ expenses rather than of their management of economic policy.

FOI has also had some unexpected successes. The heavy demand by government employees for access to their personnel records has led to more open personnel management practices in all countries. The demand for information collected by government for its own purposes but having

other uses has begun to make governments aware of the value of their information holdings. ... Anecdotal evidence from journalists and others suggests that in Australia and New Zealand departments are now more open in their day-to-day dealings with outsiders. In Canada they are not (Hazell 1989, pp. 208-209).

Here then is the more telling story about freedom of information, not in the hypothetical damage it may wreak on a Westminster constitution, but in the challenges a newly open regime faces in making freedom of information live up to its potential. All things being equal, openness is better than secrecy, and more democratic. But enacting a freedom of information law, even a very good one is hardly a guarantee that citizens will immediately reap all the potential benefits. Freedom of information remains an important policy, but experience in Australia, Canada and New Zealand shows that even with a law in place that creates a presumption of openness and officials who speak favorably of the principle, there are any number of obstacles — such as excessive fees, narrow interpretation of statutes and lengthy, expensive litigation — that may limit the practical extent of public access (McDonald and Terrill 1998).

Canada's 1982 federal legislation was the culmination of a gradual evolution of information policy with roots in the Treasury Board's 1967 attempt to produce a comprehensive guide to disclosure policies in the form of the *Policy and Guide on Canadian Government Publishing*, followed in 1968 by the formation of the Task Force on Government Information, which in its final report was highly critical of existing policy on disclosure as fragmentary and inadequate to ensure sufficient public access. As a response, the ill-fated Information Canada was established in 1970 but was disbanded in 1976, having been widely perceived as more a propaganda agency than an effective

avenue of access. It was the 1982 passage of the Access to Information Act, which came into effect in 1983, that was as a real watershed event (Nilsen 1994).

However, in the interim, there was also activity below the federal level. Between 1977 and 1982, three of the four Atlantic provinces enacted freedom of information laws, with the legislation in New Brunswick and Newfoundland proving especially effective (Ferris 1988). Prince Edward Island did not enact similar legislation at the time, and in fact became the last of Canada's provinces and territories to have such a law when its Freedom of Information and Protection of Privacy Act came into effect on Nov. 1, 2002. Nova Scotia's Freedom of Information Act was noteworthy in its extraordinary effort to remain true to the principle of ministerial responsibility. It makes no provision for judicial review of denied requests, but instead provides for appeals to a department's minister, with the Legislature itself as the ultimate arbiter. As Charles Ferris (1988) notes, without some kind of independent system of review, such a law is likely to be of little effect.

Quebec passed its own Access to Information Act, which combines freedom of information and privacy provisions, in 1982, creating a model followed by other provinces, including Ontario in 1988, Saskatchewan in 1991, British Columbia in 1992 and Alberta in 1994 (Comeau and Ouimet 1995). (Prince Edward Island's new law also appears to follow this model). While this is speculative, it may be that Quebec's unique history and diminished attachment to the mythology of the Westminster model helped to position it as an innovator with regard to information policy.

The post-1982 period, however, has not simply been one of adjustment followed by comfortable accommodation to freedom of information. Instead, at both the provincial

and federal levels, there has been some movement backward, with several developments resulting unnecessarily in greater secrecy. Effective openness requires not only a statutory commitment but also effective implementation and ongoing administration. Areas as mundane as budgeting have a serious impact on how much access citizens are truly afforded to the functioning of their state. While the federal Access to Information Act was not an intentional target of a series of reforms meant to increase administrative efficiency, openness has suffered from as an unintended but serious consequence. Cuts to “nonessential” spending have resulted in delayed responses to requests for information, as well as weakening the mechanisms for ensuring compliance. Outsourcing of traditional government functions has also removed them from public scrutiny, as private contractors are not subject to freedom of information laws. Finally, increased fees, as official efforts to capitalize on the economic value of some types of information have created barriers to access that for many citizens may be as insurmountable as formal requirements for secrecy (Roberts 2000b).

Because most provincial laws do not require regular, comprehensive reporting of how requests are processed under freedom of information laws, it is difficult to quantify the impact of recent reforms to the public sector. However, the federal law and Ontario’s law do have specific reporting requirements, and results from both strongly suggest that access to information is being negatively affected. Ontario has had a significant reduction in the number of requests filed under its Freedom of Information and Protection of Privacy Act. On the federal level, “resource cutbacks and a weakening of enforcement mechanisms appear to have caused a steady increase in non-compliance with legislative requirements” (Roberts 2000a, p. 424).

This retreat on public access is intelligible and even unsurprising in light of two countervailing trends in how Canada has treated government information. Evolving publication policies in the 1960s and 1970s, culminating with the Access to Information Act, emphasized a public right to access to government information. However, this approach has been overtaken by a “corporate resource approach,” which emphasizes efficiency and cost recovery and views information simply as a commodity (Nilsen 1994). While there is certainly something to be said for efficiency and cost management, there are definite contradictions between these approaches, and the shift toward the latter approach has caused damage to the cause of public access.

### **Conclusion**

Canada’s experience with freedom of information is emblematic of the challenges inherent to formulating and administering a coherent, workable and democratic policy to provide access to information. The biggest difficulty is not making freedom of information compatible with Westminster-style government, but in making laws on access function in the spirit in which they are intended. Officials in Westminster-style systems have no greater need for confidential advice than officials in other democracies, and freedom of information does not undermine ministerial responsibility or collective Cabinet responsibility. In fact, providing citizens access provides greater accountability than depending on parliament alone to oversee government, and states with official secrets acts would be well-advised to repeal them: Their costs in democratic terms far outweigh their negligible benefits. Arguments against freedom of information that appeal

to the unique character of Westminster-style system fall apart when examined closely. Furthermore the experiences of Australia, Canada and New Zealand under freedom of information laws offer compelling evidence that such legislation is not a precursor to constitutional crisis and collapse. It is telling that the constitutional compatibility issue faded in all three countries once legislation was enacted — and it has not reappeared in any significant manner.

However, with the U.K. Freedom of Information Act coming into effect in January 2005 and access to government information facing ongoing challenges in general, there are other considerations. First and foremost, the benefits of freedom of information can be significant, whether it is villagers in the Indian state of Rajasthan using a new law to uncover how they were cheated out of wheat rations (Lakshmi 2004), farmers in New South Wales using documents from the Australia Defense Department to thwart the setting up of a training ground they opposed (Hazell 1989) or neighborhood activists in Washington, D.C., using information contained in environmental disclosures to persuade the management of a sewage treatment plant to switch from the use of chlorine to a safer solid chemical (Guzy 2002). At their best and most effective, freedom of information laws make citizens more engaged and make states more democratic.

Such results are not foregone conclusions, though. Freedom of information laws in Australia, Canada and New Zealand have not entirely lived up to their promise. Indeed greater democracy and increased citizen engagement require an ongoing commitment, not simply the enactment of a statute, not matter how perfectly designed. And the gains from passing a freedom of information law are far from invincible. In the last three years, the United States has moved radically toward greater secrecy, without repeal or even

major changes to its Freedom of Information Act. In Canada, changes to how information policy is conceived and administered have had the result that citizens have diminished access to their government. Freedom of information statutes are necessary, but they do not stand on their own. Freedom of information does not present a threat to Westminster-style democracy, but it has yet to live up to its promise. Making it do so is the real challenge today.



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<sup>1</sup> Quoted in (Tant 1990, p. 486). Thatcher, speaking in 1960 as a new M.P., had introduced a private members bill imposing freedom of information requirements on local governments.

<sup>2</sup> Protection of personal privacy or trade secrets is yet another concern. However, this generally involves a category of secrets different from those contemplated by the first two justifications. However, while freedom of information and privacy laws are often enacted in tandem, analytically, privacy is very different. What does or does not constitute private personal information is certainly contestable, but in general private information does not hold the potential political ramifications of other types of secrets. The concern for openness expressed here should not be construed as being so radical as to include hostility toward the legitimate protection of personal privacy.

<sup>3</sup> Benn, who left the British House of Commons in 2001, after serving half a century as a Labor M.P., was urging the passage of a freedom of information law. Labor has voiced support for some version of freedom of information legislation since 1974 (Birkenshaw 1999), but it was not until 2000 that the U.K. Freedom of Information Act became law, and its provisions requiring disclosure do not become effective until January 2005. The law that was ultimately enacted is also a greatly weakened version (Birkenshaw 2000) of what was contemplated in a 1997 White Paper.

<sup>4</sup> One significant but very limited area is protected from exposure by criminal penalty in American law. The Intelligence Identities Protection Act of 1982 was passed in response to the existence of a number of publications that specialized in the disclosure of the names of American intelligence operatives. It criminalizes disclosure of intelligence operatives' names not only by individuals with access to classified material, but also (and of dubious constitutionality by those who find those names in open-source materials (Charkes 1983). Hardly the subject of prolific jurisprudence, this law has received some attention over the past year due to the scandal in which columnist Robert Novak exposed the Joseph Wilson's wife, Valerie Plame as a CIA operative. Wilson had exposed as fraudulent the Bush administration's claim that Iraq had attempted to purchase yellowcake uranium from Niger.