
Designing Freedom of Information Systems

An Overview from
Legislation to Implementation

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Introduction

This research examines the implications of different models that governments use to handle access to information requests. Specifically, it compares a decentralized system where the response mandate is held by individual government departments in contrast to a system where response is centralized in one government department.

To provide context, this report begins with a short discussion of institutional design and continues with an overview of FOI systems, including model legislation (e.g., Organization of American States,¹ the Article 19 Model Law² and the African Commission on Human and Peoples' Rights³).

In order to focus on the institutional design of FOI systems, this report uses two approaches.

First, it looks at systems through the lens of effective implementation. Implementation begins with creating a law, which may itself have flaws in its design, such as an absence of enforcement powers or sanctions. Beyond that, however, many failures in FOI systems are implementation failures. The design and establishment of relevant institutions happens at this stage, although general level design decisions may be in the legislation itself. It is common to underestimate the full range of tasks, resources, training and coordination that may be required when introducing new legislative regimes. The cross-government nature of FOI means that the necessary skills and preparation can vary widely. Implementation success may not be uniform and attitudes and personalities can make a difference.⁴ There are indicators of effective implementation of new systems, such as allocating sufficient resources and adequate expertise to tasks, so institutional choices can be tested against these indicators.

Second, the paper analyzes institutional design choices for FOI legislation from a compliance point of view. Most studies on compliance focus on the private sector's compliance with government regulation. But governments have internal rules and compliance arrangements. Financial management usually has extensive operational requirements; procurement is another example. FOI is a form of internal regulation. FOI legislation imposes rules and duties on the public sector (however defined for FOI purposes) and noncompliance is an issue. Where governments fail to comply with FOI requirements by allowing delay, being nonresponsive, enlarging exemptions, and allowing extraneous matters to enter decision-making, they undermine the law. How institutions are affected by these compliance failures or how their design promotes these failures is the focus here.

The final sections of this paper will look at how governments navigate contentious issues and FOI systems accommodate conflicting priorities. Contentious issues play a role in undercutting FOI compliance through creating delays and, occasionally, imposing extra-legal criteria on decision-making (e.g., Ministerial embarrassment). A basic principle of FOI, the anonymity of the applicant, is often ignored or undercut in

¹ Organization of American States, "Model Inter-American Law on Access to Information", 2010, available at www.oas.org/en/sla/dil/access_to_information_model_law.asp.

² Article 19, "A Model Freedom of Information Law", 2006, available at www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf.

³ African Commission on Human and Peoples' Rights, "Model Law on Access to Information in Africa", 2012, available at www.achpr.org/files/news/2013/04/d84/model_law.pdf.

⁴ For example, studies have shown that the acceptance of a new transparency culture can vary across government and that a commitment to openness will be reflected in the timeliness and even the nature of responses. See, Benjamin Worthy and Robert Hazel, "The Impact of the Freedom of Information Act in the UK," in Nigel Bowles, James T Hamilton, David Levy (eds) *Transparency in Politics and the Media: Accountability and Open Government*, 2013 (London: L.B. Tauris) 31- 45.

contentious issues management.⁵ Institutions and relationships have an effect on how this is approached and can strengthen or weaken compliance with the law or a settlement of competing interests.

Observations are provided at the end of this paper.

Throughout, some topics which are tangential to institutional design are discussed, such as open government, proactive disclosure and increased recognition of the value of the use and reuse of government information.⁶ These are closely inter-related and complement the creation of the environment in which FOI systems operate effectively. Active disclosure of useful information in helpful format can relieve pressure on FOI systems and strengthen a culture of openness.

However, the focus of the paper is on the implications of different approaches to designing FOI systems and particularly centralizing the FOI Officer function. There is, therefore, no discussion of such matters as the breadth of exemptions, the existence or application of a public interest test or the scope of the application of disclosure obligations.

⁵ See “Consideration of Requests without Reference of the Identity or Motives of the Applicant”, 2015, by the Information Commissioner’s Office in the United Kingdom for a discussion of principles, available at <https://ico.org.uk/media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>.

⁶ Improved recordkeeping and archive practices, imposition of a duty to document, and use of information technologies are also part of this complex environment in which FOI operates. This paper will not examine these in any detail except to note interconnections, particularly in implementation and compliance contexts.

Background

Alberta, like most governments with freedom of information (FOI) legislation, follows an essentially decentralized model. A number of governments are introducing centralized request portals, often as part of larger e-government initiatives and in recognition of citizens' growing preference to communicate electronically. In some countries, the portal access function is even controlled by the Information Commissioner or equivalent, with the specific requests being distributed to the responsible organizations.⁷ Governing legislation in most jurisdictions continues to impose decision-making responsibilities on officials within the responsible organization, with some exceptions.⁸

There is now sufficient experience with FOI legislation in Canada, and most established democracies, that problems have been identified, reviews have taken place, and legislation has been amended or enacted.

There are common themes about problems: delays, excessive secrecy, overuse of exemptions, potential discrimination among types of requests or applicants, non-responsiveness and excessive expense for applicants.⁹

For government officials, there are concerns about lack of resources, excessive burden on capacity, distraction from more important work and "inappropriate" use of a system that was not designed to respond to large commercial users of data.¹⁰

Recommended changes have included better training and professionalization of FOI Officers, additional resources, implementation of duties to document, improved records management, more attention being paid to open government, and strengthening a culture of transparency and public accountability.

In Canada, one response to concerns about the operation of the FOI system was British Columbia's adoption of a centralized response model. This is in contrast to a centralized request model, which is growing with the use of central government portals and the desire to present a "seamless" experience of service delivery to users. Such institutional redesign to a centralized response model is not a common

⁷ International Ombudsman Institute, "Network of Information Commissioners publishes international exchange survey 2014"; "In the Experience of Information Commissioners", 2014, available at www.theioi.org/loi-news/current-news/network-of-information-commissioners-publishes-international-exchange-survey-2014.

⁸ Where veto power or Minister's certificates place decisions at the political level for certain sensitive matters, officials will maintain an advice function, at best. The United Kingdom has agreed to only consider use of the veto power after the Information Commissioner has made her decision, thus allowing her to consider and explore any public interest considerations that might argue for disclosure. See House of Commons, Library, Parliamentary Briefing, "Fol and Ministerial vetoes," 2014, available at <http://researchbriefings.files.parliament.uk/documents/SN05007/SN05007.pdf>.

⁹ For example, Information Commissioner of Canada, "Striking the Right Balance for Transparency: Recommendations to modernize the *Access to Information Act*," 2015, available at www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/eng/reports-publications/Special-reports/Modernization2015/OIC_14-418_Modernization%20Report.pdf; Government of Canada, House of Commons, Standing Committee on Access to Information, Privacy and Ethics, "Review of the Access to Information Act," 42nd Parliament, 1st Session, June 2016, available at www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-2/; Government of the United Kingdom, "Independent Commission on Freedom of Information Report", March 2016, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf; Australia, Commonwealth Government, "Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010," July 2013 (Hawke Review), available at www.ag.gov.au/Consultations/Documents/FOI%20report.pdf. Additionally, reports by Commissioners in Alberta, B.C., Canada, Ontario, Ireland, in Australian states and so on describe issues and problems within their own jurisdictions.

¹⁰ In the United States, a significant proportion of requests are from law firms using FOI as a complement to discovery in litigation; there are also applicants who have made a business out of using data obtained from requests, particularly in financial fields, to advise clients on investment decisions.

response to dealing with access system problems, but its potential should be examined in greater depth.¹¹ Arguably, it allows for greater consistency, development of expertise, possibly lower costs and possibly greater sensitivity to concerns of the government of the day. It has been argued, however, that centralization of control over processing is a means of informal resistance to FOI legislation and associated cultural change.¹²

The advantages of institutional restructuring or redesign should be assessed against the particular problem it is intended to solve, such as delays, resource use, inconsistent decisions, and so on.

As will be noted later in this report, FOI regimes interact with other government systems and institutions and the potential of unintended consequences is strong. A central system that concentrates on “difficult cases,” for example, may divert attention from routine requests and actually increase overall delays or it may disadvantage individuals who require assistance to clarify and form their requests. A system that handles all requests may undermine the perception of the importance of good documentation by officials in Ministries or undercut records management practices or reduce information needed for effective policy formulation. Systemic problems with documentation, records management, problem identification and development of a culture of transparency may be overlooked or underestimated.

¹¹ A central response model was also adopted in Prince Edward Island in 2014, primarily in response to lack of expertise and pressures placed on departmental FOI decisions where the relatively small number of requests limited opportunities to develop expertise yet caused serious disruption when requests increased.

¹² Alasdair Roberts, “Dashed Expectations: Governmental Adaptation to Transparency Rules” in C. Hood and D. Heald, (eds), *Transparency: the Key to Better Governance?*, Oxford University Press, Oxford, 2006 at p.108.

Institutional Design: It Makes a Difference

Most of the literature on institutional design in government looks at regulatory bodies, especially those that operate with some degree of independence. The design of inspection and enforcement systems is usually treated separately. Regulatory institutional design is relevant to FOI systems because FOI imposes behavioural rules on government departments. FOI systems also involve discretionary decision making and may include adjudication or mediation that should be unbiased.

Legislation is usually designed by lawyers who are concerned with legality and precedents and, increasingly, with accountability and transparency.¹³ Departmental officials may be concerned with maintaining policy control and also with achieving policy goals. Politicians often take shorter term views; they typically want good news and “the quiet life.” None of these viewpoints will necessarily promote the design and resourcing of FOI systems that can be implemented and maintained effectively.¹⁴

Creating a clear and implementable legislative framework for FOI can assist in overcoming risk avoidance and an historic culture of secrecy.

The World Bank Governance and Private Sector Group noted:

Some authors go further and call for laws and regulations outlining the procedures for implementing and applying the FOI legislation to be more detailed. The case of South Africa, where civil servants are accustomed to following laws with great deference and where it proved critical to provide for all the implementation mechanisms within the law and limit discretion, demonstrated the importance of providing for all implementation mechanisms within the legal framework. Greater precision in the language of the law, thus allows for greater accountability of government departments in implementation. “In other words, it is easier to demand and get adequate implementation of systems and procedures where the law is clear and specific, with sufficient level of detail, than where it is vague or too general.”¹⁵

The FOI legislation is aimed at changing the actions and culture of government. A characteristic of regulation is expertise. Gathering expertise primarily in an independent regulatory agency is not part of FOI, but the need for expertise has design implications. Expertise is required government-wide, but steps may be needed to foster and maintain expertise and develop a compliance culture that is essentially a culture of openness. These steps may include designating a centre of expertise that can develop guidelines, regulations, and coordinate functions, such as records management and cybersecurity that are ancillary to FOI. This has been called the “nodal” government department.

Regulatory programs are usually designed to limit the role of the courts to the most serious or novel problems; other enforcement and sanctioning processes are used. These may include an independent adjudicator with specialized expertise and alternative enforcement tools, such as compliance agreements. Compliance orders may not provide the range of compliance incentives alone, even when aimed at

¹³ Gillian Hadfield, “The Levers of Legal Design: Institutional Determinants of the Quality of Law,” USC Center in Law, Economics and Organization Research Paper No. C07-8.

¹⁴ de Moura, Marcelo de Gamiero, “Regulatory Agencies: Some Theoretical Concerns on Their Creation,” VII Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Lisboa, Portugal, 8-11 Oct. 2002.

¹⁵ World Bank, Governance and Public Sector Group, “Literature Review and In-law indicators: Legal Framework for establishing Freedom of Information,” June 2010, available at http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1361546839123/PAM_FOI_LIRREVIEW.pdf.

government organizations.¹⁶ Legislative authority is usually required to exercise a range of sanctions or enforcement techniques and legislation may be deficient in this area.

The emphasis on expertise may be overlooked in the legislative and institutional design of FOI systems. Resources are a constant issue but so is the clear authority to develop, apply and share expertise. Viewing FOI as a regulatory system can also encourage the cross-development of skills found in “Regulators’ Networks” in many jurisdictions.¹⁷ Commissioners are more likely to have adequate resources for outreach when sharing expertise, experience and concerns is specifically authorized or even mandated.

The Common Model of an FOI System: Functional but Often Flawed

The Legal and Institutional Elements of a Right to Information System

There are dozens of decisions involved in the design of an FOI system and its implementation.

Some relate to the assignment of various functions (e.g., who makes decisions and any exceptions) and relationships with existing organizations and the machinery of government. Some are influenced by a jurisdiction’s broader social culture (e.g., how hierarchical or stratified the society is or how citizens perceive governments or how they view their own rights in society). Some deal with how a “corporate culture” has evolved in the government organization (e.g., the culture of secrecy in the Westminster model of government¹⁸).

Attitudes, history, resources, priorities, national crises—all these and many other factors will determine how the system works in practice. The cross-government report by the Australian National Auditor of the administration of the *Freedom of Information Act 1982*¹⁹ identifies some of the variations:

It is open to entities to adopt an organisational model for FOI administration which best meets their needs: a small entity with few applications each year would not require a unit dedicated to processing FOI applications. The three selected entities have adopted different organisational approaches to processing FOI applications:

- In AGD [Attorney General’s Department], the Secretary has delegated FOI decision-making powers to Senior Executive Service Officers in the relevant policy area, with a centralised FOI team providing advice and administrative support;
- In DSS [Department of Social Services], FOI decisions are made by specialised teams located within the department’s legal division with the relevant subject area providing administrative support (such as searching for documents) ; and
- In DVA [Department of Veteran’s Affairs], personal FOI applications (which form the majority of the entity’s applications) are generally managed by the National Information Access Processing team in the Client Access Branch. Non-personal FOI applications and more complex personal applications are

¹⁶ Authority for compliance alternatives is particularly relevant for privacy protection regimes and there may be no consequences for ignoring simple compliance orders.

¹⁷ These can be informal, such as “brown bag lunches” and invited speakers at the Federal Regulator’s Network, or a formal part of the FOI scheme as found in Ireland.

¹⁸ It has been noted that the first thing the barons did at Runnymede was to take an oath of secrecy.

¹⁹ The Auditor-General, Australia National Audit Office, Report No.8 2017-18 Performance Audit, available at www.anao.gov.au/work/performance-audit/administration-freedom-information-act-1982.

managed by a specialized Information Law team located within the Legal Services and Assurance Branch.²⁰

Generally, arrangements within government organizations depend on such factors as the number of applications annually, the complexity of the typical application and the potential for exemptions—although the last factor may not be articulated.

Prince Edward Island, with approximately 200 requests per year for the 13 core government departments,²¹ decided in 2014 to create a centralized office, Access and Privacy Services, to handle requests. The experience shows that there may be a critical mass of requests necessary for FOI Officers to develop expertise and experience to handle requests effectively and within time limits. An increase in requests had overwhelmed the Prince Edward Island FOI Officers, who had been assigned the FOI tasks as part-time functions. The Commissioner, who traditionally had also been part-time, had noted that rationales for refusals were often not well developed. Quality issues had been raised about the initial decisions. Resource pressures were evident for both the departments and the Commissioner, who are now also dealing with privacy matters. The new office is located within the Department of Environment, Labour and Justice.

The United States is currently implementing a “consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website.” This, along with other changes including mediation, was mandated by the *FOI Improvements Act 2014*. The Act also created an FOIA Federal Advisory Committee. Decision making will continue to be done in the departments and agencies.

Common Elements

In spite of potential variations, there are some common elements found in both legislation and in supporting institutions in the more than 120 FOI regimes around the world.

The World Bank has provided a short summary of the key elements of an FOI regime:²²

- Maximum disclosure: presumption is that all information held by public bodies is public, subject to identified and limited exceptions.^{23, 24}
- Access procedures: requesters should not be required to provide need or reasons for request, officials should assist requesters if necessary and fees should not be excessive.
- Capacity and promotion: governments should put in place the necessary mechanisms to enable access, including dedicated units, a central body with overall responsibility for promoting FOI, records management standards, training, and annual reports to parliament.

²⁰ Ibid., p. 34.

²¹ Prince Edward Island, Office of the Information and Privacy Commissioner, *Annual Report*, 2016, available at www.assembly.pe.ca/docs/2016-OIPC-ar.pdf.

²² World Bank, “Supporting Passage and Implementation of Right to Information Laws,” note prepared by Anupama Dokeniya (Governance and Public Sector Practice), available at www.governanceknowledge.org/pro/Resources/Supporting%20Passage%20and%20Implementation%20of%20Right%20to%20Information%20Laws.pdf.

²³ The requirement for limited designated exceptions has implications for legislative drafting; the “Granddaddy of FOI,” the United States FOI, allows for Congressional additions to exemptions. These now number in the dozens and include secrecy for such sensitive matters as watermelon production.

²⁴ The Council of Europe recommends the following principles should be applied to all exemptions: access should be the rule and confidentiality the exemption, in cases where other legitimate interests take precedence; limitations should be set down precisely in law; exemptions should be necessary in a democratic society; and exemptions should be proportionate to the aim of protecting other legitimate interests.

- Proactive disclosure: eases access; disclosure should cover operational information; how to give stakeholder input; information held by the organization; content of decisions affecting public.
- Appeals and sanctions: internal appeals within an organization to reduce conflict; an independent information Commissioner with capacity and expertise, security of tenure for Commissioners, and financial and administrative autonomy to ensure political independence. Sanctions should be established by law.

Assigned Roles in a FOI Regime

The enabling statute assigns roles and responsibilities and defines and confers powers on various officials or organizations. These roles and powers will to a large degree establish the institutional design and relationships of the players, although in practice these can develop over time and through iteration.

Organization Head

The operation of an FOI system is usually assigned to the head of the organization, who may often delegate to another official.²⁵ Depending on how the government is structured, the head may be a Deputy Minister, Permanent Secretary, Chair or CEO.

This responsibility does not involve the political level. Where there is a delegation, it is considered appropriate to delegate to a subordinate but senior civil servant (e.g., Assistant Deputy Minister). There may be multiple delegates to accommodate geographical or subject matter divisions. A delegation order could delegate all or most of the responsibilities.

FOI Officer

FOI legislation does not anticipate all work being done by the Organizational Head or the Head's immediate delegate.

An FOI Officer, who is the customary decision maker, is usually appointed by the Head; a number of officers or assistant officers may be appointed (e.g., to deal with regional or divisional requests or because there may be a large caseload). Regional or divisional officers may be required to coordinate with the main FOI Officer. Most legislation provides immunity to designated FOI Officers for decisions made in good faith and with due diligence—another reason why decision making should be focused on the FOI Officer function.²⁶

Legislation does not usually indicate the exact institutional location of the FOI Officer, but there is an implication that the FOI Officer is in a Ministry or other body subject to the Act and has a reporting relationship with the Organizational Head.²⁷ The functions imply that the FOI Officer is in a position to communicate with the applicant, and be involved with those who are physically carrying out the search (who might act as the FOI Officer in some cases). The FOI Officer should be in a position to have discussions with subject matter experts, possibly legal experts and more senior officials, as well as communications staff and possibly Ministerial staff. The position also implies enough seniority that these

²⁵ The United Kingdom's *Freedom to Information Act 2000* takes a less personal approach, with references to the actors who receive, consider and make decisions under the scheme being subsumed under the term "public authority." Ireland's *Freedom of Information Act 2014* uses the term "head," as do a number of other access statutes.

²⁶ It could be argued that a "contentious" decision made in the Minister's office for political reasons is not protected by these good faith provisions.

²⁷ A relationship is inherent in the concept of delegation or principal-agent relationships; sidelining delegation relationships could arguably weaken the system.

relationships function in an atmosphere where the FOI Officer's concerns are taken seriously and time deadlines are respected.

Even where there are hierarchy differences, the Officer is not a supplicant. Some FOI statutes, particularly if drafted recently, emphasize that decisions are to be taken by the Officer or possibly the Organization Head, unless an internal review is involved. Either directly or indirectly, the implication is that neither the Minister nor political staff will make decisions.²⁸

Internal Reviewer

In many FOI regimes the applicant can request an internal review of unfavourable decisions. Regulatory systems often require internal reviews before a matter is submitted to an outside adjudicator. Most Ombudsman regimes insist applicants avail themselves of internal dispute settlement processes before filing with the Ombudsman.²⁹

Internal reviewers of FOI decisions usually examine the request *de novo* and must apply their own judgment to the matter. Generally, the reviewer is senior to the original decision maker and may be outside of the FOI Officer's division. The *African Model Act* requires that reviews be done by the Organization Head, who then signs off and cannot delegate the decision.³⁰

Some regard internal reviews as being a means of correcting errors cheaply and quickly, with minimal fuss. Others regard them as a way of imposing additional delay, particularly if they are viewed as being necessary before a more formal appeal to an Ombudsman, Commissioner or court is allowed. There probably is no specific answer about the better view since it depends on resources, priorities and general interest in closing the file.

Information Commissioner or Ombudsman

There are essentially three models for dealing with appeals for decisions regarding FOI.

First, the requester may go straight to the courts either on appeal or judicial review. These tend to be expensive and time-consuming and can be effectively useless to the average requester. A *de novo* appeal to a Federal District Court is the approach used in the United States *Freedom of Information Act*, although internal reviews by another official are available, which are also treated *de novo*. It is interesting that these internal reviews are not done by administrative law judges, who have a tradition of independent decision making in the United States, but by regular officials.³¹ The Office of Government Information Services within the National Archives and Records Administration may also provide mediation services between the requester and the agency.

Second, an Ombudsman model may be used. This model is used in Canada federally. The Information Commissioner of Canada, who may have all the indicia of independence (e.g., tenure, reporting function separate from government Ministries), may only recommend a course of action. In some cases, the information Ombudsman may be found within the office of a more general government Ombudsman, either as a separate official or as an individual cross-appointed to the government Ombudsman function.

²⁸ The Federal Treasury Board Interim Directive on the Administration of the Access to Information Act, effective May 5, 2016, states that delegation by the head of the institution can only be done to the institution's officers and employees.

²⁹ For example, the Ontario Ombudsman requires complainants to try to settle their issue through discussion or more formal internal review before entertaining a complaint.

³⁰ See footnote 3.

³¹ Congressional Research Service, "The Freedom of Information Act (FOIA): Background, Legislation and Policy Issues," January 23, 2014.

Indeed, there may be cross-appointments to several offices dealing with complaints and oversight (e.g., Ireland and New Zealand). The ability to only make recommendations means that governments may ignore the findings of an Ombudsman.³² In practice, the effectiveness of an Ombudsman often depends on the personal reputation of the individual who holds the office and the goodwill of the government in power. In addition to persuasion, an Ombudsman can also employ publicity and special reports to parliament to highlight problems and seek redress. Nonetheless, a survey in 2014 showed that if Commissioners make only recommendations, fewer than half secure compliance with a significant majority of their decisions.³³ Additionally, Ombudsman have not traditionally been involved in playing advocacy or educational roles, and where the review role has been given to an Ombudsman, it is often only one among many dispute settlement responsibilities.³⁴

Third, the gold standard approach to oversight is through an appeals Commissioner who is independent, expert, specialized and can often promote access to information, although privacy protection and FOI functions may overlap. The office is likely to develop additional expertise, create a consistent jurisprudence of decisions or binding orders, foster respect, foresee problems or new developments, be in a position to provide advice, and contribute to public communication and broader training. Commissioners' decisions may be subject to judicial review or to appeals on points of law by a court; in some cases, a specialized tribunal may be the next step (e.g., the Administrative Appeals Tribunal in Australia or the First-tier Tribunal [General Regulatory Chamber] in the United Kingdom).³⁵ Commissioners may also be given statutory responsibilities to promote access to information, publish guidance, codes of conduct, statistics, provide regular reports to the government or parliament, undertake special investigations either on their own motion or at the request of the government or parliament, and generally play a supportive role.³⁶ In some cases, guidance or codes may be binding on officials.

Politicians (Ministers, Cabinet)

There are both implicit and explicit roles for Ministers and the government as a whole in an FOI system.

In a parliamentary system, there will be a responsible Minister and an associated Ministry with responsibilities for legislative development. There may be responsibilities relating to budgets or staffing for the Commissioner or Ombudsman.

³² In New Zealand, there is a statutory duty to comply with the Ombudsman's recommendation on access matters; this duty would be enforced by the Attorney General and not the Ombudsman. This is viewed as not disrupting the classic ombuds model.

³³ See footnote 7. In spite of the likelihood of lower compliance levels, adoption of the Ombudsman function has been promoted in the United States federally: Mark Fenster, "The Informational Ombudsman: Fixing Open Government by Institutional Design," *International Journal of Open Government*.

³⁴ In jurisdictions with small populations or few resources, such as emerging economies, using an Ombudsman or other existing institution to review complaints is sensible. A dedicated body with more limited responsibilities, however, is likely to be able to take on stronger leadership and educational roles.

³⁵ There are recommendations to eliminate the First Tier of the Regulatory Tribunal for appeals from the Commissioner's decisions and go straight to the Upper Tribunal. This makes sense. Among the other duties of the First Tier are the micro-chipping of dogs, regulatory decisions on driving instructors, gambling and letting (i.e., rental) agents. Many would read the current arrangements as a downgrading of the importance or complexity of the Commissioner's decisions.

³⁶ See, for example, sections 53 and 54 of Alberta's *Freedom of Information and Protection of Privacy Act*, available at www.qp.alberta.ca/documents/Acts/F25.pdf.

For example, the Canadian *Access to Information Act* states:

70 (1) Subject to subsection (2), the designated Minister shall

(a) cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records;

(b) prescribe such forms as may be required for the operation of this Act and the regulations;

(c) cause to be prepared and distributed to government institutions directives and guidelines concerning the operation of this Act and the regulations;

(c.1) cause statistics to be collected on an annual basis for the purpose of assessing the compliance of government institutions with the provisions of this Act and the regulations relating to access; and

(d) prescribe the form of, and what information is to be included in, reports made to Parliament under section 72.

(1.1) The designated Minister may fix the number of officers or employees of the Information Commissioner for the purposes of subsection 59(2).

In the case of the federal Act in Canada, the President of the Treasury Board has been assigned this responsibility and the Treasury Board Secretariat is the “nodal agency” that carries out the responsibilities noted in section 70. In Ontario, the Management Board Secretariat provides guidance on FOI matters. In both cases, directives can be issued that are mandatory and impose rules on the civil service. They are also both responsible for records management standards and information technology across the government which means that—at least in theory—they are a good fit with the requirements of access legislation. The actual role of a nodal agency may or may not be in legislation.

The Minister responsible for the body that holds the information will have a more day-to-day role. That Minister is answerable in question period and will be questioned in the media. It is not surprising that the line Ministers have a keen interest in the workings of the FOI regime, although they likely ignore it until something grabs their attention. This will be discussed in more detail in the section on “contentious issues” below.

Ministers and their staff may be tempted to influence or even to take over decision making for selected requests. Some FOI statutes explicitly state that politicians must not make decisions³⁷ and that those decisions are reserved to designated officials. There are, however, specific duties reserved to Ministers in some jurisdictions regarding “vetoes” of anticipated disclosures³⁸ or “Ministerial certificates” dealing with security matters (e.g., section 23 of the United Kingdom Act). If legislation encompasses information held in Ministers’ offices, then they have a role analogous to the business area of a Ministry advising on a request.

³⁷ See Office of the Information Commissioner Queensland, “Model Protocols for Queensland Government Departments on Reporting to Ministers and Senior Executive on Right to Information and Information Privacy Applications,” April 2013.

³⁸ See footnote 8.

Implementation of FOI Systems

Implementation is Key

With over 120 national FOI statutes, considerable experience has been gained with implementation. The results are mixed. Implementation failures underlie many of the problems with FOI systems—the delays, “lost” applications, overly narrow interpretation of what may be disclosed and politicization of responses to “sensitive” requests. Careful drafting and enactment of FOI legislation is only the start; implementation is often where FOI systems founder and become known as expensive failures. There is now an expanding literature on effective implementation³⁹ which identifies a number of enabling factors; resources, institutional strength and culture are critical.

Before the United Kingdom law was proclaimed—after a delay of five years reflecting more Tony Blair’s ambivalence than careful implementation planning—the responsible Minister noted: “Implementation has been beset by three problems...A lack of leadership. Inadequate support for those who are administering access requests. And a failure to realize that Freedom of Information implementation is not an event: it is a process which demands long-term commitment.”⁴⁰

Factors for Effective Implementation

Pressure from nongovernment actors, such as civil society

Some FOI legislation is passed because the government believes it is a good idea either philosophically or for practical reasons, such as obtaining funding from an international organization or donor agency or because it is an indicator of an evolving democratic society, or perhaps because a new government can only see the advantages of transparency and heightened accountability.

There may be demands from civil society or other stakeholders to introduce legislation. Experience shows that continued interest and pressure from non-government players is helpful in keeping the enthusiasm alive, which will lead to greater attention to implementation.

FOI legislation can be symbolic. If that is the intention of the government, it will likely show in the legislative structure, with weak powers and extensive exemptions. But even good intentions can fail without the continued pressure of stakeholders. Private sector champions are needed as much as those in government.

In the United Kingdom, for example, the Campaign for Freedom of Information continues to resist pressure to make the United Kingdom less open.⁴¹ Multiple submissions favouring transparency apparently made a difference to the conclusions of the 2015 Burns Committee Report. That report had been

³⁹ For example, Stephanie Trapnell and Victoria Lemieux, “Right to Information: Identifying Drivers of Effectiveness in Implementation,” World Bank, Working Paper, Dec.1, 2014; U4 Anti-Corruption Resource Centre, “Right to Information Laws: Impact and implementation,” Carter Center, “The access to information legislation Implementation Assessment Tool (IAT), available at www.cartercenter.org/peace/ati/iat/methodology.html.

⁴⁰ Laura Neuman and Richard Calland, “Making the Access to Information Law Work: The Challenge of Implementation” from *The Right to Know*, (ed.) Ann Florini (Columbia University Press, 2007).

⁴¹ The BBC noted: “There is also the strong pressure applied by FOI supporters - notably the dedicated and tightly argued lobbying by the Campaign for Freedom of Information, the numbers mobilised through the website 38 Degrees, and the powerful publicity of the media, such as the Daily Mail” to resist changes to make the Act less open. Available at www.bbc.com/news/uk-politics-35550967.

expected to recommend curtailing the United Kingdom Freedom of Information Act but expressed satisfaction instead.⁴²

Effect on institutions:

- Implementation is work—often tedious and under the radar. Resources must be devoted to designing and establishing new institutions, such as the “nodal” agency (which may be a new division within an existing agency); the FOI function within Ministries, or the Commissioner’s office. Systems must be designed and other systems re-designed. Continual public interest can provide incentives for doing the job properly. It can make working within the FOI system more interesting and worthwhile, leading to attracting good people. It can tilt early implementation toward processes that favour success.
- Public attention can be a safeguard for the provision of adequate resources or force the government to resist the temptation to shift resources to unrelated areas.
- A strong civil society interest in transparency and accountability, accompanied by a focused centre of responsibility for FOI - either in a nodal agency or a Commissioner’s office - can form the basis of a continuing dialogue on transparency and improvements to the system, especially if the civil society actors are not focused on “gotcha.”
- Civil society organizations can assist government in identifying information that should be released as part of an open government initiative; this should be viewed as an ongoing activity.

Consideration of complementary systems, such a records management, archives, cybersecurity and introduction of new technology

FOI exists in a complex and intertwined environment. Strength in one area can translate into strength in other areas—and vice versa. Without adequate records management, for example, it is almost impossible to successfully implement FOI. The African Model Law⁴³ is thus specifically written to allow for the fact that records management, digitization and other systems will have to be established or improved before FOI can be fully implemented in African countries.

Even modern governments have to consider whether they have the necessary requirements in place to cover a duty to document or caretaking of records. Governments are also likely to find that records management is an ongoing challenge and that successes can be overtaken by new demands including changing technology.

Effect on institutions:

- The interconnected environment raises the issue of how these systems can be coordinated and how the intertwined elements can progress together—if not necessarily in tandem, then with mutual recognition and consideration. One of the most difficult things for governments to do is to avoid the “silo effect” where programs are implemented or policies are made in isolation. Designating a Ministry as the nodal body with functions similar to the federal Canadian Treasury Board Secretariat, which has responsibility in a number of these areas, increases the likelihood of coordination.

⁴² University College London, Department of Political Science, The Constitution Unit, “Disruptive or beneficial? Freedom of information in the UK”, 2016, available at <https://constitution-unit.com/2016/03/09/disruptive-or-beneficial-freedom-of-information-in-the-uk/>.

⁴³ See footnote 1.

- Where these functions are spread across government or where a number of responsibilities for such matters as guidelines, training, promotion, and education are placed in a Commissioner's office, the transaction costs of coordination will increase but there may be other benefits, such as expertise. Ideally, if the Commissioner is responsible, resources are adjusted to compensate and statutory powers will then match the responsibilities.
- In a number of jurisdictions, the responsibility for the FOI statute itself is placed with the Minister of Justice or the Attorney General, possibly in recognition of the constitutional or quasi-constitutional nature of the legislation. Sometimes the Minister or Attorney General is a strong proponent, a "champion" for transparency and openness, and a valuable ally. The Ministry, however, is unlikely to be in the forefront of awareness on such matters as records management or new technology and cross-Ministry coordination can suffer, especially if there is no competent and established nodal agency or if supportive functions are given to a Commissioner who lacks the power to impose duties on the civil service.

Attention to the review or appeal process

The design of the review process can make a difference between a system that reaches its objectives and one that becomes dormant. One commentator noted that if civil servants or politicians are determined to find a way to keep information secret they will do so.⁴⁴ The system can be successful only by keeping alive a strong review process.

Effect on institutions:

- Some of this is a matter of legislative design - Ombudsman, mediator, adjudicator, educator, facilitator or a combination. Which roles are emphasized can determine the strength of review as factor in promoting careful application of the legislation and ensuring that applicants receive what the statute promises. The strongest is a Commissioner who can make binding orders.
- In a sense, FOI is a self-regulatory system within government; this is elaborated below regarding compliance. The now extensive experience of self-regulation shows that oversight and potential sanctions are important in keeping self-regulation effective.⁴⁵ The Commissioner or Ombudsman does not have to be the sole oversight body since individual compliance regarding delays or non-responsiveness could be the responsibility of the nodal body or public service.⁴⁶ The point is that where an elaborate regime of internal rules is established, there should be some consequences for failure to ensure the system is operating.
- Policymakers may fail to appreciate the role that an effective and demonstrably fair review process can have on the ingoing integrity and reputation of the system. Researchers have found that fairness can be critical in determining whether citizens are satisfied with their experiences with authority.⁴⁷

One of the primary indicators of a successful corporate culture is whether employees feel they are being treated fairly; perceived fairness will also spill over into how the corporate objectives are

⁴⁴ See footnote 40, at p. 8.

⁴⁵ William O. Douglas, when taking over responsibility for the oversight of the financial markets industries as the second chairman of the Securities and Exchange Commission, said that he "always kept a well-loaded shotgun behind the door." One presumes he spoke metaphorically.

⁴⁶ Performance contracts and merit reviews can specifically deal with FOI.

⁴⁷ One of the earliest researchers in this area was by Tom Tyler, *Why People Obey the Law* (Yale U. Press, 2006); *Why People Cooperate* (Princeton U. Press, 2013); there is now a rapidly growing literature.

achieved.⁴⁸ An important finding is that if someone experiences unfairness with one authority figure (or organization), their sense of duty toward compliance is weakened in other areas. Unfair treatment in one forum has a spillover effect in other areas. For example, poor experience getting a building permit can reduce compliance impulses as a taxpayer.

Resources, pay and rations

It is a truism to say that allocating adequate resources to a new program will affect its success. It is also true that resource allocation can indicate importance and that resource starvation is often a sign of “the symbolic uses” of regulation. Numerous instances of resource shortages affecting the ability to carry out FOI responsibilities have been identified.⁴⁹

Effect on institutions

- Almost all government programs are being squeezed for resources; ones that are perceived as less important, such as many enforcement activities, are being starved to the point that fully effective programs are impossible. Surveys show that FOI systems suffer as well, although the degree of under-resourcing varies.⁵⁰
- FOI functions have been reorganized in different jurisdictions to save resources or promote efficiency—or both at the same time. Sometimes these changes make sense, such as assigning FOI functions to another Ministry, when an organization receives a minimal number of requests.⁵¹ But a drive to consolidate functions and develop common services has also affected the FOI function. Taking advantage of the growth of e-government and creation of all-of-government portals to have a central request point may reduce applicant confusion, although it presumes connectivity. Consolidating the FOI Officer function has both advantages and disadvantages, however, that may not be fully appreciated in an analysis that underweights “soft” values, such as relationships, job satisfaction, potential for burn out and spreading a culture of transparency.
- As a practical matter, the FOI Officer (and deputies) is the centre of the FOI function in a Ministry. While not typical, the Irish Code identifies the tasks and qualities of an FOI Officer for the Irish Government:

Role and responsibilities of the FOI Officer

...the FOI Officer, as the gatekeeper for the public body’s FOI requests and conduit both to the requester and decision-maker, is the linchpin of a public body’s capability in relation to FOI.

Expertise and Support

2.8 The FOI Officer must be given appropriate administrative support in line with the size of the organisation and the volume of requests. He/she should be or be capable of becoming a recognised

⁴⁸ For example, the cutthroat culture of greed of Enron or the disregard for safety and “culture of noncompliance” of BP with the Deepwater Horizon incident would be totally incompatible with a corporate culture that displayed fairness as a core value.

⁴⁹ At one point the Australian government, which was disenchanted with FOI, cut the Information Commissioner’s budget so severely he had to work from home. Richard Mulgan, “The Slow Death of the Office of the Australian Information Commissioner,” *Canberra Times*, Sept. 1, 2015. The tide turned (with some help from civil society) and the Commissioner’s Office was refunded.

⁵⁰ See footnote 7.

⁵¹ Prince Edward Island’s Access and Privacy Information Services Office receives all requests. In Yukon, the Access and Privacy Services Office receives and documents applications before passing them along to the Records Managers in individual Ministries.

expert within the organisation on how the legislation applies to the information and records of the public body and have sufficient expertise and experience in dealing with FOI requests.

2.9 The FOI Officer should have leadership skills and sufficient seniority and capability to raise significant issues with senior line managers and the Board, for example, the handling of specific FOI requests or the systems or capacity of the body to meet its requirements under FOI.

...

2.12 The FOI Officer has a key role in maintaining standards in delivery of FOI through ensuring that there are awareness raising, basic and advanced training courses on FOI provided at appropriate intervals, with support from CPU and external providers as appropriate; as well as keeping abreast of developments and disseminating lessons learned as gleaned from the networks and key decisions of the OIC and case law.

2.13 He/she should maintain up to date information on relevant precedents for similar requests received in his or her public body particularly in relation to exemptions sought and including those subsequently confirmed or overturned by decisions of the Information Commissioner and disseminate these amongst decision-makers.

- The Irish model of the FOI Officer’s role may not be attractive to all jurisdictions, but it has the advantage of offering an example of commitment to the values of the legislation—assuming the reality matches the described model and resources are commensurate. It is a valid question, however, if this model should be considered more broadly. It creates what is essentially a professional class of expert FOI specialists who provide a distinct presence that promotes the relevant values.
- A Queensland Review of Access to Information considered an FOI Officer who was active in a Ministry’s entire information management process to be a sign of more advanced proactive compliance with the principles and legislation.⁵² Where a strong role for the FOI Officer is lacking, it has been said that, “The allocation of FOI duties to low level officers, with little status or experience and no career path is a recipe designed to foster weak compliance.”⁵³
- Where the FOI Officer is removed from a Ministry to a centralized or more consolidated organization, a sense of the overall presence of FOI is reduced in the Ministry—an FOI request becomes an outside demand, something like providing documentation on budget requests or HR actions. Unless there are strong cross-government messages on transparency, the broader objectives of FOI are diminished. It may also diminish the status of the FOI Officer and tasks.
- The reduction of the “presence” of FOI can have effects on resource allocation and priority of the function; while the evidence may be anecdotal, the quality of decisions may be suffering. For example, the applicant is not counseled on improved framing of the request and is thus refused or receives information that is not responsive to concerns, or search costs increase.
- It is an evaluation truism that attention is given to what is easily measured. In the FOI systems, this is usually timelines. It is important to design a system that keeps accurate measures of delays but it may also be important to keep more granular measures: Where in the process are delays most likely to occur? Are resources at issue or record keeping or delays assessing the decision?

⁵² Dr. David Solomon, Freedom of Information Independent Review Panel, Discussion Paper, “Enhancing Open and Accountable Government,” 29 January 2008.

⁵³ Snell, R., “FoI officers – a constituency in decline?” Freedom of Information Review, December 2002, quoted in Discussion Paper, *ibid*.

Assessing the quality of decision making is difficult and anecdotal. Whether decisions are upheld by a Commissioner is one measure, but it presumes that all “flawed” decisions are appealed, and this may not be the case.

- What’s left in a Ministry if the FOI Officer is removed to a more centralized location and structure is the Organization Head or delegate, who becomes involved in FOI decisions in only selected circumstances. There are also program officers who will be involved with the subject matter of the request and who may interact with the FOI Officer if there are any questions about disclosure, and staff who are involved in the search and collection of the requested information. An FOI Officer who operates at an organizational distance in a central access office and who may be authorized for several Ministries will have less of a relationship with other officials. Candour and trust may be lost and persuasiveness may be compromised. Access is not intended to be an adversarial process, although it can become so when not widely supported. The FOI Officer may be less aware of the business and processes of the Ministry. It may be more difficult for the FOI Officer to educate and promote the importance of FOI, documentation and good record-keeping practices.
- It is a truism that organizational culture is led from the top - by example and actions, not by pronouncements or manuals. Many senior civil servants are sincerely committed to the values of transparency and accountability and, accordingly, support FOI. But governments change leadership and changes in political philosophies follow. Political parties that enthusiastically supported FOI in opposition decide that restrictions are more attractive when they form government. Within the organization the culture and level of support for FOI may then evolve. The FOI Officer can represent a stable centre of professionalism and expertise that maintains the culture of openness at a time when government priorities lie elsewhere.
- Seeking efficiencies through centralization may be an instance where a little bit of something is just right while taking the proposal to its logical end may be too much. In other words, advantages may be obtained by adopting elements of centralization without creating a fully centralized model. The Irish FOI networks demand a great deal of communication and coordination among FOI Officers and staff and the network draws people together.
- Governments have also joined Ministry FOI Officers together in “pods” of related portfolios (e.g., health, safety and environment; social services, housing and education; or financial services, pensions and insurance). This may allow balancing of the workload since some Ministries receive more requests than others, often by a large margin. In the “pod” model, FOI Officers may still maintain relationships, promote transparency values and assist with identifying improvements for their “core” Ministries. Encouragement may be necessary, such as invitations to senior management meetings or less formal discussion.

Effects of Failed or Reluctant Implementation on Institutions

Failed implementation means—to no one’s surprise—that the system fails and objectives are not achieved. In practical terms, this means delays, less assistance given to applicants, more wasted time and less satisfaction for both government officials and applicants.

Any number of institutional effects is possible: Commissioners with no budget or staff, or public servants with no training, no guidelines and no appreciation of their duties. Poor implementation can translate into a public that does not know its rights or how to exercise them. Many frustrations with current FOI systems can be traced back to poor implementation, especially to a failure to provide resources and allocate

sufficiently senior personnel to the tasks. Some of these failures are deliberate; others occur from indifference.

At another level, poor implementation will mean that the values of openness, transparency and accountability have been given only lip service, whether through tradition, indifference or malfeasance. A poorly implemented FOI system can be improved. Depending on the causes it may take a very long time.

A jurisdiction with inadequate record keeping and nearly nonexistent means of retrieval will face challenges different from one with adequate records but a compulsive desire for secrecy. Where there is little desire for improvement, outside pressures from civil society, international organizations (e.g., World Bank or OECD), the courts or opposing political parties may be the only stimulus for improvement.

Some think of implementation as what happens when decisions are made to start a new program or pass new legislation. In fact, it is ongoing with refinements, improvements, adjustments, upgrading, downgrading and so on happening on a continual and regular basis. Some successful systems may become dysfunctional with, for example, the introduction of new technology (e.g., email or instant messaging). Most early implementation failures can be overcome. Implementation is an ongoing opportunity. As one report comments, “Benign neglect of freedom of information laws, notably by public officials, is not an incurable disease.”⁵⁴

⁵⁴ Craig Le May et al., “Breathing Life into Freedom of Information Laws: The Challenges of Implementation in the Democratizing World,” CIMA, Sept.10, 2013.

FOI as a Regulatory System: Compliance

Ministry compliance with FOI legislation remains a continuing problem. While serious and conscious non-compliance, such as destruction of records to avoid responding to a request, is relatively rare in Canada, examples exist. Failures to meet time deadlines or not assisting the applicant to refine or focus the request are more common.

Sometimes delays are deliberate in order to discourage applicants or to nullify a competitive advantage, such as a lead on a juicy news story. More likely, delays are caused by poor identification of records, flawed record keeping, inadequate resources or training, or difficulties in coordinating consultations. Compliance failure can then be seen as both predictable and systemic.

In the last 20 or more years, the field of compliance research has grown. We know more about why people obey the law, what rule-setting approach leads to higher compliance, what happens when authorities cease to enforce the rules, what roles different stakeholders can play to increase the likelihood of compliance and what sanctions are likely to be effective. Psychology, economics, organizational behaviour studies, and field studies of enforcement have all played roles in expanding our understanding of what rule and compliance systems are likely to be more robust in what circumstances. Most of the field research and theoretical work on compliance has been done on the private sector, looking at areas as varied as pharmaceutical companies, nuclear energy plants, chemical producers, mining and nursing homes.⁵⁵

Government internal rules and regulatory systems have received less attention.⁵⁶ As Alasdair Roberts noted, within government a FOI system is a regulatory system: rules are imposed on actors in government to undertake certain behaviours in order to produce desired results.⁵⁷ Some FOI systems lack elements of a regulatory system in that sanctions for noncompliance may be weak or absent, but companion rules governing the civil service may cover compliance issues for most purposes.

In a sense FOI is a self-regulatory system. The overarching rules are in the legislation but it is the civil service, the body responsible for ensuring the day-to-day functioning of the system, that determines how many system processes are designed and implemented. They can enhance or devalue the review function, for example. This can weaken the entire system since it's been shown that self-regulation is most effective when there is some realistic threat of oversight or corrective action operating in the background. Thus oversight of a supervisory agency or creating a code of conduct that is linked to legal consequences will produce more compliance in the longer run than statements of good intentions. This is a case of "watch the walk, not the talk."

One rare example of attention to internal government regulation is the *Belcher Review* in Australia that looked at whole-of-government internal regulation.⁵⁸ The report examined the FOI Act and reported that their consultations within government found that entities found FOI to be a burden to be managed rather than an appropriate accountability mechanism. The review found that the FOI Act is the legislative underpinning of open government in Australia, and that the administrative burden was not always proportional to the risks involved.⁵⁹ Recommendations to reduce the internal administrative burden include active publication of information, potential consolidation of the Information Publication Scheme with other

⁵⁵ See, for example, the work of John Braithwaite and Neil Gunningham in Australia.

⁵⁶ Although the document is now outdated and archived, Treasury Board Canada wrote a guide on compliance with the Financial Administration Act that recognizes many elements of a good compliance approach. <https://www.tbs-sct.gc.ca/report/rev-exa/faa-lgfp/faa-lgfp09-eng.asp>.

⁵⁷ Roberts, Alisdair, "New Strategies for Enforcement of the *Access to Information Act*," (2002) 27 *Queen's Law Journal* 647.

⁵⁸ See footnote 9.

⁵⁹ Whether the risk is inappropriate disclosure or inappropriate information retention is not clear.

information initiatives, such as the digital transformation agenda. The Review also recommended that the government implement the recommendations of the 2013 Hawke Report to which the government had made no response. The Hawke Report's administrative recommendations included provisions for vexatious requests, clarifying refusals and implementing a single website for disclosure logs.⁶⁰

Institutional implications

- Effective high levels of ongoing compliance with FOI and related rules is related to several institutional issues:
 - Legislative design that provides adequate powers to the review body (e.g., Ombudsman or Commissioner). In fact, the Ombudsman design should be avoided since it typically lacks sufficient powers and its persuasive moral influence can vary with new governments or even new personnel (e.g., Prime Minister, Minister in nodal Ministry, even the Deputy or Permanent secretary).
 - The availability and use of sanctions for certain important issues such as unauthorized or bad faith destruction of records provides that important incentive for compliance. Internal sanctions should also be available for failure to respond. FOI compliance should be considered in evaluations and performance agreements.
 - Does the “nodal” agency or another body have the capacity to elaborate on the rules to fill in gaps, develop binding guidelines or codes of conduct? Compliance will not occur unless rules are known and understood. This is why education and outreach are part of every well-designed regulatory system. At the federal level in Canada, the Treasury Board Secretariat is the nodal agency for the *Access to Information Act*. It effectively provides the management structure for the government and a Treasury Board Directive is equivalent to a regulation and has the force of law.
- FOI has to be visible throughout the Ministry, although its importance may vary from section to section. This favours keeping certain functions within the Ministry⁶¹ to allow the FOI Officer to interact and build relationships with senior management, the Minister's office and other stakeholders within the Ministry.⁶² Respect is earned and expertise recognized; this also adds to the professionalization of the FOI Officer function as a valuable part of the Ministry's business.
 - Are there effective connections between those who are responsible for the FOI scheme (e.g., responsible Minister and Ministry) and those responsible for complementary systems, such as records management, archives, cybersecurity, open government or resource allocation? In many jurisdictions, the responsible Minister for the FOI function is the Minister of Justice or Attorney General. This makes sense from the point of view of the administration of a law that may have constitutional or semi-constitutional status, but is likely to result in weak linkages and a poor appreciation of some key elements of an effective FOI system.
 - Visibility also contributes to compliance through development of a corporate culture that values compliance. If FOI is seen as an important part of the Ministry's business and is supported through resources, personnel levels, inclusion in communications and in other ways that remind officials

⁶⁰ Australia, Commonwealth Government, “Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010,” July 2013 (Hawke Review), chapter 7.

⁶¹ Note that “being within the Ministry” does not mean that certain types of co-location cannot be efficient. Many Ministries are themselves decentralized into regions, buildings across the capital, or service and subject matter divisions.

⁶² This is not to say that certain functions within the system of processing and responding to a request cannot be assigned to some form of shared services or co-located.

that is part of a core value linked to probity and reputation and not simply an afterthought, cooperation will be the norm and compliance, especially to avoid delays, will be more likely.

Where the FOI Officer function is valued, there may be greater recognition of the value of expertise, which goes beyond the appropriate application of exemptions. Officers with strong ties to the Ministry's operating environment can contribute to discussions about proactive disclosure, identify concerns of the public or other stakeholders as early warnings and suggest compromises when appropriate.

- Compliance is more likely when officials and FOI Officers are supported in their roles through education and networks. Some jurisdictions have active networks of FOI Officers who can discuss best practices, complicated exemptions and seek advice. Since these networks may be government-wide or grouped into sectors (e.g., social, environmental or economic), the nodal agency has a role to play in facilitating their establishment.

Ireland⁶³ is an example where the FOI Central Policy Unit in the nodal Ministry established FOI Networks whose main function was to “lead the development of an operational environment for FOI which secures high-quality decision making... The networks should seek to secure an appropriate consistency and uniformity of approach to operational FOI issues.”

- These Irish networks have important roles to play—they are not just a “lunch and chat” opportunity. For example, their roles include:

Expertise and knowledge sharing

3.5 The networks must act as a key focal point for ensuring a cohesive and integrated approach to FOI in all public bodies, facilitating the exchange of knowledge, information and expertise and leading to on-going and progressive learning for all involved.

3.6 Networks should examine complex issues and cases and also consider cases from other jurisdictions. They must play their role in developing, supporting and promoting best practice in terms of the operation of the Act.

3.7 Networks must operate effectively to provide open and expert forums for the

communication, discussion and resolution of issues relating to the operation of FOI in FOI bodies. This would include practical matters such as sharing ideas in relation to handling of non-traditional requests, linkages with other enactments and resolving difficulties imposed as a result, best practice in publishing disclosure logs and information routinely requested etc.

Advice and Guidance

3.8 The FOI Networks should provide a forum for providing advice and guidance to FOI Officers on a range of matters including legal advices from the Office of the Attorney General, OIC findings and High Court decisions as well as sharing experience and lessons learned on an on-going basis.

Informing policy development

3.9 The Networks should develop and maintain a close working relationship with the CPU in order to ensure that policy development and consideration of legislative change is fully informed by a

⁶³ Department of Public Expenditure and Reform, FOI Central Policy Unit, June 2014.

strong knowledge of what is happening on the ground and that the FOI work of public bodies is strongly guided by the knowledge, perspectives and objectives of the centre.

The Irish approach provides support but it does a great deal more than that. Clearly the FOI Officers are expected to be knowledgeable about their Ministry, its operation, general government policies and programs dealing with records management and other matters. Ideally, they have a profile that is reinforced by the network arrangements.⁶⁴ In addition, there is the implication that officers have sufficient seniority and experience to contribute as expected. It would be surprising if they were far removed from regular interaction within their Ministries.

Developing a Compliance Culture: Openness

Creating a corporate culture that is consistently in favour of transparency will be a critical factor in producing compliance.

Cultural dissonance is stressful. The tension between transparency or openness and secrecy or risk avoidance is not only theoretical, but is also a reality for officials dealing with FOI. Does excellence in performing their FOI tasks mean that they risk career advancement? Is it a sign of “not playing the game” rather than evidence of developing expertise?

Of course, if the messages across government are consistent with emphasizing the benefits of openness by promoting open government, for example, and creating cultures that reward compliance then the tensions between objectives become more manageable. After all, one of the characteristics of government is the need to balance interests and seek consensus, unlike a business examining its bottom line.

A particular culture does not flourish when it is hidden. Among the practices recommended by the Australian *Better Practice Guide* was “keeping FOI on the corporate radar.” Methods included:

- Regular reports to senior management on significant FOI matters;
- Debriefs with the business area and other interested staff about the outcome of FOI decision processes or appeals;
- Conducting regular seminars or issuing email alerts or updates on FOI issues; and
- Ensuring FOI familiarity is part of standard induction training.⁶⁵

Clearly these activities could also be combined with ensuring that privacy issues, cybersecurity and improved understanding of information technologies were also “kept on the radar.”

Another point about creating a culture through what is essentially change management is the identification of “champions.” The *Better Practice Guide* notes:

Agency FOI performance improves where a senior figure in the agency has a role as an FOI champion. They may or may not have formal decision-making responsibilities, but it is their role to ensure that the agency is

⁶⁴ A great deal of attention has been paid to the implementation of FOI in Jamaica; e.g., Neuman and Callard, footnote 40. Although it has been a rocky ride, there is one part of the project that stood out as successful: the Access to Information Association of Administrators, where the FOI Officers met to discuss challenges and share best practices; Commonwealth Human Rights Institute, “Implementing Access to Information,” 2006.

⁶⁵ Government of Australia, “Better Practice Guide: Freedom of Information Act 1982,” June 2013, available at www.ag.gov.au/Consultations/Documents/FOI%20Better%20Practice%20Guide.pdf.

committed to high standards of professionalism in handling its FOI workload. They can also be a focal point for managing issues and developing strategic plans for FOI management within the agency.⁶⁶

Contentious Issues Management

Delays are one of the issues that dog the reputation of FOI systems. They can be signs of inefficiency, poor system design, indifference or even deliberate desire to thwart the intentions of the applicant, especially if there is a suspicion or a certainty that the applicant is a journalist with a deadline.

One cause for a file that drags on past stipulated time deadlines is the interjection of political concerns into the decision-making process. There are examples of files sitting on a Minister's desk or with the Minister's political staff for as long as six months. There are a number of examples where pressure has been placed on the FOI Officer to change a decision - almost always in the direction of less disclosure - to suit political concerns. Sometimes these disputes can be ugly and the FOI Officer may feel that future career prospects are threatened.⁶⁷

There is broad recognition that FOI responses should not "surprise" Ministers and that the system should allow for some form of "heads up." There is also recognition, albeit occasionally reluctant recognition, that FOI legislation generally only allows for decision-making by politicians in selected circumstances (e.g., Ministerial veto in United Kingdom or a Minister's certificates dealing with security matters).

There may be involvement by the Minister where the documents are specifically held by the Minister's office, in those jurisdictions where this is covered under the scope of the Act. Even where Ministers do not have an active role, in practice political players may *de facto* make decisions and their insertion into the process may account for such problems as excessive delays, overly broad redaction, and general non-responsiveness. This is where the problems occur: "The prevailing view seems to be that letting the Minister's office know what requests for information have been made is not the offence,⁶⁸ but forwarding the request to the Minister's office to be decided or influenced certainly is."⁶⁹

Delays or rejections that can be traced to political intervention undermine the reputation of the system, and foster distrust of government. The jurisdictions that seem to do best at balancing the politician's need for some warning, the civil servant's instinct for protecting government and avoiding upheaval, the requester's right to have the legislation applied fairly and without bias, and the legislative intent of providing an

⁶⁶ Ibid. Clearly, champions can also be involved in the networking, knowledge sharing and management-level support identified above in the discussion about the Irish FOI scheme.

⁶⁷ New Zealand, Report of Dame Beverley Wakem, the Chief Ombudsman, "Not a Game of Hide and Seek," 8 December 2015. See also, Alasdair Roberts, "Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada," December 20, 2003 (later published in *Blacked Out: Government Secrecy in the Information Act*, Cambridge U Press, 2006); Anne Rees, "Sustaining Secrecy: Executive Branch Resistance to Access to Information in Canada," in Mike Larsen and Kevin Walby (eds.), *Brokering Access: Power, Politics and Freedom of Information Process in Canada* (UBritish Columbia Press, 2012); Ann Cavoukian, Information and Privacy Commissioner of Ontario, "Report into Contentious Issues Management in the Ministry of Finance," May 27, 2011; R. Snell, "Contentious Issues Management: the Dry Rot in FOI Practice," *Freedom of Information Review*, December 2002; Suzanne Legault, Information Commissioner of Canada, Special Report to Parliament, "Interference with Access to Information," April 2014; Alisdair Roberts, "Two Challenges in Administration of the Access to Information Act," CISPAA ("Gomery Report"), Vol. 2, 2006.

⁶⁸ In fact, Government of Canada training about the *Access to Information Act* considers frequent communication with the Minister's and Deputy Minister's offices to be a "best practice." Report on Best Practices Workshop, July 17, 2003.

⁶⁹ Dr. David Solomon, footnote 52.

instrument for accountability also have reputations for effective FOI regimes. This is likely not a coincidence.⁷⁰

The balancing starts with explicit recognition—usually in public guidelines or protocols—of the Minister’s need for warning in contentious or sensitive matters.⁷¹ This is correctly seen as a form of risk management. At the same time, there is insistence on unpressured and unbiased decision making by officials,⁷² but formal documentation of consultation procedures with Ministers or Ministerial staff or requirements to document their involvement does not appear to be available in Canada. Recommendations on the Australian guidelines emphasize that the “heads up” should not extend the time in which decisions should be made. The insertion of a role for political or communications staff does not “stop the clock” for responding to a request.

Proactive Disclosure: Push, Push

Observers often distinguish between the push and pull models of information disclosure.

In the pull model, information is requested and pulled from government—like teeth, perhaps. In the push model, government is pushing out information about its activities, policies, organization, personnel, guidelines, manuals, decisions, annual reports and so on.

There may be central guidelines on what types of information must be published and some FOI laws require certain categories of information be made available. Information that has been disclosed after an FOI request may be published automatically.

In general, this adds to transparency, but published information has to be in a useable and relevant form. Where governments have truly provided information that interests citizens, they have found FOI requests have been reduced.

The Scottish Information Commissioner has noted, however, that obligations to publish proactively may not be sufficient to meet today’s expectations.⁷³ Arguably, a more integrated approach is required.⁷⁴ This would be one that takes into account the usability of information (e.g., duplicating data sets is often not useful), intellectual property implications and the value of government information.⁷⁵

⁷⁰ For a discussion of problems associated with Ministerial involvement, see South Australia Ombudsman, “An audit of state government departments’ of the Freedom of Information Act 1991 (SA),” May 2014, chapter 8. See also, Recommendation 25 regarding establishing a formal process for Ministerial “noting,” as it was called in South Australia.

⁷¹ See, New Zealand, Office of the Ombudsman, “Model protocol on dealing with OIA requests involving Ministers,” July 2017; Queensland, Office of the Information Commissioner, “Model Protocols for Queensland Government Departments on Reporting to Ministers and Senior Executive on Right to Information and Information Privacy Applications,” (undated); Newfoundland Labrador, “Access to Information: Policy and Procedures Manual,” October 2017.

⁷² Some governments have responded with public warnings about political interference in FOI decisions: “Political staff shouldn’t meddle in FOI releases: PMO,” www.ctvnews.ca/political-staff-shouldn-t-meddle-in-foi-releases-pmo-1.481827 and “Premier bans political interference in records,” British Columbia, December 15, 2016; www.merrittherald.com/premier-bans-political-interference-in-records/.

⁷³ United Kingdom, Scottish Information Commissioner, “Proactive Publication: time for a rethink?” 2017. The Commissioner is also concerned that the current approach to FOI is not sustainable given increasing requests.

⁷⁴ A discussion of the relationships between FOI and open data can be found in Janssen, Katleen, “Open Government Data: right to information 2.0 or its rollback version?” Available at <http://ssrn.com/abstract=2152566>.

⁷⁵ While current concerns about Facebook, Russia, cybersecurity, data mining and general misuse of data highlight the need for careful analysis, there are potentially large gains available from more open data. See, for example, McKinsey & Company’s estimate that the value could be between \$5-7 trillion annually, available at www.mckinsey.com/business-functions/digital-mckinsey/our-insights/open-data-unlocking-innovation-and-performance-with-liquid-information. Australia takes the view that government-held information is a national resource; Australia, “Better Practice Guide: Freedom of Information Act 1982,” June 2013.

Observations

There are observations made in the sections above, some of which are tangential to institutional design and fall out of discussions on compliance or implementation failures.

The focus of the paper is on the implications of different approaches to designing FOI systems and particularly centralizing the FOI Officer function. There is, therefore, no discussion of such matters as the breadth of exemptions, the existence or application of a public interest test or the scope of the application of disclosure obligations.

The choice of review model: Ombudsman, Commissioner with binding decision power or the courts

- The Ombudsman model is likely to lead to lower compliance since recommendations need not be followed. An Ombudsman is also less likely to be in a position to provide ongoing guidance, explore new policy issues or new technologies, and educate the public and officials.

The Information Commissioner of Canada, who operates as an Ombudsman, is an exception and vigorous leadership has characterized the position. The Canadian Commissioner's experience, however, has highlighted the shortcomings of the Ombudsman oversight of a scheme whose political popularity waxes and wanes.

New governments may show enthusiasm for modernized legislation or improved systems but eventually the complexity of information systems, the need for resources, including time and political attention, and the desire for the quiet life overcome early good intentions. That is an important reality of FOI.

The Ombudsman FOI role may be especially limited where there is oversight responsibility for the whole of government or a number of other positions. Although one could argue that in Ireland much of the educational and promotional role is carried by the nodal agency, the Ombudsman's approach is notably adjudicative and legalistic in tone, judging from annual reports.⁷⁶ Time will tell if any reform recommendations emerge from the Ombudsman and Information Commissioner for Ireland.

The ability to elaborate or create rules through regulation, directives or other means that have a binding or influential effect on the other components of an FOI system

- A "nodal" agency within government that can promote and enforce the managerial and information requirements of the FOI system as a whole strengthens implementation. Ideally, the nodal agency is responsible for records management, cybersecurity, information technologies and the other matters that create the environment and enabling conditions for successful operation of the FOI system.

In a Westminster system, having an FOI system linked to a Minister who has the authority to develop and present regulations for Cabinet approval can be an important advantage in maintaining a modern, integrated system that can, at best, work around the silos of the technical, organizational, legal, political and management interests.

⁷⁶ The Ombudsman and Information Commissioner for Ireland's annual reports are available at www.oic.ie/publications/annual-reports/.

Recognition across government of the overarching and yet interconnected nature of FOI, transparency, openness and accountability

- The broader nodal agency responsibilities mentioned above are part of this. But FOI is more than disclosing non-exempt information within a set time. It is now a necessary function of government has to be integrated into the business of government.

Silo management should be avoided across government. Similarly, FOI should not be isolated or treated as an “add on” within a Ministry. FOI should be considered an inherent part of the business and culture of the Ministry. This requires support, resources, expertise and the building of a “profile” for the function and the value of transparency as a necessary part of good government.

Resources will always be a problem, but they should not be the most important criterion in creating and implementing the operational system supporting quasi-constitutional legislation

- This may be particularly true in the early days of developing the system. While it can be said that Canada has many years of experience with FOI, it can also be said that it has fallen behind and that the current system needs to be rebuilt, modernized and better integrated into other related information management systems.

Band aids may be applied and reform may be piecemeal in practice, but it is worthwhile to spend some time rethinking the system from an implementation and compliance viewpoint. What is missing? What needs to be added or strengthened? Can new technologies be anticipated? And many other similar questions.

- In looking at two designs for the FOI functions—intra-Ministry or decentralized and centralized—it becomes evident that the underlying philosophies are different. The differences are accentuated when the full potential of the two designs are considered.

The intra-Ministry design allows for wider development for the role of the FOI Officer, discussed in the next section. That in turn implies a greater awareness of the nature of access and transparency and their capacity to strengthen civil society and promote accountability.⁷⁷ It may also promote considerations of privacy, data protection, enhanced cybersecurity and the development of a culture that is both more open and more secure.

The centralized model looks at the decision-making function in greater isolation, with emphasis on efficiency and reduced cost. It is not clear that experience with this model in Canada has produced efficiencies since in British Columbia, for example, early improvements in timeliness have been lost.

Any contribution of decision making to changing government culture or attitudes is incidental. Since culture is one of the critical underpinnings to a successful FOI regime, this is an important difference. Expertise and possibly a broad acceptance of the function as integral to the work of the organization, rather than an “add on”, may be more likely to promote efficiency.

The full importance – or potential – of the FOI Officer should be appreciated

- There are a number of possible supportive functions that the FOI Officer can play other than the key legislated decision-making role. Decision making must be accompanied by an unbiased fairness that is

⁷⁷ It should not always be assumed that this moves society to a more “liberal” or accommodating direction; information can be used to rationalize discrimination, inequality and authoritarian politics. But information should open up the playing field.

acknowledged in commentary but is also likely inherent in the administration of a quasi-constitutional statute.

In itself, this does not speak to either the employment classification or the institutional arrangement within which the FOI Officer operates. However, the development of relationships of mutual respect and promoting the cultural values underlying FOI – and its companion, privacy protection – within the Ministry imply a certain level of active presence for the Ministry. Involvement in building a responsive culture, dealing with different issues, such as privacy, and exposure to operational personnel can add interest to the job.⁷⁸ Depending on the Ministry, burn out is a possibility (e.g., file after file on child abuse or other distressing subjects).⁷⁹

- The attention paid by governments to FOI issues varies, often in conjunction with the political cycle. New governments are more likely to be supportive while more established governments see access as a nuisance or worse.

Experience has shown the bumpy ride of some FOI regimes, even in advanced democratic countries – Commissioners carrying on business out of their homes, severe resource cuts, the imposition of legislative reviews that are clearly intended to clip claws and reduce the impact of FOI.⁸⁰ FOI systems have had to learn how to survive in both lean and less lean years – one can hardly use the word “rich” – and organizations should be concerned about protecting a vital function.

Making greater use of the strengths and potential of FOI Officers does not mean efficiency or resource savings must be ignored

- For one thing, there may be problems with record searches and identifying documents, as well as with delays in decision making. Different jurisdictions are emphasizing different ways to achieve efficiencies: more education and “networks”, strong applications of technology, and serious efforts to anticipate requests through active dissemination of information in different modes.

A strong FOI Officer function is most likely to be found in a Ministry

- Maintaining the Ministry as the location of the FOI Officer function does not necessarily mean that the full possible range of activities has to be implemented. It does mean, however, that adding functions can be explored.

Privacy complaints and training could be included without making major changes in their role. There are also hybrid arrangements that can be explored, particularly cooperation among Ministries or agencies to stabilize workflows, expand expertise, etc., and could involve co-location.

Smaller jurisdictions already combine functions and locate them in agencies that might not be appropriate if more resources were available or if FOI activity were higher.

⁷⁸ Routine paper management without other tasks can lead to high turnover: David Flaherty, “Managing Response Times Under Canadian Access to Information Legislation,” Review Task Force (2000).

⁷⁹ The potential for burn out was raised anecdotally but was also an explicit concern of the Queensland Ombudsman reporting on FOI reform, footnote 52.

⁸⁰ The most recent United Kingdom review was clearly intended to produce recommendations to narrow the scope of the legislation; instead, the review found the scheme generally satisfactory. BBC, “FOI Commission: why has it surprised observers?”, March 1, 2016, available at www.bbc.com/news/uk-politics-35550967.

Two matters that have an effect on the FOI system and compliance—contentious issues and proactive disclosure—should be addressed more forcefully

- It is realistic to assume that there will be political interest in some requests. There is no reason, however, to fail to comply with statutory requirements to satisfy this interest.

The nature of the law implies that the culture of secrecy has changed and will continue to change. To deny this is to either undercut or fail to comply with the law.

At the same time, merely discussing protocols and documentation about the involvement of Ministers and political staff does not realistically solve the problem of divergent interests.

Investigation reports show highly protective political staff and often appear to show unprotected FOI staff who feel pressured to pull back from their assigned role. The interests are simply competing but the legislation does not nor should it allow political convenience or potential embarrassment to override.

- At least one expert has noted that the existence of files that are “contentious” can distort the system.⁸¹
- A few FOI requests cause most of the trouble: The Pareto Principle, or the 80/20 rule, operates in FOI, as in other fields of policy. In the United Kingdom and elsewhere (e.g. New Zealand), a few high profile cases cause disproportionate effort, media attention, public controversy and political pain.

Importantly, most requests are for “non-political” information.

- Arguably, more discretion should be applied to what files go through a political consultation process. There is worry, though, that a file that later garners attention may be missed; the view is “better safe than sorry,” so the process will often routinely involve vetting rather than merely allowing for a “heads up” to plan responses and talking notes.
- Creating a documented process to handle “sensitive” requests helps defuse matters, reminds all players of legislative objectives and imposes transparency that is likely to foster compliance.

One might argue that the decisions should remain within the organization’s personnel and that any contact with political staff taints the process with perceived bias. That may be a “pure” approach, but it is not realistic. Creating structure and boundaries, including time limits, that are public may build trust and is even more likely to give FOI Officers behavioural reference points if pressured.

- If legislation is not amended to allow for this, then it can begin with a Code of Conduct for Ministers, which would be more public and binding than a press announcement. A companion code should be developed for political staff. Any protocols or MOUs between the Deputy Minister and Minister should also include this matter.

⁸¹ Worthy, Benjamin and Robert Hazell, “The Impact of the Freedom of Information Act in the UK,” in Nigel Bowles, James T Hamilton, David Levy (eds), *Transparency in Politics and the Media: Accountability and Open Government*, 2013 (London: L.B. Tauris) 31- 45.

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