

Records Management and Freedom of Information: a marriage partnership

As the official custodians of government information, archivists and records managers should be involved at every stage of the formulation and development of freedom of information legislation.

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INTRODUCTION

The importance of Freedom of Information (FOI) legislation to society cannot be overstated. Patrick Birkinshaw, Professor of Public Law at Hull University Law School in the United Kingdom argues that FOI legislation

has the ability to generate more controversy and heated debate than any other aspect of contemporary government and administration.¹

Why should this be so? Is it because FOI legislation enables the citizens to access information which they would otherwise have to wait for years before being able to access, or is it simply because governments the world over believe in secrecy? David Banisar, a Policy Fellow at the Open Society Institute and Deputy Director of Privacy International, a UK-based human rights group, argues that the collapse of authoritarianism and the emergence of new democracies have given rise to new constitutions that include specific clauses guaranteeing citizens rights of access to government-held information. He also singles out the World Bank, the International Monetary Fund and some donor agencies as champions in advocating FOI legislation as a way of increasing government transparency and combating corruption.² There are also other reasons justifying citizen's interest in gaining access to government-held records. These reasons were perhaps best summed up by Norman Marsh when he wrote:

There are somewhat different reasons why it may be said that the citizens of a democracy ought to be informed about the operations of the executive government. That is because it is feared that any government, if it is allowed to work in secrecy, will abuse the power entrusted to it. The second reason is simply that openness of the government process is essential to good government.³

Any discussion into the role played by records in the implementation of FOI legislation must begin by first defining records and the role they play in society. A record may be defined as

any documentary material regardless of physical form or characteristic, made or received by an organization in pursuance of law or in connection with the transaction of business, and used by that organization or its successor as evidence of activities or because of informational value.⁴

Studies conducted in Australia show that records play a key role in all governmental activities. Lowell opines,

Government records have a unique character that imposes special responsibilities on the agencies that preserve and manage them.

He goes on to say

the value of state records derives from information they contain and the evidence they provide. State records not only document past decisions, they often establish and protect current rights and responsibilities of both the government and the governed.⁵

He came to the conclusion that

records provide a source of public accountability for the ways in which elected officials and the bureaucracy have carried out their public trust and the mandates of the citizenry.⁶

Perhaps the best summary of the usefulness of records was provided by Sylvia Piggot, a Senior Information Solution Consultant with the World Bank when she wrote:

without access to good records, officials are forced to take decisions on an ad hoc basis without the benefit of institutional memory. Fraud cannot be proven, meaningful audits cannot be carried out and government actions are not open to review.⁷

Having defined what constitutes a record and the importance of records to society, the next step is to define freedom of information legislation. This may be defined as legislation that enables citizens to have

access to files or to information in any form in order to know what the government is up to.⁸

As John Bolton has rightly observed,

the fundamental purpose of FOI is to make public bodies more accountable by providing the public with records on request.⁹

Under FOI legislation, a citizen who requests information should be given the opportunity to inspect documents and obtain copies of them or be provided with the opportunity of viewing a film or videotape, hearing a sound recording, or receiving a transcript of a sound recording or shorthand notes.

AREAS GENERALLY COVERED UNDER FOI LEGISLATION

The first area usually contained in FOI legislation relates to the definition of terms. This is particularly important as it specifies the types of records that would be subject to the legislation. In most cases the legislation should cover all records regardless of the format or medium in which the information is contained. Examples include papers or other material on which there is writing, marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, maps, plans, drawings or photographs, or, any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device.¹⁰

The second area usually covered under FOI legislation relates to the right of access by the citizens to government-held information. Without such provisions, the legislation would be of no value. FOI legislation provides procedures that enable the citizens to identify the records they may require. Departments are therefore required to publish detailed indexes, manuals, and guides to their information holdings. Where citizens are unable to identify the records, it is a requirement that the office concerned take reasonable steps to search for and produce the documents sought. An additional requirement demands that government institutions appoint officers responsible for responding to requests for information from the public. The question that should be asked here is whether the records officer, as the individual responsible for records keeping, should also be the person responsible for providing access to the records? Most FOI laws make provision for requesters of information to decide whether they would be satisfied with obtaining copies of the original documents or with access to the originals. It is the responsibility of the office holding the records to provide suitable facilities which the public can use while consulting the records.

There are clearly stated requirements that must be met by the citizens when requesting information. FOI

legislation demands that the request be in writing and be signed by the person making the request and that it must contain an indication that the request is being made pursuant to the FOI Act. Moreover the application must describe the records or topic to which the request relates, state the category of the requestor for fee purposes (commercial, media, educational, all others) and contain an agreement to pay all the fees that might be incurred in searching for or reproducing the information being sought.

It is not enough to establish that the documents being sought exist. The documents must be located and retrieved and decisions made on whether they should be made available to the requester or be subject to closure. This can be time-consuming, especially for agencies with a limited number of staff. Moreover, FOI legislation demands that time limits be established with regard to how long an institution should take to respond to a request for information and how much it can charge for that information. Where an institution charges excessive amounts for providing information or where it takes too long to respond to a request for information, the objectives of FOI legislation will not have been served. In the United Kingdom, for instance, departments are obliged to respond to requests within 21 days. Where information cannot be provided within this time, the act requires that the requester be informed accordingly and the reasons for the delays be explained.¹¹

The third area covered by FOI legislation worldwide relates to exemptions in respect of records which cannot be accessed by the public. An FOI Act ought to state clearly the kinds of records that will normally not be available for inspection by members of the public. This will normally be done through exemption clauses. The Act should categorically state the reasons why such records cannot be made available. For instance, in the United Kingdom, it has been proposed that the following records should not be available for public access:

- records relating to defence and national security
- records pertaining to international relations
- records relating to internal opinions, discussions and advice
- records pertaining to law enforcement and legal proceedings
- personnel information
- confidential commercial information
- safety of individuals
- information provided in confidence
- limiting premature disclosure
- limiting unreasonable or voluminous requests
- public authorities' commercial and negotiating interests.¹²

It cannot be overstated that under FOI legislation applicants need not state their reasons for requesting information and can only be denied access to records if these are officially exempted from public inspection. But even in those cases where certain records are restricted, an indication should be made as to when they will be reviewed or made public. No records should be closed for ever and ever.

Finally, but not least, ideal FOI legislation makes provision for the settlement of disputes between an institution and a person requesting information, through which requesters can appeal if they feel that their requests were not adequately addressed.

The mere existence of FOI legislation and a Records Act is not enough. Other legislation such as Official Secret Acts and various privacy laws must also be examined to ensure smooth implementation of FOI legislation.

The existence of FOI legislation does not mean that citizens will automatically have access to government-held records. As David Banisar has rightly observed:

The mere existence of an information act, however, does not always mean that access is possible. In many countries, the access and enforcement mechanisms are weak or unenforceable. Governments resist releasing information. They also delay the processing of information requests or impose unreasonable fees to discourage access. Sometimes, courts undermine the intent of the law, so citizens give up. In addition, independent bodies that process information requests can succumb to political pressure or are made ineffective by lack of funds. In countries such as Zimbabwe, the access laws that have been enacted actually legislate censorship rather than freedom of information.¹³

THE RELATIONSHIP BETWEEN RECORDS MANAGEMENT AND FREEDOM OF INFORMATION

No one can deny that there is a direct relationship between records management and FOI. John Bolton, a Records Officer working for the British Columbia Ministry of Skills, once noted that

without a substantial and comprehensive records management programme in place, the FOI legislation would not be worth the paper it was written on. Records could neither be identified as existing nor would they be obtainable from their storage.¹⁴

There is no doubt that the enactment and implementation of FOI legislation lays considerable demands

on records management personnel. This is often ignored by higher authorities. In several countries, including the United Kingdom, FOI legislation has been introduced without due consideration of the impact it would have on records management. No wonder that in the UK it was later realized that a phased approach was the only workable solution to successful implementation of FOI in government departments. In justifying this phased approach the Lord Chancellor observed that

it has to be remembered that a much greater level of preparation is required. We took two years with the Human Rights Act before the Freedom of Information Act. The act covers about 70,000 organizations ... The information commissioner has to double her staff and she has to approve about 70,000 publication schemes. That will take time.¹⁵

Full implementation of the FOI Act in the UK has therefore been delayed until 2005.

The importance of records in achieving the objectives of FOI was further stressed in a draft *Code of Practice on the Management of Records under Section 46 of the Freedom of Information Act 2000 of the United Kingdom* where it was observed that

any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed, or if arrangements for their eventual archiving or destruction are inadequate.¹⁶

For records to meet the objectives of an FOI law, they must be accurate, complete, timely, appropriate for retention, relevant, adequate, credible, engaging, readily accessible and likely to be needed in the future. To be reliable, records must in turn be accurate; that is, they must accurately reflect the transactions that they document. Records are reliable when it is possible to rely on the evidence that they contain as being accurate. There are cases where human error or deliberate falsehoods can affect the reliability of records, but this must be guarded against. Dietel (2000) suggests that for records to be considered accurate and reliable they should not contain errors in transcription, collection or aggregation. He goes further to suggest that

the information in this sense is either right or wrong. Yet accuracy is also affected by how finely or grossly it is measured, that is how much of the information stays at a high or abstract level or gets into the fine details of the subject matter involved? Perceptions about accuracy are

important for if the person who receives the information does not trust the source, then the source has questionable accuracy. Reliability and credibility matter.¹⁷

The accuracy and authenticity of records is one major factor that can be used as evidence. But records can only be considered to be authentic when they have been under proper custody and care, and when it can be proved beyond any reasonable doubt that they have not been altered or tampered with by unauthorized persons. Moreover, for records to be useful they must contain complete information; that is, the information should not have holes or areas that are left to guesswork or speculation. A complete record should contain the context in which the transaction was conducted, the business process the transaction of which is documented by the record, the participants in the transaction, the exact time of the transaction or communication and its chronological relationship with others.

Rick Snell, who has conducted some preliminary studies in Tasmania, Australia, is of the opinion that the passing of FOI legislation in Australia is

a mixed bag and certainly changes in records management practices appear to have lessened the potential of any significant impact.¹⁸

He goes further to say that:

A study of the literature about the effects of FOI provides strong support for the benefits which flow to records management. This literature can be separated into three major groupings. The first either briefly refers to other reports which mention the records management benefits of FOI or assume a benefit without any supportive evidence. The second grouping, and the far smaller category presents some tangible evidence for the positive linkages between FOI and improved records management. The third grouping and most informative, consists of the reports of government agencies about their perceptions of the benefits of FOI. Rarely in any of the groupings, are possible negative consequences of FOI on records management canvassed.¹⁹

Using five different case studies for his study, Snell sought to answer five basic questions:

1. What was the department's system of records management prior to FOI?
2. Has it changed with the advent of FOI?
3. What other factors have contributed to changes in records management, e.g. new managerial policies, updates, staff departmental changes?

4. Has FOI assisted or hindered other changes to records management, e.g. by necessitating a new system of information retrieval?
5. Has FOI had a negative, positive or neutral impact on the working of the Department?

In response to the above questions, Snell came to the conclusion that some departments had noticed considerable improvements in the management of records while others had not noticed any changes at all. Snell did acknowledge that the passing of FOI legislation is likely to exert pressure in some of the following areas: fear of disclosure, normal demands of good record keeping, the need to justify decisions, the impact of a range of administrative mechanisms such as the ombudsman, Auditor General, Ministerial or Parliamentary requests.²⁰ Although it cannot be categorically stated that FOI is likely to improve record keeping practices such as filing, storage, retrieval and destruction of government records, nonetheless the passing of FOI is likely to lead to improvements and increased efficiency of these systems.

The provisions contained in the legislation, if properly implemented, should lead to improvements in record keeping requirements. In the first instance, as the law requires that each government agency publish lists, indexes, manuals, etc. of its information holdings, one would expect that record storage conditions should improve. Moreover, as a requirement under FOI legislation each agency is expected to appoint an officer who will be responsible for dealing with all requests for information. The appointment of such officers will obviously lead to the establishment of linkages between national archival institutions and records-creating institutions and should strengthen the links between registries and national archival institutions and ensure the smooth transfer of records from record-creating agencies into the national archives. Furthermore, as agencies will be required to retrieve records while they are still current, it is hoped that current records will be better managed and transferred to national archives in better conditions. Finally, as decisions to deny individuals access to documents are likely to be challenged before the courts, record-keeping officers will be required to exercise greater care in administering exemption clauses.

The impact that FOI is likely to exert on archival institutions relates to the increased demand for access to records, which would normally be restricted to public inspection. Experienced gained in the West indicates that after the passing of FOI legislation there has been an initial upsurge in the number of records requested, but this initial increase tends to decline with the passing of years.

Most countries provide access to recorded information only. However it must be remembered that due to

time constraints and other pressures, some officers might be unable to record their decisions. The Danish law demands that officials record details of information obtained verbally, while the New Zealand law makes provision for access to information where officials are capable of providing information which might not have been recorded but of which they are aware.

There is every possibility that in some countries the passing of FOI legislation may have negative effects on records management. For example, one cannot rule out the possibility that some departments might destroy records or even fail to document their decisions for fear that their actions might be challenged in courts of law under FOI legislation. However it is hoped that such cases will be few in number.

CONCLUSION

Having described the requirements of FOI legislation, the major provisions that might be included and the impact such legislation is likely to have on record keeping requirements, what role should archivists and records managers play in the formulation and implementation of this legislation?

It seems clear that archivists and records managers, as the official custodians of government information holdings, should be involved at every stage during the formulation and development of FOI legislation. Failure to do so may result in the passing of legislation which is not well balanced or which will exert undue pressure on archivists and records managers. Moreover, as archivists and records managers will ultimately be the officers responsible for the implementation of FOI legislation, it is imperative that they not only be consulted, but that they should play a leading role in the formulation and development of such legislation.

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Abstract

Seeks to demonstrate that successful implementation of Freedom of Information (FOI) legislation is directly linked to effective and efficient records keeping regimes. Where records keeping systems are poor or ineffective, the implementation of FOI will either be problematic or fail to achieve the desired results.

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