‘Keeping the Bastards Honest’ – The Promise and Practice of Freedom of Information Legislation

This thesis is presented for the degree of Doctor of Philosophy of Murdoch University in 2006

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I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution

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Abstract

In the last decade the number of countries that have enacted Freedom of Information (FOI) laws have increased dramatically. In many respects FOI laws have become a democratic ‘right of passage’. No FOI, no ‘proper’ democracy.

The promises of FOI regimes are far-reaching: access to personal information and increased transparency in the form of third-party independent access to government-held information will prevent corruption and maladministration and encourage the public to participate more fully in the political process. But are the promises borne out by the practice of FOI?

To answer this question this thesis will track a number of real-life FOI requests in five countries. Based on this and other data this project will lay the foundation for the first International Freedom of Information Index, ranking five countries on how their FOI regimes deliver on the promises made. Included in the ranking will also be an evaluation of the legal situation for media whistleblowers and shield laws for journalists.

The thesis will show that it is easier to promise information access than to implement it. It will demonstrate that for most of the countries of study FOI laws serve more as a PR tool projecting an illusion of an informed public, rather than granting real independent access to quality information.
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Introduction

When Don Chipp\(^1\) in 1977 coined the phrase ‘keeping the bastards honest’ he articulated on a practical political level one of the essential ingredients of any democracy – there must be a way to keep track of and scrutinise what our elected representatives are doing to ensure they deliver on their promises and follow the principles of good governance during the course of their political term.

The genesis of this project dates back to 1994 when I began working as a freelance journalist in Australia. I had trained and worked as a journalist in

\(^1\) Don Chipp was the founder of the Australian Democrats, a political party which in 1977 broke away from the main conservative party The Liberal Party of Australia. Among other things Chipp and the new party vowed to act as a scrutiniser of politicians ("the bastards") that used the system and did not deliver on their promises…assuming that the elected members of the new party had not yet become ‘bastards’ themselves…
Sweden, other European countries and the Middle East. I was amazed at the
differences between Australia and Sweden in terms of access to government-
held information. What would have taken me a matter of hours to access in
Sweden would take weeks and months in Australia and would be of a lesser
quality, assuming I could get access to it in the first place. Why these vast
differences in information flow between political systems that, at least on the
surface, seemed to share common goals and values? And if and how might this
impact on journalistic content? These and other questions led to an MA project
(Lidberg, 2003) which in turn developed into this study.

Many have made the argument for Freedom of Information (FOI) laws
and the support for the FOI concept has grown overtime to become close to
universal among the democratic community – at least in theory. FOI enlists
support from a multitude of sources such as the Universal Declaration of
Human Rights:

Everyone has the right to freedom of opinion and expression; this right includes
freedom to hold opinions without interference and to seek, receive and impart
information and ideas through any media and regardless of frontiers (UN, 1948:
Article 19)

Although FOI laws are potentially one of the most potent accountability
tools to date this thesis will demonstrate that, based on a five country sample, in
some cases the laws are little more than a toothless paper construct and
democratic ‘showcase’ rather than the effective scrutinising tool they were
intended to be.
This thesis is about how FOI laws work in practice. The theoretical, and legal, promises of FOI are tantalizing and fascinating. In general they tempt prospective users with three aims:

- To provide access to government-held records concerning individual and personal information

- To provide third party access to the public to increase transparency in the governing process and thereby increase accountability and prevent maladministration and corruption

- To provide third party access to increase the publics’ knowledge of the political process and thereby encourage and foster public participation in the political process

The first aim, to provide access to personal records (also called first party access), is met in most functioning FOI regimes (Banisar, 2004: 4-5), which in itself is a very positive effect of FOI. However this study is concerned with the second and third objectives, which in most cases involve third parties such as journalists and media organisations, requesting information.

In the last 10 years the numbers of FOI laws around the world have increased dramatically. At last count there were 58 active FOI regimes and about 30 in development (Banisar, 2004: 2). It would appear that FOI has become a democratic ‘right of passage’, a way for political systems to demonstrate their commitment to democracy and transparency. So far, so good. The problem occurs at the level of translating FOI promise into practice.
The most frequent, experienced, and at times frustrated, users of FOI are journalists and media organisations. It can be argued that FOI needs journalists to realise its potential as a political accountability tool and journalists need FOI to fulfil their role as the fourth estate, scrutinising societal power in general and political power in particular.

This tension between the public’s demands for increased transparency and politicians’ and public servants’ demands for protective confidentiality lead to the formulation of the overall research question for this project: **to what extent, if any, are the promises made by FOI legislation borne out by the practice in the countries of study?** This in turn gave rise to three sub-questions each of which needed to be answered in order to examine the workings of the legislation more forensically. The sub-questions were:

1. What are the aims of the different FOI legislations and what do they promise to deliver in terms of information access?
2. What are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?
3. In practice, does FOI supply journalists (and media organisations) with independent access to government-held information?

The countries included in the sample were: Australia, South Africa, Sweden, Thailand and the United States.
Question one was addressed in sub-study one: ‘the promise’. This study evaluated the aims and objectives of the laws based on a number of set parameters such as cost, turnaround time and appeal options.

Question two was covered in ‘the spin’. This was in essence a survey study of the ministers and the chief public servants in each country of study in an attempt to capture their attitudes towards the principles of FOI. Consequently, Presidents George W Bush and Thabo Mbeki; and Prime ministers John Howard, Göran Persson and Thaksin Shinawatra\(^2\) received questionnaires.

Question three tracked real-life FOI requests in the countries of study. Three investigative journalists in each country were recruited as research collaborators to complete ‘the practice’ sub-study.

In sum: ‘the promise’ evaluated the legislation, ‘the spin’ studied the administration of FOI and ‘the practice’ mapped the use of FOI.

A second challenge concerned the presentation of the resulting data. If it was possible to translate the data into numerical comparators it might be possible to compile a Freedom of Information Index. The index would allocate a rank for each country of study, indicating in graphic terms the comparative practical functionality of their FOI regimes.

This project is unique in three respects: firstly, it is the first study to systematically track real-life FOI requests on an internationally comparative

\(^2\) Prime Minister Thaksin Shinawatra resigned on April 3, 2006. He was however, PM at the time of implementation of the Thai study.
basis. Secondly, it is the first study to include an evaluation of the level of protection for media whistleblowers and the journalists they choose to work with as part of the overall FOI system. Thirdly, it lays the foundation for the first International Freedom of Information Index.

Part I of the thesis describes the background and theoretical pillars on which this project rests. It also presents the overall methodology and describes the development and trial of the research instruments.

Part II situates the countries of study politically and presents and analyses the data captured. Chapter eleven is in many ways a capstone chapter. It brings together all data and provides the comparative overview.

Freedom of Information is, in some countries, a very powerful accountability tool and safeguard for open government. Banisar’s Global FOI survey (Banisar, 2004) is at present the only comprehensive international project covering FOI. However, the survey evaluates only the letters of the law, it does not compare what the different legislations deliver in practice. In this lies the main justification for this project.
Part I

Chapter One: Theory and Background

Introduction

This thesis will argue that FOI rests on three pillars: political representation, political accountability and the scrutinising role of the media as the fourth estate. This chapter will define and explore these concepts in relation to FOI. Chapter one will also investigate the link between these pillars and democracy.

All countries that have adopted FOI legislation can claim to have political systems incorporating, if not all, at least most traits of democracy (the concept of democracy and its definitions will be dealt with later in this chapter), albeit in some cases at an emerging level if you chose to have liberal democracy, LD, as the benchmark (Banisar, 2004: 1). Hence, it would be easy to draw the conclusion that the foundation for FOI is democracy. However, the roots of FOI can be traced back to well before LD was conceived (Lamble, 2002b: 2-8) and although democracy certainly plays an important role in the emergence and evolution of FOI, it is not its genesis. It will be argued that FOI grew out of a demand for increased political accountability in systems based on political representation.

Political Representation

Being ruled is at times a painful experience. It can be a source of great frustration to feel unrepresented by the party/parties in government. It can be
equally frustrating when the elected representatives renege on their earlier promises. Dunn puts it thus:

To be ruled is both necessary and inherently discomforting (as well as dangerous). For our rulers to be accountable to us softens its intrinsic humiliations, probably sets some hazy limits to the harms that they will voluntarily choose to do to us collectively, and thus diminishes some of the dangers to which their rule may expose us. (Dunn, J., 1999: 342)

Dunn covers a lot of ground: political representation, political accountability and the impact on those who are ruled. These concepts are all disciplines in their own right and to cover them in some depth would require numerous chapters, indeed several theses. Nevertheless, they are the theoretical foundation for the FOI Index project and there is a need to at least touch on them to provide some background.

In most political systems, ranging from totalitarian to liberal democracies, some degree of representation exists. Whether they are installed via force such as military coups or more democratically via general elections representatives usually claim to rule on behalf of the people. Their rule is built on a contract with the citizens where the representatives in many cases have gained power by promising to deliver a number of outcomes. In the case of an election, the citizens have fulfilled their ‘contractual obligations’ with the casting of their votes. It is now up to the representative to deliver on his or her promises. It can at times be very tricky to keep track of if and how the representative delivers. This is where the accountability mechanism comes in and where (as will be pointed out and discussed in various ways throughout this thesis) independent access to government-held information plays a vital role. But let us first deal with the concept of representation.
Heywood defines political representation in its most basic form as ‘a relationship through which an individual or group stands for, or acts on behalf of, a larger body of people (2000: 143).’ As is further discussed below, there is no single, widely accepted theory of representation. There are four main strands of political representation.

The first is a model identified and defined by Edmund Burke (1729-97) often labelled the ‘trustee model’ (ibid: 144). The argument in this model is that the representatives best serve their constituents by acting independently and basing their actions on their own thinking and judgement. The main criticism of this model is that it favours and breeds an elitist political class.

The delegate model emerged as a reaction to the perceived elitism of the first model. In this model the representatives are conduits for those that they represent and do not express own views or opinions. Heywood points to ambassadors as an example of this model (ibid). Criticisms of this model include that it limits the parliament’s debating and manoeuvring options.

The third model has the mandate at its core. This means that the representatives should only carry out the policies and actions that have been ratified by an election, i.e. given a mandate. The same critique as for the delegate model applies.

The fourth model involves a ‘representative cross-section’, that is: a parliament should ‘constitute a microcosm of the larger society’ to form a
parliament with numbers of representatives that ‘are proportional for the size of
the groups in society (ibid).’ The criticism here is that this model suggests that
only women can represent women and only immigrants can represent
immigrants.

It is important to keep in mind that political representation is not a liberal
democratic invention. Pitkin illustrates this point well. She divides the nature of
representation into two main categories: authorized representation and
accountable representation. She defines the difference thus:

Whereas authorization theorists see the representative as free, the represented as
bound, accountability theorists see precisely the converse. The authorization
theorist defines representative democracy by equating elections with a grant of
authority: a man represents because he has been elected at the outset of his term of
office. The accountability theorists, on the contrary, equate elections with holding
to account: an elected official is a representative because (and insofar as) he will be
subject to re-election or removal at the end of his term (1967: 55-56).

Pitkin points out that the concept of representation was conceived well before
the first stumbling steps of liberal democracy. She bases her argument and
case on Hobbes ‘Levithan’ and observes that ‘when Hobbes called his
sovereign a representative, he implies that the man is to represent his subjects,
not merely do whatever he pleases (1967: 33)’. Although Pitkin does give
Hobbes some credit for coming up with the ‘contemporary’ concept of
representation, she also points out that Hobbes view of representation was very
narrow, taking into account ‘only one kind of representation (1967: 37)’.

I suggest that Pitkin is a bit hard on Hobbes considering ‘Leviathan’ was written in 1651 well before the
benefit of the hindsight provided by our more contemporary political systems. For Hobbes to describe
society as a living organism embodied by its sovereign who should at least to a certain extent do the will
of the people was truly new and a revolutionary thought of its time. The fact that Hobbes is still discussed
shows how important his ideas were and are.
Pitkin goes onto discuss the mandate/independence controversy, ie. the tension between doing the will of the constituency and maintaining the independence of the representatives. She illustrates this tension by posing the following questions: ‘Should (must) a representative do what his constituents want, and be bound by mandates of instructions from them; or should (must) he be free to act as seems best to him in pursuit of their welfare? (1967: 145)’. This highlights the conflict between the wishes of the voters and the welfare of the voters, leading on to the point that the wishes, quite often being short term and individual, do not always contribute to welfare, which by way of contrast is more often collective and long-term. Independence theorists view the representative as a free agent, an expert who is best left alone to do his/her work. This view of political representation is close to elite theory that is a property of the trustee model discussed above.

Pitkin uses Burke’s writings to describe elite representation. According to Burke the constituency is so fragmented that it is practically impossible to represent according to wishes. Pitkin points out that Burkean theory is based on the elite being the ‘natural aristocracy (1967: 169)’ that knows what is collectively best for the country and hence for the individual citizen. The second point, which underscores the elitism of elite theory, is that according to Burke, the representatives do not have to consult with their constituencies because ‘government and legislation are matters of reason and judgment (ibid)’ tacitly implying that voters do not always have reason and judgment. Again, as with Hobbes, Burke did his work at the time of the emergence of contemporary political representation and the nature of politics has evolved since then.
Pitkin concludes that representation will always include some form of trusteeship. She also points out that none of the theories describe and deal with what goes on during representation: ‘how a representative ought to act or what he is expected to do, how to tell whether he has represented well or badly (1967: 56).’ This is where FOI fits in. A far-reaching and smoothly working FOI regime will provide the scrutinizers of government (the opposition, the media and individual citizens) with the information they need to determine whether the elected representatives are doing a good job during their term. This will be dealt with in more detail later on in this chapter when we look at the issue of accountability.

Przeworski et al agree with Pitkin that the key issue of debate and controversy is ‘over what was supposed to go on during representation (1999: 3).’ The main point argued in the impressive work of Przeworski et al is summed up thus:

The founders of representative government expected that the formal arrangements they advocated would somehow induce governments to act in the interests of the people, but they did not know precisely why it would be so. Neither do we today after two hundred years (ibid).

Przeworski et al list a number of generic reasons why governments may act in a representative fashion:

1. Representatives are ‘public spirited’

2. The vote will be used to select those who represent the ‘identical interest’
3. The threat of being voted out will make governments deliver on their promises

4. The separation of powers (different in each political system) creates a balance between the government, the legislature and judiciary that may contribute to governments acting in the peoples' best interests (1999: 3-4)

In their discussion Przeworski et al point out that dictators can be representative. Indeed it could be argued that they could be very effective representatives. If they know what the people want, nothing prevents them from doing it. The problem is of course the 'nothing prevents'. If a subject is not pleased with how the dictator represents him or her, nothing prevents the dictator from 'convincing' the subject that the ruler is a marvelous representative. However, as Prezworksi et al note, there is a connection between representation and democracy: 'A central claim of democratic theory is that democracy systematically causes governments to be representative (1999: 4).’ They base the claim on a number of democratic theorists such as Dahl, Riker, Schmitter and Karl. Importantly for this project the same democratic theorists also provide support for the argument put forward by this thesis, that political representation was identified long before it was viewed as one of the cornerstones of liberal democracy (ibid) leading to a need for political accountability with FOI as one of its tools.

On elections and political representation Przeworski et al conclude that ‘elections are not a sufficient mechanism to ensure that governments will do everything they can to maximize citizens’ welfare’ because ‘governments make
thousands of decisions that affect individual welfare; citizens have only one instrument to control these decisions: the vote. One cannot control a thousand targets with one instrument (1999: 50).’ This conclusion is further backed by a study by Chiebub and Przeworski where 102 democratic regimes were analysed. In discussing the results Cheibub and Przeworski points out that ‘we should observe that incumbents who generate a bad performance are more likely to be thrown out of office. We do not observe it...this implies that elections are not an effective instrument for inducing representation (1999: 225).’

One aspect of representation that is often overlooked is the role of the public service (or civil service as it is called in some countries). In theory the public servants are supposed to be independent and give objective advice to the ministers and execute the decisions made by the legislature and the executive. In practice this is not always the case. Delmer Dunn observes that the mix between elected and non-elected officials is important because it ‘...determines the extent to which government reflects more nearly the preferences of elected officials or the preferences of the un-elected public servants (Dunn, D., 1999: 298).’ This is yet another reason for a smoothly working FOI regime. It has the potential to work as an accountability tool for both elected and un-elected officials.

**Political Accountability**

The second theoretical pillar of FOI is political accountability. Most writers seem to agree that accountability ‘is a retrospective mechanism, in the sense that the actions of rulers are judged ex post by the effects they have (Chiebub and Przeworski, 1999: 225).’ Delmer Dunn points out that
'accountability at its most basic means answerability for one’s actions or behavior (1999: 298).’ Drawing on Stokes, Dwivedi and Pennock, John Dunn defines political accountability thus:

…the relation of accountability holds fully where persons exercising these powers are (1) liable for their actions in exercising there powers, (2) predictably identifiable as agents in the exercise of these powers to those to whom they are liable (in the democratic case, ultimately to the demos distributively), (3) effectively sanctionable for these acts once performed, and (4) knowably so sanctionable for them in advance (1999: 335)

So why do we need political accountability? John Dunn justifies the need thus:

The quest for democratic accountability is not best seen as a search for magically efficacious causal mechanisms for rearing the fabric of felicity by the hands of reason and of law. Rather, it is an attempt to draw an ever brighter line between the freedom of action that professional political agents require in order to act boldly and effectively, and the degree of personal privilege that they can excusably claim for their actions from the citizens on whose behalf they purport to act. It reconciles the formers’ freedom at one time with their responsibility then and later by insisting on the citizens’ right of informational access to (their right to know about) these actions, once they have been performed: not necessarily immediately, but at least at some definite point in the future (1999: 341).

What John Dunn is saying is that there must be a clear connection between the ‘principal’ (the citizens in whose names the representative rule) and the ‘agent’ (the representative). Further, this should be a connection that is not only valid on election day and in the political campaigns, but is ongoing and where the principal does have the tools, using force if necessary, to make the representative listen. However, because of the complicated structure and workings of current political systems, John Dunn points out that ‘political accountability today cannot be direct, peremptory and reliable. To work benignly (and, over time, probably to work at all) it must be very elaborately mediated, somewhat tentative, and mutually pretty patient (1999: 336).’
Defining accountability and justifying the need for it is the easy part. Much harder is making it work in practice. John Dunn identifies two main accountability tools (apart from elections): criminal law and the freedom of information regime. The legal option is very limited and can only be utilised when criminal misconduct is suspected and then there is still the issue of proving the misconduct. Much more often the public is concerned with the representatives not fulfilling their end of the ‘contract’ – delivering on their promises – a ‘misconduct’ not covered by the law. This is where we turn to FOI and our expectation for it to grant independent access to government-held information. Przeworski et al summarise the importance of this access for the accountability mechanism:

Yet, to evoke Kant, "All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public." Bobbio (from which this passage is taken, 1989: 84) comments further that "a precept not susceptible to being publicized can be taken to mean a precept which, if it was ever made known to the public, would arouse such a public reaction that one could not put it into action." We do not want governments to take actions that they would have not taken had we known why they are taking them. But this means that we have to know what the governments are doing and why independently of what they want us to know. Our authorization to rule should not include the authority to hide information from us. Thus, even if elections give governments a broad authorization to rule, this authorization should not extend to informing us. Our information must not depend on what governments want us to know. The institutional implications are obvious: we need offices, independent statistical agencies. To coin a term, we need ‘accountability agencies’, independent of other branches of government and subject to direct popular control, perhaps through elections (1999: 24).

Numerous suggestions to improve political accountability have surfaced during the evolution of political systems. Dunn and Uhr propose the following ‘accountability agencies’:

(1) an independent board to assure transparency of campaign contributions, with its own investigative power; (2) an independent auditing branch of the state, an auditor-general (Worldbank, 1994) in the vein of the Chilean contraloria; (3) an independent source of statistical information about the state of the economy; and
All sound suggestions, however they do not address the issue at the core of the accountability problem: the need for citizens to have independent access to government-held information. This is supported by Heywood:

…accountability is effective only under certain circumstances. These include that the mechanisms for monitoring performance are rigorous; that ‘higher’ institutions or bodies have sufficient access to information to make critical and informed judgements (2000: 117).

Back to John Dunn again and his point that ‘citizens can only choose on the basis of what they are enabled to know (1999: 341).’ Dunn also emphasizes that no ‘accountability agency’ is perfect and FOI regimes are certainly open to manipulation and hypocrisy ‘but the development and deepening of practices of public exposure – of putting politically consequential conduct tendentially under the floodlights – must be essential to any coherent project of rendering the most democratically generated of rule effectively accountable (Dunn, J., 1999: 340).’ Perhaps what is needed is a combination of several accountability agencies, as suggested by Dunn and Uhr, in addition to a smoothly functioning and far reaching FOI system.

Thus far we have examined modern versions of political accountability, but just as with political representation, it is important to keep in mind that political accountability pre-dates modern liberal democratic ideas. The driving force behind the first FOI related legislation in the world, the Swedish parliamentarian Anders Chydenius (1729-1803), sought inspiration regarding political accountability from the Chinese Tang Dynasty that ruled China from
Lamble points out that ‘there is absolutely no doubt that he was inspired by the precedent of the Imperial Chinese Censorate and its relationships to human rights, individual freedoms and transparency of government (Lamble, 2002b: 3).’ It is interesting to note that Chydenius translated the more than 1000-year old Chinese experiences into his contemporary political climate by choosing the Press as the main ‘accountability agency’. It is a tribute to Chydenius’ intellectual capacity that he was able to locate the Chinese sources and draw these parallels in 1765. In our times a similar connection between ancient Chinese politics and today’s press and information freedom has been done by Steinberg:

The Chinese, and the Koreans emulating the Chinese model, developed an institution that was critical to how power was executed, and institutionally provided some modest exposure to different views within the general Confucian ideological configuration. This was the Imperial Consorate. It was composed of officials who had access to the Emperor, and whose function was to tell the leader when things were right or wrong, when he was being led astray, and when plans or actions were likely to have deleterious effects or be contrary to moral or established principles…

[Today] the press has become, or perhaps better has the potential of becoming, the equivalent of the Chinese Censorate…If the press does not fulfil this function, the country is the poorer for it, and in greater danger. The press is to provide transparency to the processes of decision-making and to the decisions themselves, because bureaucracies generally abhor light, even when upright and responsible.

Without the press, the modern emperor – whether dictator or elected president – is insulated, encapsulated in a cocoon of many who are either sycophants or who are truly awed by those in power. They do not directly question the leader, sometimes because protocol inhibits it, sometimes because of social ostracism. Even in democracies, this may be difficult. The staff may believe they are protecting the leader, but it is a short-term service and a long-range disservice both to the individual and to the state. So if the Imperial Censorate is gone, and if the press is not free to perform this role, then the arrogance associated power will grow, reinforced by a supportive wrapping that inflates egos and hides reality (Steinberg, 1997: 1-2).

4 It is not surprising that Chydenius was inspired by the Tang dynasty. This stable and relatively peaceful time in China saw many advances such as printing on paper using movable wooden type. It was also a great period for literature and the arts and has been referred to as China’s ‘golden age’ Gillian Denton, ed., The Dorling Kindersley History of the World (London: Dorling Kindersley Limited, 1998).
So who will use FOI to access the precious raw, non-spun and non-sanitised government information? In those FOI systems that keep statistics tracking and identifying FOI use, the data clearly shows that the media are the most frequent third-party users (Waters, 1999; Evans, 2003). But before further exploring the role of the media as a modern day ‘Imperial Censorate’, there is a need to situate political representation and accountability within the concept of democracy.

**Democracy**

If direct democracy were the dominant political system there would be no need for political accountability. We would all be accountable to ourselves for our own political decisions and actions. However, it is a fact that the vast majority of democratic regimes use a representative system in some form and it is because of this that political accountability exists. The entry in the *Concise Oxford Dictionary of Politics* observes that ‘when democracy was reinvented in the eighteenth century, every system was indirect: voters elected representatives who took decisions for which they were answerable only at the next election. Rousseau argued that this was no democracy…but he was a lone voice (McMillan, 2003: 140).’ There was renewed interest in direct democracy in the 1890s and 1960s and the computer age has removed many of the technical and practical problems with the system. However, direct democracy remains very unpopular with contemporary political representatives for the simple reason that they would largely become obsolete and many academics and political philosophers subscribe to Schumpeter’s argument ‘that direct democracy is incompatible with responsible government (ibid).’
Even though the etymology of democracy is ‘people rule’ (from the Greek words ‘demos’ for people and ‘kratos’ for rule (Held, 1996: 1)), it is just another form of rule with ‘people power’ delegated to others. Agreement on a definition for democracy is as hard as getting consensus on a definition for good art, and for much the same reasons – the beauty of art, like that of democracy, is in the eye of the beholder. Held puts it thus:

The history of the idea of democracy is curious; the history of the democracies is puzzling. There are two striking historical facts. First, nearly everyone today professes to be a democrat. Political regimes of all kinds throughout the world describe themselves as democracies. Yet what these regimes say and do is often substantially different form one to another. Democracy appears to legitimate modern political life: rule-making and law enforcement seem justified and appropriate when they are 'democratic' (1996: xi)

Following Held, Heywood concludes:

Now, however, we are all democrats. Liberals, conservatives, socialists, communists, anarchists and even fascists are eager to proclaim the virtues of democracy and to demonstrate their democratic credentials (2000: 126).

In its first incarnation in the city-state of Athens in 590 B. C. democracy took the form of direct democracy where all citizens of Athens took direct part in both legislating and governing. All Athenean citizens were expected to attend when the Assembly (the Athenean parliament) sat and it has been estimated that up to 6000 citizens participated (McMillan, 2003: 140). Some representational features such as appointment of chair people, executive public servant positions and generals to defend and expand the city-state existed, but on the whole it was a direct democracy. These public positions were most
commonly assigned by lot (Elster, 1999: 225). There was only one form of political accountability and this was towards the individual citizens. One example is that voting in the assembly was compulsory. Interestingly they were not punished for not voting, but did receive a payment for voting (Elster, 1999: 277), the opposite of, for instance, the Australian compulsory voting system. There were several accountability mechanisms for citizens holding office. Some of the sanctions were severe indeed, with execution topping the list. There were other less harsh sanctions. One of the more intriguing ones was ostracism. As opposed to the loose use of the term in modern English, in Athenian democracy this meant that a citizen who had misused his powers or in other ways not performed well was sent into exile for ten years. If it was any consolation he did not loose his property. Note the use of the term ‘he’: this is because only free males were allowed to become citizens and hence vote in the assembly. Women, slaves and metics (resident aliens) were not allowed to participate (Elster, 1999: 259). To be fair it should be noted that Athenian democracy did evolve from allowing only the aristocracy to become citizens to in the end including all free males regardless of economic standing. When you bear in mind that this was the first democracy this is an amazing achievement.

Athenian democracy ended in the year 322 with military defeat of the city-state and subsequent suppression of the system (ibid). Hence, democracy Mark I survived for roughly 700 years. It would take close to 1500 years for democracy Mark II to arrive. That version has yet to celebrate its 200th birthday.

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It is of course plausible that democracy was conceived and practiced long before the city state of Athens, but there are no historical records. Also the fact that the word ‘democracy’ is based on a Greek word does speak in favour of the Greeks as the founders of democracy.
It is difficult to pinpoint the birth of what we today call democracy. Was it during the Enlightenment? Or during the revolutionary era? Did it start with the French revolution and the consequent crumbling of the divine monarchs?

There are many definitions of democracy Mark II. The *Oxford Concise Dictionary of Politics* simply refers to it as ‘majority rule’ (McMillan, 2003: 139). Heywood, like most political writers and analysts, adopts a very cautious attitude towards defining democracy.

In being almost universally regarded as ‘a good thing’, democracy has come to be used as little more than a ‘hurrah’ word, implying approval of a particular set of ideas or system of rule...In reality, democracy is a contested concept: there is no agreed of settled definition of the term, only a number of rival definitions. The most influential of these have been between direct and representative democracy (1998: 42).

The exclusion of women, slaves and certain other groups from citizenship is perhaps the biggest difference between Athenian and modern democracy. You can also add political representation and the severity of some of the accountability sanctions to the list of differences.

The sheer volume of work done on democratic theory is truly daunting. These are some of the chapters and headings in Held’s *Models of Democracy*:

‘Classical Democracy: Athens, Republicanism, Liberal Democracy, Competitive Elitism, Pluralism, Corporate Capitalism, Democratic Autonomy (1996: vii-xi)’ and the list goes on. However for the purposes of this study, liberal democracy is the model that most clearly hosts the concepts of political representation and accountability, two of the three theoretical pillars for FOI. For all its inherent problems and weaknesses [one potent problem is identified by Schumpeter: representative ‘democracy is the rule of the politician’(Heywood, 1998: 45)]
liberal democracy is still a remarkably strong system with properties that seem to survive the most serious challenges, perhaps because of its partnership with the very successful capitalist economic system. Or perhaps, as Heywood explains, the durability of liberal democracy is because ‘it is the only system of rule capable of maintaining equilibrium within complex and fluid modern societies (ibid)’.

In spite of his unwillingness to define it, Heywood still tries. He points out that liberal-democratic systems have a hybrid character. As the name implies they contain two main features, one liberal, the other democratic.

The liberal element in liberal democracy is the belief in limited government, the idea that the individual should enjoy some protection from the arbitrary action of public officials. The democratic element reflects the belief that government should in some way be accountable or sensitive to the people. In combination, the elements create a model of democracy that has three central features:

First, liberal democracy is an indirect and representative form of democracy. Political office is gained through success in regular elections, conducted on the basis of formal political equality – ‘one person, one vote; one vote, one value’

Second, it is based upon competition and electoral choice. This is ensured by political pluralism, a tolerance of a wide range of contending beliefs, conflicting social philosophies and rival political movements and parties.

Third, liberal democracy is characterised by a clear distinction between the state and civil society. This is maintained both by internal and external checks on government power and the existence of autonomous groups and interests, and by the market of capitalist organisation of economic life (this authors emphasis) (1998: 46)

As the emphasis above shows Heywood’s definition makes it clear that liberal democracy hosts the concepts of representation and accountability.

At the moment it seems as if the liberal democratic model is the world’s favoured political system: most nations seem to want to claim to be democratic, or to be more democratic than others. Its adaptability is what makes it so
difficult to define, but it may also be the source of its endurance since it can be
adjusted to fit into most known political ideologies (as pointed out by Heywood
above). In a way democracy could be labeled a metaideology, one that spans
many systems. It should also be kept in mind at all times that the hegemony of
democracy is very recent. As Heywood points out:

The mass conversion of politicians and political thinkers to the cause of democracy
was one of the most dramatic and significant events in political history. Well into
the nineteenth century the term continued to have pejorative implications,
suggesting a system of ‘mob rule’ (ibid).

Chiebub and Przeworski designed a study to investigate the
relationship between democracy, elections and accountability for economic
outcomes. They decided on a sample group of 135 countries between the years
1950 and 1990. For the purpose of the study they classified the countries as
follows:

1. the chief executive is elected (directly or indirectly),
2. the legislature is
elected,
3. more than one party competes in elections,
4. incumbent parties have
in the past or will have in the future lost an election and yielded office. All regimes
that fail to satisfy at least one of these four criteria are classified as dictatorships
(1999: 222-23).

So, one basic democratic criterion out of four needed to be met - fairly
generous one would have thought. In spite of this out of the 135 countries in the
sample group 123 qualified as dictatorships, and only 99 met any of the
democratic criteria. Hence, not even between 1950 and 1990 was democracy
the most widespread political system (1999: 224).

Democracy does have its problems, but so do other political systems.
There is unlikely to be any single political system that will satisfy all citizens.
However because democracy hosts the concepts of political representation and
accountability, it has played and will play an important role in the advancement of FOI.

The Fourth Estate

The last theoretical pillar of FOI and this project is the concept of the media as the fourth estate. The term as such is a bit confusing, because its meaning varies between countries. In Australia, and in most liberal democracies, the first three estates are defined as the legislature (Australia: the House of Representatives and the Senate), the executive (Australia: the Cabinet headed by the Prime Minister) and the judiciary (universally made up of the court system and the police). In other countries, for example Sweden, you come across terms such as the third estate. The reason for this is that the executive and the judiciary are referred to under the same heading in the Swedish Constitution. The Swedish judiciary is less clearly defined as a separate estate compared to for instance the US and Australia. However, in practice, the Swedish judiciary is still quite independent from the other estates (SOU, 1999: 7-8). The variations continue all the way up to the ‘seventh power’ in former Yugoslavia (Schultz, 1998: 47). However they all allude to the same concept: the idea that the media should independently scrutinize government and the corporate sector and be a watchdog over the execution of power in general, and of political power in particular. The role is further strengthened by the notion among journalists that the public has delegated the role of scrutinising power to the media (Tanner et al, 2005: 27). This line of reasoning is supported by international research that clearly shows that the media, in the form of individual reporters, are by far the most avid users of FOI, especially in
those countries that have far reaching and well functioning FOI regimes (Evans, 2003: 13, Lidberg, 2003: 82-90).

It is important to keep in mind that the concept of the fourth estate is dependent on the media delivering on its side of the bargain. Tanner et al explain: ‘the power of the media is based on a simple trade-off: access in exchange for ‘doing the right thing’...If the media do the wrong thing and lose the confidence of the public they may kill the goose that lays the golden egg (2005: 28). The media’s end of the bargain is not to abuse the scrutinizing powers delegated to them by the public. However, it is not in the media’s interest to be considered ‘just another business’:

Those self-appointed custodians of the power of the Fourth Estate have also been determined not to see it devalued. The power, influence and profitability of the contemporary news media depend in no small measure on this independent standing. It is scarcely surprising then that media owners, editors, managers, journalists and producers are such determined advocates of the idealised Fourth Estate. Without it, the media would be just another business and its status significantly devalued (Schultz, 1998: 48).

The values underpinning the concept of the fourth estate derive from the ideas of the Enlightenment in the 19th century:

...a period when democratic idealism emerged in the wake of the revolutionary turmoil of the previous century. People power grew out of the embers of the American revolution in the New World and the French revolution in the Old, and essential to the new order were freedom of speech and the free flow of information to the public. Both would ensure that governments were accountable and that the public was informed enough to participate fully in the democratic process (Tanner et al, 2005: 27).

The first editor/journalist to define in practical terms the meaning of the fourth estate was John Thadeus Delane, editor of The Times. In 1852 the paper had drawn fierce criticism from the future British Prime Minister Lord Derby about the frank coverage of some controversial political events. Lord Derby
pointed out that ‘if the press wished to maintain influence it should adopt a tone of moderation and respect (cited in Schultz, 1998: 24).’ Lord Derby’s criticism prompted Delane to attempt to define the roles of parliament and newspapers. His main argument was ‘for the separation of the responsibilities of journalism and statecraft (ibid)’:

We cannot admit that a newspaper’s purpose is to share the labours of statesmanship or that it is bound by the same limitations, the same duties and the same liabilities as the Ministers of the Crown. The purpose and duties of the two powers are constantly separate, generally independent, sometimes diametrically opposite.

The dignity and freedom of the press are trammelled from the moment that it accepts an ancillary position. To perform its duties with entire independence, and consequently to the utmost public advantage, the press can enter into no close or binding alliances with the statesmen of the day, nor can it surrender its permanent interests to the convenience of the ephemeral power of any government.

The first duty of the press is to obtain the earliest and most correct intelligence of the events of the time and instantly by disclosing them to make them common property of the nation. The press lives by disclosures...

The duty of the press is to speak, of the statesmen to be silent, we are bound to tell the truth as we find it without fear of any consequences – to lend no convenient shelter to acts of injustice and oppression, but to consign them to the judgement of the world... The duty for the journalist is the same as that of the historian – to seek out truth, above all things and to present to his readers not such things as statecraft would wish them to know, but the truth as near as he can attain it (cited in Schultz, 1998: 24-25).

As Schultz points out, Delane is considered by many later writers and researchers to be ‘declamatory, pompous, self-congratulatory and sentimental (1998: 24)’. Nevertheless, Delane’s editorials are still cited by many journalists as the standard definitions of the fourth estate role.

The etymology of the term ‘fourth estate’ is uncertain. Some have credited the English statesman Edmund Burke who in 1790 ‘is said to have pointed to the press gallery in parliament and said: “There are three estates in Parliament but in the reporters’ gallery yonder sits a fourth estate more
important far than they all” (cited in Pearson, 2004: 49). Others credit Lord Macauley who ‘first acknowledged the presence of reporters in the House of Commons and described their location with the grandiose title the Fourth Estate (Schultz, 1998: 25). It is interesting to note that Delane wrote his editorials nearly two decades after Burke’s and Lord Macauley’s label, sixty years after the First Amendment (guaranteeing freedom of expression) to the US constitution was passed in 1791, and 86 years after Sweden passed the then most progressive freedom of the press and access laws in the world in 1766.6

The fourth estate, its effectiveness and how important and seriously its role is viewed by journalists are matters of debate. In 1992 Julianne Schultz surveyed Australian journalists on the importance of the fourth estate ideal and how well they defended the ideal. Her surveys clearly showed that to the majority of those surveyed, the fourth estate concept was very important as a role model to aspire to and one of the key reasons for them becoming journalists. The surveys also showed that the majority of the journalists surveyed were quite prepared to defend the fourth estate role (Schultz, 1998: 65, 134-35).

From an international perspective it is also clear that the fourth estate concept plays a vital role in defining journalism. Despite the high costs of investigative journalism, many newsrooms and media organisations do aspire to have at least some of their reporters designated as investigative journalists. An international example of the fourth estate role in action is the ‘right to know

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6 In international research Sweden’s leading role in press and information freedom is often overlooked. The most likely explanation is the language barrier. One underlying, albeit not driving, motive for this project is to make the Swedish FOI regime more well-known for other researchers, the public and journalists to draw upon.
articles’ published by freedominfo.org. These articles show what can be achieved if journalists have the advantage of operating in a country that has a functioning FOI regime (Freedominfo, 2004).

One of the main threats to the functioning of the fourth estate is the concentration of media ownership. The big media owners are now powerhouses in their own right and should ideally be scrutinised by the journalists they employ. Instead there is a great risk that journalists will be pressured to serve their employers’ interests, taking fewer risks in rocking the boat and in the process becoming mere mouthpieces for politicians and corporations. There are compelling reasons to question the independence of large parts of the mainstream media and consequently the extent to which they would be willing to take advantage of FOI as an accountability tool. As media barons gain more power the important democratic and societal role of journalism may take second place to the economic bottom line. An example of this is the apparent Dr Jekyll and Mr Hyde transformation of one of the most powerful media players in the world. This is a quote from a speech made by a young Rupert Murdoch in 1961:

Unless we can return to the principles of public service we will lose our claim to be the Fourth Estate. What right have we to speak in the public interest when, too often, we are motivated by personal gain (cited in Schultz, 1998: 230).

It shows a different Rupert Murdoch from the originator of Fox News, the culture of which is well captured in the documentary Outfoxed. The film clearly illustrates how opinions have replaced journalism at Fox News, leaving a void where the fourth estate role should thrive (Greenwald, 2004).

For all its flaws the fourth estate role of the media is still alive, at least as a source of inspiration and motivator for journalists, as Schultz’s research
has shown. The fourth estate role will always be a matter for debate and, as
Schultz points out, is constantly negotiated between its members and the
members of the other three estates (Schultz, 1998: 93). This is a sign of
strength.

**Conclusion**

This chapter has argued that FOI rests on the three theoretical pillars:
political representation, political accountability and the concept of the media as
the fourth estate. It has shown how representation and accountability have been
accommodated within the modern dominant political model of liberal democracy
and the role FOI plays in this context.

As Przeworski et al note in their study of democracy, representation and
accountability, the democratic system affords opportunities for creativity that
have been largely unexploited:

The fact is that during the past two hundred years we have thought little about the
institutional design of democracy. Since the great explosion of institutional
thinking, when the present democratic institutions were invented – and they were
invented – there has been almost no institutional creativity. Except for the never
implemented provisions for workers’ comanagement in the Weimar Constitution,
the discovery of proportional representation in the 1860s was the last major
institutional invention. All democracies that have sprung up since the end of the
eighteenth century, including the most recent ones, just combine in different ways,
often piecemeal, the preexisting institutions, Hence, there is lots of room for
institutional creativity (1999: 51)

It could be argued that FOI is an example of just this sort of ‘institutional
creativity’ manifested by the different forms it has taken in more than 50
countries around the globe. In the next chapter we will examine in more detail
the origins and evolution of FOI.
Chapter Two: The evolution of Freedom of Information

Introduction

The political ideals underpinning FOI are, as pointed out in chapter one, not new. However it was not until after World War II that FOI started to get international political traction. This chapter looks at the evolution of FOI and analyses and compares the two systems which provide the basic templates on which all the others are modeled: Sweden and the United States. It will also examine the role of the whistleblower and, the symbiotic relationship between FOI and the media.
FOI defined

The vast majority FOI laws in the world are broadly similar and build on the same three principles summarised by the former West Australian FOI Commissioner:

The first one is concerned with human rights and privacy. It enables people to gain access to information about themselves and to correct that information if necessary. The second is the principle of accountability and it seeks to open governing processes to public scrutiny to facilitate efficiency and competency in decision-making. The third principle is that of democratic participation to allow public participation in the policy process and in government itself (Keighly-Gerardy, 1999: 1).

There is little controversy concerning the first point, providing access to personal information for individuals. The sticking points are the two other objectives: to allow public scrutiny of government processes and as a consequence of greater access to information to increase the public’s participation in the political process. Why would anyone who is and has been in a privileged position with access to public funds for a long time want to be scrutinised? Banisar suggests that one reason could be to ‘assist in developing citizen trust in government actions and maintaining a civil democratic society (2004: 3).’ David Banisar’s global survey of all existing FOI systems currently provides the best overview of the different FOI regimes. In the latest revision (May 2004), 58 countries had enacted FOI legislation and over thirty were in the process of doing so (ibid: 2). It is interesting to note that although the concept of FOI has been around for centuries, more than half of the acts have been passed only in the last ten years (ibid: 3). But as this thesis will show, there are many problems with existing FOI laws, even those that are supposedly well established, supporting Banisar’s contention that:
Many of the laws are not adequate and promote access in name only. In some countries, the laws lie dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions are abused by governments. Older laws need updating to reflect developments in society and technology. New laws promoting secrecy in the global war on terror have undercut access. International organisations have taken over the activities of national government but have not subjected themselves to the same rules (2004: 2).

Despite these problems, Banisar is still hopeful. ‘Access to information ebbs and flows in any country but the transformation has begun and it is no longer possible to tell citizens that they have no right to know (ibid: 1).’

Banisar points to a number of reasons why we have seen the steep increase in the number of FOI laws enacted in the last decade.

*International pressure.* The international community has been influential in promoting access. International bodies such as the Commonwealth, Council of Europe and the Organisation of the American States have drafted guidelines or model legislation and the Council of Europe decided in September 2003 to develop the first international treaty on access.

*Modernisation and the Information Society.* The expansion of the Internet into everyday usage has increased demand for more information by the public, businesses and civil society groups.

*Constitutional rights.* The transition to democracy for most countries has led to the recognition of FOI as a human right. Almost all newly developed of modified constitutions include a right to access information from government bodies. Over forty countries now have constitutional provisions on access.

*Corruption and Scandals.* Often, crises brought about because of a lack of transparency have led to the adoption of laws to prevent future problems. Anti-corruption campaigns have been highly successful in transitional countries attempting to change their cultures (2004: 3-4).

In other words FOI laws seem to have become ‘a right of passage’ for emerging democracies. It seems that to gain full access to the international political system a country must show that it supports the notion of transparency and openness in governance (at least in theory) by adopting FOI laws.

The main differences that exist between FOI systems relate first, to the number of government agencies exempt from the law and second, to the appeal
options. Exemption regimes can range from, for instance, the Swedish system where no agency is formally exempt (although in practice documents from the security police that handle national security are very hard to obtain) to the much more restrictive Australian federal FOI legislation that has a whole list of exempt agencies (this will be further discussed in chapters six and seven). As to appeals, again compare Sweden where the appeal system is local, speedy and free of charge with Australia where the national FOI appeal system is remote, time consuming and prohibitively expensive. This thesis will also show that there are other major variations amongst different FOI systems.

Two main systems: Sweden and the US

The two main models for FOI are Sweden and the United States. The Swedish regime predates the American by 200 years. Before comparing the two systems, let us first examine the history of the Swedish system. This takes us back to the ‘father’ of Swedish FOI, Anders Chydenius (first mentioned in chapter one).

In the middle of the 17th century Chydenius and his colleagues realised that they had been given a unique window of opportunity to introduce freedom of the press and access to document legislation. The process of how it happened is fascinating and is described in the entry on Chydenius in the Biography of Finland (Chydenius was born in Finland):

In the parliamentary session of 1765, a faction was formed among the Caps party (as opposed to the Hats), promoting social reforms and opposing the supremacy of the nobility. This new wing was obviously led by the radicals in the clergy, and with a natural sounding board among the peasantry, and broad support among the burghers. Among the most radical in Sweden itself were some of the clergymen in
Skåne [the southern most province close to Denmark]. The radical movement among the Caps induced the conservative leadership, consisting of noblemen and prelates, gradually to seek a common line with their former opponents, the Hats. Chydenius and other radicals saw the necessity of improving the political competence of a broad cross-section of the population, consequently adopting the notion of freedom of the press with great zeal. Chydenius' memorandum on this matter in 1765 was signed by an elderly representative of the clergy. Furthermore, the radicals succeeded in making Chydenius a member of a parliamentary committee dealing with the freedom of press issue, and he became its most outspoken member in the winter session of 1765 - 66.

The conservatives had a majority in the committee, but since they were extremely lazy about participating in the meetings, the freedom of press supporters could handle the planning stage almost by themselves. Most of the work was done by Chydenius, with enormous industry and competence. The conservatives could not find tenable arguments against him in the big deputation revising the committee report. In its final recommendation in spring 1766 the freedom of press committee suggested abolishing censorship on other than religious articles, which would be subject to cathedral chapter control. The committee also suggested giving the public free access to all official documents as well as parliamentary committee reports and records. The conservatives did not succeed in voting these propositions down. In autumn 1766 the parliamentary majority consisting of the three commoner Estates approved the propositions, even though Chydenius had meanwhile been expelled from the parliament. Thus the Freedom-of-Press and the Right-of-Access to Public Records Act came into force at the end of the year, and Sweden had acquired the most progressive freedom-of-the-press law in the world (Virrankoski, 1998: 3).

It is interesting to ponder the fact that it was the complacency and laziness of the governing party that paved the way for the radical reform. It is quite clear that Chydenius himself considered the introduction of access laws that allowed all citizens access to documents to be his greatest achievement (ibid: 4). In the same year, 1766, the Swedish parliament also passed legislation establishing the world's first parliamentary Ombudsman ('ombud' is the Swedish word for 'delegate'), one of few Swedish words that have been directly 'exported' to the English language in recent times.

The incentive for the first Swedish FOI-related legislation came mainly from an information-starved political opposition that was given a rare chance to pass legislation that would grant them and all citizens more access to government-held documents and information. As has been pointed out earlier,
Chydenius drew inspiration from the early Chinese Tang dynasty as well as the contemporary 18th century political thinkers and philosophers such as John Locke who were active during the Age of Enlightenment (known in Sweden as the Age of Liberty). The introduction to the Swedish Constitution describes the change in the political landscape thus:

The death of Carl XII in 1718 brought to an end not only Sweden’s great power status but autocratic rule as well. The pendulum now swung back in the other direction. A new form of government took shape, which became known, significantly, as the Age of Liberty government, and captured the imagination of the great philosophers of the age like Voltaire, Rousseau and Mably (Riksdagen, 2005).

Sweden had been at war for the better part of the period since the rise of its military might 150 years earlier and had instigated and driven the 30-year war of the previous century. The country was drained both economically and in terms of manpower and was suffering from extreme war fatigue. The intelligentsia sensed this and its political manifestation was the radical press freedom and access to document acts that were so cunningly passed through Parliament.

The US FOI model grew out of a global move towards more open government following the World War II. In the period of self-analysis immediately after the war, the US and several other members of the newly formed United Nations concluded that too much secrecy in too many countries had provided fertile soil for conflict. In May 1946 the US delegation to the UN persuaded the Commission on Human Rights to create a sub-commission on FOI (Lamble, 2002b: 5). By 1953 a draft convention on FOI had been formulated. The idea was that this convention should serve as a template for all member countries. This would have had enormous impact on the flow of
government-held information globally, with anyone from any country being able to request documents from any member country. This was much too progressive and far-reaching and was seen by many member countries as compromising national sovereignty. The idea was dropped after opposition from, amongst others, some western journalists and editors. One of the leaders of this opposition was the Australian Sir Lloyd Dumas, the then managing director of the Advertiser Newspapers Limited, publisher of the *Adelaide Advertiser*. Dumas’ rationale was that if Australia backed the convention too much power over the Australian press would pass to federal government. He argued that the convention might have prohibited the publication of articles critical of foreign governments or it could have ensured that foreign governments were given an equal right of reply to any article which offended them (ibid: 5). After this international setback the US pursued its own version of FOI. A first attempt in 1958 resulted in an amendment to the 1946 Administrative Procedure Act that made it mandatory for government agencies to keep and maintain records. The amendment was passed in 1966 and called the Freedom of Information Act. DeFleur summarises the amendment:

This amendment, commonly called FOIA, placed the burden of compliance squarely on the agencies and required that they prove they were justified when denying access to records. It also clarified the conditions under which agencies could legally withhold records by specifying nine exemptions to the Act. In order to protect against unwarranted invasions of personal privacy, the law allowed agencies to delete identifying details, but required that the agencies justify any decisions in writing. The FOIA amendment was written with some very real teeth to enforce its provisions. If records were not released, citizens could register a complaint in court about the agency. That could then enjoin that agency and order the production of any records improperly withheld. More forcefully, that statute stated that ‘in the event of non compliance with the court’s order, the district court may punish the responsible officers for contempt.’ Finally a provision was included requiring that such court cases ‘take precedence on the docket over all other cases and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way (1994: 50)
This excellent summary of the US FOIA clearly shows that the US legislation is similar to Swedish FOI, particularly with its emphasis that the request for documents should have priority, that real avenues for appeals should exist, and that legally binding rulings would ensure repercussions for the agencies/public servants that refuse to comply. However, there are also differences between the Swedish and US Acts. These are well summarised by Lamble in the table below.

<table>
<thead>
<tr>
<th>Model</th>
<th>Sweden</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Influences</strong></td>
<td>7th to 18th century Chinese culture, Lutheran church, academe, liberal libertarian ideals of individual freedoms and a free press, emerging democratic concepts</td>
<td>Press interests, the United Nations, post World War II democratic ideals, presidential desire to help stop public service becoming a fourth arm of government</td>
</tr>
<tr>
<td><strong>Relevant legislation first enacted</strong></td>
<td>1707 and 1766</td>
<td>1947, 1958 and 1966</td>
</tr>
<tr>
<td><strong>FOI as a constitutional concept</strong></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td><strong>Links to press freedom</strong></td>
<td>Direct, constitutional and very specifically and clearly stated in legislation</td>
<td>No direct links but implied support in the First Amendment to the Constitution</td>
</tr>
<tr>
<td><strong>Perceptions and attitudes of legislators and officials</strong></td>
<td>A cultural tradition of administrative openness. Strong expectations of transparency as a natural right</td>
<td>Ranging from enthusiasm to obstruction. A deep and long-standing pre-FOI Act tradition of administrative secrecy which was reinforced by the Cold War</td>
</tr>
<tr>
<td><strong>‘Ownership’ of information</strong></td>
<td>Expectations of public ownership and control</td>
<td>A mixed perception of government ownership and control and public ownership</td>
</tr>
<tr>
<td><strong>Cost</strong></td>
<td>Free, no access or processing fees [photocopying fees apply after the 10th copy]</td>
<td>Often expensive, nearly always a processing fee and photocopying charges. However, reduced charges or no charge for the press</td>
</tr>
</tbody>
</table>
With this overview it is clear that there are more similarities than differences between the Swedish and US FOI systems. The most important difference is that FOI is part of the Swedish constitution, which makes it very hard for the government of the day to alter FOI (for more detail see political
profile of Sweden below in chapter six). FOI in the US is a separate Act. Amendments to the constitution do support the publics' right to know, but the standing of FOI in the US is weaker than in Sweden. An example of this is the vast increase in classified documents that has occurred in the US as part of the War on Terror. This form of classification exempts the documents from the FOI Act (Lamble, 2003a: 38-39).

The other main points of differences are procedural: the processing costs of requests, the turnaround time and the appeal options. These could possibly be attributed to the much longer tradition of openness in Sweden (for further discussion and analysis see below, chapter eleven).

Lamble argues that the US adapted the Swedish FOI regime to suit its own political system. Most other nations adopted, with very few changes, the US version. America has one of the clearest separation of power structures in the democratic world. There are very clear boundaries and checks and balances between the legislature, the executive and the judiciary. The most striking difference between the US and Westminster-based regimes (often also referred to as parliamentary systems) is that in the US the chief executive is elected directly by the public. In the Westminster system the legislative and executive powers operate within and are drawn from the parliament. The party or coalition that holds the majority in parliament forms government and some members of parliament are made Ministers heading government departments. Lamble points out that ‘there is therefore greater potential for legislators and public servants to work together in secrecy in a Westminster system and to
interfere in the administration of FOI than there is in the US system (Lamble, 2003b: 54).'

Lamble’s view is that the Swedish model is more wide-ranging and would have been better suited for creating ‘generic’ FOI regimes.

One of the underlying motivations for the introduction of FOI in the US was to help control the public service and make it transparent and accountable so that it did not develop into a fourth arm of government. That motivation is irrelevant in systems which do not have a full and clearly defined separation of powers. Such jurisdictions would be much better served if they had drawn on the Swedish precedent and developed a system of FOI that was constitutionally supported and safeguarded (2003b: 55).

Terrill uses Australia as a case study to map the move away from secrecy towards openness in governance. His extensive work covers the period from Menzies to the present day. His main conclusion is that currently ‘secrecy regularly attracts criticism and requires justification and publicity has become an important tool for governing. Once anathema, openness has become a fundamental democratic value (Terrill, 2000: 232)’. This may be the case in theory, however as this study will show, practice does not always follow theory. Terrill also qualifies his conclusions of increased openness by pointing out that under successive Australian governments there has been an incremental growth in the size of their publicity departments in order to ‘manage openness’ (ibid: 235). Terrill also identifies the trend of ‘snowing’ as an effect of the breakthrough of FOI legislation. Snowing is when departments attempt to ‘drown’ and disarm the public and the media with so much irrelevant information, via for instance websites, that you lose sight of what is important (ibid). Certainly this trend is observable not only in Australia but in other
countries as well. It has long been a well-known tool for less scrupulous public relations officers.

It is interesting to note that neither the Swedish nor the US Acts allows any access rights to information held by private companies. The Swedish Act has been amended to cover government-run and -owned companies that have adopted a corporate structure, but it does not cover the private sector in general, and nor does the US Act. As we shall see there are however newcomers to the FOI family that have addressed this very important issue (see chapters nine and eleven). Achbar points out that the corporate sector probably has as much, if not more, influence on our daily lives as those who politically govern us (2003: chapter 21), but the accountability mechanisms between the public and the private sector are very limited indeed. The annual shareholders meeting is a very limited and blunt accountability tool, that only includes shareholders. The notion that ‘the market will regulate itself’ into accountability has been proven wrong time and time again. The concept of corporate accountability will be further discussed in chapter twelve.

Information does not come in the form of documents only. The sources of information, those who collate the information, interpret it, and write the documents, play a pivotal role in the flow of public information. This thesis argues that a well-functioning FOI regime requires not only open access to documents but also the protection of the rights of sources who supply information - the whistleblowers.
Whistleblowing

‘Whistleblower protection’, ‘legal protection of journalistic sources’, ‘public servants’, ‘public comment’, ‘collaborators of justice’, ‘shield laws for journalists’: there are many labels for the concept of encouraging public servants (who as the name suggests serve the public, albeit indirectly via their government department or agency) to speak their minds frankly not only to their Minister when something is wrong, but also to the public, often via the media. Important information on how the country is governed cannot be found in documents and written information only. Indeed, there is a strong argument that the inside knowledge and background information that public servants have is of much higher caliber than documents as such. Hence, any system that is serious about transparency and openness in government should have incentives that encourage public servants (and preferably also workers in the private sector) to provide information that is of high interest to the public. Whether the mechanism of public comment is embedded within the FOI regime or a separate entity, it plays a vital role in how the public gains access to government-held information. Hence, any study attempting to map how the overall FOI regime works in practice would be incomplete if it did not attempt to also evaluate the whistleblowing climate.

Looking at the terms used to describe someone who decides to point out maladministration, corruption or other perceived injustices, there seems to be a sliding scale ranging from the quite benign sounding ‘public servants’ public comment (Terrill, 2000: 65)’ to the very dramatic sounding ‘whistleblower’
In between these two extremes you find the concepts of ‘legal protection of journalistic sources’ (Australia, 1994: ix) and ‘collaborators of justice’ (Vaughn, 2002: 29). In an ideal politically open system public servants, and indeed employees of corporations, would be free to comment on policy and practice before any problem emerged. However, there is a strong argument that political leaders would never tolerate this on grounds that it is impossible to have public scrutiny at every stage of the policy process. There would be a risk that policies would take forever to develop. The other three concepts all imply that something has gone wrong, or is about to go wrong, and needs to be put on the agenda for fixing. Although the term ‘legal protection of journalistic sources’ is perhaps the most descriptively accurate, it is awkward and seldom used. The European Union uses the term ‘collaborators of justice’, which carries connotations of treachery. Hence, in this project the term ‘whistleblowing’ will be used to refer to the concept of the institutionalized ‘leak’.

Vaughn finds that:

Whistleblower provisions are closely linked to freedom of information laws. They share common values. They seek similar goals. Both are intertwined with the rights of free expression and association as human rights that form the foundations of democratic accountability. The enactment of freedom of information laws and whistleblower protections within the last decade illustrate their common connections and the attraction of values which they implement (2002: 32).

However Vaughn also points out that there are several examples of whistleblower legislation that have become effectively a ‘Good Citizens Elimination Act’, indicating that whistleblower protection must ‘operate with other reforms which act to assure democratic accountability that ensures that whistleblowers are protected in reality and not only in theory (ibid).’
As with access to documents Sweden and the US again emerge as the two main systems and frontrunners when it comes to legal protection of whistleblowers. However, in the literature it is mainly the US Whistleblower Protection Act that is referred to, in spite of the fact that the Swedish system is more far-reaching (for further details see chapters six and eight).

Martin defines a whistleblower as ‘a person who believes that truth should prevail over power: a successful whistleblower brings down corrupt people in high places purely by exposing information (Martin, 2004: 122).’ However he argues that according to research and experience institutionalized whistleblowing does not work. His interviews with whistleblowers paint a depressing picture. The stories often start with a public servant who wants to do the right thing and tell the public about something that is going wrong or has gone wrong. The result is all too often ‘rumors, ostracism and questioning the employee’s performance (Martin, 2004: 119)’. Martin divides whistleblowing into two categories: using ‘official channels’ such as whistleblowing protection acts, and ‘skill development’, which rests on the employee himself taking command of events and not using the official channels (ibid: 120). According to Martin’s studies the skill development approach is better for the individual. The main reason for this is that the official channel is controlled by the very entities that are the potential subjects of the whistleblower’s disclosure. However, Martin misses a vital point. His theories assume that the whistleblower always needs to disclose his or her name. This is not always necessary. Indeed, it can be argued that proper protection of whistleblowers should include a means of granting anonymity when needed.
Often the most effective avenue for whistleblowing is using the media.

As De Maria points out:

None of the schemes in other parts of the world, bar the United States, appears to protect media whistleblowers. It is common knowledge that the media is often the only door open to the whistleblower determined to expose wrongdoing. It is also common knowledge that government often will only move on allegations once they have been aired in the media (cited in Martin, 2004: 123).

De Maria may be forgiven for overlooking the Swedish whistleblower protection. The legislation is part of the constitution (Riksdagen, 2005) and not referred to as 'whistleblower protection' but as 'freedom of speech'. In the Swedish whistleblower protection scheme public servants know that, rather than being penalized themselves, their employer will be penalized if they investigate who 'leaked' today’s front-page story. The Swedish ‘whistleblower’ is further protected by the fact that the journalist is bound by law not to disclose the source (if anonymity has been agreed upon between the source and the reporter), risking a heavy fine and a one-year prison term for doing so. Swedish journalists can only be forced to reveal their sources on grounds of national security, treason and if the source has broken confidentiality agreements (Sefastsson, 1999: 116-27).

One of the most well-known examples of whistleblowing is Woodward and Bernstein’s main source in the Watergate story, code named ‘Deepthroat’. In 2005, more than 30 years after Watergate, the identity of Deepthroat was revealed, by the source himself. Anonymous sources do pose journalistic problems, but these can be overcome as the practice of extensive whistleblower protection in Sweden has shown. The main upside is that the whistleblower
need not fear for his/her job and reprisals. Only the Swedish whistleblower protection system guarantees the whistleblower anonymity in most cases. On the federal level the US system does not guarantee anonymity. This is further discussed in chapter eight. Martin concludes by underscoring the importance of whistleblower protection offering anonymity if needed.

A well-informed and well-connected employee will not turn to official bodies unless they promise better prospects than what individuals can achieve through their own efforts. Why make a protected disclosure when a leak or a well-planned campaign is safer and more effective? This suggests that the best way to improve the performance of official channels is to develop workers’ understanding and skills (2004: 129).

Again it is instructive to look at how Australia has dealt with whistleblowers. There are a number of state-based laws attempting to provide protection for whistleblowers. They are what Martin would label prime examples of ‘official channels’ and none deal with protection if a potential whistleblower decides to talk to a journalist. On the federal level there is no whistleblower protection at all. In the early 1990s there were a number of high profile court cases where Australian journalists refused to reveal their sources of information. A number of journalists were subsequently found to be in contempt of court and some of them served short prison terms. This triggered a Senate inquiry into ‘Shield Laws for Journalists’ Confidential Sources’ (Australia, 1994: ix). The report states that:

The media have been pressing for legislative action to protect journalists from the law of contempt, based on the argument that the ability to keep a source confidential is essential to the free flow of democracy necessary to a democratic society and that sources of information will dry up if journalists are forced to disclose them (this author’s emphasis) (ibid).

This goes to the heart of whistleblowing via the media: if you are not protected, why should you risk everything? The inquiry was quite thorough and
heard many opinions and arguments from most stakeholders. It explored who can be defined as being a journalist, the role of investigative reporting and the role of the fourth estate, and the conflict between the journalists’ code of ethics and the legal system. The report made a number of concrete recommendations, partly sympathetic to greater protection of journalistic sources. However, it did not recommend increased legal protection of journalistic sources along the lines of doctor-patient confidentiality. The main argument was that journalism is not ‘regulated’, as are for instance the legal and medical professions. Hence journalists cannot be trusted with the great power and responsibility that comes with having legal protection for their sources, in effect overriding the contempt law (Australia, 1994: xx-xxi). The inquiry’s main argument, which flows out of the lack of professional accreditation of journalists, is the lack of accountability for journalists. If you are to be granted legal protection of your sources, there should be some accountability, the report argues.

The accountability point is crucial. But who is to hold journalists to account? The government? This is hardly an appropriate power for those most likely to be scrutinised: what impact might this have on independence and quality of journalistic scrutiny? The whole idea of the media taking on the role as independent scrutinisers of power rests on the notion that they come from outside government and are not tainted by power – at least according to the ideal.

As for how to hold journalists to account, it is hard to conceive of any regulatory system which would not compromise journalistic activity (as is already exemplified by the chilling effect of extensive and prohibitive defamation
laws in some countries, like Australia). Regulation would render impossible the fourth estate capacity to scrutinise those in power. The compromise solution that many countries have come up with is a set of ethical guidelines for journalists to follow. Policing these guidelines is a perennial problem, not only in terms of enforcement but also in terms of what sort of penalties, if any, should be imposed on transgressors.

**Conclusion**

This chapter has explored the evolution of FOI and described the Swedish and US models which are the main templates for FOI around the world. It has shown the symbiotic relationship between the FOI and fourth estate and underscored the importance of whistleblower protection for the effectiveness of any FOI regime. However there are two sides to the FOI relationship – the seekers after information and the holders of information. This brings up further vital questions, which are addressed further in chapter three: who owns the information held by government - the people or the government? How do politicians and public servants see their role as information keepers? Do they see themselves as facilitators that dispense information on request from citizens because they keep the information on behalf of the public? Or do they subscribe to the Sir Humphrey Appleby view that the less the public knows about government and governing the better. These attitudes at the core of FOI determine how well the regime works in practice.
Chapter Three: Methodology

Introduction

Scene: The Civil Servants Club Westminster, London. The Permanent Secretary to the British Prime Minister, Sir Arnold (SA), has just been served a brandy. Joining him is Sir Humphrey (SH), the Permanent Secretary to the newly appointed Minister for Administrative Affairs. As they discuss what the new Minister is like the Minister’s private secretary Bernard (B) joins them. Sir Humphrey’s main concern is that the new Minister wants ‘open government’ reform.

SH: As long as we can head him off from this open government nonsense.

B: But I thought we were calling the white paper Open Government?

SH: Yes, well, always dispose of the difficult bits in the title. Does less harm there than in the text.
SA: The less you intend to do something, the more you need to keep talking about it.

B: But, I mean, what’s wrong with open government? Why shouldn’t the public know more about what’s going on?

SA: Are you serious?

B: Well, yes Sir, it is the Minister’s policy after all.

SA: But, my dear boy, it’s a contradiction in terms. You can be open, or you can have government.

B: But surely the citizens of a democracy have a right to know?

SH: No, they have a right to be ignorant. Knowledge only mean complicity and guilt, ignorance has a certain…dignity.

B: But if the Minister wants open government….

SH: You just don’t give people what they want if it’s not good for them. Do you give brandy to an alcoholic?

SA: If people don’t know what you’re doing, they don’t know what you’re doing wrong.

B: Well, I’m…I’m sorry, Sir Humphrey, but I am the Minister’s private secretary, and if that’s what he wants…

SH: My dear fellow, you will not be serving your Minister by helping him make a fool of himself. Of the Ministers we’ve had, every one of them would have been a laughingstock in three months had it not been for the most rigid and impenetrable secrecy of what they were up to.

B: What do you propose to do about it?

SH: Can you keep a secret?

B: Of course

SH: So, can I. (BBC, 1979)

This time the Minister lost. Sir Humphrey outmanoeuvred him and the white paper on open government withered and died. Although the above dialog is satirical in nature, it still goes to the core of how well a freedom of information regime works in practice. As pointed out in chapter one, it raises the key issue of who ‘owns’ government information and what role politicians and public servants play: are they guardians of this information or facilitators for dispensing
government-held information to those that request it? This question is
addressed in the three sub-studies that make up the research design for this
project.

The way FOI works in practice in different countries has thus far
received little attention by researchers. This is confirmed by earlier literature
reviews by Lidberg (2003: 37) and Snell (2004: 59-60). Further Terrill points out
that ‘secrecy, openness and publicity are unusual concepts to research. They
are not concepts frequently found in indexes, and are often present only
between lines or evident form the way that activities and events do – or do not –
occur (2000: 3).’ And Snell observes:

There is an urgent need for academics, postgraduates, government officials and
NGOs to develop comparative studies in this area which include, but extend
beyond, singular case studies or collections of case studies. These studies will not
only inform the policy development processes of countries yet to adopt FOI
legislation but will also feed back into reforms of veteran jurisdictions like

This project is an answer to this call and will be unique in three ways:

1. it is the first project to systematically track actual FOI requests on
   an internationally comparative basis

2. it is the first study to evaluate and take into account the
   protection and legal situation of media whistleblowers and the
   journalists they choose to work with

3. it lays the foundation for the first International Freedom of
   Information Index
Using a five-country sample (Sweden, Australia, US, South Africa and Thailand) the study will compare FOI regimes, the attitudes of the government administrators, and the experiences of journalists who use them. This chapter will review the relevant literature, discuss the research questions and identify and describe the methodologies used in designing the research instruments.

**Literature review**

The literature shows that while a number of comparisons of different FOI regimes have been made, these studies have focused on comparing the ‘letters of the law’ rather than the practical outcome - what the FOI laws deliver in actual access to information. Coulthart, (1991), Lamble (2002a), Ricketson, (2002), Snell, (2004), Terrill,(2000) and Waters, (1999) among others, have from an Australian perspective, and in Snell's and Lamble’s cases with international outlooks, covered a wealth of legal aspects and journalistic uses of FOI. However there are no studies tracking actual FOI requests (testing the law, if you like), and providing international comparisons on a practical level of how the different legislations deliver on their promises. The whistleblowing climate as part of the overall FOI regime is largely overlooked. Although shield laws for Australian journalists were the subject of a senate inquiry in Australia, researchers have not focused on their importance to the overall information climate (see chapter one).

The Swedish literature is also focused on the legal framework of FOI. There is ample literature analyzing the laws and suggesting concrete journalistic uses of FOI. Writings by, among others, Olsson, (1992), Sefastsson, (1999), Hederén, (1988), Gustafsdotter, (2001) and Löwenberg, (1992) cover these
areas well. However, when it comes to testing what Swedish FOI delivers, there are no scientific studies available. The Swedish journalism union, Svenska Journalistförbundet, SJF, conducted two ‘openness tests’ of Swedish Government agencies in 1997 and 2000 (Svenska Journalistförbundet, 1997), and although they give an indication of a relatively wide general knowledge of FOI among Swedish public servants, they are of little use from a scholarly perspective.

A search for relevant literature and relevant studies in the United States shows a picture similar to Sweden and Australia, although there seems to be more emphasis on the practical workings of FOI in the US literature covered by writers such as Davies and Splichal, (2000) and Rozell, (2002). However, the bulk of the studies are still concerned with legal issues exemplified by the works of Richelson, (2003), Bass and Hammit, (2002) and Siegal, (2002). There are no comparative international FOI studies done as far as this literature search has been able to detect.

The other two countries of study, South Africa and Thailand, are relative newcomers to the FOI family. Their Acts came into effect in 2001 and 1997 respectively (Banisar, 2004: 72, 80). For obvious reasons there is much less literature on FOI in these two countries. Snell points to one of the reasons: ‘the Thai academics have barely had time to realize that FOI legislation is now operational (Snell, 2004: 60)’, all the more reason to study these countries. The literature review found that Thailand is part of a study that compares the level of information access in eight Southeast Asian countries. The study uses 45 categories of records, such as population census data, data concerning the
environment, local governments’ budgets, military expenditures, etc. The study ranks the eight nations based on the level of access. Thailand and the Philippines rank as the most transparent nations in Southeast Asia (Coronel, 2001). No previous studies relating to use of FOI were found in South Africa.

**Research question**

The overarching research question for this project is: **to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study?** The object is to determine whether there is a gap between the ‘promise’ of Freedom of Information legislation (that is, what the legislation has as its aims) and what it delivers in ‘practice’ in the countries of study (ie. the level of public independent access to government-held information). A secondary aim of the project is to investigate whether it is possible to convert the data into an index format that would allow for an easy comparison between different FOI systems.

In framing the research questions and finding an adequate study design both qualitative and quantitative methodologies were considered. There has been a longstanding debate amongst researchers about the comparative worth of qualitative and quantitative data. There are still social scientists that argue that the only real research that can be called scientific is the positivist approach based on natural science methods generating quantitative data. As a result, as Miles and Huberman explain:

> Qualitative researchers have complained that they are disparaged as The Other, losing out against the powerful, prestigious establishment that take quantitative methods for granted. Researchers are stereotyped as number crunchers or navel gazers (1994: 40).
The core of the conflict between the two research strands is summed up by the title Gherardi and Turner chose for their (1987) book: *Real Men Don’t Collect Soft Data*. However, the numbers of researchers using a mix of qualitative and quantitative methods are growing as noted by among others Neuman, (2000), Yin, (2003), Miles and Huberman, (1994) and Denzin and Lincoln, (2003).

All of the above authors argue strongly for the use of triangulation. Denzin and Lincoln whose book *Collecting and Interpreting Qualitative Materials* has been labelled state of the art in the field of evaluating qualitative inquiry have this to say of triangulation:

> Triangulation is not a tool or a strategy of validation, but an alternative to validation. The combination of multiple methodological practices, empirical materials, perspectives, and observers in a single study is best understood, then, as a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry (2003: 8).

The design of this project utilises triangulation on two levels:

- Methodological triangulation applying three different methods towards the same overall research question.
- Data triangulation in collecting data that feeds into the overall research question.

The study design comprises three sub-studies each with its own sub-set of research questions. The sub-studies are qualitative in nature with some quantitative elements. On the surface the survey study shares many properties with a quantitative study, but the bulk of the study poses qualitative questions, albeit with closed reply options. The aim of this method of data collection is to
turn the qualitative findings into numbers – the index. Turning qualitative data into numbers is nothing new and has become a standard technique used by many qualitative researchers. Miles et al point out that ‘we have to face the fact that numbers and words are both needed if we are to understand the world (Miles and Huberman, 1994: 40).’ This is well exemplified by the a number of software aids such as QSR NUD*IST that in the last decade have come to play an important role in analysing qualitative data. It is important to point out that the FOI Index is meant to provide an overview of the data and serve as an indication as to how well the FOI regime in question works in practice in providing independent access to information to the public. To appreciate the whole picture the Index rank needs to be complemented by the qualitative comments and analysis of the system.

**Countries of study**

From an early stage it was decided that the study needed to be comparative to create both breadth and depth of data. The countries of study needed to represent a spread based on a number of parameters:

- Longevity of FOI regime
- Political system
- Level of democratisation
- Level of economic prosperity

A spread in relation to the above parameters was considered important as it was hypothesised that this would generate a spread in data.
As the ‘parents’ of the other FOI systems, Sweden and the US were included on the basis of maturity. They also represented mature representative democratic systems with high levels of economic prosperity. Australia is also a mature democracy with a strong economy, with a relatively old FOI system (the federal FOI Act was passed in 1982), but with a very shaky FOI track record (Waters, 1999). The country also represents a mix of the Westminster and federal political systems. South Africa was picked as a newcomer to the FOI family (the Official Information Act was passed in 2000) with a very interesting Act since it applies to the private sector. South Africa was also considered interesting since it is a young, emerging democracy with social issues and big divides in prosperity. Initially Indonesia was the preferred fifth country. It was hoped that it would pass its FOI Act in time to be included in the project; however, this was unfortunately not the case. Instead Thailand was picked as a replacement (the Official Information Act was passed in 1998). Thailand represents a country with lower levels of prosperity compared to the US, Sweden and Australia. It is a mature democracy with some issues relating to freedom of the press and freedom of speech. Thailand is also significant in that it is one of very few Asian countries that have FOI.

Given the timeframe and financial resources of the project, five countries was considered a realistic maximum number given that there would be a total of 15 studies (three per country).

The thought of investigating whether it was possible to create an FOI Index based on the data collected emerged early on and so had an influence on
the research design. It is therefore relevant to examine the index concept before the sub-studies are described in detail.

The FOI Index

The general purpose of an index is to provide an overview for large quantities of data that are usually complex in nature. There are different types of indexes, some built entirely on quantitative data such as crime and stock market indexes. However, in the last 10-15 years, a number of socio-economic indexes have risen to prominence. One defining property of these indexes is that they often combine quantitative and qualitative data. Neuman points out that an index is quite easy to create and at face value can seem to have great validity. He argues that the researcher therefore has a great responsibility to make sure that ‘every item in the index has face validity (2000: 177).’ In other words, the legitimacy of an index rests to a large extent on the methodology used to create it. Several indexes were examined to assist with developing a paradigm for this study and an analysis of the three most relevant ones is included below.

The Corruption Perceptions Index

Transparency International (TI) is a non-profit organisation based in Berlin, Germany. TI has published the Corruption Perceptions Index (CPI) since 1995. The Index was originally designed by Dr Johann Graf Lambsdorff and his colleagues based at Göttingen University in Germany. In its mission statement TI defines the purpose of the organisation as: ‘to curb corruption by mobilising a global coalition to promote and strengthen international Integrity Systems (Transparency-International, 2003a).’ The bulk of TI’s funding comes from
public institutions and foundations around the globe. The private sector also contributes to TI (ibid).

The CPI is described as a composite index that attempts to capture the perceptions of the level of corruption as perceived by analysts and expatriate business people (Transparency-International, 2003b). The index is based on selected answers drawn from a number of surveys. In all, 15 survey sources were included in the 2002 edition of the CPI. The surveys were implemented between 2000-2002 (implementing institution/company in brackets):

- State Capacity Survey (Columbia University)
- Asian Intelligence Issue (Political and Economic Risk Consultancy)
- Institute for Management Development, IMD, Switzerland (World Competitiveness Yearbook)
- World Business Environment Survey (World Bank), Opacity Index (Pricewaterhouse Coopers)
- Country Risk Service and Country Forecast (Economist Intelligence Unit)
- Nations in Transit (Freedom House)
- Africa Competitiveness Report (World Economic Forum)
- Global Competitiveness Report (World Economic Forum)
- Corruption Survey (Gallup International on behalf of TI) (ibid: 4).

The respondents were asked to rank how severe they perceived the corruption to be in a specific country. A typical question is like this one from the Asian Intelligence Issue survey: ‘How do you rate corruption in terms of its quality or contribution to the overall living/working environment? (ibid: 5)’ Each source/survey uses its own scaling system. To combine the results of the
surveys into one single measure per country (allocating a rank on a scale from 1-10, where 1 is high rate of corruption) the designers of the CPI use a two-step approach. Step one uses the standard deviation method to standardize each source after which the average for each country is calculated (ibid: 5). This method was adequate for the first few years of ‘merging’ the different sources. However, Lambsdorff and his colleagues noted a tendency towards ‘continuously smaller diversity of assessments (ibid)’. There were also instances where scores would be below 0 and above 10. To avoid this they concluded that the scores had to be stretched using the more complicated beta transformation standardization method available in most statistics softwares. This method made sure that the ranks stayed within the 10-point scale relative to each other.

A number of the surveys cover the same countries. This overlap, argues Lambsdorff, allows for cross-referencing of the ranking. This is, according to Lambsdorff, the main strength of the methodology behind the CPI and allows for relatively high confidence intervals in the ranking of the individual countries (ibid: 2).

**Analysis**

As Lambsdorff points out ‘unbiased, hard data [regarding the extent of corruption in a country] continue to be difficult to obtain and usually raise problematic questions with respect to validity (ibid: 1).’ It could be argued that this is because of the intrinsic secrecy surrounding corruption. Put simply, corruption is hard (perhaps close to impossible) to measure in quantifiable terms. Hence, the CPI rests entirely (as the name suggests) on a number of
peoples’ perceptions of the extent of corruption. However, as Lambsdorff says, this may still be the most credible way of comparing corruption in different nations (ibid). Because no other measure of corruption exists the base data is the ranking provided by the respondents. This is a validity problem in itself.

Another validity problem is the selection of the sample groups. The respondents are drawn from two groups: expatriate business people and analysts from the academic and corporate sector. None of the surveys include respondents drawn from citizens of a country or the public and political sector. This has been somewhat rectified by the recent publication of the Global Corruption Barometer, a pilot survey distributed to 40 838 citizens in 47 countries measuring attitudes within each country towards corruption (Bosh, 2003).

**Dow Jones Sustainability Indexes**

The Dow Jones Sustainability Indexes (DJSI) is an offspring of the Dow Jones Stock Market Index and was introduced in September 1999 with the aim to ‘provide objective benchmarks for the financial products that are linked to economic, environmental and social criteria (DJSI, 2003a)’. It is a commercial entity financed by the sale of licences, which allows licensees (mainly financial management companies) to use the index for benchmarking sustainable investment portfolios. Currently the indexes rank 10 per cent of the largest 2500 companies globally and ‘aim to cover 20% of the total global market cap of each industry (ibid)’. When this author sought information about the cost of each licence the following response was received from the SAM-Group, a Swiss-based business company that collects and analyses the data for the index:
Thank you for your interest in the Dow Jones Sustainability Indexes. Information about the license fees is something that we only provide directly to interested prospects - mainly, because it’s competitive information, but also because the price varies depending on the product (Barkawi, 2003).

The DJSI covers three main areas in its data collection: economic performance (with emphasis on corporate governance), environmental impact and performance, and social performance. Each area is weighted roughly at a third each in calculating the figures for the end rank. The most important data collection instrument is an extensive questionnaire (DJSI, 2003c) to be filled out and signed by the company’s CEO or equivalent. The answers are then cross-referenced with, among other sources, media reports and stakeholder reports. A major difference compared to the CPI is that the analysts rank the answers in the questionnaire according to a template. For example the criteria ‘corporate governance’ has the general weighting of .054. The specific question: How many members are on your Board of Directors? Carries the weight of .08. The answers are scored according to the following intervals:

- 11-15 Board Members: 100
- 6-10 Board Members: 75
- 0-5 Board Members: 0

Hence, if the company had 12 members of the Board the end value for this answer would be calculated thus:

\[ 100 \times 0.08 \times 0.054 = 0.432 \] (DJSI, 2003b: 8-14).
Analysis

Apart from the method used to evaluate and calculate the rank the DJSI is quite similar to the CPI and shares the same validity problems arising from the fact that it too does not generate its own *independent* data. It relies on company management to provide accurate data in areas that are notoriously hard to verify and check. The DJSI also battles a general legitimacy problem in that it does not exclude companies producing chemicals, weapons and tobacco products; which can hardly be considered as meeting the basic definition of sustainability. The DJSI lists a number of arguments for including all sorts of companies in its index. One is that by including, for instance, highly polluting companies and picking the best of the worst ‘we recognize that some companies are more responsible in managing their impacts than others and are thereby leading their peers towards a more sustainable way of doing business (DJSI, 2003a).’

DJSI recognizes that transparency is an important part of building up the legitimacy for the index and it is to their credit that the whole methodology and the questionnaire used are available on their website (apart from the price of the licence). The validity of the index is heightened by the fact that the international audit firm PricewaterhouseCoopers has confirmed that the sustainability evaluations are in line with the methodologies and applied appropriately by the SAM Group staff (DJSI, 2003d). Given the cloud hanging over international auditing firms in the wake of Arthur Anderson’s role in the Enron corporate fraud case in 2003, the question arises whether this really
strengthens the validity of the DJSI. Perhaps an audit by university-based independent researchers would be preferable.

**The Conflict Barometer**

The last socio-economic index analysed is the Conflict Barometer, created, compiled and published annually by the Heidelberg Institute on International Conflict (HIIK) at Heidelberg University in Germany. The HIIK is a non-profit registered organisation and 'is dedicated to research, evolution, and documentation of inner- and interstate political conflicts (HIIK, 2003).’ This index has been included because it incorporates both quantitative and qualitative data (HIIK, 2002). A very elaborate coding system is used to track and describe the more than 301 conflicts contained in the database that is the core of the index.

**Analysis**

As with the other indexes described the bulk of the data is not independently generated, but relies on earlier studies and media coverage of conflicts (ibid: 2). The Barometer allocates a rank of between 1 and 4 to each conflict, where 1 is latent conflict and 4 is war. However, it is very unclear how the different ranks are calculated. The most important lesson learnt from the Conflict Barometer is that it is vital to clearly explain what methodology is used and how the rank is calculated.

Of the indexes discussed the CPI has risen to prominence quickly. Since its start in 1995 it has emerged as one of the leading indicators in the social sciences, in spite of the inherent weaknesses already noted. The DJSI has more than 50 licensees (DJSI, 2005) and is often quoted as an authority in
ranking companies’ performance from a sustainability perspective, again
despite much the same weaknesses as the CPI. The Conflict Barometer is less
well-known, but shares the same core problem with the other indexes
described: the lack of independent generation of quantitative and qualitative
data. This indicates that there is a need for instruments and tools that can
capture complex structures in society, such as corruption, corporate
sustainability and political conflict, in a way that is more easily comprehended.
In an increasingly globalised and complex world order, it also seems more
relevant then ever to compare different countries in terms of their social
structures, problems and solutions.

This is very promising for the Freedom of Information Index. Like the
indexes profiled above it will provide an overview and make it easier to
understand and compare how information flows in different countries. The
greatest strength of the Freedom of Information Index compared to the other
indexes profiled is that it will have a practical component where the efficacy of
FOI regimes will be independently put to the test.

Sub-study 1: ‘the promise’

The three sub-studies addressed similar sets of questions and used
similar evaluation templates. The first sub-study was the most straightforward of
the three addressing the research question: **What are the aims of the different
legislations and what do they promise to deliver in terms of information
access?**
The evaluation template (appendix 3) aimed to identify the key elements of the legislation as well as the in-built instruments that can inhibit the publics’ independent access to information such as non-regulated processing fees, poor scope for appeals, or costly appeals processes.

The method used in the ‘the promise’ is a very structured form of analysing what in qualitative research is termed ‘material culture’ (Hodder, 2003: 155). Hodder distinguishes between records and documents, where records are more general in nature such as ‘marriages certificates, driving licenses and banking statements (ibid: 156).’ Documents are much more personal in nature and include diaries, letters, field notes etc. According to this classification, legislation fits under the heading ‘record’.

Sub-study 2: ‘the spin’

The second sub-study addressed the research question: What are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants? Through the use of a questionnaire directed to the top politicians and public servants in each country of study it aimed to capture what ‘spin’ the administrators put on FOI that might impact on the practical implementation of the law.

One of the most important questions in the survey was:

Which of the following statements is closest to the attitude held by yourself and your staff?

a) the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible
b) the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant
c) the government owns the information but increased openness and transparency is good

d) the government owns the information and decides who will have access

e) the government owns the information and decides who will have access and increased openness and transparency is not good

The questions were formulated to be as similar as possible to those used in the other studies staying true to the idea of triangulating the data (see appendix 2). However while ‘the ‘promise’ and ‘spin’ studies were able to cover protection of journalistic sources, this aspect could not be included in ‘the practice’, since it was logistically difficult to recruit a source and could have put that person at risk.

**Sampling issues**

The potential sample population for ‘the spin’ was very large indeed. It consisted of all politically appointed staff and all public servants within the federal departments that make up the cabinet in each country of study. During the trial of the studies in Sweden the Swedish sample population was calculated to be 4,899 (4,729 public servants plus 170 political appointments such as ministers) (Falck, 2004). Clearly this was beyond the scope of the project.

When surveying possible sampling methods, two were identified: random selection and what Neuman describes as ‘purposive or judgmental sampling’ This sampling is used when the group you want to sample can be categorized as ‘select members of a difficult to reach, specialised population (Neuman 2000, p.198).’ This method reduced the numbers in the sample group. The rationale followed was that FOI implementation and interpretation is handled at the political and public service management level in each department so a sample group consisting of the Minister and Deputy Minister,
or the equivalent, the Chief Public servant (head of department) and the FOI Officer or equivalent seemed logical. It was interesting to observe that all countries of study had a very similar number of departments in their cabinets, ranging between 15 and 19. It therefore made sense to aim for a similar number of questionnaires to allow for a true comparison of response rates. The total number of questionnaires sent to each sample group ranged from 65 to 68.

In effect this meant that questionnaires went to all Ministers in the countries of study, including President George W. Bush, USA; Prime Minister John Howard, Australia; Prime Minister Göran Persson, Sweden; President Thabo Mbeki, South Africa and Prime Minister Thaksin Shinawatra, Thailand. The questionnaires were anonymous (with a voluntary ‘biographical details’ section), hence there is no record of whether President Bush and his colleagues in the other countries of study replied or not.

**Sub-study 3: ‘the practice’**

It is easy to make a promise but much harder to keep it. This holds particularly true for FOI legislation, as this project will show. No matter what the law promises in theory, the real test is what it delivers in practice. The objective of the ‘the practice’ sub-study was to track freedom of information requests to answer the research question: **In practice, does FOI supply journalists (and media organisations) with independent access to government-held information?**

In ‘the practice’ study three journalists in each country were recruited and each was asked to submit one FOI request to a relevant federal/national
government department. The processing of the requests was tracked via the ‘paper trail’ generated by the contacts between the journalist and the department. When the request was granted or refused an evaluation of the process was done. The method used was a combination of selective observation and semi-structured interviews.

Observational research can take a variety of forms. Angrosino and Perez trace this type of research to the early studies of societal systems by anthropological ethnographers in the late 19th and early 20th century. The ‘classic’ definition of observational research lists three main variations:

- ‘The complete participant’. This method called for the researcher to immerse him/herself and take full part in a social setting. The researcher would take field notes of the experience and would later analyse the notes. Agrosino and Perez point out that this method was from the outset considered ‘a highly subjective stance whose scientific validity was suspect (2003: 113).’

- ‘The participant-as-observer’. In this observational variation the researcher still participates, but attempts to be more withdrawn from the social setting he/she is observing. This shares the same validity problems as the first strand (ibid).

- ‘The observer-as-participant’. The researcher is further removed and only engages with the social setting when he/she has to (ibid).
‘The complete observer’. This is a theoretical construct. In this model the researcher is totally removed from the social setting and does not interact in any way with those that he/she observes, not even if they try to engage. This has its own validity problems since someone who does not interact even when invited will influence the course of events by not behaving as the group observed would expect (ibid).

Agrosino and Perez describe the methodological compromise reached thus:

Because of the difficulty of maintaining the purity of such a stance and because such research was sometimes conducted without the informed consent of the observed (an ethical lapse that is no longer tolerated by responsible social researchers), the observer-as-participant role was considered an acceptable compromise (ibid).

This allowed the researcher to interact in a ‘casual and nondirective way’ with subjects (ibid). In present observation research, participation is considered less of a validity problem, as long as there is a well thought through research design (ibid: 114). Agrosino and Perez further list a number of principles, where the third one in particular applies to the collaborative nature of ‘the practice’.

Interaction is always a tentative process that involves the continuous testing by all participants of the conceptions they have of the roles of others. In other words, ethnographers and their collaborators do not step into fixed and fully defined positions, rather, their behaviours and expectations of each other are part of a dynamic process that continues to grow (this authors emphasis, ibid: 124).

The observational method used in ‘the practice’ study is called ‘selective observation’. This is the most systematic of the observational methods. Using this method the researcher ‘concentrates on the attributes of
different types of activities (eg. apart from the obvious differences in content, what makes instructing a class in language arts different from instructing a class in social studies) (Angrosino and Perez, 2003: 114).’ In ‘the practice’ the process of both the submission and the handling of a FOI request is observed. The observation is done by maintaining contact with the reporters selected to make the FOI requests during the period when the request is being processed by the department receiving it. Another important source of data for the observation part of the study was the ‘paper trail’, that is, the reporters’ correspondence with the department via mail, e-mail and phone conversations. In effect the real subject of this sub-study is the federal/national department receiving the request. Because of the different political systems in the countries of study it was decided that the point of comparison should be the overarching federal/national FOI regimes. Sweden, for instance, has a single FOI system that applies to all levels of government, while Australia has a federal act as well as individual state (and territory) acts, each of which differ slightly. For the purpose of this study only the federal/national acts were examined.

The other data collection method used in ‘the practice’ was ‘semi-structured’ interviewing. There are two main strands of scientific interviewing: ‘structured’ and ‘un-structured’ (Fontana and Frey, 2003: 68-85). Structured interviewing is used mostly in quantitative studies where the interviewer does not engage with the interviewee (ibid). Unstructured interviewing poses an open-ended question that requires the interviewer to engage to ask follow-up questions to clarify answers. The model used in the evaluation template for ‘the practice’ utilises both. The basis of the evaluation template (further described
below) is highly structured with closed reply options. This is to generate data that can be used to calculate the index. The aim is to replicate the interview with each interviewee. However, all questions in the evaluation template are followed by a set of open-ended probing questions in order to deepen the understanding of the process identified in the initial closed reply.

The first step was to decide suitable parameters against which the different FOI regimes should be evaluated. As pointed out in chapter two, there are a few aims shared by all existing FOI regimes. They are:

- Allow individual citizens access to government held information on their person. This is often referred to as first party access and is seldom a controversial issue. It allows for corrections of faulty personal records.

- Increase transparency in the governing and bureaucratic processes to prevent corruption and maladministration.

- Increase citizens participation in the political process via independent access to quality information (for further details see chapter two)

In these seemingly simple aims are embedded a plethora of very complex and detailed problems and conflicts which can impact positively or negatively on the final result, for example costs, turn-around times, appeal options, interpretation of legislation, public servants’ and politicians’ attitudes towards FOI, etc. To cover these variables an evaluation template consisting of
a number of questions was designed (appendix 1). The data captured (the answers to the questions) is qualitative in nature and in order for it to be able to be converted into a format suited to the FOI index it would need to be ‘translated’ into a numerical equivalent. The answer was to design the reply options based on the Likert Scale method (Anderson, 1990: 334). Each question has five reply alternatives. Alternative ‘a’ is always the most positive outcome from the ‘public access to information’ perspective and ‘e’ is always the most negative. This allows for a number of coding alternatives that will be further explored in chapter four. The questions posed in all sub-studies were as similar as possible allowing for both triangulation of data and method (Yin, 2003: 98-99). This is one of the most important traits in constructing an index: ‘Each part of the construct [the index] should be measured with at least one indicator. Of course, it is better to measure the parts of a construct with several indicators (Neuman, 2000: 177).’ Yin points out that a key issue for data triangulation is that there is a ‘convergence of evidence’, – that is – all data collected is analysed and interpreted towards the SAME set of research questions (2003: 100-01) This is done in terms of all studies addressing the overall research question via their sub-questions and the fact that the evaluation template, the analytical instrument, for each study is build on the same base set of evaluation parameters.

The next issue was who would lodge the FOI requests. At the outset it was considered that the researcher would lodge the requests. The problem with this is that the receiving government agencies would know that the request was

[7] Appendix one shows the final Australian version. The questions remained the same for each country, but reply alternatives such as processing costs etc. were customised for each country.
part of a study. This increased the risk of the agencies treating the request in a
non-typical fashion. The solution to this problem was to recruit three journalists
in each country as collaborators. Using reporters for the study killed two birds
with one stone: firstly, journalists, from time to time, use FOI as a tool to
scrutinise power (as defined in chapter two), secondly, this connects well with
one of the theoretical pillars of the project, political accountability. The number
of journalists needed for the study was considered at length. At one point a
quantitative design was considered, however, recruiting a statistically viable
number of journalists for the study was in the end considered unrealistic.

Sampling issues

After it was decided that triangulation was to play an important
methodological role, three case studies8 per country were deemed to be an
adequate number to cross reference data and to feed data into the index. The
next issue was how to find and recruit the journalists. As in the spin sub-study,
‘purposive sampling’ (described above) was used. In several of the countries of
study only journalists undertaking investigative projects make use of FOI as a
tool to obtain information, hence the sampling had to be ‘purposive’.

The International Consortium of Investigative Journalists, ICIJ, is the
international arm of the American based, non-profit, non-partisan organisation,
Centre for Public Integrity, CFPI. Through quality journalism the centre aspires
to ‘serve as an honest broker for information – and to inspire a better-informed

8 It could be argued the study design could also be described as ONE case study providing particular
access to information across several national contexts. After some deliberation it was decided that the
triangulation method was a more precise definition and provided a stronger case for generating data that
could feed into the index. However, it is relevant to note that as with most studies of some breadth and
depth, the method combines several research techniques.
citizenry to demand a higher level of accountability from its government and elected leaders (CFPI, 2005).’ The ICIJ has 92 members from 48 countries, all leading investigative reporters and editors. The ICIJ member biography list (CFPI, 2003) was picked as a method of identifying at least the first of the three journalists from each country of study. The initial thought was that the ICIJ list would guarantee the quality of the journalists recruited, however as we shall see in the data analysis chapters, ICIJ membership did not always guarantee an interest in and commitment to FOI.

FOI topics
In line with the 'observational method' described above, the role of the researcher in this project was as facilitator, coordinator, observer and interviewer. I endeavoured to make this as clear as possible to the journalists recruited to the project. One of the most important tasks was to make sure that the topics chosen for the FOI requests were as similar as possible to make for a true comparison between the countries of study. The journalists had to pick one topic each from the three available:


2. A list of all weapons and munitions trade (import and/or export) or other relevant topic related to the defence force.

3. Refugee issues, such as: deaths/suicides in detention, number of entry refusals at border, etc.
The topics were intentionally kept quite general to allow for them to be adapted to suit the individual journalist and country. Although generating information for the reporter that could be used in a story was not an aim in itself, this was a very useful drawcard when recruiting journalists to the study. It was also necessary to allow for some variations between countries to draw up FOI requests that had a real chance of generating information. For instance: Australia has mandatory detention for refugees so one Australian journalist framed a request for reports on suicides and self harm in custody. Sweden does not have mandatory detention, but there are issues arising out of the common refugee policy formulated by the European Union. The Swedish request was based on these issues.

**Ethical considerations**

The research design was submitted to Murdoch University’s Human Research Ethics Committee for approval. The committee gave a positive response to two of the studies but raised several issues regarding ‘the practice’ sub-study. The main concern was the apparently ‘covert’ element arising from the fact that government agencies would not be informed that the request in question was not only from a journalist and media organisation, but was also part of a scientific study. The discussion that followed between the researcher and the committee was at times slightly frustrating, but in retrospect very useful in clarifying why the agencies could not know they were part of a study. As noted above identification of the researcher might corrupt the data by leading any agency that knew it was being evaluated to treat the FOI request in a non-
This point was made in a number of letters to the committee that in the end gave approval to the study.

**Conclusion**

This chapter has outlined and described the methodologies used in the project. In a proposed multinational survey of FOI it will use a combination of ‘selective observation’, ‘semi-structured interviewing’, ‘survey study’ and ‘analysis of records’. It has established that the study will generate qualitative data. The sub-studies can be summarised thus:

- ‘The promise’ will evaluate and analyse the aims and objectives of the FOI **legislations** in each country of study.

- ‘The spin’ will capture the attitudes of the **administrators** of FOI.

- ‘The practice’ will track the **use** of FOI via real-life requests.

The chapter discussed the ethical considerations of the ‘covert’ part of ‘the practice’ study and identified this sub-study as the core of the project. The chapter also described the theoretical foundations of constructing indexes. Triangulation (several points of data collection and observation) was identified as one of the most important traits of a reliable and valid index.

The rationale for presenting the data as a Freedom of Information Index was explained and a number of socio-economic indexes were described and analysed. What sets this project apart from the analysed indexes is that ‘the practice’ study generates data independently of the stakeholders of Freedom of Information.
The draft research-design is now ready and it is time to trial it. This process is described in chapter four.
Chapter Four: Piloting the research design

Introduction

When the first draft of the sub-studies was finished the opportunity arose to pilot the methodology during a six-month stay in Sweden. The aims during the stay were to trial and finalise all three sub-studies and then to collect the Swedish data. This chapter will describe this process, the outcomes and what conclusions were drawn.

Reliability and Validity

A lot of thought and effort goes into designing research instruments. When the draft is done, all you want to do is implement them. But as Oppenheim points out much time and effort can be saved by pilot work:

Pilot work may be costly, but it will actually save time and money in the end. Studies which have been inadequately piloted or not piloted at all, will find that a great deal of effort has been wasted on unintelligible questions, producing unquantifiable responses and uninterpretable results. Moreover, dozens of administrative matters concerned with sampling and fieldwork that ‘could not possibly go wrong’, will go wrong (1999: 64).

Neuman concurs, observing that ‘reliability can be improved by using a pre-test or pilot a version of a measure first (2000: 166)’. He argues that pilot work can also strengthen the validity of the study. Validity is a tricky concept, that according to Neuman ‘is an overused term (2000: 167).’ By this he means that validity at times is understood to mean only ‘true’ or ‘correct’. There are many types of validity. This chapter is concerned with measurement validity. Neuman defines and discusses measurement validity thus:

At its core, measurement validity refers to how well the conceptual and operational definitions mesh with each other. The better the fit, the greater measurement validity. Validity is more difficult to achieve than reliability. We cannot have absolute confidence about validity, but some measures are more valid than others.
The reason we can never achieve absolute validity is that constructs are abstract ideas, whereas indicators refer to concrete observation. This is the gap between our mental pictures about the world and the specific things we do at particular times and places (ibid).

In other words: do the research instruments generate data that is relevant to answering the research questions? Do the instruments work as a bridge between the construct and the data?

**Piloting ‘the promise’**

Trialing ‘the promise’ sub-study in Sweden was an interesting exercise in that the Swedish FOI legislation is arguably the hardest one to grasp. The reason for this is that it extends through three different Acts (further described in chapters two and six). ‘The promise’ was a fairly straightforward sub-study, largely because it does not involve other human participants and collaborators.

No major issues surfaced during the pilot of the evaluation template and the draft was finalised and the data captured. The only real potential challenge that emerged concerned finding the aims and objectives of the FOI regime. In the Swedish case the pre-legislation work and committee reports had to be located. If this were to be the case in the other countries of study, finding the data might take some time.

**Piloting ‘the spin’**

The main issue for the ‘the spin’ was defining the sample group and its size. The survey population would include all public servants and political appointments in the 11 Swedish ministries/departments on the national level. As pointed out in chapter three the total survey population was 4066. Using the ‘judgemental or purposive’ sampling method described in chapter three the
following positions in each department were included in the sample group: the
Minister, the Deputy Minister (if there was no deputy, the chief political advisor),
the public servant head of department and the chief information officer. In other
words, the two top political and public servant appointments from each
department (67 respondents in total).

Questionnaire feedback

‘The spin’ questionnaire was trialed on 15 public servants and
politicians based at a regional agency responsible for implementing and
overseeing national government policy. There were no major issues with the
questions as such; however an overall interpretation issue surfaced. I could tell
from the responses that some of the respondents were somewhat confused as
to whether the questionnaire sought their professional attitudes and opinions on
FOI or their personal opinions. In a debriefing meeting with the head public
servant this was discussed at length. After the meeting the cover letter of the
questionnaire was changed to its final form where it is made clear that ‘if your
opinion does not correspond with the current FOI rules and regulations – let
your opinion be the answer’ (appendix 2). The rationale for this was that there is
considerable room for interpretation in all FOI laws. The opinions and attitudes
towards FOI held by individual public servants and politicians will inevitably
influence their interpretation of how to implement FOI in practice. Several
questions were also amended to more clearly reflect this data capture aim. In
retrospect, this feedback was the single most important result of the pilot work
and led to significantly increased reliability in ‘the spin’ research instrument, illustrating the importance of pilot work.\(^9\)

**Distribution process**

The survey was sent by ordinary mail to the Swedish respondents and within two weeks 21 responses had been received, bringing the response rate to 31%, a good response rate considering that this was a qualitative study.\(^{10}\)

The general quality of replies was very satisfying. No complaints or comments were received as to whether questions were unclear or hard to answer. After two weeks I e-mailed a reminder to those respondents whose direct e-mail I could obtain. The e-mail included an electronic version of the survey. This had no effect, no electronic reply was received and no further snail-mail responses were triggered by the e-mail reminder. Because of the high public profile of half of the sample group (national Ministers), it proved very difficult to obtain direct e-mail addresses. An e-mail was sent to the Prime Minister’s Information Department asking whether they could forward e-mails to the Ministers, there was no confirmation that this was done. Four Ministers and chief political advisors replied that they do not reply to surveys as a policy. A reply was sent asking for an exception from the policy since this was an international

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\(^9\) The Swedish questionnaire was translated into Swedish. The rationale was that although Swedes in general have good command of English, it is not the official language. As the author is a native Swedish speaker it was seen as an opportunity to encourage more responses. As the other countries, apart from Thailand, use English as one of their official languages, it was not deemed that the translation of the Swedish questionnaire unfairly favoured Sweden in terms of the response rate. As we shall see in the Thai study the English language questionnaire did not seem to work to its disadvantage judging from the response rate. The translation methodology drew from experiences in an earlier similar study. Great care was taken to ensure that the Swedish translation of the questionnaire conveyed the same meaning as the English original (Lidberg, 2003: 46-47).

\(^{10}\) Since ‘the spin’ is not a statistical quantitative study as such, the response rate has no bearing on the end result. Rather, it is argued that each reply is a ‘case’ in itself with the attitudes held by the respondent having an impact on the FOI policies in his/her department. However, on initial evaluation of the responses, the question arose whether the response rate could be an indication as to how important the respondents found FOI issues. In effect, did they find FOI important enough to reply? The response rate will be further discussed in chapter eleven.
comparative study with very clear bearing on fundamental democratic issues. There were no further replies from the Ministers concerned.

‘The spin’: conclusions

The aims of ‘the spin’ survey in Sweden were achieved. The e-mail reminder did not trigger any further responses, suggesting that ordinary mail seems be the preferred distribution method. Based on the quality of replies, ‘the spin’ instrument could be regarded as workable and ready to implement in the other countries of study.

Piloting ‘the practice’

Because of the time needed to recruit journalists and lodge the FOI requests, it was believed that ‘the practice’ sub-study would take longest to trial and implement. Therefore it was a pleasant surprise that the Swedish recruitment process was quite quick.

Recruitment of journalists

From the outset of the project considerable time was spent discussing the recruitment process of the journalist collaborators needed for ‘the practice’ sub-study. The initial contact was most likely to be via e-mail. However, it was hypothesised that it would be essential to build trust between the researcher and the collaborators for ‘the practice’ to work well. At the trial stage, variations of this process were tested and some very interesting observations were made, discussed in the conclusion of this chapter.

The first step was to contact the Swedish member of the International Consortium of Investigative Journalists, ICIJ to discuss a list of other Swedish
journalists to contact (the rationale for using the ICIJ as a starting point is discussed in chapter three). The initial contact was via e-mail. The journalist responded within a day and a meeting was setup in Stockholm, the capital of Sweden, where his publication is based. The journalist embraced the study, describing it as worthwhile. Together we drew up a list of in all six possible names. After some discussion we decided that it was preferable to try to recruit journalists who were currently assigned reporter duties rather than editors. This excluded him, as he had been working for the last two years as a news editor. At the outset the criteria for reporters to qualify for the study was quite ambitious:

- One each from the print, radio and television media
- Minimum one female
- Minimum five years experience with investigative projects

The rationale for the first criterion was to cover all media formats. It could be argued that a journalist is someone who seeks, evaluates and compiles information, regardless of the media outlet. Nonetheless it was considered worthwhile to attempt to achieve a spread to include the slightly different journalistic methods used in the various media formats. Another reason to include all three media formats was that at least one reporter should be recruited from a public broadcasting organisation, such as the Swedish Broadcasting Corporation, to cover both commercial and public service media. The second criterion was to as far as possible reflect the gender spread in the industry. The number of female journalists is rapidly growing and it would be an
unfair representation not to include females in the sub-study. The rationale for the last criterion was to ensure the quality of the FOI applications. It was argued that if the recruited reporter was experienced in investigative work, it was likely he/she had lodged FOI applications before. However, as we shall see later in the data presentation chapters (six to ten), it became more important for the quality of the sub-study that the reporters were passionate about FOI issues rather than experienced in investigative journalism.

The first two invitations were e-mailed the day after the initial meeting and got an immediate positive response. The Swedish print and TV journalists were recruited within three days from the first e-mail. The radio reporter caused some grief. The first person approached was not available as he was stationed in New York for the next two years. The second declined as he was not presently an active investigative journalist. The third attempt paid off and also generated the female reporter the study required. The whole recruitment process took two weeks. In retrospect it was very quick compared to what was to come in the other countries of study.

Initially the intention was to meet all three reporters in face-to-face meetings. This was considered important for the trust-building process between researcher and collaborator. As it turned out only the print and TV reporter participated in face-to-face meetings (the print reporter will from now on be referred to as reporter A, the TV journalist, Reporter B and the radio journalist, reporter C). The reason for this was at the time mainly logistical. Reporters A and B were based in Stockholm while reporter C was based on the other side of the country, in Gothenburg. After some consideration it was deemed a good test.
and point of comparison to manage Reporter C remotely to see whether this had any impact on the study. There were in all two face-to-face meetings with A and B. In the initial meeting the sub-study was explained, the researcher’s role outlined and discussed, and the FOI topics assigned. The second meeting was the evaluation interview. With Reporter C this was done via e-mail and phone conversations. There were also a number of e-mail contacts with A and B before the lodgement of the requests.

The conclusions reached from the recruitment and management process of the Swedish practice sub-study were that the process was fairly quick and easy and that all reporters contacted and invited responded quickly and positively. It was also clear that there was little difference in managing the sub-study remotely via e-mail and phone compared to face-to-face meetings. The only difference noted was that reporters A and B were faster in lodging their FOI requests. The most important face-to-face meeting was the one with the Swedish ICIJ member which proved to be an excellent way to access the Swedish investigative reporter community. This suggested that the ICIJ method of recruiting could be fruitful in the other countries of study as well.

**Feedback on ‘the practice’ evaluation template**

The draft template was reviewed by the Swedish ICIJ member who suggested some minor changes. It was more a matter of clarifying some questions rather than matters of substance. The recruited Swedish reporters were also asked to provide feedback on the template before the evaluation interview. They had no comments. Lastly the draft template was reviewed by a
fellow Swedish journalism academic. She provided some feedback, but in essence the draft became the final version.

**Evaluation interviews**

The Swedish evaluation interviews confirmed that the combination of closed reply options followed by a number of probing questions worked well in capturing relevant information. They showed that there was significant data and information to be gained by the follow up questions, hence the recording of the interviews was crucial. From a data point of view there was no difference between doing the interview via phone, as was the case with Reporter C, or face-to-face as with Reporters A and B. However, from a management and feedback point of view, it was much nicer and more trust-building for future collaborations to have the face-to-face meetings. Still, the important point confirmed was that it was possible to run the sub-study remotely.

**‘The practice’: conclusions**

The aims for ‘the practice’ sub-study had been achieved: feedback on the draft and finalising of the sub-study, trial of the recruitment process and implementation and data collection. The positive experience collaborating with the Swedish ICIJ member indicated that this recruitment avenue to find the reporters for ‘the practice’ was very promising. It was a relief to find that there was no difference in the quality of the data captured whether the reporters were managed via face-to-face meetings or via e-mail and phone. It was very likely that the reporters recruited in the other countries of study would have to be managed remotely because of budget and time constraints limiting the capacity for on the ground field work.
The Index

To finish off the trial of the three sub-studies a first coding of the data was done. This initial coding used a scale that ranged from –2 to +2 (‘a’ responses received +2 and ‘e’ responses –2, please see appendix 1, 2 and 3 to view the research instruments). The coding seemed to work well, but it needed points of comparison from the other countries of study before the final coding method could be determined. In this first attempt at calculating an index rank for Sweden the index scale ranged from 0-15 to accommodate all three sub-studies. Incremental scales based on the max score for each sub-study were then constructed. For example: using the –2 to +2 coding the max score for ‘the promise’ was 32. This gave a points scale of: 0-5:

0: 0-5
1: 6-10
2: 11-15
3: 16-20
4: 21-25
5: 26-32

Sweden scored 29 in the promise, hence got the scale score 5 for ‘the promise’. The other studies were coded and translated the same way. This calculation method showed that a final index score could be calculated and Sweden ended up getting 11.8 out of 15. However, the method had number of in-built problems. One was that translating the total score for a study into an incremental score increased the margin for error (as illustrated by the above scale where the increments are not consistent). The 0-15 index scale was not satisfactory. The calculation method went through another six drafts before
settling on the final version with an index scale presenting the score in percentage form. This calculation method and presentation is much more exact and is described in detail in chapter eleven.

**Conclusion**

This chapter has described the pilot run of the sub-studies. The aims of the pilot were to generate feedback on the drafts of the sub-studies via trials, finalise the sub-study instruments and capture the Swedish data for the project. All aims were achieved, including the creation of a first rudimentary model of calculating the FOI Index. This model showed that it was possible to calculate an index score, but the method needed improvement.

The single most important change generated by feedback to the pilot was the amendments to ‘the spin’ survey. These made the questionnaire much clearer and resulted in the capturing of high quality data.

The pilot further showed that using an ICIJ member as a starting point for recruiting the journalists for ‘the practice’ provided a valuable introduction into a country’s investigative journalist community.

The fact that remote management did not impact on the quality of the data collected was also reassuring. There would be no opportunity for face-to-face meetings between myself and the recruited journalists in the other countries of study.

Overall, the pilot of the sub-studies provided invaluable feedback and experiences for the rest of the project. All three sub-studies were now finalised and could be implemented in the other countries of study.
This chapter concludes part I of this thesis. Part II will present the data for each country leading up to the final description and calculation of the International Freedom of Information Index.
Part II Data Presentation, Analysis and the FOI Index

In this section chapters six to ten present the data collected in each country of study. The chapters follow a similar format, starting with the political profile of the country, followed by an overview of the evolution of its FOI, and finally the presentation and analysis of the data.

The countries in this study represent variants of the political system defined as representative liberal democracy. There are consequently some features common to all and to avoid needless repetition in subsequent chapters these commonalities will be dealt with in chapter five.
Chapter Five: Overview of political systems

Introduction

The types of political systems which exist in the countries of study do influence the FOI legislation and how it is interpreted. For example: Australia’s federal system means that the federal FOI Act applies only to federal departments and agencies. State-based agencies fall under the various state FOI Acts. So, an FOI user needs to know whether the information he/she seeks falls under the state or federal jurisdiction in order to ascertain which Act will apply. By way of contrast, Sweden’s political system consists of a national
parliament and local governments; hence its FOI regime applies to all levels of government.

**Comparative politics**

Comparative politics as a research area has a long history, but there was a resurgence of interest in it after World War II when researchers sought explanations for the last two major conflicts in Europe by analysing and comparing the different political systems (Lane and Ersson, 1999: 1-3). The number of studies in the field is substantial and the available literature quite formidable.

Comparative politics covers all existing political systems but since all countries in the present study can be categorised as representative liberal democracies we can confine ourselves to two systems characteristic of liberal democracy: the unitary system and the federal system.

The discipline of Comparative politics employs a large number of criteria when comparing different systems, such as economic system, judicial system, social welfare, party system, political participation etc (Needler, 1991: x-xiii). Again, not all these criteria are relevant to this project. The points of comparison used here will relate to two of the three branches of government: the legislative/decision-making structure and the political executive. These two have a direct influence on the structure and processes of FOI, whereas the third branch, the judiciary, has only indirect input into the initial implementation stage of FOI.
The Decision-making/legislative systems

The Unitary system

The great majority of contemporary nation-states employ unitary systems for their legislative/decision making structure. In a unitary system there are two major levels of government: the central/national and the regional/local. There are no states with individual legislatures as in federal systems. Because the legislative power in unitary systems rests with the national assembly, it is easy to jump to the conclusion that the regional/local political bodies are powerless. This is not true. Hague and Harrop define the typical roles of local government in a unitary system thus:

1. control over policy implementation
2. responsibility for the direct provision of public services such as health, education and welfare;
3. some revenue-raising power;
4. a local electoral mandate

Against this must be set the resources of the centre:

1. control over legislation, including the right to abolish or more realistically to modify local government;
2. provision of most local authority finance;
3. setting administrative standards for service provision;
4. popular expectations that the national government should solve problems

(1987: 176)

It should be pointed out that, as with most definitions of complex concepts, the above is a generalisation and most countries that follow the unitary system have adapted it to suit their individual circumstances. There are two broad sub groupings under the unitary system: the Westminster (or
majoritarian) type and the consensus type. Lipjhart (as cited in Lane and Ersson) has defined the two types as follows:

<table>
<thead>
<tr>
<th>Westminster type</th>
<th>Consensus type</th>
</tr>
</thead>
<tbody>
<tr>
<td>One party and bare-majority cabinets</td>
<td>Executive power-sharing</td>
</tr>
<tr>
<td>Fusion of power and cabinet dominance</td>
<td>Separation of powers, formal and informal</td>
</tr>
<tr>
<td>Assymetric bicameralism</td>
<td>Balance bicameralism and territorial representation</td>
</tr>
<tr>
<td>Two-party system</td>
<td>Multi-party system</td>
</tr>
<tr>
<td>One-dimensional party system</td>
<td>Multi-dimensional party system</td>
</tr>
<tr>
<td>Plurality system of election</td>
<td>Proportional representation</td>
</tr>
<tr>
<td>Unitary and centralized territorial government</td>
<td>Territorial and non-territorial federalism and decentralization</td>
</tr>
<tr>
<td>Unwritten constitution and parliamentary sovereignty</td>
<td>Written constitution and minority veto</td>
</tr>
</tbody>
</table>

(Lane and Ersson, 1999: 158)

The Westminster system originated in the United Kingdom and this nation-state is still the clearest example of the system in practice. However, it is quite widespread both in its pure form and in variations. For example the Australian system uses a combination of the Westminster and the federal
systems (see chapter seven). Sweden is a very clear-cut example of a consensus-type unitary system (see chapter six).

**The Federal system**

The federal system has more levels of government than the unitary, most commonly three: the federal (central) government, the state/province/regional governments and the local governments. In theory the federal and state levels are supposed to have the same amount of decision-making power. Wheare (cited in Hague and Harrop) has defined the federal principle thus:

> The method of dividing powers so that the general and regional governments are each, within a sphere, coordinate [that is, equally important] and independent (Hague and Harrop, 1987: 170).

Hague and Harrop observe that this definition of federalism is a purist one and point out that ‘in all federal systems, one level of government (typically the central) tends to predominate; were this not so, stalemate would result (ibid).’ The local government level is much weaker in the federal system with many of the powers it has under the unitary system residing with the state governments under the federal model.

In a federal system a written constitution is essential in order to clarify how the decision-making powers will be divided up between the federal and state levels. Hague and Harrop define the federal and state tasks:

> The central government will be responsible for external relations – defence, foreign affairs and immigration – and for some common domestic functions such as the currency. Provincial governments will be given responsibility for other domestic policies such as education or housing (ibid).
Federal states have always been in the minority. At present there are about twenty (the number fluctuates since some evolving democracies are somewhat hard to define). On the other hand, some of the geographically largest and most economically influential states employ a federal system. As with the unitary system federalism has evolved into a number of variant forms. The United States represents one model. Another version of federalism is found in some former British colonies such as Australia, Canada and India. A number of Latin American countries adopted a version of the US system, the clearest and most enduring example being Brazil. There is also a European strand of federalism to be found in Austria, Germany and Switzerland (ibid p. 171-172). A more detailed description of the US system is given in chapter eight.

The Political Executive

Moving on from the legislative systems, the second point of comparison in this overview of political systems concerns the executive branch of government and how the executive power is organised. All political systems that meet the basic criteria for a working democracy (i.e. limited powers with respect to the citizenry and ‘whose leadership derives directly or indirectly from popular elections (Needler, 1991: 113)’), fall within two major types in relation to how they appoint and organise the political executive: parliamentary and presidential. The presidential model is typically connected to the federal system.

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11 There is a third system within the framework of liberal democracy and that is the confederate system. In this a number of sovereign nation-states form a federation to deal with matters of common interest. However, these federations lack their own decision-making power since each member nation needs to ratify each decision. (Rutger Lindahl, ed., Utlandska Politiska System (Lund, Sweden: Universitetsförlaget Dialogos, 1988) 14. The most prominent example is the European Union (EU). While the EU has in recent times been moving towards a federated Europe with a new common constitution, at the time of writing, the constitution has been rejected in referenda in both France and the Netherlands, bringing the process to a standstill.
and the parliamentary to the unitary system. The most important difference between the two models is that ‘in the parliamentary system the executive is elected by, or is otherwise responsible to, the legislature [ie. parliament], while in the presidential system the chief executive is elected independent of the legislature (ibid)’ and hence not responsible to the legislature.

The Parliamentary Executive

Most of the world’s nation-states operate politically within the framework of some kind of constitution or constitutional instrument or legislation that provides them with a more solid base than, for instance, common law on its own. The constitution sets out the ground rules for how the country’s political system is to operate, who has what powers, and how these powers are checked and balanced. Interestingly the United Kingdom, with one of the oldest parliamentary traditions in the world, has no written constitution; instead a form of constitutional practice has evolved over several hundred years. Needler defines the parliamentary system as one in which ‘[executive and legislative] powers are fused (1991: 116).’ The logic is that, ‘the party or coalition of parties that controls a majority of seats in the assembly forms government and introduces the great bulk of legislative projects. If any significant legislative initiatives are defeated by the assembly, this signifies that the heretofore dominant party or coalition has lost its majority and should therefore be replaced (ibid).

Hence, there is a very clear connection between the chief executive and the legislative assembly in the parliamentary model.

The Presidential Executive

If the fusion of powers is the defining property for the parliamentary system, the opposite is true for the presidential model; here separation of
powers is the most important property. The political powers are divided between
the legislature, the executive and the judicial branch of government. The
rationale behind this model is that there is some ‘jealous hostility or at least
rivalry…between executive and legislature, so that each will act to prevent any
abuse of power by the other (ibid.’ In this model the president is elected by
popular vote separately from the members of the legislature. In practice this
means that if the legislation prepared by his cabinet and put before the
legislature is turned down, the president will serve his/her term out in any case.
The only a way a president can be removed is by losing the following election or
if he/she has engaged in criminal behaviour. In the latter case the legislature
then typically has the option to censure the president. One of the most famous
examples concerns former US president Richard M. Nixon who decided to step
down from the US presidency in the wake of the Watergate affair just as the
Congress was preparing to move an impeachment that was very likely to

The Parliamentary/Presidential Hybrid

There is a hybrid version that combines the parliamentary and
presidential models. However, this hybrid is quite rare. Only a handful of
countries have tried it and a number of them have abandoned it. The most
famous example was the German Weimar republic (1919-1933) that ended with
Adolf Hitler gaining power in the lead up to the World War II. France and
Finland are two current examples of the parliamentary/presidential hybrid. The
most serious problem with the model is the inbuilt conflict that can be triggered
when the head of the executive, the president, and the head of cabinet, usually
a Prime Minister, are elected on different mandates. This is what brought down the Weimar Republic and almost caused the downfall of the French Fifth Republic (Needler, 1991: 127-30).

**The Political Systems Model**

The counties of study in this project are: Australia, Sweden, the US, South Africa and Thailand. A more detailed and individual political profile of each country will be given in the data presentation chapters six to ten. However, it may be useful to situate the countries in a model using the above points of comparisons as measures. Figure 1 provides an overview.

*Figure 1 Overview Political systems*
Figure 1 clearly illustrates that the countries of study in this project cover three of the four theoretically possible combinations.

Conclusion

When reviewing the literature on comparative politics for this chapter one recurring theme related to the problem of auditing the political system. Most writers commented on the difficulties this posed, cogently summarised by Needler:

It seems hardly exaggerated to say that in the general panorama of democratic societies, what have been called the auditing and control functions are not performed with the appropriate vigour, or performed at all, so that abuses of power by government are quite common. Thus the first objective of any institutional reform should be the devising of mechanisms and the structuring of incentives so that the auditing functions are not neutralized by political influences, bartered away for reasons of career advancement, or allowed to wither because of bureaucratic inertia (1991: 118-19).

Lindahl takes this a step further when he points out that when comparing different political systems you need to go beyond the formal structures and also evaluate the general level of knowledge among citizens of the how the political system works. Even more important from the viewpoint of this project, Lindahl also points out that the access to knowledge and information is vital for a well functioning political system. Lindahl refers to several studies done in liberal democracies that indicate that the general level of knowledge about the political system is low and that there is a feeling of ‘alienation’ between the citizens and the representatives of the system (1988: 24-25).

Needler’s and Lindahl’s observations together provide another strong argument for a well functioning FOI regime which can indirectly fulfil an ‘auditing
function’ (as discussed in chapter one) and give access to the information needed to increase political knowledge among the public. It could also be argued that the media in its fourth estate role can be viewed as an independent auditor of how the political system is run.

Having situated the countries of study in the political landscape it is now time to present and analyse the data captured by this project.
Chapter Six: Sweden

Introduction

This is the first of a series of chapters which will present and analyse the data captured to evaluate the different FOI regimes. It therefore may be worth recapitulating here the main aims of this project.

The overarching research question is: to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study? This question is examined via three sub-studies focusing in turn on the FOI legislation (‘the promise’), the administration of FOI (‘the spin’) and the use of the system (‘the practice’). The qualitative data will subsequently be translated into a quantitative representation of the scores for each sub-study, for inclusion eventually into the FOI Index in chapter eleven.

Sweden will be dealt with first and we will begin by setting the country into its political context.

Political Profile

In situating Sweden politically, it may be useful to recall figure 1 from the previous chapter:
Sweden is a constitutional monarchy where the head of state is the current king or queen. As in most liberal democracies, the royal head of state has no real political power. At the national level Sweden has a uni-cameral assembly which operates in a similar fashion to those of other liberal democratic systems. However, as Lane and Ersson note, what makes Sweden stand out ‘is a high degree of institutional autonomy underlining power dispersal to various levels of government’ as opposed to the Westminster model that has ‘a low degree of institutional autonomy, emphasizing the sovereignty of parliament (1999: 189).’
Sweden has a unitary system with an executive appointed by parliament. The current Prime Minister is Göran Persson. His party, Socialdemokraterna (the Socialdemocrats), was the dominant party in Sweden for much of the 20th century. Its constituency has now shrunk to about 30 per cent, which puts it on a par with the largest conservative party, Moderata Samlingspartiet. Sweden has a multiparty system and Persson has headed a left/green coalition during the last two terms. The two coalition partners are Miljöpartiet (the Greens) and the reformed communist party, Vänsterpartiet.

The Swedish system is well-known for its unitary nature and what Lane and Ersson have termed ‘its ideology of local government (1999: 180)’. The extent and depth of this ideology is well illustrated by the fact that local governments in Sweden have the right to levy taxes to handle their affairs and services. The lion’s share of tax paid by Swedish citizens goes to the local government where they reside. This does not mean that the national government has a totally hands off approach to local government. As Lane and Ersson note, ‘Local governments are provided with autonomy as a matter of principle, but the discretion of these bodies is restricted by national government directives, financial initiatives as well as legal rulings restricting degrees of freedom in local government autonomy (ibid).’

While Swedish local government has great economic independence from its national counterpart, the local government assemblies have very limited legislative powers. They have the right to enact some local statutes such as regulating traffic, but the law is largely made by the national assembly and applies to all levels of the system. The relevance of this for the Swedish FOI
The local government system has gone through a number of reforms. These are well summarised by Lane and Ersson:

During the 1970s the local government system expanded at a rapid rate as both the municipalities and the county councils became more and more responsible for the provision of public services in the Swedish welfare state. To strengthen the capacity of the municipalities to engage in service production comprehensive amalgamation was resorted to first in 1952 and then in 1969 and 1974. The reduction in the number of municipalities was quite substantial, from roughly 2000 to about 285. These reforms and the concomitant expansion of the activities of the various local governments resulted in local government units being transformed into large-scale formal organisations with heavy bureaucracies, big budgets and a large number of employees (1999: 181).

There are at present 23 county councils handling the large costs and complex nature of running the public health system. The importance of these councils grew in parallel to the emergence of increased independence of the municipalities.

To sum up: Sweden has two major levels of government (national and local government), employs a multiparty system and gives great autonomy to local government that has the right to levy tax. Given the strong political powers of local government, it is often pointed out by Swedish journalists that the most relevant journalism to the readers/viewers/listeners is local investigative journalism described by the phrase: ‘dig where you stand’ (literally translated from Swedish).

**Evolution of FOI in Sweden**

The history and evolution of FOI in Sweden was comprehensively covered in chapter two. However, a few points under this heading require closer
examination here. Because the first FOI-related legislation was enacted in 1766 in Sweden it is easy to jump to the conclusion that the media in general and individual journalists in particular have been using FOI to acquire government-held information for hundreds of years. This is not the case. As shown in earlier research by this author it was not until the 1960s that journalists started using FOI in a more systematic way as a tool for political accountability. It was at that time that each government agency had to be ‘broken in’, ie. made aware of and educated in the workings of FOI (Lidberg, 2003: 57-69). Quite often part of the ‘breaking in’ process of an agency included taking appeals to the administrative courts when FOI applications were refused.

Like all liberal democracies, Sweden has been affected by the increased secrecy of governments in the wake of the ‘war on terror’. As pointed out in chapter two the tool at the government’s disposal to control the flow of information is the Secrecy Act. This Act can be changed by the government of the day, and weakens the strong constitutional standing of the Swedish FOI laws. The Swedish Union of Journalists, SJF, is very active in monitoring the health of the FOI regime and in the most recent report points out that between 1992-2002, 74 out of 194 changes to the Secrecy Act increased secrecy, while only two increased openness (SJF, 2003: 2). The report will be discussed further below in the presentation of the ‘the practice’ sub-study.

Interestingly in the last five years a debate has emerged in Sweden with some FOI observers questioning if the far-reaching access regime may in fact be counterproductive. Their reasoning is that public servants and politicians are aware that as soon as a document is archived in their department, in the vast
majority of cases it is covered by the FOI system and can be acquired by the public. This, they reason, has made civil servants more reluctant to document for instance, the policy-making process and hence has decreased overall transparency. They cite the example of the European Commission in 2002. Concerns emerged that the Commission had engaged in both illegal and highly unethical behaviour. An inquiry was ordered and the veil of secrecy of the Commission was lifted. The inquiry found it easy to document the maladministration using the comprehensive documentation and its report forced the members of the Commission to resign. However, this level of documentation is not currently available in the Swedish system because of the reasons stated above. So, the far-reaching Swedish FOI system has the paradoxical effect of producing less documentation and hence fewer accountability options (Lindell, 2003: 12-14). It should be pointed out that these views are held only by a minority of Swedish FOI observers and that they are regarded as quite controversial.

One overarching problem with tracking the operations of the Swedish FOI system is that no formalised reporting or auditing system exists. In the other countries in the present study each government agency covered by FOI and/or the attorney general’s department is obliged to publish annual FOI reports stating how many requests were made, how many were granted or refused, etc. This provides a valuable tool for tracking the performance of FOI in practice. The only FOI statistics that exist in Sweden concern the number of FOI appeals taken to the administrative courts. This is not comprehensive and the
information would require a lot of work to collate compared to a formal FOI reporting system.

Data presentation and analysis

‘The promise’: Sweden

The research question for ‘the promise’ was: what are the aims of the Swedish FOI legislation and what does it promise to deliver in terms of information access?

To answer the research question a number of key parameters were identified. As pointed out in chapter three, where the overall methodology is described in detail, these parameters were formulated as questions and kept as similar as possible in all three sub-studies (‘the promise’ evaluation template can be viewed in full in appendix 3).

There are two parts to the evaluation template. Part one covers access to documents, part two maps protection of journalistic sources. As noted in chapter three considerable confusion exists around the general topic of ‘whistleblowing’. This study is concerned with the media whistleblower only and the level of protection, if any, the system offers to the whistleblower who decides to work with a journalist to make public his/her grievances. However, before the data is presented, the aims and objectives of the Swedish FOI regime need to be pinned down.

Aims and objectives of the legislation
The main legislative instrument for the Swedish FOI system can be found in the Constitution\textsuperscript{12}. The Swedish Constitution consists of four ‘Grundlagar’ (Fundamental laws). Three of these laws cover Freedom of Information: Regeringformen - ‘The Instrument of Government’ (IG), Tryckfrifhetsförordningen - ‘Freedom of Print and Publication’ (FPP) and Yttrandefrihetsgrundlagen - ‘Freedom of Speech’ (FS). The limitations and exceptions to FOI are regulated in the ‘Secrecy Act’ which is not a Fundamental law.

The basis for the Swedish FOI regime can be found in the first paragraph of the Instrument of Government (IG):

All public power in Sweden emanates from the people. The Swedish popular government is built on the right to freely form opinions and on the universal and equal right to the vote. This is guaranteed by a representative and parliamentary system and through the independence of local government (Sveriges Grundlagar Och Riksdagsordningen, 2003: Sec 1, 1§).

The IG has an inbuilt Bill of Rights that has this to say about freedom of speech and FOI:

freedom of speech: the freedom to verbally, in print or visually or in any other way express and share information and express thoughts, opinions and feelings

freedom of information: the freedom to access and receive information and to access the opinions of others (Sveriges Grundlagar och Riksdagsordningen, 2003: Sec 2, § 1).

\textsuperscript{12} The word Constitution is not used as such in Swedish, however the Fundamental laws effectively have the same function as a Constitution. So, for the purpose of this study, the Fundamental laws will be referred to as the Swedish Constitution. The Fundamental Laws have the same legal standing as a Constitution in that they can only be changed by two different sessions of parliament, separated by an election. All translations from the Swedish Constitution are done by the author.
The Bill of Rights also covers: the right to organise meetings, the right to demonstrate, and the right to practice any religion. The first paragraph ends by referring to FPP and FS for further details regarding freedom of publication and speech.

Section 2 of FPP covers access to government-held information. Paragraph 1 states: 'To promote free debate and diversity in knowledge and opinion, all Swedish citizens shall have the right to access public information (Sveriges Grundlagar Och Riksdagsordningen, 2003).’ The general rule is that all government-held information is to be regarded as public and hence accessible to anyone who requests it, including for instance foreign journalists. No departments or agencies are exempt, however some restrictions apply, for example in relation to national security, business confidentiality and protection of privacy for individuals.

This is all the FPP has to say about the Swedish FOI regime. One reason for this very sparse aims/objectives statement in the Acts could be that the first Swedish version of FOI was made part of the constitution in 1766 and that there has been ample time for traditions, precedents and interpretations to evolve. However, when combined with what is set out in the ‘bill of rights’ section above with the evaluation of the Act below the aims become clear: all government-held information should be public. Only in exceptional circumstances should government-held information not be released. This principle is underscored by the fact that no government agency or department is exempt from FOI, not even the intelligence organisations.
It is important to understand that FOI in Sweden covers much more than just access to documents and media whistleblower protection. The Swedish overarching name for its FOI system is 'Offentlighetsprincipen'. This translates literally as 'The Public Principle'. This principle permeates all levels of society. As Sefastsson puts it:

> Offentlighetsprincipen, does not give the agencies the right to choose to act in an open and transparent fashion. Instead, the right rests with the public who can choose whether they want access. The agencies have no choice (1999: 11) (this author’s translation)

The driving thought behind this is that openness and transparency will make public administration more effective and prevent corruption and misuse of power. To find the legislature’s aims and objectives that underpin the Swedish FOI system, one has to turn to the government ‘proposition’ (bill) that was introduced before the last revision of FOI:

> How public agencies and departments are run and managed are of concern for all citizens. Hence, in a society ruled by the people it is inevitable that agencies supply and release wide-ranging information about their operations…This means that public administration lies open for citizens and the media to access information whenever they want and independent of the information policies of the agencies (ibid, author’s translation and emphasis).

The importance of the explicit mention of ‘independent access’ and the inclusion of the reference to ‘the media’ cannot be emphasized enough. It is not unusual for references to freedom of opinion, expression, speech and even access to government-held information to be included in a nation’s constitution. However, Sweden is unique in including in its constitution two very comprehensive separate laws covering Freedom of Information and Speech and media whistleblower protection. The acts also explicitly outlaw censorship in any form and provide very strong protection for public servants who ‘leak’ and
'whistleblow' by providing information to the media. This right even extends to some information that is classified as secret by the Secrecy Act (Sveriges Grundlagar Och Riksdagsordningen, 2003: 47-49). However, the Secrecy Act has the potential to be used as a ‘backdoor escape’ for any government of the day that might want to restrict access. All that is needed to amend the Secrecy Act is a decision by the government.

In sum, Sweden advocates an open information system based on the principle that government information should be available to the public and only withheld in exceptional circumstances.

‘The promise’: score and summary of findings

As outlined in chapter three the five-point coding scale used to rate the replies in the ‘promise’ evaluation ranged from ‘a’ at the top end, representing legislation catering for a very high level of independent access to public information to ‘e’ at the bottom end describing legislation that is weak and never really intending to deliver independent access. The coding process is illustrated in the following example, using the first question in the Swedish ‘promise’ evaluation:

1) Does the Act stipulate a fee when lodging a FOI request?

   a) No  4
   b) SEK 50-100  3
   c) SEK 101-150  2
   d) SEK 151-200  1
   e) SEK 201-250  0

Notes: Hence the score for this question is 4.13

13 Because of the different currencies, the evaluation templates had to be altered slightly to fit each country of study. See appendix 1-3.
The maximum possible score for 'the promise' was 68, describing a very far-reaching FOI regime including to a full or partial extent the private sector and providing substantial legal protection of media whistleblowers (journalistic sources). The Swedish ‘promise’ score was 63 out of 68, indicating a very high legislative ambition.

The areas covered by the evaluation template included: cost, turnaround time, the appeal process and protection of sources. Table 1 shows a selection of key questions, scores and this author’s comments. The costs for using FOI has been converted back to A$.

Table 1 'the promise' Sweden

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part I Access to documents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) Does the Act allow the agencies to charge processing fees?</td>
<td>4 out of 4</td>
<td>Clear guidelines. The agency can charge only for copies of the information. The Ombudsman has ruled that no agency may charge for the retrieval, collation and processing of the information. The latest set fees for copies are: General rule: first nine photocopies free. A$10 for the 10th copy and 20 cents for all following copies. A$120 for video copy, A$25 for audio copy. If you bring your own photocopier the copying is free and there is effectively no processing fee. (Sveriges Grundlagar Och Riksdagsordningen, 2003: FPP Sec 2 ) and (Sefastsson, 1999: 34-45)</td>
</tr>
<tr>
<td>4) How long does the Act give the agency to make a decision</td>
<td>4/4</td>
<td>FPP stipulates that a request for copies of information should be</td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>--------</td>
<td></td>
</tr>
<tr>
<td>on the request?</td>
<td>handled ‘as soon as possible.’ A number of cases have over the last 40 years been considered by the Ombudsman and Administrative courts. The interpretation of ‘as soon as possible’ is that the public servant should do it immediately in the case of a limited request and within a day or two if it is a larger request. The request should have priority over other tasks at hand (ibid).</td>
<td></td>
</tr>
<tr>
<td>6) Does the Act require agencies to keep a running diary over current and archived documents?</td>
<td>4/4 Yes – and the diary is public and often the starting point in locating documents of interest (Sveriges Grundlagar och Riksdagsordningen, 2003: Sec 2).</td>
<td></td>
</tr>
<tr>
<td>8) Are any federal/national agencies exempt from the Act?</td>
<td>4/4 No agencies are exempt. Exempt matter is regulated by the Secrecy Act and mainly applies to matters of national security or information relating to other states, the nation’s central fiscal policies, agencies’ inspections, ongoing crime investigations and privacy of individuals (Bohlin, 2004: 97-146).</td>
<td></td>
</tr>
<tr>
<td>10) Does the Act allow for legal costs being covered by the state?</td>
<td>4/4 Yes, in most cases. It has become common practice that the appeals of FOI requests are viewed as a public interest matter and that legal costs should not stop the case from being heard (Domstolsverket, 2005).</td>
<td></td>
</tr>
<tr>
<td>11) Is the FOI Act(s) part of the constitution?</td>
<td>4/4 Yes. The Act(s) can only be changed by two different sessions of parliament separated by an election. However, the government of the day can make changes to the Secrecy Act that regulates exempt matter.</td>
<td></td>
</tr>
<tr>
<td>12) Does the Act apply to the private sector?</td>
<td>2/4 It applies to government agencies that have adopted a ‘corporate</td>
<td></td>
</tr>
</tbody>
</table>

14 ‘Domstolsverket’ is a national agency that oversees and regulates the Swedish court system.
| Part II Protection of journalistic sources | Journalistic sources in this respect are also known as media ‘whistleblowers’ and it is the level of legal protection, if any, that is evaluated |
| 1) What level of protection of journalistic sources exists? | The source has full legal protection, meaning that a journalist has the option to guarantee source confidentiality and anonymity (Sveriges Grundlagar Och Riksdagsordningen, 2003: FPP Sec 1 ) and (Sefastsson, 1999: 111-17). |
| 2) When can journalists be forced to reveal their sources? | Only in very few cases can a journalist be forced to reveal their sources. These are in court cases involving treason and national security. It is very rare for a journalist to be put under official pressure to reveal sources. It would be seen as interfering with freedom of the press and the ‘principle of openness’ (see chapter two for further details) (Sveriges Grundlagar Och Riksdagsordningen, 2003: FPP Sec 7) and (Sefastsson, 1999: 121-26). |
| 3) Are journalists in any way bound not to reveal their sources? | Yes – they risk a criminal charge and substantial fine (more than AUS$1000) if they reveal their source to anyone – including colleagues and editor. The law also allows for a maximum prison term of a year for disclosing a source. However, it has become common practice that the reporter is allowed to disclose the source to one colleague, usually the editor, for support in editorial decisions |
4) Are colleagues and managers (eg the Minister and chief public servant) of a government agency in any way prevented from investigating the source of a ‘leak’ to the press?  

Yes – they risk a criminal charge and substantial fine (more than AUSS$1000) if they make any inquiries (Sveriges Grundlagar Och Riksdagsordningen, 2003: FPP Sec 3) and (Sefastsson, 1999: 117-19).

5) If legal protection of journalistic sources exists – is the legislation part of the constitution or a separate Act?  

Yes – and the Act(s) can only be changed by two different sessions of parliament. For further detail, see above under ‘aims and objectives’.

Discussion and analysis: ‘the promise’

At first glance the legislation appears quite vague. Formulations like ‘as soon as possible’ in regards to decision-making time do appear to leave the way open for abuse by government agencies. The fact that there is little abuse goes to the core of one of the three main strengths of the Swedish FOI regime: the interpretation of the law through the years has specified what ‘as soon as possible’ means: hours and days rather than weeks. Swedish FOI is backed up by a very progressive ombudsman and court system that over the decades in most appeals have ordered agencies to reverse decisions where they have refused to release documents.

The second area of strength is that the legislation makes it clear that agencies may not charge for retrieving and collating information. As we shall see, this is one of the main problem areas in other FOI regimes.
The third area of strength is the very potent legal protection of journalistic sources. The fact that a source can be granted confidentiality by a journalist clearly enhances the overall flow of information. As we shall see, no other country in this study offers a level of protection that comes even close. Having said that, it should be pointed out that in the last ten years there has been ongoing concern in Sweden that public servants are increasingly reluctant to utilise this opportunity (SJF, 2003: 5). Nevertheless, the option does exist.

How does this analysis answer the research question for ‘the promise’: what are the aims of the Swedish FOI legislation and what does it promise to deliver in terms of information access?

‘The promise’ sub-study has confirmed that in Sweden, in the words of the Swedish Parliament (Riksdagen), the FOI regime ‘…means that public administration lies open for citizens and the media to access information whenever they want and independent of the information policies of the agencies (this author’s translation) (Sefastsson, 1999: 1): In practice this means that all information held by government agencies should be viewed as public and handed over to whoever requests it as quickly as possible and at a minimum cost with no questions asked. This is indeed a big promise. The high score in the Swedish ‘promise’ sub-study, 63 out of 68, indicates that the legislation holds true to the promise of its aims and objectives. The qualitative analysis of the laws further bears this out. However, to promise is easy, to deliver is hard. This is where those charged with administrating the legislation come in.
‘The spin’: Sweden

The research question for ‘the spin’ sub-study was: what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?

The ‘spin’ was in essence a survey study built around the same set of parameters and questions as the other two sub-studies. Please see chapter three and appendix two for more details and the full questionnaire.

‘The spin’: score and summary of findings

The same coding technique used in ‘the promise’ was employed in ‘the spin’. The three-part questionnaire covered (1) general attitudes towards FOI and its functions, (2) access to documents and (3) protection of sources. The maximum possible score for ‘the spin’ was 76. For the Swedish ‘spin’ 67 questionnaires were sent out and 21 responses were received within two weeks giving a response rate of 31%. The response rate will be further discussed in chapter eleven.

The score for ‘the spin’ was calculated by adding up the total score for each survey and then dividing it by the total number of replies producing an average score: the higher the score the more positive the attitudes towards FOI and protection of journalistic sources. In the Swedish case the total score was 1362/21 = 65/76 = 85%.

15 The questionnaire allowed the respondent to remain anonymous to attract more responses. To enter which department and what position the respondent held was voluntary.
‘The spin’ posed 19 questions in three sections to capture the attitudes towards FOI. Table 2 provides an overview of the pivotal questions (the table does not include all questions and replies).

Table 2: Swedish replies to ‘the spin’

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part I General attitudes FOI</strong></td>
<td></td>
<td><strong>Score</strong></td>
</tr>
<tr>
<td>Questions 1-4 covering the importance of FOI for democracy.</td>
<td>‘Strongly agree’ in all but 5 replies that had ‘agree’</td>
<td>Fairly predictable, but still important data indicating positive general attitudes towards FOI.</td>
</tr>
<tr>
<td>6. FOI should be extended further to partly cover the corporate sector when public interests are at stake.</td>
<td>Responses much more varied covering the whole spectrum of reply alternatives. Score: 47 out of 84 or 56%</td>
<td>Clearly this is still a controversial issue in Sweden. The score shows that there is a slim majority support among the respondents for extending Swedish FOI further to cover the private sector.</td>
</tr>
<tr>
<td><strong>Part II Access to government held records</strong></td>
<td></td>
<td><strong>Score</strong></td>
</tr>
<tr>
<td>2) In your view, what length of time is reasonable before your department makes a decision on the request?</td>
<td>73 out of 84 – 87%. Close to all respondents have chosen the two top alternatives 1-10 and 11-20 days.</td>
<td>This was a bit of a trick question. As pointed out in the cover letter the survey was primarily concerned with the attitudes of the respondents. If they found the law too demanding, they had the option to voice this, but the respondents are clearly happy to serve. This indicates that there is a strong will to facilitate FOI requests in Sweden.</td>
</tr>
<tr>
<td>3) If your department needs to charge a processing fee, which of the costs below do you find reasonable?</td>
<td>79 out of 84 – 94%</td>
<td>The respondents strongly back the existing free system. They hold the attitude that processing fees should be as low as possible and really only be fees for copying, in most cases under $100.</td>
</tr>
<tr>
<td>7) Which of the following statements is closest to the attitude held by yourself and your staff?</td>
<td>75 out of 84 – 89%</td>
<td>This is the single most important question in ‘the spin’. It cuts to the core of how FOI is interpreted, regardless of what the law says. All but 3 of the Swedish respondents picked reply alternatives a or b. This clearly shows that Swedish public servants and politicians</td>
</tr>
</tbody>
</table>

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16 84 was the maximum score on any one question: 21 replies x 4=84
soon as possible

b) the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant
c) the government owns the information but increased openness and transparency is good
d) the government owns the information and decides who will have access
e) the government owns the information and decides who will have access and increased openness and transparency is not good

take the view that the government does not own the information. The importance of this mindset cannot be overemphasised. The complete table in chapter 11 containing all countries of study is very telling.

8) In your view, which statement most adequately describes the ‘fourth estate’ role that some media and reporters claim to fulfil?

a) It is a vital part of the political accountability process and delegated to the media by the citizens
b) It is a vital part of the political accountability process, but exists on a mandate invented by the media itself
c) It does not have any particular influence on the political accountability process
d) It is an invention by the media to justify its existence
e) It is a threat to the political accountability process because of the incompetence of most journalists

67 out of 84 – 80%. Majority of respondents picked alternative b. A very interesting outcome. Although it indicates awareness of the fourth estate’s role and sympathy for it, it is clear that most of the respondents see it as being instigated by the media rather than evolving out of a mutual understanding between the public and the media.

9) In your view, which is the most important function of FOI?

a) To work as a tool for political accountability
b) To increase transparency of the governing process to prevent maladministration and corruption
c) To increase the public’s

63 out 84 – 75%

The coding in this question is based on the accountability function of FOI. The score is not really all that relevant, when looking at this parameter in isolation. What is more important is what reply alternative was the most common one. In the Swedish ‘spin’ it was overwhelmingly b – 62%.
| participation in the political process |  
| d) To allow citizens a means to check what personal data agencies hold and to correct errors |  
| e) FOI is an unnecessary law that fills no particular function |  

**Part III Protection of Journalistic sources**  

1) What is your view of legal protection of journalistic sources?  
   
a) It should be made stronger and include the corporate sector when public interests are at stake  
b) It should be made stronger in the public sector to encourage public servants to make public maladministration  
c) It should stay the way it is  
d) It should be weakened - problems within a department are best handled internally  
e) It should be abolished in Sweden. Journalists in general cannot not be trusted with this level of confidence  

| 56 out of 84 – 67% | Most respondents picked reply c. Hence, they seem happy with the current system. |  

2) With public access to documents, is there a need for legal protection of journalistic sources?  
   
a) Yes – it complements the access to document regime and strengthens the overall flow of public information  
b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime  
c) No – the document access regime is enough  
d) No – it is a threat to good public administration  
e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia  

| 80 out of 84 – 95% | A resounding round of praise for protecting sources. 81% picked reply a, the rest picked b. |
3) What are your initial feelings towards a public servant who leaks information to the media to disclose maladministration?

- a) Generally it is the right thing to do and it should be encouraged
- b) The first option should always be solving it within the department – if that does not work, then a leak could be the right thing to do
- c) It must be the very last option when all other options have been exhausted
- d) A leak is never an option – problems should be addressed internally within the department
- e) A public servant that leaks information to the media betrays his colleagues and employer

61 out of 84 – 73%

So, a bit more hesitant when it comes to the crunch. Protection of sources is good in theory, but perhaps not always so good in practice…..

4) In some countries you break the law if you investigate who leaked information to the media. Which of the following statements corresponds best with your views on this legislation?

- a) It is the most important part of the source protection. Without the legal protection it would be a ‘paper tiger’
- b) Journalistic sources should have legal protection, but exemptions when it is allowed to investigate a leak should exist
- c) Legal protection for journalistic sources as a principle is good, but the exemptions for when journalists can be forced to reveal their sources should be far-reaching
- d) Journalistic sources do not need legal protection – protection by ethical guidelines for department managers is enough
- e) Journalists are not credible and accountable enough to be granted the privilege

78 out of 84 – 93%

Confirms and strengthens the earlier replies in this section.
Discussion and analysis: ‘the spin’

As discussed in chapter three at the core of ‘the spin’ was the issue of who owns the information held by the government. Does government hold the information on behalf of the people and facilitate access, or does the government own the information in its own right? Question seven in part two of the questionnaire attempted to capture these attitudes (see table 2). The reason for the importance of this question connects back to one of the theoretical foundations for this thesis: that FOI is an essential tool to ensure political accountability. The point made in chapter one was that it is very hard, indeed close to impossible, to hold someone accountable if you do not have the necessary information. If the entity that is to be held accountable also controls the information process and holds the view that it owns the information and will grant access at its pleasure, there can be no, or very limited, accountability.

According to the replies to question seven in part I (see table 2), the top Swedish politicians and public servants seem to view themselves as keepers of information on behalf of the people. It is of the utmost importance for the flow of information that the managers sitting at the top of the political process take this view since they determine the culture of the organisation.

Overall it seems that the respondents to the Swedish ‘spin’ survey are quite content with the existing FOI regime. They even seem to sympathise with the notion of the fourth estate and its use of FOI.
The very strong support for journalistic source protection was quite unforeseen. As we shall see, this part of the questionnaire attracted very different replies in the other countries of study.

So what answer does the data suggest for the research question for ‘the spin’ sub-study: what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants? The overall response for Sweden must be; very positive. Leading Swedish politicians and public servants seem to be at ease with the existing FOI regime and strongly support even the more controversial features such as the very far-reaching protection of journalistic sources. The only question that provoked a wide spread in responses was if Swedish FOI should be extended to cover the private sector.

‘The Practice’: Sweden

In simple terms, ‘the promise’ sub-study evaluated the theoretical ground on which the FOI system rests, while ‘the spin’ sub-study relates to the interpretation of FOI, the official version peddled by the highest political and bureaucratic leadership in the country (even though ‘the spin’ also attempted to capture what they really think, not only the official version). With a score of 63 out of 68 for ‘the promise’ and 65 out of 76 for ‘the spin’ it could be said that in Sweden the FOI promise is very far-reaching indeed, and this is reinforced by government attitudes towards FOI. In other words: ‘the promise’ says to the public, ‘all government-held information is public, come and get it!’ ‘The spin’ says, ‘absolutely! And we are here to help you find the information.’ Could the
FOI regime possibly be that good? That is what the last sub-study, ‘the practice’ was designed to find out.

The research question for ‘the practice’ sub-study was: in practice, does FOI supply journalists (and media organisations) with independent access to government held information? It was vital that the research tool was ‘invisible’ to the subject being studied, ie. government agencies/departments. The methodology used and the ethical issues it raised are described and discussed in the overall methodology in chapter three.

Recruitment of reporters

Recruitment of the Swedish reporters for ‘the practice’ went entirely according to plan. I made contact with the Swedish member of the International Consortium of Investigative Journalists, ICIJ. He thought the project was worthwhile and agreed to a meeting. He brought up the point that he had been the night editor at his paper for the last five years and that the project would probably be better of with journalists currently on reporter duties. I agreed and together we assembled a list of six possible names. The Swedish recruitment process is described in detail in chapter four. The end result was that one female and two male investigative reporters were recruited. One worked for the biggest Swedish daily newspaper, one was a reporter/producer for an investigative program on public service television and the third reporter worked for the equivalent show in public service radio. All three had extensive investigative reporting experience, in all three cases more than ten years. They will be referred to as Reporter A, B and C.
‘The practice’ score

The parameters in the evaluation template for ‘the practice’ were as similar as possible to the other two sub-studies (for details see appendix one). As noted in chapter three, the single major difference between ‘the practice’ and the other two sub-studies concerns the protection of journalistic sources. Because of the complexities involved in using a source in the study, ‘the practice’ evaluates the access to the document regime only.

‘The practice’ cases

The qualitative data was derived from the replies to the questions in the evaluation template (see appendix one) and interviews with the journalists concerned.

Case 1: The PM’s expenses

The request was sent via e-mail. The full request read:

Swedish Public Television logo

To the Prime Minister’s Office

Request for copy of public documents

I would like a copy of public documents relevant to the following:

All invoices or other expenditure documents describing or connected to the Prime Minister’s travels and expenditure for representing Sweden in his official capacity during 2003.

If any of the documents fall under the secrecy act, I ask that you delete that information and let me have a copy of the rest.

Yours sincerely

Journalist A (author’s translation)

The request was sent on Wednesday February 18, 2004. Two days later February 20, Reporter A got a phone call from the Prime Minister’s office
telling him that the documents had been retrieved, in total 600 pages. He was informed that there was a copying fee of A$ 0.20 per copy, in total A$ 108. He agreed to pay and received the copies via ordinary mail at the beginning of the following week. A sample of copies obtained via the request:

- Invoice from the ‘Security Police’, SÄPO, for bodyguard and protection for the PM on a trip to Brazil: $29 551
- Two credit card invoices connected to cards held by two of the PM’s closest staff: $5063 (these invoices were quite frequent and do probably deserve further investigation)
- Various domestic travels, costs for flights and bodyguard protection: $3340

The maximum score for ‘the practice’ evaluation template was 68. The score in case one was 49.

‘The practice’ summary of findings case 1

Table 3 gives an overview of the replies to the core questions in the evaluation template incorporating some of Reporter A’s own comments.

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>3) Did the agency’s reply quote a processing fee?</td>
<td>No, 4 out of 4</td>
<td>A fee of $108 was charged to make copies of the 600 documents. But no processing fee to retrieve and collate the information was charged. This is not allowed according to the Swedish FOL.</td>
</tr>
</tbody>
</table>
5) How much time elapsed from the agency’s confirmation of the receipt of the request to the grant/refusal of the request?  

| 4/4 | Two days. ‘A public servant from the PM’s office phoned me and said that the documents were ready. Even though it’s not unusual to get quick decisions, this was unusually swift considering the size of the information requested. I suspect this is not an uncommon request and that they had routines in place to collate the information. If I hadn’t heard anything within a week, I would have become suspicious (Interview: 4, 2004).’ |

6) What was the agency’s decision?  

| 4/4 | Request granted in full with no processing costs. |

8) Compared to the information ‘served’ to newsrooms by the government’s press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable?  

| 4/4 | ‘The quality of information is much higher compared to the ‘sanitised’ version. It’s richer in detail and I get information that would otherwise not make it into the public arena. Without FOI I can’t do my job (ibid).’ |

13) Which of the following statements best sums up the attitude held by the public servant/s you dealt with during the course of the request?  

| 4/4 | ‘It’s alternative (a) without a doubt. I base this on my phone conversation with the public servant. She did not complain although I sought a lot of information. I also base it on the speed that the request was dealt with (ibid).’ |

   a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible.  
   b) the government holds information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for you.  
   c) the government owns the information but I abide by its values of openness and transparency in
related to the public access to information.

d) The government owns the information and decides who will have access so I act conservatively rather than proactively in relation to public access.

e) The government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

14) What do you perceive the end product to be?

2/4

‘Further research. This is a good start, but looking at the documents I suspect there is more documentation regarding the PM’s expenses in other government departments. I base this on the fact that there are not enough invoices for travels abroad. But a story can certainly be based on the information obtained in this request (ibid).’

Two things about the first case are worth noting. First, the very short turnaround time, which journalist A puts down to the fact that the PM’s office probably had received a similar request before, and so had routines in place to deal with the request. Second, there was nothing in the information released that indicated maladministration or corruption. However, the information provides a very solid basis for further research into the overall costs and workings of the PM’s office. Reporter A is a reporter for an investigative TV program that specialises in what they call ‘explanatory journalism’ where they attempt to make visible and explain complicated societal structures such as how
the European Union works in practice. Without the Swedish FOI such journalism would be very hard to perform.

**Case 2: Refused entry for aliens**

The initial idea was to lodge an FOI request with the immigration department for statistics on the numbers of refugees who were refused entry at the border and the reasons for these decisions. However, since Sweden joined the European Union in 1995, very few refugees physically make it to Sweden. Instead they tend to get processed by another EU member, with the result that Sweden currently processes very few refugees at its borders. Nevertheless people are still being stopped at Swedish borders and denied entry for various other reasons. In his background research, before the request was lodged, Reporter B accessed articles written by colleagues regarding a perceived increase in theft crimes supposedly committed by visitors from the Baltic States. This information was based on statistics from a police district on the south east coast of Sweden. One strategy that had been employed was to utilise a section of Swedish migration law that allowed for refused entry at the border if the person seeking entry fell under the broad category of ‘särskilda omständIGHETER’ (extraordinary circumstances). According to the police this strategy had been very successful. Reporter B wanted to find out if a similar policy had been adopted at the border controls in the Stockholm district as well. Reporter B also wanted to know the nationalities of those refused entry and the reasons. His preliminary research showed that the border police in Stockholm could be FOIed directly. His FOI request read:

(The logo of the newspaper)
March 30, 2004

Request for information

I request information regarding the number of refused entries at the border crossings at the airports Arlanda and Bromma and at the ferry quays City, Kappellskär and Nynäshamn. I would like the information for the month of January 2004 itemised as to place, nationality and reason for the refused entry decision.

Furthermore, I request copies of all refused entry decisions during week 4 executed at the City ferry quay. If you determine that some of the information cannot be released due to exemptions in the Secrecy Act, I accept this and would like copies of the decisions with names deleted.

Regards

Journalist B (author’s translation)

As in case one the public servant handling the request (in this instance a police officer) made phone contact with Reporter B to confirm that he still wanted the information, although some of it would be deleted to protect the identity of the people seeking entry to Sweden. The day after the phone call the reply letter from the officer arrived. The letter claimed that the police department had received the request April 5. The department’s reply letter was dated April 7, total processing and decision time: two days. The letter further states that the information requested can be released with the exception of the names and date of birth of the people seeking entry. The letter ends with an instruction on how to appeal the police department’s decision.

The information released consisted of 11 documents. The department could have charged a copying fee for the last two copies according to the Swedish FOI act, but clearly decided not to. The released information confirmed
the journalist's suspicions regarding country of origin. The computer printout for the month of January showed that 64 out of the total 96 entry refusals were persons from one of the Baltic States; Estonia, Lithuania and Latvia. So, 67 per cent of people denied entry to Sweden in the Stockholm police district were from the Baltic States. The national origin of the rest is a mix of predominantly eastern European nations with some from Middle Eastern states. The computer printout also showed that the vast majority of refused entries were based on the above mentioned section of the Migration Act. One of the printouts even had a pie chart breakdown of grounds for refused entry. The rest of the documents were copies of the actual protocols written at the time of interviewing the person requesting entry. The protocols were complete apart from the name and date of birth of the person seeking entry.

The score for case two was 52 out the maximum score 68.

'The practice' summary of findings case two

Table four shows a summary of Reporter B’s replies to the evaluation questions.

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>3) Did the agency's reply quote a processing fee?</td>
<td>4 out of 4</td>
<td>No processing and no fee for photocopying, even though the department had the right to charge. ‘I have found that if you have a limited number of copies, the departments quite often do not bother to charge (Interview: 5, 2004).’</td>
</tr>
<tr>
<td>5) How much time elapsed from the agency's confirmation of the receipt of the request to the grant/refusal of the request?</td>
<td>4/4</td>
<td>Two days. ‘This was quite quick. I usually give it up to ten days, then I follow up with a phone call or other communication (ibid)’</td>
</tr>
<tr>
<td>Question</td>
<td>Rating</td>
<td>Response</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>--------</td>
<td>----------</td>
</tr>
<tr>
<td>6) What was the agencies decision?</td>
<td>4/4</td>
<td>Request granted in full, no processing or other fees.</td>
</tr>
</tbody>
</table>
| 8) Compared to the information 'served' to newsrooms by the government's press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable? | 4/4    | The information obtained via FOI is of much higher quality compared to the 'spin' version. 'This information is unique and would not be in the public arena, were it not for FOI (ibid).'</a>
| 13) Which of the following statements best sums up the attitude held by the public servant/s you dealt with during the course of the request? | 4/4    | 'Based on my phone conversation with the police officer it is clearly alternative (a) (ibid).'</a>
| a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible. |        |          |
| b) the government holds information on behalf of the people but it is not my role to serve as an 'information facilitator' for you. |        |          |
| c) the government owns the information but I abide by its values of openness and transparency in relation to the public access to information. |        |          |
| d) the government owns the information and decides who will have access so I act conservatively rather than proactively in relation to public access. |        |          |
| e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it. |        |          |
| 14) What do you perceive the end product to be?                          | 3/4    | 'The information released is very promising from a
Again (as in case one) what stands out in case two is the very short turnaround time: two days. Case two could be labelled a successful ‘fishing expedition’. Reporter B suspected that a new and harsher immigration policy was being implemented at Swedish borders and the statistics he received proved him right on that point. The information also indicated that there was more information to be obtained from other border crossings. For a half day of preliminary research and a couple of hours formulating the request, the outcome is quite phenomenal: information highly relevant to the readers and possibly three articles. Shortly after partaking in the study Reporter B took up a position as editor and did not write the articles. However, at the time of writing, he is considering repeating the request and comparing the results with the information from 2004 to see if the EU enlargement has had an effect on immigration to Sweden.

**Case 3: Weapons export**

The third case is by far the most complex and interesting of the Swedish FOI requests. Weapons export has been a very controversial topic
ever since Sweden’s reinvention of itself as a neutral and largely pacifistic nation. The image of Sweden as an international arbiter of peace is at present almost 200 years old. The last armed conflict that Sweden took official part in, as a fighting party, was in 1809. It has always been hard, if not impossible, to reconcile Sweden’s image as a peace dove with its track record as an international supplier of armaments from its strong and thriving domestic weapons industry. There are plenty of examples throughout contemporary history when the ‘dove image’ has clashed with the ‘hawk’ reality of Sweden’s weapons exports. The most recent one and the one that forced far-reaching changes to Swedish weapons export law was the Bofors bribe case during the mid-1980s. The case involved alleged bribes by cannon manufacturer Bofors to Indian defence officials to secure multi-million dollar contracts in supplying the Indian army with howitzers (Zaremba, 2006). Since then the control of Swedish weapons export trade is rigorous, at least that is the official version.

Journalist C’s preliminary research showed that Inspektionen för Strategiska Produkter or ISP (the Commission for Regulation of Strategic Products), reports annually to Parliament on the extent of Swedish weapons export. The report is also published on the Swedish Foreign Department’s website. The report itemises country of destination, number of granted export permits, types of weapons and the financial sums of sales for each country. Swedish weapons exports are worth a lot of money. In 2001: $43.10 billion (the first sale to South Africa of the Swedish designed and built fighter plane JAS accounted for the bulk of that year’s sales), 2002: $1.06 billion and 2003: $5.44 billion (Swedish Government, 2003). Since the sales were itemised stating
country of sale, some specification of materiel sold and the sums for each
country, it could be argued that the information sought was already in the public
domain. But, as Reporter C noted in the diary she kept during the case ‘if you
can get someone to believe that everything is already public, no more questions
will be asked’ (author’s translation).

Reporter C noted that the sales to the US and the United Kingdom rose
significantly during 2003. Sweden has a long-standing practice to not sell
weapons to countries at war 17(Skiljedomsföreningen, 2005: 7). Hence it would
be very interesting to see if any weapons were sold and/or delivered to the US
and the UK during the wars in Afghanistan and Iraq. So, the initial request put to
ISP read:

TELEFAX
May 3 2004
Att: xxxx (public servant at ISP)
Fax: ISP’s fax number

Request of copy of public documents

I hereby request a copy of the public documents listing Swedish export of weapons
(guns, cannons, munitions, vehicles, spare parts etc.) to the US during the period
October 1 2001 to December 31 2001 and a copy of the documents listing sales and
exports of weapons (guns, cannons, munitions, vehicles, spare parts etc.) to the US
and the United Kingdom during the period March 1 2003 to May 31 2003.

Exemptions under the Secrecy Act

This information is requested under the Freedom of Information Act. Should you
find that some of the information is exempt under the Secrecy Act, I request that
you delete that information and that you release the rest of the documents. I request
an appeal instruction for each piece of information that is deleted.

Cost

17 Svenska Freds och Skiljedomsforeningen is a long standing Swedish non-governement organisation
that lobbies Swedish Government not to sell weapons to nations at war.
I wish to have the requested information delivered as economically as possible. I prefer to receive the information via e-mail xxx, but ordinary mail is also perfectly acceptable. I am prepared to pay the fees as stipulated in the schedule of fees. I would like to be contacted if the fee exceeds $100.

Speed of process

I assume that you will expedite this request according to the FOI Act §2:13 and according to the principles laid down by the ombudsman regarding speed of process. I look forward to receiving a reply from you as soon as possible.

Best Regards

Reporter C (author’s translation)

Nine days later May 12, after a reminder via fax the same day, ISP replied via e-mail that they received the fax May 3. They apologised for the delay and explained that retrieving and collating the information takes time, since there were more than 200 items. The next day, May 13, Reporter C received the decision from ISP. In the letter ISP said that it granted C’s request in part. Attached were a number of copies of earlier FOI request of similar nature, but none of the information that Reporter C had requested. ISP had decided that releasing the requested information would harm Sweden’s relations with other states and infringe on business confidentiality. ISP referred to a number of paragraphs in the Secrecy Act. The e-mail did however confirm that 200 ‘items’ were indeed delivered to the UK and the US during the periods specified in the request. This fact was already publicly known and had been discussed at the time of the two wars. What was not known was exactly what sort of weapons were indeed delivered.

Reporter C decided that the reasons given for refusal of her request were weak and decided to appeal to the administrative court; Kammarrätten. In the appeal Reporter C argued:
a) The requested information is of very high public interest

b) The total sum for the 2001 and 2003 export is already public. If the name of the individual export companies are deleted, it is hard to understand why the export for the specified periods cannot be released.

c) The Swedish Public Radio charter prevents journalist C from publishing name of individuals without careful consideration. This protects the privacy of individual companies (this author’s translation).


On 23 November, 2004, Reporér C decided to lodge a second FOI request with ISP where she asked the agency to create a new document based on the information she requested. Based on the Swedish FOI Act, Reporter C assumed that this new document would automatically become public. ISP’s decision took three weeks and arrived via mail to Reporter C December 2, 2004. ISP again maintained that part of C’s request were already granted and referred to the annual reports published on the web. ISP dismissed C’s request based on the same parts of the Secrecy Act as in the original request.

After consulting experienced colleagues Reporter C lodged a third request with ISP in January 26, 2005. Her core argument this time was that the Swedish Secrecy Act was changed when Sweden entered the European Union
in 1995. This change to the Act made it clear that some disturbance in relations to foreign states was acceptable and the public interest of access to documents can, in some instances, overrule the need for secrecy.

On February 2, 2005, ISP dismissed Reporter C’s last request outright on the same grounds cited in the first two decisions. ISP did not in its decision take into account the changes to the Secrecy Act cited by Reporter C.

Reporter C lodged a second appeal with Kammarätten in Stockholm February 7, 2005. In its decision the court again found in favour of ISP on the same grounds as in its first decision.

In May, 2005, Reporter C appealed Kammarätten’s ruling to the highest administrative court in Sweden, Regeringsrätten. The court decided not to hear the case based on precedents set in previous cases. In sum: Reporter C took the case from initial FOI request, via two further requests and two court appeals to the highest court in the country within the space of two years. The cost for this was two days’ effective working time and one consultation with the in-house lawyers.

The case assessed is the initial request. The score was 39 out of 68.

‘The practice’ summary of findings case 3

Table five summarises Reporter C’s most important responses.

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>3) Did the agency’s reply quote a processing fee?</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>5) How much time elapsed from</td>
<td>4/4</td>
<td>“Ten days. It took them</td>
</tr>
</tbody>
</table>
the agency’s confirmation of the receipt of the request to the grant/refusal of the request?

unusually long to confirm the receipt of the request. Overall ten days is probably normal for this request (Interview:6, 2004).^

<table>
<thead>
<tr>
<th>6) What was the agencies decision?</th>
<th>0/4</th>
<th>Request refused</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>‘They said it was partially granted and referred to what is in their annual report, but I got none of the information I asked for (ibid).’</td>
</tr>
</tbody>
</table>

8) Compared to the information ‘served’ to newsrooms by the government’s press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable?

| 13/33) Which of the following statements best sums up the attitude held by the public servant/s you dealt with during the course of the request? |
|---------------------------------|----------------|
|                                  | 3/4 |
| a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible. |
| b) the government holds information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for |

Alterative (b)

‘Based on my correspondence with the public servants at the agency. They were helpful but not facilitating (ibid).’

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18 When a request was partially granted or refused, the evaluation and interview moved to another part of the evaluation template. For details, see appendix 1.
c) the government owns the information but I abide by its values of openness and transparency in relation to the public access to information.
d) the government owns the information and decides who will have access so I act conservatively rather than proactively in relation to public access.
e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

| 14/35) What do you perceive the end product to be? | 0/4 | ‘I can’t do a story now, I need the information first. If I get the documents I can easily see a minimum of three stories: the financial, the legal/ethical aspect and the political dimension (ibid).’ |
| 28) Are you satisfied with the agency’s reasons for the refusal? | 0/4 | ‘No, I’m not happy with their reasons. Using the ‘relationship between states’ section of the secrecy act is an easy way out (ibid).’ |
| 29) In your experience – what do you estimate the cost to be if you | 4/4 | None |
It should be pointed out from the outset that in case three both Reporter C and I were aware that we were pushing the boundaries of Swedish FOI. As C’s initial research showed, part of the information asked for was already publicly available. That being said, the information requested would have contributed to the ongoing debate about Sweden’s weapons export. This raises the inevitable question as to whether it was precisely this that ISP wanted to avoid by not releasing the information. Another reason the request was designed to push the boundaries of Swedish FOI was that FOI is supposed to deliver not only benign information, but controversial information as well. More often than not, it is the controversial information that is needed to ensure genuine political accountability.

On the negative side: the requested information was not released. ISP was slow off the mark in confirming they had received the request. The claim that the request was partly granted when no information was released was an outright lie.

On the positive side: the decision was made reasonably quickly. The appeals process was cost-free. This in itself is noteworthy - as we shall see, the appeals process in other FOI systems is anything but free.
Discussion and analysis: ‘the practice’

The maximum score for the ‘practice’ was 68. The scores for the three Swedish ‘practice’ cases were: 52, 49 and 39, in total 140. This was divided by 3 to arrive at the average ‘practice’ score for Sweden of 47 out of 68 or as a percentage 69. ‘The practice’ score means little until it is seen in relation to the other countries of study. However, the score complemented by the qualitative findings supplied by the interviews indicates that the Swedish FOI regime is working quite well. The extremely quick turnaround times (case one: three days, case two: two days and case three: ten days), the low cost of acquiring the information and the fact that information was obtained in two of the cases, shows that Sweden’s FOI regime does deliver. In one case the information obtained could have lead to an article. In the second case more research was needed. However, the Swedish journalists agreed that the quality of information that can be acquired using FOI is quite high.

As mentioned above, the Swedish Journalism Union, SJF, are very active in monitoring the health of the Swedish FOI regime. In 1997 and 2000 they conducted an ‘openness test’ consisting of a number of requests put to a variety of Swedish government agencies on local and regional level. The results from the tests are fairly consistent with the findings in ‘the practice’. In the SJF tests in 2000 50-70% of the agencies passed (SJF, 2003: 3-5).

However, SJF points to worrying trends in the Swedish FOI system. One is the increased number of exemptions to FOI under the amended Secrecy Act discussed above. Another negative trend is the decline of information supplied by media whistleblowers, in spite of the legal protection
that exists for public servants who supply information to the media. SJF sees the increased number of privatised former government agencies as one possible reason (SJF, 2000: 19).

**Overall analysis: Sweden**

Having presented the data in each study, let us look at how the data connects to the overall research questions: to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study? To answer this an overview of the three sub-studies is needed.

<table>
<thead>
<tr>
<th>Table 6 Swedish scores</th>
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</thead>
<tbody>
<tr>
<td><strong>‘the promise’</strong></td>
</tr>
<tr>
<td>Score</td>
</tr>
<tr>
<td>Score in %</td>
</tr>
</tbody>
</table>

Looking at the high ‘promise’ and ‘spin’ scores, which together define the theoretical potential of the Swedish FOI, Sweden could be expected to have an open system with most government-held information available immediately on request. The legislation is very far-reaching with a lot of legal clout to back its major aims. The attitudes towards FOI among leading politicians and public servants appear to support this system. However, the promises are not quite borne out by the practical workings of Swedish FOI. If FOI was truly delivering what it promised the score for ‘the practice’ study would have been closer to 80 per cent. So, there is a gap. How significant this gap is will not become evident until Sweden’s performance is compared with those of the other countries of study. However, the data gathered so far suggests that we are looking at a strong system based on the following findings:
- The extremely short turnaround time for requests (2, 3 days, and 10 days in the three requests respectively)

- The very low cost for processing the requests

- The non-existent cost to take case three to the highest court of appeal

- The very far-reaching legal protection of journalistic sources as described by ‘the promise’ and ‘spin’ sub-studies

- Most important: the attitude towards ownership of government held information which correlates through all three sub-studies. ‘The promise’ makes it clear that the public servant must process an FOI request immediately. In ‘the spin’ the highest scoring reply alternatives from public servants and politicians for this question were:

  - the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible

  and

  - the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant

  The score for this question was 75 out of a maximum of 84. This means that 89 per cent of the politicians and public servants who responded subscribe to the above views on information ownership. The importance of this cannot be over-emphasised. This means that there is an attitude among government in Sweden that it is acceptable to release information, indeed that it is even a right of the public to access the information held by the department.
This is probably owing to a number of factors: a potent legal framework, a long FOI tradition, and very active users in the form of journalists who have in a way trained public servants practically in how the FOI regime works.

So, the reply to the overall research question is that: there is a gap between the promise and practice of Swedish FOI, but it is not a very big one. However, from the citizens’ and journalists’ perspective this is of course not good enough. There should be no gap at all. The promise should be borne out by the practice. Otherwise, why promise?

‘The promise’ evaluation showed a very far-reaching legislative FOI system demanding speedy processing of FOI requests and promising wide-ranging access at very limited cost. This sub-study also found that the legal protection of journalistic sources in the public service is very potent. It gives journalists a similar protection in relation to confidentiality as applies to doctors, lawyers and priests. The journalist can be forced to reveal his/her sources only in a very limited number of legal proceedings. The legislation prohibits any investigation into a journalistic source, by for instance the ministerial or public service head of a department.

‘The spin’ captured attitudes towards FOI among leading politicians and public servants in Sweden. It clearly showed the administrators of FOI are very positive towards the FOI regime and view themselves as keepers of government information on behalf of the public. The sub-study also detected very positive attitudes towards legal protection of journalistic sources.
The first two sub-studies combined to promise a public information system where virtually everything is available on demand, straight away. In quantitative terms ‘the promise’ scored 92 per cent and ‘the spin’ 85 per cent.

This promise was not upheld by the last sub-study. Two of the three FOI requests in ‘the practice’ delivered the requested information. The third case delivered some peripheral information but was substantially refused. It should be pointed out that to appeal the refusal to the highest administrative court, Reporter C had no expenses, apart from her own working time. ‘The practice’ scored 69 per cent.

**Conclusion**

The findings in this chapter can be summarised thus:

‘The promise’ uncovered very ambitious aims and objectives for the Swedish FOI regime. These aims were backed by a similarly ambitious legislation.

‘The spin’ found that the administrators of Swedish FOI are enthusiastic about FOI and that they see themselves as information facilitators rather than gatekeepers – at least officially.

In ‘the practice’ two of the users of FOI got access to the information they requested, the third user was denied access.

So, it can be concluded that the very far-reaching promise of the Swedish FOI system is not quite born out by the practice. The following
chapters will show how Sweden compares in relation to the other countries of study.
Chapter Seven: Australia

Introduction

This chapter will present and analyse the data captured to evaluate the Australian FOI regime. Following the template of the preceding chapter each sub-study will be examined separately. It will become clear that the federal Australian FOI regime falls far short of delivering on its legislative promises.

However to put the data into context it is first necessary to politically profile Australia based on the overview presented in chapter five and to examine the evolution its federal FOI system.

Political Profile

When putting the Australian political system into context, in comparison with the other countries of study, it may be useful to recall figure 1 first presented in chapter five.
Australia is a constitutional monarchy with the current King or Queen of the United Kingdom as the formal head of state. In reality the UK Head of State has very little to do with Australia as the Head of State role is delegated to a Governor General formally appointed by the Queen on recommendation from the Prime Minister.

The Australian political system is described by some as the ‘Washminster’ system (Galligan, 1993: 208). This is a telling description as in its origins the Australian system combines the traditions of Westminster-style responsible government with the separation of powers found in the US federal system.
At the end of the 19th century the heretofore self-governing states of Australia decided to join together as a federation, agreed on a federal constitution and added an additional level of government to those at state and local levels: the federal. The Australian Commonwealth Constitution Act came into effect in 1900 and defines the different roles of the states and the Commonwealth.

A key feature in the Westminster system is ‘responsible government’, a concept that has been adopted by most parliamentary systems. According to Galligan:

…parliamentary responsible government has the Executive based primarily in the popular or lower House to which it is accountable on a day-to-day basis. Hence there is a fairly direct line of accountability from the people who elect the Members of Parliament to the Executive which holds office subject to the confidence of the popular House of Parliament – at least according to the classic theory (1993: 203).

However, Emy and Hughes observe that the Australian constitution is vague on exactly how responsible government is to be achieved in Australia.

…the Australian Constitution, by not taking explicit account of the conventions of the British system, leaves it unclear as to precisely how responsible government was meant to work in Australia. Convention delegates were colonial parliamentarians who were sufficiently familiar with the system of responsible government, and they saw no need to spell out its details in the Constitution. It should not be forgotten that five of the six Australian colonies had been self-governing for forty years by the time of Federation, and this experience was undoubtedly important in shaping the Australian Constitution (1991: 265).

Apart from ‘responsible government’ and the Head of State, several other traits were borrowed from the Westminster system, such as calling the Head of the Executive Prime Minister. One very important concept that was not inspired by the ‘mother country’ was the notion and content of a political

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constitution. This idea came from the other main influence on the Australian political system, the United States.

Emy and Hughes observe that the Australian founders probably thought they were taking the best part of both systems to come up with a third uniquely Australian one. The Australian Constitution is very different to the American version:

The US founding fathers worked to draw up a Constitution which guaranteed the rights of citizens as well as restricting the power of government. The Australian Constitution only divides powers between the Commonwealth and the states and makes no reference to individual rights or liberties. Instead of being a comprehensive document like the American, it includes only the very minimum necessary for dividing powers between the two levels of government (1991: 266).

The fact that the Australian founders decided not to include a Bill of Rights in the Constitution has been the topic of much debate in Australia. Emy and Hughes point out that the Australian hybrid constitution has a built-in tension centred on the citizens’ rights issue (ibid). Emy and Hughes and several other authors and constitutional observers see the solution as the future incorporation of a Bill of Rights in the Constitution. Others, such as Galligan, are less categorical on the need for an Australian Bill of Rights. According to his analysis, the Constitution has been underestimated in its ability to protect citizens’ rights (1993: 208) and the current debate focuses too much on a Bill of Rights delivering a complete solution. There is of course nothing that says that you cannot have both a system of responsible government and a Bill of Rights. Sweden is one example where both exist.

Emy and Hughes offer a possible explanation as to why a Bill of Rights was not included. They point out that at the time of federation five of the six
Australian colonies had been self-governing for forty years without a Bill of Rights. This may have had an impact on the way the Australian Constitution was formulated (1991: 265).

There is a third level of Australian government: local government. Compared to unitary systems such as, for instance, Sweden’s, where local governments are at least on a par with the national government in terms of relevance to the daily lives of citizens, local governments in Australia are relatively invisible. The reason for this is of course that the power is one step up at state level.

The Australian states have considerable freedom to govern themselves. They can make laws; they have control over their own finances and can impose certain taxes such as stamp duties and royalties from mining companies operating in the states. However, the Constitution makes it clear that the power to impose income tax rests with the Commonwealth (Commonwealth of Australia Constitution Act, 1900: Chapter 5). This is important because it indicates the balance of power between central government and the periphery. Yes, the states can legislate, but they cannot raise the bulk of the revenue.

In sum, Australia has three levels of government: federal (the Commonwealth), state and local government. The real political power resides at the federal and state levels. States can pass laws but have only limited powers to generate revenue through taxes. The Australian system combines facets of both the Westminster and the US federal systems (a hybrid sometimes referred to as the ‘Washminster’ system).
Evolution of FOI in Australia

Australia is no newcomer to the international FOI family. The federal government introduced the first FOI legislation in the country in 1982. The lead-up to the introduction was a long and rocky one. As pointed out in chapter two Australia opposed the international FOI initiative led by the US via the United Nations. As Terrill observes, Australia's position shifted slowly during the late 1960s to one of reluctant interest. At the same time the interpretation of 'freedom of information' became equal to 'access to documents' in Australia (2000: 88).

Although the Australian FOI is inspired by and in parts largely built around the US version, the enactment of the US Freedom of Information Act in 1967 hardly registered in Australia (ibid, p. 89). It would take until 1972 and a visit by the American consumer advocate Ralph Nader to put FOI on the political agenda. Nader was interviewed on current affairs TV and agitated strongly for an Australian version of FOI. His arguments were backed by Australian academic Jim Spigelman in his book Secrecy, Political Censorship in Australia (Spigelman, 1972). The book added fuel to the debate sparked by proponents of FOI within the Labor party and in November 1972 the ALP committed itself to introducing FOI in a policy speech:

A Labor government will introduce a Freedom of Information Act along the lines of the United States legislation. This Act will make mandatory the publication of certain kinds of information and establish the general principle that everything must be released unless it falls within certain clearly defined exemptions. Every Australian citizen will have a statutory right to take legal action to challenge the withholding of public information by the government or its agencies (cited in Terrill, 2000: 92).
It would take another ten years for the legislation to be prepared and drafted. The time frame indicates that the public service and some politicians approached FOI with some trepidation and even fear. Terrill takes the analysis a step further: ‘politicians lost control of the debate. The agenda was being steered by the bureaucracy to the extent that even the release of an innocuous report could develop into a strong test case (2000: 98-99).’ His analysis is underscored by the Labor Prime Minister who had promised to give Australia its FOI. Gough Whitlam’s own account of his government mentions FOI in just one line: ‘The Government devoted many hours of discussion to freedom of information legislation but not sufficient to overcome the resistance of its most senior and respected public service advisors (ibid).’ This is not an ideal situation when your goal is to increase transparency to achieve greater political accountability.

Terrill’s most striking finding on the history of FOI in Australia is the fact that much of the material including minutes and discussions in the interdepartmental committee appointed to prepare the legislation are labelled ‘confidential’ and are in effect secret. So, here we have the paradoxical situation whereby researchers even today cannot gain access to the discussions leading up to what was touted as increased openness in federal governance in Australia (2000: 101). In the minutes that Terrill was allowed to access he found that the Department of Defence took the view that ‘there was a wide variety of documents relating to the defence of the country that could never be released to the public (ibid).’ Terrill comments: ‘what sorts of decision, one wonders, could
never be made public – a decision to incinerate Darwin if Australia was invaded from the north; grisly experiments on Australian citizens? (ibid).

Australia’s FOI history would have ended with the dismissal of the Whitlam government had the Liberal Party not done a backflip on the issue. In a policy speech in December 1975 the incoming Prime Minister, Malcolm Fraser, endorsed the idea of FOI (ibid, p. 109). During the Fraser reign other committees mulled over the various aspects of FOI. Two of the most powerful arguments against were: the cost of administering the Act; and FOI’s incompatibility with the Westminster concept of ministerial responsibility.

Although potent at the time, the first argument fell on its face. The Australian Electoral Commission had predicted it would receive 100,000 requests in the first year. It did not receive one single request during the first seven months, then a few trickled in. The Department of Social Security also predicted a similar number of requests. In fact it received 1177 in the first year of operation (ibid, p. 117). In the first year the numbers were similar in other departments and agencies.

The second argument concerning the potential threat to ministerial responsibility is of a more complex nature. The core of the argument is that the Westminster system relies heavily on cabinet solidarity. If an extensive FOI made public the discussions and debates held in cabinet meetings, it would harm the system. Fears were also raised that public servants’ advice to Ministers would be less frank if it were accessible under FOI (Lamble, 2002a: 123).
To address these various concerns the matter was referred to the Senate Standing Committee on Constitutional and Legal Affairs. The Committee reported in November 1979 and the report became a standard reference text.

On the Westminster system and FOI issue the report concluded:

A great deal of the talk about the Westminster system and how it would be altered by Freedom of Information legislation has been obscure and misleading. To a great extent the term “Westminster system” has been used as a smoke-screen behind which, and with which to cover up existing practices of unnecessary secrecy (cited in Terrill, 2000: 113).

Terrill observes that;

Despite these charges, the Senate Committee took the concerns about the Westminster system seriously, and was generous in its exemptions covering Cabinet and advice to Ministers (ibid).

The debate has continued and recently some FOI watchers, such as Snell and James, have observed that instead of modifying FOI, it is perhaps the Westminster system itself that ‘needs to evolve to accommodate FOI (2002: 40).’

There was considerable excitement among the possible users of FOI at the time of its introduction in 1982. The excitement soon turned to disappointment. Considering the hard birth of FOI in Australia, it is hardly surprising. Terrill defines the core problem well:

…it is difficult to see why departments would ever accept the routine release of information when this could be against their interests. More seriously, as in recent years the focus on government has shifted from expanding citizens’ rights to achieving policy and program outcomes, FOI has increasingly been viewed as an impediment to governing (2000: 119).

After only a few years it became clear that the Act delivered acceptable access to requests for individual and personal information, which in itself is an achievement. However, the so-called ‘third party requests’ from, for instance
media organisations, were not doing well. Against this background the
Australian Law Reform Commission was in 1994 charged with conducting a
review of the federal FOI Act. This review will be discussed later in this chapter.

After the passage of the Federal Act the Australian States and
Territories passed their own Acts, some with slight variations, but at their core
similar to the Federal Act. The final Act to be passed was the Northern Territory
legislation in 2003.

It is important to keep in mind that the Australian Act covers documents
only as opposed to for instance Sweden, the US and New Zealand, where the
laws also cover information. This is an important distinction as information
extends beyond documents and includes, for instance, the knowledge held by
public servants. Also at the federal level no protection at all exists for media
whistleblowers. Indeed, the opposite is true. According to Section 70 in the
Crimes Act:

A person who, being a Commonwealth officer, publishes or communicates, except
to some person to whom he is authorised to publish or communicate it, any fact or
document which comes to his knowledge, or into his possession, by virtue of his
office, and which it is his duty not to disclose, shall be guilty of an offence (cited in
Terrill, 2000: 245).

The penalty for such disclosure is up to two years imprisonment, not the
sort of regime that would encourage public servants to take on such a role.
Data presentation and analysis

‘The promise’: Australia

Aims and objectives of the legislation

The main means of legislation is the Freedom of Information Act 1982
(This evaluation is based on the latest available reprint, March 1 2004, with amendments up to Act No 148, 2003). There are other Acts relevant to the overall openness regime like the Public Service Act. Regulation 34 of this Act prohibits ‘unauthorised disclosure of information (Terrill, 2000: 37)’. This clause is further backed by section 70 of the Crimes Act which in effect makes it a crime for a public servant to disclose information to, for instance, the media without having clearance from an ‘authority’ (ibid). Hence, it is clear from the outset that instead of encouraging public servants to release information (any information, benign or controversial, verbal or documents), the Australian system is set up to punish those who do. While the Public Service Act does not have direct bearing on what is being evaluated in the ‘promise’ template, it is worth keeping it in mind.

Main Aims/Objects of FOI legislation:

(1) ‘The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:

a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and
b) creating a general right of access to information in documentary form in
the possession of ministers, departments and public authorities, limited
only by the exceptions and exemptions necessary for the protection of
essential public interests and the private and business affairs of persons in
respect of whom information is collected and held by departments and
public authorities; and

c) creating a right to bring about the amendment of records containing
personal information that is incomplete, incorrect, out of date or
misleading.

(2) It is the intention of the Parliament that the provisions of this Act shall be
interpreted so as to further the object set out in subsection (1) and that any
discretions conferred by this Act shall be exercised as far as possible so as to
facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of
information (Freedom of Information Act, 1982: Part I)

The objects of the Act are very much in line with FOI Acts conceived in
other countries. The most important pointer towards the implementation and
interpretation of the Act comes in the last part of section (2): ‘shall be exercised
as far as possible so as to facilitate and promote, promptly and at the lowest
reasonable cost, the disclosure of information (ibid).’ (author’s emphasis). So
the keywords that will be kept in mind for the evaluation of the Act and
Australia’s whole FOI regime are facilitation, promotion of the Act and prompt
handling of requests, at the lowest reasonable cost.

‘The promise’: score and summary of findings

The methodology for calculating the score has been detailed in chapter
three. The maximum possible score for ‘the promise’ was 68, describing a very
far-reaching FOI regime including to a full or partial extent the private sector and
providing substantial legal protection of media whistleblowers (journalistic
sources). The Australian ‘promise’ score was 14 out of 68, indicating a very low
legislative ambition.
The areas covered by the evaluation template included: cost, turnaround time, the appeal process and protection of sources. Table 7 shows a selection of key questions, scores and comments. Unless otherwise indicated the references in the table refer to the Australian federal FOI Act.

Table 7 Australia ‘the promise’

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part I Access to documents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) Does the Act allow the agencies to charge processing fees?</td>
<td>1 out of 4</td>
<td>Very unclear guidelines on the level of charges which could be considered reasonable. Sec 29 (5) states: ‘Without limiting the matters the agency or Minister may take into account in determining whether or not to reduce or not to impose the charge, the agency or Minister must take into account: (b) whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public’ So, a fairly strong wording. The problem is proving the ‘public interest’. The Act also gives plenty of room for interpretation.</td>
</tr>
<tr>
<td>4) How long does the Act give the agency to make a decision on the request?</td>
<td>0 out of 4</td>
<td>Sec 15 (5) and (6) p. 22-23 Clearly sets out the maximum decision time as 30 working days. However, it also provides for additional time, provided the agency communicates this to the requestor.</td>
</tr>
<tr>
<td>6) Does the Act require agencies to keep a running diary over current and archived documents?</td>
<td>0 out of 4</td>
<td>This is one of the biggest problems with the Australian Act from a user’s perspective. Without some sort of diary with a</td>
</tr>
</tbody>
</table>
heading system, it is virtually impossible to know what sort of documents the agency holds. In, for instance Sweden, the diary is public and by reading the headings of the documents held, you get a fair idea whether it would be interesting from a journalistic point of view to request the full document.

8) Are any federal/national agencies exempt from the Act?

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are any federal/national agencies exempt from the Act?</td>
<td>0 out of 4</td>
<td>In total 12 federal agencies are exempt. In some FOI regimes (like Sweden, South Africa and to some extent the US) the legislator has chosen not to exempt any agencies. Symbolically this is very important. It indicates that the legislator sees openness as all-encompassing, including the secret intelligence agencies. In these regimes exemptions are based on evaluating every request on its merits. The Australian Act has blanket exemptions for 12 agencies and two schedules listing exempt content, making secrecy the rule, rather than the exception. (Schedule 2, parts I, II and III).</td>
</tr>
</tbody>
</table>

10) Does the Act allow for legal costs being covered by the state?

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the Act allow for legal costs being covered by the state?</td>
<td>1 out of 4</td>
<td>Based on a win in court by the applicant and/or the public interest the Attorney-General may, based on a recommendation from the court, decide to cover the costs for an applicant (Sec 66 (1), (2) and (3)).</td>
</tr>
</tbody>
</table>

11) Is the FOI Act(s) part of the constitution?

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the FOI Act(s) part of the constitution?</td>
<td>0 out of 4</td>
<td>No, and the incumbent government can change the</td>
</tr>
</tbody>
</table>
### Part II Protection of journalistic sources

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) What level of protection of journalistic sources exists?</td>
<td>0 out of 4</td>
<td>At the federal level no protection exists for media whistleblowers. Attempts have been made at state level, but no Act gives legal protection to journalistic sources (Martin, 2004: 122-23)</td>
</tr>
<tr>
<td>2) When can journalists be forced to reveal their source?</td>
<td>2 out of 4</td>
<td>In any court case (Australia, 1994: ix)</td>
</tr>
<tr>
<td>3) Are journalists in any way bound not to reveal their source?</td>
<td>1 out of 4</td>
<td>They are not legally bound, but ethical practice is to not reveal sources.</td>
</tr>
<tr>
<td>4) Are colleagues and managers (eg the Minister and chief public servant) of a government agency in any way prevented from investigating the source of a 'leak' to the press?</td>
<td>0 out of 4</td>
<td>No, an Australian Head of Department may investigate a journalistic source at his/her leisure. Restricting the right of investigation into journalistic sources is the last piece in the jigsaw in protecting and encouraging public servants to use the media to make, for example, maladministration public.</td>
</tr>
<tr>
<td>5) If legal protection of journalistic sources exists – is the legislation part of the constitution or a separate Act?</td>
<td>0 out of 4</td>
<td>No Act exists.</td>
</tr>
</tbody>
</table>

### Discussion and analysis: ‘the promise’

There is one pivotal issue in Australian FOI that table 7 does not cover, namely the very weak legal powers of the first legal appeal option, the Administrative Appeals Tribunal (AAT). Most importantly the tribunal has no
right to try and change departmental and Ministerial decisions regarding exempt matter: ‘…the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted (Freedom of Information Act, 1982: Sec 58 (2)).’ Furthermore the tribunal cannot terminate a conclusive certificate issued by a Minister. A conclusive certificate can effectively exempt any document from disclosure on the grounds of its potential to harm the relationship between the Commonwealth and other states. A Minister may also issue a conclusive certificate preventing the release of a document if the Minister believes that it is not in the public interest to make the document public (Ibid, sec 33A (1) and (2).

The conclusive certificate is in practice virtually impossible to revoke. The Act states: ‘…the powers of the Tribunal do not extend to reviewing the decision to give the certificate (ibid, sec 58 (3)).’ To date the best illustration of the weak appeal options and astronomical costs for driving an appeal within the Australian FOI system is the McKinnon vs Treasury case involving a conclusive certificate. This case will be further discussed in the analysis of ‘the practice’ below.

Overall Table 7 clearly indicates that the Australian FOI Act leaves plenty of room for the agencies to interpret the legislation to their advantage. They are allowed to charge processing fees with no guarantee what information will be released. They are given 30 plus 30 working days to process a request and the appeal options for refused requests are limited and expensive. So, let us apply these findings to the research question for ‘the promise’: what are the aims of the Australian FOI legislation and what does it promise to deliver
in terms of information access? As pointed out above ‘the promise’ found the core aims and objectives to be: to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information. After evaluating the body of the Act, it is clear that it is poorly equipped to meet these aims. The very low score, 14, and the qualitative analysis unequivocally illustrate this. Indeed, the Act in itself is so poorly equipped to deliver on its aims and objectives that it could be argued that it is in conflict with its own aims.

‘The spin’: Australia

The research question for ‘the spin’ was: what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?

The spin was in essence a survey study built around the same set of parameters and questions as the other two sub-studies. Please see appendix two for full details on the questionnaire.

Timing

The timing of the survey was a challenge in this part of the study. The issue was the election cycle. Sending out the questionnaire in the middle of an election campaign or at the end of the term of an incumbent government or at the start of a newly elected government all posed potential problems for the result of ‘the spin’. When the Australian ‘spin’ was finalised indications were that Australia was on the verge of an election campaign.²⁰ The distribution process was speeded up and ‘the spin’ questionnaires reached the respondents four

²⁰ In the Australian system, the federal election date is not fixed and the incumbent government can call the election at its discretion within certain time parameters before the formal end of its three year term.
weeks before the election was called. Therefore it can be safely assumed that the election campaign did not impact on the response rate or the results of the survey.

‘The spin’: score and summary of findings

The same coding technique used in ‘the promise’ was employed in ‘the spin’. The three-part questionnaire covered general attitudes towards FOI and its functions, access to documents, and protection of sources. The maximum score for ‘the spin’ was: 76. In total 68 questionnaires were sent, 5 responses were received within three weeks giving a response rate of 7 per cent. Since ‘the spin’ is not a statistical quantitative study as such, the response rate has no bearing on the end result. Rather, it is argued that each reply is a ‘case’ in itself with the attitudes held by the respondent having an impact on the FOI policies in his/her department. However, the number of responses can be taken as an indicator of how important FOI is as such to the leaders of each country of study. The Australian response rate of 7 per cent provides an interesting contrast to the Swedish rate of 31 per cent. The response rates will be further discussed in chapter eleven.

The score for ‘the spin’ was calculated by adding up the total score for each survey and then dividing it by the total number of replies producing an average score, the higher the score indicating the more positive the attitudes towards FOI and protection of journalistic sources. In the Australian case the total score was 246/5, which gave the average score of 49 out of 76.
‘The spin’ posed 19 questions in three sections to capture the attitudes towards FOI. Table 8 provides an overview of the pivotal questions.

### Table 8 ‘the spin’ Australia

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>Part I General attitudes FOI</strong></td>
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<tr>
<td>Questions 1-4</td>
<td>‘Strongly agree’ and ‘agree’ in all responses apart from one.</td>
<td>The data indicates positive general attitudes towards FOI</td>
</tr>
<tr>
<td>6. FOI should be extended further to partly cover the corporate sector when public interests are at stake.</td>
<td>Responses varied covering the whole spectrum of reply alternatives. Score: 10 out of 20 or 50%.</td>
<td>The score shows that there is not majority support among the respondents for extending Australian FOI further to cover the private sector.</td>
</tr>
<tr>
<td><strong>Part II Access to government held records</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) In your view, what length of time is reasonable before your department makes a decision on the request?</td>
<td>8 out of 20 – 40%</td>
<td>This was a bit of a trick question. As pointed out in the cover letter the survey was primarily concerned with the attitudes of the respondents. If they found the law too demanding, they had the option to voice this. Two of the respondents thought that 40 days rather than 30 days was a more adequate processing time. The low score indicates that the respondents do not necessarily see themselves as facilitators of quick and easy information access.</td>
</tr>
</tbody>
</table>
| 3) If your department needs to charge a processing fee, which of the costs below do you find reasonable? | 11 out of 20 – 55% | Replies varied from reply alternative a) $0-99 to e) more than $400. However, according to the score, most respondents seem to favour a ‘low-cost-as-possible’ policy. This is, as we shall see in ‘the
7) Which of the following statements is closest to the attitude held by yourself and your staff?

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<td>a) the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible</td>
<td>11 out of 20 – 55%</td>
<td>This is the single most important question in ‘the spin’. It cuts to the core of how FOI is interpreted, regardless of what the law says. This is a clear example of why the qualitative analysis is needed to complement the quantitative measure. The score 55% can be interpreted as an acceptable score, a slim majority, but still a majority. However, if you look at the individual responses you note that only ONE of the Australian respondents picked a). The other four picked c) and d). This indicates that a majority of respondents hold the attitude that the government owns the information, not the public. This is a crucial difference to, for instance, the Swedish score where all but 3 of the Swedish respondents picked reply alternatives a or b. This clearly shows that Swedish public servants and politicians take the view that the government does not own the information. The importance of this mindset cannot be overemphasised. The complete table in chapter 11 containing all countries of study is very telling.</td>
</tr>
<tr>
<td>b) the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c) the government owns the information but increased openness and transparency is good</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d) the government owns the information and decides who will have access</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e) the government owns the information and decides who will have access and increased openness and transparency is not good</td>
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</tbody>
</table>

8) In your view, which statement most

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<tbody>
<tr>
<td>statement most</td>
<td>16 out of 20 – 80%. Majority of respondents</td>
<td>A very interesting outcome. Although it indicates</td>
</tr>
</tbody>
</table>
adequately describes the ‘fourth estate’ role that some media and reporters claim to fulfil?

- a) It is a vital part of the political accountability process and delegated to the media by the citizens
- b) It is a vital part of the political accountability process, but exists on a mandate invented by the media itself
- c) It does not have any particular influence on the political accountability process
- d) It is an invention by the media to justify its existence
- e) It is a threat to the political accountability process because of the incompetence of most journalists

picked alternative b.

awareness of the fourth estate role and sympathy for it, it is clear that most of the respondents see it as an invention by media and not a mutual understanding between the public and the media.

9) In your view, which is the most important function of FOI?

- a) To work as a tool for political accountability
- b) To increase transparency of the governing process to prevent

10 out 20 – 50% The coding in this question is based on the accountability function of FOI. The score is not really all that relevant, when looking at this parameter in isolation. What is more important is what reply alternative was the most common one. In the Australian ‘spin’ the replies covered the whole
maladministration and corruption
c) To increase the public's participation in the political process
d) To allow citizens a means to check what personal data agencies hold and to correct errors
e) FOI is an unnecessary law that fills no particular function

range a-e. This indicates a non-homogeneous view of what function FOI fills, if any at all.

<table>
<thead>
<tr>
<th>Part III Protection of Journalistic sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) What is your view of legal protection of journalistic sources?</td>
</tr>
<tr>
<td>a) It should be made stronger and include the corporate sector when public interests are at stake</td>
</tr>
<tr>
<td>b) It should be made stronger in the public sector to encourage public servants to make public maladministration</td>
</tr>
<tr>
<td>c) It should stay the way it is</td>
</tr>
<tr>
<td>d) It should not be implemented in Australia – problems within a department are best handled internally</td>
</tr>
<tr>
<td>e) It should not be implemented in Australia. Journalists in 9 out of 20 – 45%</td>
</tr>
</tbody>
</table>

The responses are on the negative side c, d and e, indicating a hostile attitude towards legal protection of sources.
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes: 10 out of 20 – 50%</th>
<th>No: 7 out of 20 – 35%</th>
</tr>
</thead>
<tbody>
<tr>
<td>2) With public access to documents, is there a need for legal protection of journalistic sources?</td>
<td>Confirm the response in question 1. Very hesitant reception of legal protection of media whistleblowers. This can be compared with Sweden where the replies to this question were a resounding round of praise for protecting sources. 81% picked reply a, the rest picked b.</td>
<td>Even more hesitant when it comes to the crunch. This score clearly shows where loyalty sits – with the department and not with the public.</td>
</tr>
<tr>
<td>a) Yes – it complements the access to document regime and strengthens the overall flow of public information</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c) No – the document access regime is enough</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d) No – it is a threat to good public administration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3) What are your initial feelings towards a public servant who leaks information to the media to disclose maladministration?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) Yes – it complements the access to</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
document regime and strengthens the overall flow of public information

b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime
c) No – the document access regime is enough
d) No – it is a threat to good public administration
e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia

| 4) In some countries you break the law if you investigate who leaked information to the media. Which of the following statements corresponds best with your views on this legislation? |
|---|---|
| a) It is the most important part of the source protection. Without the legal protection it would be a 'paper tiger' | 11 out of 20 – 55% |
| b) Journalistic sources should have legal protection, but exemptions when it is allowed to | |

The score is in line with the overall hesitant response among the Australian respondents towards legal protection of journalistic sources.
investigate a leak should exist
c) Legal protection for journalistic sources as a principle is good, but the exemptions for when journalists can be forced to reveal their sources should be far-reaching
d) Journalistic sources do not need legal protection – protection by ethical guidelines for department managers is enough
e) Journalists are not credible and accountable enough to be granted the privilege of legal protection of their sources

Discussion and analysis: ‘the spin’

In sum ‘the spin’ data for Australia displays a wide range in attitudes. Part I shows a positive general attitude towards FOI. However, when asked more detailed questions in part II the picture changes dramatically ranging from very hesitant to mainly negative attitudes towards FOI. Part III, protection of journalistic sources, displays outright hostile attitudes from the leading politicians and public servants. Interestingly it seems that the main grievance was that the respondents did not trust the media to handle the privilege of being
granted legal protection of their sources. There seems to be a fear that the Australian media would abuse this privilege. This attitude is echoed in some of the main recommendations in a 1994 Senate report into shield laws for journalists:

The Committee considers that before journalists can be given any consideration for special treatment, they have to gain the confidence of the public that such special treatment is deserved and will not be abused. The public needs to have confidence that the media is fulfilling its important role in a responsible manner (Australia, 1994: xxi).

The Senate report and this attitude in general does not seem to be backed by any hard evidence, rather it seems to be a self-perpetuated view that is aired from time to time. In countries with far-reaching shield laws for journalists, such as Sweden, the issue of abuse of this privilege does not seem to be an area of debate. But, clearly it is a strongly-held view among the public administration in Australia.

There were a few additional comments at the end of two of the questionnaire responses. One of them brings up an interesting point:

There is a tension that exists between meeting the objectives of the FOI Act, and making the correct preferable decision in relation to access to documents, to meeting the needs and expectations of our political masters.

FOI is a political process – regardless of the political party

This is an interesting study. The tension between “chiefs” (decision makers) and the “Indians” is not addressed here, and applies not just to FOI, but public administration as well.

The ‘tension’ mentioned would indeed be an interesting future area of study.

As discussed in chapter three, at the core of ‘the spin’ was the issue of who owns the information held by the government. Does government hold the
information on behalf of the people and facilitate access, or does the
government own the information in its own right? Question 7 in part II of the
questionnaire attempted to capture these attitudes (see table 8). The reason for
the importance of this question connects back to two of the theoretical pillars for
FOI: political representation and accountability. In Australia’s case the top
politicians and public servants seem to view themselves as gatekeepers of
government-held information, rather than facilitators of information access.
Since these attitudes are held by the political and bureaucratic leadership, it can
be concluded that they are likely to permeate throughout their organisations.

‘The practice’: Australia

Looking at the Australian results so far (14 out of 68 for ‘the promise’
and 49 out of 76 for ‘the spin’) it could be said that the FOI promise is not very
far-reaching. However, according to the attitudes displayed in ‘the spin’, the
politicians and public servants appear more willing to give access to information
than the legislation allows. The overall message to the public from ‘the promise’
study can be summarised as: ‘the aim is that all government-held information
should be public, but there are many exceptions to this rule for your own good.
This legislation is on the government’s side, not yours, again for your own
good!’ Meanwhile ‘the spin’ says: ‘FOI as a general idea is OK, but it is not for
Australia. We cannot govern if we have to let the public know what we know all
the time.’ Is it really this bad in Australia? That is what the last sub-study, ‘the
practice’ was designed to find out.
Recruitment of reporters

Recruitment of the Australian reporters for ‘the practice’ went according to plan. I made contact with one of the Australian members of the International Consortium of Investigative Journalists, ICIJ (Reporter D). He thought the project was worthwhile and agreed to join it. We discussed other possible journalists to recruit and he pointed me towards the second recruit (Reporter E). The third reporter took some time to locate. Since the first two were male, I wanted a female, preferably from the public broadcaster the ABC to contrast with the commercial media. I contacted three female ABC reporters via e-mail who did not respond. In total it took a month to find and recruit the last reporter (Reporter F).

Reporter D is an experienced investigative reporter who has run international investigative projects. He works for one of the major Australian newspapers. Reporter E is also an experienced investigative reporter with a well-respected commercial current affairs TV program who has been very active in the debate regarding journalistic use of FOI. Reporter F works for ABC Radio National and has extensive investigative reporting experience. Gender distribution: two males, one female. When they had agreed to join the project via e-mail, I scheduled a phone conversation with each of them where I described ‘the practice’ in detail. I was particularly concerned with making my role as a facilitator and then observer clear, and to point out that the departments/agencies must not be made aware that the FOI request is part of a research project. We also discussed the ethical considerations. The final point of discussion was the topics of the FOI requests. Overall the Australian
recruitment process went very smoothly. The entire Australian ‘practice’ sub-
study was run remotely via e-mail and phone. There appeared to be no
disadvantage in this method compared to the face-to-face meetings used in the
Swedish ‘practice’ study.

‘The practice’: score and summary of findings

The maximum score for the ‘practice’ study was 68. The scores for the
three Australian ‘practice’ cases were: 27, 12 and 0, in total 39. This was
divided by 3 to arrive at the average ‘practice’ score for Australia of 13 (13/68=
19%).

Case 1: The PM’s expenses

The original FOI request was sent via mail to the FOI Officer in the
Department of Prime Minister and Cabinet. It read in full:

Name of FOI Officer

Department of Prime Minister and Cabinet, address

Journalist D, name of paper and address

Dear First name of FOI Officer

Under the Freedom of Information Act, I seek documents that detail the Prime
Minister’s official overseas travel expenses from July 2003 to the end of June this
year [2004].

I also request details of the expense of those in the official party – such as staff,
advisers, security officials and members of the Prime Minister’s family, including
his wife – who accompanied the Prime Minister on his overseas trips.

To clarify, I am seeking costs and expenses for all members of the official party on
each overseas trip undertaken in the nominated time frame. The documents may
include all spending items, such as travel expenses, hotels, meals, drinks and other
expenses.

The form of access I prefer are photocopies of the documents or access to them. If
you decide that any of the documents I have requested are technically exempt, I
urge you to use your discretionary power and release the documents in the public
interest as the object of the Freedom of Information Act requires. I enclose
herewith an application fee for $30 as outlined and look forward to
acknowledgement of my request and a decision as soon as possible, at least 30 days
from receipt or this letter.

I would appreciate that if any part of my request is refused you exercise your
discretion and waive such exemptions. If there is material over which you are not
prepared to waive an exemption, please delete the material you believe to be
exempt and release the remainder to me.

Please transfer this request to any further agency if you think that agency would
have in their possession any relevant documents.

As I am a journalist acting in my professional capacity and as disclosure of the
information I seek would be in the public interest, I ask that any fees be waived in
full.

I would appreciate that if any part of my request is refused in your response you
advice as follows:

1. Clearly identify and describe each document to which you are claiming an
   exemption.

2. Identify which particular section of the Freedom of Information Act provides
   an exemption.

3. Provide full reasons for the exemption.

4. Please advice me of my rights of appeal. If you would like to discuss this
   request more fully, I can be reached on xxxxxxx

Yours faithfully

Reporter D

August 24, 2004

Two days later, August 26, Reporter D received a letter confirming
receipt of the request. On September 17, three weeks later, Reporter D
received the department’s decision to charge $921.50 for ‘search & retrieval,
decision-making and photocopy fee’. The letter further states that the decision
maker at the department has determined that the public interest argument put
forward by Reporter D for waiving any fees and charges does not apply. The
reason being that:

Under current reporting arrangements, information about overseas travel by the
Prime Minister, including summary information on costs, is tabled biannually in
Parliament. Mr [Name of Decision maker] considers that the degree to which release of further information would be in the public interest is not necessarily clear. In particular, Mr [Name of Decision maker] notes that a number of individuals will need to be consulted about possible release of information about them, in accordance with the requirements of the FOI Act. He considers that there is a possibility that some of the information you have sought would be exempt from release under the FOI Act, for example, information disclosure of which would involve unreasonable disclosure of personal information, and therefore release of all the information you have sought may not necessarily be in the public interest (Extract from letter to Reporter D from Department of the Prime Minister and Cabinet).

Attached to the letter was an instruction sheet dealing with how to ask for an internal review of the decision to charge a fee. The application fee for the review was $40 and as the name implies the review is conducted internally by the department which originally decided to impose the fee. Other avenues of appeal include a complaint to the Ombudsman and an appeal to Administrative Appeals Tribunal. In an interesting twist the rights of review attachment ends with the statement:

You are entitled under the Freedom of Information Act to seek access to documents concerning decisions made in respect of your request, including the decisions to impose a fee and/or charge. A request would be treated as a completely new request. If you wish to do so, you should apply in writing to the FOI Co-ordinator at the address given above and should send a fee of $30. You may seek remission of the fee, either before or at the same time or afterwards, for the same reasons described above. A processing charge may be imposed on the request (Extract from letter to Reporter D from Department of the Prime Minister and Cabinet).

So, if you want access to the documents, for instance correspondence between the FOI officer and the decision maker regarding your request, you have to lodge a new request and pay a new fee and possibly processing charges. As predicted by the data captured by ‘the promise’ and ‘the spin’ studies, the law and the public servants are not exactly facilitating the provision of information.
Reporter D decided to lodge an application on September 23 2004 for an internal review of the fee decision with the PM’s department. He pointed out that he sought the review because of the public interest in how public money is spent. He argued that this fact should be enough to waive the $921.45 fee. Reporter D also observed that he had pursued the document tabled bi-annually in parliament referred to by the decision maker.

I discovered it provided only lump sum information for Ministers and several opposition representatives – nothing like the detail I requested. In my view – and I have been in the public accountability game for three decades – lump sum aggregates do not meet the test of public accountability. Nor does the provided information inform as to the numbers of staff involved in the trips, nor any breakdown of how the money was spent.

In the letter Reporter D agreed to temper his request regarding security staff. He also pointed out that he is not seeking personal information and that allocating a full working week to contact the people involved seems excessive. A week later, on October 1, Reporter D received confirmation that the PM’s department has received his application.

27 days later Reporter D received the result of the review. The decision-maker (not the same person as in the first decision) upheld the initial decision on much the same grounds. The travel expenses were already tabled in Parliament and any further details must be considered to contain personal information and cannot be disclosed. Based on this the decision maker concludes that since the information sought is personal it cannot be in the public interest; hence the fee cannot be waived on that ground.

The decision-maker did reveal some information in her review of the costs. She points out that consultation with 24 individuals regarding release of
information is needed and that it concerns 11 overseas trips during 2003-04.

The charges are described by the table below:

Table 9 Australia ‘practice’ case 1

<table>
<thead>
<tr>
<th>Task</th>
<th>Rate</th>
<th>Initial</th>
<th>On review</th>
<th>Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Search and retrieval</td>
<td>$15 per hour</td>
<td>7.5</td>
<td>11 hours</td>
<td>$165</td>
</tr>
<tr>
<td>Decision-making</td>
<td>$20 per hour</td>
<td>40</td>
<td>25.5</td>
<td>$510</td>
</tr>
<tr>
<td>Photocopies</td>
<td>0.10 per page</td>
<td>90</td>
<td>45</td>
<td>$4.50</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>$679.50</strong></td>
</tr>
</tbody>
</table>

So, for the fee of $40 Reporter D managed to take $242 off the initial processing fee. However, having read the reasoning of the decision maker regarding what information is in the ‘public interest’, you have to ask yourself, what is in the public interest if the itemised spending of public money by elected representatives is not considered to be in the public interest?

Reporter D is further advised on his options.

1. He can agree to pay the $679.50, however, there is no guarantee what quality information he may receive. It may the 45 blank pages.

2. He can appeal to the Administrative Appeals Tribunal (AAT). Filing fee: $606.

3. He can withdraw his request
After discussing the case with his editor, Reporter D decided to withdraw since the indication in the correspondence from the PM’s department was that even if they paid the fee they would get very little information released in the end. As we shall see later appealing to the AAT is both time-consuming and very costly. Total processing time for this request came to: two months and three days. This can be compared to, for instance, two of the Swedish cases that had a turnaround time of four days.

On January 5, D received a final letter from the PM’s department pointing out that the 60 day period within he could seek a review with the AAT has expired and the department now ‘therefore deemed your request to have been withdrawn.’

Since Reporter D did not pursue the request it could be argued that the PM’s department never officially refused the request. However, from a user's point of view the high processing fee effectively stopped the request process. As we shall see in the second Australian case, this is a tactic quite often used by Australian federal agencies to fend off requests. Hence, for the purpose of evaluating this request it will be regarded as refused, since this was the technical outcome.

‘The practice’ summary of findings case 1

The maximum score for ‘the practice’ evaluation template was 68. The score in the first Australian case was 27. Table 9b provides overview and qualitative analysis of key questions incorporating Reporter D’s own comments:
Table 9b Australian ‘practice’ case 1

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>3) Did the agency’s reply quote a processing fee?</td>
<td>0 out 4</td>
<td>‘The original processing fee was 921 dollars and 50 cents. I thought the fee was excessive. I’ve dealt with the Victorian Act, which usually don’t quote such high processing fees. This fee was higher than expected. 40 hours of decision making time, I thought that was extraordinary. The reasons I thought this was that it was only 11 trips in total and it could not have been that much information to collate and that many people to contact (Interview: 7, 2005).’</td>
</tr>
<tr>
<td>5) How much time elapsed from the agency’s confirmation of the receipt of the request to the grant/refusal of the request?</td>
<td>2 out 4</td>
<td>‘The response time was quite fast, they complied to the act. In most of my experience with the Victorian Act, the agencies broke the time frame and nothing seems to happen when a department breaks the statutory limitations (ibid).’ In total it took 22 days for the department to respond to D’s original request. Clearly Australian journalists have a very different perception of processing speed compared to their Swedish colleagues, as illustrated by the data presented in chapter five.</td>
</tr>
</tbody>
</table>
6) What was the agencies decision? | 0 out of 4 | Application not granted |
---|---|---|
8) Compared to the information ‘served’ to newsrooms by the government’s press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable? | N/a | |
13/33) Which of the following statements best sums up the attitude held by the public servant/s you dealt with during the course of the request?[^21] | Reply d) 1 out of 4 | ‘The FOI officer’s initial response was that the request was quite straightforward. After looking into it she seemed to change her mind. When it came to the ownership of information, she carried out others orders. She didn’t come across being proactive and she acted conservatively (ibid).’ |
   a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible. |
   b) the government holds information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for you. |
   c) the government owns the information but I abide by its values of openness and transparency in relation to the public access to information. |
   d) the government owns the information and |
[^21]: When a request was partially granted or refused, the evaluation and interview moved to another part of the evaluation template. For details, see appendix 1.
decides who will have access so I act conservatively rather than proactively in relation to public access.

e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

14/35) What do you perceive the end product to be? 2 out of 4

‘I could possibly write one story about the knockback, but it would be rather boring and sparse (ibid).

Overall Reporter D was surprised that he had so much trouble getting information that he regarded as non-controversial. In this case the FOI process did work according to the Act and the department adhered to the statutes. The most important observation in this case is the fact that it generated no information. It is quite understandable that the requestor would not want to pay for what in the end may just be blank pages (as in the McKinnon vs Treasury case discussed below). Reporter D and his editor decided not to appeal the internal review decision to the AAT since they judged their chances of winning as very slim. Looking at ‘the promise’ evaluation of the Act and the powers given to the AAT by the Act, this was probably a wise decision.

The department’s reasoning around what information is in the public interest and what is not is very weak. What can be more in the public interest than how the PM spends public money? The fact that the department’s
arguments are supported by the Act indicates that the Act is inadequate. If the Act cannot facilitate the release of comparatively benign information, what will happen when the information requested is more controversial? This was the case with Reporter E in the second Australian FOI request.

**Case 2: Training of foreign military personnel**

After discussing the FOI topic with Reporter E we decided that the import and export of weapons and military materiel was not a particularly controversial topic in Australia and of little interest for his news organisation. Reporter E pointed out that he would be very keen to re-lodge a request from 1997. At that time there was considerable discussion about the fact that the Australian defence force had held joint military exercises with the Indonesian Kopassus special forces. There had been many allegations laid against members of the Kopassus regarding human rights violations in the former Indonesian region of East Timor. As a result of Australia’s support for East Timor’s move towards independence, the joint exercise and training program with the Indonesian military was suspended. Now, a few years later, Reporter E was keen to see in total how many Indonesian and other foreign military personnel Australia had trained, if they were Kopassus, if it was possible to get their names to cross reference with Amnesty International reports containing names of known violators of human rights, and if the Australian Defence Force (ADF) had re-started its military exercises and training program with Indonesia.

Reporter E was inspired by FOI requests in the United States in the mid 1990s that asked for similar information. The initiative came from an organisation called School of the Americas Watch (SOA Watch). SOA Watch
was founded in 1990. Following a massacre of six Jesuit priests, their co-worker and her teenage daughter on November 16, 1989 in El Salvador after which ‘A US Congressional Task Force reported that those responsible were trained at the U.S Army School of the Americas at Ft. Benning, Georgia (SOA, 2005).’

After very humble beginnings in 1990, SOA Watch started to get results using the federal FOI Act to declassify and release the training manuals used at the SOA. Several media organisations lodged FOI requests and on January 24, 1997 two CIA training manuals were released in response to a 1994 FOI request by the *Baltimore Sun*. The manuals contained numerous passages providing instructions on the use of torture, extortion and ‘neutralizing’. The release of the manuals was a major embarrassment to the US authorities (ibid). Several other requests were directed at obtaining the name and country of origin of trainees at the SOA. Some were successful (ibid). The SOA Watch’s successful use of FOI and its subsequent campaign led to the closure of SOA in December 2000, though it reopened under a new name (The Western Hemisphere Institute for Security Cooperation, WHINSEC) in January 2001 (ibid). Most of the information that was requested had been stored in US military databases. Reporter E suspected that a similar database existed in Australia and was maintained by the ADF.

Reporter E’s original request was received and acknowledged by Department of Defence (DoD), October 22, 2004. The request sought:

…a copy on computer disk of all information retained by the Department of Defence on computer, detailing any foreign military personnel ever trained in Australia or outside Australia. This request includes the Defence Cooperation Database, including detail of ADF or other establishments where training took place, attendee’s home country; full names of attendees, their rank and the military unit they represented.
The request listed the 61 army, navy, airforce and central military training facilities in Australia that could have hosted the training. The request further pointed out that on February 27, 1997, the then Deputy Defence Secretary Hugh White told a Senate Estimates hearing that no foreign government had asked for secrecy regarding the training of their military personnel in Australia. In his request Reporter E also observed that the bulk of information on the list had already been assembled in reply to a question by then Senator Dee Margetts.

After further research, Reporter E amended his request on November 18 to include a database entitled ‘Defence Corporation Activity Management System and other databases managed by the School of Management, Technology and Training’.

In a phone conversation with the FOI Officer at DoD on November 29, Reporter E said he did not want to limit his request to a time period, but advised that he wanted access to the entire database.

DoD’s first reply was dated December 7, well within the 30 working days timeframe as set out by the Act. The letter pointed out that much of the information sought would be exempt under subsections 4 (1) and 33 (1) relating to the release of personal information (ie. names of the personnel trained) and the security, defence and international relations of the Commonwealth. Hence, DoD was saying that there were significant grounds for exemptions and that in practice the request may end up delivering a lot of blank pages.
DoD referred the request to the different parts of ADF in order to establish a fee for processing the request.

Search and retrieval time: 150 hours @ $15 per hour: $2250
Decision-Making time: $440
Other costs: $2
TOTAL $2692 (Excerpt from letter to Reporter E from Department of Defence)

It would require $2692 to process a request which potentially may deliver very little information.

Reporter E decided to challenge the fee in a letter dated February 14, 2005 (DoD had extended Reporter E’s response time due to an overseas assignment). Reporter E build his argument on the public interest clause in the FOI Act:22

I submit that the Department should either waive or significantly reduce the charge under the provisions of S29(5)(b) of the FOI Act, in that “the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.”

Defence’s role in training overseas military forces comprises a substantial part of the taxpayer funded Defence budget. The public’s right to review the utility and effectiveness of Defence Department expenditure, especially by responsible media organisations, is an important and essential part of any democracy. This is a substantial public interest reason for allowing waiver of your processing charge.

Also, there would be considerable public interest in our programme being granted access to this information because our report intends to analyse the utility of such a training programme – in particular the compliance of individual Australian-trained foreign troops with international human rights obligations to which Australia is a signatory. There is a strong public interest in seeing Australia allow full accountability for the enforcement of those international obligations – since Australia has demanded the same from other countries in its own diplomatic position internationally.

I believe also that historical precedent illustrates that Defence’s own estimates of the processing charges can be substantially incorrect.

22 Reporter E’s letter is reproduced in full as it illustrates well the carefully constructed argument of the case.
As [Program X] explained in its initial FOI request, this application is almost identical to a previous request made to Defence which met with a formal refusal in 1998. It is instructive to review the costs charged when we made this original request in late 1997 for much the same information held on the Defence Cooperation Database. In that earlier application, Defence initially asserted, in a letter dated 23 February 1998, that Search and Retrieval time would take 30 hours at $15 per hour and that decision-making time would take 10 hours at $20 per hour. They also charged another $650 for ‘Computing’.

In a subsequent letter dated 14 April 1998 the initial costing was revised dramatically downwards to a total of $290. This comprised 8 hours for Search and Retrieval time at $15 an hour and 8.5 hours at $20 an hour for decision-making. The computing fee appeared to have been dropped.

This means that in 1997 the estimated cost of processing our request was overstated by Defence by 450%.

In your most recent communication, we are now told that Search and Retrieval time will take 150 hours at $15 per hour and Decision-making time will take 22 hours at $20 per hour – a total of some $2692.

It would appear that one major difference between our original 1997 request and this most recent request is the advice you noted from the Department that the Defence Cooperation Activity Management System (DCAMS) database is not structured to easily provide the information in the format we have requested. I do not understand how any modern database system could require one hour for processing each of the 94 entries to provide them to us in a format under the terms of the FOI Act.

Why is it not a simple matter of interrogating the database for the names of all personnel listed on that database and limiting that inquiry to the fields that fall within our original request? And why is it that the DCAMS database is now apparently more difficult to extract data from that in 1997?

I do not see how, in light of the fact that computing database technologies have significantly improved since 1997, the cost of processing our request should be now more than 900% greater than the figure quoted for a nearly identical request in 1997. Computer efficiencies have surely made it easier to isolate and extract information off publicly funded databases than ever before.

I anticipate that one argument which might be used to deter our application being found to be in the public interest is an argument that such an application might in some way breach the Privacy Act. But it is very important to note that, as in our original 1997 request, we are not asking for information on overseas trained soldiers that has not already been made available to the Parliament.

To help you with your deliberations on the possible application of the Privacy Act, I emphasise that we are happy to confine the information sought in our application strictly to the full names of such overseas military personnel, their rank, source country, their unit and the Australian institution through which they obtained such training, and the nature of such training. We are not seeking information, which could betray operational matters or jeopardise Australia’s security.
To further assist you on the question of whether the release of such names would be barred under the Privacy Act, I note that the Department has previously accepted that was not the case. In answers to Questions on Notice No 944 of 24 February 1997, the names of PNG, Thai, Fijian and Malaysian military personnel serving in Australia were listed.

To assist you in your deliberations, I would note assurances given to Senate Estimates by then Deputy Secretary, Strategy and Intelligence, Mr Hugh White, on February 27 1997. He assured the committee the identity of foreign military personnel is not an Australian secret and he also confirmed no foreign governments have instructed that such information is kept secret. When questioned as whether there was any legal reason why such information should be secret, Mr White told the Committee it was a 'policy' reason. Subsequent answers provided in written form to the Senate Foreign Affairs, Defence and Trade Committee admitted there is no written policy on the release of names of foreign personnel.

For all of these reasons I respectfully ask the Department to reconsider the charge it requests before processing our request for information. We believe a waiver or significant reduction would be in the public interest, and thus fall within the discretionary provisions of S29 of the FOI Act.

On February 18 DoD replied and its decision was not to waive the processing charges for the following reasons:

a) Without seeing the documents in question you could not know whether the giving of access would be in the public interest

b) Airing of the information on the X [name deleted by author for confidentiality reasons] program would involve what is essentially a commercial decision – that is whether or not the information is "newsworthy". It is conceivable that the information may not be used in the X program as you are involved in the commercial enterprise of television and the documents are sought primarily for the purpose of business.

c) Section 29 of the FOI Act established prima facie that charges should be imposed so that applicants contribute to the cost of processing all their requests. As you work for a profitable business enterprise, it is my view that your employer has the financial resources to pay the charges.

In the letter DoD revised its initial processing charge of $2692 reducing it to $1167. The grounds given were that since the initial assessment 'the action areas have had the opportunity to review their assessments at this time and are better able to gauge a more accurate estimate.'
It is interesting to note that DoD’s response does not really deal with Reporter E’s public interest argument. DoD dismissed it under point a) above and instead opted to focus on the fact that Reporter E works for a commercial network and should therefore pay for the information.

Based on the initial indications given by DoD where it was made quite clear that significant parts of the information requested probably could not be released, Reporter E and his editor decided to drop the request.

Similar to Reporter D, since Reporter E did not pursue the request it could be argued that Department of Defence never officially refused the request. However, from a user’s point of view the high processing fee effectively halted the request process. Hence, for the purpose of evaluating this request it will be regarded as refused.

‘The practice’ summary of findings case two

The total score for the second Australian case was 12 out of 68, or 17 per cent. Table 10 provides an overview of the key evaluation parameters. The comments includes the reporter’s comments and this authors analysis.

Table 10 Australian ‘practice’ case 2

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>3) Did the agency’s reply quote a processing fee?</td>
<td>0 out of 4</td>
<td>‘They quoted $2692 just to consider our application, with no guarantee of it being released. It is typical of the way Federal and State Government agencies jack up the cost of</td>
</tr>
</tbody>
</table>
decision-making time to deter requests. It is far more than we should reasonably have to expect. In my original request for very much the same information, made in 1998 the Department stated it would take 10 hours at $65 per hour to process the request. That totalled $1300. But they previously agreed to ask only for a deposit of $325. Now, five years later the cost of processing that information has escalated from 10 hours to 22 hours at $20 per hour…It is also significant that when I proceeded with the original 1998 application, Defence amended their original estimate of costs from $1300 decision-making time and search time to $290! I will make this point in my appeal letter, asking them – under S29 of the Act – to reduce the $2692 charge on the grounds that it is excessive (Interview:8, 2005).’ As shown above, the ‘appeal' was only partly successful and not successful enough to continue the request.

5) How much time elapsed from the agency's confirmation of the receipt of the request to the grant/refusal of the request?

0 out of 4

‘It was more than 40 days to get to the stage of them sending me a statement of costs for the cost of considering the request. This seems excessive but in the context of me revising my original request to limit it to keep costs down, it’s probably reasonable. The hindrance is not so much in
the consideration time. It’s in the costs of decision-making imposed before they even get to the consideration stage (ibid).’

<table>
<thead>
<tr>
<th>6) What was the agencies decision?</th>
<th>0 out of 4</th>
<th>Application not granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>8) Compared to the information ‘served’ to newsrooms by the government’s press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable?</td>
<td>N/a</td>
<td></td>
</tr>
<tr>
<td>13/33) Which of the following statements best sums up the attitude held by the public servant/s you dealt with during the course of the request?</td>
<td>Reply e) 1 out of 4</td>
<td>‘It’s very much the case that the Government bureaucrats are politicised into accepting that release of information is a very bad thing. The problem is that senior public servants have no security of tenure and their very career depends on minimising harm to the politicians who run their department. Perhaps the best most recent example of that is the way that Senator Hill’s statement to Parliament on whether Australians interrogated people in Abu Ghraib was a deliberate lie – based on an implausible distinction between an ‘interview’ and an ‘interrogation’. Most of them don’t understand the intention behind the laws. So they apply the black letter law and place obstacles to genuine public interest inquiries. Any public-</td>
</tr>
</tbody>
</table>
access so I act conservatively rather than proactively in relation to public access.

e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

| 14/35) What do you perceive the end product to be? | 0 out of 4 | ‘It would be boring television seeing me shuffling papers around. However, I have written opinion pieces in papers and journals about earlier requests (ibid).’ |

In the interview with Reporter E the costs of legal appeals to, in the first, instance the Administrative Appeals Tribunal (AAT), were discussed. Reporter E pointed out this is not a viable option in Australia for two reasons: the very poor outcome from the FOI requestors’ perspective (the reason for this was covered above in ‘the promise’ findings) and the very prohibitive costs. ‘Apart from the $680 lodgement fee with the AAT, you also have to consider the huge fees for the lawyers you need to hire. Looking at counsel fees around $20 000 a day is not unusual (ibid).’ Asked why it was necessary to hire such expensive legal counsel Reporter E replied: ‘well, you’re up against the best government lawyers, against those you can’t really self-represent, so if you are to stand any chance, you need to hire the best as well (ibid).’ The Australian FOI appeals process will be discussed further below in the McKinnon vs. Treasury case.
As in case 1, the sticking point in case 2 is the interpretation and definition of what is in the public interest. The fact that the agencies themselves have initial right of interpretation opens the door to very high processing fees as a means of terminating FOI requests. Both Reporters D and E point out that in their experience this is a very common tactic. Clearly, a deterioration of the Australian FOI process has occurred since Reporter E submitted his initial request in 1997. The fact that DoD brushed aside his arguments when he pointed this out in his letter challenging the fees further illustrates how complacent Australian federal agencies seem to have become in relation to FOI.

Case 3: Self-harm and suicide in detention centres

The last Australian case build on Australia's policy of mandatory detention of asylum seekers. In the last five years there has been considerable debate about whether the policy has caused psychological damage to the detainees. Cases of self-harm and suicide has occurred, but it is unclear how many. In 2001 the Australian federal government decided to ‘out-source’ part of the processing and detention of some asylum seekers to the island nation on Nauru. The policy was named ‘The Pacific Solution’. The total cost of this policy has never been disclosed and was also deemed to be of interest in the third FOI request.

The original request read in part:

Request for Information under the Federal Freedom of Information Act

Further to the provisions of the federal FOI Act, the x Program on ABC Radio National would like to formally request the following information:
A copy of all reports/summaries into self-harm and attempted or successful suicides at all Australian detention centres for asylum seekers between 1990 and 2003. If you propose releasing the information to us with the names deleted of the people involved in the reports we accept this.

Any reports/estimates/summaries/calculations done on the total cost of the ‘Pacific Solution’, ie the Australian detention centre on Nauru between 2001 to present date.

I look forward to receiving your decision and the schedule of documents as soon as possible.

The request was dated December 3, 2004. On December 21, 2004 the FOI Delegate at DIMIA responded via a letter acknowledging the receipt of the request. She also pointed out that the department were ‘currently experiencing significant delays’ and might not be able to meet the 30 days deadline for a decision.

Five and half months later on May 16, Reporter F faxed a reminder letter to DIMIA and enquired about the status of the request. In early August Reporter F received a message on her voice mail from DIMIA about processing costs (this is another breach of procedure since such communication should be in writing). Reporter F could not make contact with the FOI officer at this point in time. The officer left another phone message on September 13. Reporter F called back the same day. After apologies for the delay, the officer confirmed that DIMIA had been able to retrieve some of the information and would e-mail it to Reporter F. However, the self-harm information was incomplete. It only went back to 2002 and was not comprehensive. Reporter F was told that to do a full search would be very resource intensive and the department did not want to quote the charges (this is another breach of the Act) as it would ‘require huge changes to priorities within the Department’. The information received by Reporter F shows that between 2002 and 2005, 878 cases of self-harm were
reported at Australian detention centres. 14 deaths had occurred between 1998 and 2005 and the Coroner had found that one of the deaths was caused by suicide.

The information regarding the costs for the off shore processing centres was also incomplete. DIMIA had been able to collate some of the costs and it amounts to about $167 million, but other departments held more information on costs.

‘The practice’: summary of findings case 3

Compared to the first two Australian cases, the third had a very short ‘paper trail’ dragged out during a very long time frame. Until this case there had been no consideration of how the research project should deal with agencies that breached the Act. As time passed during this request, it became clear that the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) was dysfunctional in regards to FOI administration. Having considered various options it seemed logical that if a department did not meet the requirements of the Act, it would receive the score 0. Hence, there was no evaluation done of this request, however, the process of the request was monitored.

It took the department nine months and seven days to deliver a decision. The Act stipulates 30 working days.

A general observation by Reporter F, who is a senior journalist and producer at ABC Radio National, was that after the initial letter the case was delegated to junior staff at DIMIA who seemed to have neither the experience nor the delegated decision-making power to handle requests of this magnitude.
Discussion and analysis: ‘the practice’

To arrive at one quantitative score for ‘the practice’, the scores for the three studies were added and divided by three: \((27+12+0)/3= 13\) (out of 68). Expressed as a percentage Australia scored 19 per cent. This can be compared with Sweden’s score of 69 per cent in ‘the practice’. Combined with the qualitative data for ‘the practice’, it paints a very bleak picture of how FOI works in reality in Australia. The most important point to note is that none of the requests were granted in full and only one generated any information at all, and this information was incomplete and delivered nine months after the request. With this in mind it may seem odd that Australia generated any score at all in ‘the practice’. The reason for this is of course that ‘the practice’ evaluated not only the information acquired, but also the process of acquisition. But the fact remains – the requests generated no information that could be used as part of a political accountability process, a very discouraging result indeed.

Based on the result of the Australian ‘practice’ it can be concluded that the federal FOI system does not provide independent access to government-held information.

The two outstanding obstacles to obtaining information under FOI in Australia are the breaches of the turn around time and the excessive processing costs. ‘The practice’ clearly illustrated how hard it is to argue that the information sought is in the public interest. However, there are other very potent hindrances spectacularly illustrated by the recent McKinnon vs Treasury case.
McKinnon vs Treasury

This case is not part of this project, but arose independently when the study was in progress. The case involved two FOI requests from the Australian newspaper’s FOI editor to the federal Treasury. The first request, lodged October 17, 2002, sought information on ‘bracket creep’ within the taxation system. Part of the original request read:

Reports, reviews or evaluations completed in the 12 months from 3 December 2001 to 3 December 2002 detailing the extent and impact of bracket creep and its impact on revenue collection of income tax, including information in relation to higher tax burdens faced by Australian and/or projections of revenue collection increases from bracket creep (McKinnon, 2005: 1).

The second request covered the first home buyers scheme (FHS). It was lodged, December 3, 2002 and read in part:

Documents relating to any review/report or evaluation completed on the First Home Buyers Scheme in the last two years, including documents summarising the level of fraud associated with the program, its use by high wealth individuals and its impact on the housing sector’s performance in the Australian economy (McKinnon, 2005: 1).

The Treasury refused the release based on the numerous exemptions offered by the FOI Act. The applicant sought several internal reviews that were all unsuccessful and decided to appeal to the Administrative Appeals Tribunal (AAT). The hearing was listed before the AAT in Brisbane in early December 2003. On December 1, 2003 the Treasurer issued a ‘conclusive certificate’ under S36 (3) of the FOI Act which reads:

Where a Minister is satisfied, in relation to a document to which paragraph (1)(a) applies, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect (specifying the ground of public interest in relation to which the certificate is given and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest (Freedom of Information Act, 1982).
What this means in practice is that the any federal Minister is granted papal-like powers to ‘conclusively’ decide what information is to be released, regardless of the level of public interest. The Treasury’s initial grounds for not releasing the information in the bracket creep request are interesting to consider. The Treasury argued that the information may ‘create or fan ill-informed criticism’ and that ‘the release of documents containing tentative and partially considered issues’ that could ‘confuse or mislead the public’ and encourage ‘ill-informed speculation and unhelpful debate (McKinnon, 2003: 5)’.

The problem is of course that with no access to un-spun information there will be no debate at all. The Treasury’s views presented in its initial response permeate the rest of the case. It prompts the issuing of the conclusive certificate on similar grounds in which interestingly it is also noted that ‘the release of such documents would threaten the protection of the Westminster-based system of Government (McKinnon, 2005: 10).’

The core of the problem from a user’s perspective is that a ‘conclusive certificate’ severely limits the scope of hearing and ruling for the AAT and the subsequent courts. Sec 58 (3) of the FOI Act states that: ‘the powers of the Tribunal do not extend to reviewing the decision to give the certificate.’

Effectively this means that all the court is allowed to do is to determine whether the grounds for issuing the certificate were reasonable or not (ibid (4)). The McKinnon case has shown that the courts take a very generous view on what is reasonable. In the AAT hearing what this meant was that the Treasury just had to repeat its claim and grounds to be ruled reasonable. News Ltd appealed to the full bench of the Federal Court, which upheld the AAT ruling. The case was
subsequently appealed to the High Court of Australia and has been granted Leave of appeal in August 2006 (McKinnon, 2006: 22-23).

The McKinnon case is significant since it is one of very few cases that has been appealed to the highest court. Significantly, it is the first case effectively challenging a ‘conclusive certificate’. It clearly shows that the Australian federal FOI Act favours the government in the appeals procedure. The fact that the courts are not allowed to review and try the reasons for a ‘conclusive certificate’ is of grave concern from an accountability and flow of information perspective. The cost of driving FOI appeals is prohibitive. The estimated cost if News Ltd. loses the appeal in the High Court is $300 000 (Jackson, 2005: 2)

So, here we have a case that is arguably in the highest public interest (what can be more in the public interest than tax policy?) where the government spends an un-disclosed sum of money to defend its refusal to make public the requested documents in court and where the FOI requestor seeking to obtain information to hold the government accountable and stimulate public debate (two of the main aims of the FOI legislation) ends up paying a fortune challenging a power granted to the Minister that is clearly in conflict with the aims of the legislation. The McKinnon case alone clearly illustrates why the Australian FOI regime scored so poorly in the studies.

**Overall analysis: Australia**

Having presented the data in each study let us look at how the data connects to the overall research questions: to what extent, if any, are the
promises made by Freedom of Information legislation borne out by the practice in the countries of study?

Table 11 summarises the Australian scores:

Table 11 Quantitative data Australia

<table>
<thead>
<tr>
<th></th>
<th>‘the promise’</th>
<th>‘the spin’</th>
<th>‘the practice’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Score</td>
<td>12 out of 68</td>
<td>49 out of 76</td>
<td>out of 68</td>
</tr>
<tr>
<td>Score in %</td>
<td>17.6%</td>
<td>72%</td>
<td>19.1%</td>
</tr>
</tbody>
</table>

The above scores are not very flattering. ‘The promise’ points to very weak legislation and an overall FOI system that offers only modest promise in terms of independent access to unspun information. Interestingly the bleak promise correlates with the very low score in ‘the practice’. So, the answer to the research question is that the gap between the promise and practice of FOI in Australia is very small indeed. The legislation promises very limited access and this is the case in reality. (It should be noted that the aims and objectives of the Act promise significant access to information, but the Act in itself does not deliver on these promises) However, what stands out in table 11 is ‘the spin’ score. According to that score the public servants and politicians are quite positive towards FOI to the point of favouring the facilitation of access. As we have seen in this chapter this is not the case in practice. So, in the Australian study ‘the spin’ title of the survey is a particularly adequate name. It shows clearly that the leading public servants and politicians would like us to think that FOI works, when in reality it does not. Hence, in the case of Australia the major gap is between the ‘spun’ version of FOI and the practice. This picture is underscored when you consider some of the qualitative findings:
None of the Australian requests generated information within the frame work of the legislation (the only information obtained was incomplete and the department refused further search and retrieval)

The turnaround time for the three requests was long (2 months, 6 months and 9 months respectively)

The cost for processing the requests was high (initial quotes for the two cases where the departments followed procedure: $921.50 and $2692) This serves as a very effective deterrent to discourage requestors to follow the process through since you end up paying regardless of whether you receive actual information or blanked out documents

There was no legal protection of journalistic sources/shield laws for journalists as described by ‘the promise’ and ‘spin’ sub-studies

Most important: the attitude towards ownership of government-held information correlates through all three sub-studies. ‘The promise’ makes it clear that departments have 30 plus 30 working days to process requests and that the law provides the government with a multitude of delaying tactics. The attitudes of government functionaries revealed in ‘the spin’ supported the view that the governments owns the information and that it decides who will have access. These findings were mirrored in ‘the practice’.
This situation is compounded by the powers granted to federal Ministers in the Act allowing them to use ‘conclusive certificates’ that effectively block access and weaken the appeal options. The McKinnon vs Treasury case shows how prohibitively expensive it is to drive FOI appeals.

As pointed out earlier the issue of shield laws for journalists was the focus of a Senate inquiry in 1994 (Australia, 1994). The inquiry was triggered by a number of court cases between 1989 and 1993 that saw three Australian journalists jailed, and a number of others fined (Pearson, 2004: 235) after they were convicted of contempt of court for refusing to disclose their sources. This issue is still very current in Australia. In February 2004 two Canberra based Herald-Sun journalists exposed the contents of a secret government document outlining plans to not to proceed with a $500 million boost to veterans’ pensions. The document was leaked to the two journalists by a public servant. The Federal Government investigated the source of the leak and charged a public servant under Section 70 of the Crimes Act (described above). In August 2005 the two journalists refused to disclose their source when called as witnesses in the case. They were charged with contempt of court and could face jail terms. The case is still before the court (Crittenden, 2005: 1). The debate regarding shield laws for journalists has been re-ignited by this case which gets to the core of whether the public interest benefits from encouraging leaks of this nature. Clearly it was very important to Australian war veterans to know of the document. Were it not for the leak, the public most likely would never have found out. Another issue that has been raised in the debate is that the
journalists are just doing their job of reporting and it is unfair that they should be used as tools in the government’s hunt for who leaked what (ibid, p. 2).

The 1994 Senate inquiry ‘recommended that the courts weigh up the competing public interests before citing a journalist for contempt (Pearson, 2004: 252)’. However, as this recent case shows, little seem to have changed in practice regarding protection of journalistic sources and shield laws for journalists in Australia since the 1994 Senate Report. Pearson points out that other Western democracies have jailed journalists for not revealing sources, among them Britain and South Africa. ‘Even the bastion of the free press, the United States, has jailed 17 journalists since 1984 for such offences (ibid).’

One of the few positive attributes of the current federal FOI regime in Australia is the annual FOI report compiled by the Attorney General’s department. The report is a useful tool for tracking the practical workings of the Act. The 2003-2004 report shows that during this year federal government agencies received 42 627 requests (Attorney-General, 2005: v), 92.1 per cent of which were from individuals seeking personal information. Most of these requests were granted. So, from an individual perspective the Act does work. However, this project is concerned with the requests that are labelled ‘other’ in the report, for instance requests from journalists on matters of government policy and conduct for political accountability purposes. A closer look shows that most of the ‘other’ requests have turnaround times of between 30 to 90 days (ibid: 8), which confirms the findings in ‘the practice’. Even more telling is the information under fees and charges. Federal agencies notified $1 287 010 in charges, but only collected $268 947 (ibid, p.12). The report does not specify...
how many requests were withdrawn, but the discrepancy between notified and collected charges infers a number of withdrawn requests (the 2002-2003 report specifies the number of withdrawn requests at 3333, but does not list the reason for withdrawal, (Attorney-General, 2004)). The statistics in the annual FOI reports confirm the findings in the Australian study.

The end result for Australian federal FOI is bleak indeed: when put to the test Australian FOI completely failed to deliver. The problems start with the legislation that does not provide the framework to deliver on the FOI Act’s aims and objectives. The dysfunctionality of the Australian FOI regime is made clear by ‘the practice’ where none of the requests generated any information within the framework of the law. Perhaps most serious of all is that since the launch of FOI the leading elected Australian representatives and their supposedly independent and non-political leading public servants have tried to and are still trying to convince the Australian public that FOI in Australia is alive and well. The Australian results are frankly embarrassing for a country that claims to stand for liberal democratic values of which openness in governance is an important part. The poor performance is not surprising when you consider what the Federal Treasurer, Peter Costello, recently had to say in an address to public servants:

Costello claimed freedom of information laws were conceived so that citizens could know what the government knew about them and so they could correct any misinformation in their personal files.

Costello was reported as saying: “That is their [FoI laws] use,” before lamenting that some presumably meddling newspaper editors had developed a practice of using FOI laws to seek documents relating to policy matters (Day, 2005: 20).
Clearly Costello has not read, not understood or does not want to understand the aims and objectives of the federal FOI Act. What makes the situation even more deplorable is that the Federal government was given the analysis and tools in 1995\(^{23}\) to rectify the situation – this far the lack of political will has been astounding and is eating away at the government’s democratic credentials.

### Conclusion

The first two sub-studies combined to show that no legal protection of media whistleblowers exists in Australia and that the government respondents are very negative towards the prospect of legally protecting journalistic sources. Indeed, legislation exists that severely punishes public servants who disclose information to for instance media, on their own initiative. From a quantitative point of view the scores in the studies differ greatly: ‘the promise’ scored 18 per cent and ‘the spin’ scored 64 per cent. The implication of this discrepancy is that the administrators of FOI try to project an ‘all is well’ image belied by reality. In other words: they are applying spin to a dud legislation that was never meant to deliver proper third party access to government-held information.

Of the three Australian FOI requests lodged in ‘the practice’, NONE delivered information, within the framework of the law. Ironically, the only

\(^{23}\) In 1995 The Australian Law Reform Commission produced a report that recommended 106 amendments to the Act that would have addressed most of the legal issues. The report was very positive towards a well functioning and far-reaching FOI as a political accountability tool and pointed out its importance to representative democracy. Among other things the report recommends part removal of the conclusive certificate clause, re-structuring of the fee and charges system and the installation of a FOI Commissioner to oversee proper implementation of the Act. The recommendations would address most of the current problems with the FOI Act ALRC, Open Government: A Review of the Federal Freedom of Information Act 1982 (Australian Law Reform Commission, 1995).
request that did deliver was one where the department breached the legislation on two counts, one being a nine-month decision period. The score for ‘the practice’ was 19 per cent.

So, it can be concluded that the federal Australian FOI regime was never intended to work. The number of exemptions, the prohibitively expensive processing charges and the internal appeals process made it a dud as a tool for political accountability from day one. The loop-holes in the law are simply too many. What compounds the seriousness of the situation is that successive federal governments, backed by the public service, have projected the image that the FOI system is working well, creating the illusion of an informed public, which from the citizen’s point of view, is worse than being ignorant.

Former Prime Minister Paul Keating used the ‘banana republic’ analogy to convince Australians of the need for economic reform in the 1980s and 90s. Now, Australia has turned into a ‘public information banana republic’ with a flow of public information not worthy of a country that claims to be a mature liberal democracy.
Chapter Eight: USA

Introduction

The United States plays an important part as one of the role models for FOI internationally. It has long and proud tradition of a well-functioning FOI, which since the enactment of FOI in 1966 has provided relatively independent third party access to government-held information. This is exemplified by the thousands of journalistic articles based on information acquired using FOI. However, as this chapter will show, a recent shift has occurred, severely restricting the practical effectiveness of FOI in this country.

Political Profile

It may be useful to recall figure 1, first presented in chapter five, to situate the US politically compared to the other countries of study.

Figure 1 Overview Political systems
As figure 1 shows the US has a federal system with a popularly elected President as head of the executive.

The concept of balance of power lies at the heart of the US political system. The US founding fathers drew heavily on the ideas of the French political philosopher Montesquieu. In his most comprehensive political work *L’Espirit des lois* (The spirit of the laws), published in 1748, he outlined his balance of power concept. In Montesquieu’s France the powers were the Church, the military aristocracy and the legal aristocracy. The idea was that these three groups would be ‘able to restrain the monarch and each other because of their independent moral or social positions (Slevin, 1996: 327-28).’ The need for restraint, argued Montesquieu, was to prevent any one of the powers of society from becoming too powerful with the risk of despotism and consequent limitations on the freedom of the individual. The goal was to permit ‘development of liberty in its modern form, as a sphere of life for each individual free from collective interference (ibid).’ The US constitutional fathers translated Montesquieu’s ideas into three arms of government, the legislative (Congress), the executive (the President) and the judiciary (the Courts). Apart from the ‘natural’ occurrence of checks and balances as argued by Montesquieu, the three arms were also given legal powers to check each other. For instance, the President has to sign and approve legislation passed in Congress for the law to come into force while the President in turn has usually to take his/her law
proposals to Congress. The Supreme Court’s main task is to ensure actions by
the executive and Congress does not go against the Constitution.

The US Constitution is a very substantial document with 27 powerful
and often referred to amendments (Congress, U. S., 1789). As pointed out in
chapter seven, the US constitution does much more than divide up the powers
between the different levels and arms of government. It also seeks to guarantee
the rights of the individual by limiting the powers of government. The most
important tool for this is the Bill of Rights (amendments 1-10), in which the
fundamental rights of the individual are listed. The first amendment, on which
the FOI regime is partly based, reads:

Congress shall make no law respecting an establishment of religion, or prohibiting
the free exercise thereof; or abridging the freedom of speech, or of the press; or the
right of the people peaceably to assemble, and to petition the Government for a
redress of grievances (Congress, U. S., 1789).

From an FOI perspective it is very significant that ‘the press’ is explicitly
mentioned in the Constitution as an institution that should be allowed to operate
freely and that the government should not make laws limiting its operation. This
gives FOI almost a constitutional standing, but not quite.

The US is a federal republic with a popularly elected President as its
Head of State. The President also heads the executive branch and appoints
and leads the cabinet. The US parliament, the Congress, is made up of two
houses: the House of Representatives and the Senate.

The greatest difference to the other countries of study is that the US
President is not drawn from the Congress. This means that he/she and the
cabinet can stay in office even if the Congress carries a different political
majority. As a matter of fact, this has quite often been the case. The President is not directly responsible or accountable to the Congress, instead he/she answers directly to the public via elections. The President appoints his/her own members of the Executive. Generally they are drawn from the private sector and the public service, although serving members have also been appointed. The latter are required to resign from Congress before they take up an executive appointment.

There are three levels of government in the US, federal (national), state and local. Similarly to Australia, most of the regional political power sits at the state government level. As far as FOI is concerned this means that the US has state acts as well as one federal Act.

**Evolution of FOI in USA**

The evolution of FOI in the US has been covered in detail in chapter two. However, there has been an important recent shift in the implementation of federal FOI in the US that deserves attention. Since September 11 2001 and the war on terror, access to documents and information has been severely restricted. This is clearly illustrated in the results of the American ‘practice’ study (see below). The shift can be traced to a memorandum dated October 12, 2001 put out by the then Attorney General, John Ashcroft and added to the FOI Act as guidance for the implementation of FOI. After initial assurances that the Attorney General is committed to FOI the memo gets down to business:

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and
deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records (Freedom of Information Act, 1966: 50-51)

The message to federal government agencies is clear: be much more restrictive in releasing information; and if you refuse applications and they are appealed you can count on legal assistance from the Attorney General's department. This memo has not been widely published, but is possibly the worst blow to US federal FOI since its inception in 1966 (the full memo is available as appendix 4). Because the US, as pointed out in chapter two, is one of the two 'model' FOI systems, what it does in terms of FOI is of particular significance. The other model system, Sweden, has, at least officially, gone in the opposite direction to that indicated by the Ashcroft memo. However, Sweden has nowhere near the political reach of the US. The implications of this will be further discussed in chapter eleven.

Data presentation and analysis

The promise: USA

Aims and objectives of legislation

The main legislative vehicle is the Freedom of Information Act, FOIA, enacted in 1966 and fully operational in 1967. The FOIA has been amended several times and was in 1996 complemented by the Electronic Information Act
which extends FOIA to encompass information stored on digital media and requiring that electronic reading rooms be provided by agencies. Private requests for information are made under the Privacy Act of 1974. The Government in the Sunshine Act requires the US government to open the deliberations of multi-agency bodies. The Whistle Blower Protection Act of 1994 provides some protection for federally employed whistleblowers. The False Claims Act (as amended in 1986) allows individual federal employees to take agencies to court over fraudulent behaviour. This Act is to date the most effective and far-reaching whistleblower protection in the US. However, none of the above acts provide legal protection to media whistleblowers.

As pointed out above the US FOI regime is based on the First Amendment to the US constitution. The intent of providing the public with independent access to information was clearly articulated by former United States President James Madison when he chaired the committee which drafted the First Amendment to the US constitution:

Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both. (cited in Supperstone and Pitt-Payne, 2001: v)

Further guidance as to the objectives and aims of the US FOI regime can be found in the very comprehensive citizens’ guide to using FOIA prepared
by the Committee of Government Reform (CGR). The introduction clearly points out that with the enactment of FOIA in 1966:

the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the ‘need to know’ standard has been replaced by a ‘right to know’ doctrine. The government now has to justify the need for secrecy (CGR, 2002).

The US FOI regime does make far-reaching promises that are well summed up by a passage in the introduction to the citizen's FOIA guide:

Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public. The history of the act reflects that it is a disclosure law. It presumes that requested records will be disclosed, and the agency must make its case for withholding in terms of the act's exemptions to the rule of disclosure (CGR, 2002).

In sum: all US government-held information should be regarded as public, and the agencies should make it their priority to grant access to the requested information as rapidly as possible. Such is the articulated promise of the US legislation which will be evaluated in ‘the promise’ study.

‘The promise’: score and summary of findings

The methodology for calculating the score has been detailed in both chapters three and six (‘the promise’ evaluation template can be viewed in full in appendix 1). The maximum possible score for ‘the promise’ was 68, describing a very far-reaching FOI regime including to a full or partial extent the private sector and providing substantial legal protection of media whistleblowers (journalistic sources).
The ‘promise’ score for the US is 31 out of 68, indicating a reasonable legislative ambition. The areas covered by the evaluation template included: cost, turnaround time, the appeal process and protection of sources. Table 12 shows a selection of key questions, scores and comments. When not indicated differently, the references in table 12 are based on the federal Freedom of Information Act, 1966 in its latest amended and revised version.

Table 12 The Promise USA

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>2) Does the Act allow the agencies to charge processing fees?</td>
<td>2 out of 4</td>
<td>FOIA spends an entire section on the fees that agencies can charge to retrieve and copy the requested information. It requires each agency to provide a set schedule for fees and clearly states that the fee should be as low as possible. It also distinguishes between information sought for commercial purposes (higher fees allowed) and information sought for non-commercial use such as scientific and educational purposes. Importantly the media is specifically mentioned in the second group. Another very important part of the fee structure is that an agency is NOT allowed to require advanced payment of any fee. In contrast with, for instance, the Australian FOI Act (Freedom of Information Act, 1966: section 4)</td>
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</tr>
<tr>
<td></td>
<td>It is clear that the intention of the Act is to encourage the agencies to charge as low a processing fee as possible.</td>
<td></td>
</tr>
<tr>
<td>4) How long does the Act give the agency to make a decision on the request?</td>
<td>3 out of 4</td>
<td>The response time is the problem area in US FOIA. An audit done in 2002 found excessive backlogs in response times in many agencies. Failure to respond within 20 days is the most common breach of US FOIA (GAO, 2002).</td>
</tr>
<tr>
<td>6) Does the Act require agencies to keep a running diary over current and archived documents?</td>
<td>3 out of 4</td>
<td>This is a clear similarity between the Swedish and US FOI systems. (Freedom of Information Act, 1966: section 1)</td>
</tr>
<tr>
<td>8) Are any federal/national agencies exempt from the Act?</td>
<td>3 out of 4</td>
<td>Congress, the courts, the President’s immediate staff and the National Security Council are exempt (Banisar, 2004: 92). It is symbolically important that some government entities are exempt. On the other hand CIA and FBI are not exempt.</td>
</tr>
<tr>
<td>10) Does the Act allow for legal costs being covered by the state?</td>
<td>1 out of 4</td>
<td>Yes, at the discretion of the state. (Freedom of Information Act, 1966: section 3)</td>
</tr>
<tr>
<td>11) Is the FOI Act(s) part of the constitution?</td>
<td>0 out of 4</td>
<td>No, and the incumbent government can change the Act.</td>
</tr>
<tr>
<td>12) Does the Act apply to the private sector?</td>
<td>0 out of 4</td>
<td>No. And the Act does not apply to former government agencies that have been privatised.</td>
</tr>
</tbody>
</table>

**Part II Protection of journalistic sources**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1) What level of protection of journalistic sources exists?</td>
<td>2 out of 4</td>
<td>Numerous laws exist to protect whistleblowers from punitive action from employers, both</td>
</tr>
</tbody>
</table>
When can journalists be forced to reveal their source? | 2 out of 4 | In any court case (ibid)
---|---|---
Are journalists in any way bound to reveal their source? | 1 out of 4 | ‘In the US, no, they are not legally bound to keep a promise to a source, although some would say that they are based on the legal principle of collateral estoppel...(ibid)’
Are colleagues and managers (eg the Minister and chief public servant) of a government agency in any way prevented from investigating the source of a ‘leak’ to the press? | 0 out of 4 | ‘No limits on what they can do over here to investigate a leak...(ibid)’
If legal protection of journalistic sources exists – is the legislation part of the constitution or a separate Act? | 0 out of 4 | ‘At the federal level, were protection to exist, it would have to come from statute because the Court in Branzburg v. Hayes ruled it was not a constitutional right...(ibid)’

Discussion and analysis: ‘the promise’

Overall table 12 shows a rather ambitious FOI legislation. The message sent to agencies is that they should waive rather than impose processing fees in the interest of public access and that processing should be speedy. As we shall see later, it is the speed that is lacking in the US system. The reason for the relatively low US score (31) compared to the Swedish score (63) is mainly...

24 Charles Davies is the director of the Freedom of Information Center at Missouri University in the US.
explained by the fact that no legal protection of media whistleblowers exists on the federal level in the US system. This is surprising, especially when one considers the fact that several of the most important disclosures of corruption and maladministration in the US have come from whistleblowers. On the other hand, the prime Watergate source, 'Deep Throat' did keep his identity secret until 2005, more than 30 years after the event.

Judging from the score it seems clear that the aims of the US FOI regime are far-reaching and that the Act lays a reasonable foundation to deliver on its promises of making government-held information public. The next question is: what are the attitudes towards FOI of those in charge of implementing the Act?

‘The spin’: USA

The research question for ‘the spin’ was: what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?

Timing

As with Australia the election cycle impacted on timing. The US presidential election was set for early November, 2004. Because the date was fixed it was easier to plan around it than in the Australian case where the federal election date was flexible. Another issue with the US election was the ‘spoil system’. If the incumbent Bush government had lost, it would have meant replacing not only political posts, but also a large number of the public servants. This could have impacted on the capacity and the will to reply to the survey.
Hence, the US questionnaires were finalised and mailed in August 2004, leaving plenty of time for the incumbent administration to reply. Therefore it can be safely assumed that the election campaign did not impact on the response rate of the survey.

**‘The spin’: score and summary of findings**

In total 68 questionnaires were sent, 8 responses were received within three weeks giving a response rate of 12% (compared with 31% for Sweden and 7% for Australia). Since ‘the spin’ is not a statistical quantitative study as such, the response rate has no bearing on the end result. Rather, it is argued that each reply is a ‘case’ in itself with the attitudes held by the respondent having an impact on the FOI policies in his/her department. However, the number of responses could be taken as an indicator of how important FOI is for those charged with its administration. ‘The spin’ posed 19 questions in three sections to capture the attitudes towards FOI. Table 13 provides an overview of the pivotal questions.

The score was calculated by adding up the total score for each survey and then dividing it by the total number of replies producing an average score, the higher the score, the more positive the attitudes towards FOI and protection of journalistic sources. In the US case the total score was 382/8, which gave the average score of 48 out of 76.
Table 13 'the spin USA

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part I General attitudes FOI</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Questions 1-5</td>
<td>‘Strongly agree’ and ‘agree’ in most responses. Six responses included ‘no opinion’ and ‘disagree’.</td>
<td>The data indicates a qualified positive general attitudes towards FOI. Compared to Sweden and Australia the US responses are more cautious.</td>
</tr>
<tr>
<td><strong>6. FOI should be extended further to partly cover the corporate sector when public interests are at stake.</strong></td>
<td>Responses much more varied covering the whole spectrum of reply alternatives. Score: 16 out of 32 or 50%.</td>
<td>The score shows that there is not majority support among the respondents for extending US FOI further to cover the private sector.</td>
</tr>
<tr>
<td><strong>Part II Access to government held records</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) In your view, what length of time is reasonable before your department makes a decision on the request?</td>
<td>11 out of 32 – 40%</td>
<td>This was a bit of a trick question. As pointed out in the cover letter the survey was primarily concerned with the attitudes of the respondents. If they found the law too demanding, they had the option to voice this. Two of the respondents wanted 40 days or more, four thought 21-30 days were reasonable and only two found that the 20 days allocated by the Act was a good time-frame. This clearly shows that the implementers of the Act are not satisfied with the current time-frame. The effect of this will become clear in ‘the practice’ sub-study.</td>
</tr>
<tr>
<td>3) If your department</td>
<td>23 out of 32 – 72%</td>
<td>Replies kept within the</td>
</tr>
</tbody>
</table>
needs to charge a processing fee, which of the costs below do you find reasonable?

<table>
<thead>
<tr>
<th>7) Which of the following statements is closest to the attitude held by yourself and your staff?</th>
<th>28 out of 32 – 88%</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible</td>
<td>This is the single most important question in ‘the spin’. It cuts to the core of how FOI is interpreted, regardless of what the law says. 88% is a very convincing score, further backed up by the fact that six out of eight respondents picked alternative a). The other two picked c). This indicates that that American public servants and politicians view themselves as facilitators of information access. As pointed out in earlier chapters, the importance of this attitude cannot be over emphasized in relation to the practical functionality of FOI. The complete table containing all countries of study can be viewed in chapter eleven.</td>
</tr>
<tr>
<td>b) the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant</td>
<td></td>
</tr>
<tr>
<td>c) the government owns the information but increased openness and transparency is good</td>
<td></td>
</tr>
<tr>
<td>d) the government owns the information and decides who will have access</td>
<td></td>
</tr>
<tr>
<td>e) the government owns the information and decides who will have access and increased openness and transparency is not good</td>
<td></td>
</tr>
</tbody>
</table>
8) In your view, which statement most adequately describes the ‘fourth estate’ role that some media and reporters claim to fulfil?

<table>
<thead>
<tr>
<th></th>
<th>Statement</th>
<th>24 out of 32 – 75%</th>
<th>A very interesting outcome. Although it indicates awareness of the fourth estate role and sympathy for it, it is clear that most of the respondents see it as an invention by media and not a mutual understanding between the public and the media.</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>It is a vital part of the political accountability process and delegated to the media by the citizens</td>
<td>Majority of respondents picked alternative b.</td>
<td></td>
</tr>
<tr>
<td>b)</td>
<td>It is a vital part of the political accountability process, but exists on a mandate invented by the media itself</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c)</td>
<td>It does not have any particular influence on the political accountability process</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d)</td>
<td>It is an invention by the media to justify its existence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e)</td>
<td>It is a threat to the political accountability process because of the incompetence of most journalists</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

9) In your view, which is the most important function of FOI?

<table>
<thead>
<tr>
<th></th>
<th>Statement</th>
<th>22 out 32 – 69%</th>
<th>The coding in this question is based on the accountability function of FOI. The score is not really all that relevant, when looking at this parameter in isolation. What is more important is what reply alternative was the most common one.</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>To work as a tool for political accountability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b)</td>
<td>To increase transparency of the governing</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
In the US ‘spin’ most picked b). Only one picked a). Importantly all respondents take the view that FOI has a function to fill.

<table>
<thead>
<tr>
<th>Part III Protection of Journalistic sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) What is your view of legal protection of journalistic sources?</td>
</tr>
<tr>
<td>a) It should be made stronger and include the corporate sector when public interests are at stake</td>
</tr>
<tr>
<td>b) It should be made stronger in the public sector to encourage public servants to make public maladministration</td>
</tr>
<tr>
<td>c) It should stay the way it is</td>
</tr>
<tr>
<td>d) It should not be implemented in Australia – problems within a department are best handled internally</td>
</tr>
<tr>
<td>e) It should not be implemented in Australia. Journalists in general cannot not be trusted with this level of confidence</td>
</tr>
</tbody>
</table>

| 18 out of 32 – 56% | Varied responses. The dominant view is that it should stay the way it is, alternative c). i.e. no legal protection for sources. |
2) With public access to documents, is there a need for legal protection of journalistic sources?

<table>
<thead>
<tr>
<th>Option</th>
<th>Frequency</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Yes – it complements the access to document regime and strengthens the overall flow of public information</td>
<td>16 out of 20 – 50%</td>
<td>Confirms the response in the question 1. Very hesitant reception of legal protection of media whistleblowers. (This can be compared with Sweden where the replies to this question gave a resounding round of praise for protecting sources. 81% picked reply a), the rest picked b.)</td>
</tr>
<tr>
<td>b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c) No – the document access regime is enough</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d) No – it is a threat to good public administration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia</td>
<td></td>
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</tbody>
</table>

3) What are your initial feelings towards a public servant who leaks information to the media to disclose maladministration?

<table>
<thead>
<tr>
<th>Option</th>
<th>Frequency</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Yes – it complements the access to document regime and strengthens the overall flow of public information</td>
<td>12 out of 32 – 37%</td>
<td>Even more hesitant when it comes to the crunch. This score clearly shows that the loyalty is to the department and not to the public. (Very similar score to the Australian ‘spin’, which had 35%)</td>
</tr>
<tr>
<td>b) Yes – it encourages</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime.

c) No – the document access regime is enough

d) No – it is a threat to good public administration

e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia

4) In some countries you break the law if you investigate who leaked information to the media. Which of the following statements corresponds best with your views on this legislation?

<table>
<thead>
<tr>
<th>Statement</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) It is the most important part of the source protection. Without the legal protection it would be a ‘paper tiger’</td>
<td>48%</td>
</tr>
<tr>
<td>b) Journalistic sources should have legal protection, but exemptions when it is allowed to investigate a leak should exist</td>
<td>26%</td>
</tr>
<tr>
<td>c) Legal protection for journalistic sources as a principle is good, but the</td>
<td>44%</td>
</tr>
</tbody>
</table>

Clearly this idea did not sit well with the American respondents. It further confirms the general very hesitant attitude towards source protection.
exemptions for when journalists can be forced to reveal their sources should be far-reaching

d) Journalistic sources do not need legal protection – protection by ethical guidelines for department managers is enough

e) Journalists are not credible and accountable enough to be granted the privilege of legal protection of their sources

**Discussion and analysis: ‘the spin’**

Part I of ‘the spin’ shows a general positive, albeit slightly hesitant, attitude towards FOI. Part II indicates a sincere will to keep processing costs as low as possible. Regarding the time-frame stipulated by the Act to process requests – 20 days – most are of the view that this is not enough time. Several of the respondents thought that more than 41 days was reasonable. Part III – legal protection of journalistic sources - got a very cool response from the respondents. While not as hostile to the idea as that of their Australian counterparts the general attitude seems to be that source protection should stay the way it is, i.e. no shield laws for journalists.
The overall hesitancy in the replies is well illustrated by a comment added at the end of one of the questionnaires where the respondents were asked to enter the name of the department/agency they worked for and their position. The respondent wrote:

This is funny – I don’t trust you to not exploit my being in the position I hold, thus, I’m not identifying my Department – what does that say about the thesis of your study?

Good question! I think it indicates that an ambivalent and suspicious attitude towards FOI seems to exist within the American administration, especially since the respondent identified him/herself as an FOIA officer.

It must be noted, though, that this suspicious attitude is somewhat countered by the responses to the key seventh question where a very clear majority take the view that the government holds information on behalf of the public.

Based on the data captured by ‘the spin’ the US respondents displayed a predominantly positive attitude towards FOI apart from protection of journalistic sources where the attitudes were predominantly negative. The US ‘spin’ data also indicates possible practical problems in turnaround time for requests.

‘The practice’: USA

Looking at the US results from the first two US studies (31 out of 68 for ‘the promise’ and 48 out of 76 for ‘the spin’) the FOI promise appears relatively very far-reaching and public servants seem more willing to give access to information than the legislation allows. In summary: ‘the promise’ says to the US
public: ‘the aim is that all government held information should be public, but there are some exceptions to this rule. The legislation is on your side and the government has to make its case when not releasing information.’ ‘The spin’ says: ‘FOI as a general idea is good and we as public servants and politicians hold the information on behalf of the people and we will release it on request.’ The question that remains to be answered is: is this promise borne out by the practice of US FOI?

**Recruitment of reporters**

The recruitment process for the US ‘practice’ study can only be described as a long and hard slog. It took from August 10, 2004 to May 17, 2005 to recruit the three US journalists (compared to 1-2 months in Sweden and Australia). As with the other countries of study recruitment started with US members of the International Consortium of Investigative Journalists (ICIJ). Since the US has eight ICIJ members one would have thought this an easy task. Not so. None of the ICIJ members replied to e-mails and phone calls. I also e-mailed ICIJ to ask for assistance and support – again no response. After two months I gave up on ICIJ and moved to other organisations.

Overall US journalists and media have a strong tradition of being very involved and proactive in protecting the right to know as embodied by FOI, and there are numerous organisations dedicated to this cause. I attempted to contact several. The first was one of the most prominent: Investigative Reporters and Editors (IRE). I received no response when I outlined the project and asked for assistance, however, via their website ([www.ire.org](http://www.ire.org)) I identified six possible candidates. I e-mailed all six, but got no replies. After six months I
discovered the Coalition of Journalists for Open Government (CJOG) and got a first response.

CJOG was formed in 2003 and consists of more than two dozen journalism-related organisations concerned about secrecy in government (CJOG, 2005). CJOG came into being as a direct response to the increased government secrecy in the US following the September 11 terrorist attacks in 2001. The CJOG co-ordinator posted a call for reporters to volunteer for the US ‘practice’ study in their e-newsletter – no responses. CJOG recommended the Washington bureau of the COX Newspaper group as a possible recruitment source. The editor had a keen interest in FOI and passed me on to one of his reporters. She was willing to join the study. I got two e-mails from her, then she vanished and did not reply to either e-mails or phone messages. I went back to the ICIJ membership list and tried another round of e-mails and attempted for the third time to contact the organisation – no response.

The breakthrough finally came in mid May 2005, ten months after the start of the recruitment process for US reporters. By now I had given up on contacting US reporters directly, a method that had worked well both in Sweden and Australia. Trawling various academic institutions via internet I came across the FOI Center at Missouri University and its School of Journalism (one of the most prominent journalism schools in the US). The director and some of his staff at the Center were very positive toward the study. In a stroke of luck all three had a background as working journalists, so they fit the reporter profile for the ‘practice’. As a result the director and two colleagues lodged the US FOI requests.
It is still a mystery to me why the US recruitment process was so hard. The same methods and introduction letters that had worked so well in Sweden and Australia were used, slightly tweaked to fit the US FOI context. It could be that US reporters are most concerned with FOI at a state and local government level, as the FOIA Audit toolkit designed by the FOI Center indicates\textsuperscript{25}. They may be too busy and are less prepared than their colleagues in other countries to participate in research. Perhaps they find other ways of campaigning for FOI more effective.

\textbf{‘The practice’: score and summary of findings}

In the US case the findings for ‘the practice’ are very easy to summarise: they rated a score of 0. This is because all three departments are in severe breach of FOIA, similar to the third Australian request.

Request one asked for a breakdown of the travel expenses for the President during 2003. The request was put to the Office of Administration.

Request two sought any reports on suicide and self-harm by asylum seekers and illegal immigrants held in US detention centres between 1990 and 2004. The centres are run by the Department of Homeland Security that received the request.

The third request was put to the Department of State and asked for the following information:

\textsuperscript{25} The FOIA Audit toolkit is concerned with the State and local levels of government only and is available at http://foi.missouri.edu/.
Any reports/summaries/documents/audits outlining the weapons and munitions sales by US based/owned companies and US government agencies to the Iraqi government from 1980 to 1990.

I am seeking information regarding what sort of weapons and other goods that could be classified as strategic that the Iraqi regime bought from the US.

Other relevant information is the price of the sales. If the individual prices cannot be disclosed I request total annual sums.

All requests were lodged in the first two weeks of June 2005. The US FOI Act gives departments and agencies 20 days to make a decision. At the time of writing, April 2006, the departments are ten months late. One of the comments by the Director of the FOI Center when asked whether they had had any responses is telling:

None at all. I wouldn’t expect a word for weeks… maybe months. I asked Justice for something last year [this e-mail dated July 20 2005] and got a response two weeks ago (Davies, C., 2005a).

Discussion and analysis: ‘the practice’

In terms of data there is nothing to analyse. Similar to the Australian study, the US ‘practice’ study produced no information at all within the legislated time-frame of the FOI Act. This is of course very disappointing. The American reporters did receive neither a confirmation the requests had been received, nor any decisions within the time-frame set out by the FOI Act. In the Australian cases there were at least communications between the reporters and the departments to analyse, in the US cases there was nothing. Hence no interviews with the American reporters were conducted.

As pointed out at the beginning of this chapter the US has been held up as one of the model FOI systems and it is true that pre-September 11 the US FOI regime provided the US media with extensive independent access to
government-held information. This is illustrated by the database containing thousands of media stories based on successful FOI requests maintained by the FOI Center (FOIC, 2005). A very prominent example is the School of the Americas exposé as described in chapter seven.

The ongoing communication with the US reporters participating in this study shows that the Ashcroft memo, described above, has been embraced by the Bush administration and the bureaucracy. One of the reporters describes it thus:

Much has happened to federal FOIA, not the least of which is this regime, which has cast a permissive tone that all the federal agencies have heard loud and clear: don’t give up any information without a fight, charge people like hell for it, obfuscate, lawyer them to death…it’s a secret regime, and it has trickled down into the bureaucracy in a huge way. It will take decades to regain what’s been lost. It’s so bad that many Republicans are joining the fight, on the side of opening more stuff up (Davies, C., 2005b)26.

‘Decades to regain what’s been lost’- it is a chilling thought that the most powerful nation on earth has gone from a relatively open system of governance to a closed and secretive regime.

In applying the US data to the research question for the ‘practice’: in practice, does FOI supply journalists (and media organisations) with independent access to government held information? the answer is NO. The outstanding problem in US FOI practice is clearly the huge backlog of work in the departments processing the requests. In the wake of the Ashcroft memo the question arises as to how much of the backlog is legitimate, or whether it is

26 As pointed out above Charles Davies is the Director of the FOI Center at Missouri University. He was also one of the US reporters that lodged requests. As he is previously identified in the study as the Director of the FOI Center, it was decided to disclose his name as one of the US reporters.
used as an excuse to justify delays in response. The bleak result for the US 'practice' study confirms the point made by Banisar that:

The FOIA has been undermined by a lack of central oversight and in many agencies, long delays in processing requests. In some instances, information is released only after years or decades (2004: 87).

One example of this 'lack of central oversight' is that each department and agency produces its own annual FOI report. There are 14 federal departments and 69 federal agencies that are required to produce reports. This does not provide a good overview of how the system is functioning. In this instance the Australian system where the Attorney General's department compiles a report that encompasses all departments and agencies under FOI is preferable.

A comparison of the United States State Department's (USSD) annual reports for 2000 and 2004 shows that the number of 'denials' of requests has almost tripled from 93 in 2000 to 345 in 2004. The fees collected have also increased dramatically from US$ 5821 in 2000 to US$30 767 in 2004. On the positive side it should be noted that the State Department has managed to cut its numbers of pending requests from 5782 in 2000 to 1996 at the end of the 2004 fiscal year, however the backlog is still significant (USSD, 2004). Reviewing the 2004 reports for the other 13 federal departments confirms the backlog problem. The numbers of pending requests at the end of the 2004 fiscal year range between 1000 and 2000 requests per department.
Overall analysis: USA

Having presented the data in each study let us look at how the data connects to the overall research questions: **to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study?** Table 14 summarises the scores.

Table 14 Quantitative data USA

<table>
<thead>
<tr>
<th></th>
<th>‘the promise’</th>
<th>‘the spin’</th>
<th>‘the practice’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Score</td>
<td>31 out of 68</td>
<td>48 out of 76</td>
<td>0 of 68</td>
</tr>
<tr>
<td>Score in %</td>
<td>45%</td>
<td>63%</td>
<td>0%</td>
</tr>
</tbody>
</table>

The data indicates that currently the federal US FOI regime is highly, if not totally dysfunctional, at least in relation to the aims and objectives spelt out in the legislation. The system does not deliver in the way the Act intends it to. The quantitative data is further underscored by some of the recent experiences of US journalists described above.

The US FOI Act scored significantly better in ‘the promise’ compared to Australia. However, like Australia, the public servants and politicians seem to promise much more than they deliver. As a matter of fact, they promise very good access and yet, as shown by the practice, they deliver nothing. The poor state of the US FOI system is confirmed by the qualitative findings:

- **Data gathering**: none of the US requests generated information within the framework of the legislation.

- **Delivery time**: Currently the US federal departments evaluated in ‘the practice’ have been in breach of the legislation for more than nine months.
o **Whistleblower protection**: there is no legal protection on the federal level of journalistic sources as described by ‘the promise’ and ‘spin’ sub-studies.

One of the most interesting findings in ‘the spin’ is the very high score in question 7 – concerning who owns the information: the government or the public. Clearly the respondents took the view that the government holds the information on behalf of the public. However, this attitude does not seem to translate into practice. It could be that this attitude is based on earlier FOI practice, pre-September 11, 2001.

**Conclusion**

The US legislation is ambitious and quite detailed in describing the practical function of FOI. As opposed to its Australian counterpart it is much more user-friendly and puts a lot of pressure on departments and agencies to provide access. Its greatest weaknesses are the lack of a tool to make agencies comply with the 20-day decision period; the appeals process that allows for very lengthy legal processing; and the lack of legal protection of media whistleblowers.

The administrators of FOI are positive towards the FOI regime, apart from the 20-day time limitation. Interestingly they also see the public as owners of government-held information, a very important difference to their Australian colleagues who take the opposite view.

Unfortunately this view of information custodianship does not translate into facilitating access to the information as the FOI requests put to three
departments in ‘the practice’ generated no responses and no information at all within the framework of the Act.

The most important finding in the US study is the overall picture of an FOI system in severe crisis. In just 10 years it has gone from being one of the most progressive and user-friendly access regimes in the world to one in a state of dysfunction. From a global FOI perspective this is alarming indeed. It seems as if the current Bush administration has seized the opportunity provided by the war on terror to effectively change the tradition of open government into secret government. This is illustrated by the Ashcroft memo discussed at the beginning of this chapter. It is further illustrated by one high profile example: the Private Jessica Lynch story from the Iraqi war. When the war was going badly the US army successfully ‘liberated’ a female soldier from an Iraqi hospital where she was treated for injuries. The whole episode was captured on video by US Army personnel and was ‘sold’ to information starved world media as a great success story. According to the US Army Private Lynch was rescued from maltreatment and torture at the Iraqi hospital. After the war a documentary team from BBC’s Correspondent program found a totally different story. Private Lynch was receiving good treatment at the hospital and the ‘rescue’ was completely unnecessary. The US Army videotapes could have confirmed which version of the events was most true. The BBC reporter lodged an FOI request with Pentagon asking for copies of all the tapes. The request was refused (Kampfner, 2003).
Based on all the above evidence is fair to say that the current state of the federal FOI regime in the US is not worthy of a mature liberal democracy which sees itself as a model for the world.

Having evaluated three established and long standing liberal democracies, let us turn to a relative newcomer to the democratic FOI family: South Africa.
Chapter Nine: South Africa

Introduction

During the 1990s South Africa (SA) provided the world with political inspiration when it managed to transform itself from one of the most oppressive countries in the world into a fledgling democracy. As part of this process it decided to design a system of government that is as transparent as possible. Freedom of Information was considered one of the pillars of this system.

Political profile

Of the five countries of study SA is the nation that has gone through the most remarkable political changes in contemporary times. It is hard to think of any other example in world history where a minority, ruling by violent physical and mental oppression, decides to hand over political power to the oppressed majority. Even more impressive is that this handover was executed with a minimum of violence. The troubled history of SA is acknowledged in the preamble to its 1996 constitution:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which
government is based on the will of the people and every citizen is equally
protected by law;

Improve the quality of life of all citizens and free the potential of each
person; and

Build a united and democratic South Africa able to take its rightful place
as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika

(Constitution of the Republic of South Africa, 1996)

The changes in the SA political landscape have been well documented
by many scholars and observers and this thesis will provide only a very brief
overview to show how the political events impacted on the evolution of South
African FOI.

In May 1910 the Union of South Africa became a self-governing part of
the British Commonwealth. The South Africa Act, passed by the British
Parliament in 1909, served as the SA constitution until 1961 (Congress,1996).

In May 1961 SA officially became the Republic of South Africa. The
constitution was re-written and, among other things, legally formalised the
system of apartheid where black voters were denied what the rest of the liberal
democratic world considered basic rights for citizens such as: the right to vote,
the right to stand for election, the right of assembly, etc. The law that came to
symbolise the depth of oppression in the apartheid system was the Separate
Amenities Act that called for, among other things, separate toilet facilities for white and black South Africans (ibid). In 1984 the Constitution was rewritten to pave the way for a new tri-cameral system that allowed representation for coloured (also referred to as non-black) and Indian South Africans. Because the system still excluded the black majority it made SA even more of a pariah in the international community and a period of severe international isolation began.

The 1984 constitution was in effect the beginning of the end for apartheid. The black majority headed by the African National Congress (ANC) started to complement its armed fight for freedom with mass demonstrations and civil disobedience prompting the government to implement a number of martial laws that led to the use of violence to curb the protests. The then President P. W. Botha instigated a number of secret meetings with the jailed leader of the ANC, Nelson Mandela. These meetings were made official and formal by Botha's successor F. W. de Klerk who in a historic speech in February 1990 announced the release of eight long-term political prisoners including Mandela. This paved the way for further negotiations between the ANC and the ruling white National Party and the other ethnic groups. In September 1992 an agreement was reached to form a democratically elected five-year interim government lead by a political coalition. On May 8 1996 the Constitution of the Republic of South Africa was adopted by the South African Parliament (ibid).

So, in less then ten years SA had gone from being one of the most unfair and un-democratic nations in the world to a fledgling democracy. This is important to keep in mind when evaluating the SA FOI system.
In describing the current SA political system it may be useful to recall figure 1 first presented in chapter five.

As figure 1 shows the SA system employs a mix between the Westminster and federal systems, much like Australia. The main difference between SA and Australia is that SA has a President as its Head of State and not the British Monarch. SA has three levels of government: the national parliament, nine Provinces (equal to States in the Australian and US systems) and local governments.

The national parliament is bi-cameral and consists of the National Assembly (the lower house) and the National Council of Provinces (the upper house). The function of and the balance of power between the two houses are similar to other federal systems. The Lower House is where most of the
legislative work is done, but the bills must also pass the Upper House, which in effect becomes a house of review mainly representing the interests of the provinces.

The President is elected by the National Assembly. He/she appoints and leads the Cabinet that is directly responsible to the National Assembly. In reality, just like in other parliamentary systems, it is the majority or coalition that elects the President. The fact that the executive head is called President and not Prime Minister is at first slightly confusing since presidential systems usually have directly-elected Presidents who are answerable not to parliament, but to the public. Perhaps SA tried to avoid the problems of the French and Weimar models that had both a President and a cabinet executive.

Although SA is a young democracy its constitution and political model easily merit its qualification as a fully-fledged liberal democracy. It has also passed one of the most important democratic tests by holding several successful and fair elections.

**Evolution of FOI in South Africa**

The origin of FOI in SA is closely linked to its political history. A common property of authoritarian systems is the obsession with secrecy and the need to control information and the apartheid government in SA was no exception. During the apartheid era misinformation was rife and this explains the high priority accorded to information access post-apartheid. Currie and Klaaren observe that the drive to construct a FOI system was ‘motivated by a desire not to repeat the mistakes of the past (2003: 73). Hence the right to
access was written into the Constitution as part of the Bill of Rights. Section 32 reads:

(1) Everyone has the right of access to

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state (Constitution of the Republic of South Africa, 1996)

So the Constitution guarantees both the right of access and the legislation to make it happen in practice. The constitutional foundation for the Act will be further discussed below.

Freedom of Information was deemed so important that work on the draft legislation started in 1994 in parallel with work on what was to become the final version of the Constitution. The ‘task team’ was lead by the then Deputy President Thabo Mbeki (currently the President of SA) (Currie and Klaaren, 2003: 73). The draft legislation was presented to Cabinet in 1996 under the name the Open Democracy Bill. The draft suggested the legislation would be an ‘omnibus’ legislation, that is a law that covered all aspects of the information regime. In other FOI systems areas such as privacy, right to open meetings and whistleblower protection are usually covered by separate acts. Clearly the draft Act was a bit too far-reaching for the cabinet and it was watered down. One of the things that was dropped was the whistleblower protection section (ibid). However, as we shall se below the Act is still quite far-reaching.

The Bill was passed in January 2000 under the name of the Promotion of Access to Information Act (PAIA). It went through a transitional period during
which some changes were made, most notably that the processing time allowed for agencies went from 90 to 60 to the current and final 30 days (Banisar, 2004: 77). One trait that makes the SA Act unique remained unchanged: it applies to private bodies, such as corporate entities (this will be discussed further below).

The implementation of the Act has been slow and problematic. The SA non-government organisation, the Open Democracy Advice Centre, published a pilot survey in 2002 that found that 54 per cent of public sector employees were unaware of the Act. Another 16 per cent were aware of the Act but not implementing it. Only 30 per cent were aware of the Act and implementing it (Currie and Klaaren, 2003: 74). The private sector scored even worse. Only 11 per cent (6 out of 56) were implementing the Act (ibid).

The Act delegates to the South African Human Rights Commission (SAHRC) the oversight of the implementation of the Act. The SAHRC also has the very important task of spreading information about the Act and educating public servants and corporate officers on how to implement the Act. The SAHRC notes in its successive annual reports that severe under-funding has impeded its ability to monitor implementation effectively (Banisar, 2004: 78). A concrete example is the delayed appearance of the general how-to-use PAIA manual that SAHRC was supposed to publish by the end of 2003, but which did not appear until March 2005 (SAHRC, 2005).

It should be pointed out that although SA has a federal political system the PAIA applies to all levels of government, in contrast to both Australia and the US that have one Act that applies to federal agencies and state acts that cover state-based agencies.
Data presentation and analysis

The promise: South Africa

Aims and objectives of the legislation

The main means of legislation is the Promotion of Access to Information Act of 2000. The aims and objectives are clearly defined at the end of the preamble to the POAI Act as being to: ‘foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information’ and ‘actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all for their rights (Promotion of Access to Information Act, 2000: 2).’

The preamble to the Act explicitly recognises one of the driving forces behind the Act: ‘the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations (ibid).’

The aims and objectives so clearly spelled out by the SA Act closely correspond with the generic aims of most FOI regimes detailed in chapter two:

- Provide **access to personal information** held by government agencies for control and correction of errors

- Allow **scrutiny (to achieve accountability of political representatives and public servants)** of administration and political decisions/processes and policy making by providing
access (both first party and third party) to government-held information

- Inhibit and prevent maladministration and corruption via increased transparency and openness

- Increase the quality of policy making by increased public participation in the policy process via increased access to government held information

The SA FOI regime will be assessed on its main goals: to foster and provide a culture of transparency and accountability and to allow SA citizens to exercise their constitutional right of independent access to information.

‘The promise’: score and summary of findings

South Africa’s ‘promise’ score was 31 out of 68, indicating a reasonable legislative ambition. Table 15 provides an overview of the score and qualitative analysis. When not indicated differently, the references in table 15 are based on the Promotion of Access to Information Act of 2000.

Table 15 ‘the promise’ South Africa

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part I: Access to documents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) Does the Act allow the agencies to charge processing fees?</td>
<td>1 out of 4</td>
<td>As with the Australian FOI Act, the fee structure is determined outside the Act. Although the Act and its guidelines point out that the fees for retrieving and collating information should be reasonable, no maximum fees are...</td>
</tr>
</tbody>
</table>
stipulated. Requests for personal information do not incur a fee, all other requests do. Furthermore, 'a request for a record...will be processed only after a request fee has been paid' and 'the fee payable for access to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record (SAHRC, 2002)'. A provision to argue exemption of the request fee exists. As experience has shown in Australia, when the Act and its regulations do not stipulate maximum fees, many agencies utilise the method of charging excessive fees to deter applicants from pursuing their application since they run the risk of getting blank pages in the end.

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>4) How long does the Act give the agency to make a decision on the request?</td>
<td>1 out of 3</td>
<td>30 days. This is in line with most other countries of study, but does not send a message of urgency to the agencies (Promotion of Access to Information Act, 2000: sections 25 and 26)</td>
</tr>
<tr>
<td>6) Does the Act require agencies to keep a running diary over current and archived documents?</td>
<td>0 out of 4</td>
<td>No</td>
</tr>
<tr>
<td>8) Are any federal/national agencies exempt from the Act?</td>
<td>4 out of 4</td>
<td>That no agencies are exempt is highly significant. Not to exempt agencies that hold sensitive information like the intelligence agencies is a way for the legislators to show that the Act applies</td>
</tr>
</tbody>
</table>
across the board. Similarly to Sweden the SA legislators have opted for a version where exemptions are listed in the Act. Exemptions include information relating to: personal privacy, commercial, confidentiality, safety of persons and property, law-enforcement proceedings, defence, etc. However, almost all exemptions require the agency to show how the release of the information would cause harm and most exemptions must be weighed against a fairly potent public interest clause (ibid sections 33-46)

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Unable to Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>10) Does the Act allow for legal costs being covered by the state?</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>11) Is the FOI Act(s) part of the constitution?</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>12) Does the Act apply to the private sector?</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Yes – subject to the public interest (ibid sections 78-82)
The Act as such is not part of the constitution, but as pointed out above it is based on the citizens’ rights set out in the constitution in section 32. Because the existence of an FOI act is explicitly expressed in the Constitution, it can be argued that the Act effectively has constitutional status. If the government were to abolish PAIA it would breach the Constitution.

This is the truly progressive part of the POAI legislation. However, there are certain hurdles to clear. Section 50 (1) (a) qualifies the access to records held by private entities. To get
access the record must be part of protecting and upholding citizens’ rights (Promotion of Access to Information Act, 2000). These rights are set out by the Bill of Rights in the Constitution. So, a quite complicated legal discussion can be foreseen in these cases. But, the core of the matter is that the Act provides this option. As yet, this is unique in the FOI family.

<table>
<thead>
<tr>
<th>Part II Protection of journalistic sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) What level of protection of journalistic sources exists?</td>
</tr>
<tr>
<td>2) When can journalists be forced to reveal their source?</td>
</tr>
<tr>
<td>3) Are journalists in any way bound not to reveal their source?</td>
</tr>
<tr>
<td>4) Are colleagues and managers (eg the Minister and chief public servant) of a government agency in any way prevented from investigating the source of a ‘leak’ to the press?</td>
</tr>
<tr>
<td>5) If legal protection of journalistic sources exists – is</td>
</tr>
</tbody>
</table>
Discussion and analysis: ‘the promise’

Judging from the score it seems clear that the Act is trying to deliver on the aim that independent access to information is a constitutional right of the public.

There are two truly unique traits in PAIA: the strong Constitutional backing of the Act (matched only by Sweden whose whole FOI regime is part of its Constitution) and the fact that PAIA covers the private sector as well. Overall table 15 describes an FOI regime that is sincerely attempting to be far-reaching. However, a few trouble spots can be noted, most importantly the unclear processing fee guidelines. As pointed out, this can be used by agencies to deter requestors, as exemplified by the Australian cases. Another potential problem arises from the lack of funding to the agency overseeing the implementation of the Act, as mentioned above. There is a lack of clarity about how the appeals process will work and how costly it will be. This will be further discussed below. Finally, the complete lack of legal protection of journalistic sources is serious and is the main reason for the relatively low score. It is however encouraging that shield laws for journalists are being discussed. It would have been even better if this had been included in the legislation, as was the intention in the draft PAIA.
‘The Spin’: South Africa

The research question for ‘the spin’ was: what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?

‘The spin’: score and summary of findings

In total 66 questionnaires were sent, 6 responses were received giving a response rate of 9%. As noted in the previous studies, this is not a statistical quantitative study and each reply is a ‘case study’ in itself capturing individual attitudes held by administrators towards FOI. However, as has also been noted, the rate of response may be an indicator of the priority given to FOI in each department. The SA response rate compares with the Swedish rate of 31 per cent, the Australian of 7 per cent and the US of 12 per cent. The response rates will be further discussed in chapter eleven.

After adding up the total score for each survey and then dividing it by the total number of replies in the SA case the total score was $270/5^{27}$, which gave the average score of 54 out of 76. Table 16 provides an overview of the pivotal questions.

---

27 One of the responses was invalid since the respondent crossed out most of the questions and wrote ‘I don’t know’ and ‘not applicable’ across the pages.
Table 16 ‘the spin’ SA

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part I General attitudes FOI</td>
<td></td>
<td>----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Questions 1-4</td>
<td>‘Strongly agree’ and ‘agree’ in all responses. Question five that asked if politicians and public servants are generally well informed regarding FOI generated the reply ‘disagree’ from all respondents.</td>
<td>The data indicates positive general attitudes towards FOI. An anomaly compared to the other three countries of study is that all SA respondents thought that the general level of knowledge of FOI among SA public servants and politicians is very low.</td>
</tr>
<tr>
<td>6. It is good that the SA FOI applies to the corporate sector.</td>
<td>All responses ‘strongly agree’ or ‘agree’. 18 out of 20 – 90%</td>
<td>Clearly the respondents are very supportive of PAIA covering the private sector as well (note: this question was re-written to suit the fact that the SA Act does apply to the private sector as opposed to the other countries of study)</td>
</tr>
<tr>
<td>Part II Access to government held records</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) In your view, what length of time is reasonable before your department makes a decision on the request?</td>
<td>13 out of 20 – 65%</td>
<td>This was a bit of a trick question. As pointed out in the cover letter the survey was primarily concerned with the attitudes of the respondents. If they found the law too demanding, they had the option to voice this. Although there is support for a short turn-around time, there is hesitation that indicates that the respondents would like more decision-making time.</td>
</tr>
<tr>
<td>3) If your department needs to charge a</td>
<td>18 out of 20 – 90%</td>
<td>Overwhelming support for a lowest-cost-possible</td>
</tr>
<tr>
<td>Question</td>
<td>Score</td>
<td>Interpretation of the Law</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>-------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>processing fee, which of the costs below do you find reasonable?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7) Which of the following statements is closest to the attitude held by</td>
<td>13 out of 20 – 65%</td>
<td>This is the single most important question in ‘the spin’. It cuts to the core of how FOI is interpreted, regardless of what the law says. 65% is not a convincing score in this important question. Three out of the five respondents picked response c), the other two a) and b). The score indicates that the SA public servants and politicians are ambivalent about the ownership questions and hence what their role is: facilitators of information access or gatekeepers. As pointed out in earlier chapters, the importance of this attitude cannot be over emphasised in regards to the practical functionality of FOI. The complete table containing all countries of study can be viewed in chapter 11.</td>
</tr>
<tr>
<td>yourself and your staff?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) the government holds information on behalf of the people and I should</td>
<td></td>
<td></td>
</tr>
<tr>
<td>endeavour to deliver the information requested as soon as possible</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b) the government holds information on behalf of the people but it is not</td>
<td></td>
<td></td>
</tr>
<tr>
<td>my role to serve as an ‘information facilitator’ for an FOI applicant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c) the government owns the information but increased openness and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>transparency is good</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d) the government owns the information and decides who will have access</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e) the government owns the information and decides who will have access</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8) In your view, which</td>
<td>19 out of 20 – 95%</td>
<td>A very clear backing of the interpretation of the law.</td>
</tr>
<tr>
<td>19 out of 20 – 95% A very clear backing of the interpretation of the law.</td>
<td></td>
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</tbody>
</table>
statement most adequately describes the ‘fourth estate’ role that some media and reporters claim to fulfil?

- a) It is a vital part of the political accountability process and delegated to the media by the citizens
- b) It is a vital part of the political accountability process, but exists on a mandate invented by the media itself
- c) It does not have any particular influence on the political accountability process
- d) It is an invention by the media to justify its existence
- e) It is a threat to the political accountability process because of the incompetence of most journalists

<table>
<thead>
<tr>
<th>Question</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>9) In your view, which is the most important function of FOI?</td>
<td>15 out of 20 – 75%</td>
</tr>
<tr>
<td>a) To work as a tool for political accountability</td>
<td></td>
</tr>
<tr>
<td>b) To increase transparency of the governing process to</td>
<td></td>
</tr>
</tbody>
</table>

This question relates to the accountability function of FOI. The score is not really all that relevant, when looking at this parameter in isolation. What is more important is what reply alternative was the most common one. In the SA ‘spin’ most picked b). Only one picked...
<table>
<thead>
<tr>
<th><strong>prevent maladministration and corruption</strong></th>
<th><strong>a). Importantly all respondents take the view that FOI has a function to fill and strongly support the theoretical foundation for the legislation.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>c) To increase the public’s participation in the political process</strong></td>
<td></td>
</tr>
<tr>
<td><strong>d) To allow citizens a means to check what personal data agencies hold and to correct errors</strong></td>
<td></td>
</tr>
<tr>
<td><strong>e) FOI is an unnecessary law that fills no particular function</strong></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Part III Protection of Journalistic sources</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1) What is your view of legal protection of journalistic sources?</strong></td>
<td><strong>14 out 20 – 70%</strong></td>
</tr>
<tr>
<td>a) It should be made stronger and include the corporate sector when public interests are at stake</td>
<td></td>
</tr>
<tr>
<td>b) It should be made stronger in the public sector to encourage public servants to make public maladministration</td>
<td></td>
</tr>
<tr>
<td>c) It should stay the way it is</td>
<td></td>
</tr>
<tr>
<td>d) It should not be implemented in SA – problems within a department are best handled internally</td>
<td></td>
</tr>
<tr>
<td>e) It should not be implemented in SA. Journalists in general cannot be trusted with this level of confidence</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>2) With public access to</strong></th>
<th><strong>14 out 20 – 70%</strong></th>
<th><strong>Confirms the response in</strong></th>
</tr>
</thead>
</table>
documents, is there a need for legal protection of journalistic sources?

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Yes – it complements the access to document regime and strengthens the overall flow of public information</td>
<td></td>
</tr>
<tr>
<td>b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime</td>
<td></td>
</tr>
<tr>
<td>c) No – the document access regime is enough</td>
<td></td>
</tr>
<tr>
<td>d) No – it is a threat to good public administration</td>
<td></td>
</tr>
<tr>
<td>e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia</td>
<td></td>
</tr>
</tbody>
</table>

3) What are your initial feelings towards a public servant who leaks information to the media to disclose maladministration?

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Yes – it complements the access to document regime and strengthens the overall flow of public information</td>
<td></td>
</tr>
<tr>
<td>b) Yes – it encourages public servants to talk to journalists, but it</td>
<td></td>
</tr>
</tbody>
</table>

12 out of 20 – 60%

More hesitant when it comes to the crunch – but still on the supportive side.

the question 1. Positive attitude towards whistleblower protection.

(This can be compared with Sweden where the replies to this question were a resounding round of praise for protecting sources. 81% picked reply a, the rest picked b.)
<table>
<thead>
<tr>
<th>Could probably be replaced by a re-worked document access regime</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>c) No – the document access regime is enough</td>
<td></td>
</tr>
<tr>
<td>d) No – it is a threat to good public administration</td>
<td></td>
</tr>
<tr>
<td>e) No – journalists and the media would abuse this privilege and it should not be implemented in SA</td>
<td></td>
</tr>
</tbody>
</table>

**4) In some countries you break the law if you investigate who leaked information to the media. Which of the following statements corresponds best with your views on this legislation?**

| a) It is the most important part of the source protection. Without the legal protection it would be a ‘paper tiger’ |  |
| b) Journalistic sources should have legal protection, but exemptions when it is allowed to investigate a leak should exist |  |
| c) Legal protection for journalistic sources as a principle is good, but the exemptions for when journalists can be forced to 13 out of 20 – 65% | Majority in favour of this most extensive part of source protection. |
reveal their sources should be far-reaching
d) Journalistic sources do not need legal protection – protection by ethical guidelines for department managers is enough
e) Journalists are not credible and accountable enough to be granted the privilege of legal protection of their sources

**Discussion and analysis: ‘the spin’**

The most interesting question in the SA ‘spin’ was the unanimous view that the general knowledge of FOI among public servants and politicians is very low. This was contrary to the response of the other three countries and it confirms the result of the survey by the Open Democracy Advice Centre discussed above. While there were differing views on who owns the information held by the government, a majority of the respondents thought that the public owns the information. The support for legal protection of media whistleblowers was overwhelming; close to the Swedish response and much more positive than the Australian and US views on shield laws for journalists.
Overall, the high score, 54, indicates that the respondents hold very positive views towards FOI and protection of journalistic sources. The question is do these attitudes translate into practice?

‘The practice’: South Africa

The research question for ‘the practice’ was: in practice, does FOI supply journalists (and media organisations) with independent access to government held information?

Looking at the SA scores this far (31 out of 68 for ‘the promise’ and 54 out of 76 for ‘the spin’) it could be said that the FOI promise is relatively far-reaching. As in the Australian and US cases, according to the attitudes displayed in ‘the spin’, the politicians and public servants in SA seem more willing to give access to information than the legislation allows. In other words: ‘the promise’ says to the public: ‘this legislation gives you the right to access virtually all government-held information. It falls on the agencies to justify why they will not release requested information’. ‘The spin’ says: ‘FOI is an important part of our new democratic system and we as public servants and politicians hold the information on behalf of the people and we will release it on request.’ Unfortunately this far-reaching promise did not translate into practice.

Recruitment of reporters

Similar to the US study, the SA recruitment process was not easy. The initial e-mail was sent to the only SA ICIJ member at the beginning of August 2004. After many follow up e-mails and one phone conversation where he said he was interested further contact ceased in mid-September. After various
unsuccessful attempts to request assistance from the SA journalism union and a number of academic institutions, contact was made with a former academic colleague now working at one of the SA universities. She relayed the recruitment e-mail to five SA journalists. In mid-November 2004 the first SA reporter agreed to take part. Through her the second was recruited by end of May 2005 and the last SA reporter signed on early August 2005, close to a year after recruitment had begun.

In the SA case there are more possible reasons for the recruitment difficulties compared to the US case. Firstly, the SA media have only operated in an uncensored free way for 12 years. Parallel to the constitutional revolution, the SA media landscape went through a revolution of its own, perhaps best exemplified by the South African Broadcasting Corporation that went from a heavily censored mouthpiece of the apartheid government to an independent and objective public broadcaster (Congress, 1996). Secondly, based on the interviews with the South African reporters, the general awareness of PAIA among South African journalists appears to be very low. Perhaps this made them feel less inclined to take part in the study. However, it should be pointed out that the recruitment result in SA was better than in the US in that it generated three actively working reporters. Reporter F is a researcher with a well-respected TV current affairs program. Reporter G is a reporter with one of the biggest daily newspapers and so is Reporter H. Again the gender distribution was two males and one female.
‘The practice’: score and summary of findings

Similar to the US ‘practice’ the score for SA is 0, for the same reasons: the receiving departments failed to meet the most basic criteria of the Act – delivering a decision on time.

The first request, submitted by Reporter F, sought information the Department of Immigration on suicide and self-harm in SA detention centres for refugees. The original request was lodged May 23 2005. Three days later Reporter F received a phone call from the Deputy Information Officer that confirmed the receipt of the requests. He asked Reporter F what her deadline was. Reporter F responded that it was two weeks and got the impression that she would receive the information within that timeframe. Reporter F was also asked to e-mail her request, which she did. Two weeks passed without any decision. In late June she left a phone message to remind the information officer. At the time of writing (April, 2006) she had received no decision on her request. When asked how she found the process, Reporter F responded: ‘very disappointing! When I got the confirmation call after three days I thought that this will really work, but since then I’ve heard nothing (Interview: 9, 2005).’

The second request, by Reporter G, was lodged with the Office of the President and asked for the President’s expenditure for overseas travel during 2004. It was lodged on June 9 2005. Fifteen days later, June 24, Reporter G received a letter from the President’s office confirming the receipt of the request. More than a month later, July 27, he got a phone message from a public servant in the President’s office saying that the request could not be processed since it was not submitted using the correct form. At this point the
department was in breach of the Act since it was more than 30 days (63 days) since the original request was submitted. According to the Act a decision should be made within 30 days. The public servant promised to mail the request form to Reporter G, but this never eventuated. Instead the form was located using the Internet. On September 12, Reporter G lodged the request again using the form. On September 15 he received a confirmation letter. At the time of writing (April, 2006) the President’s office is now for the second time in breach of the Act, since the processing time has expired (Interview: 10, 2005).

As already noted, the current SA President, Thabo Mbeki, led the team that drafted the PAIA. It is at the very least embarrassing that the highest office in the land held by one of the ‘fathers’ of FOI in SA cannot process a straightforward request within the framework of the Act.

The third SA request, by Reporter H, was lodged on June 10 with the Department of Foreign Affairs and sought information on SA weapons trade with a number of surrounding nations. As of October, Reporter H has heard nothing from the Department (Interview: 11, 2005). At the time of writing (April, 2006), Reporter H is still waiting for a response.

Discussion and analysis: ‘the practice’

The poor result for SA in ‘the practice’ is consistent with the survey done by the Open Democracy Advice Centre (ODAC) in 2002. The survey found that ‘on the whole, PAIA has not been properly or consistently implemented, not only because of the newness of the Act, but because of low levels of awareness and information of the requirements set out in the Act.'
Where implementation has taken place it has been partial and inconsistent (Banisar, 2004: 79).’ It is disappointing that little seems to have improved since the 2002 ODAC survey. The inconsistency in implementation is also confirmed by the findings in ‘the practice’ where one department, the President’s office, asked for the request to be submitted using the proper forms, where the other two departments did not demand such a procedure.

As pointed out above, the overseeing agency, the South African Human Rights Commission (SAHRC) has received very limited funding for its task of monitoring FOI. This could be one explanation for the poor implementation of FOI. It also indicates a low level commitment to the FOI regime by the SA government in spite of its supposedly high profile. Another result of the lack of funding for SAHRC relates to its reporting duties. The Act delegates to the agency the task of reporting on the use of the Act. The first report was supposed to be submitted to the SA Parliament by the end of 2003, but has yet to be presented. Hence, there are no statistics available that can be used as a tracking tool for the functionality of PAIA.

There is however some cause for hope. Currie and Klaaren describe one court case involving an appeal of a refused PAIA request. The ruling was very favourable to the requestor and other pending cases indicate a similar trend (2003: 75-76).

When we apply the SA data to the research question for the ‘practice’: in practice, does PAIA supply journalists (and media organisations) with independent access to government held information? The answer is NO. The reason is that the Act does not deliver on the most basic of requirements:
delivering decisions on time. A more serious question is whether the
departments and agencies deliver decisions at all. Furthermore, if the public
agencies cannot set a good example by adhering to the Act, what message
does that send to the private bodies that fall under the Act?

Overall analysis: South Africa

Having presented the data in each study let us look at how the data
connects to the overall research questions: to what extent, if any, are the
promises made by Freedom of Information legislation borne out by the
practice in the countries of study? Table 17 provides a quantitative overview:

Table 17 Quantitative data SA

<table>
<thead>
<tr>
<th>Score</th>
<th>‘the promise’</th>
<th>‘the spin’</th>
<th>‘the practice’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Score in %</td>
<td>31 out of 68</td>
<td>54 out of 76</td>
<td>0 of 68</td>
</tr>
<tr>
<td></td>
<td>45%</td>
<td>71%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Looking at the above data the answer is: the promise is not borne out at
all in practice. Currently the SA FOI regime is highly, if not totally dysfunctional,
at least within the aims and objectives set by the legislation. The system does
not deliver in the way the Act intends it to.

The SA FOI Act scored significantly better in ‘the promise’ compared to
Australia. However, like both Australia and the US, the public servants and
politicians seem to promise much more than they deliver. As a matter of fact,
they promise very good access and, as the practice shows, deliver nothing. The
poor state of the SA FOI system is further underscored by the qualitative
findings:
- **Data gathering**: None of the SA requests generated information within the framework of the legislation even though the initial contacts with information officers were promising.

- **Delivery time**: Currently the SA departments evaluated in ‘the practice’ have been in breach of the legislation for six months with no indication they will ultimately comply.

- **Whistleblower protection**: While there is no legal protection of journalistic sources as described by ‘the promise’ very positive attitudes towards source protection were displayed by the replies in ‘the spin’.

South Africa’s extraordinary transformation from totalitarian to democratic state and the newness of the PAIA are factors that may explain some of the dysfunctionality of the SA FOI system. However, it must be seen as serious that the agency that is put in charge of overseeing the implementation of PAIA is so under-funded. As mentioned above this demonstrates a low commitment to the free flow of information from the current government. The FOI system has now existed for five years in SA and it would have been reasonable to expect at least one of the requests in this study to generate information within the framework of the legislation. The poor performance of the President’s office is particularly disappointing considering his supposed commitment to FOI.
Conclusion

When South Africa became a democracy in the 1990s it was held up as an international inspirational example. This chapter has shown that its troubled past played a vital role in giving the FOI issue a prominent place in South Africa’s new Constitution. The SA studies also showed that the FOI legislation is powerful and that the attitudes of leading politicians and public servants are very positive towards FOI. Unfortunately the idea of holding information on behalf of the public does not appear to translate into facilitating access to that information.

From a wider African perspective SA plays a vital leadership role. The other African nations will look to SA to lead the way on transparency and openness in governance. Let us hope for a more positive outcome next time ‘the practice’ is implemented in South Africa.

It is now time to turn to the last country in this project: Thailand, one of three Southeast Asian nations that have enacted FOI.
Chapter Ten: Thailand

Introduction

Thailand is the last country of study in this project. It proved to be the greatest challenge in recruiting reporters for ‘the practice’. So, much so, that this sub-study is incomplete in the Thai case. However, other data were captured that was able to contribute to the project.

Political profile

Thailand is unusual politically in Southeast Asia (SEA) in several respects. It is one of very few SEA countries that have not been colonised during any period in contemporary history. It is one of three SEA nations that have legislated for FOI (the other two are Japan and South Korea) and it is considered a relatively mature liberal democracy. However, as we shall see, the current and previous Thai governments struggle with the concept of a free and independent press.

Thailand is a constitutional monarchy. The monarchical history goes back a long way. The first united Thai state was proclaimed as the Kingdom of Sukhothai in the 13th century (1257-1378). This established an absolute monarchy that as its greatest feat managed to steer Thailand through the 19th century as an autonomous state when so many of the other SEA countries were ruled by the various colonial powers of the time such as the United Kingdom, France and the Netherlands (Thailand, 2005: 1). The absolute monarchy was challenged in the 1920s and in 1932 King Prajadhipok agreed to transfer power to a constitution-based system of government (ibid).
The armed forces and their leaders have always played a prominent role in Thai politics. Although national elections to choose political representatives have been held since the 1930s, many democratically elected governments have been overthrown by military coups. The last coup was in 1991. Subsequently governments have been elected and dismissed by elections (CH, 2003).

To situate the Thai political system in the general political context it may be useful to recall figure 1 first presented in chapter five.
Figure 1 shows that Sweden and Thailand have a very similar base for their political systems. Both countries are constitutional monarchies with a Monarch as Head of State; both countries draw their executive heads from the majority party/coalition in parliament; and in both countries the executive is directly responsible to the House of Representatives. Both are also highly unitary countries as described in chapter five.

Thailand’s legislative branch is bi-cameral. The House of Representatives has 500 members. The members of the 200 seat Senate (the upper house) used to be appointed by the King, but in 2000 were directly elected for the first time (Thailand, 2005: 4). An interesting point is that candidates who stand for a senate seat cannot belong to a political party.

In what was a political first in Thailand the general elections in February 2005 saw the incumbent Prime Minister Thaksin Shinawatra re-elected with a landslide majority. The party founded by Thaksin in 1999, Thai Rak Thai (Thai loves Thai), increased the absolute majority gained in the 2001 elections to 375 of the 500 seats in the House of Representatives (Electionworld, 2005)28.

Thus far the Thai political system seems like a fully functioning liberal democracy with fair and free elections and an enacted FOI regime as an added bonus. However as mentioned above, media freedom and independence is an issue. This is best illustrated by the fact that the government and military control most national television and radio networks (BBC, 2005). Add to this the fact

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28 Prime Minister Thaksin Shinawatra resigned as PM on April 4, 2006 after months of demonstrations against alleged corrupt behaviour.
that Prime Minister Thaksin is the largest owner of private media in the country and a very restricted media landscape emerges. This will be further discussed below.

Another recent problem for Thailand’s democracy has been the re-emergence of separatist violence in its southern Muslim region. The government has enacted emergency powers in the region: ‘the laws enable the authorities to censor the media and to detain suspects without charge (BBC, 2005).’ Connors points out that Thailand has pulled off a PR coup of gigantic proportions in managing to the keep the tourist brand alive in spite of the fact that ‘a week hardly goes by without a bombing incident or seemingly random slaying’ in Thailand’s southern regions of Narathiwat, Yala and Pattani where Malay Muslims are in majority (Connors, 2005: 1).

Evolution of FOI in Thailand

The right of access to government-held information is supported by section 48 of the 1997 Constitution:

A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law (cited in Banisar, 2004: 84).

This section first appeared in the previous Constitution in 1991. The Official Information Act (OIA) was approved in July 1997. In most countries the enactment of an FOI system is usually preceded by a lengthy and often heated debate as to why FOI should be made law and how it would benefit the country. This does not seem to be the case in Thailand. In spite of extensive research no
such background information has been found. Because of Thailand's unitary system with two levels of government, OIA applies to all levels of government.

Data presentation and analysis

‘The promise’: Thailand

Aims and objectives of the legislation

All FOI acts evaluated in this project spell out the aims and objectives of the legislation either in a preamble or as part of the legislation itself. Not so the Thai Act. Because no aims and objectives are stated it is hard to ‘benchmark’ the Thai legislation and define what it promises. Instead the Act will be evaluated on what it provides for. In general the Thai Act is a very sparse document compared to the other acts evaluated. One reason for this could be that the Act delegates to the very powerful Official Information Board, consisting of the top public servants (the Permanent Secretaries) within each national department, the power ‘to supervise and give advice with regards to the performance of duties of State officials and state agencies for the implementation of this Act (Official Information Act, 1997: Sec 28 (1)).’ The vagueness of the Act provides the Board with a very large scope for interpretation and top-down implementation. It has been very hard to gain independent and credible information on how the Act works in practice.

Attempts were made via the website of the Office of the Official Information Commission (OIC), which is part of the Prime Minister’s office. The English language version of the site was mostly under construction. According to Banisar: ‘there were many requests in the first three years of the Act (2004: 85).’ There was one particularly high profile case where a requestor sought
information regarding the entrance tests to an elite state school. Her request was initially refused. She appealed to the OIC and the courts and was eventually granted access. The documents showed that children of influential people gained entry in spite of low scores (ibid). Following a number of initial successful requests, Banisar observes that interest for the Act seems to be slipping, ‘especially with the media, who appear to use the Act very infrequently (ibid).’

The Prime Minister seems to be aware of the problems with the FOI system. In 2002 the Thai government proclaimed the ‘Year of Access to Official Information’. Prime Minister Thaksin called on citizens to use the Act as a means to fight corruption. He said: ‘I believe 95 per cent of government information can be disclosed to the public. I myself have nothing to hide (ibid, p.86).’

‘The promise’: score and summary of findings

Thailand’s ‘promise’ score is 18 out of 68, indicating a very low legislative ambition. When not indicated differently, the references in table 18 are based on the Official Information Act of 1997.
<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part I Access to documents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) Does the Act allow the agencies to charge processing fees?</td>
<td>0 out of 4</td>
<td>The Act is vague. Section 7 (8) states: ‘A person whether interested in the matter concerned or not, has the right to inspect or obtain a copy or a certified copy of the information under paragraph one. In an appropriate case, a State agency may, with the approval of the Board, lay down rules on the collection of fees therefore. For this purpose, regard shall also be had to the making of concession given to persons with low incomes, unless otherwise provided by specific law (Official Information Act, 1997: Sec 7 (8))’ In effect the Act leaves it up to each agency to determine the processing fees, in consultation with the Board. This is a major gap in the law that makes it possible for agencies to charge excessive fees to deter requestors from proceeding.</td>
</tr>
<tr>
<td>4) How long does the Act give the agency to make a decision on the request?</td>
<td>0 out of 4</td>
<td>Section 11 puts the processing time (including acknowledgement of receipt of request) to ‘a reasonable period of time’. Again, this is too vague and</td>
</tr>
</tbody>
</table>

285
much to open for interpretation which gives openings for breaches and non-compliance. All other acts evaluated clearly stipulate a time frame in the Act.

6) Does the Act require agencies to keep a running diary over current and archived documents?

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>3 out of 4</td>
<td></td>
<td>Yes, to a certain extent, as regulated by Section 12. This is the one feature of the OIA that sets it apart in a positive light from the other evaluated acts (apart from the Swedish one that also demands the agencies to keep a diary)</td>
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</table>

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>8) Are any federal/national agencies exempt from the Act?</td>
<td>3 out of 4</td>
<td>Section 14 states that: ‘official information which may jeopardise the Royal Institution shall not be disclosed’. In what way disclosure of information could harm the Royal Institution is very unclear. Apart from that no other agencies are exempt. There are the usual exemptions for information relating to: national security, international relations, national or economic security, law enforcement, personal information etc. So, only one agency is explicitly exempt. This can be compared to the Australian Act where 12 agencies are exempt.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>10) Does the Act allow for legal costs being covered by the state?</td>
<td>0 out of 4</td>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question/parameter evaluated</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>11) Is the FOI Act(s) part of the constitution?</td>
<td>0 out of 4</td>
<td>The Act does have some support in the Constitution, but only general support. It</td>
</tr>
<tr>
<td>Question</td>
<td>Score</td>
<td>Yes/No</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>12) Does the Act apply to the private sector?</td>
<td>0 out of 4</td>
<td>No</td>
</tr>
</tbody>
</table>

**Part II Protection of journalistic sources**

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) What level of protection of journalistic sources exists?</td>
<td>0 out of 0</td>
<td>There is no legal protection for media whistleblowers</td>
</tr>
<tr>
<td>2) When can journalists be forced to reveal their source?</td>
<td>2 out of 4</td>
<td>In any court case. There seems to be considerable fear among journalists for professional repercussions such as transferral to a less attractive job after publishing critical stories about government (Harrison, 2004: 21)</td>
</tr>
<tr>
<td>3) Are journalist in any way bound not to reveal their source?</td>
<td>0 out of 4</td>
<td>No</td>
</tr>
<tr>
<td>4) Are colleagues and managers (eg the Minister and chief public servant) of a government agency in any way prevented from investigating the source of a ‘leak’ to the press?</td>
<td>0 out of 0</td>
<td>No</td>
</tr>
<tr>
<td>5) If legal protection of journalistic sources exists – is the legislation part of the constitution or a separate Act?</td>
<td>0 out of 0</td>
<td>No</td>
</tr>
</tbody>
</table>

**Discussion and analysis: ‘the promise’**

There is really only one positive aspect about the OIA: the onus on agencies to keep a diary over available documents. This is the only reason why OIA scored higher than the Australian FOI Act (18 compared to 13). Thailand
and Australia have by far the least ambitious FOI legislations. As already noted the worst feature of the Thai Act is the Information Board, which clearly serves as a central instrument of government to control what information is being released.

The lack of specificity in the OIA gives the Information Board virtually unlimited room for interpretation on issues such as ‘reasonable’ turnaround time and ‘reasonable’ processing fees.

When ‘the promise’ data is applied to the research question: what are the aims of the Thai FOI legislation and what does it promise to deliver in terms of information access? It can only be concluded that the Thai FOI Act promises very little in terms of independent information access.

‘The spin’: Thailand

The research question for ‘the spin’ was: what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?

‘The spin’: score and summary of findings

In total 67 questionnaires were sent, 17 responses were received giving a response rate of 25 per cent. The Thai response rate can be compared with the Swedish rate at 31 per cent and the Australian at 7 per cent. It must be noted that the relatively high Thai response rate (second only to Sweden) indicates that the Thai government finds FOI a highly important issue. The response rates will be further discussed in chapter 11.
The total score for 'the spin' was 968/17, which gave the average score of 56 out of 76. ’The spin’ posed 19 questions in three sections to capture the attitudes towards FOI. Table 19 provides an overview of the pivotal questions.

Table 19 ‘the spin’ Thailand

<table>
<thead>
<tr>
<th>Question</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part I General attitudes FOI</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Questions 1-5</td>
<td>‘Strongly agree’ and ‘agree’ in close to all responses.</td>
<td>The data indicates very positive general attitudes towards FOI.</td>
</tr>
<tr>
<td>6. OIA should apply to the corporate sector.</td>
<td>Almost all responses ’strongly agree’ or ’agree’. 49 out of 68 – 72%</td>
<td>Clearly the respondents are very supportive of the suggestion that OIA should apply to the private sector as well.</td>
</tr>
<tr>
<td><strong>Part II Access to government held records</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) In your view, what length of time is reasonable before your department makes a decision on the request?</td>
<td>60 out of 68 – 88%</td>
<td>This was a bit of a trick question. As pointed out in the cover letter the survey was primarily concerned with the attitudes of the respondents. If they found the law too demanding, they had the option to voice this. According to the responses the turnaround time for most FOI request in Thailand should be 1-5 days.</td>
</tr>
<tr>
<td>3) If your department needs to charge a processing fee, which of the costs below do you find reasonable?</td>
<td>61 out of 68 – 90%</td>
<td>Overwhelming support for a low-cost-as-possible interpretation of the law.</td>
</tr>
</tbody>
</table>
| 7) Which of the following statements is closest to the attitude held by yourself and your staff? | 49 out of 68 – 72% | This is the single most important question in ‘the spin’. It cuts to the core of how FOI is interpreted, regardless of what the law
a) the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible  
b) the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant  
c) the government owns the information but increased openness and transparency is good  
d) the government owns the information and decides who will have access  
e) the government owns the information and decides who will have access and increased openness and transparency is not good  

<table>
<thead>
<tr>
<th>8) In your view, which statement most adequately describes the ‘fourth estate’ role that some media and reporters claim to fulfil?</th>
<th>53 out of 68 – 78%</th>
<th>A clear backing of the role of media, which indicates a will to facilitate FOI requests from the media.</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) It is a vital part of the political accountability</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

72% is a relatively convincing score. However the responses vary between a) or c) and e) only. This indicates that there is a firm divide in the attitudes towards ownership of information.
process and delegated to the media by the citizens
b) It is a vital part of the political accountability process, but exists on a mandate invented by the media itself
c) It does not have any particular influence on the political accountability process
d) It is an invention by the media to justify its existence
e) It is a threat to the political accountability process because of the incompetence of most journalists

9) In your view, which is the most important function of FOI?
   a) To work as a tool for political accountability
   b) To increase transparency of the governing process to prevent maladministration and corruption
   c) To increase the public's participation in the political process
   d) To allow citizens a means to check

<table>
<thead>
<tr>
<th>Function</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) To work as a tool for political accountability</td>
<td>45 out of 68 – 66%</td>
</tr>
<tr>
<td>b) To increase transparency of the governing process to prevent maladministration and corruption</td>
<td>The coding in this question is based on the accountability function of FOI. The score is not really all that relevant, when looking at this parameter in isolation. What is more important is what reply alternative was the most common one. In the Thai ‘spin’ only one respondent picked a), most picked b) followed by c). This indicates that FOI as tool for political accountability is not high on the agenda. Still, the responses illustrate views that FOI has a function to fill and support the process.</td>
</tr>
<tr>
<td>c) To increase the public's participation in the political process</td>
<td></td>
</tr>
<tr>
<td>d) To allow citizens a means to check</td>
<td></td>
</tr>
</tbody>
</table>

291
<table>
<thead>
<tr>
<th>what personal data agencies hold and to correct errors</th>
<th>theoretical foundation for the legislation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>e) FOI is an unnecessary law that fills no particular function</td>
<td></td>
</tr>
</tbody>
</table>

### Part III Protection of Journalistic sources

1) What is your view of legal protection of journalistic sources?

- **a)** It should be made stronger and include the corporate sector when public interests are at stake
- **b)** It should be made stronger in the public sector to encourage public servants to make public maladministration
- **c)** It should stay the way it is
- **d)** It should not be implemented in SA – problems within a department are best handled internally
- **e)** It should not be implemented in SA. Journalists in general cannot be trusted with this level of confidence

| 51 out of 68 – 75% | Predominantly positive responses – three c) and d) replies. |

2) With public access to documents, is there a need for legal protection of journalistic sources?

- **a)** Yes – it complements the access to document regime and strengthens

| 55 out of 68 – 81% | Confirms the response in the question 1. Very positive attitudes towards whistleblower protection. |
the overall flow of public information
b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime
c) No – the document access regime is enough
d) No – it is a threat to good public administration
e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia

3) What are your initial feelings towards a public servant who leaks information to the media to disclose maladministration?

a) Yes – it complements the access to document regime and strengthens the overall flow of public information
b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime
c) No – the document access regime is enough
d) No – it is a threat to good public

55 out of 68 – 81% So, even when it comes to ‘the crunch’ the Thai respondents are very positive towards the concept of whistleblowing.
| administration  
| e) No – journalists and the media would abuse this privilege and it should not be implemented in SA |

| 4) In some countries you break the law if you investigate who leaked information to the media. Which of the following statements corresponds best with your views on this legislation? |
| 45 out of 68 – 66% |
| More hesitancy, but still a healthy majority that agrees with extending the ultimate legal protection to media whistleblowers. |

| a) It is the most important part of the source protection. Without the legal protection it would be a ‘paper tiger’ |
| b) Journalistic sources should have legal protection, but exemptions when it is allowed to investigate a leak should exist |
| c) Legal protection for journalistic sources as a principle is good, but the exemptions for when journalists can be forced to reveal their sources should be far-reaching |
| d) Journalistic sources do not need legal protection – protection by ethical guidelines |
Discussion and analysis: ‘the spin’

The ‘spin’ score for Thailand, 56, is the second highest in the project after Sweden’s 65. Judging by the Thai ‘spin’ data only, Thailand’s FOI regime should work very efficiently and provide quick, cheap and independent access to most government-held information. The Thai public servants and politicians also appear to be very supportive of media’s fourth estate role. According to the replies to question 8, they even wholeheartedly support the concept of media whistleblowing. In terms of the research question: **what are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?** The overall interpretation of the Thai ‘spin’ data is that it gives a ringing endorsement of everything that a very progressive FOI regime stands for. The question is: how does this measure up in ‘the practice’?

‘The practice’: Thailand

Unfortunately this project will not provide an answer to the above question. Despite every effort, the three Thai journalists needed for ‘the
practice’ could not be recruited. The possible reasons for this will be discussed below.

**Recruitment of reporters**

As with the other countries of study, recruitment started with the membership list of the International Consortium of Investigative Journalists (ICIJ). There is no Thai member. The closest was an Australian freelance journalist based in Thailand. That was my starting point. The first e-mail was sent August 8 2004, but generated no reply.

There are two English language newspapers in Thailand: *The Bangkok Post* and *The Nation*. Both are privately owned and independent enough to at times critically scrutinize government. Most journalists working at these two publications are, for obvious reasons, very skilled in English. They are also native Thai speakers, essential for putting in the Thai FOI requests. So, these two publications seemed a logical starting point. A recruitment letter to the Editor of the Bangkok Post early September 2004 generated no response.

Via the Walkley Magazine I tracked down an Australian journalist who had worked for two months at the Bangkok Post. He provided me with the name and e-mail of one of the editors who he knew had a keen interest in FOI. E-mail contact was attempted in early October 2004, but received no response. After a very brief phone conversation in mid-October he asked me to re-send the e-mail, which I did, but there was still no response. The next stop was an Australian sub-editor at The Nation – again, no response. At this point I decided to seek the advice of the Asia Research Centre (ARC) at Murdoch University.
The ARC pointed out that most Asia researchers and watchers avoided using Thailand as a base for case studies since it is notoriously hard to get Thai academics and journalists to participate in research projects. One of the academics suggested the use of Hong Kong, Singapore, Japan or South Korea instead. As mentioned above, the only other SEA countries with an enacted FOI are Japan and South Korea. However, both these countries are too similar to Sweden, Australia and the US economically. Thailand was essential to ensure the study had an adequate range of political and economic systems. After a fortnight of e-mails the very helpful Director of the ARC found a Thai academic who recommended a reporter at *The Nation*.

The initial recruitment e-mail was sent in early March, 2005. Reporter I responded within two days. She agreed to participate and recommended two other names. One was a close colleague at *The Nation* who was also a press freedom activist. The other reporter was an editor of a political magazine that frequently used FOI. Suddenly it was all happening. Two new recruitment e-mails were sent – no response. Reporter I preferred to be briefed via e-mail instead of via phone. All necessary information was sent, including making clear my role and the fact that the agency receiving the request must not know that the request was part of a study. After three weeks, March 27, the next e-mail arrived. Reporter I seemed very hesitant in participating and referred to a heavy workload. I explained that lodging the requests were not a complex process and offered assistance. No response. At this point the other case studies were demanding attention and it was decided to put Thailand aside for the moment.
On May 30, 2005 three draft OIA requests were e-mailed to Reporter I. This was to offer her the same assistance as some of the other journalists in the other countries of study. By now a considerable amount of research had been done on the media political situation in Thailand and I felt obliged to ask Reporter I the following question:

It would also be very useful for me to know if there are any other issues but time that play a role.

The only way I can ask is to be frank: do you fear any sort of ‘problems’ for you professionally if you lodge an OIA request? Like political pressure? Or censorship issues? Having your honest answer to that question would be very useful to me. You should be aware that you will at all times remain anonymous in my writings about this study. I will only refer to you as Thai Journalist A. So, your identity stays with me (extract from e-mail to Reporter I)

There was no reply and the attempt to recruit Thai journalists was abandoned (apart from one last effort on November 26 when the Thai Journalism Union was e-mailed a request for assistance – no response).

More research is needed to determine why the recruitment process in Thailand failed. Three hypothetical reasons can be identified.

1. Low awareness and knowledge of FOI legislation. This could apply to some of the contacted reporters, but the last three including Reporter I had more than average FOI knowledge.

2. The fact that Thai journalists are not operating in a media context where press freedom is extensive, and hence critical and investigative journalism which would make most use of FOI is not commonplace. On the other hand – recruitment was successful in South Africa, where journalism was also restricted until only a decade ago.
3. Thai journalists might be fearful of repercussions such as loss of job or transfer to a less interesting job if they scrutinize government in a critical way. This includes lodging FOI requests.

Recent writings and observations support this latter interpretation. One writer points out that 'the media are free to criticise government policies and cover instances of corruption and human rights abuses, but journalists tend to exercise self-censorship regarding the military, the monarchy, the judiciary and other sensitive issues (BBC, 2005: 4).’ Other observers claim that Prime Minister Thaksin via his own very extensive media ownership and that of his colleagues and affiliates economically controls the media by directing advertising. Harrison gives a recent example of this trend:

Last December, the Post [Bangkok Post] published the headline “King warns PM on arrogance” above a front-page report of remark made by the king in his birthday speech. Veera [Editor of the Bangkok Post] was hauled before one the company’s major shareholders and asked to explain. “They said that the Prime Minister was not very happy,” he says. “After that I was given three months to make changes in the editorial department.” (2004: 21)

Generally the mood amongst Thai journalists seems to be quite pessimistic. The editor of The Nation observes that ‘the media at the moment is in a state of intensive care…the point is you have a leader who doesn’t respect freedom of the press (ibid).’

The director of the Southeast Asian Press Alliance is even more pessimistic:

The optimistic mood of the late 90s that followed the establishment of Thailand’s new constitution has been replaced with one of hopelessness. Now the domino is falling back again…the overall situation is really dismal because if Thailand falls, then there is no leading voice of the region (ibid).
Judging from the comments above, it does not sound like a system within which FOI would flourish or where use of the legislation would be encouraged.

**Overall analysis: Thailand**

Having presented the data in each study let us look at how the data connects to the overall research questions: **to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study?** Table 20 provides a quantitative overview:

Table 20 Quantitative data Thailand

<table>
<thead>
<tr>
<th></th>
<th>‘the promise’</th>
<th>‘the spin’</th>
<th>‘the practice’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Score</td>
<td>18 out of 68</td>
<td>56 out of 76</td>
<td>N/a</td>
</tr>
<tr>
<td>Score in %</td>
<td>26%</td>
<td>76%</td>
<td></td>
</tr>
</tbody>
</table>

Apart from the failed ‘practice’ study, the most striking feature of the Thai data is the big gap between what the legislation promises and how the public servants and politicians view it. Either they have faith way beyond the capabilities of the law or they have interpreted it very much in favour of the users. However the ‘spun’ version of Thai FOI will not be put to the test in this project because of the failure to recruit reporters.

**Conclusion**

The Thai study revealed the largest gap of all between the promise of the legislation and the attitude of the government administrators. Despite the administrators’ vision of easy, fast and very extensive access to government-held information this is belied by the weakness of the actual legislative instrument. Because it was not possible to put the legislation to the test the
overall research question concerning the effectiveness of FOI remains unanswered in Thailand’s case. Just as South Africa plays a leadership role in furthering transparency in governance in Africa, so does Thailand in Southeast Asia. As one of three Southeast Asian nations with FOI legislation it is vital to map how it works in practice. This is a loose end that needs to be tied up, but time restrictions prevent this being achieved in the context of the present study.

This was the last of the data presentation chapters. It is now time to turn to the most exciting part of comparative research – the overall comparative table.
Chapter Eleven: The FOI Index

Introduction

This chapter will present the FOI Index. It will summarise the most relevant data from the preceding five country studies, in a comparative table providing overview of the data on which the FOI Index is based. The findings will be discussed and recommendations for reform for each country of study will be explored.

The Freedom of Information Index

The sub-studies discussed in chapters six to ten generated three scores per country. To achieve an index score the three scores needed to be collapsed into one score. This was done by dividing the totalled country scores by the total possible score of 212 (68+76+68). For instance: Sweden generated the following scores: ‘the promise’: 63 out of 68, ‘the spin’: 65 out of 76 and ‘the
practice': 47 out of 68, generating a total score of 175 out of the possible maximum of 212, or 82 per cent. The index scale ranges from 0.0 to 10.0, where 10.0 is a fully functional FOI system scoring top on all evaluation parameters across all three sub-studies. 10.0 is not a utopian score. It is quite achievable, but requires a far-reaching FOI system including extensive legal protection of media whistleblowers in addition to public servants and politicians acting as information access facilitators. The reason for the 0.0-10.0 scale was that it was perceived to be easier to digest quickly rather than presenting the score in percentage format. Sweden’s score, 82 per cent, thus translates into 8.2 out of 10.0. Table 21 (starting on the next page) summarises the scores and the most important qualitative data and provides an initial analysis of the data.
<table>
<thead>
<tr>
<th>The FOI Index</th>
<th>Sweden Score</th>
<th>Sweden Comment</th>
<th>SA Score</th>
<th>SA Comment</th>
<th>US Score</th>
<th>US Comment</th>
<th>Australia Score</th>
<th>Australia Comment</th>
<th>Thailand Score</th>
<th>Thailand Comment</th>
<th>Overall Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Promise</td>
<td>63</td>
<td>Very far-reaching promise</td>
<td>31</td>
<td>Relatively ambitious legislation FOI system explicitly backed by constitution</td>
<td>31</td>
<td>Relatively ambitious legislation FOI system backed by constitution</td>
<td>12</td>
<td>Very low legislative ambition</td>
<td>18</td>
<td>Very low legislative ambition</td>
<td>One important reason for Sweden’s high score is the extensive legal protection for media whistleblowers.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>FOI system part of constitution</td>
<td></td>
<td>No legal protection of sources</td>
<td></td>
<td>No legal protection of sources</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The US and SA scores are close to 50% and must be regarded as a pass.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Extensive legal protection of sources</td>
<td></td>
<td>Most information perceived public within 30 days</td>
<td></td>
<td>Most information perceived public within 20 days</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Australian and Thai FOI systems fail the test. These two legislations were never meant to work, not even in theory. They promise little and deliver close to nothing.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>All information perceived public and accessible within days at very low cost</td>
<td></td>
<td>Processing costs</td>
<td></td>
<td>Processing costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Two things stand out: Sweden’s source protection regime and that the SA Act applies to the private sector.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No processing costs</td>
<td></td>
<td>No agencies exempt from Act</td>
<td></td>
<td>Several agencies exempt from Act</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Act delegates much of the interpretation to the ‘Information Board’ consisting of the Permanent Secretaries to the most influential departments.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No agencies exempt from Act</td>
<td></td>
<td>Act applies to private sector</td>
<td></td>
<td>Act does not apply to private sector</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The Act is very non-specific on key issues such as turn around time and processing costs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Act does not apply to private sector</td>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>

One important reason for Sweden’s high score is the extensive legal protection for media whistleblowers. The US and SA scores are close to 50% and must be regarded as a pass. Two things stand out: Sweden’s source protection regime and that the SA Act applies to the private sector. The Australian and Thai FOI systems fail the test. These two legislations were never meant to work, not even in theory. They promise little and deliver close to nothing.
<table>
<thead>
<tr>
<th>Table 21 continued</th>
<th>Sweden Score</th>
<th>Sweden Comment</th>
<th>SA Score</th>
<th>SA Comment</th>
<th>US Score</th>
<th>US Comment</th>
<th>Australia Score</th>
<th>Australia Comment</th>
<th>Thailand Score</th>
<th>Thailand Comment</th>
<th>Overall Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Spin</strong></td>
<td>65</td>
<td>Result backs 'the promise' virtually no gap 'promise' – 'spin' Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection</td>
<td>54</td>
<td>Gap between 'promise' and 'spin' indicating a 'spun' version of how FOI works in practice Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection</td>
<td>48</td>
<td>Gap between 'promise' and 'spin' indicating a 'spun' version of how FOI works in practice Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection</td>
<td>49</td>
<td>Extensive gap between 'promise' and 'practice' indicating a very 'spun' version of how FOI works in practice Majority of respondents say that the government owns the information and do not see themselves as information access facilitators Great hesitancy towards source protection</td>
<td>56</td>
<td>Greatest gap between 'promise' and 'spin' in the project. Very hard to conceive how such a weak legislation could deliver the level access indicated by the result of 'the spin' Respondents see themselves as access facilitators and hold information on behalf of the public Very positive attitudes towards source protection</td>
<td>Only Sweden shows consistency between 'promise' and 'spin'. All other countries display gaps to various degrees. A high spin score and low promise score indicates that the respondents are projecting a 'spun' version of FOI that the Act does not back up. What really stands out is that the Australian 'spin' is the only one were most respondents thought the government owns the information This is crucial in explaining Australia's poor Index score.</td>
</tr>
</tbody>
</table>

305
<table>
<thead>
<tr>
<th>Country</th>
<th>Sweden Score</th>
<th>Sweden Comment</th>
<th>SA Score</th>
<th>SA Comment</th>
<th>US Score</th>
<th>US Comment</th>
<th>Australia Score</th>
<th>Australia Comment</th>
<th>Thailand Score</th>
<th>Thailand Comment</th>
<th>Overall Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>8.2</td>
<td></td>
<td>4.0</td>
<td></td>
<td>3.7</td>
<td></td>
<td>3.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>USA</td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<td></td>
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<td></td>
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<tr>
<td>Australia</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Thailand</td>
<td></td>
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</tbody>
</table>

### The Practice

<table>
<thead>
<tr>
<th>Country</th>
<th>Score</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>47</td>
<td>Information generated and released within days in two cases. Very high FOI knowledge level among public servants. Last case where appealed and reached the Highest Admin court within a year at no cost to appellant—information not released.</td>
</tr>
<tr>
<td>South Africa</td>
<td>0</td>
<td>The requests generated no information. All three departments that received the FOI requests in severe breach of the time frame for decision making as set out by the Act. At the time of writing, the breaches vary between 2 month to 7 months and counting.</td>
</tr>
<tr>
<td>USA</td>
<td>0</td>
<td>The requests generated no information. All three departments that received the FOI requests in severe breach of the time frame for decision making as set out by the Act. At the time of writing, the breaches are 6 months and counting.</td>
</tr>
<tr>
<td>Australia</td>
<td>12</td>
<td>The requests generated no information within the framework of the Act. Two requests were terminated after very costly processing costs were quoted. Last request received incomplete access after 9 months.</td>
</tr>
<tr>
<td>Thailand</td>
<td>Incomplete</td>
<td>The three Thai journalists needed to implement 'the practice' could not be recruited, despite 10 months of recruitment efforts. This indicates a great hesitancy among Thai reporters to use FOI. Possible reasons for this are discussed in chap ten.</td>
</tr>
</tbody>
</table>

The most important finding is that only the Swedish study generated any information. Had the US and SA requests generated information, or even been handled according to the Acts, these two countries would have scored much better.
Main findings and conclusions

It is of course very disappointing for the international practice of FOI that only two out of 12 submitted FOI requests generated any information within the framework of the legislations. This is the main finding that clearly illustrates the very poor state of FOI in three of the countries where the studies were completed.

The study clearly shows that the two ‘template’ FOI systems, Sweden and USA (discussed and compared in detail in chapter two) have gone down opposite paths since September 11, 2001.

It is surprising how quickly the federal FOI system in the US has deteriorated from being one of the best functioning as late as the second half of the 1990s to the sorry state illustrated by the 3.7 FOI Index score. The US has effectively become more secretive and does not facilitate access to information. One of the sources for this change is former Attorney General Ashcroft’s memo from 2001 as described in chapter seven (the complete memo is available as appendix 4).

By way of contrast in June 2002 the Swedish government finished its ‘Open Sweden’ campaign that sought to spread information and educate the public (particularly young adults and immigrants) and public servants about FOI and openness in general. The aim of the campaign was to make Sweden into an international role model of transparency and openness in governance. Interestingly the report identified the lack of a reporting system on the functionality of Swedish FOI as a problem (Sweden, 2002: 13) and this has
been confirmed in the present study discussed below. The ‘Open Sweden’ campaign was used to launch attempts to export Sweden’s FOI system to the European Union. Although critics point out that Sweden has slowed down the flow of information, as discussed in chapter six, in a comparative sense its FOI regime still works well in practice, as indicated by its 8.2 FOI Index score. Unfortunately this is likely to have less impact on FOI globally than the US changes.

One of the reasons that Sweden post September 11, 2001 has opted for a different FOI path compared to the US could be traced back to specifically Swedish traits in political communication. Apart from the obvious long historical tradition of transparency in governance, clear differences between how Swedish politicians communicate with the public, compared to their American colleagues, can be observed. Nord points out that political advertisements are still not allowed during election campaigns in Sweden. He also observes that ‘political awareness among ordinary citizens is generally higher in Sweden than in many other countries (Nord, 2001: 118).’ Interestingly Nord still concludes that in spite of these differences between Sweden and the US:

Americanization or modernization of Swedish election campaigns has taken place, probably not because of the US origin of the changes, but due to the fact that similar changes in most advanced democracies – regarding public opinion, media development, and politics – contribute to the harmonization of the effects of this process (ibid).

The results of this project show that the general changes in political communication in Sweden have not impacted on the FOI regime – yet. It remains to be seen if Sweden will eventually be influenced by the US in future changes to the implementation of its FOI system. In the interest of the health of
FOI globally it is to be hoped that Sweden sticks to its current far-reaching FOI regime.

The study showed that the South African FOI legislation is quite progressive and that there is strong support for the FOI concept among the leading politicians and public servants. However, there is a major awareness and educational problem. The main reason appears to be that the agency responsible for overseeing the implementation of the FOI system, the South African Human Right Commission, is grossly under-funded to the extent that it cannot do its job properly. This indicates that, although FOI is supported by the SA government officially, in practice it is not given priority.

In more than one way, Australia is the worst case in the study. Not only did it generate the lowest FOI Index score, but its FOI system was exposed as being dysfunctional in practice, despite presenting itself as a fully functioning part of a mature democracy. The Australian results are frankly embarrassing for a country that claims to stand for liberal democratic values of which openness in governance is an important part.

While Thailand scored highly in the ‘spin’ this is undermined by the low score in the ‘promise’. With as yet no reportable results from ‘the practice’ it is not possible to comment further at this stage.

The ‘promise’ and ‘practice’ gap

The overall aim of this project was to see whether there was a gap between FOI promise and practice. Ideally there should be no gap at all with
promise and practice scoring equally. However, as Table 22 shows a gap was found to exist in all the countries evaluated.

Table 22 ‘promise’ – ‘practice’ gap

<table>
<thead>
<tr>
<th></th>
<th>Sweden</th>
<th>Australia</th>
<th>USA</th>
<th>SA</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘the promise’</td>
<td>63</td>
<td>12</td>
<td>31</td>
<td>31</td>
<td>18</td>
</tr>
<tr>
<td>‘the practice’</td>
<td>47</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>incomplete</td>
</tr>
</tbody>
</table>

Although Sweden scores highest, there is still a gap. As for Australia, the promise-practice gap is small simply because the legislation promises very limited access and this is borne out by ‘the practice’. So, relatively speaking, Australia plays in a different FOI league compared to Sweden.

Interestingly another gap also showed up during the course of the project: the difference between how the leading politicians and public servants perceived FOI and what the legislation promises and delivers in practice, as illustrated in Table 23:
Table 23 gap between ‘spin’ and ‘promise’ and ‘practice’

<table>
<thead>
<tr>
<th></th>
<th>Sweden</th>
<th>Australia</th>
<th>USA</th>
<th>SA</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘the promise’</td>
<td>63</td>
<td>12</td>
<td>31</td>
<td>31</td>
<td>18</td>
</tr>
<tr>
<td>‘the spin’</td>
<td>65</td>
<td>49</td>
<td>48</td>
<td>54</td>
<td>56</td>
</tr>
<tr>
<td>‘the practice’</td>
<td>47</td>
<td>13</td>
<td>0</td>
<td>0</td>
<td>incomplete</td>
</tr>
</tbody>
</table>

Ideally the scores in the sub-studies should be as close to each other as possible. While in Sweden the scores are relatively close, in the other countries of study the gaps between ‘the spin’ and the other two sub-studies are very large indeed. This indicates that ‘the spin’, was a very adequate name for the survey study: the attitudes held by the respondents must be considered a ‘spun’ version of FOI reality. \(^{29}\)

**Discussion of findings**

The main issues that emerge as impacting on the effectiveness of FOI are:

1) Newness of the FOI concept.

Going from secrecy in governance to true transparency is not easy in the best of circumstances. Among other things, it requires a change of the ‘old

\(^{29}\) While the total possible maximum score for ‘the spin’ is eight points more than the other two sub-studies, this was not considered large enough to skew the results of the study as a whole.
guard’ among the public servants and a very active, well-resourced and
independent overseeing agency to drive the change of attitudes that is so
important for FOI to work in practice. Coupled to this is the need to build
awareness of FOI and its potential and uses amongst the potential users. South
Africa was an example of the challenges facing a comparatively immature FOI
regime.

2) Lack of political will.

Passing FOI legislation is relatively easy; the hard part is making it work
in practice. This requires sincere and real political will, not only during one
political term, but consistently over decades. This political will appears to be
lacking in Australia, as illustrated by the recent McKinnon vs Treasury case (see
chapter seven) and the fact that the federal government has ignored
suggestions for reform of FOI by the Australian Law Reform Commission.
Political will has gone dormant in the US and the jury is still out on SA. The only
country in the study where the political will to make FOI work still exists appears
to be Sweden.

3) Use of FOI as ‘window dressing’.

FOI may be used as a way to convey an image of transparency and
openness in governance that simply is not carried through in practice. In this
study the US, Australia and SA are examples of this. The SA FOI regime seems
genuine in concept but is currently not working as intended and might yield a
different result if it were to be evaluated again in three to five years. The US and
Australia both have mature FOI regimes and have no excuses for their low
rating. It raises questions about exactly how they define democracy in their campaign to extent it to countries such as Afghanistan and Iraq.

From a more general point of view it is useful to consider Roberts’ observations regarding the impact of different political systems on FOI. His main point is that there is a ‘tension between the demand for transparency and elite anxiety about the decline of governability (Roberts, 2005: 20).’ This is particularly evident in countries with a Westminster-based system ‘distinguished as they are by a concentration of executive authority (ibid).’ The point being made is: why would any governing body want to give up information that will expose its possible shortcomings? In the short term the disadvantages to government are obvious. However, in the long-term, a truly transparent system will benefit both the rulers and the ruled. Proper political accountability will weed out corruption and maladministration (provided the executive is prepared to sack the politician/public servant who has been exposed, sadly an as yet uncommon occurrence) and in the long run increase the staying power of the government from a voter confidence point of view. From the public’s point of view, independent access to government-held information would be likely to increase faith in government and encourage political participation. The keywords are short term and long term. With the current ruling paradigm characterised by ‘short termism’ and a focus extending little beyond the next election it is hard to see how the long-term commitment needed to build a working FOI regime can be accommodated.
Impact on journalism and the fourth estate role

As has been noted in the discussion of the fourth estate in chapter one, independent access to un-spun government-held information is absolutely crucial if the media are to fulfil their role as independent scrutinizers of political power. This is how a Swedish journalist in a previous study described what it would be like to try to do the job without the benefit of a well functioning FOI system:

It would be like turning of the water – it’s that natural and taken for granted. I’m from the generation journalists that were ‘born and bred’ with it [FOI]. The first job you got in a newsroom was to do the rounds at different government agencies, read their mail and archive indexes, and to learn how to interpret them (Lidberg, 2003: 14).

Luckily for the Swedish journalists (and for political accountability and ultimately Swedish society) the ‘water’ is still flowing. The other countries studied in this project are less lucky. Another concrete effect of not having a well functioning FOI is that reporters are much more dependent on leaks from people in power to acquire information. As all journalists know, many of the best stories have started with a leak. However a problem occurs when you cannot verify, via for instance FOI, the quality of information supplied by your source. The reporter is also much less able to identify the agenda of the informant (all information supplied by a leak is done so for a reason). Ultimately this means that in systems with poorly functioning FOI regimes, individual reporters and media outlets are less independent from the power they are attempting to hold accountable, and so less able to fulfil their fourth estate role.

This research has shown that:
Sweden’s FOI system still delivers independent access to high quality information that would otherwise not enter the public domain. The conclusion reached in an earlier study that Swedish FOI encourages ‘everyday investigative journalism’ (Lidberg, 2003: 14) is confirmed by the findings in this broader comparative research.

South Africa certainly has a law that potentially provides journalists with individual access to government and corporately held information; however, this study has shown that the powerful promises of the law are not carried through in practice.

The decline of FOI in the US has had a devastating effect on journalists’ independent access to information. The impact is best described by the Director of the Center for Freedom of Information at the Missouri School of Journalism. In chapter eight he pointed out that ‘it will take decades to regain what’s been lost’ (Davies, C., 2005b) in terms of information access.

In Australia many journalists have come to the end of the road with the current version of federal FOI. There are countless examples of frustrated FOI requests, some of them described in chapter seven. Given the current close relationships between the US and Australia, there is little reason for hope that in terms of FOI reform Australia will take a different path from that of its close ally.

As for Thailand, the verdict is still open. Because of the limited data captured by this study, the incentive is very strong to complete the last sub-study to get a complete picture.
Recommendations

Given the discussed deficiencies, the following recommendations would make FOI work more effectively in the countries of study.

Sweden:

1. Implement some sort of statistical reporting system tracking FOI requests. One possible problem with this is adding a bureaucratic level to an otherwise very non-bureaucratic system, (one of the strengths of the Swedish FOI system).

2. Make the Secrecy Act part of the Constitution to stop the government of the day using this ‘back door’ to restrict FOI access.

South Africa:

1. Dramatically increase the funding of the South African Human Rights Commission to allow it to properly oversee the implementation of FOI and to run educational and awareness campaigns.

2. Legislate to provide legal protection for media whistleblowers.

The US:

1. Replace or delete the Ashcroft memo. The Act is specific enough regarding implementation and much more generous than the very restrictive Ashcroft memorandum.
2. Provide additional resources to government agencies to clear the backlog of FOI requests.

3. Run an awareness and education campaign reviving and reinforcing the aims and objects of FOI legislation.

4. Legislate to provide legal protection for media whistleblowers on the federal level.

**Australia:**

1. Revoke or at least re-work the ‘conclusive certificate’ section (for details, see chapter seven)

2. Point 1 is part of the 106 recommendations to changes and amendments made in the review conducted by the Australian Law Reform Commission (ALRC) in 1996. The ALRC recommendations also cover changes to the processing cost regime and the processing time allowed for agencies. In recommendation 31, the ALRC pointed out that the processing time should be shortened to 14 days within three years (ALRC, 1996)

3. The ALRCs most important suggestions are recommendations 18-23 that outlined the functions and powers of an independent Freedom of Information Commissioner. The ALRC pointed out that:
the existence of such a person would lift the profile of FOI, both within agencies and in the community and would assist applicants to use the Act. It would give agencies the incentive to accord the FOI the higher priority required to ensure its effective and efficient administration (ALRC, 1996)

The ALRC perceives the role of the FOI Commissioner as two-fold:

First, the Commissioner will, on the basis of regular audits, monitor agencies’ compliance with, and administration of, the Act. Second, he or she will promote the Act and provide advice and assistance to agencies and members of the public. Additional functions will include providing legislative policy advice and participation in broader information policy (ibid).

Overall the recommendations cover all the areas identified as problematic in this study. The sheer number of recommendations is a clear illustration of the inadequacies of the federal Australian FOI Act. The government has had this very potent reform tool at its disposal since 1996 and acted on none of the essential recommendations. This in itself indicates the low level of political commitment to FOI in Australia.

4. Legislate to provide legal protection for media whistleblowers.

Thailand:

1. Abolish the Information Board and replace it with and independent FOI Commissioner (like the one suggested above in the ALRC review of the Australian Act).

2. Amend the FOI Act to include specific time frames for processing requests. This would make it easier for both the applicant and the appeal system to determine whether the agency was
following the law. As it stands now there is too much room for interpretation.

3. Amend the Act to include clear guidelines on processing costs. Rationale as in point two.

4. Regulate private ownership of media companies. There are indications that advertising is used as a form of censorship to punish media outlets that cover controversial topics often suitable for the use of FOI. As discussed in chapter ten, some publications have been threatened with less advertising if they publish articles covering a certain topic.

5. Encourage journalists and the public to use FOI. This can be achieved by FOI awareness campaigns and the creation of FOI advisory centres supporting users of FOI free of charge.

‘The spin’ reply league table

As pointed out in the data presentation chapters the response rate to ‘the spin’ survey did not feed into the scores and subsequently into the Index score. However, it is interesting to compare the response rates as they are an indicator of how important FOI issues are to each government of study: the hypothesis is that the higher the response rate – the higher FOI sits on the governments’ agenda. Table 24 provides an overview of the response rates:

Table 24 Responses to ‘the spin’
The numbers underscore the findings in the rest of the study. Thailand’s 25 per cent is a bit of an anomaly, but cannot really be analysed fully since the data for this country is incomplete. Again, Australia scores poorly, further emphasising that FOI does not register on the political radar.

### Reliability and validity

A secondary, but important, aim of the project was to design and trial a comparative instrument that could help assess how well different FOI regimes work in theory and practice. This was described in chapter three as a separate research question: **is it possible to design an evaluation tool that captures data that describes how a specific FOI regime works in practice; and can it be presented in an index?** For this to be possible it is necessary to demonstrate that the measuring instruments are both reliable and valid.

#### Reliability of the sub-studies

Neuman observes that reliability:

…means dependability or consistency. It suggests that the same thing is repeated or reoccurs under identical or very similar conditions. The opposite of reliability is a
measurement that process yields erratic, unstable or inconsistent results (2000: 164).

So, if another researcher were to use the same methodology as used in this project to evaluate the same FOI regimes he/she would capture data of a similar range. You could not expect to get exactly the same results if this study were repeated since society is in a state of constant change. This is, after all one of the main differences between natural science and social science and the reason why natural science methods have to be altered to fit investigations into the social world which are predominately concerned with human interaction. We need more than just numbers to describe this interaction.

As Yin notes, in social science research ‘the emphasis is on doing the same case again, not on “replicating” the results of one case by doing another case study. The goal of reliability is to minimize the errors and biases in a study (2003: 37).’ Miles and Huberman elaborate further: ‘the underlying issue here is whether the process of the study is consistent, reasonably stable over time and across researchers and methods (1994: 278).’

To summarize the qualitative data has been operationalized into quantitative terms. The qualitative nature of ‘the promise’ and ‘the practice’ sub-studies limits the capacity to conduct statistical reliability analysis. However, the total number of data entry points in ‘the spin’ (in effect the total number of responses) was considered sufficient to enter the data into the SPSS statistical software package to conduct a scale analysis. The ideal situation would have been to run a full-scale pilot of the whole project and to conduct the scale analysis before the study was implemented. However, this is a very costly exercise which would have required much more funding than was available for
this project. Instead a compromise solution was to run a pilot of the study as part of the Swedish implementation (this was described in chapter four).

A scale analysis looks at the correlation patterns of responses across questions. Where an item correlates poorly with the rest, it can be examined more closely to work out why and whether it should be re-worked or removed from the bank of questions. This analysis gives an indication of the extent to which a group of likert-style questions forms an internally consistent scale. The level of reliability in an instrument is often described in the 'coefficient alpha' (also referred to as Cronbach’s alpha). According to DeVellis, alpha is ‘an indication of the proportion of variance in the scale scores that is attributable to the true score’ and ‘one of the most important indicators of a scale’s quality.’ He points out that any problems with the design of the survey, such as ‘poor variability’ and ‘negative correlations among items’, ie questions, ‘will tend to reduce alpha… (1991: 83).’

In theory alpha varies between 0.0 to 1.0, however, DeVellis observes that in practice values under 0.60 are unacceptable. He further rates the increments as follows: ‘between .65 and .70, minimally acceptable; between .70 to .80 respectable; between .80 and .90 very good (1991: 85).’ The Cronbach’s alpha for ‘the spin’ was 0.835, indicating very high reliability. On further breakdown only question six in part I (whether FOI should be extended to cover the private sector) received responses that seemed not to correlate with the rest of the responses in the questionnaire.
Validity of the sub-studies

According to Neuman ‘validity addresses the question of how well the social reality being measured through research matches the constructs researchers use to understand it (2000: 164).’ Miles and Huberman define validity through a number of questions: ‘Here we arrive at the crunch questions: truth value. Do the findings of the study make sense? Are they credible to the people we study and to our readers? Do we have an authentic portrait of what we were looking at? (1994: 278).’

Since the data in this study is predominantly qualitative it is important to consider the fact that, as Neuman points out: ‘qualitative researchers are more interested in authenticity than validity. Authenticity means giving a fair, honest, and balanced account of social life (2000: 171).’ The authenticity of the data captured in this project can hardly be in doubt. The three instruments are available as appendices 1, 2 and 3 for the reader to see how the data was captured. The data captured has been compared with available reports and studies on FOI performance\(^\text{30}\) that back the findings and indicate high validity.

To complement the qualitative validity of the findings, there is also an element of quantitative validity, that is: the connection between the construct and the measurement. The construct was that a gap between the promise and practice of various FOI regimes could exist. The data captured by this study clearly shows that a gap does exist; hence the measurement sought connected back to the hypothesis.

\(^{30}\) For example the openness tests conducted by the Swedish Journalism Union, the annual FOI reports in Australia and the US and previous studies of FOI regimes by other researchers. These are outlined in chapter three in the literature review and referred to in the data presentation chapters six to ten.
FOI Index reliability and validity

The purpose of an index is to provide overview. Neuman observes that: ‘an index is a combination of items into a single numerical score (2000: 177).’

For evident reasons the reliability of an index is built on the reliability of the instruments used to capture the data on which the index is based. It has been shown above that the reliability of the sub-studies is high; hence it can be concluded that the reliability of the FOI Index is high as well. Another factor that contributes to the high reliability of the FOI Index is that it measures most evaluation parameters at least twice, an important criterion to create a reliable index (ibid). It is also important that the instruments that capture the data for the index pose questions that pull in the same direction. The scale analysis of ‘the spin’ has shown that this is the case in this project.

It should be pointed out that the reliability for the FOI Index applies to the four countries evaluated in this study. While the high overall reliability bodes well, the index will benefit from being implemented in as many countries with FOI laws as possible, preferably all, to enable further evaluation of its reliability.

Conclusion

The comparative summary in this chapter shows that a gap between the promise and practice of FOI exists in all countries of study to varying degrees.

Only two out of 12 FOI requests lodged in four countries generated any information. The requests in SA, USA and Australia generated no information within the framework of the legislation.
The ongoing war on terror has impacted on the flow of government-held information in The United States and there are indications that this applies globally with governments now seeking to justify restricting access to information in a way not seen since the rise of FOI legislations.
Chapter Twelve: Conclusion

This thesis has been about the flow of government-held information. Its starting point was exploring the theoretical pillars for FOI laws: political representation, accountability, and the scrutinising role of the media as the fourth estate. With the ongoing war on terror, the issue of political accountability is more current than ever. This is especially true in the lead up to a conflict. The following conversation took place between G. M. Gilbert, prison psychologist during the Nuremberg war crime trials 1945-46 and Herman Goering. The trial was in recess during Easter 1946 and Gilbert visited Goering in his cell.

We got around to the subject of war again and I said that, contrary to his attitude, I did not think that the common people are very thankful for leaders who bring them war and destruction.

“Why of course, the people don’t want war,” Goering shrugged. “Why would some poor slob on a farm want to risk his life in a war when the best that he can get out of it is to come back to his farm in one piece. Naturally the common people don’t
want war; neither in Russia, nor in England nor in America, nor for that matter in Germany. That is understood. But, after all, it’s the leaders of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy or a fascist dictatorship.”

“There is one difference,” I pointed out. “In a democracy the people have some say in the matter through their elected representatives, and in the United States only Congress can declare war.”

“Oh, that is all well and good, but, voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same in any country.” (Gilbert, 1947: 278-79)

More than ever we need the ‘independent accountability agencies’, discussed in chapter one, to question the reigning political and economical paradigms. This thesis has argued that journalists and the media by taking on and fulfilling the fourth estate role are such ‘accountability agencies’. But to do their job properly they need independent access to government-held information – they need well-functioning, far-reaching Freedom of Information systems.

Through three separate studies this project has evaluated the FOI regimes in five countries: Sweden, Australia, USA, South Africa and Thailand. In the four countries where the research was able to be properly completed there was a gap between what each country promised and what it delivered in real independent access to government-held information at a national level. The gap varied between small in Sweden to very substantial in South Africa, the US and Australia.

The project has also shown that the data captured can be used to create a FOI Index, allowing the evaluated countries to be ranked against each other.
Where is FOI going?

So, do the findings of the study give any indication as to the state of FOI globally and where it will go? From a strict data collection point of view five countries constitute too small a sample to generalise in global terms. However, the US has been a world leader in FOI ever since the concept got international political traction after World War II. The findings in this study indicate that the FOI family seems to have lost its leader, though hopefully only temporarily. This may have a negative impact on FOI globally given the greater political influence of the US even though Sweden offers an example of a better functioning system. It should be pointed out that some, like Banisar, take a more optimistic view claiming that the momentum for openness and transparency is substantial (Banisar, 2004: 2). However, this project is the first study to capture comparative data evaluating FOI in practice on an international scale. It can safely be concluded that the war on terror is not good for FOI globally.

Tactics similar to those described above by Herman Goering are being used as an excuse to limit FOI. As long as political leaders have the option of using the war on terror (or any other perceived ‘outside’ threat) to create more secrecy, there appears to be little reason for optimism for the future of FOI.

However, it could be argued that FOI is, like democracy itself, at its strongest when it is under threat. If political leaders continue to use FOI as ‘democratic window dressing’, an increasing number may come to its defence.

Future research areas

The study throws up several important areas worthy of further research.
1. The focus of future research would be to make the FOI Index global including all existing FOI regimes. With 58 FOI laws currently enacted a problem keeping the index up to date can be foreseen. Once you have completed the first evaluation of all 58, it is probably time to start over again. Perhaps this could be solved by delegating the implementation of the study to a body in each country. The methodology behind the index would also benefit from being implemented as many times a possible. This would allow for further development and refinement of the research instruments.

2. The most obvious loose end to tie up is the incomplete Thai study. Because of its high score in ‘the spin’ sub-study, it would be highly interesting to put Thai FOI to the test.

3. There is some evidence that the New Zealand FOI regime is very successful in delivering on its promises. Hence, implementing the study there could yield interesting results. NZ could be the first country in a possible next stage in the development of a truly global FOI Index.

4. Another intriguing area is crime/court reporting and FOI. During the course of this study it has been noted that there are vast differences in how FOI laws apply to the judiciary between countries.

5. After the defeat of the draft European Constitution in the French referendum, the EU project has slowed down considerably. There is little doubt it will be revived, especially considering the drive and enthusiasm among the new eastern European members. The EU has taken its first
stumbling steps towards a common FOI regime. It would be very rewarding applying the FOI Index to this system to see how it measures up internationally.

6. This thesis has been concerned with government-held information only, for the simple reason that most FOI laws only applies to the public sector (apart from a few exceptions like the South African law). It is however, highly debateable if our political leaders have as much influence on our daily lives as the corporations. Sam Gibara, CEO of Goodyear, puts it thus:

Governments today do not have the power over corporations they had 50 or 60 years ago. This is a major change, so governments have become powerless compared to where they were before (Achbar, 2003: Chapter 21).

Ira Jackson, Director of the Centre for Business and Government, Kennedy School Harvard University is even more to the point:

Capitalism today, commands the towering heights and has displaced politics and politicians as the new high priests and reining oligarchs of our system (ibid).

In spite of this huge shift in power away from politics to capitalism represented by the big corporations and in spite of the fact that corporations probably influence our daily lives as much, if not more, than our elected representatives, the accountability mechanisms that apply to the corporate world are very limited. As a member of the public the only way to get some insight, albeit very limited, into a corporation is to buy shares, read its annual report and go to its annual shareholders’ meeting. We only have to look at the spectacular corporate collapses of the last few years, such as the energy giant Enron in the US and the telecommunications company One Tel in
Australia, to realise the demand for accountability during the ‘term’ of a company, just as FOI applies to governments while they govern. Increased accountability could be a way to re-build public trust for corporations. Applying the FOI Index model to a number of corporations would be fascinating.

Public support for FOI

Does the public care about FOI? There are indications they do. A 2001 survey done by the First Amendment Center and the American Society of Newspaper Editors showed that more than 90 per cent of the respondents thought access to public records was important to them ‘and six in 10 said public access to government records was ‘crucial’ to the functioning of good government (Owens, 2001: 1).’ It can be argued that there are parallels between the public perceptions of democracy and FOI. If you ask the public: ‘Do you support democracy?’ you are likely to get an overwhelming yes. Similarly if you ask ‘Do you support Freedom of Information?’ you will probably also get a strong majority in favour (who says no to a ‘freedom’?). The question is how deep does this support extend? New trends in journalism could potentially expand the pool of supporters for FOI. The web has spawned a new type of journalism, citizen journalism, or citJ. One definition of citJ can be found on one of the greatest achievements of the blogosphere – Wikipedia (an online dictionary which is constantly updated). According to Wikipedia, citJ ‘usually involves empowering ordinary citizens – including traditionally marginalised members of society – to engage in activities that were previously the domain of professional reporters (Higgins, 2005: 11).’ There are a number of issues...
concerning citizen journalism, such as credibility of sources, quality in content, who is to be defined as a citJ, etc, but those apart, if the number of citJs continues to grow and if they realise that FOI can be used as a tool to acquire information (at least in some countries) we may see the rise of a new, potentially strong, FOI user group.

The last three years of research and the main findings of this project can be summed up in one sentence: **there is only one thing worse than ignorance – the illusion of knowledge.** Currently it seems that the spin-doctors have the upper hand in creating this illusion.

In the end the question of information access is quite a philosophical one. If we are to develop and further ourselves socially as a collective, we need to extend our knowledge. Part of this extension process is to have independent access to quality un-spun information. From this knowledge will come wisdom. Kofi Annan, Secretary General for the United Nations and Nobel Peace Price winner provides an appropriate note to end on:

…it is ignorance, not knowledge, that makes enemies of men. It is ignorance, not knowledge, that makes fighters of children. It is ignorance, not knowledge, that leads some to advocate tyranny over democracy. It is ignorance, not knowledge, that makes some think that human misery is inevitable. It is ignorance, not knowledge, that make others say that there are many worlds, when we know there is one. Ours (Annan, 1997).
Appendix 1: ‘the practice’ evaluation template

This is the Australian version of the template. For the other countries of study the template was changed slightly to accommodate local variations, such as currency.

Evaluation Template ‘The Practice’

Note: If the agency evaluated breaches the FOI legislation, for example not complying with time frame for decision, the evaluation will not progress and the case will be awarded the score 0.

1) How long did it take you to prepare the request (this includes research time deciding what to specifically ask for and what to exclude in your request)?

   a) 1-5 hours
   b) 5-8 hours
   c) 1-2 days
   d) 2-3 days
   e) more than 3 days

PROBE: what did you exclude? And why?

2) What did it cost to lodge the request?

   a) A$ 0
   b) A$ 0-20
   c) A$ 21-40
   d) A$ 41-80
   e) more than A$ 100

3) Did the agency’s reply quote a processing fee?

   a) no fee
   b) A$ 20
   c) A$ 21-100
   d) A$ 101-200
   e) more than A$ 200

PROBE: Is this cost average? More or less than you expected? Reasons?
4) How much time elapsed before confirmation from the agency that they had received the request?
   a) 1-5 days  
   b) 5-10 days  
   c) 10-15 days  
   d) 15-20 days  
   e) more than 20 days

PROBE: Expected time? Average?

5) How much time elapsed from the agency’s confirmation of the receipt of the request to the grant/refusal of the request?
   a) 1-10 days  
   b) 10-20 days  
   c) 20-30 days  
   d) 30-40 days  
   e) more than 40 days

PROBE: Expected? Average?

6) What was the agency’s decision?
   a) application granted in full with no processing cost  
   b) application granted in full subject to a processing cost  
   c) application partially granted with no processing cost  
   d) application partially granted subject to a processing cost  
   e) application not granted

If the application was granted, proceed to question 7.  
If the application was partially granted, please proceed to question 16.  
If the application was not granted, please proceed to question 28.

7) In your experience, can you base an article on the information you have acquired?
   a) yes  
   b) yes – but it needs further research 1-7 days  
   c) yes – further research 7-14 days  
   d) yes – further research more than 14 days  
   e) no

PROBE: Why? Please substantiate your answer.
8) Compared to the information ‘served’ to newsrooms by the government’s press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable?

   a) much higher quality
   b) higher quality
   c) on par
   d) lower quality
   e) much lower quality

PROBE: Why? Please give examples.

9) In your role as an independent scrutiniser of politicians and public servants – is the information acquired of assistance?

   a) indispensable
   b) of great assistance
   c) of some assistance
   d) of limited assistance
   e) based on this information I would terminate the investigation

PROBE: In what way? Please give examples?

10) How was the information released to you?

   a) I was sent copies at no cost (via mail, fax or e-mail)
   b) I collected the documents physically from the agency and was allowed free photocopying
   c) I had to pay photocopying costs
   d) I was allowed to sight the documents and take notes, but no photocopying
   e) I was allowed to sight the documents but not take notes

PROBE: Did you ask for another mode of delivery? What was the reaction?

11) In your view, what was the extent of knowledge of FOI among the public servant/s you dealt with?

   a) very good
   b) good
   c) average
   d) poor
   e) very poor
PROBE: On what evidence have you formed this opinion? Please give examples.

12) In your view, were the public servant/s you dealt with during the course of the request:

   a) facilitating
   b) helpful
   c) indifferent
   d) obstructionist
   e) hostile

PROBE: On what evidence have you formed this judgement? Please give examples.

13) Which of the following statements best sums up the attitude held by the public servant/s you dealt with during the course of the request?

   a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible.
   b) the government holds information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for you.
   c) the government owns the information but I abide by its values of openness and transparency in relation to the public access to information.
   d) the government owns the information and decides who will have access so I act conservatively rather than proactively in relation to public access.
   e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

PROBE: On what evidence have you formed this judgement? Please give examples.

14) What do you perceive the end product to be?

   a) 1-3 articles
   b) 1-2 articles
   c) 1 article
   d) further research
   e) termination of investigation

PROBE: Why? Please motivate your answer. How have you made the decision on the format of the final product?

15) Where do you take the story from here?
PROBE: Please describe freely how you would use the information you have acquired to reach the end goal – the finished story
Partly granted application:

16) Are you satisfied with the agency’s reasons for the partial disclosure?
   a) yes
   b) partly, but there is scope for an appeal
   c) partly, no scope for an appeal
   d) no, but there is scope for an appeal
   e) no and no scope for an appeal

PROBE: On what evidence have you formed this judgement? Please give examples

17) In your experience – what do you estimate the cost to be if you were to appeal?
   a) A$ 0-100
   b) A$ 101-200
   c) A$ 201-300
   d) A$ 300-400
   e) more than A$ 400

18) In the event of an appeal, based on your experience, how do you judge your chances of winning the appeal?
   a) very good
   b) good
   c) average
   d) poor
   e) very poor

PROBE: On what evidence have you formed this judgement? Please give examples

19) How was the information released to you?
   a) I was sent copies at no cost (via mail, fax or e-mail)
   b) I collected the documents physically from the agency but was allowed free photocopying
   c) I had to pay photocopying costs
   d) I was allowed to sight the documents and take notes, but no photocopying
   e) I was allowed to sight the documents, but not take notes

PROBE: Did you ask for another mode of delivery? What was the reaction?
20) In your view, what was the extent of knowledge of FOI among the public servant/s you dealt with?
   a) very good
   b) good
   c) average
   d) poor
   e) very poor

PROBE: On what evidence have you formed this judgement? Please give examples

21) In your view, were the public servant/s you dealt with during the course of the request:
   a) facilitating
   b) helpful
   c) indifferent
   d) obstructionist
   e) hostile

PROBE: In what way? Please exemplify?

22) Which of the following statements best sum up the attitude held by the public servant/s you dealt with during the course of the request?
   a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible.
   b) the government holds information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for you.
   c) the government owns the information but I abide by its values of openness and transparency in relation to the public access to information.
   d) the government owns the information and decides who will have access so I act conservatively rather than proactively in relation to public access.
   e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

23) In your experience, can you base an article on the information you have acquired?
   a) yes
   b) yes – but it needs further research 1-7 days
   c) yes – further research 7-14 days
   d) yes – further research more than 14 days
e) no

PROBE: Why? How have you made the decision on the format of the final product?

24) Compared to the information ‘served’ to newsrooms by the governments press secretaries and public relations officers, how does the information acquired rank in terms of usefulness for holding the government accountable?

   a) much higher quality
   b) higher quality
   c) on par
   d) lower quality
   e) much lower quality

PROBE: Why? Please give examples.

25) If your role is to be an independent scrutiniser of politicians and public servants – is the information acquired of assistance?

   a) indispensable
   b) of great assistance
   c) of some assistance
   d) of limited assistance
   e) based on this information I would terminate the investigation


26) What do you perceive the end product to be?

   a) 1-3 articles
   b) 1-2 articles
   c) 1 article
   d) further research
   e) termination of investigation

PROBE: Why? How have you made the decision on the format of the final product?

27) Where do you take the story from here?

PROBE: Please describe freely how you would use the information you have acquired to reach the end goal – the finished story)
Application refused:

28) Are you satisfied with the agency's reasons for the refusal?
   a) yes
   b) partly, but there is scope for an appeal
   c) partly, no scope for an appeal
   d) no, but there is scope for an appeal
   e) no and no scope for an appeal

   PROBE: Why? Please motivate your answer.

29) In your experience – what do you estimate the cost to be if you were to appeal?
   a) A$ 0-100
   b) A$ 100-200
   c) A$ 200-300
   d) A$ 300-400
   e) more than A$ 400

30) In your experience, how do you judge your chances of winning the appeal?
   a) very good
   b) good
   c) average
   d) poor
   e) very poor

   PROBE: Why? Please motivate your answer.

31) In your view, what was the extent of knowledge of FOI among the public servant/s you dealt with?
   a) very good
   b) good
   c) average
   d) poor
   e) very poor

   PROBE: Why? Please illustrate with examples.

32) In your view, were the public servant/s you dealt with during the course of the request:
a) facilitating
b) helpful
c) indifferent
d) obstructionist
e) hostile

PROBE: On what evidence have you formed this judgement? Please give examples

33) Which of the following statements best sum up the attitude held by the public servant/s you dealt with during the course of the request?
   a) the government holds information on behalf of the people and I should endeavour to deliver the information requested as soon as possible.
   b) the government holds information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for you.
   c) the government owns the information but I abide by its values of openness and transparency in relation to the public access to information.
   d) the government owns the information and decides who will have access so I act conservatively rather than proactively in relation to public access.
   e) the government owns the information and decides who will have access and my role is to guard information as opposed to dispensing it.

34) In your experience, can you base an article on the FOI process and the fact that the agency refused the request?
   a) yes
   b) yes – but it needs further research 1-7 day
   c) yes – further research 7-14 days
   d) yes – further research more than 14 days
   e) no

PROBE: Why? Please motivate your answer.

35) What do you perceive the end product to be?
   a) 1-3 articles
   b) 1-2 articles
   c) 1 article
   d) further research
   e) termination of investigation

PROBE: Why? Please motivate your answer.

36) Where do you take the story from here?

PROBE: Please describe freely how/if you can pursue this story.
Appendix 2: coded data ‘the practice’

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*Questions 15, 27 and 36 do not generate quantitative data

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Appendix 3: ‘the spin’ questionnaire

This is the Australian survey. The questionnaires were changed slightly between countries to accommodate for the variances in FOI systems.

Johan Lidberg
Project Researcher, PhD Candidate
School of Media, Communication + Culture (MCC)

The Promise and Practice of Freedom of Information – an International Comparative Study

This PhD project is about the flow of public information. It will investigate whether there is a gap between what elected representatives promise (the policies and legislations) regarding access to government held documents and how the Freedom of Information (FOI) laws are interpreted and implemented in practice and what they deliver in access to information. One aim of the study is to investigate if it is possible to create an international comparative Freedom of Information Index/Indicator that will rank the FOI regimes in different countries based on a number of parameters indicating the extent of access to government information.

This survey is one part of the project and covers practice and attitudes towards FOI and will also seek to map attitudes towards the protection of journalistic sources. If your opinion does not correspond with the current FOI rules and regulations – let your opinion be the answer. Some questions may seem awkward. This is due to the international comparative nature of the project and I ask for your patience.

Your participation is greatly appreciated and essential for the success of the project. The answers you provide will be treated confidentially. You may decide to withdraw from the study at any time. If you have any questions about how the material will be used, please feel free to contact either myself, Johan Lidberg, on phone +61 404 949250, e-mail: j.lidberg@murdoch.edu.au or my supervisors, Associate Professor Gail Phillips, on phone +61 8 93602320, e-mail: g.phillips@murdoch.edu.au or Dr Steve Tanner on +61 8 93602850, e-mail: s.tanner@murdoch.edu.au.
My supervisors and I are happy to discuss with you any concerns you may have on how this study has been conducted, or alternatively you can contact Murdoch University’s Human Research Ethics Committee on +61 8 9360 6677, e-mail: ethics@central.murdoch.edu.au.

The survey will take approximately 15 minutes to fill out.

Thank you for your cooperation!

Please note that the questionnaire is printed on both sides of the paper.
Part I – General Attitudes towards FOI

You will be given six statements. Your reply options are:

Strongly Agree, Agree, Uncertain, Disagree and Strongly Disagree

Please circle one option only

1. A well functioning FOI legislation is an important part of the political system.

2. Transparency of the governing process, as safeguarded by FOI, inhibits corruption.

3. FOI works as a tool for political accountability.

4. Public servants and politicians should be helpful in assisting FOI requests.

5. Generally, Australian public servants and politicians have good knowledge of how FOI works.

6. FOI should be extended further to partly cover the corporate sector when public interests are at stake.
1) In your view, what length of time is reasonable before the applicant receives confirmation of receipt from your department?

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2) In your view, what length of time is reasonable before your department makes a decision on the request?

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3) If your department needs to charge a processing fee, which of the costs below do you find reasonable?

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4) When you grant an application – which is your most common mode of release of the documents?

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<td>c) Collection of the documents physically from the agency and free photocopying</td>
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<td>e) Sighting of the documents and note taking, but no photocopying</td>
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</table>
5) In your view, what level of knowledge and understanding do the public servants and politicians in your department have of FOI?
   a) very good
   b) good
   c) average
   d) poor
   e) very poor

6) In your view, what general attitude do public servants in your department have towards FOI requests?
   a) facilitating
   b) helpful
   c) indifferent
   d) obstructionist
   e) hostile

7) Which of the following statements is closest to the attitude held by yourself and your staff?
   a) the government hold information on behalf of the people and I should endeavour to deliver the information requested as soon as possible
   b) the government hold information on behalf of the people but it is not my role to serve as an ‘information facilitator’ for an FOI applicant
   c) the government owns the information but increased openness and transparency is good
   d) the government owns the information and decides who will have access and increased openness and transparency is not good
   e) the government owns the information and decides who will have access

8) In your view, which statement most adequately describes the ‘fourth estate’ role that some media and reporters claim to fulfil?
   a) It is a vital part of the political accountability process and delegated to the media by the citizens
   b) It is a vital part of the political accountability process, but exists on a mandate invented by the media itself
   c) It does not have any particular influence on the political accountability process
   d) It is an invention by the media to justify its existence
   e) It is a threat to the political accountability process because of the incompetence of most journalists
9) In your view, which is the most important function of FOI?

a) To work as a tool for political accountability
b) To increase transparency of the governing process to prevent maladministration and corruption
c) To increase the public’s participation in the political process
d) To allow citizens a means to check what personal data agencies hold and to correct errors
e) FOI is an unnecessary law that fills no particular function
Part III Protection of journalistic sources

To encourage public servants to make corruption and maladministration public, legal protection of journalistic sources, at times called media whistleblowers, has been discussed and debated in a number of countries. It has been argued that legal protection of journalistic sources would complement the system of access to public documents and enhance the overall Freedom of Information regime.

Please circle ONE alternative only

1) What is your view of legal protection of journalistic sources?
   a) It should be made stronger and include the corporate sector when public interests are at stake
   b) It should be made stronger in the public sector to encourage public servants to make public maladministration
   c) It should stay the way it is
   d) It should not be implemented in Australia – problems within a department are best handled internally
   e) It should not be implemented in Australia. Journalists in general cannot not be trusted with this level of confidence

2) With public access to documents, is there a need for legal protection of journalistic sources?
   a) Yes – it complements the access to document regime and strengthens the overall flow of public information
   b) Yes – it encourages public servants to talk to journalists, but it could probably be replaced by a re-worked document access regime
   c) No – the document access regime is enough
   d) No – it is a threat to good public administration
   e) No – journalists and the media would abuse this privilege and it should not be implemented in Australia

3) What are your initial feelings towards a public servant who leaks information to the media to disclose maladministration?
   a) Generally it is the right thing to do and it should be encouraged
   b) The first option should always be solving it within the department – if that does not work, then a leak could be the right thing to do
   c) It must be the very last option when all other options have been exhausted
   d) A leak is never an option – problems should be addressed internally within the department
   e) A public servant that leaks information to the media betrays his colleagues and employer
4) In some countries you break the law if you investigate who leaked information to the media. Which of the following statements corresponds best with your views on this legislation?

   a) It is the most important part of the source protection. Without the legal protection it would be a ‘paper tiger’
   b) Journalistic sources should have legal protection, but exemptions when it is allowed to investigate a leak should exist
   c) Legal protection for journalistic sources as a principle is good, but the exemptions for when journalists can be forced to reveal their sources should be far-reaching
   d) Journalistic sources do not need legal protection – protection by ethical guidelines for department managers is enough
   e) Journalists are not credible and accountable enough to be granted the privilege of legal protection of their sources

The following entries are voluntary. They are however of great value to the project and will be treated confidentially:

Ministry/Department:

Position:
### Appendix 4: coded data ‘the spin’

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Appendix 5: ‘the promise’ evaluation template

This is the Australian version of ‘the promise’. To accommodate for variations between the countries of study, some of the parameters were changed, for instance the fee and charges increments.

**Evaluation Template**

“The Promise”

Overall:

Generic aims of FOI legislation:

- **Provide access to personal information** held by government agencies for control and correction of errors.

- **Scrutiny (to achieve accountability of political representatives and public servants)** of administration and political decisions/processes and policy making by providing access (both first party and third party) to government held information.

- Inhibit and prevent **maladministration and corruption** via increased transparency and openness.

- Increase the quality of policy making by **increased public participation** in the policy process via increased access to government held information.

Main Means of legislation:

Main Aims/Objects of legislation:

Comment/analysis:
Part I – Access to documents (in this case the term documents refers to information stored on: hardcopy, computer files, audio formats and video formats)

1) Does the Act stipulate a fee when lodging a FOI request?
   a) No
   b) AUS$10 – 20
   c) AUS$21 – 30
   d) AUS$31 – 40
   e) AUS$41 – 50

Notes:

2) Does the Act allow the agencies to charge processing fees?
   a) No
   b) Yes – but only to cover costs for copying of documents and audio and videotapes
   c) Yes – but the agency has to substantiate the charge
   d) Yes – no maximum fee
   e) Yes – no guidelines are given

Notes:

3) How much initial processing time are agencies given?
   a) As fast as possible referring to days rather than weeks
   b) 5-10 days
   c) 11-20 days
   d) 21-30 days
   e) 31-40 days

Notes:

4) How long does the Act give the agency to make a decision on the request?

As fast as possible referring to days rather than weeks
   a) 5-10 days
   b) 11-20 days
   c) 21-30 days
   d) 31-40 days
   e) more than 40 days

Notes:
5) What request formats does the Act allow?

   a) phone requests and alternatives b to c
   b) e-mail
   c) fax
   d) face-to-face meeting
   e) written and mailed only

Notes:

6) Does the Act require agencies to keep a running diary over archived documents?

   a) Yes – and the diary is public
   b) Yes – to a certain extent and the diary is public
   c) Yes – but the diary is not public
   d) No – but after a request you receive a summary of what is available
   e) No

Notes:

7) Does the Act allow agencies to decide in what way the documents should be released?

   a) No - the applicant can chose the mode of access
   b) Yes – it can decide whether to deliver copies via ordinary mail or in electronic form
   c) Yes – the agency can request the copies to be picked up in person
   d) Yes – it can decide on sighting of documents only – notetaking allowed
   e) Yes – it can decide on sighting of documents only – notetaking not allowed

Notes:

8) Are any federal/national agencies exempt from the Act?

   a) No
   b) Yes 1-3 agencies
   c) Yes 4-6
   d) Yes 7-9
   e) Yes 10 or more

Notes:

9) In case of an appeal – is the ruling by the court/ombudsman/commissioner legally binding?

   a) Yes – and it is practice that the agency follow the ruling
   b) Yes – and agencies follow the ruling in most cases
c) Yes – but experience shows that agencies often stall and follow the rulings irregularly

d) No – but it is practice that the agency should follow the ruling

e) No – it is a recommendation only and the agency does not have to follow the ruling

Notes:

10) Does an appeal involve any costs for the applicant?

   a) Yes – in most cases
   b) Yes – subject to the public interest
   c) Yes – subject to the applicant winning the appeal
   d) Yes – at the discretion of the state
   e) No

Notes:

11) Is the FOI Act(s) part of the constitution?

   a) Yes – and the Act(s) can only be changed by two different sessions of parliament
   b) Yes – and the Act(s) can only be changed by a qualified majority in parliament
   c) No – it is a separate Act, but changes can only be made by two different sessions of parliament
   d) No – it is a separate Act, but changes can only be made by a qualified majority in parliament
   e) No – and the government of the day can change the Act

Notes:

12) Does the Act apply to the private sector?

   a) Yes – it applies to any information held by private companies that is not classified as business confidential
   b) Yes – it applies to information held by private companies relating to contracts assigned by government agencies
   c) Yes – it applies to government agencies that have adopted a 'corporate structure'
   d) As 'c' but only to information that is not classified as business confidential
   e) No
Part II – Protection of Journalistic Sources

1) What level of protection of journalistic sources exists?
   
a) The source has full legal protection
b) The source has limited legal protection – there are some instances where a journalist can be forced to reveal a source
c) The source has very limited legal protection – a reporter must reveal the source in all legal proceedings
d) Legislation exists to support and protect media 'whistleblowers'
e) The government offers no protection for media 'whistleblowers'

Notes:

2) When can journalists be forced to reveal their source?
   
a) In a very limited number of instances such as treason cases and matters of national security
b) In some court cases of serious nature, such as homicide
c) In any court case
d) By the agency head enquiring about a leak relating to his/her specific agency
e) By any government official enquiring about the reporter’s source

Notes:

3) Are journalists in any way bound not to reveal their source?
   
a) Yes – they risk a criminal charge and substantial fine (more than AUS$1000) if they reveal their source to anyone – including colleagues and editor
b) Yes – they risk a criminal charge and symbolic fine (less than AUS$1000) if they reveal their source to anyone
c) Yes – they risk a criminal charge and substantial fine if they reveal their source to anyone but their editor
d) They are not legally bound, but ethical practice is not to reveal sources to anyone
e) No

Notes:
4) Are colleagues and managers (eg the Minister and chief public servant) of a government agency in any way prevented from investigating the source of a ‘leak’ to the press?

   a) Yes – they risk a criminal charge and substantial fine (more than AU$1000) if they make any inquiries whatsoever
   b) Yes – they risk a criminal charge and symbolic fine (less than AU$1000) if they make any inquiries
   c) Yes – they risk a criminal charge and substantial fine if they ask the journalist who the source is
   d) No – but ethical practice is not to investigate a source
   e) No

Notes:

5) If legal protection of journalistic sources exists – is the legislation part of the constitution or a separate Act?

   a) Yes – and the Act(s) can only be changed by two different sessions of parliament
   b) Yes – and the Act(s) can only be changed by a qualified majority in parliament
   c) No – it is a separate Act, but changes can only be made by two different sessions of parliament
   d) No – it is a separate Act, but changes can only be made by a qualified majority in parliament
   e) There is no Act

Notes:
## Appendix 6: coded data ‘the promise’

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Appendix 7: the Ashcroft Memo
Statement of Attorney General Ashcroft Regarding
Implementation of FOIA

October 12, 2001
Memorandum for Heads of all Federal Departments and Agencies

From: John Ashcroft, Attorney General
Subject: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or
present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.
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