

Book Review

Freedom of Information in Scotland in Practice, Kevin Dunion, October 2011, Dundee University Press, Dundee, ISBN: 9781845861223, 515 pages

Freedom of information is a complex business. Giving the public a statutory right to know and to access information about the government seems on the face of it a simple task. At the last count 90 countries, from China to Chile, have passed some form of Freedom of Information (FoI) legislation.

Passing the law may be the easy part. Making the legislation work and judging its impact is fraught with difficulties. FoI laws have to do many difficult things simultaneously. They have to enforce access rights to public bodies and protect requesters while deterring abuse and protecting privacy. As so much of the legislation around the world is very new, little is known about how well they do this or even whether they work.

Scotland has had a Freedom of Information Act since 2002 that covers matters devolved to the Scottish Parliament. Since then things have been very interesting. Scotland experienced its own mini ‘expenses crisis’ long before Westminster, a slight squall that led to the resignation of the leader of the Scottish Conservatives over inappropriate taxi use. More recently there was controversy around an attempt by tobacco manufacturer Phillip Morris to access research data on young smokers held at the University of Stirling, and to access information on the Libyan national convicted of the Lockerbie bombing. Perhaps more importantly, underneath the headlines, there has been a great deal of activity with the public, media and NGOs using FoI to find out more about their Parliament, their local council and their public services.

For some time Scotland looked set to lead the world in openness. In 2008, the Scottish Government considered extending FoI to cover private bodies working for public bodies, a radical proposal that few other FoI regimes have dared take. Extension could have opened up a whole new area to public scrutiny. The plans were put on hold, described by Kevin Dunion as a ‘disappointing conclusion’ (2011, 444).

Kevin Dunion, the man at the centre of many of these issues and the author of the book, was the first Scottish Information Commissioner (SIC), the person to whom FoI appeals are taken. At the end of his two-term tenure, he offers his thoughts on FoI, how it works and where it is going. As he points out, few so intimately involved in the operation of transparency laws have ever done this.

The first part of the book takes a look in detail how the Act works. Within the first few sections of a FoI Act the problems crowd in. How is a public authority to be defined? This seemingly abstract question can have a stark bearing on whether you can use FoI to find out about your local leisure centre, or about the private contractor mending roads. Can a requester be identified? FoI is intended to be ‘purpose blind’ to protect the identity of the requester. When and why a requester can be named can have deep implications. The attempt by Philip Morris to use FoI to access research data on underage smoking from the University of Stirling via a third party caused huge controversy when it was revealed who was doing the asking. Does a request cover information or just a document? The wrong answer to this question could seriously jeopardise how or even if an FoI Act can function, as it very nearly did in Scotland.

The author spends some time examining one of the key balancing acts; that between openness and privacy. These two issues are likened to ‘tectonic plates’ as they ‘grind against each other, sending out seismic shocks’ (2011, 340). The potential for problems arises everywhere from government statistics to correspondence held by a local councillor. Many felt that this would give rise to endless complications

with the Commissioner continually stuck between a rock and a hard place. Although it has certainly caused difficulties, this interaction in Scotland has worked better than hoped (2011, 360).

Dunion also offers some thoughts on the practicalities of being Information Commissioner. The 'Achilles Heel' of any FoI regime is resources and the common feature of almost every system, and every appeal system, is delay. Complex cases take up time and resources, taking months and sometimes years to resolve. The Scottish Information Commissioner stood out in this respect, and practitioners will be interested in the processes utilised. Dunion was committed to avoiding a 'taxi rank' system with a simple queue for dealing with appeals, and also pledged to have no 'orphan' cases lost in the system. Instead, a weightings system was developed with a difficulty scale on 1–4 accompanied by a time estimate for resolution based on the nature and cost of the case, the complexities and number of exemptions, its sensitivity and whether it breaks new ground (2011, 388–389). A timetable is agreed with regular meetings and a target of closing cases within 20 weeks (2011, 389). He also sought to avoid establishing general principles and dealing with controversial cases quickly. He points out that political pressure to hurry could backfire; the more controversial a case, the more time is needed (2011, 389).

The final part of the book deals with the achievements of FoI and its impact. Here Dunion makes an important point: the law is only one part of creating openness. Changing the culture of government and having politicians' support in this are vital. There was a sharp contrast between the reactions of Members of the Scottish Parliament (MSPs) and the reactions of UK Members of Parliament to requests for information relating to their expense claims. In Scotland, MSPs reacted to a potentially damaging situation prompted by the McLetchie revelations by publishing all their expenses very soon after, with a little help from the Commissioner. In contrast, Westminster's MPs fought a four-year battle against publishing data on their expenses, which heightened the damage caused on eventual publication.

Comparing FoI in Scotland with its larger fellow UK Act, Dunion points out that legal differences may have less bearing than political attitudes. Leadership is key. High-profile support encourages compliance and innovation just as much as hostility breeds resistance and non-compliance. FoI in Scotland has benefited from high profile political support and also from new institutions such as the Scottish Parliament, which are explicitly founded on principles of openness. The UK Act has been attacked and criticised and has been subject to two attempts to limit its force. Unlike in Scotland, senior UK politicians and officials have publically complained about FoI. Tony Blair claimed passing the Act was one of his worst mistakes, as the right to information has been 'abused' by politicians and journalists and led to a reluctance to record decisions [1, pp. 516–517]. Cabinet Secretary Gus O' Donnell voiced similar worries that it is undermining what is often vaguely termed 'good government' [3]. David Cameron, a strong supporter of Open Data and online transparency, recently spoke of FoI 'occasionally . . . furring up the arteries of government' [2]. Although alive to the possible impact on government, the author is sceptical of some of the larger claims made that FoI is hampering government, not least because it is difficult to substantiate and hard to isolate FoI from the other factors that influence decisions.

The growing disquiet has also been reinforced by a perception that FoI is costly. There have been suggestions in the UK and Scotland that requests should be subject to a standard fee to deter 'frivolous' applications. Dunion rightly points to the fact that one country that has tried this, Ireland, has experienced only a temporary drop in numbers. Fees neither stop requests nor deter them.

The book ends with a consideration of whether FoI has done what its supporters hoped. In the author's view it has clearly increased transparency and accountability. The hope that FoI may have an impact on public trust or participation is a harder issue to judge. The Act does lead to 'negative' stories in the media or a 'distrustful' use by those predisposed to pursue a grievance. However, such effects may be context-dependent and nuanced: a requester may distrust a politician but have more confidence in the particular outcome or issue.

A frequent complaint made about FoI is that, like much political activity, it is driven by the small, self-selecting group of 'usual suspects'. This same small group of local activists or 'anoraks', it is said, dominate FoI just as they dominate consultation or local council meetings. However, this logic can be turned its head. Rather like the small group who complain in restaurants, they improve standards for everyone else. This group constitutes a 'cadre' of experienced FoI users who are driving the transparency of public bodies. Their actions are also benefiting the public and politics as a whole, and encouraging others to do the same. Rising request numbers suggest an FoI 'trickle down' from this small group of frequent users to the wider public.

The Commissioner leaves his most important point to the end. FoI is not about huge revelations, though it can bring them. It is about what he calls the 'fine grained' changes. Here, other research in the UK on use of FoI at local government level supports this crucial point [4]. The real impact of FoI is local and personal.

In this sense, FoI is less about MPs' expenses and more about the pothole in the road, the local library closing or about continued availability of allotments. These issues often escape the attention of the press or politicians who see only the high-profile and controversial. Yet they are the key way in which FoI can and does make a difference everyday on the doorstep.

As Kevin Dunion's book shows, the passage of FoI legislation is the beginning, and not the end, of a struggle to make government more transparent. FoI is complex and difficult but, with transparency so high on the agenda, this book offers a valuable first set of thoughts as to how, why and when it works.

Dr. Ben Worthy
Research Associate
University College London
b.worthy@ucl.ac.uk

References

- [1] T. Blair, *A Journey*. London: Arrow Books, 2010.
- [2] House of Commons Liaison Committee. (2012 March 6). Evidence from the Prime Minister. Retrieved from <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=10438>.
- [3] A. Stratton, (2011 Nov 23). FOI act has 'hamstrung' government. *The Guardian*. Retrieved from <http://www.guardian.co.uk/politics/2011/nov/23/freedom-of-information-act-government>.
- [4] B. Worthy, R. Hazell, J. Amos and G. Bourke, *Town Hall Transparency? The Impact of FOI on Local Government in England*. London: Constitution Unit, 2011.