

The International Freedom of Information Index

AV JOHAN LIDBERG

Tracking the Promise and Practice of FOI

Demokratiinstitutet och Studier i Politisk Kommunikation

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FÖRORD

Öppenhet och fri tillgång till information är centrala värden i ett demokratiskt samhälle. Att kunna ta del av allmänna handlingar hos myndigheter och offentliga institutioner betraktas ofta som ett centralt vapen i jakten för att bekämpa korrupktion och möjliggöra ett meningsfullt politiskt ansvarsutkrävande. I slutändan har både lagstiftning och praktik direkta konsekvenser för journalisters möjlighet att granska makthavare och fungera som en tredje statsmakt.

Men tillgången till offentliga handlingar varierar världen över. Skillnader finns inte bara mellan demokratiska och icke-demokratiska länder utan också mellan demokratier. I denna rapport undersöker och analyserar Johan Lidberg den fria tillgången till offentliga handlingar i Sverige, USA, Australien, Sydafrika och Thailand. Det huvudsakliga syftet med studien är att konstruera ett öppenhetsindex – the Freedom of Information Index – som fångar inte bara lagstiftningens ambitioner utan också dess praktik. Med hjälp av ett unikt internationellt fältarbete och en kombination av metodologiska angreppssätt lägger författaren grunden för en diskussion om tillgången till offentliga handlingar och förutsättningen för politiskt ansvarsutkrävande i den demokratiska världen.

För rapportens innehåll och slutsatser svarar författaren själv.

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OM FÖRFATTAREN

JOHAN LIDBERG är Program Chair of Journalism vid Murdoch University i Perth i västra Australien. Parallellt med det akademiska arbetet är han också frilansjournalist. Sedan artikeln skrevs har ett internationellt forskarkonsortium med åtta medlemmar byggts. Målet är att utvärdera samtliga länder med offentlighetsprincip. Projektet är backat av UNESCO (the United Nations Educational Scientific and Cultural Organisation).

Introduction

This paper is about what could be one of the most potent political accountability tools available – if it worked properly. In the last two decades the numbers of Freedom of Information Acts (FOI) around the world have increased dramatically. Currently 68 nations have enacted FOI laws (Banisar, 2006). Most mature liberal democracies have some form of FOI regime, as do many emerging democracies. Passing FOI laws is the easy bit, the trick is to make them work in practice. So, how do they measure up from a user's perspective? The research question for this project was: *to what extent, if any, are the promises made by FOI legislation borne out by the practice in the countries of study?* Another way of putting it is that the study evaluates and describes the relative health of the FOI systems in the countries of study. It will be shown that there is a consistent gap between the promise and the practice of FOI in the evaluated countries and that FOI has deteriorated into dysfunctionality in one of the 'template' systems.¹

FOI seldom makes it onto the mainstream political agenda. One possible reason for this is that general awareness and interest for FOI issues among the public is low. Hence, it seemed important to find a way of presenting the data and findings in this project that could be easily digested. Although the FOI Index was not the primary goal of the study, it became increasingly clear during the course of the project that the study provided a very good opportunity to explore the possibilities of constructing a prototype of the FOI Index. Like all prototypes it needs further refinement and more data to determine its validity and reliability.

It should be made clear from the outset that this study is concerned with third party access (in particular FOI requests lodged by journalists) to government held information only. It does not evaluate access to personal/individual information. Because of the differences in political systems between the countries of study, the laws evaluated are the federal/national FOI Acts to allow for true comparisons between the different FOI systems.

The genesis of this, by now five-year project, was my puzzlement with the differences between the practical functionality of Swedish and Australian FOI. Working as a journalist in Sweden from 1989 to 1998 FOI provided the base for most journalistic practice. This is not the case in Australia. This was explored in a previous comparative study that concluded, among other things, that the extensive Swedish FOI regime provides the base for 'everyday investigative reporting', whereas investigative reporting in Australia is seen as something much more exclusive where FOI does not necessarily play a role (Lidberg, 2003: 91). The first study led to the second more extensive one presented in this paper. The second study covered five countries and incorporated a number of sub-studies further discussed in the methodology section.

Methodology

The study design comprises three sub-studies each with its own sub-set of research questions. The primary aim was to determine whether there is a gap

¹ Since the data capture for this study changes to the federal FOI laws in the US and Australia have been suggested. What impact, if any, this will have on practical use of FOI remains to be seen.

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 was to investigate whether it was possible to compile a prototype International Freedom of Information Index based on the data collected in the project.

In framing the research questions and finding an adequate study design both qualitative and quantitative methodologies were considered. It was determined that triangulation was needed to construct an index. A multitude of researchers such as (Neuman, 2000), (Yin, 2003), (Miles, 1994) and (Denzin, 2003) are strongly in favour 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 utilizes 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.

All three sub-studies are predominantly qualitative in nature. Expressing qualitative data in numerical terms 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' (1994: 40). This is well exemplified by a number of software aides such as QSR NUD*IST that in the last decade have come to play an important role in analysing qualitative data. It is very 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 score 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. Conducting the study within one country (eg. comparing the state and federal FOI legislations in Australia) was considered too narrow a scope for the project. 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 useful for FOI Index purposes.

As the 'parents' of most other FOI systems, Sweden and the US were a given on grounds of maturity. They also represented mature liberal 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 in part 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 a lower level of prosperity compared to the US, Sweden and Australia. It is a semi-mature democracy with some issues relating to freedom of the press and freedom of speech and the role of the military and politics as we saw again in 2006 when the military removed Prime Minister Takshin Shinawatra from power. Thailand is also significant in that it is one of few East Asian countries that have implemented FOI

Given the timeframe and financial resources of the project five countries were considered to provide a realistic spread for this initial survey which would comprise 15 studies in all (5x3 sub studies).

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, 2002),

(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, 2000) and (Rozell, 2002). However, the bulk of the studies are still concerned with legal issues exemplified by the works of (Richelson, 2003), (Bass, 2002) and (Siegal, 2002).

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. 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. In this evaluation 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.

A study published by the Soros foundation backed Open Society Justice Initiative, OSJI, is the only one that deals with what FOI delivers in practical information access on a larger international scale. The project is quite impressive. It maps and evaluates 140 requests in 14 countries² of study (seven with FOI laws, seven without), in total the database holds 1926 requests for information (Darbishire, 2006: 11). Interestingly the OSJI study was conceived and implemented at the same time as the FOI Index pilot

² One of the countries evaluated in the OSJI study is South Africa. The overall findings of the study and the findings for South Africa will be dealt with further below in the data presentation and analysis section.

study, however the researchers were not aware of each other's studies. Some of the methodology is similar as are some of the aims of the projects.

The main differences are that the FOI Index focuses on the promise and the practice of FIO and whether the quality of information obtained is relevant from a political accountability perspective. The focus in the OSJI study is to evaluate whether countries with FOI laws have a higher level of access compared to non-FOI countries, to map consistency when multiple requests seeking the same information are lodged and whether the nature of the requestor (eg. journalist, non-affiliated person, business person, etc.) plays a role in the outcome of the request. Another important difference between the two studies is that the FOI Index also includes an evaluation of the protection of media whistleblowers.

So, based on the above the FOI Index is unique in three respects: firstly, it is the first project to systematically focus on journalistic use of FOI to fulfil its fourth estate role by tracking actual FOI requests on an internationally comparative basis. Secondly, 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. Thirdly, it lays the foundation for a future comprehensive International Freedom of Information Index.

Sub-study 1: The Practice

The objective of 'the practice' sub-study was to track freedom of information requests. The research question to be answered was: *In practice, does FOI supply journalists (and media organisations) with independent access to government held information?* The method used was a combination of observation and semi-structured interviews.

Parameters included in the evaluation instrument that tracked the FOI requests included, among others: turn around time, processing costs, attitudes encountered among public servants, the quality of the information obtained (if any) and the appeals process. Copies of 'the practice' research instrument, and the other two instruments, are available from the author on request.

After it was decided that triangulation was to play an important methodological role, three case studies per country seemed 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. There were two alternatives: random selection and what Neuman describes as 'purposive or judgmental sampling' (2000: 198). This sampling is used when the group you want to sample can be categorized as 'select members of a difficult to reach, specialised population' (ibid). 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. Through quality journalism the centre aspires to: 'serve as an honest broker for information – and to inspire a better-informed citizenry to demand a higher level of accountability from its government and elected leaders' (Integrity, T. C. f. P., 2005: 1). The ICIJ has 92 members from 48 countries, all leading investigative reporters and editors. The ICIJ member biography list (Integrity, C. f. P.,

2003) was picked as a method of identifying at least the first of the three journalists from each country of study.

FOI Topics

It was vital 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 were asked to pick one topic each from the three available:

1. The Prime Minister's/President's travel/expense account for 2002, 2003 or 2004.
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, it 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 were issues arising out of the common refugee policy formulated by the European Union. The Swedish request was based on these issues.

Each reporter submitted his or her request in writing (to allow for a 'paper-trail') asking for specific information. Below is one of the Australian requests lodged with the Department of Immigration, Multicultural and Indigenous Affairs.

Request for Information under the Federal Freedom of Information Act

Further to the provisions of the federal FOI Act, the x [program name suppressed to maintain confidentiality] 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 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.

When the request had run its course, ie. when the agency had delivered a decision (in one case the decision was appealed and hence the evaluation left pending until the appeals process had finished) an interview was conducted with the reporter based on 'the practice' evaluation template.

Sub-study 2: The Spin

The task of interpreting and implementing FOI legislation falls on the public servants in government agencies. The public servants are in turn influenced by the senior political heads of departments who direct them in relation to policy issues. Hence it was vital to capture the attitudes towards FOI among senior politicians and public servants, in other words their 'spin' on the legislation. To the greatest extent possible, the same or similar questions were asked in 'the spin' questionnaire as in 'the practice' evaluation template, staying true to the idea of triangulating the data.

The research question for 'the spin' was: *What are the attitudes towards FOI and protection of journalistic sources among leading politicians and public servants?* One of the key 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

Another important part of 'the spin' concerned the public servants' and ministers' attitudes towards whistleblower protection. This was not covered by 'the practice', since it was not possible to simulate such a situation in real life.

Sampling Issues

The sample population for 'the spin' was very large indeed. It consisted of all politically appointed staff and all public servants within the federal/national 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. Again the 'purposive/judgmental' (as described above) sampling technique used in 'the practice' was applied.

This method seemed logical since the policy on how to interpret and implement FOI is formulated at the top level of each department. Hence, the Minister and Deputy Minister, or the equivalent, and the Chief Public servant (head of department) were deemed a logical sample group. 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 each country to allow for a true comparison of response rates. The number of surveys sent to each sample group ranged from 66-68.

Sub-study 3: The Promise

The third sub-study was the most straightforward of the three. The research question was: What are the aims of the different legislations and what do they promise to deliver in terms of information access?

Again the evaluation template used was firmly based on the first two studies and attempted to answer the same set of questions which covered, among other parameters, turn-around time for requests, lodgement fee, processing costs and avenues for appeal. In essence 'the promise' was a comparative content analysis of the five FOI laws that identified the issues that can inhibit the public's independent access to information such as long turn-around times, non-regulated processing fees, poor scope for appeals and costly appeals processes.

The Freedom of Information Index

Each sub-study generated a score for each country of study. The score was generated via a Likert scale-type coding, meaning that reply a) to each evaluation parameter/question received the score 4, b) 3 etc down to reply e) that was allocated the score 0. For instance: Sweden generated the following scores: 'the promise': 63, 'the spin': 65 and 'the practice': 47. Added up these total 175. The total maximum score achievable was 212 (68+76+68). The index was calculated by dividing the total score for each country by 212. In Sweden's case 175/212. The index scale ranges from 0.0 to 10.0 where 10.0 is a totally 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 very far-reaching FOI system including extensive legal protection of media whistle blowers and with public servants and politicians acting as information access facilitators. Sweden's score is 8.2 out of 10.0. Table 1, 2 and 3 (starting on the next page) summarize the scores and most important qualitative data.

³ The Swedish 'spin' score was calculated as follows: the individual scores of the 21 replies to the questionnaire were added to a total of 1362, then divided by 21 to produce the average score of 65. The individual score for the three cases in 'the practice' were similarly added up to a total of 140 and divided by 3 to arrive at the final score of 47. 'The promise' generated only one score, so no average calculations were needed.

Table 1. The Promise (Max Score 68).

Sweden Score: 63	South Africa Score: 31	United States Score: 31	Australia Score: 12	Thailand Score: 18	Overall Analysis
Comments:	Comments:	Comments:	Comments:	Comments:	
Very far-reaching promise	Relatively ambitious legislation	Relatively ambitious legislation	Very low legislative ambition	Very low legislative ambition	One important reason for Sweden's high score is the extensive legal protection for media whistleblowers.
FOI system part of constitution	FOI system explicitly backed by constitution	FOI system backed by constitution	This Act is not on the users' side. This is clearly illustrated by the 'conclusive certificate' function which effectively allows a minister to block most requests	Act delegates much of the interpretation to the 'Information Board' consisting of the Permanent Secretaries to the most influential departments	The US and SA scores are close to 50% and must be regarded as a pass.
Extensive legal protection of sources	No legal protection of sources	No legal protection of sources			
All information perceived public and accessible within days at very low or no cost	Most information perceived public within 30 days	Most information perceived public within 20 days	The evaluation showed that this Act was never meant to work. It cannot deliver on its aims and objectives in its current form	The Act is very non-specific on key issues such as turn around time and processing costs	Two things stand out: Sweden's source protection regime and that the SA Act applies to the private sector.
No processing costs	Processing costs	Processing costs		1 agency exempt	
No agencies exempt from Act	No agencies exempt from Act	Several agencies exempt from Act	12 agencies exempt under the Act	No legal protection of sources	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 poorly.
Act does not apply to private sector	Act applies to private sector	Act does not apply to private sector	Very high processing costs	Act does not apply to the private sector	

Table 2. The Spin (Max Score 76).

Sweden Score: 65	South Africa Score: 54	United States Score: 48	Australia Score: 49	Thailand Score: 56	Overall Analysis
<p>Comments:</p> <p>Result backs ‘the promise’ virtually no gap ‘promise’ – ‘spin’</p> <p>Respondents see themselves as access facilitators and hold information on behalf of the public</p> <p>Very positive attitudes towards source protection</p>	<p>Comments:</p> <p>Gap between ‘promise’ and ‘spin’ indicating a ‘spun’ version of how FOI works in practice</p> <p>Respondents see themselves as access facilitators and hold information on behalf of the public</p> <p>Very positive attitudes towards source protection</p>	<p>Comments:</p> <p>Gap between ‘promise’ and ‘spin’ indicating a ‘spun’ version of how FOI works in practice</p> <p>Respondents see themselves as access facilitators and hold information on behalf of the public – but more hesitant to this concept compared to Sweden and SA.</p> <p>Great hesitancy towards source protection</p>	<p>Comments:</p> <p>Extensive gap between ‘promise’ and ‘spin’ indicating a very ‘spun’ version of how FOI works in practice</p> <p>Majority of respondents say that the government own the information and do not see themselves as information access facilitators</p> <p>Great hesitancy towards source protection</p>	<p>Comments:</p> <p>Greatest gap between ‘promise’ and ‘spin’ in the project. Very hard to conceive how such a weak legislation could deliver the level of access indicated by the result of ‘the spin’</p> <p>Respondents see themselves as access facilitators and hold information on behalf of the public</p> <p>Very positive attitudes towards source protection</p>	<p>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.</p> <p>What really stands out is that the Australian ‘spin’ is the only one were most respondents thought that the government owns the information. This is crucial in explaining Australia’s poor Index score.</p>

Table 3. The Practice (Max Score 68).

Sweden Score: 47	South Africa Score: 0	United States Score: 0	Australia Score: 12	Thailand Score: Incomplete	Overall Analysis
Comments:	Comments:	Comments:	Comments:	Comments:	
Information generated and released within days in two cases	The requests generated no information	The requests generated no information	The requests generated no information within the framework of the Act	The reason for the incomplete score for Thailand is that the three journalists necessary to implement 'the practice' could not be recruited. The recruitment attempts went on for close to a year and exhausted all available contacts and channels. This indicates a great hesitancy among Thai journalists towards using FOI.	The most important finding is that only the Swedish requests generated any information.
Very high FOI knowledge level among public servants	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 end of the study the breaches varied between 1 and 6 months	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 end of the study the breaches varied between 6 and 9 months	Two requests were terminated after very costly processing costs were quoted		Had the US and SA requests generated information, or even been handled according to the Acts, these two countries would have scored OK.
Last case was appealed and reached the Highest Admin court within a year at no cost to appellant – information not released			Last request received incomplete access after 9 months		

Table 4. Final FOI Score (0-10).

Sweden	South Africa	United States	Australia	Thailand
8,2	4,0	3,7	3,5	Incomplete

Main Findings and Conclusions

Because of the failed recruitment of reporters in Thailand (see table above) a total of 12 FOI requests were lodged (three in each country of study). Disappointingly only two (both in Sweden) generated any information within the framework of the legislations. This clearly illustrates the very poor state of FOI in three of the countries where the studies were completed.

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 study clearly shows that the two 'template' FOI systems, Sweden and USA have gone down opposite paths since September 11 2001. The US has effectively become more secretive and does not facilitate access to information the way it used to. The shift can in part be traced to a memorandum put out by the then Attorney General, John Ashcroft immediately after the September 11 terrorist attacks in the US. The Memo is added to the FOI Act as guidance for implementation of FOI and is dated October 12, 2001. After initial assurances that the Attorney General is committed to FOI it 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).

The messages to federal government agencies are clear: be much more restrictive in releasing information. If you refuse applications and they are appealed you can count on legal assistance from the Attorney General's department. This memo is possibly the worst blow to US federal FOI since its inception in 1967. Because the US is one of the two 'model' FOI systems, what it does in terms of FOI is of particular importance.

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). This study has also identified this as a problem. The Open Sweden campaign was used to launch the attempts to export Sweden's FOI system to the European Union. Although critics point out that Sweden has slowed down the flow of information, in comparative terms its FOI regime still works well in practice, as indicated by its 8.2 FOI Index score. Unfortunately, because the US is a super power, its change will have a much greater impact on FOI globally than the Swedish attempts to become a role model in transparency.

The study clearly showed that the SA FOI legislation is quite progressive and that there is very strong support for the FOI concept among 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 systems, the South African Human Right Commissions, is grossly under funded to the extent that it cannot do its job. This indicates that, although FOI is officially supported by the SA government, in practice it is not given priority. The SA findings in this study are very similar to those in the OSJI project (described above in the literature review), where SA also performed poorly (Darbshire, 2006).

It is hard to take the Thai 'spin' data seriously because of the great gap in scores between 'the promise' and 'the spin'. However, as long as 'the practice' is pending, it is not possible to comment further on Thailand.

In many respects Australia is the worst case in the study. Not only did it score lowest, it also projects what turns out to be a misleading and even false image of having a functioning mature FOI system as part of a mature democracy. The study clearly shows that the federal Australian FOI regime is completely dysfunctional and not worthy of a country that prides itself of being a mature liberal democracy.

The most common response to FOI requests in this study was no response (all six requests in the US and SA were met with silence and one of the Australian requests had no response for three months). This was also the most common outcome in the OSJI study where 47 per cent of the lodged request drew a 'mute refusal' (Darbshire, 2006: 38). This indicates that there is a great need for vigorous use of FOI by not only journalists but every constituency to drive home the point that this is not an acceptable performance. Interestingly the OSJI study shows that newcomers to the FOI family such as Armenia outperform mature FOI countries such as France (ibid).

The Promise and Practice Gap

The overall research question for this project was: *to what extent, if any, are the promises made by Freedom of Information legislation borne out by the practice in the countries of study?* Ideally there should be no gap at all between promise and practice. Generally the study has shown that a gap exists in all countries evaluated in this project. The gap ranges from relatively small in Sweden and Australia to quite substantial in the US and SA (see table 5 below).

Table 5. 'Promise' – 'Practice' Gap.

	Sweden	Australia	USA	South Africa	Thailand
'The Promise'	63	12	31	31	18
'The Practice'	47	13	0	0	incomplete

Although Sweden scores well, there is still a gap. Australia appears to score quite well with an apparent balance between the two. Unfortunately 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.

Discussion of Findings

So, why did three out of four countries in the study score so poorly? There are several possible reasons:

In the case of SA, and to a certain extent Australia, the newness of the FOI concept and regime is part of the explanation. 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 guard' among the public servants and a very active, well-resourced and independent overseeing agency is needed to drive the change of attitudes that is so important for FOI to work in practice. This is lacking in both Australia and SA. Coupled to this is the low awareness of FOI and its potential and uses. This is especially true for SA.

The main reason for the poor rating for the US has been discussed above. The US FOI regime has become a very good illustration of another general reason for poor FOI Index scores: FOI as democratic 'window dressing'. FOI appears to be used by some nations as a way to convey an image of transparency and openness in governance that simply is not carried through in practice – in other words: it is a fabrication. In this study FOI as democratic 'window dressing' clearly applies to the US, Australia and SA. The SA FOI regime seems very sincerely meant, but is currently not working as intended. The US and Australia both have mature FOI regimes and have no excuses for the poor score. From an international point of

view it is embarrassing that these two countries are currently ‘exporting’ their version of democratic ‘openness’ to, for instance, Iraq.

Closely connected to democratic ‘window dressing’ is the concept of political will. As pointed out above, passing FOI legislation is relatively easy; the hard part is making it work in practice. This requires sincere and real political will, not just during one political term, but consistently over decades. This political will never existed in Australia, it has gone dormant in the US, and the jury is still out on SA, though the current signs are not encouraging. The only country in the study where the political will to make FOI work still exists appears to be Sweden.

The Spin Reply League

As shown in table 3 below the response rates to ‘the spin’ were, from a quantitative perspective low, however ‘the spin’ was a qualitative study where each response was viewed as a stand alone indicator on the attitudes among the top public servants and ministers. Nevertheless, it is interesting to compare the response rates as these indicate 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 6 provides an overview of the response rates:

Table 6. Responses to ‘the Spin’ (percent).

	Sweden	Thailand	USA	South Africa	Australia
Response Rate	31	25	12	9	7

The numbers underscore the findings in the rest of the study. Thailand’s 25% is a bit of a loose cannon, but cannot really be analysed fully since the data for this country is incomplete. Again, Australia scores poorly, further emphasizing that FOI does not register on the political radar.

It would of course have been desirable to have a greater response rate, particularly in the US and Australia. Indeed a case can be made to question the validity of ‘the spin’ and if it really contributes to the index. As described below the reliability of ‘the spin’ is high and the best way to further determine the validity is to run the study again. It could be that instead of using survey methodology to capture the attitudes towards FOI and source protection, interviews with leading politicians and public servants should be conducted. However, by the same token it is important to keep in mind that the responses the survey did generate came from key people that create policy on how to administer and interpret FOI. Hence, the data extracted from these responses is still very valuable in spite of the low response rate.

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.

A scale analysis using the SPSS software showed that the reliability of 'the spin' sub-study is very high (the Chronbach's Alpha score was 0.835 where 1.0 is the maximum score). It was only possible to apply the scale analysis on 'the spin' as the other two sub-studies did not contain a sufficient number of data points. However, as all three instruments share a common design and set of parameters/questions, the solid result in 'the spin' scale analysis indicates that that all three sub-studies are reliable. The reliable performance of the sub-studies, indicate that the reliability of the FOI Index is high as well. However, more countries need to be evaluated and the Index expanded to allow for further reliability analysis. Another factor that contributes to the high reliability of the FOI Index is that it measures most evaluation parameters at least twice, which is an important criterion to create a reliable index (ibid).

The Future

It is important to keep in mind that the FOI Index is a prototype. What is needed now is to run the studies in as many countries as possible to allow for cross analysis of reliability and validity. Indeed it is highly desirable to increase the number of data points collected in all three sub-studies. 'The practice' could do with between 5-20 journalists lodging requests in each country of study. In the case of 'the spin' it is probably preferable not to extend the sample group, but it would be highly desirable to increase the response rate by re-sending and perhaps e-mailing the questionnaires as a follow up. Another possible avenue would be to complement 'the spin' with in-depth interviews with leading politicians and public servants.

Imagine implementing the above in 68 countries. It is a rather large project, but in the end most certainly worth it. Think of the database that could be created. It would be the first of its kind and it could be used for a multitude of purposes: as an indicator of the level of transparency in a political system, a practical guide for international investigative journalists, detailed comparison and analysis of why some FOI systems work and others do not. When the index gains momentum, perhaps countries will aspire to getting a good score. In this way the index could become a powerful tool for international FOI advocates.

However, a project of this magnitude requires extensive international collaboration. The Open Society Justice Initiative study solved this by working with a few prominent civil society groups/organisations in each country of study. This is certainly one possible avenue, however, I propose to broaden this to include academic institutions and other non-government organisations with an interest in the development and monitoring of FOI. So, I close this paper by extending an invitation to help build the first comprehensive International Freedom of Information Index.

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