

Legislating Usability: Freedom of Information Laws That Help Users Identify What They Want

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I. INTRODUCTION

With the rapid diffusion of freedom of information (FOI) legislation in recent decades,¹

II. FOI LEGISLATION: AN ENLIGHTENMENT MECHANISM FOR LIMITING GOVERNMENT CENSORSHIP

From a historical perspective, a source for addressing the general question about usability is the 18th century Kingdom of Sweden during which time the Riksdag passed the world's first FOI law.¹⁰ Until the United States passed its Freedom of Information Act in 1966, the question of usability of access legislation could only be a parochial concern limited to northern Europe.¹¹ But with the accelerated rate of diffusion of FOI laws globally, most countries of the world now face questions about usability. Examining the history of FOI legislation is important because the distance in time may offer the present moment a novel perspective. For example, in contemporary discussions, the purpose of freedom of information legislation is often framed as making governments transparent or more accountability to the public.¹² However, as will be explained in this section, the political debates giving rise to the world's first freedom of information law in eighteenth century Sweden were more clearly focused on the issue of the minimizing state censorship.¹³

In the English FOI scholarship that examines Sweden's history, attempts have been made to acknowledge a range of contributors to the idea of access to government information.¹⁴ The benefit of recognizing a widening range

10. See Manninen, *supra* note 5, at 18.

11. *Chronological and Alphabetical Lists of Countries with FOI Regimes*, FREEDOMINFO (Jun. 30, 2016), <http://www.freedominfo.org/?p=18223>. But see Banisar, *supra* note 1, at 58 (Colombia appears to have had a legal code for access to public documents in 1888. Information about it is difficult to find in available English literature).

12. E.g., Mark Boven, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317, 327 (2002); Seth F. Kreimer, *Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1012 (2008); Lindita Camaj, *Governments Uses and Misuses of Freedom of Information Laws in Emerging European Democracies: FOI Laws Impact on News Agenda-Building in Albania, Kosovo, and Montenegro*, JOURNALISM & MASS. COMM. Q. 1, 12 (2015).

13. See Christoffer von Kocken et al., *Additional Report on the Third Committee of the Grand Joint Committee of the Honourable Estates of the Realm on Freedom of Printing, submitted at the Diet in Stockholm on 21 April 1766*, in *ANTICIPATING THE WEALTH OF NATIONS: THE SELECTED WORKS OF ANDERS CHYDENIUS (1729-1803)*, at 237-248 (Maren Jonasson & Pertti Hyttinen ed., Peter C. Hogg, trans., 2011); Ackerman & Sandoval-Ballesteros, *supra* note 1, at 88 (referring to the intimate tie between access to government information and freedom of expression).

14. E.g., Manninen, *supra* note 5 (touching on the influence of people such as Anders Chydenius, Anders Schönberg, Gustaf Cederström, Peter Forsskal, Anders Nordencrantz, Johan Arckenholtz, and the Tang Dynasty); David Goldberg, *Peter Forsskal: Goettingen Prodigy and Author of One of the Least Known Jewels of Enlightenment Literature*, http://www.peterforsskal.com/pdf/Goettingen_paper4.pdf (last visited May 3, 2017) (describing the contribution of Peter Forsskal); Rolf Nygren, *The Citizen's Access to Official Records – A Significant Principle in Swedish Constitutional Life Since 1766*, in *DIE ZUNÄNGLICHKEIT VON PARLAMENTS AKTEN UND DIE AUDIOVISUELLEN MATERIALIEN IN PARLAMENTS-UND PARTEIARCHIVEN* 14, 20-21 (Günter Buchstab ed., 1999) (describing the contribution of Baron

of contributors and influences is that it helps broaden our understanding of what the world's first FOI law was addressing in its historical moment. This broader understanding makes it easier to frame answers to questions about using FOI laws in our contemporary moment.

In 18th century Sweden, books or pamphlets could only be printed if approved by a censoring body. Likewise, Sweden's Chancellery and Royal Court exercised absolute power to withhold documents held in state archives.¹⁵ Numerous individuals reacted against this control. In 1759, Swedish naturalist Peter Forsskål (1732-1763) wrote a pamphlet titled *Thoughts on Civil Liberty*. After parts were censored, five hundred copies were printed

skewed, however as he did not describe how the publication was under absolute control by the Emperor and used to strengthen, not question, imperial power.²¹ Although a champion of a free press, Nordencrantz did not propose an outright ban on censorship.

capacity to use them.³⁴ As a result, FOI laws may be prone to merely existing on paper.³⁵ Although usability is an important litmus test for their success, studies that examine issues of use cannot keep up with actual levels of usage.³⁶ Beyond the pragmatics of conducting studies, another reason for the difficulty in studying FOI usability is because access laws often follow a principle of applicant blindness.³⁷

cases, a high-volume disclosure may give evidence of otherwise concealed government activities, which can then be the basis for subsequent and more specific searches.⁵³ Another advantage of high recall searches is that high

jurisdictions⁵⁷ or within a jurisdiction over a period of time.⁵⁸ For example, to compare the FOI retrieval systems under the Clinton and Bush administration, Kim analyzed eight years of annual FOI reports from twenty-

are being audited, they may change their behavior to look more favorable.⁶⁶ For example, Newspapers Canada reported that in 2011 many public bodies had determined they were being audited and “officials in every province, in several federal departments as well as the City of Windsor, Ontario,

3. User-centered evaluation

A third way to evaluate information retrieval systems is based on user evaluations, such as indicators of satisfaction.⁷⁶ User expectations are a key factor in their satisfaction with an information system.⁷⁷ User expectations of FOI-based retrieval can be shaped by experiences with other information retrieval systems, such as search engines or databases.⁷⁸ The information retrieval systems created by online databases, however, are significantly different than the information retrieval systems implemented under FOI laws. Online databases contain well-structured information, which can be searched rapidly at low cost. In contrast, government institutions contain a massive number information sources, which may be unstructured, unclassified, not indexed, and may require extensive human intervention to search. FOI officers tasked with responding to users may not know where to find the information.⁷⁹ Institutions may also be insufficiently resourced to perform at the level expected by users.⁸⁰ FOI users have been reported to underestimate the vast amount of information contained with bureaucracies and oversimplify the ease with which it can be found.⁸¹

These observations do not imply that FOI procedures or the conditions in which they are implemented are immutable and cannot be improved based on experiences of users; rather, it recognizes that users may have unrealistic expectations of usability because they are unfamiliar with nature of the information retrieval system they are querying. Users should not be faulted for this because the lack of knowledge of government is precisely the problem FOI laws attempt to address.

B. Factors Affecting Usability

1. Knowledge of bureaucracies

To use FOI laws effectively requires have some knowledge in certain areas, such as the nature of one's access rights and the procedures to exercise them.⁸² Knowledge of government bureaucracy and structure are also important for using access laws.⁸³ This bureaucratic knowledge gives FOI users realistic expectations needed to conduct successful searches. Novice users, for example, can incorrectly assume governments have a single, central database that can be searched for anything.⁸⁴ It should not be surprising that novice users have misconceptions about governments as the need for an access law acknowledges government secrecy is a problem. Unless one is employed in a government department or routinely engages with one, it may take time to develop knowledge of bureaucracy and to develop expertise in using access laws. In the United States, a cottage industry of expert FOI users has emerged.⁸⁵ The challenges of learning how to use FOI proficiently also means it may take time before users in field such as journalism⁸⁶ or academic research are in a position to share their knowledge.⁸⁷

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2. Non-government capacity

Another factor affecting the usability of FOI laws is the how engaged civil society organizations are with access rights. In many countries, public interest groups, media associations, and other civil society organizations are not only important users of FOI laws but also promoters of it.⁸⁸ Use of FOI legislation by community organizations has also had secondary benefits, such as making FOI laws easier to use by journalists.⁸⁹ Additionally, when community-based organizations routinely use access laws, it has been found to have a positive effect on the empowerment of citizens.⁹⁰ FOI usage levels could be an indicator of the capacity of civil society to use access rights or whether conditions for a robust civil society are present.⁹¹

3. Governments burdening the FOI system

Another factor that can affect usability of FOI laws is government procedures for responding to users. Depending on the sensitivity of the records being accessed, the procedures for reviewing and providing them can change in complexity. The use of FOI laws can draw criticism because of the alleged costs it places on government authorities.⁹² FOI laws are often characterized as a method of last resort and to be used after all other informal and presumably less costly methods have been exhausted.⁹³ But this characterization is specious. The procedures for responding to informal access methods also involve costs for locating, retrieving, and protecting sensitive information and therefore have the same costs as formal access methods. If any of these informal procedures are more cost effective, then government administrations should integrate them into their FOI handling procedures. This implies that using FOI laws should actually be the most cost-effective method of accessing unpublished information.

88. See ROBERTS, *supra* note 34, at 116-20.

89. See Camaj, *supra* note 88, at 116-20 (presumably less costly as making use of FOI laws is less costly as making use of other methods).

minimize the amount of information the user is to provide about themselves.¹⁰⁰

Another statutory mechanism to enhance usability is to assign government officials a duty to assist users. In a comparative study of Canada, the United States, New Zealand, Australia, and the United Kingdom, the Information Commissioner of Canada found this clause involves three principal features: helping the user identify the information they want, conducting a fair and reasonable search, and responding to the user as accurately and quickly as possible.¹⁰¹ According to the Global Right to Information Rating, of 111 national FOI laws, 78 assign officials some duty to assist users.¹⁰² A duty to assist requirement would also be expected to include assisting people with special needs arising from circumstances such as disabilities, illiteracy, or other circumstances. The Global Right to Information found that sixty national FOI laws have some requirement to assist people with special needs.¹⁰³ As people with disabilities may be underemployed, fees associated with using access laws affect their usability. Seventy-eight of 111 national FOI laws do not include clauses that waive fees for people with low or no income.¹⁰⁴

A third statutory mechanism to make FOI laws more usable is to require government bodies to publish information that helps users find information.¹⁰⁵ Canada's Access to Information Act, for example, requires the federal government to publish "a description of all classes of records under the control of each government institution in sufficient detail to

gives a score of 2, 1, or 0. Data was accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=13>.

100. Based on a review of scores of indicator 14 of Global Right to Information Rating. Indicator 14 is "Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery)." The rating system gives a score of 2, 1, or 0. Data was accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=14>.

101. Information Commissioner of Canada, *The Duty to Assist: A Comparative Study*, Office of the Information Commissioner of Canada (May 2008).

102. Global Right to Information Rating, indicator 16 ("Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification"). The rating system gives a score of 2, 1, or 0. Data was accessed in April 2016 from <http://www.rti-rating.org/by-indicator/?indicator=16>.

103. Global Right to Information Rating, indicator 17 ("Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled"). The rating system gives a score of 2, 1, or 0. Data was collected in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=17>.

104. Global Right to Information Rating, indicator 26 ("There are fee waivers for impecunious requesters"). The rating system gives a score of 2, 1, or 0. Data accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=26>.

105. Global Right to Information Rating, *Indicator 58*, <http://www.rti-rating.org/by-indicator/?indicator=58> (last visited Mar. 12, 2017).

coded for their conceptual features. At the end of the first phase, the concepts were organized into a classification scheme. Five major classes of published information emerged, described below. In the second phase, the fifty-one FOI laws were reviewed again using closed coding based on the classification scheme. This resulted in a frequency count of conceptual features within each larger category.

1. Publishing information about the access system

It is common for FOI laws to require government agencies to publish information about the access system itself. Fifty-one percent of the surveyed laws required governments to publish contact details of FOI officials. For example, China requires state organs to

prepare and publicize guides for government information. . . Guides on government information release should include types of government information, their system for arrangement, methods for obtaining information, the names of government information release organizations, their office addresses, office hours, contact telephones, fax numbers, and electronic mailing addresses etc.¹¹⁹

More than half (fifty-five percent) of the reviewed laws required governments to publish information about the procedures for using the legislation. For example, Croatia's law requires public authorities to publish annual reports, which contain, amongst other things, "notifications on the manner of exercising the right of access to information and re-use of information with contact data of the information officer."¹²⁰ Likewise, Ethiopia requires public bodies to publish a "detailed explanation of the procedures to be followed by persons who wish to access this information."¹²¹

A smaller percentage (twenty-four percent) of surveyed laws required governments to publish information about available complaint procedures. South Africa, for example, requires the Human Rights Commission to publish an easily comprehensible guide in each official language for people who want to use their access rights. Amongst many other things, the guide is required to include:

119. People's Republic of China Ordinance on Openness of Government Information, article 19, <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041352.pdf>.

120. Right to Information Act, article 10(1)(1), <http://www.rti-rating.org/wp-content/uploads/Croatia.pdf>.

121. A Proclamation to Provide for Freedom of the Mass Media and Access to Information, No.590/2008, <http://www.rti-rating.org/wp-content/uploads/Ethiopia.pdf>.

4. Publishing description of government records

Based on the selection criteria, all the laws reviewed required governments to publish description of some sort about the records held by government. Of these, it was most common (eighty percent) for governments to proactively publish description of classes of records held in their custody. Significantly fewer (twenty-nine percent) required publishing item level descriptions, such as lists of documents. Even fewer (six percent) required departments to publish lists of subjects.

An innovative clause found in South Sudan, Maldives, Antigua, Finland, and Guinea was to publish description of the overall records keeping system. Whi21 11.04 T0 gea 0 612 792 reW* nQ EMC ction criteria, al

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laws should be viewed with caution. Proactive disclosure requirements can conflict with FOI laws in an important way. When governments decide which materials to publish, political interests will inevitably influence their decisions. Proactive disclosure policies may end up serving the political interests of the governing party.¹²⁹ By transferring the authority about what is made available from government officials to individuals, FOI laws are designed to avoid this problem. While some scholars propose that governments publish all information automatically,¹³⁰ it is difficult to imagine how this could be implemented without requiring an army of FOI officers to review every document for information needing protection. This would also risk accidentally disclosing information that legally requires protection.¹³¹

Proactively disclosing documents may also diminish FOI laws as a system for accessing information. In the United Kingdom, government authorities are required to publish information according to a publication scheme, which must be approved by the Information Commissioner.¹³² However, governments have not implemented them effectively and the Information Commissioner has lacked resources to monitor them properly.¹³³ It is worth quoting findings from interviews with FOI users in the United Kingdom:

the utility of the original publication schemes has been seen to be limited,

been relevant” (requestor 4), does not “make any difference” (requestor 8) and “isn’t good enough” (requestor 6).¹³⁴

While improvements to proactive disclosure could be made, it should not be assumed that integrating publishing requirements into FOI laws are inherently an effective meF1 11.084(h)11(at)5()-86(i)-4(n)11(t)-4(eg)9(r)7(at)-5(i)6(ng)11()-86(publ)6o