

Freedom of Information in the U.K., U.S., and Canada

Freedom of information (FOI) laws are becoming more prevalent throughout the world. But they are only as effective as the systems that support them.

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The following article is based on a research report written for the ARMA International Educational Foundation in 2006. The complete report may be downloaded free at www.armaedfoundation.org.

Over the past two decades, the number of freedom of information (FOI) laws has grown from nine to 68, and they are continuing to be passed by more and more countries around the world. The legislation is often touted by campaigners and other supporters as a window into government and by government administrations as proof of their commitment to transparency and accountability. How FOI works in practice, however, is often far from the ideal envisioned by either group.

Federal FOI laws can look very different, depending on where they are implemented and practiced. In three countries – Canada, the United

Kingdom, and the United States – federal legislation was enacted at three distinct periods of FOI’s evolution, yet the governments face common challenges and issues regarding their respective laws.

The U.S. Freedom of Information Act (FOIA), which originally passed in 1966 and has been amended four times, has given the rest of the world 40 years of experience on which to draw when writing and implementing their FOI laws. Canada, which passed its Access to

Information Act (ATIA) in 1982, can take credit for a carefully structured act that has incorporated most of the key points necessary for good FOI legislation. The U.K.’s FOI Act 2000, to which 100,000 U.K. public authorities are subject, is the most recently passed law, having been fully implemented in 2005.

The Right to Access

FOI legislation works by conferring to the public the legal right to ask for and receive information held by public bodies. Enforceability is what sets FOI laws apart from general pledges of access to information made by governments. In the United States, the FOIA is enforceable in court, whereas Canada and the United Kingdom have established information commissioners to ensure compliance with their acts, backed by court action in Canada’s case. However, though unused, both Canada and the United Kingdom incorporated a “government veto” into their legislation – a somewhat tentative commit-

At the Core

This article

- ▶ Compares and contrasts federal FOI laws in Canada, the United Kingdom, and the United States
- ▶ Examines the costs of compliance, as well as the response rates, in each country
- ▶ Discusses the importance of recordkeeping to FOI laws

ment to FOI when compared to the U.S. legislation.

FOI legislation qualifies the right of access by defining a series of issues, or exemptions, for which the right is not valid. Exemptions are the key section of any FOI legislation because their breadth and depth determine how much information is actually disclosed. The practice of exempting information from disclosure to protect essential functions of government is consistent across all countries' FOI regimes. Common exemptions cover information that is related to national defense, international relations, and law enforcement, as well as information provided in confidence, personal information, and policy advice. There are few significant differences in the scope of the exemptions in the U.S., Canadian, and U.K. acts.

An obvious yet important potential exemption relates to the requester: Does the law give the right of access to anyone or only to that country's citizens? FOI laws in the United States and the United Kingdom allow anyone to make a request, while the Canadian ATIA applies only to Canadian citizens or permanent residents. A recent change in the United States via the Intelligence Authorization Act for Fiscal Year 2004 prohibits intelligence agencies from complying with requests from foreign governments, their representatives, or intergovernmental organizations.

In terms of numbers, FOI is actually used by only a minute portion of the population. In the United States, Canada, and the United Kingdom, fewer than 1 percent of the population in each country has made an FOI request. However, in terms of sheer numbers, far more people file FOI requests with the U.S. government than with the U.K. or Canadian governments. For example, the U.S. government received 2.6 million FOI requests in 2005 compared to Canada's 25,207 and the U.K.'s 38,108. The most frequent categories of requesters are pri-

vate citizens, the media, and businesses.

Implementing FOI Laws

When deciding whether to pass an FOI law or how to implement one, government officials and politicians often fail to think carefully about the practicalities of putting the law into practice. For example, few seriously consider

how the law will affect the jobs of civil servants and other government employees or, conversely, how the staff's abilities and attitudes will affect the success of the law's implementation. Yet those who answer requests and respond to complaints are the key players in the FOI implementation process. Along with FOI officers, records managers

play a large role in ensuring that that implementation goes smoothly.

Several areas of FOI implementation are worth examining to understand the complexity of dealing with the legislation. The main ones to consider are:

- FOI response process/system
- Costs of compliance
- Time spent processing requests and backlogs
- FOI training and awareness for public authorities
- Senior management's role
- Recordkeeping as key to FOI's success

Those who are not prepared face many challenges as they scramble to organize the information being requested.

Responding to FOI Requests

The logistical complexity of the FOI request response process is influenced by the nature of the tracking system as well as the type of the request. The centralized Canadian system allows all requests to be fed into one database, which is used by most departments and agencies. The United Kingdom and the United States, however, do not have centralized systems; nor do individual departments in those countries use common tracking software.

Another factor is whether departments respond to requests on a simple first-come, first-served basis ("single track") or divide them into those that are simple (requiring minimal administrative effort) and those that are complex or voluminous ("multi-track"). The process becomes more complicated and unwieldy as more moving parts lead to the involvement of more actors and increase the need for coordination.

Actors include those providing legal services or consultations with other departments, people at other levels of

government, and foreign governments. If a request is refused and the requester is dissatisfied, additional actors can become involved in internal reviews (in both the United Kingdom and the United States), appeals to the information commissioner (in the United Kingdom and Canada), and appeals to a higher court (the U.K. information tribunal, the Federal Court of Canada).

The precise cost of complying with FOI legislation in the three countries is virtually impossible to calculate. One

According to the U.S. Department of Justice Office of Information and Privacy, the total cost of administering the U.S. FOIA in 2003 was just over \$23 million. According to the government of Canada, its annual FOI cost is estimated to be around \$30 million (Cdn.) or approximately \$25 million in U.S. dollars.

reason for this is that some agencies keep track of costs while others do not; another reason is the wide variation in how the costs are calculated. According to the U.S. Department of Justice Office of Information and Privacy, the total cost of administering the U.S. FOIA in 2003 was just over 23 million. According to the government of Canada, its annual FOI cost is estimated to be around \$30 million (Cdn.) or approximately \$25 million in U.S. dollars. In the United Kingdom, an estimate after 18 months was £35 million per year (about \$68 million U.S.). The cost, naturally, depends on the efficiency of the response procedures and, therefore, to the time dedicat-

ed to FOI compliance.

The statutory guidelines for time needed for compliance are broadly comparable across the three jurisdictions. The U.K.'s FOI act stipulates that the authority must comply "not later than the twentieth working day following the date of receipt." In the United States, "(once) an agency properly receives a FOIA request, it has twenty working days in which to make a determination on the request," according to the Department of Justice's May 2004 "Freedom of Information Act Guide." In Canada, the ATIA mandates that the response must be made "within thirty days after the request is received."

In each jurisdiction, however, these statutory response times are often not adhered to – for instance, delays are the most common reason for requester dissatisfaction in Britain and Canada – and response times are mixed in each jurisdiction. U.K. central government organizations' adherence to the time limit varied between 64 and 92 percent, according to one set of statistics from the "Freedom of Information – One Year On" report.

Comparable U.S. figures are hard to come by, owing to the decentralization of the process and compilation of statistics, which do not include delay time. Under the Canadian legislation, a late response constitutes a "deemed refusal" and, after a marked decrease in the number of deemed refusals in 1999, the number is on the rise again: the lowest being 5.9 percent, the highest 60.1 percent (Citizenship and Immigration Canada and Department of Foreign Affairs and International Trade respectively), according to the Information Commissioner of Canada's annual report for 2005-2006. In all three countries, delays typically lead to backlogs: 18 percent of requests in Canada are backlogged each year, while only 7.1

percent in the United States and 2.6 percent in the United Kingdom share the same fate.

Training and Support

One of the factors that can affect the efficiency with which FOI requests are processed is the amount of training FOI practitioners receive. In the United States, the Office of Information and Privacy (OIP) takes government FOI staff training seriously, recommending a year to learn the job. Training FOI practitioners in the United Kingdom is the responsibility of each government department. Levels of training in access

work vary across departments in Canada, where it is usually sparse, voluntary as opposed to mandatory, and takes the form of voluntary information sessions. The importance of training, however, has been recognized, and recommendations are being considered to improve training, according to an ATIA Review Task Force report, "Constructing a Culture of Access in the Federal Public Service."

Support from senior management is also seen as crucial for successful implementation, not only with regard to training, but also the effect of management's attitudes toward the work. The direct involvement of managers in access work

and sensitivity toward employees' time constraints can do much to facilitate access work as well as to boost morale. Senior management has been reproached in each jurisdiction, however, for its lack of support. Senior managers in the United States are said to pay little attention to FOI, while their Canadian counterparts are too reactive, showing interest only in specific issues and files, according to an ATIA Review Task Force report from Canadian training firm Yvon Gauthier Info-Training Inc. This has also been identified as a problem in local authorities in the United Kingdom.

The Role of Recordkeeping

The importance of recordkeeping has been flagged with the implementation of FOI legislation. Recordkeeping appears to have risen toward the top of the agenda since FOIA 2000 was passed in the United Kingdom. According to a report, "Freedom of Information Act 2000: The First Six Months," 34 percent of local authorities in England surveyed in 2005 felt that FOI had had a positive impact on records management, with issues being recognized and progressed.

Twenty-seven percent of public authorities surveyed by the U.K. Information Commissioner in a January 2006 survey stated that they believed recordkeeping had improved, and 57 percent of these thought their filing system was likely to change within the next year to comply with FOIA 2000.

Scope for authorities to use specialized software has also been identified. In the United States, E-FOIA is thought to have had a beneficial effect on database quality, but information records management expertise is still being deployed on authorities' databases. In Canada, the quality of filing systems has been flagged and, despite confusion over the definition of a "record," recommendations have been made for explicit guidelines in this respect.

In the end, FOI laws are only as good as the systems that underpin them. Staffs have to learn to deal with the demands of compliance and a new decision-making process. Efficient and effective procedures for creating, managing, disposing of, and archiving documents and records are key to their success. Obviously, if a government employee cannot find information when asked for it, he/she cannot evaluate it, make the decision on whether to release it, make necessary redactions, or relay it to the requester within the legislation's statutory time limit. Without good records management, FOI simply does not work. ■

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