The British state's failed attempt to kill off the Freedom of Information Act

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> 'Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naïve, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.' [1]

It appears that Freedom of Information (hereinafter FOI) laws have never been loved by their parents. When US President Lyndon Johnson signed the world's first FOI Act into law in 1966, he was so keen not to be associated with it that – uniquely among modern Presidential enactions – there was no photographer present to capture the historic moment. It is fitting that Britain's Prime Minister Tony Blair, who gave the UK its own FOI Act, has since attempted to disassociate himself from the law he presented to the Queen for Royal Assent in 2000.

The UK's FOI Act has been threatened with curbs, cuts, and cancellations almost since its inception. In 2015 an Independent Commission on the Freedom of Information Act was established. This was led by Lord Burns and will hereinafter be referred to as the Burns Commission. Coming at a time of much political opposition to FOI, the Burns Commission seemed to promise, if not outright doom for the Act, then certainly a significant setback or two. But the trap that had been lovingly prepared for the Act, which included (as we shall see) stacking the Commission with the state's henchmen, did not snap shut. The Act has survived untouched and will irritate, annoy, and alarm state bureaucrats for at least the foreseeable future. With the previously mentioned history of governmental pressure upon FOI, its fans and foes alike are now in somewhat uncharted waters. However, we can perhaps draw some provisional observations by comparing the UK FOI Act to its US predecessor, which similarly encountered a potentially-devastating clampdown barely a decade after enactment.

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1 Tony Blair, *A Journey*, (London: Hutchinson, 2010) p. 516

Tony Blair had consistently championed the FOI cause throughout his time as leader of Her Majesty's Opposition, and, when he became Prime Minister in 1997, the enactment of UK FOI legislation was taken for granted. Delays set in almost immediately. The tentative consultation signalled by the White Paper Y*our Right to Know* didn't begin until December 1997, some seven months after Labour had formed its first government since 1979.[2] Three years later, the Lord Chancellor's department proposed that the new legislation should be phased in with delays between the Act taking effect in various categories of 'holding authority'. The idea was to start the process with central Government to provide 'models of best practice' that would naturally cascade down into lower tiers of governance. Instead, Mr Blair set a uniform commencement of 1 January 2005, which, it was believed, would allow for public sector bodies to consult, confer, and prepare for the new openness. As Conservative Party researchers demonstrated, the five-year lead-in also coincided with a notable uptick in file destruction by Whitehall departments, with some civil service branches essentially doubling their shredding efforts.[3]

Even with such a significant lead-in time before FOI came into effect, Mr Blair was slow to notice the 'dangers' he was creating for himself. When realisation hit, the Government responded with surprising speed. Just 18 months after FOI was implemented, Mr Blair's Attorney-General Lord Falconer was directed to re-examine the new law and see if it should be curtailed. The envisioned method of curtailment was financial, in the form of fees for requests (where there were none before) and increases in such fees as already existed. Even before Lord Falconer had finished his re-assessment, Mr Blair had resigned and the role of Prime Minister had been transferred to Gordon Brown. Given the historical rivalry between those successive PMs, there was surely a personal dimension to the remarks made by Gordon Brown during his speech 'On Liberty', delivered at the University of Westminster barely four months after Mr Blair's resignation.

> 'The Freedom of Information Act has been a landmark piece of legislation, enshrining for the first time in our laws the public's right to access information. Freedom of Information can be inconvenient, at times frustrating and indeed embarrassing for governments. But

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[2] Cabinet Office, HM Government (1997) *Your right to know. The Government's proposals for a Freedom of Information Act,* London, The Stationery Office. See <http://tinyurl.com/yd5wsl4o> or <https://www.gov.uk/government/publications/your-right-to-know-the-governments-proposals-for-a-freedom-of-information-act>.

[3] Matthew Matthew *et al*, 'File destruction doubled ahead of new information act', *The Guardian,* 23 December 2004 at <http://tinyurl.com/ybsnf9w9> or < https:// www.theguardian.com/uk/2004/dec/23/freedomofinformation.politics>.

> Freedom of Information is the right course because government belongs to the people, not the politicians.' [4]

Brown then went on to identify the people he felt would be best-positioned to protect the public's right to know, by referring to his desire to 'make sure that legitimate investigative journalism is not impeded' and his belief that 'our rights and freedoms are protected by the daylight of public scrutiny as much as by the decisions of Parliament or independent judges.' If there was any lingering doubt about Mr Brown's views on journalistic freedom, it was decisively dispelled when he went on to name *Daily Mail* editor Paul Dacre as an appointee to an *ad hoc* panel to examine the question of how some material still held by the National Archives should be declassified with the FOI Act in mind.

Mr Brown had put his finger deftly on the point that had alarmed Mr Blair in 2005, and to which Mr Blair only confessed in his autobiography published three years after Mr Brown's remarks.

> 'The truth is that the FOI Act isn't used, for the most part, by "the people". It's used by journalists. For political leaders it's like saying to someone who is hitting you over the head with a stick, "Here, try this instead," and handing them a mallet. The information is neither sought because the journalist is curious to know, nor given to bestow knowledge on "the people". It's used as a weapon.' [5]

Mr Blair's language here is revealing. It is the vocabulary of conflict, of instability, of incipient revolution. It betrays a siege mentality. Why does he perceive FOI as a weapon with which to assail public servants?

The apparent answer is that Mr Blair had an uncharacteristically troubled conscience. No sooner had the FOI Act come into force than Mr Blair's own Labour Party used it to go on muck-raking expeditions. Labour Party activists up and down the country were enrolled into a pseudo 'crowd-sourcing' exercise, in which the Home Office was barraged with requests for information. The requests all had one thing in common: they related to Mr Blair's opposite number on the Parliamentary benches, Conservative Party leader Michael Howard. Mr Howard (now Baron Howard of Lympne) was the distinctly authoritarian Home Secretary from May 1993 to the last day of John Major's fractious 1990-97 administration. The Labour Party clearly felt reviving the

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[4] Gordon Brown, 'On Liberty', speech delivered at the University of Westminster (25 October 2007). See transcript at <http://tinyurl.com/ydhrf38c> or <http://webarchive.nationalarchives.gov.uk/20071003115008/number10.gov.uk/page13630>.

[5] Tony Blair, *A Journey*, (London: Hutchinson, 2010) p. 517

atmosphere of the Major years would be a significant advantage in 2005.[6]

Mr Blair draws a distinction between 'journalists' and 'the people' as though the two categories were somehow mutually exclusive. This curious and artificial dichotomy has a suitably paradoxical corollary: that Mr Blair believes it would be safe (under FOI) to release information to members of the public, who do not have the means to publish it, but unsafe to release such information to the press who would publish it for everyone else to see. Mr Blair – who famously admitted that he could not operate a home computer – was clearly thinking in Gutenbergian terms, since even during the first decade of the 21st Century the Internet had put a form of publication within reach of just about everyone in Britain who was minded to try it.

It would be entirely natural to infer that Mr Blair's fear of FOI-equipped journalism was at least partly fed by his close advisor and confidante Alastair Campbell, a veteran of the print-era Fleet Street before becoming Mr Blair's press secretary. There is no index entry for 'Freedom of Information' in Mr Campbell's diaries. And if there was any doubt about the extent to which Mr Blair's and Mr Campbell's views could be treated interchangeably, in 2004 Mr Campbell explicitly said: 'I'm just an extension of Tony [Blair]. That's what I am. And I did a job for him and I think while I was there I did a good job.' [7]

There is an absolutely crucial socio-political context here. Britain's traditional press is famously dominated by right-wing proprietors and viewpoints. A certain distrust of 'Tory rags' is in the figurative lifeblood of members of the Labour Party, which by and large maintained an uneasy truce with the press for most of the decade after Mr Blair's 1997 election.

However, even once admitted, this context does not alter the fact that Mr Blair's perception of FOI as a tool wielded by a hostile press is at odds with reality. A survey conducted in 2010 indicated that non-journalists accounted for the majority of all requests submitted to government at both local and national level.[8] Journalists account for 33 per cent of FOI requests submitted to councils, which could indicate that local journalism is as robust as ever. However, journalistic activity accounts for a mere 8 per cent of FOI requests to central government as opposed to the 39 per cent submitted by 'the public'.

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[6] Marie Woolf, Marie, 'Labour uses Information Act to target Michael Howard', *The Independent*, 5 February 2005. See <http://tinyurl.com/ybwwfa6l> or <http://www.independent.co.uk/news/labour-uses-information-act-to-target-michael-howard-5385504.html>.

[7] Ian Katz, 'I'm tribal, I'm Labour, I'm Burnley, I'm Campbell. I feel it all very deeply', *The Guardian*, 8 March 2004. See <http://tinyurl.com/y939frgg> or <https://www.theguardian.com/media/2004/mar/08/bbc.huttoninquiry>

[8] Ben Worthy, *The Politics of Freedom of Information* (Manchester University Press, 2017)

This is worth restating in stronger terms. Mr Blair's time in office appears to have led him to become detached from reality and adopt a 'siege mentality' about journalists on national publications, who were in fact failing to make significant use of their legislated access to some of Whitehall's filing cabinets.

We may never get the chance to learn what Mr Blair might offer by way of explanation for his remarkable beliefs, because he refused to appear before the Justice Select Committee of the House of Commons in 2012 when the Committee was re-examining the FOI Act. Chairman Sir Alan Beith MP was sufficiently annoyed to set down the following decidedly undiplomatic statement:

> 'Former Prime Minister Tony Blair described himself as a "nincompoop" for his role in [creating] the legislation, saying that it was "antithetical to sensible government". Yet when we sought to question Mr Blair on his change of opinion he refused to defend his views before us and submitted answers to our written questions only after our Report was agreed, and after a press report had appeared, suggesting we might criticise his failure to give evidence. We deplore Mr Blair's failure to co-operate with a Committee of the House, despite being given every opportunity to attend at a time convenient to him.' [9]

Mr Blair's Home Secretary at the time the FOI Act was passed was Jack Straw, and – rather like his patron – the Right Honourable Mr Straw underwent something of a 'reverse Damascus' conversion in his subsequent views on the matter. He stated several times that the FOI Act was being 'misused' and proposed the introduction of a fees regime to curb the amount of FOI requests.[10] When Mr Straw and Lord Howard were both appointed to the Burns Commission, the omens seemed clear.

Maurice Frankel is chairman of the Campaign for Freedom of Information, which championed the cause of open access legislation for years prior to the 2000 Act and since then has acted as an unofficial 'watchdog'. He found Mr Straw's appointment to the Burns Commission 'unsurprising'.

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[9] Sir Alan Beith, introductory remarks to *Report of the Justice Select Committee on Post legislative scrutiny of the Freedom of Information Act* (2012). See <http://tinyurl.com/yb655ltz> or <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/foi-report/>

[10] Ben Riley-Smith, 'Charges for Freedom of Information requests are being considered by commission reviewing laws', *The Daily Telegraph* 9 October 2015. See <http://tinyurl.com/y9yk9x5j> or <http://www.telegraph.co.uk/news/politics/11922053/Charges-for-Freedom-of-Information-requests-are-being-considered-by-commission-reviewing-laws.html>.

> 'It was clear how the Commission was being set up. We all thought "Here it comes..." My belief is that Jack Straw was the cornerstone and everyone else was an afterthought. I certainly don't believe that Michael Howard was the first name on anyone's mind when the Commission was being created. But once they had dragged in a former Home Secretary from the Labour Party they tried to provide balance, or what looked like it, by getting Michael Howard on board too. But of course both men were known for their hostility to FOI.'[11]

The mystery, then, is why a 'hanging jury' delivered an acquittal. A straightforward reading would be that the pair of Home Office heavyweights simply failed to swing the opinions of other commissioners, and ultimately the opinion of the chairman himself. Mr Straw did not respond to inquiries undertaken during the present research and Lord Howard did reply but declined to say anything.[12]

Lord Bridges of Headley, who drew up the Commission, also declined to comment. It has therefore not been possible to question him about the extent to which his position at the time might have influenced his appointments. This is particularly regrettable since one of the circumstances that appears to have renewed Government efforts to rein in the FOI Act was the release in May 2015 of letters sent by the Prince of Wales to Government departments. Fought tooth and nail by the Government at every inch of the way, the Supreme Court eventually decided in favour of requesters, *The Guardian.*[13] When he appointed the Burns commissioners, Lord Bridges was Parliamentary Secretary to the Chancellor of the Duchy of Lancaster, a governmental post which is in the direct gift of the Duke of Lancaster, better known as Her Majesty Queen Elizabeth II.

The Burns Commission's historical analogue appears to be the efforts to rein in the then eight year-old US FOI Act by the Gerald Ford administration in 1974. President Ford, somewhat in keeping with his bungling image, proposed to restrict the US FOI Act as part of an attempt to restore faith in the workings of the federal government. This motivation is essentially the same concern that drove Tony Blair to disavow his own FOI Act some 35 years later. Ford did

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[11] Telephone interview, 24 April 2017.

[12] Lord Howard demonstrated his commitment to transparency by stating: 'I do not think it would be appropriate for me to share with you the internal deliberations of the Commission.' Letter to author, 27 April 2017.

[13] Rob Evans, 'Release of Prince Charles's letters shows the point of freedom of information', *The Guardian*, 13 May 2015 See <http://tinyurl.com/ya6977ae> or <https://www.theguardian.com/uk-news/2015/may/13/release-of-prince-charles-letters-point-of-freedom-of-information-black-spider-memos>.

not appear to notice the towering irony of setting out to restrict the public's 'right to know' in the aftermath of the Watergate scandal that had propelled him into the Oval Office in the first place (another instance of a government trying to defend itself against a supposedly 'hostile press'). It is worth noting that the *Washington Post's* investigation of the Watergate scandal, culminating in the downfall of President Nixon, did not involve any use of the US FOI Act anyway.

Ford's attempt to use Watergate as an excuse to 'smother' FOI managed to achieve the opposite, with Congress passing a series of enhancements strengthening the FOI Act rather than weakening it. Nate Jones is director of the FOI project run by George Washington University's National Security Archive (ironically abbreviated to NSA), a cross-disciplinary effort between academics and journalists which (to cite the project's own *raison d'etre*)

> '….combines a unique range of functions: investigative journalism center, research institute on international affairs, library and archive of declassified U.S. documents ("the world's largest nongovernmental collection" according to the *Los Angeles Times*), leading non-profit user of the U.S. Freedom of Information Act, public interest law firm defending and expanding public access to government information, global advocate of open government, and indexer and publisher of former secrets.' (National Security Archive, 2017)

Mr Jones identifies the Ford administration's misjudged attempt to weaken the US FOI Act as the point at which the fight for access really took off.

> 'Most commentators agree that the biggest step forward for FOIA was the 1974 Amendments, [passed] in the wake of Watergate. The 1974 Amendments enacted provisions so that public interest requesters paid fewer fees, established [the principle of] segregability review so that agencies now have to go line by line of each document and must release all information that is not specifically exempt, [and] gave more teeth to requesters suing in court, and other improvements.
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> The bottom line is that the US law has generally grown stronger over time – though with steps backwards as well. The 2016 FOIA Improvement Act, for example further strengthened the law by weakening the B5 exemption, eliminating most FOIA fees if an agency misses its statutory deadline, strengthening the Ombudsman's Office, and other improvements.'[14]

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[14] Nate Jones, FOI project director at the National Security Archive, email discussion 22-24 April 2017.

The ‘B5’ exemption referred to by Mr Jones (sometimes given as ‘B(5)’) is the bit of the US FOI Act that is hated and derided by himself and his fellow FOI aficionados as the ‘Withhold It Because I Feel Like It’ clause. This is because the clause is so loosely-worded that it can be used to justify the withholding of just about any document that might conceivably prejudice a future legal action against the body holding the information. Some measure of exactly how subjectively B(5) can be interpreted can be gained by simply observing the fact that the Department of Justice has found it necessary to publish an 8,590 word explanation (not including footnotes) setting out how and why the 25-word exemption is applied.[15]

The UK’s FOI Act does not contain such a catch-all exemption.

Nor is exemption B(5) the only obstacle raised in dealing with officialdom via the US FOI Act. The legislation contains just nine specific exemptions, but as Mr Jones is keen to observe:

> ‘Exemption three allows Congress to pass a new exemption at any time -– this is how the CIA Operational Files exemption was created. To date there are over 300 of these on the books... including information about watermelon growing techniques! That these statutory exemptions are snuck in so easily is another problem with US FOIA.’[16]

The CIA Operational Files exemption to which Mr Jones is referring was created in 1984 (appropriately, some might think) and allows the Central Intelligence Agency to withhold anything it claims is ‘operational’ without even requiring the material in question to be reviewed.

> ‘[Since passage of the exemption] the CIA has stretched the definition of “operational” to include all manners of files, including histories [which are] by definition not operational! Essentially the CIA can now deny many requests without even reviewing the documents to see if their withholding is truly justified. Other agencies are jealous of the CIA’s ability to deny documents without reviewing them and have strived to get their own statutory non-review denial authority, but largely have not been as successful.’[17]

Perhaps, then, the UK has learned a lesson from the US Act by not allowing a hydra-headed proliferation of arbitrary FOI exemptions. But there is a sting in

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[15] US Department of Justice, (webpage accessed 2017), ‘A Guide to FOI Exemption 5’. See <http://tinyurl.com/ydgytvzj> or <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-5>

[16] See note 13.

[17] See note 13.

this hydra's tail. Unlike the CIA, the security and intelligence agencies of the UK (better known as MI5 and MI6 respectively) are protected by Britain's FOI Act with an all-encompassing clause 23(1) concerning 'Information supplied by, *or relating to,* bodies dealing with security matters', which is an absolute exemption and therefore not amenable to public interest considerations (emphasis added).[18] The words 'relating to' are interpreted so broadly by the Information Commissioner's Office that it has led to their rejection of an attempt by this author to learn even the total number of documents held in a certain MI6-related category by the Foreign and Commonwealth Office.

Here, the US FOI has an interesting kink. It is known as the Motion for Vaughn Index, and appears to have no parallel in its British counterpart – or outside it. The Vaughn Index is named after an FOI applicant who in 1973 sued the US federal government, which put the court in the position of having to decide whether the government had applied its own exemptions properly. To this end, the court required a sort of pre-digital set of metadata, just enough to reach a conclusion without actually disclosing the contested information itself.[19]

Consequently, the Vaughn precedent has been used to pry from withholding agencies a detailed summary of the requested material, including the number of pages, who created the record, when they created it, a synopsis of what the record is, and so on. This is a glaring example of how the UK's FOI Act might be augmented, and it could considerably ease the burden on the FOI tribunal system (a process outside the scope of this essay). The National Security Archive's Nate Jones calls the Vaughn Index 'an important tool, but [one that] came about because court precedent mandated it […] Alas far fewer than one per cent of FOI requests go to court, and thus have Vaughn indexes [created].' [20]Perhaps the concomitant lack of public awareness is the sole reason that there has been no impetus for a British 'Vaughn'.

All this, however, is for the future. In its 2016 report, the Burns Commission concluded:

> '…the Act is generally working well, and that it has been one of a number of measures that have helped to change the culture of the public sector.

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[18] Frequently misunderstood, and sometimes deliberately misrepresented, the term 'public interest' relates to whether or not the public's best interests would be served by releasing material responsive to an FOI request. It has no bearing on the question of whether or not the general public would find the material interesting.

[19] Article 19, (webpage accessed April 2017), *United States: Vaughn v Rosen (1973).* See <http://tinyurl.com/yadly954> or <https://www.article19.org/resources.php/resource/2358/en/united-states:-vaughn-v.-rosen>.

[20] See note 14.

> It has enhanced openness and transparency. The Commission considers that there is no evidence that the Act needs to be radically altered, or that the right of access to information needs to be restricted. In some areas, the Commission is persuaded that the right of access should be increased.' [21]

The Commission might have been persuaded that access should be enhanced, but it did not actually recommend doing so. However the 'Straw objection' was explicitly addressed, in terms that made it clear that a decision was anticipated in Whitehall.

> 'We have not been persuaded that there are any convincing arguments in favour of charging fees for requests and therefore we make no proposals for change.' [22]

There is a distinct sense of entrenchment and stalemate here. The state's 'big guns', in the form of two formidable Home Secretaries, were wheeled out and deployed against FOI in its current form, and their ammunition proved to be dud. But on the other hand, the 'front line' of FOI reform has not advanced one figurative inch. The end result is a typically British compromise that satisfies everyone precisely because it satisfies no-one. Maurice Frankel calls this outcome 'benign neglect'.

> 'There is a sense in which the failure to enhance the Act is benign neglect, a common tactic with Governments throughout history. The press was full of anxiety about the Act being curtailed and tightened and I think that in their relief they were willing to overlook the fact that things hadn't improved either. The press are fond of sticking up for the freedom of the press, but when it comes to actually advancing and widening freedoms they are very conservative.' [23]

As for Tony Blair's shuddering confession of the 'stupidity' of introducing FOI in the first place, one can look back at the shadow cast by the USA's 1966 FOI Act. Despite solid progress on domestic issues, President Lyndon Johnson is now remembered chiefly for his effective resignation in 1968 due to the disaster unfolding in Vietnam. Mr Frankel's succinct observation is apt:

> 'I'm sure most people can think of at least one decision that Tony Blair made while he was Prime Minister that was a far bigger mistake than the

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[21] Lord Burns, *Report of the Independent Commission on Freedom of Information* (2016). See <http://tinyurl.com/y8u68vln> or < https://www.gov.uk/government/publications/independent-commission-on-freedom-of-information-report>.

[22] See note 18.

[23] See note 11.

Freedom of Information Act.’[24]

[24] See note 11.