SCANDALS AND FREEDOM OF INFORMATION

David Cuillier

Sunlight, the best disinfectant

Problems exposed are problems solved. Freedom of information laws throughout the world serve a critical role in helping journalists, nongovernmental organizations, and citizens expose government corruption and hold powerful institutions accountable. Every day, official records bring to light through sunshine laws scandals of significant importance for society:

- Documents obtained through the U.S. Freedom of Information Act showed that the United States government deliberately skewed information to suggest falsely that North Vietnamese ships had attacked U.S. ships in the Gulf of Tonkin in 1964, justifying escalation of the Vietnam War (Shane 2005).
- ProPublica used public record laws to reveal that at least 165 nursing home residents from 2011 to 2014 were hospitalized or died in the United States because of the improper use of a popular blood thinner (Ornstein 2015).
- Journalists wielded public record laws in 2014 to unravel the details of Hillary Clinton’s use of a private email and home server to conduct public business as secretary of state, which later became a campaign albatross in her presidential election bid against Donald Trump, perhaps even costing her the presidency (Gillum and Bridis 2015; Leopold 2015).

Regardless of the implications, scandals exposed through freedom of information laws number in the thousands and serve as a critical tool for investigative journalism in open democracies (News Media for Open Government 2018; National Security Archive 2018). Nations continue to adopt freedom of information laws in the name of good governance, and journalism schools routinely instruct their students on the law and practice of acquiring public records. Government officials extol the virtues of transparency. U.S. Supreme Court Justice Louis D. Brandeis probably expressed it best: “Publicity is justly commended as a remedy for social and
industrial diseases. Sunlight is said to be the best disinfectants; electric light the most efficient policeman” (Brandeis 1914, 92).

For the purposes of this chapter, freedom of information laws are defined broadly as any type of law that guarantees citizens the right to find out about their government. Transparency laws share much in common across levels of government and internationally, including the presumption that all recorded materials held or created by government agencies are open for anyone to look at unless a specific law would enable an agency to keep it secret. Public record and open meeting laws provide for exemptions—justifications that agencies can use to deny requesters, such as for national security or personal privacy. And transparency laws typically spell out the process for acquiring information, such as how fast an agency must respond, how much it can charge for copies, and penalties, if any, for noncompliance. These laws empower everyone to get a glimpse at how government is operating, sometimes leading to the exposure of scandals and corruption, or better, providing an incentive for government officials to conduct themselves appropriately to avoid scandals. After all, what child is going to sneak a cookie from the jar while a parent is watching?

The following pages will examine the benefits and limitations of public record laws on exposing scandals. The chapter also lays out the growing body of research exploring whether sunshine laws actually improve institutional accountability and society, or merely give people the false appearance of citizen oversight. The role of journalists in using freedom of information laws to expose scandals is discussed, as well as current threats to transparency. Finally, the chapter offers new opportunities for bolstering the public’s right to know in the twenty-first century.

Dawn of sunshine

Freedom of information laws are relatively new in human history, emerging from the Enlightenment era as common folk throughout the Western world began questioning the absolute power of kings. Sweden and Finland, in the distant past combined as one country, adopted the world’s first national right-to-know law in 1766 (Ortenhed and Wennberg 2017). Since then more than 120 nations have followed suit, most of those in just the past 20 years (Global Right to Information Rating 2018).

North American colonialists, upon a successful revolt, valued the need for citizens to maintain control over the governments they created; yet nowhere did they include in the U.S. Constitution an explicit “right to know.” They even met in secret to draft their documents. The closest inkling to a public records law from the Founding Fathers came in the form of a brief phrase in Article I, Section 5, of the U.S. Constitution that required that “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.” A start, but hardly a strong tool for citizens to expose corruption and scandals.

Just because the Founding Fathers did not enact a freedom of information law, however, did not mean they eschewed transparency. After all, they expressed in the Declaration of Independence their concerns with the king of England’s excessive secrecy and bureaucratic bullying: “[The king] has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measure.” From the beginning of the young nation, disagreement would emerge between those advocating secrecy and those espousing the right to know, particularly between the president and Congress (Halstuk 2002).

Over time, freedom of information in the United States evolved through common law, court cases, and statutes, based on the general premise that if people are to govern themselves, then they ought to know what is going on (Martin and Lanosga 2010). Democratic theory
suggests that First Amendment protections of speech, press, petition, and assembly serve as a check on the abuse of power by public officials, and that citizens should be informed so as to govern adequately (Blasi 1977). As a result, Congress enacted various laws through the centuries to require the printing and dissemination of government information for citizens, including the formation of federal depository libraries in 1895 (Quinn 2003).

One of the first known references to “the right to know” came from Kent Cooper, executive director of The Associated Press in a public speech in 1945: “The citizen is entitled to have access to news, fully and accurately presented,” he said. “There cannot be political freedom in one country, or in the world, without respect for ‘the right to know’” (New York Times January 23, 1945). Secrecy during World War II continued into the Cold War, and as a result journalists like Cooper pushed back, eventually convincing Congress in 1966 to pass the Freedom of Information Act, an amendment to the Administrative Procedure Act (Foerstel 1999; Martin 2008; Lemov 2011). Since then, public record laws proliferated through the United States. Amendments to the FOIA roughly every 10 years included mandates to post information online (Electronic Freedom of Information Act Amendments of 1996) and penalties for agencies that miss response deadlines (FOIA Improvement Act of 2016). Congress enacted the Clery Act (1990) to require universities to report crime on campus. Open meeting laws, or “sunshine laws,” were passed at the state and federal levels to ensure governing bodies conducted business in public and Congress passed regulations to require a variety of industries to report safety information for consumers (Lemov 2011).

The relationship between freedom of information laws and scandals have become symbiotic – the laws expose scandals and scandals lead to new or improved transparency laws (Worthy 2017). The 1970s Watergate scandal, for example, led to the broad passage of state public record and campaign finance disclosure laws. “Perhaps Nixon’s most significant legacy has been to provoke a national cynicism toward public officials that, until then, was unknown,” wrote long-time transparency advocate Mitchell Pearlman (2010, 47). He continues:

As a result of Watergate, landmark campaign financing and ethics laws were enacted to reduce the changes of similar abuses of power. And new, stronger Freedom of Information laws were passed by legislatures across the country to help guarantee that the people could learn what their government agencies were doing. Let’s hope we don’t forget the Nixon legacy.

These laws expanded beyond the United States as other countries began adopting their own freedom of information acts for a variety of reasons. India’s law emerged from the bottom up, as citizens demanded better government services, while other countries’ laws, such as China’s, were implemented top down (Florini 2007). Some laws were spawned from political party competition (Berliner and Erlich 2015), and others to make their countries appear more attractive to foreign investors (Relly and Sabharwal 2009; Darch and Underwood 2010). By 2019, more than 120 nations had adopted right to information laws (Global Right to Information Rating 2018). Further, dozens of nations have incorporated the right to know into their constitutions, and some governing bodies, such as the Inter-American Court of Human Rights, have ruled the right to information as a basic human right, similar to the right to clean water and to be free of torture (Reyes v. Chile 2006).

**Effects on society**

So, clearly, freedom of information is a lofty principle, tied to the ideals of democracy and the people’s “right to know.” But do these laws actually help mitigate corruption and expose
scandals, ultimately leading to better government and better societies? The short answer is “Yes. Mostly.”

At minimum, research indicates that transparency laws do little harm to society. One study found that about a third of registered sex offenders in a Florida county reported that their identities and addresses released through public records because of the disclosure-oriented Megan’s Law led to dire events, such as harassment, property damage, and loss of jobs (Levenson and Cotter 2005), but on the other hand the disclosure positively pressured them to avoid relapse. Some skeptics have claimed that freedom of information laws crush the government under expensive mountains of paperwork with little to show (Scalia 1982). Yet, the cost to administer the FOIA in the United States is just 0.011 percent of agency budgets (Wagner 2017).

Some research indicates that implementation of freedom of information laws leads to increased perceptions of corruption in government, most notably in nations with a free press (Costa 2013). In other words, once the laws go into effect journalists acquire records, expose scandals, and then the public perceives more corruption in their governments. However, over time this perception diminishes as citizens get accustomed to the scandals and as corruption is minimized by transparency (Vadlamannati and Cooray 2017).

Indeed, hundreds of studies suggest societal benefits directly linked to transparency laws, including reduction of drinking water health violations (Bennear and Olmstead 2008), decreased consumer complaints through disclosure of restaurant food safety inspections (Almanza, Ismail, and Mills 2002), greater confidence in the U.S. Social Security system through release of expected benefits statements (Cook, Jacobs, and Kim 2010), and increased general levels of transparency and accountability (Worthy 2010).

Cuciniello, Porumbescu and Grimmelikhuijsen (2017) reviewed 187 studies published between 1990 and 2015 in public administration journals regarding government transparency to find that freedom of information is effective at increasing public participation in government, improving financial management, and reducing corruption.

In addition to improved money management and reduced corruption (Lyrio, Lunkes, and Taliani 2018), other benefits of transparency include enhanced electoral accountability, according to a review of 38 studies published between 1991 and 2015 (de Renzio and Wehner 2017). A preponderance of research indicates that freedom of information laws result in better government and better societies, no doubt from the threat of scandal exposure, most often from journalists.

**Watchdogs with bite**

Journalists rely on freedom of information laws to expose government corruption on the public’s behalf. Momentum grew in the 1960s and 1970s through more aggressive reporting and increased skepticism (Schudson 2015). Investigative reporters are a relatively small lot and shrinking by the year in the United States (Houston 2010; Lanosga, Willnat, Weaver, and Houston 2015). Overall, journalists comprise just 2–14 percent of all U.S. FOIA requesters, depending on the agency and study (Frequent Filers 2006; Kwoka 2016; Silver 2016). Business interests typically comprise about two-thirds of requesters, with citizens and non-profits filing the rest.

But while journalists might not be the most common users of FOI laws, they pack a big punch. Gerry Lanosga and Jason Martin (2018) examined 757 award entry forms submitted to the Investigative Reporters and Editors contest from 1979 through 2007, noting how the stories were “triggered” from source tips, examining public records, editor assignment, or other methods. They also noted stories that used public records and made specific mention to public record laws, and whether the resulting scandal led to an official investigation, arrest, firing, resignation, new laws, or other action.
They found that government wrongdoing, or scandals, were the focus of half the stories, and problems with the private sector comprised 30 percent. About half the stories came from enterprise work, and tips accounted for 35 percent. Public records were used in 90.6 percent of the stories, 41.7 percent specifically mentioned using public record laws to obtain them, and a third mentioned use of government data. The use of records increased during the five decades, from 7.8 percent in the 1970s to 65.3 percent in the current decade. About 70 percent resulted in substantive change or action, such as new laws, official investigations, arrests, or resignations. Also, stories that mentioned use of public record laws were more likely to produce positive results.

Records-based investigative reporting has demonstrated definitive benefits on government efficiency, whether through exposing scandals and corruption, or simply pressuring officials to stay on their best behavior. When newspapers close, for example, local government pays more in borrowing costs because of increased inefficiencies (Gao, Lee, and Murphy 2018). The shuttering of The Cincinnati Post in 2007 resulted in fewer candidates running for municipal offices, incumbents more likely to win re-election, and lower voter turnout (Schulhofer-Wohl and Garrido 2009). Reporting of scandals that is dramatic, convincing, and with clear evidence, such as government documents, are more likely to affect public attitudes and effect positive change (Protess et al. 1987).

From a pure dollars and cents perspective, document-based investigative reporting pays significant dividends for society. James T. Hamilton, an economics and communication researcher at Stanford University, calculated that one investigative reporting series by the Raleigh News & Observer, which exposed a scandalous probation system and relied on dozens of different documents acquired through FOI laws, yielded $62.1 million in societal benefit from the $216,500 spent by the newspaper, or about $287 in benefits for every dollar spent (Hamilton 2016). Scandals exposed in the media through public record laws have a greater chance of effecting change when tied to external audits or when involving other government officials (Grimmelikhuijsen and Snijders 2016).

While investigative reporting struggles in the United States due to economic decay of the legacy media, it is growing in strength around the world (Chalaby 2004; Rasmussen 2014) and still has the opportunity for rebounding through innovation and philanthropy (Houston 2010). Ultimately, investigative journalism, which relies on freedom of information laws, exposes scandals in government, business, and other institutions, making for a better world.

**Threats to transparency**

While scandals exposed by journalists through freedom of information laws lead to better government, forces are pushing back.

Once sunshine laws are enacted they are prone to whittling and degradation over time, often by institutions wishing to avoid scandals and the limelight. For example, an examination of U.S. congressional testimony over the past 60 years indicates that business interests played a key role in shaping the law by decreasing public access to information (Relly and Schwalbe 2016).

The U.S. FOIA law, seen as a model for many nations, is rated just 69th in the world in its strength of provisions (Global Right to Information Rating 2019). That is worse than the FOIA laws in Rwanda (ranked 64th), Russia (43rd), the United Kingdom (42nd), Kyrgyzstan (39th), and Mexico (2nd). The country with the strongest FOIA law in the world? Afghanistan. The United States’ law has not kept pace with the rest of the world. It resembles a 1966 Ford Mustang—a classic and laudable vehicle for its time—but a 2019 Hyundai Sonata has better mileage, safety features, sound system, reliability, and performance.
The written words of a law, however, do not necessarily translate directly into performance. Despite its textual strength, for example, Mexico’s freedom of information act implementation has had significant problems, according to an analysis by Bookman and Guerrero Amparan (2009). “A transparency law, however well-conceived, is not a panacea,” they wrote. “It rises and falls with the general health of the state. Freedom of information reaches no further than the political will that imbues it.”

Penalties are weak in most freedom of information laws, and rarely enforced (Stewart 2010). Arbitrary fees, sometimes in the thousands or millions of dollars, might be charged for copies, search time, or even for attorneys to black out passages (Lee 2016). While strong laws are important, they mean little without buy-in from those administering them. Transparency works best when the principals outline the benefits, respond meaningfully, support the concept, and have the ability to incentivize openness (Williamson and Eisen 2016).

Transparency implementation can even vary by community and culture (Grimmelikhuijsen et al. 2013). For example, one study in Florida indicated that the more gender and ethnic diversity in a community the more transparent its government and easier it is to access information (Armstrong 2008).

Some research indicates that existence of freedom of information laws might actually harm the public’s ability to acquire government information. That’s what Lindita Camaj (2015) found when she interviewed journalists in Kosovo, Albania, and Montenegro. After the countries adopted freedom of information laws, journalists reported access to more information but complained of run-arounds, delays, and excuses for secrecy. Before the law, officials had to make a reasonable argument to withhold a document. After the law, officials had a legal peg to hang their secrecy on.

Transparency laws can unintentionally result in “perverse effects,” such as civil servants engaging in strategic behavior to appear open but not actually improve services (Williamson and Eisen 2016). The adversarial process can amplify suspicion, antagonism, and resentment between officials and journalists (Worthy 2010). As a result, governments faced with legislated openness often hunker down and defend themselves. Informal methods of resistance include changes in record keeping, decline in candor, manipulation of records, failure to create records, centralizing information control, under-resourcing FOI offices, and restructuring government services through privatization (Roberts 2006). What emerges is a doctrine of resistance. In the end, effectiveness of freedom of information laws often rests with the people administering, enforcing, and using them (Fung, Graham and Weil 2007).

Opportunities for openness

Despite the increasing challenges in building better governments and societies through greater transparency, the future for sunshine laws is bright.

Nations throughout the world are adopting freedom of information laws at a quick pace, and old laws are continuously reinvigorated. But we need to think beyond the U.S. FOIA model statute, perhaps scrapping it altogether and starting over (Stewart and Davis 2016; Pozen 2017). Current statutes, with their beg–deny–sue structure, might not be the best avenue for improving government openness. Long-term, radical transformation is needed. Many countries—not including the United States or the United Kingdom—have enshrined the right to know in their constitutions, and it is time for all nations to declare it a fundamental human right.

Political divisiveness and growth of authoritarianism in the United States and elsewhere are likely to actually help transparency legislation. Information is power, and those in power want to keep it and those without power want it. Pushback against President Donald Trump’s
anti-media rhetoric has bolstered journalism and open-government advocacy groups in the United States through increased fundraising and membership. Pearlman (2010) reminds us to remember Nixon and the positive outcomes of scandal. National scandals under any presidential administration are likely to lead to calls for more openness, transparency, and accountability.

Increased crackdowns on information by government also result in documents emerging through other venues (Hobbs and Roberts 2018). Leakers and whistle-blowers get busy. Records find themselves posted on Wikileaks. People find other ways to get information out through social media. Try to squeeze a balloon and the air pops out another place. Any attempt by anti-democratic regimes to inhibit freedom of information will backfire in the long run.

Journalism organizations will continue to use freedom of information laws, even with fewer staff and resources. The decline of investigative reporters has been supplanted by others who acquire public records through freedom of information laws to expose scandals and hold government accountable. Special-interest nonprofit organizations are picking up the slack, submitting FOIA requests, litigating, and then providing the documents to journalists (Powers 2018). Even average citizens are doing their part. An analysis of more than one million public records requests in Mexico from 2003 to 2015 indicated that about two-thirds of the records requested had a public accountability purpose (Berliner, Bagozzi, and Palmer-Rubin 2018). Citizens care about their communities and are using freedom of information laws not just for their own personal gain but for holding government accountable.

More academic research in transparency will identify better practices for administering freedom of information laws for maximum public benefit. Additional empirical studies are needed, particularly experimental, to identify what laws are most effective and the repercussions for society. Standardized record-keeping and valid measures of transparency performance will help compare transparency across communities and nations.

And, of course, enhanced technology is empowering proactive disclosure of information by governments, saving time for requesters and agency personnel. Information systems one day will allow data to be posted immediately to electronic public sites, automatically redacting information that should remain private. Eventually it will be deemed a failure if someone needs to submit a freedom of information request for government documents because it should be available proactively for free and easily searchable and retrieved.

Ultimately, we will likely always need freedom of information laws in some form for the citizenry to hold government accountable. The natural tendency of bureaucracy is secrecy, and only laws supported by the public and those who administer them will fend off darkness and ignorance. Freedom of information mechanisms will remain critical tools for journalists and citizens to expose corruption and scandals, therefore improving governance and making society better.

References


David Cuillier


Brandes, I.D. (1914). Other people’s money and how the bankers use it. New York: Frederick A. Stokes.


