Freedom of information – a literature review

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Despite a global movement for open government, FOI scholarship reflects a return to secrecy

Abstract

When Mexican president Enrique Peña Nieto launched the third summit of the Open Government Partnership (OGP) in October, 2015, outside the event protesters disputed the highly scripted account of his government's transparency. Worldwide, the membership of the OGP may be growing but increasingly scholars and journalists are reporting a degradation of freedom of information (FOI), even in so-called liberal societies like Aotearoa-New Zealand. Stemming from a doctoral review of FOI scholarship, this paper traces the literature from early scholarship on FOI's role in democratic governance to a contemporary focus on emergent 'push' systems advocated for by the OGP. Scholars increasingly situate access to state-held information as a fundamental human right but also describe scepticism among journalism practitioners and researchers alike about the realpolitik success of FOI regimes. Among other things, including a growing structural pluralism that has cast information shadows over state expenditure, scholars have recorded governmental tendencies to return to state secrecy since the declaration by the West of the so-called war on terror. This paper also considers literature on Aotearoa-New Zealand's FOI regime and argues that the scholarship has largely been produced by legal-studies and policy-studies scholars, to the detriment of a complete picture of FOI. It outlines what research does exist within journalism studies but contends that a lack of more significant contributions has restricted our understanding of the regime. It outlines a need for further scholarship on FOI on Aotearoa-New Zealand in light of both global and local trends.

Introduction

> *'Secrecy, being an instrument of conspiracy, ought never to be the system of regular government.'*
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> *Jeremy Bentham 1748-1832*

When Mexican president Enrique Peña Nieto launched the third summit of the Open Government Partnership (OGP) in October 2015, protesters outside the event disputed the scripted account of his government's transparency. Mexico is considered one of the most dangerous countries to be a journalist and state officials are regularly accused of the repression and even murder of reporters (Reporters Without Borders, n.d.). The president's stated commitment to openness seemed, at best, hypocritical. 'México está lejos de cumplir con un gobierno abierto,' countered the human rights and transparency advocate CENCOS (Centro Nacional de Comunicación Social-Cencos, n.d.). *Mexico is far from reaching open government.* This paper will argue it was a contradiction indicative of an emerging situation in the world of freedom of information (FOI), in which governments are encouraged by digital communication technologies to commit to increased publication of state-held information but on a day-to-day basis are in fact increasingly secretive on sensitive matters. Worldwide, the membership of the OGP, an 'international effort to strengthen democracies around the world by cultivating transparency, participation, and accountability in governance' (Harrison & Sayogo, 2014, p. 513), may be growing but increasingly scholars and journalists are reporting a degradation of FOI, even in comparatively open societies like Aotearoa-New Zealand, through heightened state powers prompted by the so-called war on terror, privatisation and a weakened media locally. This paper first traces the evolution of freedom of information (FOI), including its function in Aotearoa-New Zealand society, and its apparent decline in the early 21st century, through a review of the literature. It attempts to identify some global trends against which it then considers FOI in the context of press freedom in Aotearoa-New Zealand.

Scholarship on both the theory and practice of FOI exists within legal studies, policy

studies, rights-based approaches to sociology and political science, and, to a lesser extent, in journalism studies. This paper reviews literature on the origins of FOI, the sudden and widespread development of FOI laws globally and the increasing challenges FOI faces today. It also reviews literature that has Aotearoa-New Zealand as a key focus and notes new directions researchers are taking. These parameters are established by the context of the doctoral research from which this literature review is drawn. In that research, New Zealand's FOI regime is viewed as a legislative cornerstone of open government and a mechanism of emancipation for Aotearoa-New Zealand journalists.

This review first considers the somewhat contested origins of FOI (e.g., Lidberg, 2006, pp. 25-26) and then its rapid spread (Banisar, 2006; Ackerman & Sandoval-Ballesteros, 2006; Roberts, 2006) across the world. It then considers FOI's role in democratic governance (e.g., Dunn, 1999; Birkinshaw, 2006; Lidberg, 2006; Lamble, 2002). It considers scholarship that increasingly situates access to state-held information among fundamental human rights (eg, Hazell & Worthy, 2010, p. 352) but also describes scepticism among journalism practitioners and scholars alike (eg, Nader, 1970; Hager, 2001; Roberts, 2006) about the realpolitik success of freedom-of-information (FOI) regimes. Scholars (eg, Giddens, 2000; Roberts, 2006) have recorded tendencies on the part of Western governments to retreat to operating in more secrecy after the declaration of the so-called war on terror by the United States and its allies after the 2001 attacks on New York's World Trade Center. Added to this increasingly complex puzzle is the effect of structural pluralism, under which services paid for by the public are delivered by both public and private providers (Roberts, 2001). Scholars are increasingly asking to what extent has the wide-scale privatisation of public services in Western society over the past three decades had an effect on journalists' access to information deemed to be of public interest. This literature review explores this idea and defines in more detail the notion of structural pluralism. Finally, researchers in other countries have now begun to compare developing systems of proactive 'push' publishing of information held as digital data with the older 'pull' systems of request and release. There is arguably a need for such research in Aotearoa-New Zealand.

What is FOI and why do we need it?

Freedom-of-information regimes are legislative mechanisms for ensuring a society's citizens have unfettered access, as a 'presumptive right' (Birkinshaw, 2006, p. 188), to information held by their government. It is widely accepted that the principle of government by the people is dependent on the people's freedom in accessing information. Researchers agree (eg., Lidberg, 2006; Birkinshaw, 2006; Danks, 1980) the world's 100-plus FOI regimes have three widely established purposes in common:

- Firstly, they are to provide access for all citizens to information the state holds on them, a check on the power of the state and an affirmation of individuality and a citizen's autonomy.
- Secondly, FOI is to improve accountability of government through transparency. Both citizens and the media can only take effective part in the accountability process if they can access all the information they need and in a timely manner.
- Thirdly, FOI legislation is intended to improve and increase citizen participation in government, a political ideal in monitory and participative democracies.

Summing up these core principles of FOI regimes, the Committee on Official Information told New Zealand Prime Minister Robert Muldoon that the case for more openness rested on 'the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals' (Danks, 1980, p. 13). In more than 100 nations across the world now, these ideas are the drivers of right-to-access (RTI) laws. 'In democracies where citizens delegate authority for decision making, transparency and accountability function together to produce the information that citizens need to assess and validate the actions of their governments, thus providing an ongoing basis for consent of the governed' (Harrison & Sayogo, 2014, p. 513).

A human right

FOI was enshrined in the UN Declaration of Human Rights in 1948 and is often considered a prerequisite for and enabler of many, if not all, human rights (Birkinshaw, 2006) today. According to UNESCO assistant director-general for communication and information Abdul Waheel Kahn, the free flow of information and ideas lies 'at the heart of the very notion of democracy and is crucial to effective respect for human rights' (Mendel, 2008, p. 1).

> In the absence of respect for the right to freedom of expression, which includes the right to seek, receive and impart information and ideas, it is not possible to exercise the right to vote, human rights abuses take place in secret, and there is no way to expose corrupt, inefficient government. Central to the guarantee in practice of a free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public. These bodies hold vast wealth of information and, if this is held in secret, the right to freedom of expression, guaranteed under international law as well as most constitutions, is seriously undermined (Mendel, 2008, p. 1).

Once the preserve of liberal Western societies, there are now (December, 2015) 104 FOI regimes around the world (Freedomofinfo.org, 2015) and enacting disclosure laws is seen increasingly as a rite of passage for emerging democracies (Lidberg, 2006, p. 11). Scholars rarely play down the importance of FOI. Since Socrates demanded the 'liberty to know, to utter, and to argue freely according to conscience, above all liberties' (as cited in Pearson, 2014), such liberty has been linked to a meaningful participation in society. The prescient statement that 'information is the currency of democracy' has been perhaps unreliably attributed to the architect of the American Declaration of Independence, Thomas K Jefferson (Carnaby & Rao, 2003). But whoever said it began a train of thought that has endured through the peripatetic journeys that liberal democracies have taken since. In 1970, almost 200 years later, citizen and consumer advocate Ralph Nader called a well-informed public the 'lifeblood' of democracy' (p. 1). Birkinshaw (eg, 2006) and other legal scholars provide a more notional take on the value

of FOI, arguing that like freedom of speech, FOI is 'both intrinsically and instrumentally good' (pp. 203-204), encouraging government, as it does, to have a necessary trust in its people.

But FOI did not grow as a co-requisite of representative democracy, in fact. According to the literature, the first legislation that enshrined the right of ordinary people to access government-held information was passed in Sweden as long ago as 1766. Radical opposition politicians, led by Anders Chydenius (1729-1803), 'cunningly' (Lidberg, 2006, p. 44) took advantage of a lethargic Parliament and pressed the Freedom of Press and the Right of Access to Public Records Act through in 1766. But the idea itself goes back further still. Chydenius was inspired not just by contemporary political and philosophical thinkers from the Age of Enlightenment such as John Locke (1632-1704) but also by the thinking of the Tang Dynasty, which ruled China from the 7th to the 10th century. During that time China established an 'Imperial Censorate', a body comprised of officials close to the Emperor whose job it was to 'tell the leader when things were right or wrong, when he was being led astray, and when plans or actions were likely to have deleterious effects or be contrary to moral or established principles' (Steinberg, 1997, p. 2). This idea of transparent and more accountable imperial leadership has been cited as the distant progenitor of today's FOI regimes (Lidberg, 2006, pp 25-26; Lamble, 2002, p. 3; Steinberg, 1997, pp. 1-2). Lidberg finds it 'interesting to note that Chydenius translated the more than 1000-year-old Chinese experiences into his contemporary political climate by choosing the Press as the key "accountability agency"' (2006, p. 26).

Democracy's need for FOI

But of course, even if ideas of transparency through the disclosure of information pre-date modern government, the theory of FOI is inseparable now from today's theories of representative and monitory democracy (Keane, 2011, p. 212), premised are they are 'on a right to discourse on public affairs which is dependent for its quality on access to government information' (Paterson, 2008, p. 3). While FOI may have not been seeded in

the blueprint for democracy, and Schudson makes a case for much of the pressure for openness in the United States was actually from cultural shifts in the 20th century (Treadwell, 2015), representative and participatory democracy, as it is variously constituted, relies heavily on FOI for authenticity.

As Held notes, 'from ancient Greece to the contemporary world, there have . . . been fundamentally different opinions expressed about the general conditions or prerequisites of *successful* "rule by the people"' (2006, p. 2). Held does, however, manage a convincing taxonomy of democratic modelling, and is arguably typical of the scholarship. He includes (2006) both classic models and more contemporary ones. He groups four classic models: ancient Athenian democracy, the republican self-governing model, liberal democracy, and a Marxist direct democracy. He also groups five more recent models: competitive elitist democracy, pluralism, legal democracy, participatory democracy and deliberative democracy (p. 3). FOI is required for each of these modern models of democracy, though some might survive better with lower levels of transparency than others. Among those mostly clearly in need of strong state transparency would be pluralism of a post-Schumpeter kind that relied on the accountability effect of social organisations, including unions and other organised interest groups. Also requiring FOI is legal democracy with its idea that majority rule must always circumscribed by the rule of law. Participatory democracy is a model that 'fosters a sense of political efficacy, nurtures a concern for collective problems and contributes to the formation of a knowledgeable citizenry capable of taking a sustained interest in the governing process' (Held, 2006, p. 215). Participatory democracy is uniquely identified as having citizens directly participating in shaping key social institutions and so would be reliant on FOI. Finally, Held includes deliberative democracy, a radical model of direct decision-making by a reflective, participating citizenry. Deliberation is seen as spreading knowledge, revealing hidden interests, and testing reasoned, impartial arguments. FOI is obviously critical.

As Lidberg (2006) sees it, FOI relies on three 'pillars' of democracy theory – political representation, political accountability and the role of the media as a 'fourth estate' (p. 15). For Lidberg, political representation has four 'strands' (2006, p. 17) – a 'trustee' model, under which political representatives act entirely on their own judgement; a 'delegate' model, a more dialogic situation under which the elitist political class the trustee model had created was constrained; a 'mandate' model, under which an elected representative carried out the will of electors; and a fourth model, under which representatives are a mixed cross-section of voters, a 'microcosm' (p. 17) of the community.

Lidberg's second democratic 'pillar' for FOI is political accountability, a 'retrospective mechanism' that requires a clear line of connection between the political principal and their agent or representative (Lidberg 2006 p. 18). What's more, it needs to be ongoing and the principal needs some way of making the representative listen – even by force, if necessary. Other than elections, John Dunn (1999, p. 24) lists criminal law proceedings (relatively rare) and freedom-of-information regimes as key mechanisms for ensuring the accountability of political representatives. Mulgan (2003) describes as political mechanisms for government accountability: elections, legislative scrutiny (accounts and reports, ministerial responsibility, committee investigation and constituency representation), policy dialogue and the media.

Third in Lidberg's (2006) trio of theoretical pillars is the media's role as the 'fourth estate' of a society. This so-called 'watchdog' role on behalf of the citizen body is dependent, as he notes, on 'the media delivering on its side of the bargain' (p. 34). To what degree, if any, the news media does deliver on its side of the bargain depends on the framework through which press freedom is being viewed. Celebrated cases of FOI empowering a journalist's work are numerous. Indeed, FOI requests are commonly involved when journalists bring the light of publicity on malpractice and malfeasance. With a broader framework, however, there is increasing clarity in arguments that the inherent interests of the media itself have distorted the function of that watchdog role

and as a result the theory of press freedom is open to charges from critical theorists (eg, Chomsky, 1988; Habermas, 1992) of fallacious accountability. Dawes finds the origins of the decline of real press freedom as far back as the end of the 19th century when the rise of the press barons cast doubt on the 'democratic potential of the press and its legitimacy as a form of public opinion' (2014, p. 21). Dawes notes theorists who include John Keane and Jürgen Habermas have pointed out the theory of press freedom, at the heart of which we find the media's relation to FOI, makes 'a series of unconvincing assumptions' (p. 21).

Today's architecture of self-government

Of interest here in more normative terms is John Keane's thesis (2011) that, from roughly the middle of the 20th century, there was a sea change in liberal democracy. Pluralist in approach, this new form has been characterised by the growth of numerable accountability agencies, both national and supranational in nature, including a more critical press and numerable governmental and non-governmental watchdogs.

> The strange-sounding term monitory democracy is the most exact for describing the big transformation that is taking hold in regions like Europe and South Asia and in countries otherwise as different as the United States, Japan, Argentina and New Zealand. Monitory democracy is a new historical form of democracy, a variety of 'post-parliamentary' politics defined by the rapid growth of many different kinds of extra-parliamentary, power-scrutinising mechanisms. These monitory bodies take root within the domestic fields of government and civil society, as well as in cross-border settings once controlled by empires, states and business organisations. In consequence, the whole architecture of self-government is changing. The central grip of elections, political parties and parliaments on citizens' lives is weakening. Democracy is coming to mean much more than free and fair elections, although nothing less. Within and outside states, independent monitors of power begin to have tangible effects. By putting

> politicians, parties and elected governments permanently on their toes, these monitors complicate their lives, question their authority and force them to change their agendas – and sometimes smother them in disgrace. (Keane, 2011, pp. 212-213).

In this view of society, information *must* be the very lifeblood of the democracy. If the monitoring of power during terms of government and not even primarily at election time, is key to the new architecture of democracy, as Keane claims, then FOI is imperative to its success.

The global explosion in FOI

Researchers (eg, Banisar, 2006; Roberts, 2006) have described a worldwide and exponential explosion of FOI regimes in recent decades. After Sweden in 1766 and, to some extent, Colombia in 1885, the next FOI legislation was not passed until the second half of the 20th century when the United States (1966) and then France (1978) enacted laws guaranteeing their citizens' right to access state-held information. Australia and New Zealand followed suit in 1982 and Canada in 1983 ("FOI Countries by Date", n.d.). 'These [early] efforts were mainly a result of extended campaigns led by the media with some government support and many took decades to succeed' (Banisar, 2006, p. 19). It was a wave of wealthy, stable democracies that had active medias and a growing 'skepticism about state authority' (Roberts, 2006, p. 107) that increasingly demanded transparency. They had both citizens and press calling for an end to secrecy being enshrined in law. Some thought these prevalent conditions, including authentic free speech, to be prerequisite to the passing of FOI laws. But then came something of a flood of FOI laws around the world, from countries as diverse as Belgium (1995) and Zimbabwe (2002). By 1990 there were 14 nations with FOI laws (Roberts, 2006, p. 107) and by 2006 there were 69 (Mendel, 2008, p. 22). In January 2015 there were 100 across the globe, with Paraguay having joined the ever-swelling ranks of the global movement for openness ("FOI Countries by Date", n.d.). Noam Chomsky's journalist

from Mars (2002) might assume there was a virulent spread of openness and disclosure underway on Earth. One does not need to dig far to find, of course, that the reality of even liberal Western democracies is some distance from the stated aims of lawmakers who created such regimes. In one of the great ironies that riddle democracy, FOI laws are dependent for their success on the very officials and politicians whose behaviour they are intended to control. Despite the legislation's aim to correct a power imbalance (the State has the information, the citizen does not and information is power), and despite disclosure laws, the mechanism of balance is characterised by an imbalance of power. In the United States, which enacted its Freedom of Information Act (FOIA) in 1966, nearly two decades before Aotearoa-New Zealand's Official Information Act 1982 (OIA), Ralph Nader (1970, p. 1) wrote that despite the introduction of the FOIA, government agencies were still 'baronies beyond the law'.

> It is important to remember that the FOIA is a unique statute, since its spirit encourages government officials to display an 'obedience to the unenforceable.' Insofar as the statute is enforceable, the duty devolves to the citizen; yet few citizens are able to engage an agency in court, the only recourse afforded by the Act. Those who can afford judicial recourse are special interest groups who need the protection of the FOIA least of all. Consequently, as a practical matter, the attitude of agency officials toward the rights of the citizenry overwhelmingly determines whether the FOIA is to be a pathway or a roadblock (Nader, 1970, p.2).

While the US did go on to strengthen its FOIA with significant amendments in following years, it is widely acknowledged FOI regimes create the potential for openness but the real level of public scrutiny of a government relies as much on the administration of the law as its creation.

> . . . there is much work to be done to reach truly transparent government. The culture of secrecy remains strong in many countries. Many of the laws are not adequate and promote access in name only. In some countries, the laws lie

> dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions and fees are abused by governments (Banisar, 2006, p. 6).

Banisar notes the passing of a right-to-information law (RTI) law is just the start.

> For it to be of any use, it must be implemented. Governments must change their internal cultures. Civil society must test it and demand information. Governments resist releasing information, causing long delays, courts undercut legal requirements and users give up hope and stop making requests (2006, p. 26).

The undermining of access

FOI can be undermined in any number of ways and because a country has legislated for openness does not necessarily make it open. A review of the literature highlights the areas of most concern.

Window dressing

Some FOI laws are inconvenient but effectively mandatory prerequisites to trade or international finance deals, with many intergovernmental organisations pressuring 'poorer and more fragile states' (Roberts, 2006, p. 109) into adopting disclosure laws. In the worst of these situations, little or no will to openness existed prior to the legislation being passed and not much changed afterwards.

> Despite FOI laws' virtues and the current zeal for transparency, various dilemmas are threatening to consign these laws to the irrelevant status of window dressing – good-looking from a distance, perhaps, but ill-suited to any useful end and even dysfunctional in practice. Some of these window-dressing dilemmas have to do with the technical and legal characteristics of FOI laws. Others have to do with the bureaucratic capacity of governments to implement good laws, much

> less enforce them. Still others can be traced to the origin of so many open-government statutes, which often begin as items pushed onto the policy agendas of developing countries by international or regional organizations without much if any prior grassroots demand (Michener, 2011, pp. 146).

Other flawed FOI regimes have democratic-sounding names but are in fact legislative tools of oppression. Banisar, known widely for his global FOI audits, says the most egregious in this category is the 'baldly misnamed' (2006, p. 27) Zimbabwean Access to Information and Protection of Privacy Act.

> It sets strict regulations on journalists and has been used to shut down nearly all newspapers that do not unconditionally support the government and imprison or expel all non-cooperative journalists. Its access provisions are all but unused probably for fear of any person brave enough to ask for information will be beaten by government supporters. "Freedom of information" Acts have also been adopted in Uzbekistan and Tajikistan with predictable difficulties of having freedom of information in countries that have serious problems with human rights and freedom of expression (Banisar, 2006, p. 27).

Elsewhere, the legislation itself may appear sound in terms of the legislative principles of FOI, but governments simply ignore it. In the Cook Islands, for example, where the nation's Official Information Act, passed in 2009, was based closely on New Zealand's celebrated OIA 1982, there is little sign of transparent governance as a result. Newspaper editor John Woods wrote:

> Despite our Official Information Act, the Cook Islands is being denied its right to know at the highest level. The most powerful entity of government, Cabinet, is still a stronghold of secrecy and non-disclosure. We believe, and argue, that the public has every right to know what Cabinet decides, what deals it does and what funds it spends. For the past five years we have pleaded for weekly cabinet media briefings, and for release of cabinet minutes and documents, but we are

> continually denied information. Nowadays we rely on leaks (when it suits an individual) and on papers falling off the back of a truck. (2010, p. 18)

Other failures of, and threats to, FOI are being increasingly recorded by researchers. In a five-country comparison of the promise and the practice of FOI, Lidberg (2006, p. 10) stated that while FOI laws were potentially one of the most potent accountability tools going, his doctoral research showed that in some cases they were 'little more than a toothless paper construct and democratic "showcase" rather than the effective scrutinising tool they were intended to be".

The war on openness

Roberts (2006) and others have studied 21st-century influences on FOI that frustrate its success, including a reduction in openness since the New York attacks on September 11, 2001, increased secrecy around security services, powerful networks that are 'opaque' and operate at levels removed from public access, and the secrecy of corporations whose operations are arguably in the public interest but who have few or no disclosure obligations. Within weeks of the 9/11 attacks, large amounts of government information, previously open to all, were withdrawn from public scrutiny, despite the US FOIA.

> In the three years following the September 11th attacks, complaints about the erosion of these [access] rights were common, although the evidence was still inchoate. In one prominent case, a Utah-based environmental group, Living Rivers, challenged the Interior Department's refusal to provide maps that showed the likely impact of a failure of the Glen Canyon Dam on the Colorado River, the second highest concrete-arch dam in the United States (Roberts, 2006, p. 39).

Critics of President Barack Obama have been quick to point out that despite the president campaigning on openness, his administration has, in fact, a higher rate of FOIA refusals than his predecessor's (eg, Moos, 2012).

But it was not just the United States that began to recoil at the effects of an open government. British prime minister Tony Blair took power in 1997 on the back of a promise to sweep aside Britain's culture of governmental secrecy only to bemoan his stupidity in his memoirs years later (Blair, 2010). He told the Associated Press: 'What happens in the end is that you make politicians very nervous of actually debating things honestly, because they're worried about what's going to happen when there's a FOI request' (Stringer, 2011). In Aotearoa-New Zealand, Prime Minister John Key admitted his government sometimes delayed the release of information if that was politically helpful, despite the OIA requiring the release is done as soon as reasonably practicable (McCulloch, 2014).

Structural pluralism and FOI – the 'privatised sector'

Core to the aims of this research is the idea of structural pluralism, a term used by Giddens (2000) to define a economic environment in which services to the public that are deemed essential are provided by both the state (eg, most education) and the private sector (eg, telephone services). The multiple forms of privatisation – from entire divestment of a state service to any one of a variety of types of state-owned or controlled enterprise – have created a group in the economy that might be thought of as the "privatised sector". This sector has characteristics of both state service and private enterprise but is neither, oriented as it is operationally to the private sector while being fundamentally connected to the public purse. The public interest in the provision of the service – be it roading or television news – is clear but so too is the requirement that the quasi-private organisation providing the service subjects itself to market forces and conditions, and, of particular interest here, demands varying levels of secrecy in which to do it. Not yet clear but increasingly demanding attention is a corresponding increase in its perceived confidentiality requirements.

Roberts argues that ongoing privatisation and the state's withdrawal from the provision of services to the public is having a deleterious effect on FOI. Contractors engaged in this new world of outsourced and market-driven services have pressured governments

to exclude them from the public scrutiny formerly applied to the provision of the same services (2006, p. 151).

> . . . the effectiveness of many FOI laws has been undermined as a consequence of restructuring. These laws have traditionally applied to government departments or other agencies that are tightly linked to these departments. As authority has shifted to quasi-governmental or private organizations, the ambit of the law has shrunk. Many public functions now are undertaken by entities that do not conform to standards of transparency imposed on core government ministries. There is little consensus on how to address this problem. Existing laws vary widely in their treatment of the various components of a fragmented public sector. This variation in responses may be evidence of a deeper confusion about how best to think about the proper scope of FOI requirements (Roberts, 2001, pp. 2-3).

New Zealand's ongoing privatisation of once-public services and organisations is a key part of the country's brand of economic liberalism, unleashed with dramatic effect in the mid-1980s. From state-owned coal companies to passport photos, successive governments have sought, to varying degrees and for various reasons, to privatise many of the enterprises under its control. Despite a growing recognition of the issue among scholars internationally, the effects of such privatisation on FOI have never been seriously studied in Aotearoa-New Zealand. More recent introductions to the privatised sector include private prisons, charter schools and council-controlled organisations. The research project from which this literature review was developed includes in its aims an exploration of such societal changes and their influence on the levels of press freedom experienced by journalists. Among its research questions, it asks, to what extent, if any, do Aotearoa-New Zealand journalists say they face opaqueness when dealing with private or quasi-private organisations that provide important public services?

Roberts (2011) argues that rights to access state-held information are based on "physical and economic security, privacy, and political enfranchisement" and that these

are the reasons for a free flow of information from any organisation that holds information the public needs. This approach "rejects the classical liberal insistence on differential treatment of the public and private spheres, recognizes that harm to fundamental interests could as easily arise from either sector, and establishes information rights where these seem likely to avert such harm" (p. 3). The right to secrecy of private or quasi-private organisations is considerably weakened when information they hold is in the public interest. It is the argument of an FOI theorist and pulls in entirely the opposite direction to the increasing reluctance of governments and corporations to operate transparently in the interests of an open society.

Administrative discretion

Another challenge facing FOI and its advocates is what Roberts calls 'administrative discretion' (2002) – that is, the willingness of officials to discharge their duties under an FOI regime. Echoing Nader (1972), he wrote:

> Whether a freedom of information law succeeds in securing the right to information depends heavily on the predispositions of the political executives and officials who are required to administer it. Statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation. In fact, critics in many jurisdictions argue that FOI laws have been weakened by the emergence of internal practices designed to ensure that governments are not embarrassed or surprised by the release of certain kinds of politically sensitive information (p. 176).

Similarly, in Aotearoa-New Zealand, where such a 'no-surprises policy' exists in government, Price (n.d.) found it

> disturbing to see how often officials and ministers withheld information in apparent contravention of the OIA. Examining about 1000 OIA requests . . .

> revealed that when information was withheld, it was usually unclear whether the law was being applied correctly. Not infrequently, responses included references to wrong sections. Officials often made simple assertions that information was 'confidential' or 'commercially sensitive' without appearing to understand that these are not, in themselves, reasons for withholding information. Although officials are not required to refer to the public interest in their responses, they are required to consider it and there was usually no evidence that they had done so. Alarmingly often they issued refusals that appeared unlawful. One agency developed its own standard rule about the release of information, attempting to justify it on six different grounds (including the 'principles of the Privacy Act') in different cases. It admitted in a covering letter that its 'approach to answering OIA requests is in need of a thorough review.'

When seen from the perspective of hopeful information requesters, the FOI regime in Aotearoa-New Zealand is more complex than the one that somewhat heroic narratives accompanied onto the world stage (eg, Aitken, 1998; Elwood, 1999; Shroff, 2005, Hazel & Worthy, 2010) and then viewed as a global paragon of access laws. When journalism studies adds its thread to the FOI narrative, it adds both a strong understanding of the practical need for such a legislative guarantee of access (eg, Nader, 1972; du Fresne, 2005; Price, n.d.) and a strong understanding of the gap between the promise and the practice of FOI (eg, Lidberg, 2006; Price, n.d.). Hazell and Worthy (2010) note that

> FOI laws can be launched with initial enthusiasm, but then undergo revisions to restrict the operation of the Act when politicians start to feel the pain, or simply suffer from bureaucratic neglect when starved of resources. After observing the development of FOI in the Australian states, Zifcak and Snell developed a four-stage typology characterizing the life of an FOI regime: initial "optimism," increasing "pessimism," giving way to "revisionism" designed to alter the FOI law, normally to limit its scope or performance, and then later a return to the

> "fundamentals" of FOI. In each case, in line with the literature outlined above, the performance of FOI has been influenced by external events in the political environment, in particular the government's attitude towards the costs and benefits of FOI (p. 353).

FOI and Aotearoa-New Zealand

Studies exist into the many aspects of freedom-of information (FOI) regimes around the world (Nader, 1970; Banisar, 2006; Martin, c2008; Nam, 2012), but there is little academic work that has New Zealand's FOI laws as its centre of interest and, in particular, the media's success or failure in making a meaningful success of the OIA, intended as the architecture of open government in New Zealand and now more than 30 years old. Much of the literature on New Zealand's FOI regime is comparative in nature (eg, Hazel & Worthy, 2010) and not focused on unravelling local and specific complexities. New Zealand is considered a benchmark in a number of overseas studies (Hazell, 1991; Hazell & Worthy, 2010; Nam, 2012) but direct, local research is relatively thin. Among it are policy research projects that seek to understand how potential scrutiny of official information affects the workings of the state bureaucracy (e.g. Poot, 1997).

Also among it is White's argument (2007) that New Zealand's official information system is resulting in less trust in the state sector, rather the increased levels of trust that are meant to result. In an important study, from which emerged her book *Free and frank: Making the Official Information Act 1982 Work Better,* White, like most researchers, acknowledges the fundamental openness that was embedded in New Zealand society by the OIA. However, her research highlights significant issues with both the principles and the operation of the act. She lists (2007, pp. 90-92) 10 'themes' that emerged from her study of the OIA:

- New Zealand government is much more open because of the act

- many requests for information are unproblematic
- real uncertainty exists about the public's right to information
- the ombudsman's role has been a success
- processing delays have long been a problem and have not improved
- large requests are problematic
- officials need more training
- the protection of officials' advice from disclosure is still contentious
- the digital age brings its challenges
- it may be time (2007) to introduce a pre-emptive, push-model of information release.

Price (2006) interrogated the Official Information Act 1982 (OIA) to see how it was working in practice and concluded that while there was much to be pleased about, there were significant problems as well, with state officials frequently flouting the act's guidelines on the release of government-held information (Price, 2006, p. 50). Working journalists, including investigative journalist Nicky Hager (2002), have lamented what they see as a deterioration of the system since its inception with the passing of the OIA in 1982. Hager, a persistent requester for state-held information, has praised the readiness of officials to release information in the early days but says it was significantly different under the Labour Government in the late 1980s and 1990s. 'Ministers and officials developed ways of routinely subverting the provisions of the Official Information Act, including delaying information releases and misusing exclusion clauses" (Hager, 2002). The New Zealand Law Commission, charged with two reviews of New Zealand's FOI regime since it was introduced, declared in 2012 that the "basic pillars of the legislation remain fundamentally sound" (New Zealand Law Commission, 2012) but also recommended more than 100 changes to the legislation, including some fundamental ones that included extending the reach of the act to parts of the Government's parliamentary services. The commission argued because of the significance of the changes and the importance of the legislation, it should be redrafted from afresh. The Government disagreed, however, declining both the suggestions that

OIA needed a fresh start and that it should be extended to cover the business of Parliament (Davison, 2013).

Geoffrey Palmer (2007) attempts a plurality of perspectives by reviewing key work of four researchers. Firstly he discusses the 1997 New Zealand Law Commission's review of the OIA, in which it concluded that because of its open-textured nature, the act had weathered societal changes well and was still achieving its purposes.

> However, the Commission also identified a number of problems with the Act and its operation. The major problems identified were:
>
> - the burden caused by large and broadly defined requests
> - tardiness in responding to requests
> - resistance by agencies outside the core state sector
> - the absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues (Palmer, 2007, p. 11)

Next Palmer examines Price's 2006 study *The Official Information Act 1982: A window on government or curtains drawn?,* discussed above. Palmer notes (2007, p. 14) Price's conclusion that New Zealand effectively has two FOI systems – one for requesters wanting non-sensitive information who have their requests processed efficiently and without fuss and another for requesters of sensitive material, which is characterised by a disregard for the spirit of the law.

> They are more likely to be transferred to the minister's office, often with questionable or no justification. Many are refused outright. Information is withheld, either wholesale, or in larger than necessary chunks. Price noted, with more than a little sense of irony, that his own OIA requests for the purpose of this research apparently fell under this second, much less user-friendly OIA. It is

> this second class of requests about which Price considers there is cause for real concern (Palmer, 2007, p. 14).

Palmer includes White's 2007 research in his round-up of perspectives on the OIA. She found 'the overall information context in New Zealand today is that the Executive is, on the whole, more constrained, accountable, open and participatory than before. There is greater dissemination of government information to citizens, and consultation with citizens by government' (p. 14). However, she also found the 'political-administrative interface' was problematic, large requests face administrative issues which can breed distrust, officials often granted themselves time extensions when dealing with requests, government systms were at times at odds with electronic data, officials are reluctant to commit their advice to documents, administration of the act is a burden and a balance of respect from both sides is missing.

> The system as it works now is eroding trust in the state sector rather than building it... [I]n essence, the ambiguity of the rules leaves people free to judge behaviour against different standards, or to infer motives and conduct from their own perspective. Often that means that people see political manipulation and game-playing where in reality there may be careful administrative process and ordinary interplay with the political level of government. But because the rules are unclear, suspicion breeds. As suspicion and distrust grow, people engage in ever more behaviour based on low trust,like specifying OIA request in moreand more detail. That in turn creates "black letter responses" that may miss the point or appear overly formalistic and/or obstructive, which then fuels more distrust. And so the spiral goes. Overall, behaviour moves further away from the ideal of reasonable and balanced discussion and cooperation that the DanksCommittee hoped for, and that the ombudsmen exhort people to adopt (White, 2007, pp. 22-23).

A journalism-studies perspective

While Price (2006) included journalists in a section on the views of information "requesters", there is no singular study that assesses in any way the media's success in utilising the legislation to build a more open society in New Zealand. Even elsewhere in the world the focus of researchers tends to be on whether the passing of legislation to protect freedom of information has achieved its goals of, for example, access, transparency and openness. The media, despite being a key user of FOI legislation and an acknowledged mechanism in the accountability of officials and politicians, is often excluded.

Indeed, FOI in Aotearoa/New Zealand was for many years considered within a conventional discourse that emerged through, principally, legal studies (eg, Banisar, 2006; Elwood, 1999; Hazell, 1989; New Zealand Law Commission, 1998 & 2012; Price, n.d.a) and policy studies (eg, Poot, 1992; White, 2007), each of which has its distinct reasons for an interest in the legislation. Together they weaved a two-strand, dominant narrative that had Aotearoa/New Zealand as a world leader in FOI (Elwood, 1999; Hazell, 1991; Hazell & Worthy, 2010; Nam, 2012; Price, n.d.). The small nation was a relatively early exponent of FOI (more than 20 years ahead of the UK), along with like-minded Westminster-based democracies Australia and Canada, who were also poised to legislate for access to government information (Hazell, 1989) at the same time. Its tendencies were towards a strongly liberal regime, which made it a standout when the OIA was enacted in 1982 and became widely regarded as a 'model of how progressive access to an information regime should work' (Hazell & Worthy, 2010, p. 353). So far, the contributions of journalism studies to this discourse are relatively minor. Practitioners with special interest in the legislation have written about their experiences using the Official Information Act 1982 (eg, Hager, 2002) or published work intended to explain, and underscore the importance of, such freedoms (eg, du Fresne, 2005). But there is very little academic research with the lived experience of journalists attempting to perform their role of monitoring state transparency its centre, even in conventional-narrative terms. There is no singular study that researches the media's interface with legislation that was intended to build a more open society in New Zealand and that the

general public expect the media to use on its behalf in pursuit of that openness. Elsewhere in the world, the focus of researchers, even those formerly journalists, tends to be on whether legislation protecting freedom of information has achieved its goals of, for example, access, transparency and openness (eg, Lidberg, 2006). The object of much research is the political economy of information freedom: is one system fairer or more democratic than others? (eg, Snell, 2006). Who, in any given society, is more likely to benefit from the law? How long do officials take to respond (eg, Lidberg, 2006)? What proportion of information requests are rejected and why? How do we assess the success of an FOI regime (eg, Hazell & Worthy, 2010)? All valid and important questions, and there must be many more to be asked from a legal-studies or political-science perspective. The media, however, despite being a key user of FOI legislation and an acknowledged mechanism in the accountability of officials and politicians in liberal, monitory democracies, tend to be excluded from the horizons of such scholarship (Nam, 2012).

Despite there being very little, if any, extra allowance made for bona fide journalists under FOI regimes, they are arguably the key participants in the regulation. Their role in disseminating a wide variety of information to the citizen body and electorate means they can have far wider influence with the information they gather than any other requester. This alone is good argument for an increased focus from journalism researchers on FOI laws and their impact on journalistic practice.

Two reviews of the OIA have been carried out by the New Zealand Law Commission (NZLC), in 1998 and 2012. In the second the commission recommended that while it was still fundamentally sound, there should be some major changes – for example, expanding the reach of the OIA to the business of Parliament and many minor changes, and so it would be best rewritten from start (New Zealand Law Commission, 2012, June). The Government disagreed (Davison, 2013, February 26) and very little has changed about the Official Information Act since the 1980s. New Zealand society, however, has changed dramatically. Under the neo-liberal economic policies of

successive Aotearoa/New Zealand governments since the late 1980s, the state has withdrawn from the provision of services that it could encourage the private sector to take over (Kelsey, 1993). Now significant amounts of public money are being spent outside the watchful eyes of those who rely on FOI legislation to monitor state behaviour, arguably a damaging constraint on press freedom. Some of these services have high levels of public interest attached to them, private prisons and charter schools, for example. As these services shift to the private sector, the public loses sight of their operation to varying degrees, despite often being the major or sole funders of the service. The transparency created under FOI regimes starts to become murky as public money is spent by companies that presume a right to confidentiality around their commercial activities, even when they are contracted to the public purse. Researchers do not have to go far down that road, perhaps, to see that it needs to be asked if today's world simply isn't the governance structure for which the OIA was envisioned.

From pull to push

Let's return to our start at the summit of the Project for Open Government Partnership in Mexico, where outside protesters are disagreeing with the President. Launched in 2011, the OGP has grown to have 69 participating member countries in 2015 (Open Government Partnership, n.d.a). Digital publishing has enabled proactive publishing of information and in the interests of open government, states are joining. Government ministries across the world are starting to publish information without being asked for it, creating the beginnings of what must eventually become massive and accessible databases. So-called 'push models', according to Lidberg, are improving public access to information in Australia. As part of a series of articles on FOI, he compared (2015) traditional 'pull' systems, in which citizens request information, with emerging 'push' systems in which the state also proactively publishes data online. Able to make such a comparison in Australia, where across the state and federal situations there are both traditional and new systems, Lidberg found the new systems provide 'quicker and

easier' (p. 88) access to state-held information. When signing New Zealand up to the OGP, Prime Minister John Key (Open Government Partnership, n.d.b) said the OG's principles were in line with the New Zealand Government's commitment to transparency. Our journalist from Mars (Chomsky, 2002) might be forgiven for thinking the wave of openness sweeping Earth had just picked up pace and entered another realm of transparency altogether. But researchers around the world with a journalism-studies perspective will beg to differ (eg, Felle & Mair). At the level of realpolitik, sensitive material is as hard, if not harder, than ever to get from governments. In New Zealand, known as one of the most open societies on the planet, the Ombudsman is submerged with complaints (Treadwell & Hollings, 2015) about refusals to release information. Prime Minister John Key last year admitted his government was likely to withhold sensitive information as long as possible, instead of releasing it as soon as practicable, as the OIA requires. At the centre of the so-called 'dirty politics' scandal before and during the 2014 general election was evidence of abuse of the OIA, including preferential treatment of an attack blogger's information requests in order to embarrass an Opposition politician. In one case the blogger was said to receive his information in 37 minutes, a 'good time for a pizza delivery' as one MP noted (Treadwell & Hollings, 2015, p. 235). Such was the atmosphere of suspicion around the OIA, that the Chief Ombudsman initiated an inquiry into the way state agencies responded to their duties under it. Journalists continue to be stymied in their legitimate pursuit of information by the by the state, which undermines the constitutional and human-rights principles of FOI in ways described in this article. The contradiction with the OGP wave of FOI rhetoric is stark.

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