

EVOLUTION OF THE FREEDOM OF INFORMATION ACT IN THE UNITED STATES

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In the following paper, I would like to discuss the origin of the Freedom of Information Act (FOIA). The FOIA, is an amendment to the Administrative Procedure Act (APA). It governs the public's right to inspect government records, specifically records of the executive branch of government.

Thus the FOIA determines to a large extent the flow of information from the executive branch to the public.

According to the FOIA, all identifiable records are available to the public and it is possible to sue an agency which does not present the information sought. Starting from this assumption, nine exemptions were formulated. Information which falls within any of these nine categories can be excluded from general availability, this is explicitly an option and not a requirement .

In my dissertation, I examine those factors which led to the enactment of the FOIA and its three amendments, and how the FOIA influenced federal information policy in the United States. Today I will present to you, in a shortened version, the developments which led to the enactment of the FOIA in 1966 and its first amendment in 1974.

My principle thesis is that the restrictive news and information policies practiced toward Congress and the public by the administrations from Eisenhower to Nixon together with the constant pressure of press organizations to dismantle existing restrictions of the flow of information created a climate in Congress which made the passing of the FOIA possible.

It is interesting to examine the evolution of the FOIA within a project on problems of democracy.

Control of government information is an important power source in conflicts between the administration and the other two branches of Government as well as in conflicts between the administration and the general public. The administration can use its control over the dissemination of information in two ways. It can keep certain information secret or deliberately make information publicly available. This selective use of information is often called news management. For example, President Bush, on one hand, tried to release as little information as possible about his involvement in the Iran-Contra-Affair, while on the other

hand, he formally used a FOIA request to find out about the foreign travels of his rival Bill Clinton.

Two political arguments are paramount, when the right of inspection of public records, or, as it is often called in the political debate, the right to know is advocated:

First, the right to have access to government documents is an important precondition to create an informed electorate. From this perspective, the right to know is a civil right which is derived from the people's position as democratic sovereign.

The second important justification of the right to know is the argument that the scrutiny of the Government's activities by the public will further effective administration.

It is therefore not surprising that the regulation of the public's access to government information of all three branches was already discussed by the framers of the United States' Constitution. The right to know, however, is not explicitly mentioned in the Constitution, but from the point of view of the right to know advocates, the demand for access to public information can be based on the First Amendment.

It is necessary to know the aims which were to be reached by the creation of the APA to be able to understand fully the circumstances which led to its amendment by the FOIA in 1966. The legislators hoped that, by laying the basis for an organization of administrative procedures which would make the whole system more transparent, to enhance its effectiveness. Thus one of the aims of the APA was to ease the inspection of public records.

The APA was enacted in 1946. The phrasing of the right of inspection of public records in the APA left great flexibility to allow for secrecy. Records could be withheld "for good cause found" and a legal entitlement to the inspection of public records was limited to "persons properly and directly concerned". In practice, this meant that almost any information could be withheld.

The formulation "official records shall {...} be made available to, persons properly and directly concerned" established a need to know instead of a right to know. According to this regulation, information seekers had to have a separate legal entitlement, which they had to prove, to be able to enforce their claim. If a right to know had been in force, the administration would have had to legitimize individually all denials of access to information.

Legislation to amend the right of inspection of public records was introduced in every Congress between the enactment of the APA and its amendment by the FOIA. This happened because the 1946 version of the right of inspection of public records did not establish the envisioned comprehensive legal entitlement of the public to claim access to all the executive information.

This dissatisfaction with the information policy of the federal agencies which led among others to the enactment of the APA, increased after World War II, as the public's trust in the decision-making processes of their government eroded. Several factors enhanced this development:

1. In many cases official secrecy was obviously not justified. For example, access to research concerning the use of bow and arrow (1958), the pentagon weather report (1958), the results

of the examination of the bullets which killed Kennedy, and all documents concerning the My Lai massacre were denied.

This led to the conclusion that too much information was classified..Several reorganizations of the classifying procedures could not solve the problem.

2. Since the mid fifties, a growing number of Congressmen and journalists claimed that the administration abused secrecy invoked in the name of national security to cover up deficiencies in its own work.

Gradually the so called "Credibility Gap" developed.

Examples for events which destroyed the public trust in the sincerity of its government were the shooting down of an American U-2 spy plane over Soviet territory (1960 Eisenhower), the invasion of the Bay of Pigs (1961 Kennedy), circumstances of the passing of the Gulf of Tongkin Resolution (1964 Johnson), the publication of the Pentagon Papers (1971 Nixon), and the Watergate Scandal (1972-74 Nixon).

In response to this development and in the course of the activities of the civil rights movement and the peace movement against the American engagement in South East Asia, the number of politically active people rose considerably. Since these people were alienated from their government, their demand for direct political influence grew. Access to government information was an important tool for this.

3. The press opposed against the restrictive news policy of the federal government. Freedom of the press had been decreased and government secrecy had been increased during World War II. This had been accepted by the press as a necessary evil during the war. Restoration of the freedom of the press and a general relaxation of the information policy, however, had been expected for the post-war period. This hope was betrayed as the hot war developed into the Cold War. In addition, the rise of the bipolar power structure in the international relations resulted in a massive buildup of the (national) security system and the passing of number of laws which restricted the flow of information even further.

After World War II the press was no longer willing to accept this executive secrecy to the same extent as during the war. One example. Another example for the growing resistance the among the press against harassment of journalists is its opposition against a directive of the Veterans Administration.

In 1947 the Veterans Administration issued a directive which was supposed to classify as confidential "information the disclosure of which, although not endangering the national security, would be prejudicial to the interests or prestige of the Nation, any governmental activity, or individual, or would cause administrative embarrassment or difficulty". The ASNE successfully protested against this directive.

In 1948 the ASNE pushed through "pro Freedom of the press resolutions" at the national conventions of both major parties and in both chambers of Congress. of the change in the relationship between the press and government are the activities of the American Society of Newspaper Editors' Committee on World Freedom of Information.

For example:

In 1944 the American Society of Newspaper Editor's Committee on World FOI had asked media people and government officials worldwide to guarantee freedom of the press and restrain from censorship. This declaration had been primarily addressed to foreign countries. At this point in time, American press representatives looked at the United States as the shining example to be copied by all other nations. This positive view of the state of press freedom in the United States was still present one year later when the ASNE sent a delegation abroad to examine freedom of the press in various countries.

In 1950 the Committee on World FOI changed its view concerning the news and information policy of the United States Government. It crossed out "World" in its name, as the committee's attention now was focused on the restriction of the freedom of the press in the United States

4. Resistance against the restrictions of the flow of information was also forming in the scientific community:

The American Historical Association formed the Committee on the Historian and the Government in 1950. The aim of the committee was to make available to historians documents concerning World War II.

Scientists and technicians also opposed the restrictive federal information policy. After World War II, 40% of American scientists and technicians (twice the number of the pre-war period) were employed in programs financed by the government, and many programs at colleges and universities in these fields of research were financed by the government as well. Most of these programs were regarded as being important to the military security of the United States. Because of this, the scientists and technicians often were not allowed to publish their findings or to present them at conferences.

With the passing of the Atomic Energy Act, this information control was extended to all activities which seemed important for the military security of the USA, even when not funded by the government. It is necessary to mention, however, that the opposition of this group to the restrictive information policy rested not primarily on assumptions concerning civil rights, but rather was concerned with the negative repercussions this secrecy had on the quality of their research.

The necessity of dismantling the numerous restrictions on the flow of information in the United States was increasingly recognized. However, the actual number of people who fought for freedom of information was still relatively small in the late forties and early fifties.

Dissatisfaction with the government's information policy increased during the later half of the fifties and sixties. In principle, the growth of this opposition was linked to three lobbies. The arguments with which these groups supported their demand for greater access to public records were interrelated, but each group had characteristics which distinguished it from the other two:

- a) The first lobby group was composed of the so-called "good government people". From their point of view, it was not acceptable to have the right of inspection of public records regulated in a way which left ample space for the denial of information without the necessity of proper legitimization of these decisions. They believed that public scrutiny would lead to a more effective administration.

- b) The second lobby group was the American Bar Association.
As a professional organization, the ABA had the interests of its members in respect to their clients in mind. These lawyers wanted to broaden the right of inspection of public records to enhance their ability to defend the interests of their clients in lawsuits against the government.
- c) The most influential lobbies were the press and liberals.
These saw the demand for greater freedom of information in the tradition of the First Amendment. In their understanding the freedom of the press guaranteed by the First Amendment would be interpreted as the right of the people to secure the accountability of their government. The press is a tool for that task. Keeping government information secret would therefore violate the principle of democratic government and the Constitution. It could only be accepted in special circumstances when other values make a compromise necessary.

Legislative activity in Congress finally leading to the enactment of the FOIA began in 1955 with the forming of the Special Subcommittee on Government Information. of the House Committee on Government Operations. John E. Moss (D-Calif.) became the subcommittee's first chairman.

On the Senate side work on what was to become the FOIA started one year later. The issue was referred to the Subcommittee on Constitutional Rights, which was chaired by Thomas C. Hennings (D-Mo.)

Although legislative activities were stronger in the Senate, it was the Moss Committee that had the most expertise and led the concerted efforts of the two committees to push through a FOI bill.

Several factors led to the forming of the Moss Committee (MC):

- a) The Conflicts between Congress and Presidency
The struggle concerning the information policy of the White House and its use of the executive privilege intensified during Eisenhower's presidency. For example, Eisenhower prohibited the questioning of members of the Department of Defense by the Army-McCarthy-Committee in 1954, while on the other hand, McCarthy claimed to know that communists worked at the Department of State..Rourke (1961). Shils (1956). Ransom (1963).
- b) The power struggle between the Republican and the Democratic Party
The Democratic Party used the secrecy controversy as political ammunition against the Republican presidency (Eisenhower).
- c) The press relations of the Eisenhower administration
A real change in the executive's information policy could only be brought about by passing a general public records law, there was, however, no majority in Congress for this during the fifties and first half of the sixties.

Actually, Congress was interested in passing a public records law. Congress had criticized the executive's restrictive information policy and expected an enhancement of its influence on the president if a public records law would be enacted. But Congress' view of the matter was of contradictory nature.

For example:

- a) Many members of Congress vigorously supported executive secrecy in certain areas (for example national security). At the same time, they were willing to pass confidential information to journalists to secure a favorable relationship with the press.
- b) Demanding more information from the executive possibly involved the danger that Congress' secrecy itself would be criticized.
- c) The power of the leadership of both chambers in Congress is based substantially on its privileged access to information held by the executive. This privilege was endangered by an access law.

After Kennedy's victory in the 1960 presidential elections the Democratic Party controlled both Congress and the White House. This did not mean, however, that now the FOI bill could be passed easily. The FOI bill would only have a chance of becoming law, if a consent could be negotiated between the administration and the supporters of the bill in Congress, because it was unlikely that a Democratic majority in Congress would override a veto of a Democratic president. The central point of disagreement between the FOI bill supporters and the White House was the treatment of the executive privilege in the bill.

In 1966 consent had been reached between the supporters of the FOI bill and the administration, and majorities in Congress had shifted in favor of the FOI bill. President Johnson signed the bill into law, on the 4th of July.

The passing of the FOI bill became possible because the small group of ideological supporters of the bill was joined by:

- a) Republicans who wanted to attack the Democratic presidency,
- b) Democratic members of Congress who were alienated from their administration by the evolving "credibility gap", and
- c) members of Congress who viewed the debate of the FOIA as a general struggle between the executive and legislative branch of Government. From their point of view, the FOIA would strengthen the position of Congress against the President and end a state of legal uncertainty created by the wording of the right of inspection of government records in the APA.

The power of the Moss Committee was based on its rapport with the major press organizations which secured a wide coverage of its work in the papers.

Important lobby groups for the FOI bill besides press organizations were the ACLU, the ABA, and the Chamber of Commerce of the United States. Opposition to the bill came from all concerned agencies and some business groups opposed special sections which concerned their interests. President Johnson opposed the bill, but did not say so publicly. This is particularly important because it points to the fact that the assumptions on which the bill was based were so much in tune with the general understanding of democratic government that it was difficult to voice opposition to it.

"The task of the FOIA was to elevate the diminished trust and confidence of the American people in their government by requiring the executive to communicate directly (underlining added) with "any person" on any matter in which the government was

concerned." McWeeney (1982), p.4. McWeeney verifies his judgment with references to: Clark (1975). US Congress, House (1974). US Congress, Senate (1974).

The agencies did not adhere to the spirit of the new law. This disdain for the will of Congress was made easier because the FOI bill had been considerably watered down during the negotiations between Congress and the administration, and so its language left ample space for interpretation.

Parallel to this systematic evasion of the FOIA by the agencies, the Johnson and Nixon administrations also curbed the flow of information from their administration to Congress.

Congress was denied access to information concerning major foreign policy decisions. Examples are the cover up of the My Lai massacre, the unauthorized bombing of North Vietnam, and the publication of the Pentagon Papers.

In addition, Nixon and members of his administration expanded the use of the executive privilege considerably. The conflict between Congress and the Nixon administration culminated in the resignation of Nixon in the wake of the Watergate Scandal. The treatment of Congress by Nixon during the investigations into the scandal combined with the public criticism of the moral decline of the government convinced many members of Congress that a restriction of executive secrecy was imperative again.

Moorhead, who followed Moss as chairman in the Subcommittee on Government Information investigated the implementation of the FOIA in a set of hearings, which were held in 1972. The findings in these hearings created the basis for the drafting of the FOIA amendment of 1974. Examples for the shortcomings found are:

- excessive processing time
The important agencies on an average needed 33 days to answer a FOIA request. The answering of contradictions took another 50 days.
- excessive fees
This was one of the most effective ways to discourage applicants
- Difficulties of FOIA lawsuits
In most of the court cases the plaintiff prevailed over the denying agency but it was both time consuming and expensive to reach this goal.
- There were not enough public information officials to work on the requests, and in many agencies the chief executives had no interest in improving the processing of the requests.
- The long processing times kept the press from using the act.

Dissatisfaction with these shortcomings in connection with a deteriorating relationship between Congress and the presidency made it possible to amend the FOIA over President Ford's veto in 1974. By amending the FOIA, Congress not only tried to guarantee that the American public would get all the necessary information about their Government's activities, but also attempted to strengthen its own position in relation to the presidency.

The 1974 amendment restricted the evasion of the FOIA by the administration considerably. Most observers would agree that not until its amendment did the FOIA become of practical

use for the citizens. Nonetheless, even today users are confronted with the opposition of most agencies.

The enacting of the FOIA and its amendment was only possible under exceptional circumstances. In both cases, the executive had lost a substantial part of its credibility and provoked Congress and the public by restricting the flow of information excessively.

Considering all the compromises between the FOIA advocates and opponents which had to be made when negotiating the bill and later the amendment to the act one has to bear in mind that with the FOIA the right of inspection of public records is regulated by an international standard in a very progressive fashion. The United States government today is one of the most open governments in the world.