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Legislating Usability: Freedom of Information Laws That Help Users Identify What They Want

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Legislating Usability: Freedom of Information Laws That Help Users Identify What They Want

Mark Weiler*

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I. INTRODUCTION

With the rapid diffusion of freedom of information (FOI) legislation in recent decades,¹ questions about their usability take on global significance. These questions include: How to teach people to use their access rights? For whom are current FOI laws usable? How to make them easier to use? This article examines one important issue in usability: what are the statutory mechanisms within FOI laws that help users identify the information they want to access?

This examination is important and timely. As part of their legislative lifecycle, both established and more recently adopted FOI laws will become subject to public commentary, review, and revision.² Similar public discussions will also likely occur around the globe in years to come as policy makers formulate opinions about the efficacy of FOI laws and their implementation. Raising discussions about how to make these laws more usable, however, may encounter regressive pressures reacting against access rights.³ Three years after having left the Prime Minister's office, Tony Blair publically scolded himself for having led his government to pass the United Kingdom's first freedom of information act.⁴ Pushback of this sort may be because FOI legislation limits the power of the state to restrict freedom of expression.⁵ Without robust FOI laws, governments are free to censor the

1. See Greg Michener, *FOI Laws Around the World*, 22 J. DEMOCRACY 145, 145-46 (2011) (describing rapid diffusion of FOI laws since 1990); John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 85-86 (2006); Jeannie E. Rely, *Freedom of Information Law and Global Diffusion: Testing Roger's Model*, 89 JOURNALISM & MASS COMM. Q. 431, 447-448 (2012); see generally DAVID BANISAR, *FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT LAWS* (2006) (summarizing the FOI laws of approximately seventy countries).

2. E.g., Blaine Calkins, *Review of the Access to Information Act: Report of the Standing Committee on Access to Information, Privacy and Ethics*, H. C., i, at 1-4 (2016); Independent Commission on Freedom of Information Report (2016); FOIA Improvement Act of 2016, Pub. L. No. 114-185 (2016); ROBERT HAZELL, BEN WORTHY, & MARK GLOVER, *THE IMPACT OF THE FREEDOM OF INFORMATION ACT ON CENTRAL GOVERNMENT IN THE UK: DOES FOI WORK?* (2010). See also Jeremy Hayes, *FOI: Whitehall strikes back*, 20 British Journalism Rev. 57 (2009).

3. See Ackerman & Sandoval-Ballesteros, *supra* note 1, at 128 (describing the challenge of government backlash against FOI laws shortly after they are adopted).

4. E.g., TONY BLAIR, *A JOURNEY: MY POLITICAL LIFE* 511-12 (2010) (describing himself as "naive, foolish, irresponsible nincompoop" for supporting the passage of the U.K.'s first freedom of information law).

5. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (articulating a right to freedom of expression); Juha Manninen, *Anders Chydenius and the Origins of the World's First Freedom of Information Act*, in *THE WORLD'S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS' LEGACY TODAY* 18 (Juha Mustonen ed., 2006).

media and suppress public thought by withholding information from examination and commentary.⁶

While instruments designed to evaluate FOI laws may focus on the presence of specific clauses,⁷ the passage of a national access law, while certainly no minor accomplishment, is by no means a guarantee that they are actually implemented effectively. Other factors such as whether or not they achieve their desired outcome will also likely be considered.⁸ Since the defining characteristic of FOI laws is that they articulate a right for individuals to access unpublished information held by government authorities, a crucial factor in assessing their effectiveness is whether or not they are designed from the outset so they can be used effectively.⁹

To locate itself in the general topic of the usability of FOI laws, Part II of this article turns to the origins of FOI legislation. Situated historically, using FOI laws is viewed as an act that allows individuals to reduce the censorship capacity of governments. Part III examines a few issues that affect its usage and legislative mechanisms that aim to make FOI laws more useable. A core issue is for potential users to be able to identify the unpublished material they want to access. Within librarianship and information sciences the terms “description” and “metadata” refer to information that is about other information. An important function of description and metadata is to help users identify the items they want to retrieve from an information source. Many FOI laws require governments to publish description and metadata, which can help identify information they wanted to order. Part IV reports the results of a content analysis of legislated requirements placed on national governments to publish description or metadata that helps users identify the unpublished materials they want to access.

6. See EDWARD HERMANN & ROBERT MCCHESENEY, 4 GLOBAL MEDIA: THE NEW MISSIONARIES OF GLOBAL CAPITALISM (Continuum 2004) (describing how an instrument of censorship employed by Great Britain was withholding information under the Official Secrets Act); Christine Anthonissen *Censoring and Self-Censorship*, in HANDBOOK OF COMMUNICATION IN THE PUBLIC SPHERE 401 (Ruth Wodak & Veronika Koller eds., 2008) (explaining how an individual or group can self-censorship by withholding information); ENCYCLOPAEDIA OF UNITED STATES NATIONAL SECURITY 397 (Richard J. Samuels, ed.) (2006) (noting how the U.S. government can effectively censor journalists by withholding information).

7. See *Methodology*, GLOBAL RIGHT TO INFORMATION RATING, <http://www.rti-rating.org/methodology> (last visited Mar. 12, 2017).

8. Taewoo Nam, *Freedom of Information Legislation and Its Impact on Press Freedom: A Cross-National Study*, 29 GOV'T INFO. Q. 521, 527 (2012) (explaining that the passage of FOI laws is necessary but not sufficient in reaching its desired outcomes). See Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, PUB. ADMIN. REV. 925 (2010).

9. See STANLEY L. TROMP, *FALLEN BEHIND: CANADA'S ACCESS TO INFORMATION ACT IN THE WORLD CONTEXT* 42 (2008) (emphasizing the necessity of users to exercise their rights by ordering information through FOI laws).

II. FOI LEGISLATION: AN ENLIGHTENMENT MECHANISM FOR LIMITING GOVERNMENT CENSORSHIP

From a historical perspective, a source for addressing the general question about usability is the 18th century Kingdom of Sweden during which time the Riksdag passed the world's first FOI law.¹⁰ Until the United States passed its Freedom of Information Act in 1966, the question of usability of access legislation could only be a parochial concern limited to northern Europe.¹¹ But with the accelerated rate of diffusion of FOI laws globally, most countries of the world now face questions about usability. Examining the history of FOI legislation is important because the distance in time may offer the present moment a novel perspective. For example, in contemporary discussions, the purpose of freedom of information legislation is often framed as making governments transparent or more accountability to the public.¹² However, as will be explained in this section, the political debates giving rise to the world's first freedom of information law in eighteenth century Sweden were more clearly focused on the issue of the minimizing state censorship.¹³

In the English FOI scholarship that examines Sweden's history, attempts have been made to acknowledge a range of contributors to the idea of access to government information.¹⁴ The benefit of recognizing a widening range

10. See Manninen, *supra* note 5, at 18.

11. *Chronological and Alphabetical Lists of Countries with FOI Regimes*, FREEDOMINFO (Jun. 30, 2016), <http://www.freedominfo.org/?p=18223>. But see Banisar, *supra* note 1, at 58 (Colombia appears to have had a legal code for access to public documents in 1888. Information about it is difficult to find in available English literature).

12. E.g., Mark Boven, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317, 327 (2002); Seth F. Kreimer, *Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1012 (2008); Lindita Camaj, *Governments' Uses and Misuses of Freedom of Information Laws in Emerging European Democracies: FOI Laws' Impact on News Agenda-Building in Albania, Kosovo, and Montenegro*, JOURNALISM & MASS. COMM. Q. 1, 12 (2015).

13. See Christoffer von Kocken et al., *Additional Report on the Third Committee of the Grand Joint Committee of the Honourable Estates of the Realm on Freedom of Printing, submitted at the Diet in Stockholm on 21 April 1766*, in *ANTICIPATING THE WEALTH OF NATIONS: THE SELECTED WORKS OF ANDERS CHYDENIUS (1729-1803)*, at 237-248 (Maren Jonasson & Pertti Hyttinen ed., Peter C. Hogg, trans., 2011); Ackerman & Sandoval-Ballesteros, *supra* note 1, at 88 (referring to the intimate tie between access to government information and freedom of expression).

14. E.g., Manninen, *supra* note 5 (touching on the influence of people such as Anders Chydenius, Anders Schönberg, Gustaf Cederström, Peter Forsskal, Anders Nordencrantz, Johan Arckenholtz, and the Tang Dynasty); David Goldberg, *Peter Forsskal: Goettingen Prodigy and Author of One of the Least Known Jewels of Enlightenment Literature*, http://www.peterforsskal.com/pdf/Goettingen_paper4.pdf (last visited May 3, 2017) (describing the contribution of Peter Forsskal); Rolf Nygren, *The Citizen's Access to Official Records – A Significant Principle in Swedish Constitutional Life Since 1766*, in *DIE ZUNÄNGLICHKEIT VON PARLAMENTS AKTEN UND DIE AUDIOVISUELLEN MATERIALIEN IN PARLAMENTS-UND PARTEIARCHIVEN* 14, 20-21 (Günter Buchstab ed., 1999) (describing the contribution of Baron

of contributors and influences is that it helps broaden our understanding of what the world's first FOI law was addressing in its historical moment. This broader understanding makes it easier to frame answers to questions about using FOI laws in our contemporary moment.

In 18th century Sweden, books or pamphlets could only be printed if approved by a censoring body. Likewise, Sweden's Chancellery and Royal Court exercised absolute power to withhold documents held in state archives.¹⁵ Numerous individuals reacted against this control. In 1759, Swedish naturalist Peter Forsskål (1732-1763) wrote a pamphlet titled *Thoughts on Civil Liberty*. After parts were censored, five hundred copies were printed and distributed, although the state quickly tried to reclaim them.¹⁶ The pamphlet articulated a foundational idea of freedom of information: "it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, it must be possible for society's state of affairs to become known to everyone."¹⁷ Although several years before the principle of access to official records would be reflected in the law of 1766, this passage suggests that access legislation is needed so individuals can participate in the care of their society. This perspective, which places a responsibility for societal wellbeing on individuals, is quite different than contemporary discourses that emphasize knowledge of government activities is needed so individuals can hold government accountable for its responsibilities to act in the public interest.

Anders Nordencrantz (1697-1772), a member of the Riksdag's burgher estate, argued strongly that printers should be free to publish accounts of government activity and criticism of it.¹⁸ For Nordencrantz, the freedom from censorship would provide a means to discover truth through criticism, prevent despotism, and combat public ignorance.¹⁹ As an example of a free press, Nordencrantz described China's Peking Gazette, an official journal of the Imperial Grand secretariat, in which government edicts, appointments, and punishments of government bureaucrats, amongst other things, were announced on a regular basis.²⁰ His account of the gazette was heavily

Gustav Cederström); Lena Rydholm, *China and the World's First Freedom of Information Act: The Swedish Freedom of the Press Act of 1766*, 20 JAVNOST – THE PUBLIC 45, 60-61 (2013) (explaining how Anders Nordencrantz and Anders Chydenius drew on examples from China to support their proposals for freedom of the press).

15. Nygren, *supra* note 14, at 18-19 (explaining that access to state archives was strictly controlled, even by authors commissioned to write official histories or biographies).

16. Thomas von Vegesack, *Commentary on Thoughts on Civil Liberty*, Peter Forsskål, <http://www.peterforsskal.com/thetext.html> (last visited Mar. 12, 2107).

17. Peter Forsskål, *Thoughts on Civil Liberty* (trans. 2009), <http://www.peterforsskal.com/thetext.html> (last visited Mar. 12, 2107).

18. See Rydholm, *supra* note 14, at 48-52.

19. *Id.* at 49.

20. See *id.* at 50-51.

skewed, however as he did not describe how the publication was under absolute control by the Emperor and used to strengthen, not question, imperial power.²¹ Although a champion of a free press, Nordencrantz did not propose an outright ban on censorship. Instead, he wanted the censor's power transferred from the government to parliament.²²

Anders Chydenius (1729-1803) was influenced by Nordencrantz.²³ However, Chydenius did not think that the Riksdag should have absolute power as he thought the people should regulate it.²⁴ To ensure the best ideas for governing could be found, Chydenius argued that records of government activity and critical commentary should not be constrained by giving the king, government, or Riksdag the power to approve what could be printed.²⁵

Baron Gustaf Cederström also submitted a proposal to the 1765-66 session of the Riksdag on the question of censorship.²⁶ Although Cederström is given only passing reference in a popular account of the first FOI law,²⁷ his influence may be more significant. According to legal historian Rolf Nygren:

Cederström argued that the freedom of the press must necessarily be not only lawful but also legally protected. Technically, this meant that the law must define what kind of documents could *not* be published. This approach made the whole question turn one hundred and eighty degrees by making public access the chief rule and secrecy the exception.²⁸

The law that ultimately passed on December 2, 1766 had numerous provisions that protected printers to produce critical commentary on almost any topic without attaining government approval. The assumption that writers and the printers were free to publish records of government activity required an assurance of accessing documents held by the state, otherwise government officials could effectively censor authors or printing presses by simply withholding documents from them.²⁹ Article six of the act begins, "the freedom of the press will further include,"³⁰ and continues to state that

21. *Id.* at 51.

22. *See* Manninen, *supra* note 5, at 39 (Nordencrantz "would have moved political censorship from the Censor and Chancellery to the Estates.").

23. Rydholm, *supra* note 14, at 47.

24. *See* Manninen, *supra* note 5, at 49.

25. *Id.* at 46.

26. Nygren, *supra* note 14, at 20.

27. Manninen *supra* note 5, at 45.

28. Nygren, *supra* note 14, at 20.

29. *His Majesty's Gracious Ordinance Relating to Freedom of Writing and the Press (1766)*, in *The World's First Freedom of Information Act* 8, 13 (Gustav Björkstrand & Juha Mustonen, eds., trans. Peter Hogg, 2010) (section 6 explains that freedom of the press includes the requirement for the government to give documents immediately "to anyone who applies for them").

30. *Id.* at 13.

documents “shall immediately be issued to anyone who applies to them.”³¹ In 1766, the freedom of the press from state censorship and the ability to access documents held by the state were unified.

Drawing from this historical perspective, the functional similarity between freedom of the press and freedom of information is more obvious. Freedom of the press protects printing presses from censors who would otherwise restrain them from publishing materials, while freedom of information protects printing presses from censors who would inhibit publishing government information by simply withholding it. In both cases, the protections enable presses to publish material, whether critical commentary on government authority or records of that authority’s activity, without having to first attain state approval. FOI laws limits censorship by transferring the authority to make information available from government to individuals. As explained by the Information Commissioner of Canada, government officials can find it difficult to recognize this:

The clear lesson of my almost eight years of service as Canada’s Information Commissioner, is that—by-and-large—public officials just don’t get it! They don’t get the basic notion that, in passing the Access to Information Act in 1983, Parliament wanted a shift of power away from ministers and bureaucrats to citizens. Parliament wanted members of the public to have the positive legal right to get the facts, not the “spin”; to get the source records, not the managed message; to get whatever records they wanted, not just what public officials felt they should know.³²

Recognizing that FOI legislation has its historical origins in limiting government censorship clarifies that using access laws is an act of limiting the power of governments.

III. ASSESSING THE USABILITY OF FREEDOM OF INFORMATION LAWS

Many factors can facilitate or impede the usage of FOI laws. Due to deficiencies in their capacities, governments may not be able to implement them.³³ Even if implemented adequately, civic society may not have the

31. *Id.*

32. John Reid, *The Future of Accountability – The Federal Government’s Accountability Act and Discussion Paper and the Open Government Act*, OFFICE OF THE INFORMATION COMMISSIONER OF CANADA (June 2006), http://www.oic-ci.gc.ca/eng/media_room-speeches-2006-junexx.aspx.

33. Nam, *supra* note 8, at 527 (stating “the recent policy innovation has occurred before national capacities for FOIL have matured”); Monica Escaleras, Shu Lin, & Charles Register, *Freedom of Information Acts and Public Sector Corruption*, 145 *Pub. Choice* 435, 437 (2008) (explaining that “its effectiveness is clearly limited by the ability of interested parties to act on the information provided”).

capacity to use them.³⁴ As a result, FOI laws may be prone to merely existing on paper.³⁵ Although usability is an important litmus test for their success, studies that examine issues of use cannot keep up with actual levels of usage.³⁶ Beyond the pragmatics of conducting studies, another reason for the difficulty in studying FOI usability is because access laws often follow a principle of applicant blindness.³⁷ Under this principle, users are not required to provide details about themselves or their reasons for seeking information.³⁸ The variety of reasons for which people use FOI may also be clouded by its highly politicized portrayal in the media and treated within government.³⁹ A recent study suggests that much of FOI usage may be far less political than portrayed.⁴⁰ When evaluating the usability of FOI laws, it is important to avoid being swept up by these politicized discourses, which may hide important and revealing nuance.

A. *Approaches to Evaluating Usability*

1. Technological metaphors of information retrieval

Questions about the usability of FOI laws can be approached by framing government institutions as information retrieval systems. When subject to FOI laws, government authorities take on properties like mechanistic information retrieval systems: (1) they contain various stores of information, such as filing systems or databases; (2) a user provides a FOI officer with a query that specifies the properties of items they want retrieved; which (3) initiates a process of identifying and returning items in the sources that meet the criteria in the query. A characteristic of information retrieval under FOI

34. See ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 116-120 (2006) (describing the capacity of civil society to use FOI laws).

35. Nam, *supra* note 8, at 528 (stating “[i]n the former Soviet Republics in Central Asia, access to public information remains largely illusory even though laws have been adopted in Uzbekistan and Tajikistan”).

36. Gregory Michener & Ben Worthy, *The Information-Gathering Matrix: A Framework for Conceptualizing the Use of Freedom of Information Laws*, *ADMIN. & SOC’Y* 1, 2 (2015) (describing how the diversity of uses of FOI laws is understudied).

37. ROBERT HAZELL, BEN WORTHY, & MARK GLOVER, *THE IMPACT OF THE FREEDOM OF INFORMATION ACT ON CENTRAL GOVERNMENT IN THE UK: DOES FOI WORK?* 64-66 (2010).

38. Maeve McDonagh & Moira Paterson, *Freedom of Information: Taking Account of the Circumstances of Individual Applicants*, 3 *PUBLIC L.* 505, 506 (2010) (describing the principle of disclosure).

39. Michener & Worthy, *supra* note 36, at 2 (explaining how most FOI uses occur within the non-political/private quadrant of their model).

40. Michener & Worthy, *supra* note 36, at 2.

law, however, is that retrieved items are subjected to a review process to protect sensitive information before copies are provided to the user.⁴¹

Mechanical information retrieval systems are often evaluated using formally defined metrics, such as “recall” and “precision.” Recall is the ratio between the relevant items retrieved in response to a query and all relevant items in the information source.⁴² A search with high recall will return most of the relevant items but may include many irrelevant ones too. A characteristic of high recall strategies is the lack of consideration for the number of items returned. Some evidence suggests that both experienced and inexperienced FOI users may use search strategies aiming for high recall.⁴³ This strategy, sometimes called a “fishing expedition,” is characterized by being “[broad] in scope and us[ing] open-ended language. They tend to request records about a particular subject using phrases such as: ‘including, but not limited to, memos, reports, studies and briefing notes regarding . . .’”⁴⁴ A high-recall search is illustrated by a case where the City of Sioux City used the federal Freedom of Information Act to acquire copies of documents from the United States Postal Service. The wording of their query was very broad:

Any and all correspondence, recordings, notes or records of communication whether in person, via letter, facsimile, telephone, e-mail, text, recorded video conference, voicemail or any other written, digital or electronic means relating to any and all changes in mail drop box collections times in the City of Sioux City, Iowa or within the geographic area currently served by Sioux City, IA P&DF from December 1, 2009 through to the date of this request [June 24, 2011].⁴⁵

This was only one of 10 similarly broad and open-ended search clauses the city sent to the US Postal Service in a single fax. While high recall search strategies may have few downsides in information retrieval systems implemented in electronic environments where processing power is fast and cheap, the situation is entirely different in retrieval systems that require a significant amount of human mediation. In the case of FOI laws, all identified items, both relevant and irrelevant items, must be carefully

41. See Charis E. Wilson, *In the Beginning Was the Request: A Street-Level Perspective on the FOIA Process* at 70 (Jun. 15, 2015) (unpublished Ph.D. dissertation, Emporia State University), <https://esirc.emporia.edu/handle/123456789/3320> (documenting the work procedures of a FOI officer).

42. *Recall*, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE, http://www.abc-clio.com/ODLIS/odlis_r.aspx#recall (last visited Mar. 12, 2017).

43. See Wilson, *supra* note 41, at 75; Robert Cribb, Dean Jobb, David McKie, & Fred Vallance-Jones, *Digging deeper: A Canadian Reporter’s Research Guide* 160 (2006).

44. Cribb, et al., *supra* note 43, at 160; see also Wilson, *supra* note 41, at 94.

45. Fax from Paul Eckert, City manager, City of Sioux City, Iowa to manager, Records Office, U.S. Postal Service (Jun. 24, 2011) (acquired by author through the Freedom of Information Act).

reviewed for sensitive information. High human mediation can increase fee estimates, which can frustrate users. For example, Sioux City was reported to be outraged to receive an estimated fee of \$831,000 for the U.S. Postal Service to complete the search.⁴⁶ It is common for FOI officers to work with FOI users to help narrow down what they are seeking to avoid these types of situations.⁴⁷

Another measurement of information retrieval is “precision.” This refers to the proportion of relevant items returned to all items returned.⁴⁸ It is a measurement of information retrieval that accounts for the volume of documents returned. A high precision search strategy will reduce the volume of items returned by avoiding irrelevant items. Having precisely worded queries is strongly encouraged by experienced users and FOI officers.⁴⁹ With a highly precise search strategy that yields a low volume of documents, fewer sources have to be manually searched, fewer items have to be assessed to see if they meet the search criteria, and fewer items have to be reviewed for information requiring legal protection. An example of a highly precise, low volume search is when the City of Coquitlam in British Columbia ordered from the Metro Vancouver government “a copy of the video and/or audio recording of the Special meeting of the Greater Vancouver Regional District Board that took place on April 8, 2011 in the second-floor boardroom at 4330 Kingsway Street.”⁵⁰ In this case, the records office was able to provide the audio in one day.

The effectiveness of precise-based searches strategies may seem to suggest they are better than recall-based strategies. Overly broad queries have been disparaged, as the name “fishing expedition” implies, and characterized as a misuse of access rights.⁵¹ Such conclusions may be too harsh, however. High-recall searches strategies may be unavoidable if the information needed to be more precise is simply not available.⁵² In such

46. Lynn Zerschling, *City Outraged at Postal Service's \$831K Estimate for Document Search*, Sioux City Journal (July 27, 2011), http://siouxcityjournal.com/news/local/govt-and-politics/city-outraged-at-postal-service-s-k-estimate-for-document/article_0f2a6feb-3e9d-594c-bcfd-3b1703bc295d.html.

47. Wilson, *supra* note 41, at 126-27.

48. *Precision*, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE, http://www.abc-clio.com/ODLIS/odlis_r.aspx#precision (last visited Mar. 12, 2017).

49. Kreimer, *supra* note 12, at 1025; Wilson, *supra* note 41, at 125; MIKE LARSEN, ACCESS IN THE ACADEMY: BRINGING ATI AND FOI TO ACADEMIC RESEARCH 18 (2013).

50. E-MAIL FROM LAUREN HEWSON, MANAGER LEGISLATIVE Administrative Services, City of Coquitlam, to Chris Plagnol, Information and Privacy Coordinator, Metro Vancouver (May 3, 2011) (on file with author).

51. See Jeremy Hayes, *FOI: Whitehall Strikes Back*, 20 BRIT. JOURNALISM REV. 57, 59; Wilson, *supra* note 41, at 125 (reporting how a FOI officer explained that FOI users who submit overly broad FOIs are “expecting FOIA staff to do their research work for them”).

52. See Kreimer, *supra* note 12, at 1025-27.

cases, a high-volume disclosure may give evidence of otherwise concealed government activities, which can then be the basis for subsequent and more specific searches.⁵³ Another advantage of high recall searches is that high volume disclosures may discourage misconduct within organizations. Since a large number of documents are made public, the actions of more government employees are likely to be implicated in the release and so they may feel the pressure from public scrutiny to conduct their actions appropriately.⁵⁴ Precise, low-volume searches, on the other hand, may do less to change organizational cultures because less evidence of government activity is made public.

2. Challenges of evaluating government information retrieval

Although a technological approach may provide important insights into issues with FOI usage, drawing too heavily on mechanistic metaphors of information retrieval may be inappropriate, as it hides important insights. In studying electronic information retrieval, the Cranfield approach is commonly used by researchers and developers. This approach relies on “test collections,” which are standardized collection of documents, query topics, and relevance assessments of each document for each query.⁵⁵ Test collections are shared amongst researchers and developers who run them through their information retrieval systems repeatedly to assess their performance.⁵⁶ While this methodology is well suited for electronic information retrieval systems controlled by their designer, it has limited use for evaluating FOI laws. Evaluators cannot give governments a collection of documents and then repeatedly run queries through FOI to access them.

A method for evaluating the implementation of access laws that researchers have used is to order information from governments through FOI laws and then compare characteristics of responses, either between

53. See Kevin Walby & Mike Larsen, *Getting at the Live Archive: On Access to Information Research in Canada*, 26 CAN. J. LAW & SOC'Y 623, 625 (encouraging social and legal researchers to conceive of FOI as a means to access the living archives of government organizations).

54. See Chetan Agrawal, *Right to Information: A Tool for Combating Corruption in India*, 3 J. MGMT & PUB POL'Y 26, 33 (2012) (although government officials feel an anxiety that “the ghosts of the past might haunt them,” they are delighted by public engagement and the opportunity to build trust with them).

55. Paul Clough & Mark Sanderson, *Evaluating the Performance of Information Retrieval Systems Using Test Collections*, 18 INFO. RES. (2013), <http://www.informationr.net/ir/18-2/paper582.html> (the Cranfield approach was developed at the Cranfield Library in the United Kingdom in the 1960s).

56. *Id.*

jurisdictions⁵⁷ or within a jurisdiction over a period of time.⁵⁸ For example, to compare the FOI retrieval systems under the Clinton and Bush administration, Kim analyzed eight years of annual FOI reports from twenty-five federal agencies subject to the US Freedom of Information Act.⁵⁹ Amongst other findings, Kim found decreases in response efficiency,⁶⁰ increases in backlogs⁶¹, fewer full disclosures,⁶² and more exemptions cited for redactions from the Clinton to Bush administration.⁶³ A threat to the validity of this study is that the research could not control for any systematic variation in either the queries or the relevant documents. Over time or between jurisdictions, FOI users may initiate more or less complicated queries or seek differing levels of sensitive information that required legitimate protection.

Another method of evaluating how governments implement FOI laws is to conduct a FOI audit.⁶⁴ Newspapers Canada, for example, conducts annual FOI audits of federal, provincial, territorial, and municipal governments in Canada. Their method involves identifying a set of documents likely to be held by all government authorities being audited and then running a series of queries through FOI laws for that information. The responses are assessed according to performance criteria. An advantage of this approach is that it allows for a comparison between retrieval systems.⁶⁵ A limitation of this approach is it assumes that different FOI laws are completely comparable. Legislative bodies may have different exemptions that determine what information must be withheld. FOI audits are also prone the Hawthorne effect, whereby individuals or organizations change their behavior when they know they are being observed by researchers. If governments determine they

57. E.g., Robert Hazell & Ben Worthy, *Assessing the Performance of Freedom of Information*, 27 GOV'T INFO Q. 352 (comparing the performance of FOI in the United Kingdom, Australia, New Zealand, Canada, and Ireland).

58. E.g., Minjeon Kim, *Numbers Tell Part of the Story: A Comparison of FOIA Implemented under the Clinton and Bush Administrations*, 12 COM. L. & POL'Y 313 (comparing FOI performance in the United States of America between 1998 and 2005).

59. *Id.*

60. *Id.* at 324.

61. *Id.* at 324.

62. *Id.* at 326.

63. *Id.* at 332.

64. E.g., MEDIA INSTITUTE OF SOUTH AFRICA, MISA TRANSPARENCY ASSESSMENT: 2016 REPORT ON OPEN & SECRETIVE PUBLIC INSTITUTIONS IN SOUTHERN AFRICA (2016), http://misa.org/wp-content/uploads/2016/09/survey-2016_final_online.pdf; *Examples of FOI Audits between 2005 and 2015 Conducted by Newspapers Canada*, NEWSPAPERS CANADA, <http://newspaperscanada.ca/public-affairs/freedom-of-information> (last visited Mar. 12, 2017).

65. See NEWSPAPERS CANADA, NATIONAL FREEDOM OF INFORMATION AUDIT 2015, at 7 (2015), <http://newspaperscanada.ca/sites/default/files/FOI-2015-FINAL.pdf>.

are being audited, they may change their behavior to look more favorable.⁶⁶ For example, Newspapers Canada reported that in 2011 many public bodies had determined they were being audited and “officials in every province, in several federal departments as well as the City of Windsor, Ontario, communicated about the requests they received in common.”⁶⁷ They also reported that the BC government responding by

[launching] a concerted effort to process the requests—which they correctly identified as belonging to the 2011 audit—as quickly as they could. The effort was overseen from the highest levels of the Ministry of Citizens’ Services and Open Government, the department in charge of FOI processing in BC and featured regular updates to top officials and a formal briefing note to the deputy minister.⁶⁸

Field experiments, which systematically vary characteristics of some part of the FOI application process, may face similar problems if government officials detect that they are being evaluated.⁶⁹

A limitation of studies that only evaluate the information retrieval system created under FOI laws is they do not allow for comparison with non-FOI methods of retrieval. This comparison is important because access laws should be expected to be as good, if not better, at accessing unpublished information than informal methods. For example, Worthy, John, and Vannoni conducted a comparison study involving 4,300 English parish councils.⁷⁰ They ordered organizational charts either through FOI legislation or requested it through a regular letter.⁷¹ The results indicated that using FOI law, while not a perfect method, was twice as effective as non-FOIs. An important limitation of this study is that organizational charts, which are non-contentious in nature, do not represent a broad sample of unpublished information held by governments. If the documents were more contentious or complicated, one might reasonably expect even more pronounced differences between FOI and non-FOI methods.

66. See Gregory Michener & Karina Rodrigues, “Who Wants to Know?” *Assessing Discrimination in Transparency in Freedom of Information Regimes* 6 (Jun. 2015) (unpublished paper presented at the 4th Global Conference on Transparency Studies, Università della Svizzera italiana, Lugano, Switzerland, June 4-5, 2015).

67. *National FOI Audit: Notes on British Columbia and Interprovincial Communication*, NEWSPAPERS CANADA (2011), <http://www.newspaperscanada.ca/sites/default/files/FOI%20Audit%202011%20British%20Columbia%20notes.pdf>.

68. *Id.* at 1.

69. See Michener & Rodrigues, *supra* note 66, at 6.

70. Ben Worthy, Peter John, & Matia Vannoni, *Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests* (Dec. 4, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2699198>.

71. *Id.* at 24.

The comparison with non-FOI methods of accessing information is also important because it draws critical attention to the condition of established methods of accessing unpublished information. For example, a user of India's Right to Information (RTI) Act is quoted as saying:

Before the RTI Act was passed, it was impossible to locate one's query in the government's workflow. This resulted in applicants feeling powerless and helpless. My refusal to pay bribe to a police official led to a 3 year delay for my passport application to be processed. In the absence of RTI I was unable to locate the actual status of my application. But with the RTI coming into force, it took exactly 2 weeks from the date I filed an RTI application to know the reasons why my application is being delayed for my passport to arrive. The RTI Act forced the police official to be responsive and act according to prescribed rules and procedures.⁷²

In this example, not only does India's RTI Act provide a dramatic improvement for the user, it simultaneously draws critical attention to the degraded conditions of the established methods of accessing unpublished information. Likewise, in the United States, a researcher indicated that FOI legislation has made data on racial and ethnic preferences in government procurement far more available compared to other means.⁷³ Since FOI laws tend to be highly politicized,⁷⁴ public and scholarly discourses often direct criticisms to barriers or imperfections in access laws.⁷⁵ While there is surely merit to such criticism, the failure to publicly praise FOI laws warrants criticism itself. Praising FOI laws when they are successful makes it possible to draw critical attention to established, culturally inherited methods of accessing unpublished government material that are in worse condition.

72. Agrawal, *supra* note 54, at 32-33.

73. George R. La Noue, Two Cheers for the Freedom of Information Act, 29 Acad. Quest. 10, 12 (stating that "short of litigation, without the FOIA tool, this kind of information about important public policy issues can almost never be brought to light").

74. See Michener & Worthy, *supra* note 36, at 3-4 (explaining that the "[t]he fields of scholarship outlined above are to varying extents "politicized" and have consequently tended to focus on "barriers to accessing public information").

75. See generally MIKE LARSEN & KEVIN WALBY, BROKERING ACCESS: POWER, POLITICS, AND FREEDOM OF INFORMATION PROCESS IN CANADA (2012).

3. User-centered evaluation

A third way to evaluate information retrieval systems is based on user evaluations, such as indicators of satisfaction.⁷⁶ User expectations are a key factor in their satisfaction with an information system.⁷⁷ User expectations of FOI-based retrieval can be shaped by experiences with other information retrieval systems, such as search engines or databases.⁷⁸ The information retrieval systems created by online databases, however, are significantly different than the information retrieval systems implemented under FOI laws. Online databases contain well-structured information, which can be searched rapidly at low cost. In contrast, government institutions contain a massive number information sources, which may be unstructured, unclassified, not indexed, and may require extensive human intervention to search. FOI officers tasked with responding to users may not know where to find the information.⁷⁹ Institutions may also be insufficiently resourced to perform at the level expected by users.⁸⁰ FOI users have been reported to underestimate the vast amount of information contained with bureaucracies and oversimplify the ease with which it can be found.⁸¹

These observations do not imply that FOI procedures or the conditions in which they are implemented are immutable and cannot be improved based on experiences of users; rather, it recognizes that users may have unrealistic expectations of usability because they are unfamiliar with nature of the information retrieval system they are querying. Users should not be faulted for this because the lack of knowledge of government is precisely the problem FOI laws attempt to address.

76. Ellen M. Voorhees, *The Philosophy of Information Retrieval Evaluation*, in EVALUATION OF CROSS-LANGUAGE INFORMATION RETRIEVAL SYSTEMS, 355-370, 355 (Carol Peters, Martin Braschler, Julio Gonzalo, & Michael Kluck eds., 2001) (describing two broad classes of evaluation, system evaluation and user-based evaluation).

77. See generally D. Sandy Staples, Ian Wong, & Peter B. Seddon, *Having Expectations of Information System Benefits that Match Received Benefits: Does it Really Matter?*, 40 INFO. & MGMT. 115 (2002); Barbara Lynn Marcolin, *The Impact of Users' Expectations on the Success of Information Technology Implementation* (2014), <http://ir.lib.uwo.ca/digitizedtheses/2325>.

78. See Wilson, *supra* note 41, at 79.

79. See generally Gemma John, *Relations that Unite and Divide: A Study of Freedom of Information Legislation and Transparency in Scotland* (Dec. 2008) (unpublished dissertation, University of St. Andrews).

80. Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387 (stating that agencies may not have sufficient resources to process orders for information from users).

81. See Wilson, *supra* note 41, at 94.

B. Factors Affecting Usability

1. Knowledge of bureaucracies

To use FOI laws effectively requires have some knowledge in certain areas, such as the nature of one's access rights and the procedures to exercise them.⁸² Knowledge of government bureaucracy and structure are also important for using access laws.⁸³ This bureaucratic knowledge gives FOI users realistic expectations needed to conduct successful searches. Novice users, for example, can incorrectly assume governments have a single, central database that can be searched for anything.⁸⁴ It should not be surprising that novice users have misconceptions about governments as the need for an access law acknowledges government secrecy is a problem. Unless one is employed in a government department or routinely engages with one, it may take time to develop knowledge of bureaucracy and to develop expertise in using access laws. In the United States, a cottage industry of expert FOI users has emerged.⁸⁵ The challenges of learning how to use FOI proficiently also means it may take time before users in field such as journalism⁸⁶ or academic research are in a position to share their knowledge.⁸⁷

82. See Madhupa Bakshi, *Miles to Go: Effectiveness of RTI for Women*, GLOBAL MEDIA J. 1, 6-7.

83. See Martin Webb, *Disciplining the Everyday State and Society? Anti-Corruption and Right to Information Activism in Delhi*, 47 CONTRIBUTIONS TO INDIAN SOC. 363, 375-76 (2013) (explaining that Hindi word 'jaankaari' is used amongst FOI users in India to refer to the difficult to attain knowledge of government bureaucratic structures that is helpful for using FOI).

84. Wilson, *supra* note 41, at 65.

85. *Id.* at 48.

86. DAVID CUILLIER & CHARLES DAVIS, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS* (2010); HEATHER BROOKE, *YOUR RIGHT TO KNOW: A CITIZEN'S GUIDE TO THE FREEDOM OF INFORMATION ACT* (2007); Cribb, et al., *supra* note 43; JIM BRONSKILL & DAVID MCKIE, *YOUR RIGHT TO KNOW: HOW TO USE THE LAW TO GET GOVERNMENT SECRETS* (2014).

87. E.g., K. J. Brown, *Counterblast: Freedom of Information as a Research Tool: Realising Its Potential*, 48 HOWARD J. 88 (2009); R. Lee, *Research Uses of the U.S. Freedom of Information Act*, 13 FIELD METHODS 370 (2001); Ashley Savage & Richard Hyde, *Using Freedom of Information Requests to Facilitate Research*, 17 INT'L J. OF SOC. RESEARCH METHODOLOGY 303 (2014); K. Walby & Mike Larsen, *Access to Information and Freedom of Information Requests: Neglected Means of Data Production in the Social Sciences*, 18 QUALITATIVE INQUIRY 31 (2011); Shannon M. Oltmann et al., *Using Open Records Laws for Research Purposes*, 37 LIBRARY & INFO. SCI. RES. 323 (2015); Dominique Clément, *"Freedom" of Information in Canada: Implications for Historical Research*, 75 LABOUR / LE TRAVAIL 101 (2015); Cathy Murray, *Sport in Care: Using Freedom of Information Requests to Elicit Data about Looked after Childrens Involvement, in Physical Activity*, 43 BRITISH J. SOC. WORK, 1347 (2013); Alexander J. Fowler, et al., *The UK Freedom of Information Act (2000), in Healthcare Research: A Systematic Review*, 3 BMJ OPEN 1 (2013); LARSEN, *supra* note 49.

2. Non-government capacity

Another factor affecting the usability of FOI laws is the how engaged civil society organizations are with access rights. In many countries, public interest groups, media associations, and other civil society organizations are not only important users of FOI laws but also promoters of it.⁸⁸ Use of FOI legislation by community organizations has also had secondary benefits, such as making FOI laws easier to use by journalists.⁸⁹ Additionally, when community-based organizations routinely use access laws, it has been found to have a positive effect on the empowerment of citizens.⁹⁰ FOI usage levels could be an indicator of the capacity of civil society to use access rights or whether conditions for a robust civil society are present.⁹¹

3. Governments burdening the FOI system

Another factor that can affect usability of FOI laws is government procedures for responding to users. Depending on the sensitivity of the records being accessed, the procedures for reviewing and providing them can change in complexity. The use of FOI laws can draw criticism because of the alleged costs it places on government authorities.⁹² FOI laws are often characterized as a method of last resort and to be used after all other informal and presumably less costly methods have been exhausted.⁹³ But this characterization is specious. The procedures for responding to informal access methods also involve costs for locating, retrieving, and protecting sensitive information and therefore have the same costs as formal access methods. If any of these informal procedures are more cost effective, then government administrations should integrate them into their FOI handling procedures. This implies that using FOI laws should actually be the most cost-effective method of accessing unpublished information.

88. See ROBERTS, *supra* note 34, at 116-20.

89. See Camaj, *supra* note 12, at 12 (“[J]ournalists attributed this to the role of the civil society organization MANS that has filed more than 30,000 FOI requests, often serving as intermediaries for citizens and journalists. Such high demand for FOI has led to increased awareness of the right to information among governmental officials and increased efforts and commitment to comply.”).

90. Emmanuel Skoufas, Renanta Narita, & Ambar Narayan, *Does Access to Information Empower the Poor? Evidence from the Dominican Republic* 23-25 (May 2014), <http://ssrn.com/abstract=2445212>.

91. See ROBERTS, *supra* note 34, at 118 (explaining how the capacity of civil society organizations are affected by tax laws and presence of donors who can help sustain them).

92. See Mark Boven, *Information Rights: Citizenship in the Information Society*, 10 J. POL. PHIL. 317, 324 (2002); Wilson, *supra* note 41, at 50; Judith Ross & Phillip Whittaker, *Freedom of Information: Is Openness Too Expensive, Too Difficult or Too Dangerous?*, 7 J. FIN. & MGMT PUB. SECTOR 55, 59 (2009).

93. E.g., Mark Mulqueen, *FOI and Public Trust in Parliament, in IRELAND AND FREEDOM OF INFORMATION ACT: FOI @ 15*, at 85-102 (Maura Adshead & Tom Felle, eds., 2015).

Governments can, however, create extraneous burdens that affect the usability of FOI laws. In an investigation of secret rules for responding to the media, the Information Commissioner of Canada found

institutions that label access requests as “sensitive,” “of interest” or “amber light,” or with some other marker indicating special handling, tend to delay requests for unacceptably long periods. We also found that the media are not the only ones to encounter such delays. Requests from parliamentarians, organizations, academics and lawyers are also delayed⁹⁴

Cultures of administrative secrecy within government organizations create unnecessary resistance that frustrates FOI access procedures.⁹⁵ Governments can also burden FOI systems by withholding funding from it.⁹⁶ And when governments tightly control messages to the public, it becomes more difficult for FOI users to know what their governments are doing or what records they have in the first place.⁹⁷

C. Legislative Mechanisms for Enhancing Usability

Legislative mechanisms can enhance the usability of FOI laws. One mechanism is the principle of identity neutrality, which prevents governments from requiring a person to provide information about their identity or explaining why they are accessing the information.⁹⁸ Eighty-four out of 111 national FOI laws have some level of restriction on governments asking users the reasons they want information,⁹⁹ while eighty-three

94. Information Commissioner of Canada, *Maximizing Compliance for Greater Transparency* 29 (Jun. 2009) (finding delays when media, academic, etc. users labelled) <http://www.oic-ci.gc.ca/telechargements-downloads/userfiles/files/OIC08-09E.pdf>.

95. See Vincent Kazmierski, *Accessing Democracy: The Critical Relationship*, CAN. J. L. & SOCIETY 613, 615-17 (describing reports of administrative secrecy in the government of Canada); Daxton R. “Chip” Stewart, *Let the Sunshine in, or Else: An Examination of the “Teeth” of State and Federal Open Meeting and Records Law*, COMM. L. & POL’Y 256, 300-03; Herbert W. Synder, *The Study of the Effects of Electronic Storage of Government Information on the Freedom of Information Act* 45 (Dec. 1998) (unpublished dissertation, Syracuse University) (describing how some FOI officials in the United States of America narrowly construe a user’s search parameters); Alasdair Roberts, *Administrative Discretion and the Access to Information Act: An Internal Law on Open Government?*, 45 CAN. PUB. ADMIN. 175, 176 (2002) (summarizing an investigation into Canada’s human resource development agency that determined users that had ordered information identified as “sensitive” had longer response times).

96. See Wilson, *supra* note 41, at 110 (describing United States federal government underfunding FOI programs); Jane Lee, *Abbott Government Has Not Appointed FOI Commissioner*, SYDNEY MORNING HERALD (Aug. 26, 2015), <http://www.smh.com.au/federal-politics/political-news/abbott-government-has-not-appointed-foi-commissioner-20150825-gj7ks2.html>

97. See Kreimer, *supra* note 12, at 1025.

98. See McDonagh & Paterson, *supra* note 38, at 507.

99. Based on a review of scores of indicator 13 of Global Right to Information Rating. Indicator 13 is “Requesters are not required to provide reasons for their requests.” The rating system

minimize the amount of information the user is to provide about themselves.¹⁰⁰

Another statutory mechanism to enhance usability is to assign government officials a duty to assist users. In a comparative study of Canada, the United States, New Zealand, Australia, and the United Kingdom, the Information Commissioner of Canada found this clause involves three principal features: helping the user identify the information they want, conducting a fair and reasonable search, and responding to the user as accurately and quickly as possible.¹⁰¹ According to the Global Right to Information Rating, of 111 national FOI laws, 78 assign officials some duty to assist users.¹⁰² A duty to assist requirement would also be expected to include assisting people with special needs arising from circumstances such as disabilities, illiteracy, or other circumstances. The Global Right to Information found that sixty national FOI laws have some requirement to assist people with special needs.¹⁰³ As people with disabilities may be underemployed, fees associated with using access laws affect their usability. Seventy-eight of 111 national FOI laws do not include clauses that waive fees for people with low or no income.¹⁰⁴

A third statutory mechanism to make FOI laws more usable is to require government bodies to publish information that helps users find information.¹⁰⁵ Canada's Access to Information Act, for example, requires the federal government to publish "a description of all classes of records under the control of each government institution in sufficient detail to

gives a score of 2, 1, or 0. Data was accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=13>.

100. Based on a review of scores of indicator 14 of Global Right to Information Rating. Indicator 14 is "Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery)." The rating system gives a score of 2, 1, or 0. Data was accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=14>.

101. Information Commissioner of Canada, *The Duty to Assist: A Comparative Study*, Office of the Information Commissioner of Canada (May 2008).

102. Global Right to Information Rating, indicator 16 ("Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification"). The rating system gives a score of 2, 1, or 0. Data was accessed in April 2016 from <http://www.rti-rating.org/by-indicator/?indicator=16>.

103. Global Right to Information Rating, indicator 17 ("Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled"). The rating system gives a score of 2, 1, or 0. Data was collected in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=17>.

104. Global Right to Information Rating, indicator 26 ("There are fee waivers for impecunious requesters"). The rating system gives a score of 2, 1, or 0. Data accessed in October 2016 from <http://www.rti-rating.org/by-indicator/?indicator=26>.

105. Global Right to Information Rating, *Indicator 58*, <http://www.rti-rating.org/by-indicator/?indicator=58> (last visited Mar. 12, 2017).

facilitate the exercise of the right of access under this Act.”¹⁰⁶ In library and other information professions, this requirement can be understood as a requirement to publish “description” or “metadata.” Often used interchangeably, description and metadata refer to a process of describing resources in a standardized way. A briefing memo, for example, could be described in terms of which organization it was produced within, the date it was produced, who authored it, and who it was sent to. When this sort of description or metadata is created, it makes it easier for an organization to organize, manage, retrieve, and dispose of information. Requiring governments to publish metadata and description is important because it can help FOI users know what records they can order.

IV. REQUIREMENTS TO PUBLISH DESCRIPTION AND METADATA

A. *Prerequisite Knowledge for Using FOI*

Amongst India’s users of the Right to Information Act, “jaankaari” refers to the practical knowledge required to exercise access rights effectively.¹⁰⁷ This knowledge can be difficult to acquire. Using FOI legislation requires having pre-requisite knowledge in certain areas, such as what governments departments are doing.¹⁰⁸ It is easier to order information from a government authority if details of its activities are already publicly available. For this reason, FOI laws are more likely to be usable where institutions, such as the media, the courts, and whistleblowers are capable of making government activities known to potential FOI users.¹⁰⁹ In absence of these sources, users may also learn about government activities by using FOI, finding insider sources, or carefully reading statements made in the public.¹¹⁰

Another prerequisite knowledge needed to use FOI legislation is the procedural knowledge to actually invoke one’s access rights.¹¹¹ Related to this, is knowledge of the internal procedures government officials follow when providing access to information.¹¹² Internal handling terminology such as “office of primary interest,” which in the Canadian context refers to office

106. Access to Information Act, RSC 1985, c A-1, <http://laws-lois.justice.gc.ca/eng/acts/A-1/page-1.html>.

107. Webb, *supra* note 83, at 374-76.

108. See Kreimer, *supra* note 12, at 1029-32.

109. *Id.* (explaining how using freedom of information legislation to learn about the global war on terror can be difficult because its activities are highly secretive to begin with).

110. See generally CUILLIER & DAVIS, *supra* note 86, at 64-82.

111. Cox, *supra* note 80, at 402.

112. ROBERTS, *supra* note 34, at 117.

that is deemed to be in custody of the documents the FOI user wants,¹¹³ is helpful because it allows users to set expectations when exercising their access rights.

Knowing government activity or the procedures for invoking one's access rights is not sufficient for using access laws effectively. What is also required is knowledge of the specific records wanted. This requires users to develop knowledge of the records keeping practices of a government authority,¹¹⁴ document vocabularies,¹¹⁵ and how information sources, such as internal databases, can be searched.¹¹⁶ Given the importance of this type of knowledge for using FOI laws effectively, it is important to monitor when governments fail to live up to their obligations to publish information about the documents they have.¹¹⁷

B. *Publishing Description and Metadata*

What is the nature of the requirements that national FOI laws place on government authorities to publish description and metadata? The following results were based on a content analysis of national FOI laws. From the international Global Right to Information Rating, sixty-eight FOI laws were identified as having a requirement to publish a list or registers of documents in their possession.¹¹⁸ From these laws, sixty-two were selected because they were available in English. On inspection, eleven laws were determined not to have substantial requirements to publish registers of documents and so were excluded, which left a total of fifty-one FOI laws reviewed.

The content analysis was conducted in two phases. In the first phase, the sections containing the requirements to publish description of records were examined and open codes created in response to conceptual features of the requirements. This close reading revealed these requirements were usually part of more complex sections that had additional requirements to publish information. These complementary requirements were also open

113. Walby & Larsen, *supra* note 87, at 629.

114. Cox, *supra* note 80, at 389-90; ROBERTS, *supra* note 34, at 117.

115. Walby & Larsen, *supra* note 87, at 629.

116. Cox, *supra* note 80, at 402 (stating that while the United States Department of Justice publishes a helpful list of major information systems, it could be more useful if the list also described "how they are searched or the kinds of records they produce").

117. *See id.* at 403 (noting "many agencies have done nothing to comply with this statutory mandate"); National Security Archive, *File Not Found: 10 Years after E-FOIA, Most Federal Agencies are Delinquent* 13 (Mar. 12, 2007) (reporting findings that "only 36% of agency sites include an identifiable list of major information systems" and "[m]any agencies have not attempted to describe their record holdings in a systematic and comprehensive way"), http://nsarchive.gwu.edu/NSAEBB/NSAEBB216/e-foia_audit_report.pdf.

118. *Indicator 58*, *supra* note 105 ("Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public").

coded for their conceptual features. At the end of the first phase, the concepts were organized into a classification scheme. Five major classes of published information emerged, described below. In the second phase, the fifty-one FOI laws were reviewed again using closed coding based on the classification scheme. This resulted in a frequency count of conceptual features within each larger category.

1. Publishing information about the access system

It is common for FOI laws to require government agencies to publish information about the access system itself. Fifty-one percent of the surveyed laws required governments to publish contact details of FOI officials. For example, China requires state organs to

prepare and publicize guides for government information. . . Guides on government information release should include types of government information, their system for arrangement, methods for obtaining information, the names of government information release organizations, their office addresses, office hours, contact telephones, fax numbers, and electronic mailing addresses etc.¹¹⁹

More than half (fifty-five percent) of the reviewed laws required governments to publish information about the procedures for using the legislation. For example, Croatia's law requires public authorities to publish annual reports, which contain, amongst other things, "notifications on the manner of exercising the right of access to information and re-use of information with contact data of the information officer."¹²⁰ Likewise, Ethiopia requires public bodies to publish a "detailed explanation of the procedures to be followed by persons who wish to access this information."¹²¹

A smaller percentage (twenty-four percent) of surveyed laws required governments to publish information about available complaint procedures. South Africa, for example, requires the Human Rights Commission to publish an easily comprehensible guide in each official language for people who want to use their access rights. Amongst many other things, the guide is required to include:

119. People's Republic of China Ordinance on Openness of Government Information, article 19, <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041352.pdf>.

120. Right to Information Act, article 10(1)(1), <http://www.rti-rating.org/wp-content/uploads/Croatia.pdf>.

121. A Proclamation to Provide for Freedom of the Mass Media and Access to Information, No.590/2008, <http://www.rti-rating.org/wp-content/uploads/Ethiopia.pdf>.

all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging—

(i) an internal appeal; and

(ii) an application with a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body.¹²²

While high frequency codes in a content analysis can reveal dominant themes, examining infrequently occurring codes can draw attention to innovations. For example, the Czech Republic was unique in requiring public authorities to publish “the procedure that the obligated body shall follow when processing all requests, suggestions and other motions filed by citizens.”¹²³ This internal handling procedure is important knowledge that assists FOI users.¹²⁴

2. Publishing description of government organizations

Another major category of published description that emerged was information about the organization itself. Ninety-two percent of the laws reviewed required publishing a description of the structure, powers, or responsibilities of each organization. In countries without such clauses, it should not be assumed that citizens have the ability to know what government organizations exist and are established to do.

3. Publishing description about employees

Forty-five percent of the reviewed laws required governments to publish some information about employees. Twenty-five percent required governments to publish employee contact information and twenty-four percent required some publication of description of employee roles, responsibilities, or activities. Sixteen percent required governments to publish information about employee remuneration. This information was not necessarily exhaustive to all employees. In many cases, the information only pertained to senior employees.

122. Promotion of Access to Information Act, section 10(2)(g), <http://www.justice.gov.za/legislation/acts/2000-002.pdf>.

123. The Freedom of Information Act, 106/1999, Section 5.1.d, <https://www.access-info.org/wp-content/uploads/Czech-Republic.pdf>.

124. See ROBERTS, *supra* note 34, at 117.

4. Publishing description of government records

Based on the selection criteria, all the laws reviewed required governments to publish description of some sort about the records held by government. Of these, it was most common (eighty percent) for governments to proactively publish description of classes of records held in their custody. Significantly fewer (twenty-nine percent) required publishing item level descriptions, such as lists of documents. Even fewer (six percent) required departments to publish lists of subjects.

An innovative clause found in South Sudan, Maldives, Antigua, Finland, and Guinea was to publish description of the overall records keeping system. While many countries require publishing description of classes of records, a more comprehensive description of records keeping system within the government might help users understand how information is organized within government.

5. Publishing description of government activity

A major class of information that governments published can be referred to as description of government activity. This broad class included decisions of each public authority, documents, such as draft legal acts, annual reports, inspectors, minutes of official meetings, to name only a few. A common type of document that governments are required to publish are manuals given to their employees to carry out their responsibilities. In the United States, the requirement to publish manuals, which contain instructions on how to interpret law, is aimed to diminish secret lawmaking.¹²⁵ Some countries required publishing employment opportunities and description of hiring procedures. Financial information, such as budgets was also a common class of information to be published.

Publishing information of this sort has a different purpose from publishing information about an organization, employee, or class of records. It has the potential to furnish the public with knowledge of what their government departments are doing, which is prerequisite knowledge for using access rights. However, the broad scope of this category and apparent lack of focus makes it doubtful that the purpose of these publishing requirements is to help people user their access rights. On review, it seems that FOI laws are simply being used to implement publishing policies aimed at a broad range of other outcomes.

125. See Charles H. Koch, *The Freedom of Information Act: Suggestion for Making Information Available to the Public*, 32 MD. L. REV. 189, 198-99 (explaining four classes of information that assist in diminishing secret law making: opinions in cases, adopted policy interpretations, staff manuals and instructions that affect the public, and an index of promulgated policy).

V. DISCUSSION

From a historical perspective, freedom of information legislation has its origins in minimizing government censorship. Within contemporary FOI laws, this legacy is reflected in the transference of authority to make information available from government to individuals. Using FOI laws is an act of reducing government control over thought and expression. The statutory requirement for government authorities to publish information is a mechanism to make FOI laws more usable. It allows users to identify the specific documents that they want.

The results of this content analysis show that across fifty-one national FOI laws, there is a general pattern to publish metadata or description to facilitate the use of their access rights. Although not uniformed, governments tend to publish five categories of information: (1) information about how to use the access system, (2) description of the government organization itself, (3) information about employees, (4) description of classes of information held by the organization, and (5) information about government activity. The Global Right to Information Rating,¹²⁶ a major international standard for evaluating FOI laws, however, only recognizes a requirement for government authorities to publish lists of records. This standard may be overlooking important classes of information that make using FOI laws more user-friendly.

Of the five categories, the generic category of information about government activities is the most peculiar. Across the fifty-one FOI laws reviewed, it was difficult to find a unifying purpose for what was being proactively published. It appeared to cover a range of topics: service descriptions, relationships with other governments, budgetary information, opportunities for participating in policy making, inventories, and so forth. In some cases, the items appeared as a list of documents, reports, or information of public interest. For example, Nigeria's FOI law requires government authorities to publish 16 classes of information, including financial planning reports, application for contracts, grant information, and substantive rules of the authority.

Some take the requirement for governments to proactively publish information as a new direction for the future of FOI laws.¹²⁷ From this perspective, FOI laws are taken as the legislation home for integrating publishing policies.¹²⁸ Yet adding classes of information to publish in FOI

126. Specifically, indicator 58 ("Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public"), *supra* note 105.

127. Ackerman & Sandoval-Ballesteros, *supra* note 1, at 108 (stating that the "section of FOI laws that refer to the obligation to publish is absolutely crucial").

128. *Id.* at 125 ("Since publication on the Internet brings information out into the public domain much more than the printing of a report, these sections should get special attention in new FOI laws

laws should be viewed with caution. Proactive disclosure requirements can conflict with FOI laws in an important way. When governments decide which materials to publish, political interests will inevitably influence their decisions. Proactive disclosure policies may end up serving the political interests of the governing party.¹²⁹ By transferring the authority about what is made available from government officials to individuals, FOI laws are designed to avoid this problem. While some scholars propose that governments publish all information automatically,¹³⁰ it is difficult to imagine how this could be implemented without requiring an army of FOI officers to review every document for information needing protection. This would also risk accidentally disclosing information that legally requires protection.¹³¹

Proactively disclosing documents may also diminish FOI laws as a system for accessing information. In the United Kingdom, government authorities are required to publish information according to a publication scheme, which must be approved by the Information Commissioner.¹³² However, governments have not implemented them effectively and the Information Commissioner has lacked resources to monitor them properly.¹³³ It is worth quoting findings from interviews with FOI users in the United Kingdom:

the utility of the original publication schemes has been seen to be limited, with those produced being described as “hopeless” (interview 11), “a waste of time” and “meaningless” (interview 14), “not useful” (interview 15) and “a dead loss” (interview 17) . . . The requestors that we spoke to confirmed that they had consulted publication schemes in the past and were often directed to do so in response to a request, but none had found them useful. Requestors described these as “absolutely useless” (focus group), “hasn’t

and should be reformed in older laws.”); Information Commissioner of Canada, *Striking the Right Balance: Recommendations to Modernize the Access to Information Act* 80-81 (Mar. 2015) (specifically recommendation 6.1, 6.2, and 6.3), <http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx>.

129. See Harlan Yu & David Robinson, *The New Ambiguity of “Open Government,”* 59 UCLA L. REV. 178, 198 (2012) (summarizing criticisms of the implementation of the Obama government’s Open Government Directive).

130. CUILLIER & DAVIS, *supra* note 86, at 528-29 (proposing that government records should be open from the moment of creation).

131. See HAZELL, WORTHY, & GLOVER, *supra* note 2, at 93 (quoting an interview with a FOI official who said, “there were big mistakes, there were files or parts of files that should not have gone on the public shelf”).

132. Freedom of Information Act 2000, <http://www.legislation.gov.uk/ukpga/2000/36/contents> (section 19 and 20 pertain to publication schemes).

133. See HAZELL, WORTHY, & GLOVER, *supra* note 2, at 94-96.

been relevant” (requestor 4), does not “make any difference” (requestor 8) and “isn’t good enough” (requestor 6).¹³⁴

While improvements to proactive disclosure could be made, it should not be assumed that integrating publishing requirements into FOI laws are inherently an effective method of making FOI laws more user-friendly. When governments do not publish information that people want, proactive disclosure fails entirely as a system for accessing information.¹³⁵

Yet requirements for governments to publish a description about what they are doing, along with their access procedures, organizational structure, employee information, or records keeping information, can clearly be helpful to FOI users. Having knowledge of government activity is a precondition for knowing what to access in the first place.¹³⁶ As FOI laws are evaluated in the years to come, legislative research would stand to benefit by clarifying what forms of descriptions of government activity best helps citizens know what their government is doing. Description or information about government activity that does not help the broadest range of potential FOI users exercise their access rights is bettered suited for separate legislation.

134. Elizabeth Shepard, Alice Stevenson, & Andrew Flinn, *Freedom of Information and Records Management in Local Government: Help or Hindrance?*, 16 *INFO. POL’Y* 111, 118 (2011).

135. See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 179 (1983) (specifically stating “if officials make public only what they want citizens to know, then publicity becomes a sham and accountability meaningless”).

136. See Kreimer, *supra* note 12, at 1025-27.