*Michael COOK**

Freedom of Information: Legislation that has Radically Changed Archival Practice

* Senior Fellow, University of Liverpool Centre for Archive Studies
United Kingdom, University of Liverpool, School of History, 8 Abercromby Square, Liverpool L69 37WZ
mgc00k@aol.com

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Recent legislation in the United Kingdom, which applies standards and guidelines set out by the European Union, and follows the pioneering practice of several other countries, has resulted in radical changes to archival practice. The principal legislation is the Freedom of Information Act 2000 and the Data Protection Acts1984 and 1998. Both have resulted in extensive secondary legislation (regulations on processes and practice). These Acts have changed archival practice in effectively abolishing the time-elapsed principle under which records were opened for public access after 30 years (or similar), and in extending the legal rights of access of the public. The appointment of an independent Information Commissioner has changed the way in which archival legislation is enforced, and in the way archivists and records managers are employed. Under this regime there have been important changes in the way information is managed and used by government, the media and individuals. It is likely that similar legislation will spread to other countries and regions,

Freedom of Information (FOI) legislation now exists explicitly in more than 85 countries. New legislation is on the way in many more. Also, the broad provisions of FOI law already existed in many national constitutions and in international declarations, such as the United Nations Universal Declaration of Human Rights (1948), the Aarhus Convention of 1998,and the European Union Regulations of 2001 and 2003. The first open moves towards specific legislation on FOI were in the USA as far back as 1966 (not forgetting that Sweden was here first, in 1766). France followed in 1978; but most countries took this pathway in the late 1990s, or in the present century; many are still on the road, but they are still travelling in the same direction. It would be possible to say that FOI laws are or will be one of the distinguishing characteristics of the 21st century.

FOI is actually important for the future of the world, a world whose whole economy and political structure depends on worldwide networks of information, and whose safety and well-being depends on good governance. It is an interesting discovery that our profession of record-keeping finds itself absolutely central in this new order of things. The centrality of the record-keeping professions is not something that many people foresaw in previous decades, but as we advance into the new world of FOI, more and more unforeseen consequences are becoming apparent. We should rejoice, but also be ready to seize opportunities.

First of all, FOI and its offshoots are important at every level. In high politics, its general importance is illustrated by news which broke at the start of June 2010. At last the world has definite written evidence that the state of Israel possesses nuclear weapons. We have this evidence through the operation of FOI laws in South Africa; for it appears that Israel offered to sell the nuclear materials for a weapon to that country in 1975, during the apartheid era[1]. So the world has from the start accepted that FOI laws, if properly implemented, have had and will have considerable importance at the macro-political level.

But in a sense we always knew that: the purpose of this paper is to indicate some of the significance of FOI lower down, on the practice of archivistics and records management, and on their relationship with their local and day-to-day clients. This paper gives some thoughts on how this may be illustrated in what has been hap-

1. The Guardian newspaper, 3 June 2010, available online at http://browse.guardian.co.uk. (accessed June 2010).

pening in the United Kingdom, in the hope that these examples may be of use in countries where the same forces are at work.

FOI was brought into the UK in 2000, coming in on the back of the earlier Data Protection Acts 1984 and 1998, and supplemented by the Environmental Information Regulation 2004 (which gives the public legal rights of access to environmental information). Taken together this body of legislation has already introduced profound changes in record-keeping practice (only some of which were foreseen), and we can already see that in the normal course of administrative evolution, some even more profound changes are likely to occur in the next decades. These Acts cover all aspects of public service, not merely the departments of central government. FOI, then, spreads the effects and practices of record openness outwards from central government to all areas of public administration: to all social operations that cannot be called strictly private.

Profound changes in the way we appraise records and manage access to them were prefigured in the data protection legislation that came in earlier then FOI. These laws gave rights of access to records (rather than to information from records) to people who were data subjects. They gave rights to those people in certain cases to demand the destruction of particular records, and even, in some circumstances, to demand that the records be changed. There was still an expectation, though, that access would be given in the archives reading room, and that the general rules of closure would continue to apply. All the same, the changes made by these laws were truly profound. Archives services that held personal records, such as social service case files, found that the people who obtained access sometimes needed personal counselling and support. Users like this could not be treated as traditional researchers were. Issues of privacy began to take on greater significance.

The first thing to notice is that FOI requires at least workable records management practice. Clearly there is no point in giving people a right of access to documents or information where the records cannot be found. (We do have an illustration of this, in the case of Sierra Leone[2]). We also now have the international standard for records management, ISO 15489, which provides a good basis for introducing good practices where they were lacking. In the UK, the FOI Act explicitly requires records management, and lays down some of its vital components. Two requirements in particular stand out: the publication scheme, and the code of practice. In the first, organisations must prepare and publish a list of those parts of their record holdings which are or should be available for public reference. Obviously, no organisation can do this unless they have their records well under control. Once this publication scheme is completed, requests for information from the public can be referred to it, wherever this is possible.

The Code of Practice was first issued in 2002, and a second version, written in the light of experience and after a good deal of consultation, was published in 2009[3]. There will certainly be future revisions, and it is equally certain, in the light of the experience gained, that revised versions will take account of the spread of good practice over different areas of administration. The code does not itself carry legislative force, but is a detailed set of guidelines for any

and this development will have important implications for the public perception and use of archival evidence, and on the training and practice of archivists

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La recente legislazione nel Regno Unito, che applica standard e linee guida stabilite dall'Unione Europea e segue la pratica pionieristica di svariate altre nazioni, ha radicalmente cambiato la pratica archivistica. Le leggi principali sono la Legge sulla Libertà di Informazione del 2000 e la Legge sulla Protezione dei Dati del 1984 e del 1998. Ambedue hanno avuto ricadute sulla legislazione successiva (regolamenti sui processi e sulla pratica giudiziaria). Gli effetti di queste due leggi hanno cambiato la pratica archivistica abolendo di fatto il vecchio principio secondo il quale i documenti diventavano accessibili al pubblico dopo 30 anni (o simili), ed estendendo il diritto legale di accesso del pubblico. L'istituzione di un Commissario Indipendente ha modificato il modo in cui la legislazione archivistica viene attuata e nel modo in cui archivisti e record managers vengono impiegati. Sotto tale regime sono avvenuti cambiamenti importanti nella gestione dell'informazione e nel suo utilizzo da parte dei governanti, dei media e delle persone. È probabile che una simile legislazione si diffonderà anche ad altri paesi e regioni, e che questo sviluppo comporterà implicazioni importanti per la pubblica percezione ed utilizzo degli archivi, nonché sulla formazione e sul lavoro degli archivisti.

COOK, Michael, Svoboda informacij: Zakonodaja, ki je radikalno spremenila prakso v arhivih. Atlanti, Zv. 20, Trst 2010, str. 117-122.

Zadnja sprememba zakonodaje v Angliji, ki uvaja standarde in smernice v skladu z Evropsko unijo ter sledi trendom številnih držav, je

2. J A Kargbo, *The connection between good governance and record keeping: the Sierra Leone experience*, "Journal of the Society of Archivists", 30(2009), n. 2, pp. 249-260.
3. Available at http://www.justice.gov.uk/guidance/docs/foi-section46-code-of-practice.pdf. (accessed June 2010).

prinesla korenite spremembe v arhivski praksi. Osnovna zakonodaja so Zakon o svobodnem oblikovanju in pretoku informacij iz leta 2000 in Zakona o zaščiti podatkov iz leta 1984 in 1998. Kot posledica je prišlo do številnih novih podzakonskih aktov in delovnih praks. Omenjena zakonodaja je spremenila arhivsko prakso in načelo časovnih rokov, v katerih je bila dokumentacija dostopna javnosti po 30 letih (ali po drugih časovnih omejitvah) in je zato utemeljila postopek vedno večjega in razširjenega dostopa do arhivskega gradiva. Imenovanje neodvisnega informacijskega pooblaščenca je spremenilo način, kako se izvaja arhivska zakonodaja in kako se zaposlujejo arhivisti in drugi arhivski uslužbenci. Prišlo je do znatnih sprememb v načinu, kako vlade, mediji in posamezniki upravljajo in uporabljajo informacije. Verjetno bo omenjena zakonodaja prešla tudi v druge države in regije, kar bo pomembno vplivalo na dojemanje javnosti in uporabo arhivskih fondov.

SUMMARY

Freedom of Information (FOI) laws now exist in more than 85 countries, and many more are in the process of introducing these laws. The new regime introduced by FOI is a mark of the 21st century, and is important for the future of governance everywhere. This paper uses the example of the United Kingdom to point out radical changes in archival practice. FOI cannot be operated without effective current records management, and in this context the existence of the international standard ISO 15489 is an important factor. In the UK this has principally meant that all public organisations must issue a publication scheme, and must provide information from all records that are not explicitly kept closed for specific reasons. This means that access to records under FOI will always normally be by sending copies by post, against a fee (the amount of which is regulated). An important feature is enforcement. The matter is regulated by an independent Information Commissioner. Under his supervision any destruction

organisation wishing to establish a practical records management system conformable to FOI.

These enormously significant developments in records management (which only a few decades ago was a very much neglected area of public administration) are not necessarily obvious to members of the public, or to those with a direct interest in using the freedoms offered by FOI. What is obvious to these, however, are the provisions made for making records, or information from records, available to them in response to a request. The FOI law lays down that any person can submit a request for information from records, in writing, and that the recipient organisation is obliged to provide that information or a copy of the relevant records, within a set period of time. There is a list of excuses that can be offered, which of course includes defence or security secrets, personal privacy and commercial confidentiality. If a request does not conflict with any of these, the information from the record must be produced. The important new situation here has multiple aspects:

- The information (which would ordinarily be a copy of the relevant record) is sent to the requester, who therefore does not have to attend at an archival reading room.
- The information is not restricted because of its date, so that it may be drawn from a record that has already become an archive, held by the National Archives, or from a current or semi-current record in the originating department.
- In certain cases the copy record may be redacted – that is, sensitive information in it may be blacked out.
- The originating office may make a charge for providing the copy, but the amount of this is strictly regulated.

It perhaps takes some time to absorb all the consequences of these provisions. Records can be brought into archival use without going through the process of ageing and transfer that has been traditional. Records can be consulted long before they have been appraised and transferred from the originating office to the archives service. Free access can still be offered to users if they attend at the archives reading room, but may otherwise (and perhaps ordinarily) be provided by sending copies by post, against a fee.

A critical question is that of enforcement. Many countries have some sort of provision for freedom of access to information, often in their constitutions, but do not have any sort of enforcement procedure for specific cases. In the UK, enforcement is the province of the Information Commissioner, an independent high-level judicial officer[4]. The Commissioner receives appeals from members of the public and adjudicates on them. A list of cases and decisions is issued periodically. The existence of the Information Commissioner's office, which has status, resources and a public face, is an important new government facility.

Several issues of importance to record-keeping have already come to the surface. Perhaps the most striking is the question of appraisal and scheduled destruction of records. As part of their normal working procedures, offices are now required to appraise their records and to operate a regular destruction schedule. If an FOI request is received which deals with a record that has been destroyed,

4. General advice to the public on how to use the service is at www.ico.gov.uk, (accessed June 2010).

it is essential that the originating office can prove that the destruction was in accordance with an approved schedule. If this is not done, or if the record simply cannot be found, then the originating office is held to be in breach of the law. The same applies if the originating office has lost a record holding personal information; there have been several cases of lost memory sticks.

The FOI Act also makes it an offence, if there is an application for information, for an authority or people under its direction (employees, officials or others) to "alter, deface, block, erase, destroy or conceal any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information in the communication of which the applicant would have been entitled"[5]. In the same way, unscheduled destruction of records would probably be classified as a criminal activity if it came to light as a result of an FOI request.

The boundaries of application of the Act are constantly being questioned. The early months of 2010, immediately leading up to (and probably in part causing) a general election, were occupied in debating as to whether or not the personal affairs of Members of Parliament are subject to the legislation. It was decided that they were, and as a direct consequence very many members of the legislature were forced to resign, and in many cases to pay fines, or make repayments of public money they had claimed. In the general election that followed, a record number of candidates were new to political office. The newly elected government then issued new regulations under which the salaries of public officials were to be published, and policy statements that included new extensions of publicity to the emoluments of people in private industry. It is likely that the Information Commissioner's remit will continue to expand in this way.

In the UK, all this new legal activity has brought the National Archives (TNA) centrally into the public arena. The appearance of FOI laws has effectively overridden the rules for transferring records into archives, and under which they became open for consultation. In the UK these rules go back to 1838, and of course resemble similar rules operating in many other countries. The procedure for closing active records, appraising them, and passing them to the archives were therefore long established. So too were the rules under which records, once transferred to the archives, became open to users. All this is now changed. Records which are the subject of FOI requests must be made available whatever their age, and wherever they are kept. There is also a major change in the means of access. Anyone requesting information under FOI is supplied with the information by post: they do not have to attend at the TNA, and they do have to pay a fee. (The amount of the fee is regulated).

A recent study (Özdemir) of these changes gives an example. If a member of the public requests information contained in a police unsolved murder case, the TNA first looks at it to determine whether the material can be disclosed. Access to the information can be refused if (a) it falls under a general closure, if for example, the file gives personal information or unsubstantiated allegations against individuals; or (b) there is a reason specific to the particular case, for example if the police are considering further prosecution. If neither of

of records must only happen under an authorised destruction schedule. In this new regime, the National Archives (TNA) has become a central agency, since it carries out access in response to FOI enquiries, even where the records are held elsewhere in government offices. Examples are given of access to police records. The law applies also to electronic records, and the use of it by the public is clearly growing. All this points to a future in which only academic researchers will need to use the archival reading rooms; family historians will use the internet, and others will ask for and receive copies of records under the terms of the FOI system. Where these laws exist, they must be operated, if not by archivists, then by other kinds of record keeper. Here is a major challenge to our professional practice.

5. M Crockett, art. cit, p. 193.

these reasons for refusing disclosure applies, then it is accepted that there is a public interest argument for allowing it.

Therefore we can imagine a future in which archives reading rooms are retained in use mainly for academic researchers who need to be able to search systematically through archival fonds. Family history or personal researchers will ordinarily get access to their information by using online search engines. FOI users, as we have seen, get their information remotely. These are very profound changes for our profession. It must be admitted that some colleagues have claimed that these new principles (data protection and personal rights; FOI and the principle of public interest) have not made, and perhaps will not make, very significant difference to our general practice. We shall see.

The UK solution to the problems raised by these laws is to make the TNA the principal agent of disclosure to the public. This has given the TNA a valuable new place in the public face of government, and is enhancing its relationships with the public. It no longer needs to wait until transferred records reach the age of 30 years; instead, a rolling programme of opening and publicising records with popular appeal can be set up, allowing new revelations periodically through the year. The public profile of TNA has been greatly enhanced[6].

All these legal changes, of course, also affect the management and use of electronic records in their various forms. Archivists are very familiar with the argument that they must seize the opportunities offered by the appearance of these new media. It is said, if we do not manage these records, then others will step forward to do it instead. This warning applies also to the changes related to FOI. In the UK, TNA has been very active in stepping forward to be the principal agency for the public access to information from records. It has programmes to promote records management in the various government offices, it has allied itself actively with data collection and access programmes elsewhere in government, and it has encouraged government offices to manage FOI access to records held within those offices. The general effect of the FOI legislation, to abolish the old procedures for opening records after 30 years, has been brought into effect by the action of TNA. The office and work of the Information Commissioner is a significant benefit. These are very important milestones in the development of archival practice, which most countries will find themselves passing in the years ahead.

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