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Author: Dr Owen D Thomas, Senior Lecturer in Politics and International Relations, University of Exeter, UK. Email: o.d.thomas@exeter.ac.uk

# Paradoxical secrecy in British Freedom of Information Law[1]

Owen D. Thomas, University of Exeter
o.d.thomas@exeter.ac.uk
ORCID ID: 0000-0001-5470-9013

## Abstract

State secrecy is a necessary tool of liberal democratic governance, but public scrutiny of government is also essential to ensure accountability and good policy-making. The British Freedom of Information Act (FOIA) was introduced to promote such goals, giving the public a right of access to all but the most sensitive information. This law is flawed. The law explicitly assumes that the disclosure of official material poses an inherent danger to society and that secrecy works to protect against such harms. The notion that secrecy is also always potentially harmful to those same societal interests is absent. Drawing on recent legal disputes, I show how this imbalance has a profound and paradoxical effect: information that should, in principle, be accessible through the law is always too dangerous to release and is consequently subjected to permanent concealment.

## Introduction

It is often claimed that the United Kingdom is built upon a culture of secrecy: a 'basic assumption that good government is closed government and the public should only be allowed to know what

[1] I am grateful to Dorota Mokrosinska for her careful and supportive comments on previous drafts.

the government decides they should know' (Ponting, 1990: 1). When New Labour introduced the Freedom of Information Act (FOIA) in 2000, it promised to change a culture of government that regarded openness as an 'irksome imposition' (Cabinet Office, 1998: 34). The FOIA is regarded as an important part of the mechanisms used to hold the British state accountable, supporting an era of 'regulation by revelation' (Aldrich, 2009). The act is sometimes misused—frivolous and 'vexatious' usages of the act have included requests for the state's plans for managing 'zombie attacks' (BBC, 2012). But the FOIA is also a 'last forum of accountability' (Dobson, 2019), used by campaigners, journalists, and academics to reveal wrongdoing and provoke political change (e.g. Raphael et al., 2016).

My argument in this chapter is that the freedom of information law is also profoundly flawed because it is skewed in favour of the executive's interest in resisting disclosure. Under the law, disputes over whether official information ought to be disclosed are settled through a mechanism called 'the public interest test', according to which the decision on whether to disclose official material is reached by 'balancing' the public interests in disclosure against the public interests in refusal. This suggests that both sides have an equal chance of winning the debate, subject to the strength of their evidence. In reality, however, the balancing exercise is skewed in favour of secrecy because: (a) the harm of disclosure to goods and activities of government are interpreted as having greater weight than the disclosure's democratic benefits while the harm of secrecy is omitted from the equation, and (b) secrecy can often be presented as a 'protector' of the democratic benefits promised by disclosure.

This skew produces a paradox: the black letter of the law states that certain types of information—such as diplomatic exchanges between heads of state, minutes of Cabinet meetings or legal advice on warfare—should be accessible under the FOIA, but in reality, requests are blocked by the state's argument (accepted by the courts) that disclosure, even in the rarest of circumstances, would cause unacceptable harm. Such information is therefore always unobtainable when, by law, it ought to be accessible in principle. This makes the executive unaccountable in some policy areas. Even from a functionalist standpoint—a question as to whether the use of secrecy helps the state to achieve its proclaimed goals of democratic stability and security—this is a matter of concern (Horn, 2011:115).

The essay is set out in three parts. First, I provide an overview of the historical development of both the Official Secrets Act (OSA) and the FOIA in Britain. Law cements and codifies political ideology, and both the OSA and the FOIA contain the same ideological assumption: disclosure is inherently dangerous. The countervailing assumption that secrecy can be harmful to democracy—an idea at the root of the liberal political movement to establish freedom of information —is,

remarkably, not written into law in the same way. Second, I explain how an FOIA request works if it is opposed. Third, I use three case studies—where requests for disclosure were denied after lengthy appeals processes— to show how this one-sidedness in law produces paradoxical secrets.

## From 'gentlemanly discretion' to harm-avoidance: a brief history of British state secrecy

The invention of modern state secrecy can be traced to the sixteenth and seventeenth centuries in which European states embraced the doctrine of raison d'État (Thomas, 2019). Collecting knowledge of the state (such as statistics of population and assets), keeping this information secret as *arcana imperii*, and stealing the secrets of other states became an essential tool of security (Horn 2011: 108). But by the nineteenth century, state secrecy was derided by liberals as unconstitutional, authoritarian and a threat to society (Vincent 1999: 9). Underpinning this vilification of secrecy was a 'liberalism of fear' that behind every secret was the potential abuse or misuse of power (Shklar, 2004:158). In Britain, throughout much of the nineteenth century, this liberal attitude was reflected in political reforms such as the introduction of compulsory elementary education, the abolition of Newspaper stamp duty (reducing the cost of publishing) and the publication of Hansard (the published record of debates in the Houses of Parliament) that cultivated a literate population capable of consuming political information (Moran, 2012:27). By contrast, state surveillance and secrecy were matters of scandal. In 1844, the revelation that an Italian exile had been spied upon through his postal correspondence provoked such outrage that the espionage department of the Post Office was abolished (Vincent, 1999:2). In this context, increased legal protection for political secrecy seemed unlikely.

It is peculiar that the introduction of official secrecy legislation began at this time when British politics was becoming more open. The introduction can be explained, however, because the need for 'official' secrecy arose from a failure in the informal culture of concealment that had protected Britain's *arcana imperii* to date. State secrecy had been maintained through gentlemanly conventions of 'discretion' within the civil service, whereby career progression was attained by demonstrating one's trustworthiness and place within a social class (Moran, 2012:29). This culture failed with the convergence of two socio-economic developments. First, the expansion of the state into areas such as education, public health, and colonial administration generated an explosion of paperwork. A vast secretarial workforce was assembled in response. These workers were lower class, poorly paid, did not identify with the gentlemanly culture of discretion, nor feel a moral duty to comply with it (Vincent, 1999:79). Second, newspaper journalists—invoking the liberal ideology that aligned the public interest with open government—offered to pay for eye-catching disclosures (Vincent, 1999:77). Several clerks happily took advantage of the commodification of the political

secrets with which they had been entrusted. The state found itself ill-equipped to prevent the selling of state secrets.

The government's best defence was the threat of criminal prosecution. Under the charge of theft, secrets could be protected as the physical property of the state. But these laws were easily circumvented by a clerk who could memorise information without stealing the original documentation.[2] In response, the Breach of Official Trust Bill (later the Official Secrets Act) was laid before Parliament in 1889, criminalising any unsanctioned disclosures that were contrary to 'the interest of the state, or otherwise in the public interest' (cited in Maer and Gay 2008: 3). The law was 'catch-all', such that discussing the Home Office's shortage of toilet paper with one's spouse would be a crime just as much as passing military plans to the enemy (Moran, 2012:23). The act opposed journalists' conception of the public interest by writing into law, for the first time, the assumption that disclosure was potentially harmful to the common good.

Not until the mid-twentieth century did widespread criticism of state secrecy re-emerge. As post-war culture featured dystopian accounts of impending catastrophes caused by excessive secrecy (Fielding, 2014:147), political reform began. The Public Records Act of 1958 required government departments to transfer official papers to the Public Record Office after 30 years. By 1984, the Campaign for Freedom of Information was established, arguing that 'secrecy leads to poor policy-making and injustice to individuals' (Chapman, 1987:25). In 1992, the Major government promised to 'sweep away some of the cobwebs of secrecy' of the Cold War era—releasing over one hundred thousand hitherto secreted papers and publicly acknowledging the existence of the Secret Intelligence Service for the first time (Major, 1992). Finally, in 2000, New Labour introduced the Freedom of Information Act (FOIA) and argued that a right to know was necessary because official secrecy was leading to 'arrogance in governance' and 'defective decision-making', echoing the liberal fear of political secrecy.

There are three notable features of the FOIA's birth. Firstly, the government described disclosure as the *norm* and official secrecy as the *exception* to be used in rare circumstances. The state's attitude would be changed from 'this should be kept quiet unless' to 'this should be published unless' (Straw, 1999). Secondly, the state introduced a codification of the circumstances in which information could be exempt, which hinged on the harm that openness posed to the public good. Third, the FOIA was explicitly framed as a necessary response to an excessive culture of secrecy 'extending back to at least the 19th century and the Official Secrets Acts' (Cabinet Office, 1998: 34). The FOIA, however, shares the OSA's assumption that disclosure is harmful. The introduction of a legal right to know did not revive the liberal ideology that government was

[2] See Charles Marvin (Vincent, 1999: 78)

harmed by secrecy and protected by disclosure. Rather the law explicitly represents disclosure as potentially harmful to good government whilst missing any explicit representation of the alternative: the harm of secrecy.

## How Freedom of Information works through a misleading 'balance'

The process for FOIA requests is set out in *fig.1*. First, a person (or 'requester') asks an authority for official information. Second, if the authority holds that information and if the request is not prohibitively expensive or vexatious, the information should be released unless, in the third stage, it is covered by an exemption. There are two types of exemption: 'absolute' and 'qualified'. The logic of an *absolute* exemption is that some categories of information should never be disclosed because doing so in any instance would undermine a fundamental public interest. Examples of such interests include those related to the intelligence cycle (s.23, which exempts information supplied by, or related to, security bodies), fair legal proceedings (s32, which exempts court records), personal privacy (s40, which exempts most personal information), and the expectation of confidentiality (s41, which exempts information provided in confidence to an authority such as the identity of a police informant). If an absolute exemption applies, the authority may refuse to confirm or deny whether the information exists at all.

If the information is covered by a *qualified* exemption—which I will explain further below—the authority must use the 'public interest test' found in section 1(1):

> Any person making a request for information to a public authority is entitled… to have that information communicated to him. [This entitlement] does not apply if … the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

In other words, an authority must identify and weigh the public interests for and against disclosure. Information should be released *if the public interests in disclosure are greater than or equal to the public interests against disclosure*. If an authority refuses to disclose the information, a requester can appeal the decision: first, by asking for an internal review; second, by asking the Information Commissioner's Office (the UK's independent regulatory authority for information rights) to review the decision; third, by appealing to the Information Tribunal (the first tier of appeals in the British court system); and finally by appeal to the Upper Tribunal (equivalent to the High Court).

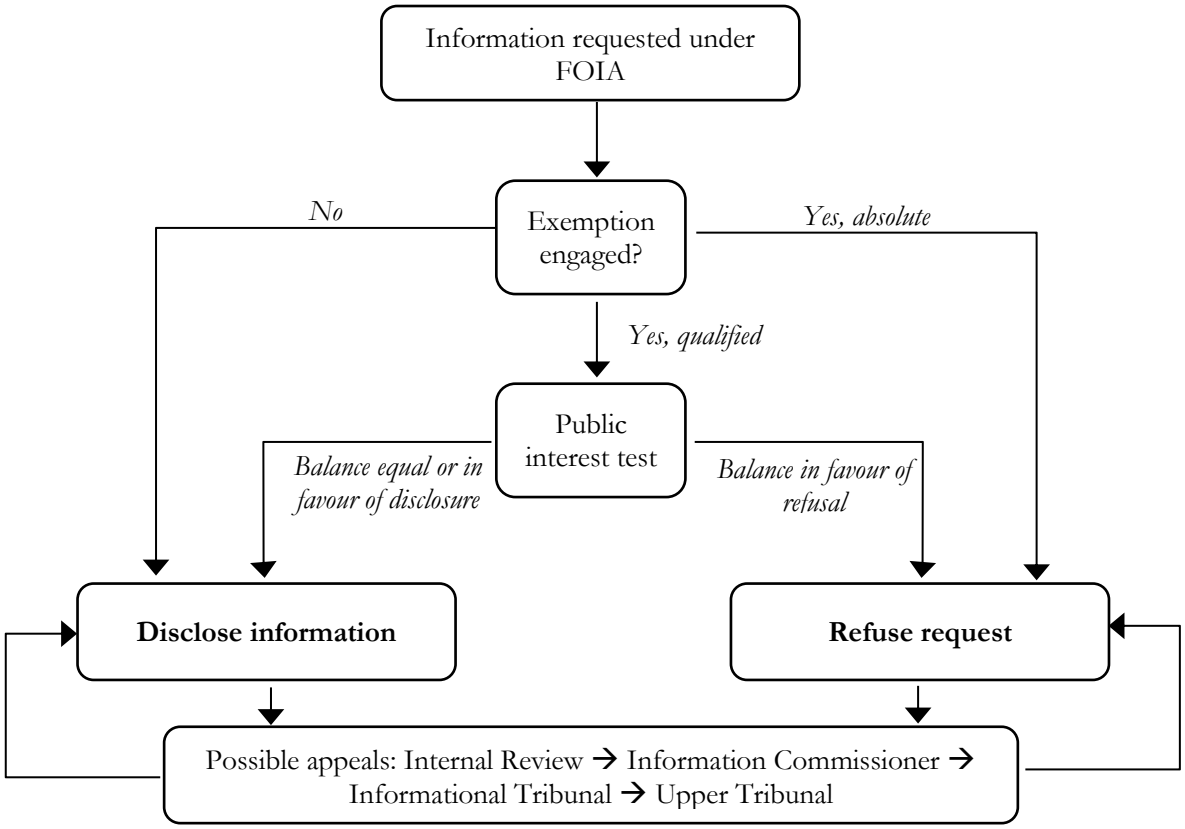


**Figure 1. The Public Interest Test (based on ICO, 2018: 5)**

This is a familiar democratic approach to state secrecy: good reasons need to exist for the secret activity and a publicly acceptable reason needs to be given for concealment (Luban, 1996). But I argue the FOIA is skewed in favour of executive arguments against disclosure. This is because there is an inequality between the 'public interests' articulated for and against disclosure.

*Incommensurable 'public interests' and the politics of harm*

'Public interests' are the common currency of FOI disputes. Those arguing for and against disclosure must show how the weightier public interests are on their side. Yet 'public interest' is an empty signifier, the meaning of which depends on a contingent judgement about what values and principles are understood to be in the best interests of society (ICO, 2013). The FOIA does not prescribe a list of public interests that must be used to argue *for* disclosure. Rather, requesters can make use of any argument that might link disclosure to the public interest. Public interests most often invoked in favour of disclosures include (based on ICO, 2018):

1. a *general public interest in transparency* implicit in the existence of the FOIA itself;
2. public interest in *promoting debate on a prominent issue* that has a widespread or significant impact on the public (e.g. a decision to go to war);

3. public interest in *disclosing specific information* to uphold justice and the fairness to the individual (e.g. information that helps the public understand their legal obligations or represent themselves);
4. public interest in the disclosure of information relevant to *a plausible suspicion of wrongdoing* (e.g. the disclosure of information on MP's expenses) and where disclosure may either refute suspicion and restore public confidence or provide a 'smoking gun' to prove that the suspicion was justified;
5. public interest in *understanding a decision-making process* free from interpretation or 'spin' (see the 'Cabinet minutes' dispute below).

By contrast, the FOIA does prescribe the public interest arguments to be used *against* disclosure. Authorities must oppose a request on the grounds that disclosure would negatively affect pre-determined public interests. The law identifies seventeen qualified exemptions detailing public interests—such as defence, the economy, and law enforcement—that could be harmed by disclosure. Examples include:[3]

1. Information should be withheld if its disclosure would, or would likely cause harm ('prejudice') to the 'defence of the British Islands or of any colony, or the capability, effectiveness or security of any relevant forces' (s26)
2. Information should be withheld if its disclosure would, or would likely cause harm ('prejudice') to the UK's international relations (s27)
3. Information should be withheld if its disclosure would, or would likely cause harm ('prejudice') to the 'economic interests of the United Kingdom or of any part of the United Kingdom' (s29)
4. Information related to the 'formulation of government policy' should be withheld if the benefits of disclosure are outweighed by the likely harm of disclosure (s35)

[3] There are two types of qualified exemption: 'prejudice-based' and 'class-based'. Both encourage the authority to oppose disclosure based on harms that would or would likely result. In prejudice-based exemptions, the authority needs to show how a pre-specified harm is posed by the requested disclosure in question (e.g. s26, s29 and s27 'harm to international relations'—see the 'Blair-Bush phone call' below). In class-based exemptions, the authority must show how the requested disclosure fits within a particular 'class' of documents (e.g. s35 'information related to the formulation of government policy'—see 'Cabinet Minutes' below) and how the public interests in secrecy outweigh those of disclosing information from that class. The authority achieves this by arguing that secrecy provides benefits (e.g. frank discussion) that would be threatened by disclosure.

The fact that the FOIA identifies public interests against but not in favour of disclosure would appear to favour the requester because arguments in favour of disclosure are unrestricted and can be offered at a broad, abstract level (see Hogan in ICO, 2018). Authorities, meanwhile, can only oppose a request when one of the prescribed public interests are threatened. When the 'public interest test' is applied and the competing arguments are weighed to determine where the balance falls, requesters can argue more freely. Yet as Ashworth explains, we ought to be wary of trying to settle matters through balance:

> At worst, it is a substitute for argument: 'achieving a balance' is put forward as if it were self-evidently a worthy and respectable goal…But the difficulty is that many of those who employ this terminology fail to stipulate exactly what is being balanced, what factors and interests are to be included or excluded, what weight is being assigned to particular values and interests (Ashworth, 1998:30).

The problem with the balancing exercise is twofold. First, the public interests in disclosure and secrecy are articulated at different levels of abstraction and in terms of values that are incommensurate. On one hand, the public interests in secrecy are formulated in *negative* terms as *specific harms* that disclosure would cause to *concrete activities* of government such as defence, diplomatic exchanges, international relations, law enforcement or policy formation. On the other hand, the interests in favour of disclosure are formulated in *positive* terms as *abstract benefits* advanced by the presence of disclosure: a 'general interest in transparency' or benefits such as promoting debate on a political issue, upholding justice to the individual or resolving suspected wrongdoing. In the balance drawn in this way—in the current version of the FOIA—harm features on only one side of the equation. The possible harms that are posed by the absence of transparency to specific government activities or public goods are omitted.

This skews the balance in favour of public interests involved in secrecy because decision-makers, when presented with a choice between protecting important state and societal activities from harm or obtaining abstract democratic benefits, perceive the former as more important than the latter. This approach to balancing public interests is often found in other political debates too, for example, on qualified rights such as privacy and surveillance. Surveillance powers—much like secrecy—are presented as a technology that protects society from concrete and imminent security threats—such as terrorism or organised crime—and these threats would increase without the use of such powers.[4] Privacy, on the other hand, is a democratic right the political benefit of which is

[4] In 2015, privacy campaigners told the parliamentary Intelligence and Security Committee (ISC) that bulk surveillance should be outlawed. The government warned that such powers helped to discover new threats. The campaigners agreed but stated: 'some things might happen that could

often too abstract and intangible to pinpoint. And in both cases, public discourse is pervaded by a 'realism' that 'there is no alternative' to the state's interference with qualified rights such as privacy or FOI (Dencik and Cable, 2017).

This reasoning is further reinforced by an epistemological approach to harm commonly found in security policy: imagining potential dangers and governing that uncertainty by pre-emptive action (Jackson, 2015). FOIA guidance states that an authority can refuse a disclosure request once three criteria are identified: a 'significant negative consequence'; a 'causal link' between disclosure and the negative consequence; and a belief that there is 'at least a real possibility of the negative consequences happening, *even if [the authority] cannot say it is more likely than not*' (ICO, 2019, my emphasis). Since the mid-1990s, the state has provided guidance that it is 'impossible in advance to describe … damage exhaustively' and that some harms will be 'indirect or longer-term', only appearing through long-term consequences that cannot be fully understood or predicted at the time of disclosure (cited in Beer, 2011: 198). With regard to the 'link' and 'real possibility' between the disclosure and the consequences, an authority need only identify a 'logical connection' between disclosure and the harm, and given that the potential harm 'relates to something that may happen in the future …it is not usually possible to provide concrete proof that the prejudice would or *would be likely* to result' (ICO, 2013, my emphasis). This means that disclosures can be refused for fear of the harm that *could* arise, it is one of many plausible futures. Advocates for disclosure, on the other hand, appeal to the present benefits that disclosure is expected to bring about. Lucia Zedner puts the problem as follows: 'we seek to weigh known present interests against future uncertainties' but 'future risks tend to outweigh present interests precisely because they are unknowable but potentially catastrophic' (2009: 137).

The skewed balance is complicated further because—as the law is written—non-disclosure can be presented as something that can achieve the vague, democratic benefits that are usually presented as public interests in favour of transparency. Put differently, as the political and legal practice makes clear, one side of the balance—the pro-secrecy side—can 'invade' or 'colonize' the other side—the pro-disclosure side (Thomas, 2019). Simply, secrecy can be presented as a 'protector' of the same public interests that are served by disclosure. As the discussion below

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have been prevented if you took all of the most oppressive, restrictive and privacy-infringing measures. That is the price you pay to live in a free society.' The ISC disagreed, stating that 'we do not subscribe to the point of view that it is acceptable to let some terrorist attacks happen in order to uphold the individual right to privacy – nor do we believe that the vast majority of the British public would' (ISC, 2015: 36). The trade-off was reduced to a balance between a vague, abstract concern for an individual's privacy against the future threat of specific, large-scale physical violence to society.

demonstrates, a request for official information could be made on the grounds that disclosure might prove or refute suspected wrongdoing and thereby promote accountability. Against disclosure, the FOIA provides state authorities with the language to argue that those *same* democratic interests would be harmed by transparency: the precedent set by disclosure could 'chill' record-keeping and incentivise politicians to discuss matters 'off the record', thus weakening the prospects of future accountability. A decision to withhold information, on these terms, is no longer an appeal to security over liberty or pragmatic interference with democratic rights. Instead, the refusal to disclose is expressed as a defence of liberty and democracy. The balance of public interests remains skewed, because—under the law—while secrecy can be presented as something that serves the 'positive' democratic benefits that are usually aligned to transparency, it is logically impossible for transparency to serve the 'negative' public interests that are usually aligned to secrecy (i.e. avoidance of the harm produced by disclosure).

## Paradoxes of the law: insights from recent FOI disputes

I now turn to examine three examples of FOI requests that were ultimately refused: diplomatic exchanges between former heads of state Tony Blair and George Bush; minutes of Cabinet Meetings from March 2003 just before the Iraq War; and legal advice for the targeted killing of a British citizen. Each case illustrates my argument that (1) the public interest test is skewed to favour secrecy, leading to (2) the de facto production of categories of information that can never be disclosed, in spite of the letter of the law. A summary of key points can be found in *table 1*.

### *Plowden's request for the Blair-Bush phone call, 2010-2014*

In February 2010, British citizen Stephen Plowden made a request to the Foreign and Commonwealth Office (FCO) for records of a telephone call between Blair and Bush from 12th March 2003. It was rumoured that, during the call, the two men agreed to blame the French for preventing a UN Security Council resolution that would provide legal authority for invasion, thereby justifying Anglo-American unilateralism. Initially, Plowden's request was refused by the FCO. But this refusal was overturned on appeal to the Information Commissioner and Information Tribunal. Finally, the Upper Tribunal reversed the decision again and refused disclosure. The courts ultimately decided that the potential harm of disclosure to the 'special relationship' and diplomatic information-sharing outweighed the pro-disclosure public interests in transparency.

*How the refusal was justified*

First, the FCO refused the request under the section 27 qualified exemption of the FOIA that allowed information to be withheld 'if its disclosure …would, or would be likely to, prejudice relations between the United Kingdom and any other State'. The FCO argued that the future Anglo-American diplomatic relationship would be irrevocably harmed by disclosure. When Plowden appealed the FCO's refusal, two FCO officials gave evidence to the Information Tribunal to explain that disclosure would threaten the 'candid' relationship between two heads of state:

> If you theoretically imagine that the US president can say what he wants, but the UK PM can't, you have a very odd conversation. In the real world, very difficult to sustain. If the UK PM is less candid, his interlocutor would be less candid. The underlying dynamic of the conversation will change (Lapsley, 2012).

This would, another FCO official told the tribunal, chill the 'information flow' between the UK and US, leading to 'serious disadvantages in [the UK's] ability to pursue foreign policy/national security' (Quarrey, 2012).

Against this argument, both the Information Commissioner and the Information Tribunal identified pro-disclosure public interests in exposing 'paramount' decisions to public scrutiny and 'transparency about, and accountability for' the decision to go to war ([2012] UKFTT EA/2011/0225 (GRC)). Plowden himself told the Information Tribunal that

> going to war is the most important decision a country can take. The invasion of Iraq was and is widely believed … to be illegal and immoral… led to thousands of British casualties, the deaths of thousands of innocent Iraqi civilians and untold other sufferings [and] increased the threats to our national security…The question which is still to some extent obscure…is whether the British Prime Minister and Foreign Secretary deliberately misrepresented the French position in order to justify the invasion (Plowden cited (2012] UKFTT EA/2011/0225 (GRC)).

The Information Commissioner and Information Tribunal's decision was not to reject the FCO's argument, but to order redaction of the US-side of the conversation and of any sentence from the UK-side likely to pose harm to the diplomatic or intelligence-sharing relationship between the UK and US.

The Upper Tribunal, however, overruled this compromise for two reasons. First, redaction itself was 'unrealistic' and potentially harmful because the public would know that information was missing. This could 'lead to attempts to infer what might be missing', which 'might be possible' ([2013] UKUT 275 (AAC), 16). Secondly, the Upper Tribunal criticised the Information Commissioner and Information Tribunal for deciding that the benefits of disclosure outweighed its 'detrimental effects' to foreign alliances. The Upper Tribunal also expressed concern that

members of the Information Tribunal lacked personal experience of the diplomatic consequences of disclosure and ought, therefore, to rely more on the government's 'expertise and experience in relation to foreign policy matters as well as security' ([2013] UKUT 275 (AAC), 15). Whilst the liberal ideology of publicity may have supported disclosure, the Upper Tribunal's interpretation of the law imposed an unsurmountable hurdle upon Plowden to explain how the revelation of Blair's utterances outweighed the demise of the diplomatic relationship. This interpretation was likely, if not predestined, by the FOIA's explicit focus on the potential harms of disclosure. The case was sent back down to a new Information Tribunal. The new tribunal struggled to mitigate the harms of disclosure and conceded that it 'must give due respect' to the experience and expertise of the FCO. Disclosure was refused for a final time.

*How the decision depended upon a one-sided balance of harm*

The dispute was constrained by the section 27 exemption into a balance between an abstract pro-disclosure public interest in transparency and accountability *versus* the pro-secrecy public interest in avoiding harm to the UK's international relations. In this form, the law presupposed that 'international relations' and 'transparency' are—*prime facia*—opposing public interests. This implicit ideological position in the law obscured the well-versed argument that governing in secrecy also risks harm by privileging private interests or enacting flawed policy (Horn, 2011). To make the public interests commensurate, it needed to be understood that secretive foreign policy-making can be harmful and that transparent, democratic forms of foreign-policy making can lead to long-term peace and security (Colaresi, 2014: 26). Plowden's testimony hints at these points—but the framing of the law obscures such nuances.

*How the decision leads to the permanent withholding of information that should be accessible*

The FCO argued that disclosure—even on rare occasions—would set a precedent that such information could be routinely disclosed, thereby risking serious harm to the Anglo-American diplomatic relationship. As one official told the Information Tribunal:

> I've spent a lot of time negotiating…Whenever someone says, 'this won't set a precedent', that's exactly what it will do. If we release this information, we would be crossing a threshold in terms of the kind of information we would be releasing. I find it inconceivable that the US wouldn't ask itself tough questions—might this happen again, might the threshold shift? (Lapsley, 2012).

Even redacting large sections and releasing ostensibly innocuous sentences from Blair's side of the conversation posed this risk, because it may be possible for the audience to deduce what was missing.

> If you put one half of a conversation in, you lead others to infer what the other half of the conversation was. This might be more worrying from a US perspective, because they might be able to construe all sorts of things that Blair might or might not be agreeing to. [This] opens up debate about what he might be saying, which the US wouldn't welcome (Lapsley, 2012).

The Information Tribunal objected that if decisions are driven by 'worry[ing] about guesswork' then 'we can never redact anything, because redaction leads to guesswork' (Hopkins in Lapsley, 2012). The FCO official replied that exchanges between heads of state are a special case, usually concerning 'the most sensitive things…this is the apex of the apex in terms of how conversations work' (Lapsley, 2012). If taken seriously, this would be akin to imposing a blanket refusal to disclose records of communication between Heads of State as a *category* of information, no matter how innocuous. Diplomatic exchanges would thus be subject to a *de facto* permanent exception, even though the legal exemption upon which the FCO relied to oppose the disclosure is qualified, not absolute.

### ***Lamb's request for the Iraq War Cabinet Minutes, 2006-2012***

Another controversy surrounding the Iraq War was the allegation that the Cabinet of the British Government had been prevented from properly scrutinising the decision to invade. Clare Short (then-Secretary for International Development) claimed she was blocked in Cabinet by 'many voices calling for me to be quiet and not ask such questions and no discussion was allowed' (Short cited in Woolf and Rice, 2005). In 2009 and again in 2012, Chris Lamb—an information rights campaigner—requested the official minutes of Cabinet meetings from March 2003, just days before the war. On both occasions, the process led to the same refusal justified by the paradoxical argument that the public interest in accountability was better served by withholding the information. This case shows how secrecy can be presented as a 'protector' of the same public interests that are served by disclosure illustrating my claim that pro-secrecy arguments can 'colonize' pro-disclosure public interest arguments.

#### *How the refusal was justified*

The Cabinet Office refused Lamb's initial request, arguing that the public interest in disclosure was outweighed by the harm to 'formulation of Government Policy'—a qualified exemption in section 35(1). This harm would arise because Ministers—fearful that their discussions would be made public in the future—would feel inhibited from being frank with one another, leading to worse decision making.

This refusal was overturned by both the Information Commissioner and the Information Tribunal, who identified a pro-disclosure public interest in accountability, judging that there was 'a widespread view' that decision on military action was 'either not fully understood or that the public were not given the full or genuine reasons for that decision' (Thomas in Sparrow, 2008). The Information Tribunal concluded that 'the value of disclosure' was the opportunity for the public 'to make up its own mind on the effectiveness of the decision-making process in context' rather than rely on second-hand accounts in political memoirs or the media ([2009] UKIT EA/2008/0024, 82).

The government chose not to appeal the decision and instead exercised a veto power contained in section 53 of the FOIA that allows the executive to block disclosure in 'exceptional circumstances' (MOJ 2012). The Attorney General justified the veto by warning that disclosure—'the fear of publicity'—might discourage future speakers from expressing dissent for fear of being held to account for views later cast aside.

> Serious and controversial decisions must be taken with free, frank—even blunt—deliberation between colleagues. Dialogue must be fearless…They must ensure that decisions have been properly thought through, sounding out all possibilities before committing themselves to a course of action. They must not feel inhibited from advancing opinions that may be unpopular or controversial (Grieve, 2012: 3).

Further, the executive argued that publishing the minutes would damage the possibilities for future accountability:

> If there cannot be frank discussion of the most important matters of government policy at Cabinet, it may not occur at all. Cabinet decision-making could increasingly be driven into more informal channels, with attendant dangers of a lack of rigour, lack of proper accountability, and lack of proper recording of decisions (Grieve, 2012: 3).

Releasing the minutes would, apparently, lead to a 'chilling effect'—a fear of disclosure leading to less information being communicated and recorded (Worthy and Hazell, 2017: 31)—leading to empty archives and diluted minutes that would be useless for holding government decision-making to account. This would, over time, impair future publics, historians and inquiries from reconstructing and understanding the past practices of Cabinet—which is presumably where the Attorney General thinks 'proper accountability' is found.[5]

[5] There is scant evidence of a chilling effect occurring as a result of FOI requests (Hazell et al., 2010: 161-180). After an investigation in 2012, the House of Commons Justice Committee states that it 'was not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act' (HCJC, 2012). Despite the lack of evidence, the spectre of a chilling effect is powerful. It is an apt example of the potential harms that authorities are encouraged to imagine when opposing an FOI request.

*How the decision depended upon a one-sided balance of harm*

The executive veto hinges upon the potential harms of disclosure to public interests that are usually aligned to publicity: democratic deliberation and accountability. The problem of making deliberations public is a familiar problem for democratic theorists (Chambers, 2004: 389). If speakers feel compelled to only articulate publicly defensible arguments, this can produce 'plebiscitary' arguments that are disingenuous, are chosen to appeal to the broadest majority and the lowest denominator, are shallow and poorly reasoned, and easily support crude majoritarian, intolerant or prejudiced policies. But the veto overlooks that those same harms to democratic deliberation and accountability can be caused by continued concealment: just as openness poses the harm of plebiscitary reason, secrecy poses harms of 'private' reason: wilful abuses of power, incompetence, and self-deception. As one Member of Parliament said after the veto,

> The argument against disclosure is that it might undermine full and frank discussion in Cabinet and mean that discussion will take place informally, outside the meeting. However, is not that precisely what happened under Mr. Blair?

Good decision-making depends on avoiding *both* harms, and neither supersedes the other. The veto emphasised one but ignored the other because the FOIA only considered harm on one side of the public interest test.

*How the decision leads to the permanent withholding of information that should be accessible*

The veto suggests a paradox. The public could not know whether the quality of Cabinet deliberation was undermined in 2003 unless the minutes were published, but publication poses a risk of damaging future deliberation. The veto implies that, on pain of damaging Cabinet's deliberations, Cabinet discussions can never be disclosed under FOI, as the Information Commissioner pointed out:

> If the veto continues to be exercised in response to the majority of orders for the disclosure of Cabinet minutes, it is hard to imagine how the most significant proceedings of the Cabinet will *ever* be made known before the elapse of 30 years …it seems that [such] disclosures … will, by definition, always be the ones to attract the veto as an 'exceptional case' (Graham, 2012).

This provides a loophole that allows the executive to conceal information, but this simultaneously threatens to undermine good government by ignoring the harms of excessive secrecy.

### ***The Reyaad Khan legal advice, 2015-2017***

In September 2015, then-Prime Minister David Cameron informed the House of Commons that a British citizen named Reyaad Khan had been killed in a 'precision airstrike' by an RAF drone in Raqqa, Syria. The Attorney General had advised the government that the action was lawful, based on the knowledge that: Khan was 'actively … seeking to orchestrate specific and barbaric attacks against the West'; that there were no feasible, alternative means of preventing the planned attacks; and the airstrike was therefore 'necessary and proportionate for the individual self-defence of the United Kingdom.' This was a 'new departure' for British foreign policy because a military asset had been used to kill in a country in which the UK was not involved in a war (Cameron, 2015). Following the announcement, a human rights NGO—Rights Watch UK—made a freedom of information request for the Attorney General's legal advice. The request was refused, so Rights Watch UK appealed to the Information Commissioner—who refused the request—and then the Upper Tribunal—which also refused the request. Given the complexity of this dispute, I will focus solely on the Upper Tribunal's final refusal.

*How the refusal was justified*

The government originally refused the request on the grounds that it fell under an absolute exemption—section 23—which allows authorities to withhold 'information supplied by, or relating to, bodies dealing with security matters' (such as the intelligence agencies or special forces). The Upper Tribunal rejected this claim and decided that *some* of the advice could, in principle, be disclosed. The advice could be divided into:

1) a general policy principle that, under certain conditions, targeted drone strikes can lawfully be used outside armed conflict against identified individuals who are planning a terrorist attack in the UK;
2) specific intelligence about Khan and the threat he posed that would affect the decision to authorise the strike;
3) operational information about how to implement the strike (e.g. the optimum time and specific location).

The Upper Tribunal decided that the 'general policy principle' could be disclosed separately from the 'intelligence' and 'operational' information. This is because it should be possible to express a policy principle entirely in an abstract hypothetical form: 'identify[ing] the circumstances and factors that have to be in place to render both the policy and then decisions made pursuant to it lawful ([2017] UKUT 495 (AAC), 21).' It should be possible, in other words, to disclose the parts of the legal advice that set out the government's interpretation of international law and its

understanding of the general principle of when, where and how it would be lawful to kill in anticipatory self-defence.

Having established that some of the advice *could* be published, the Upper Tribunal began the process of identifying and balancing the public interests for and against disclosure. In favour of secrecy, the Attorney General's Office claimed that the public interests in disclosure were outweighed by the harm to 'formulation of policy related to advice from law officers' (section 35 (1)(c)) and 'Legal professional privilege' (LLP)—that is, the frank and confidential relationship between client and lawyer (section 42). These public interests would be harmed because disclosure may cause a chilling effect, discouraging future Attorneys General from giving frank advice on sensitive issues. In favour of disclosure, Rights Watch UK claimed that there was a public interest in a 'full and informed' discussion of the lawfulness of the Raqqa attack and the 'new departure' policy—particularly in terms of the human rights concerns raised by a policy of pre-emptive killing. That is, there was a public interest in the disclosure to examine whether the interpretation of the law was correct, and what the effects on human rights would be.

The Upper Tribunal decided that these public interests in disclosure were outweighed by the need to protect against the harm of disclosure to LPP and the 'frankness and confidentiality between client and lawyer'. There were *no strong public interests in disclosure*, the Upper Tribunal judged, because the policy principle could be debated without disclosure of the legal advice ([2017] UKUT 495 (AAC), 76). In support of this decision, the Upper Tribunal referenced a 2016 inquiry by the Joint Committee on Human Rights (JCHR) that openly scrutinised the government's general policy on targeted killing. The report was based on oral and written evidence—including the Defence Secretary and Attorney General. The JCHR inquiry demonstrated, according to the Upper Tribunal, that such scrutiny of the government's policy could take place without public disclosure of the legal advice. But this was not entirely correct.

Some questions about the targeted killing policy were not fully answered in the JCHR inquiry. For instance, the JCHR requested clarification about the government's interpretation of 'imminence' in international law. The government's policy is to use lethal force abroad, including outside of armed conflict, against individuals suspected of planning an imminent terrorist attack against the UK, when there is no other way of preventing the attack (JCHR, 2016a:7-8). In response, the JCHR asked: how does the government decide that a threat is imminent? When and how do an individual's planned activities pass this threshold? Does the planned terrorist attack need to have a given scale or timeframe? If the threshold of imminence is interpreted too broadly, the JCHR argued, the UK's policy could amount to the targeted killing of any member of a

terrorist organisation abroad—which is perilously close to a policy of assassination that is illegal under international law. The government's formal response to this question is revealing:

> while high-level answers have been given to the Committee's questions, many of the questions are hypothetical … and the answers should not be taken as representing the Government's detailed and developed thinking on these complex issues. The need to take any future action would be considered according to the circumstances of each operation.
>
> …imminence must be interpreted in the light of the circumstances and threats that are faced …it will be a rare case in which the Government will know in advance with precision exactly where, when and how an attack will take place (cited in JCHR, 2016b: 14-16).

The government states that it is *not possible to produce such a generalisable threshold* for when a threat is sufficiently 'imminent' to justify self-defence, thus the policy principle *cannot* be separated from the 'intelligence' and 'operational' information. I will argue below that the government's refusal to state a generalizable policy principle has two implications. First, it hints at a serious harm posed by secrecy to democratic governance, which, overlooked by the Upper Tribunal, has resulted in its skewed balance between public interests involved in concealment and disclosure of information related to the case. Second, it has the effect of 'reactivating' the absolute exemption under section 23 of the FOIA (the automatic exemption of 'security-related matters' from disclosure), which was the Attorney General Office's original attempt to refuse the request.

*How the decision depended upon a one-sided balance of harm*

On the first point, if the government cannot publicly (and perhaps did not in the Khan advice) provide a coherent and robust explanation as to what constitutes an 'imminent' threat, it is reasonable to fear that the existing policy is incompatible with the rule of law and would not acquire citizens' approval. As noted about, one of the anxieties about Western governments' interpretation of 'imminent threats' is that it could be a slippery slope toward the normalisation of assassination (Boyle, 2015). In Thompson's words, 'if one of the reasons that a policy cannot be made public is that it would be defeated in the democratic process, then the policy should be abandoned' (1999: 183). Policy principles cannot be adequately scrutinised in public, this is harmful to liberal democratic governance. This harm is itself an *undervalued* pro-disclosure public interest. In overlooking this harm, the Upper Tribunal's contention that are no strong pro-disclosure public interests was skewed in favour of secrecy. To make the balance of public interests commensurate, the abstract value of transparency (alongside other democratic benefits such as public

understanding) must be made explicit in its 'negative' dimension: a general policy that cannot be clearly and comprehensibly scrutinised in public is harmful to liberal democracy.

On the second point, the government's refusal to state a generalizable principle of imminence underlying its security policy on account of the impossibility of disaggregating it from the 'intelligence' and 'operational' information effectively 'reactivates' the absolute exemption of 'security-related matters' from disclosure under section 23 of the FOIA. If correct, this implication points to a serious failure in the FOIA insofar as it allows the government to conceal policy principles within exempt information. Concealment of policy *principles* in addition to concealment of policy-specific *contents* is problematic in liberal democratic states for reasons explained by Dennis Thompson (1999). Even if policy details can be legitimately withheld from the public, this is only on the condition that officials admit that they resort to secrecy, and that the secrecy is justified in a process that is not secrecy and in which officials' *reasons* for the secrecy are open to public scrutiny. While the citizens do not know the details of the secret policies and, thus, cannot authorise them or call decision-makers to account, 'second-order publicity about first-order secrecy' overcomes this democratic deficit: knowing *that* certain political programmes are secret and being able to review the *reasons* provided by the officials for the secrecy, citizens can, at least partly, authorise them and call decision-makers to account (Thompson 1999, 185). This is how absolute exemptions within the FOIA can be justified. The s23 exemption for 'information supplied by, or relating to, bodies dealing with security matters' can be justified insofar as the *fact* of classification and the *reasons* for classifying information regarding security operations are publicly known. Those reasons are well-established: the disclosure of operational or intelligence-related information would endanger specific security practices (e.g. surveillance of suspected terrorism) (Gill and Phythian, 2018: 208-240). The s23 exemption does *not* extend to the general policies that govern those security practices and the behaviour of security actors (e.g. policies on detention and interrogation techniques that *are* open to scrutiny). The issue with the government's refusal to make public the Attorney General's legal advice on the Khan killing is that it secretes information within an exemption that has not been publicly scrutinised for that purpose. In other words, the s23 exemption was not designed (as the Upper Tribunal's approach clearly shows) to conceal high-level policies on the government's interpretation of killing in international law.

*How the decision leads to the permanent withholding of information that should be accessible*

Whether the legal advice on Khan's killing is withheld under the section 23 exemption or under the qualified exemptions that protect legal advice to the government (sections 35 and 32), the result is the same: government policies that, apparently, cannot be published either in-context or

in abstract terms and which are, therefore, subject to a *de facto* permanent exception from FOIA requests. This is, once again, sustained by the wider imbalance in the FOIA whereby 'harm' only features on one side of the decision—the harm to 'security' practices and/or the free and frank provision of advice in government. To be commensurate with the harm to LPP, the FOIA should list the public interests in disclosure including a public interest in protecting against the potential harm of a policy that, apparently, cannot be publicly stated in the abstract.

568 **Table 1. Summary of case studies**

| | **Balance of public interests** | **Harms missing from the balance** | **Paradoxical secret** |
|---|---|---|---|
| **Blair/Bush exchanges** | Transparency and accountability of the decision to go to war **outweighed by** potential harm to diplomatic relationships. | Secret foreign policy-making. | Diplomatic exchanges can never be disclosed because even one disclosure (to improve foreign policy decision-making) would harm future foreign policymaking. |
| **Cabinet minutes** | Understanding of, accountability for Cabinet decision-making **outweighed by** potential harm to full and frank debate. | Private reason (not just plebiscitary). | Cabinet minutes can never be disclosed because disclosure (to improve accountability for decision-making) could damage accountability for decision-making. |
| **Khan advice** | 'Full and informed' public discussion of the 'new departure' policy **outweighed by** potential harm to the 'frank and confidential' relationship between client and lawyer **or** exempt as 'security-related'. | A general policy that cannot be stated in public. | Legal advice on targeted killings cannot be disclosed because it would harm operational practices **and** such advice can be scrutinised as a general principle, **but** the general principle cannot be explained without references to the circumstances of each operation. |

569 **Conclusion**

570 This chapter started with the observation that the FOIA serves an important accountability
571 function—even if it is used to request plans for a zombie apocalypse. The liberal movement
572 against state secrecy positioned publicity as essential to the security and wellbeing of a democratic
573 society. Oddly, this ideological assumption is not written into the FOIA. More surprisingly, another
574 ideological position is written into law instead: a politically conservative assumption that disclosure
575 is inherently dangerous to the public interest. A consistent argument against disclosure, found in

all three cases, is the harm to good quality deliberation. This is legitimate; exposing government to the harsh gaze of transparency can have negative consequences. But concealing areas of government also has negative consequences. Good governance depends on managing the excesses of both, which in turn requires a law that can accommodate arguments on both sides. Such a debate is hamstrung in FOI because the law encourages discussion of the harms of disclosure but not the harms of secrecy.

The effect of this one-sidedness is the *de facto* concealment of certain categories of information that ought to be accessible under the FOIA: diplomatic messages, cabinet records, and legal advice. These categories are not, under the black letter of the law, protected by an absolute exemption. As such, there is no democratic legitimacy for their permanent exclusion from FOI requests. This is a strange exceptionalism—it does not depend on the usual executive appeal to conditions of emergency to arbitrarily deviate from liberal-democratic norms. Stranger still, the information in these categories is carefully preserved but may never be available to public scrutiny—perhaps until the zombies are the only ones left to read them.

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