

Security in the balance: How Britain tried to keep its Iraq War secrets

State secrecy is incompatible with the values of liberal democracy if there is no publicly reasonable justification for the concealment. So how can a liberal democracy continue to keep state secrets amidst suspicion that no such justification exists or that, worse, those secrets contain evidence of wrongdoing? This paper maps and critiques the justificatory strategies used by the British state to refuse to disclose secret material related to the 2003 Iraq War, despite widespread accusations of hidden deception and illegality. Through an analysis of the legal discourse that underpins freedom of information and disclosure protocols, the paper shows how the law regulates disclosure through a metaphorical ‘balance’ of public interests. This balance, however, is no balance at all. It is profoundly one-sided because security only features on one side. The law explicitly recognizes that disclosure can create insecurity for public interests, but lacks any recognition of the opposite: the insecurity of secrecy. Rather than security trumping liberal values, this law allows enduring secrecy to be framed, paradoxically, as a means to secure liberal democratic accountability. The significance of this claim is far-reaching as FOI laws in many other countries employ a similar harm-based, one-sided justificatory strategy.

Introduction

‘Suppression is the instrument of a totalitarian dictatorship; we don’t talk of that sort of thing in a free country! We simply take a democratic decision not to publish.’

- Sir Humphrey Appleby, fictional civil servant in the British television series *Yes Minister* (Jay and Lynn, 1981).

Secrecy is dangerous. Despite a global growth in freedom of information (FOI) laws, there remains a concern that state secrecy is abused to conceal mistakes and wrongdoing (Sagar, 2013; Roberts, 2006; Bail, 2015). But there are also many good reasons for secrecy, such as the protection of national security, individual liberty, economic activities and political negotiation (Bok, 1989; Luban, 1996; Chambers, 2004). An inescapable tension is that state actors conceal official information on the grounds that doing so protect the values of democratic self-government and security, *yet* those very same values are endangered by concealment (Curtin, 2014).

This tension was exemplified in the dispute over the disclosure of state secrets about Britain's decision to participate in the 2003 Iraq War. It was repeatedly alleged that the Blair Government misled the public about the reasons for war. This generated repeated demands, via public inquiries and FOI requests, for the publication of official information. Despite this pressure, successive governments refused to disclose some material. The executive claimed that some classes of information (such as diplomatic exchanges and records of Cabinet) that should, in theory, be accessible under FOI law could, in practice, *never* be disclosed because the future consequences of disclosure would be too harmful to the public interest. Successive governments have defended this argument, even vetoing judicial orders for disclosure. This is a form of exceptionalism: arbitrary decisions to deviate from a self-professed liberal-democratic norm of disclosure, justified as an act of precautionary risk management against the possible future harms of disclosure (Aradau and Van Munster, 2009: 688, 694).

A puzzle ensues: *if official secrecy is defended on the grounds that it protects the public interest, how can this justification stand if there is widespread suspicion that the secret contains evidence of wrongdoing against the public?* The paradoxical answer, in the above words of the consummate bureaucrat Sir Humphrey, is that the refusal to disclose material must appear to be a 'democratic decision'. This paper explains the strategies used by the British state to justify exceptional secrecy, not as a suspension of liberal democratic principles but as a performance *of* them. Yet this move relies on a peculiar securitisation of information that ultimately undermines democratic deliberation.

Whether or not state secrecy is a problem depends upon the theoretical lens applied. The first section of the paper reviews three standpoints on state secrecy, each present in contemporary public discourse. First, *raison d'État* (or reason of state) frames disclosure as a threat to national security — a refrain often used by authorities, most notably intelligence agencies, to defend concealment. Second, classical liberals frame state secrecy as a threat to individual security — a popular argument with transparency campaigners who link disclosure to the deterrence of defective government. Not only are these two approaches irreconcilable, they also both rely on the projection of insecurity. Third, deliberative democrats resolve this tension by recognising that liberal democracy can be harmed by both excessive secrecy and disclosure. Deliberative democrats propose that limited state secrecy is compatible with liberal democratic principles so long as there is a publicly acceptable reason for both the secret activity and the subsequent concealment. This compromise broadly reflects the contemporary justification for state secrecy in liberal democracies: the state relies on an implicit validity claim that it could reveal and justify itself in accordance with public reason

if called to do so. What makes Britain's refusal to disclose its Iraq War secrets puzzling is that it appears to be an exception to this validity claim. The secrets were kept despite widespread suspicion that they contained evidence of wrongdoing *and* despite repeated calls for disclosure from FOI campaigners, the judiciary, and an official public inquiry.

The paper then examines how UK information rights law, especially the Freedom of Information Act (FOIA), smooths over this tension. Disputes over disclosure are settled through a 'public interest test', which requires the state to 'balance' the public interests for and against disclosure. This suggests both sides have an equal chance of winning the debate, subject to the strength of their evidence. Yet this balance is not a balance at all. It is profoundly one-sided. There is an explicit acknowledgement in law that disclosure poses harm to the common good, but the law does not recognise the obverse: the possible harm to liberal governance posed by secrecy. Insecurity only features on one side of the equation: the insecurity of disclosure. *The insecurity of secrecy is not recognised.* The significance of this claim is far-reaching. FOI laws now exist in over one hundred countries (Luscombe and Walby, 2017: 379), and many of these laws employ a similarly harm-based, one-sided justificatory strategy.ⁱ

Finally, the paper examines two examples to demonstrate how this legal discourse justifies the refusal of disclosure requests — first, correspondence between Tony Blair and George Bush, and second, minutes of Cabinet Meetings from March 2003. The examples have three notable features. First, continued secrecy was associated with security; disclosure was associated with risk and insecurity. The refusal to disclose the material was justified as a measure to secure the public interest against potential harms, such as the loss of diplomatic relationships or poor decision-making. The potential harms of non-disclosure such as the concealment of deception, private gain or incompetence were not given the same recognition. Second, secrecy was not justified by an appeal to security over liberty or as an emergency curtailment of democracy. Rather, this is a transparent process in which certain public values (such as precautionary harm-avoidance) are afforded greater visibility than others (Barnett, 2015). The refusal to disclose information was framed as a measure to secure liberal democratic governance itself: fearless deliberation, public understanding, and accountability. Finally, the examples highlight the messy and fragile nature of this exceptionalism. After years of dispute and public pressure, the government reluctantly gave permission for some of the material to be disclosed in a redacted form via a public inquiry (the Iraq 'Chilcot' Inquiry). By publishing the material through this non-statutory inquiry,

however, disclosure did not change legal precedent – thereby maintaining the lawfulness of future refusals.

The paper offers the following original insights. First, significant attention has been paid to the potential advantages and disadvantages of disclosure versus concealment (Fung et al., 2007; Colaresi 2014; Lester, 2015), but less attention has been paid to the legal discourses that shape how decisions to disclose are actually made. The issue is not only that the law authorises the executive to judge the potential harms caused by disclosure (Sagar, 2013: 4), but that this harm-based discourse is *itself* problematic. Second, showing how decisions are made contributes to a growing interest in the enactment of secrecy (Kearns, 2017; de Goede and Wesseling, 2017; Walters and Luscombe, 2017). The paper shows how such decisions rely on balance metaphors and specific articulations of risk, which have been shown elsewhere to underpin exceptional states policies that would otherwise violate liberal democratic values (Waldron, 2003; Neocleous, 2007; Bigo, 2010; Stavrianakis, 2018). This explains how FOI can appear, simultaneously, as a mechanism of accountability and obfuscation (Luscombe and Walby, 2017). Such obfuscation should be concerning for security researchers, who use FOI information legislation to uncover harmful or illegal covert policies (Raphael et al., 2016).

Despite emphasising the imbalance of security in the law, the paper concludes by warning against a new or better balance between the harms of disclosure and nondisclosure. Doing so would reduce disclosure debates entirely to a zero-sum game of security trumps, to the detriment of democracy. Transparency, as de Goede and Wesseling (2017) have noted, should not be conflated with meaningful scrutiny of the value and effectiveness of security practices. Only by shifting the debate back to the question of democratic values, rather than harm-avoidance, can this scrutiny be achieved.

The problem of secrecy in a liberal democracy

The political debate on state secrecy often follows the pattern — familiar to Critical Security Studies— of framing secrecy as either a threat *to* political life or a tool to protect that way of life *from* other threats (Huysmans, 1998b). The doctrine of *raison d'État* frames secrecy as a tool of security for the state. *Classical liberals*, meanwhile, frame disclosure as a tool of security against an incompetent or ill-intentioned government. The result is a stalemate of conflicting security-based arguments, both of which can be highly detrimental to democracy. *Deliberative democrats* address this impasse by claiming that state secrecy is legitimate on the promise that

what goes on in secret could withstand public scrutiny and should be disclosed if that promise is called into question. This approach is largely reflected in FOI legislation. What makes the concealment of Britain's Iraq War secrets unsettling is that it occurs despite a widespread suspicion of wrongdoing (thereby breaking the promise that what goes on in secret could withstand public scrutiny), threatens to undo the deliberative democratic compromise and void the democratic character of the state.

First, the modern debate on disclosure would not exist without *raison d'État*. This art of government — which emerged in Europe during the sixteenth and seventeenth-centuries — created the need for state secrecy. It did so by making the 'state' a statistical reality. Government became concerned with gathering knowledge of the state, such as assets, wealth, technology and population. This knowledge made it possible to calculate future action — such as whether a state could successfully wage war. The reliability of these calculations could be improved by obtaining knowledge through espionage and surveillance. Across Europe, this rationality gave rise to the 'Black Chambers' of early Cryptology. Stealing, intercepting and maintaining these mysteries of the state (*arcana imperii*) became 'an essential tool of security' (Horn, 2011: 108, Foucault, 2007: 255-283). Political secrecy was claimed as part of the common good — protecting the state and the population therein (Erskine, 2004). This rationality persists, as Sir John Sawers — former 'C' of the Secret Intelligence Service — recently remarked.

Secret intelligence ...deepens our understanding of a foreign country or grouping ...reveals their very intentions...[and] gives us *new opportunities for action*... Political secrecy is not a dirty word... Political secrecy plays a crucial part in keeping Britain safe and secure. (Sawers, 2010, emphasis added)

Thus, publicity would unequivocally harm the intelligence gathering cycle. This was demonstrated by the 1927 Arcos Affair in which British Prime Minister Stanley Baldwin read aloud from deciphered Soviet telegrams, prompting the Russian government to adopt a new encryption system. British intelligence chiefs claimed that the recent Snowden leaks had a similar effect, producing a 'sudden darkening' that has resulted from 'our targets... discussing the revelations ...discussing how to avoid what they now perceive to be vulnerable communications methods' (Lobban, 2013: 17) It is for this reason that states often argue that security services should have an absolute exemption from FOI laws.

But political secrecy introduces a new danger: a space of exception, hidden from ordinary

law, which a ‘devilish’ sovereign could abuse to advance private interests (Viroli, 1992: 273-274; Horn, 2011: 106). An ordinary citizen could not know whether these prerogative powers were being used for or against the common good. By the mid-nineteenth century, the tools of *raison d’État* were derided by British liberals as unconstitutional and ‘un-English’ methods of authoritarianism that jarred with principles of ‘free’ Britain (Vincent 1999: 9). A ‘liberalism of fear’ held that behind every secret was an abuse of power (Shklar, 2004: 158; Foucault, 1980b: 153). Political secrecy thus helped to secure the state against one uncertainty, only to introduce another.

This leads to the second position, found in the work of some classical liberals, that government *transparency enhances the security of liberal democratic life*. Jeremy Bentham was the most vociferous advocate, although similar sentiments can be found in the work of both Mill and Madison (Colaresi, 2014: 42-45). Bentham could not understand why politics should not be conducted in public: ‘why should we hide’, he asked, ‘if we do not dread being seen?’ (Bentham, 1843a: 310). A transparent politics in which politicians were given the impression of constant surveillance would, Bentham believed, deter corrupt interests and provide ‘a security against improper conduct’ (Bentham, 1843b: 302). By forcing speakers to rely on publicly defensible arguments, ‘sound opinions will be more common’ (Bentham, 1843a: 311). Bentham and other liberals believed that government behind closed doors could never, even with the best intentions, possess the knowledge necessary to respond correctly to every eventuality (Simons, 1995: 57). Instead, conducting the business of government in public view would allow the citizenry to regulate against ‘too much government’ (Foucault, 2008: 77), which might otherwise stifle or mismanage economic and social practices.

The rhetoric of information rights campaigners has often invoked this Benthamite claim. During the interwar period, one of the first pro-transparency political movements — the Union for Democratic Control — argued that ‘frankness and publicity are better securities for peace than secrecy and intrigue’ (cited in Swartz, 1971: 223). Decades later, the British Campaign for Freedom of Information argued that ‘secrecy leads to poor policy-making and to injustice to individuals’ (Chapman, 1987: 25). When the New Labour government introduced FOI legislation, it announced that a culture of unnecessary secrecy was leading to ‘arrogance in governance’ and ‘defective decision-making’ (Cabinet Office, 1998: 2).

Yet this securitisation of secrecy can be just as damaging to democracy as the abuses of power that transparency is supposed to prevent. As one former intelligence official observed, ‘secrets are like sex. Most of us think that others get more than we do. Some of us cannot

have enough of either. Both encourage fantasy' (Braithwaite, 2003). This fantasy, coupled with the liberal fear of secrecy, reduces liberal politics to a never-ending quest for revelation (Birchall, 2011b; Horn, 2011). No matter how much disclosure takes place, the suspicion of a guilty secret remains (Dean 2001: 631). The British case for war against Iraq, for instance, was premised upon the claim that the secretive nature of Saddam's regime could only be explained as an attempt to hide a guilty secret — weapons of mass destruction. The British government portrayed Iraq's secretive behaviour as demonstrative of an urgent threat, thereby closing down debate and hastening war (Thomas 2017: 379). Transparency is not an act of resistance *against* power but the enactment of different power relations.

Deliberative democrats offer an alternative to these security-based arguments of *raison d'État* and classical liberalism. They focus instead on the conditions that facilitate well-reasoned decisions and a 'deliberative accountability' under which citizens and officials 'justify their decisions to all those who are bound to them' (Gutmann and Thompson, 1996: 128). In doing so, they recognise that both transparency and secrecy can damage liberal democratic politics. First, while transparency may force speakers to rely on publicly defensible arguments, these arguments can succumb to 'plebiscitary reason' (Chambers, 2004: 389). Such arguments do not reflect the speaker's genuine beliefs but are chosen to appeal to the broadest majority and the lowest denominator (Elster, 1998: 109-111). Plebiscitary arguments are usually shallow and poorly reasoned, and easily support crude majoritarian, intolerant or prejudiced policies that violate liberal democratic principles of respect for the individual. By contrast, if deliberation takes place in secret, participants may be more likely to speak candidly, change their position in response to better arguments or make compromises without worrying about losing face (Gutmann and Thompson, 1996: 115-17; Bok, 1989: 175-187; Morgenthau 2005: 155-58, 373-74). In this sense, some justifications for state secrecy and individual privacy are analogous in a liberal democracy (Westin, 1967: 46). Liberal democracy is founded on secrets: whether it is the vote in a ballot box or the provision of a private space in which to make decisions, secrecy provides the permissive conditions for participants to make policy according to the 'force of better argument' (Habermas, 1996: 305). Second, secrecy deters plebiscitary reason but increases the threat of 'private reason' upon which the liberalism of fear is based (Chambers 2004: 391), where participants abandon the force of better argument in favour of bargains for personal gain or for reasons that are too narrow to be publicly acceptable.

Deliberative theorists, therefore, place two conditions on the use of secrecy in liberal democratic government. First, decisions made in secret must always be capable of

withstanding public scrutiny. This means that, behind closed doors, decision-makers should act ‘as if’ their deliberations were subject to public scrutiny (see Luban, 1996 on Kant’s publicity principle). The reasons for those decisions should normally be accessible and understandable to the citizenry, who ought to be respected as autonomous agents who take part by scrutinising this reason-giving process. Second, if the decision-making process relies upon secret evidence, *good reasons* for that secrecy must be given and *opportunities to check* the evidence must be provided later on. This applies to the evidence *upon* which a decision may rest — e.g. checking the validity of secret intelligence. But it also applies to the decision-making process *itself* — e.g. checking that deliberation was competent, sincerely intended to benefit the common good, and that the reasons agreed upon in private accurately reflect the reasons given in public (Gutmann and Thompson, 2004: 4-6). This latter check also guards against deception and ‘self-deception’ (Galeotti, 2015).

This conditional approval of state secrecy is reflected in the broad principles of information rights legislation — such as FOIA. The act allows any person to request official information and have that information communicated to them unless the state can give good reasons for refusing disclosure. If the requester and the state disagree over whether the reasons for refusing disclosure are acceptable, the judiciary offers an independent verdict via an appeals process. Even when requests are denied, the vast majority of official information is published after twenty or thirty years via the Public Records Act — giving citizens an eventual opportunity to check decision and policy-making processes. Legitimate political secrecy, to summarise, is predicated upon explicit validity claims that good reasons for the secret exist and that the state *could* justify its behaviour in accordance with these reasons. The need to disclose the content of a political secret arises if that promise is put in doubt.

A paradigmatic example of this doubt was the widespread suspicion that the British Government had misled the public about the basis for war in 2003. In the years following the war — despite vociferous denials by the government — suspicions abound that the Prime Minister had ignored legal advice, disregarded Cabinet and manipulated intelligence to obtain public support for the war. In these circumstances, the liberal democratic character of the state is redeemed by checking the government’s validity claim that no wrongdoing occurred and/or that there remain good reasons to continue to conceal official records pertaining to the decision to go to war. What makes Britain’s enduring Iraq War secrets problematic is that they appear to be an exception to this deliberative democratic validity claim. Despite calls from citizens, an official inquiry and the judiciary, the government has refused to disclose some information. This refusal would place the liberal democratic identity

of the state in jeopardy unless, paradoxically, it could find an equally liberal democratic justification for the exception. A peculiarity of the law opens up this possibility.

How the law makes exceptional secrecy appear reasonable

The exception is made possible because information rights law recognises the potential harms of disclosure but not the potential harms of secrecy. This imbalance allows the state to justify enduring secrecy, even when its validity claim of ‘good reasons’ is in doubt. It is made possible by three components of freedom of information legislation: the historical legacy of the Official Secrets Act, the public interest test, and the reliance upon the concept of harm.

The principle that disclosure is potentially harmful first appeared in law in the Official Secrets Act (OSA) 1889. At the time, the government justified the OSA as a means to protect national security against German espionage. However the OSA was also a response to another problem: poorly paid, secretarial clerks were selling state secrets to the press (Moran, 2012: 31-32). The OSA solved this problem by criminalising unsanctioned disclosures that were contrary to ‘the interest of the state, or otherwise in the public interest’ (Vincent, 1991: 238). The OSA enshrined in law the expectation that disclosure could threaten the public interest and simultaneously quashed the Fourth Estate’s counter-claim that the public interest could be served by exposing the state.

Not until the latter half of the twentieth century was reform of the secret state given serious consideration. In 1958 the Public Records Act mandated the transfer of most official records and papers to the Public Records Office after a 30-year period. Ten years later, the Fulton Report criticised the excessive use of official secrecy in the British state to the detriment of good government. With the end of the Cold War, the Major government released over one hundred thousand hitherto concealed papers under the Waldegrave initiative and publicly acknowledged the existence of the Secret Intelligence Service (HC Deb 6 May 1992, c64). Eventually, New Labour introduced the Freedom of Information Act in 2000, granting a public right of access to information held by public authorities. Yet even though campaigners repeatedly linked disclosure with security, this was never formally recognised in law. The FOIA, as will be shown below, retained the OSA’s presumption that disclosure was always a potential threat *to* the public interest.

The public interest test: what public interest?

Law, like any discourse, is composed of specific concepts that speakers must use for their talk to be legitimate (Foucault, 2002: 55-61). One such concept is the public interest test. This mechanism can be found in all sorts of laws and protocols that regulate disclosure (such as the FOIA, Public Interest Immunity and the disclosure protocols for a public inquiry). The process of requesting information can be simplified into the flowchart below. First, a person (or ‘requester’) asks an authority for official information. Second, if the authority holds that information and the request is not prohibitively expensive or vexatious, the requester should have the information communicated to her *unless* the information is covered by an exemption. There are two types of exemption: absolute and qualified. If the information is covered by an absolute exemption, the authority can refuse the request and refuse to confirm or deny whether the information exists at all (e.g. information pertaining to the security services). If the information is covered by a qualified exemption, the authority must make the decision according to the public interest test. The test is set out in section 1(1) as follows:

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 plain English, this means that the authority must identify and weigh the public interests for and against disclosure. The authority can only withhold the information if the public interests in maintaining the exemption outweigh the public interests in disclosure. If the public interests in disclosure are greater or equal to the public interests in exemption, the information must be disclosed. For this reason, the UK’s independent regulatory authority for information rights — the Information Commissioner’s Office — claims that within the FOIA is ‘there is an assumption in favour of disclosure’ (ICO, 2018: 5). However, this is not accurate because the balance of public interests is not a balance at all. It is profoundly one-sided because the law only defines the ‘public interest’ in terms of specific governmental and societal activities that could be harmed by disclosure. There is no corresponding acknowledgement of how the state or society could be harmed by non-disclosure.

FIGURE ONE HERE

‘Public Interest’ is an unavoidably ambiguous term, because it depends on a judgement about the values and principles of the public good or, put differently, what is understood to be in the best interests of society. The term is an empty signifier, much like ‘security’. The FOIA, however, gives the term specific meaning by stipulating public interest arguments that can be used to deny a request. In the parlance of securitisation, each ‘public interest’ is a referent object of security that could be damaged by disclosure. An authority can use the exemption if it judges that disclosure would, or would likely, cause enough harm to outweigh the public interests in disclosure.ⁱⁱⁱ For instance, an authority can refuse a request if disclosure would:

- Cause a specific harm to the formation of government policy, section 35(1)(a).
- Cause a specific harm to ministerial communication, section 35(1)(b).
- Cause a specific harm to a criminal investigation, section 30.
- Prejudice the economy in a specific instance, section 29.
- Prejudice international relations in a specific instance, section 27(1).
- Prejudice national security in a specific instance, section 24.

There is no corresponding list of public interest arguments giving reasons for disclosure. As is often the case, the benefits of disclosure are assumed to be self-evident (Fenster, 2015). Some reasons have been established through case law: a public interest in accountability, public understanding and involvement in the democratic process; a public interest in understanding information and advice used by the government to make decisions; and a public interest investigating suspicion of wrongdoing (ICO, 2018: 11-15). This last reason mirrors the deliberative democratic argument: disclosure may either refute a suspicion or provide a ‘smoking gun’ to prove that the suspicion was justified (ICO, 2018: 14). These pro-disclosure arguments, however, are not explicitly linked to the avoidance of harm in the same way as the prescribed public interests above. The public interests in exemption are *security*-based arguments; the public interests in disclosure are vague *democracy*-based arguments. The former trumps the latter.

Harm and the myth of ‘balance’

This imbalance is compounded because the law encourages authorities to consider how the public interest ‘would, or *would be likely*’ harmed by disclosure in the future (e.g. section 27, emphasis added). Since 1996, the law on harm has been informed by a principle that it would be ‘impossible in advance to describe ... damage exhaustively’ and while ‘[n]ormally it will be in the form of direct and immediate harm’ it is also to be expected 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, emphasis added). 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). This position resembles the 'epistemological crisis' more readily visible in counter-terrorism policy – whereby uncertainty is governed through pre-emptive action and the institutionalisation of imagination (Jackson, 2015: 35). The FOIA encourages authorities to imagine a future danger that represents a 'passage to the limit' of the political (Huysmans, 1998a: 581). Those who favour disclosure do not have the opposing entitlement – to articulate the insecurity of secrecy. The competing public interests in the so-called balance occupy different planes – they are not equally knowable. Advocates for secrecy are defending the existing state of affairs; advocates for disclosure seeking the becoming of a new (and presumed potentially harmful) reality.

This one-sided emphasis on harm unravels the pretence that the public interest test 'balances' arguments for and against disclosure. 'Balance' implies that two opposing objects can be quantified like two objects on a set of scales, giving speakers on both sides of a dispute an *equal* chance of winning the debate, subject to the strength of their evidence. However, this balance is unequal because the opposing public interests are not quantified in the same terms.

This argument has been made in relation to the so-called balance of liberty versus security (Waldron, 2003: 205; Luban 2005: 245-247; Bigo, 2010: 392-401). The relationship between liberty and security is messy and contingent. A political judgment is required to codify the relationship and give weighting to the terms. The notion of a zero-sum balance *between* liberty and security is just one possible codification – made possible by placing harm on one side of the equation. An excess of liberty, on these terms, poses potential harm to security, and security, in turn, is assumed to underwrite the conditions for liberty. An alternative codification is that a reduction in liberty diminishes the security of citizen against the excesses of state power, but this argument is neutralised by the location of harm *solely as* the harm-of-liberty to security.

The public interest test is derivative of this framing. The balance is between the public interest in disclosure versus the harm that disclosure would cause to the public interest – or put differently, the norm of disclosure is outweighed by the harm of adhering to that norm. As described above, the relationship between disclosure and security can be codified in

different ways: for *raison d'État*, disclosure represents a threat to state security; for classical liberals, security (of the individual) is achieved through transparency; for deliberative democrats, a political community's best interests are preserved through the quality of democracy and this can be harmed by either excessive transparency or secrecy. Describing the public interest test as a 'balance' obscures an acknowledgement of the chosen codification (Bigo, 2010: 399). Under the present arrangement, insecurity only features on one side of the equation: the insecurity of disclosure. The insecurity of secrecy is not recognised.

To illustrate this further, consider what happens if we invert the public interest test. Doing so can make the effects of a discursive formation clearer. Here is how the FOIA currently describes the public interest test and the specific exemption related to international relations:

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 [secrecy] outweighs the public interest in disclosing the information (Section 1:1).

...Information is exempt information if its disclosure ...would, or would be likely to, prejudice relations between the United Kingdom and any other State (Section 27:1).

Now, consider how this excerpt appears inverted (the changes are underlined):

Any public authority receiving a request for information by a person is entitled to refuse to communicate that information to her. [This entitlement] does not apply if ... the public interest in [disclosure] outweighs the public interest in not disclosing the information

... Information is exempt information if its non-disclosure ... would, or would be likely to, prejudice relations between the United Kingdom and any other State

The original excerpt states that a person can expect disclosure unless the interest in disclosure is outweighed by the interest in avoiding a likely harm to Britain's international relations. The second excerpt states that an authority can expect to refuse disclosure unless the interest in refusing is outweighed by the interest in avoiding harm likely to be caused by that refusal. The difference is whether secrecy *underwrites* security by offering protection for specific public

interests or *threatens* security by endangering those interests (as it would under the inversion). The inversion shows how the test is unequal because harm resides only on one side.

Justifying secrecy: cases from the Iraq War inquiry

It was repeatedly alleged that senior figures within the British government misled parliament and the public about the justification and necessity for participating in the 2003 Iraq War (e.g. Short, 2004). This suspicion of wrongdoing generated repeated demands for the publication of official records and documentation. Official disclosure took place in two ways. First, members of the public submitted FOI requests for material that was known or suspected to exist. Second, British governments appointed a series of public inquiries culminating in the Iraq Inquiry – led by Sir John Chilcot. From 2009-2016, the inquiry had complete access to government archives and reviewed more than 150,000 documents (Iraq Inquiry, 2016: 10). No material, however, was publicly available unless Chilcot could convince the government to declassify and disclose specific documentation.ⁱⁱⁱ

The following section examines two instances where the inquiry and FOI requesters sought disclosure of significant documents: first, the records of written and verbal communication between the former Prime Minister Tony Blair and the former U.S. President George Bush (dubbed the ‘Blair/Bush Exchanges’); and second, the minutes of Cabinet Meetings held in the months leading up to the invasion. In both cases, the FOI requests were refused and the inquiry’s requests were partially granted via an extra-legal compromise. This justification hinged on the paradoxical promise to protect the very same liberal democratic values that are transgressed by exceptional secrecy.

The Blair/Bush exchanges

One rumour surrounding the war was that Blair made a promise to support the American president, regardless of public or parliamentary support. Chilcot was eager to publish the Blair/Bush Exchanges to address this suspicion. In order to obtain disclosure of official information, the inquiry had to follow a protocol that was identical in language to the FOIA. The only difference was that the protocol was not legally binding. The inquiry would make requests to the Cabinet Office, who would apply the public interest test (Cabinet Office, 2009). Writing to the Cabinet Secretary to request disclosure, Chilcot (2010) asserted that the exchanges contained ‘important, and often unique, insights into Mr Blair’s thinking and the commitments he made to President Bush’. Without disclosure, Chilcot claimed, the public

would not trust the inquiry's findings and the inquiry would fail to resolve the suspicion of wrongdoing.

The Cabinet Secretary, Gus O'Donnell, was not convinced by Chilcot's arguments and refused the request based on the possible future harm of disclosure. First, O'Donnell (2011) replied that disclosure would likely damage the UK's international relations. A future Prime Minister, O'Donnell wrote, 'may be less likely to have these exchanges (or allow them to be recorded) if he is concerned that this information would be disclosed at a later time against his wishes' and '[i]nhibiting this type of free and frank exchange would represent real prejudice to the UK's relations with the US'. Second, O'Donnell judged that non-disclosure would protect democratic accountability because disclosure could prompt future Prime Ministers to hold such discussions 'off the record' thereby reducing the opportunity for future public scrutiny. O'Donnell's decision was 'generic' inasmuch as *any* disclosure from the exchanges, no matter how innocuous, could cause harm to these public interest – thereby rendering diplomatic exchanges subject to a *permanent* exception.

It seemed that the exchanges would not see the light of day. But as Chilcot and O'Donnell argued, a citizen named Stephen Plowden filed an FOI request for the material, having learned about the exchanges during the inquiry's public hearings. Plowden's request was denied by the Foreign and Commonwealth Office, but the FOIA allows applicants to appeal the decision through three stages: the Information Commissioner, the Information Tribunal, and the Upper Tribunal. At each stage, attempts were made to mitigate the potential harms of disclosure so that the exchanges could be released. But each attempt failed.

At first stage appeal, the Information Commissioner ordered the government to disclose the material with redactions for any part reflecting information provided by Bush. In the Commissioner's view, there was a public interest in exposing such 'paramount' decisions to public scrutiny, and redaction could sufficiently reduce the harm posed to 'free and frank' diplomatic exchange (ICO, 2011). Both Plowden and the government appealed the Commissioner's decision. At the second appeal, the Information Tribunal found that the Commissioner's solution was unworkable, as both men often agreed on points together without identifying who originated the subject of discussion. Instead, the tribunal applied a 'sentence by sentence' approach, redacting any sentence that posed sufficient harm to outweigh the public interest in disclosure, which the Information Tribunal identified as 'transparency about, and accountability for' the decision to go to war (Angel, et al., 2012: 21). The government quickly appealed the decision.

Finally, the case was heard in the Upper Tribunal, who dismissed the sentence-by-sentence approach for two reasons. First, if a redacted version was disclosed, the audience would be aware of this and would attempt to infer what was missing. The resulting speculation was a potential harm of disclosure in its own right (Jacobs, 2013: 4). While the Upper Tribunal did not expand on the nature of this harm, they may have had in mind the damage that suspicion and distrust can pose to a democracy by making the public aware of secrecy, even when the content of the secret may be benign (Dean, 2001). Secondly, the Upper Tribunal concluded that the Information Tribunal had failed to explain how the benefits of disclosure outweighed its ‘detrimental effects’ – that is, how a public interest in transparency and accountability ‘could be set up against the interest in maintaining the exemptions’ – namely the preserving foreign alliances through diplomatic confidentiality. The Upper Tribunal expressed concern that the 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’ (Jacobs, 2013: 4).

The case returned to the Information Tribunal. With no option but to consider the exchanges as a whole, the tribunal struggled to mitigate the possible harms of disclosure. In a stark illustration of the executive’s symbolic advantage of residing behind the veil of secrecy, the tribunal determined that it ‘must give due respect’ to the experience and expertise of Foreign Office officials who claimed that the US would have been ‘upset and somewhat shocked’ if the exchanges were disclosed, thereby prejudicing the diplomatic relationship (Shanks, et al., 2014: 14). The tribunal refused disclosure.

There was one final twist. Three months after Plowden’s defeat in the Information Tribunal, Gus O’Donnell retired. The new Cabinet Secretary, Jeremy Heywood, reconsidered Chilcot’s request. Heywood reluctantly accepted Chilcot’s plea to publish a redacted version of the exchanges in order to provide evidence for the inquiry’s conclusions. Heywood gave permission to disclose the ‘absolute minimum necessary’ from the UK side of the exchanges, using ‘gists’ where possible. This was palatable for Heywood only because the non-binding nature of the inquiry’s disclosure protocol would not set any future legal precedent for FOI requests (Heywood, 2014b). Heywood also actively encouraged the sentence-by-sentence approach that was dismissed by the Upper Tribunal for encouraging suspicion and distrust. The compromise provided a neat political solution that allowed the government to pacify the inquiry while maintaining the lawfulness of the Plowden refusal and any future refusal.

The second case concerns the minutes of Cabinet meetings held in Downing Street during March 2003 when the government took the decision to go to war. It was subsequently alleged, most vociferously by then-Secretary for International Development Clare Short, that Cabinet was prevented from properly scrutinising the legality, necessity and planning for war (Short, 2004). Twice, the minutes have been requested under the FOIA by Christopher Lamb, an information rights campaigner. On both occasions — in 2009 under Labour and 2012 under the Conservative-Liberal Democrat coalition — the Information Tribunal ordered the release of the minutes. On both occasions, the government used a veto power contained within the FOIA to override the judicial ruling.

Both sides in the dispute relied on the conclusions of the Butler Review — an official inquiry held in 2004 — that criticised Blair’s preference for ‘sofa government’ (where decisions were made within a small group of advisors rather than the formal Cabinet). The state argued that the Butler Review had already investigated the matter. The review, however, was held *in camera*, did not publish any official documents, and was ambiguous as to whether the criticism applied specifically to March 2003. In favour of disclosing the Cabinet Minutes, Lamb, the Information Commissioner and a majority of the Information Tribunal argued that there was a clear public interest in disclosure so that the public could ‘make up its own mind’ on how decisions were taken in Cabinet (Ryan et al., 2009: 35; ICO 2012: 4).

Rather than appeal the tribunal’s decision, the governments’ attorneys general twice exercised a power of veto contained in section 53 of the FOIA. This allows the government to use an ‘executive override’ against a decision by the Information Commissioner or Information Tribunal in ‘exceptional circumstances’ (MOJ 2012). The government gave two interconnected justifications for using the veto. The basis of the state’s objection was that the public interest in disclosure was outweighed by the risk of harm to the ‘formulation of Government Policy’ (section 35:1). Firstly, it was argued that Cabinet must make decisions through involve free, frank and fearless discussion. This requires Cabinet members to consider all possibilities and ‘not feel inhibited from advancing opinions that may be unpopular or controversial’ (Grieve, 2012: 3). The government warned that disclosure might discourage future speakers from expressing dissent for fear of being held to account for views later cast aside. Secondly, it was argued that the very act of publishing the minutes, even if the revelations were uncontroversial, would damage the possibilities for future

accountability: ‘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: 4). While there is limited evidence of such a ‘chilling effect’ as a result of FOI disclosure, the rhetoric is powerful (Hazell et al., 2010: 161-180). Disclosure, the government claimed, would drive deliberation away from Cabinet and back to the sofas. There would be just as much secrecy, but these secrets would be off-the-record mysteries that could never be retrieved. There would be more dark spaces that could hide iniquity and ineptitude, and thus greater insecurity. The public, on these terms, can have diluted minutes that can be disclosed but which would be useless for the purpose of holding government decision-making to account. Together, both justifications promise to protect liberal democracy: good quality deliberation on the one hand, and the preservation of the public record for future validity checks on the other.

The government’s justification of the veto is reminiscent of the defence for ‘organisational privacy’ put forward by democratic theorists (Westin, 1967: 46). However, the justification for the veto deviates from this defence in two important respects. Firstly, transposing the government’s argument into Chambers’ language, the attorneys general are trying to protect Cabinet against the threat of *plebiscitary* reason. But the veto ignores the harm of *private* reason. The quality of public reason depends upon avoiding both harms, and neither supersedes the other. Like O’Donnell, the government justifies its veto through an identification of the harms of disclosure but ignores the opposing harms of non-disclosure. This argument was made in the House of Commons after the first veto in 2009 by David Howarth MP, who claimed that the greater threat to full and frank debate in Cabinet was not disclosure but the potential concealment of its demise: ‘[t]he argument against disclosure is ... that discussion will take place informally... However, is not that precisely what happened under Mr Blair, with the rise of sofa government?’ (HC Deb 24 February 2009 c160). Rather than threaten frank debate, disclosure might show how it was overridden.

Secondly, the government’s justification of the veto implies a paradox. We cannot know whether the quality of Cabinet deliberation was undermined in 2003 unless the minutes are published. But publication poses a risk of damaging future deliberation. This absurdity is the political version of Schrodinger’s cat - the public cannot ‘open the box’ to evaluate some policies and processes because the act itself may ‘kill’ the policy or process. The papers may be disclosed after 30 years upon transfer to the National Archives, but could even then remain closed under similar exemptions. When the FOIA was introduced, the government stated that the veto should only be used in exceptional circumstances (HC Deb 4 April 2000

c918-923). Yet after the 2012 veto, the government confirmed that it would use the veto whenever the public interest in disclosure is ‘outweighed by the public interest in good Cabinet Government’ (MOJ, 2012). The Information Commissioner pointed out the bizarre implication: on paper, the veto is only to be used in exceptional circumstances, but in practice, the government has implied that it would routinely veto any judicial order for the disclosure of Cabinet minutes – indicating that Cabinet minutes, as a category of official information, can *never* actually be disclosed under FOI (Graham, 2012).

This paradox also poses a problem for the deliberative democratic underpinnings of the UK’s information rights laws. The FOIA, as discussed in section one, broadly reflects the deliberative democratic argument that official information can only be kept secret when good reasons exist for the secret and the state could justify its behaviour in accordance with these reasons if called to do so. The veto suggests that this check cannot occur.

This can be interpreted in one of two ways. First, this could be construed as a criticism of a deliberative democratic approach to state secrecy — that there are some liberal democratic secrets that the public cannot check. A second approach is to interpret the paradox as an indictment of the UK’s information rights legislation. The veto only makes sense according to a legislative framework that makes disclosure decisions by considering the harms of disclosure but not the harms of non-disclosure. The broad intention of the FOIA does reflect a deliberative democratic ethic — and the British state draws legitimacy from the suggestion that there is an assumption in favour of disclosure in the FOIA. The harm-based decision-making framework, however, shows that this is not the case and that the framework is *not* consistent with a deliberative democratic approach. The law provides a loophole that allows the executive to keep exceptional secrets, but this exceptionalism simultaneously threatens to undo the liberal democratic character of the state.

This interpretation is borne out by the government’s attempts to find a political fudge that allows the state to keep the Cabinet minutes a legal secret *and* preserve its liberal democratic identity. Just as it did for the Blair/Bush exchanges, Jeremy Heywood gave the Chilcot Inquiry permission to publish extracts of the Cabinet minutes. Chilcot already had access to the minutes and could argue for ‘particular and specific’ disclosure of the ‘precise wording’ of extracts to justify the inquiry’s conclusions (Heywood, 2014a). No FOIA applicant could have such an advantage. Heywood further told Chilcot that his decision was conditional on not creating any future precedent for FOI policy or FOI requests (Iraq Inquiry, 2016: 11). Several months later Lamb put Heywood’s compromise to the test by making a new FOI

request for the minutes, explicitly asking how the government's previous justification for refusing disclosure (the likely harm to Cabinet deliberation and confidentiality) remained valid given the Cabinet Office had given the inquiry permission to publish extracts of the minutes. Surely Heywood's decision, Lamb argued, 'casts substantive doubt on the veracity of this contention when it was first used in order to refuse disclosure' (cited in Cabinet Office, 2015). Both the government and a new Information Commissioner declined the request by repeating the argument that disclosure would harm the 'stronger public interest' in the 'safe space' of frank Cabinet discussion, but also by suggesting that the public's understanding of the issue was better served by the inquiry's mediated publication of extracts of the material, contextualised alongside the report.

Conclusion: a new balance, or less security?

Britain's secrecy is made possible by a legal discourse that, paradoxically, emphasises the insecurity of the very thing it is intended to promote: disclosure. The law explicitly supposes that more disclosure equals more insecurity. That risk, moreover, is posed to liberal democratic concerns. This is the ingenuity of the discourse. It frames exceptional secrecy as something that protects against too much government (by preserving frank debate), not just too little government (by protecting the traditional concerns of state security). Thus, the decision to withhold information does not appear as a curtailment of liberal democratic values but as a preservation of them. But this legal discourse is an impoverished way of deliberating questions of disclosure because relevant claims about the harms of secrecy are neglected. It also gives rise to problematic and paradoxical exceptional secrets - such as the Cabinet Minutes - which seem to undermine the foundations upon which legitimate liberal democratic state secrets are validated.

This legal discourse is a common theme in FOI legislation across the world. For example, the laws of the United Kingdom, United States^{iv}, Sweden^v, Germany^{vi}, New Zealand^{vii} and the European Union^{viii} follow the same pattern: that disclosure can *harm* specific public interests, including harms to liberal democratic government; they grant authorities the *power to judge those harms and to withhold* information in order to mitigate these harms; and they do *not* explicitly state the potential *harms of non-disclosure*. These laws are also vague about the public interests *for* disclosure, or how disclosure benefits liberal democratic government^{ix}.

One response to the problem would be to reformulate the law so that it also acknowledges the potential harms of secrecy. But this would easily produce an anti-political game of

security ‘trumps’, in which the victor of the dispute is she who can conjure up the most compelling projection of fear and insecurity (Neocleous, 2007: 146). In such circumstances, claims to security become weightier than any other claim regarding rights and democracy.

A more productive alternative would be to consider disputes in terms of the consequences for democracy rather than security (Bigo, 2010: 399). Presently, the law provides a list of public interests that can be harmed by disclosure and asks whether the harm outweighs a public interest in the norm of disclosure. Instead, an alternative test could start with public interests such as deliberative justice and accountability, and asks whether those interests are best served by disclosure or continued concealment. Doing so may highlight that many security-based arguments can have a damaging effect on a democratic polity. This applies equally to Benthamite, security-based arguments for disclosure, which tends toward totalitarianism and violence just as much as excessive secrecy (Birchall, 2011a).

The law’s insufficient consideration of the benefits of disclosure, paradoxically, intensifies the potential harms of transparency, not just secrecy. There is more to democracy than the *act* of disclosure. Through FOI, politics risks being reduced to ‘a drama of concealment and revelation’ (Birchall, 2011b: 135), to which this paper is perhaps complicit. Necessary disclosure should politicize something so that it is deliberated upon (Gilbert, 2007: 38). When the Chilcot Inquiry released redacted versions of the secret material, the revelations confirmed the failures in democratic accountability that many already suspected. Blair promised Bush that he would be with him ‘whatever’; Cabinet was not consulted on important decisions about the war (Iraq Inquiry, 2016). But before and after this revelation, the problem was the same: a public value in the precautionary avoidance of insecurity (which also underpins FOI law), was given greater attention than other values, such as deliberative justice (Ralph, 2011). Such concerns can only be addressed by understanding how disclosure helps a democracy to scrutinise and learn from its failures, e.g. by some legal acknowledgment that disclosure can, in moderation, safeguard fearless speech - which, if present in Cabinet at the time, could have challenged the post-9/11 fusion doctrine that justified the war. This cannot occur while the law is vague about the democratic benefits of disclosure but definite about its dangers.

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ⁱ See 'Concluding remarks' for more details

ⁱⁱ The FOIA distinguishes between two types of qualified exemption: 'prejudiced-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 harm is *specified*. The authority need only show how that harm is posed by disclosure in the specific instance in question (e.g. 'harm to international relations' *from* disclosing diplomatic exchanges, section 27(1) – see 'Blair/Bush Exchanges'). In class-based exemptions, the authority show *why* disclosure of information from a particular *class* (e.g. information related to the formulation of government policy) would a harm the public interest (see section 35(1) and this paper on 'Cabinet Minutes').

ⁱⁱⁱ By July 2016, c. 1,800 documents had been published with redactions on the Inquiry website. 7,000 documents were partially disclosed in the final report through extracts or summaries (Chilcot, 2016).

^{iv} See the United States' Freedom of Information Act, 5 U.S.C. § 552.

^v See chapter 2, article 1 of Sweden's Freedom of the Press Act.

^{vi} See section 3 of Germany's Freedom of Information Act (2005).

^{vii} See section 9 of the Official Information Act (1982)

^{viii} See article 4 of Regulation (EC) No 1049/2001.

^{ix} New Zealand's law does state that disclosure is intended to enable effective public participation in public affairs and to promote the accountability of ministers and officials (section 4), but these interests are nevertheless not equal to the harm-based reasons for concealment.