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Citizen or Subject?

Freedom of Information and the Informed Citizen in a Democracy

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A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy by prior publication

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Contents

CONTENTS 3

ACKNOWLEDGMENTS 5

ABSTRACT 7

INTRODUCTION 9

PART ONE: LITERATURE REVIEW 17

CHAPTER 1. WHAT IS TRANSPARENCY? 19

CHAPTER 2: THE ORIGINS OF TRANSPARENCY 29

CHAPTER 3: WHY TRANSPARENCY IS IMPORTANT 39

CHAPTER 4: PRIVACY 51

CHAPTER 5: SURVEILLANCE 63

PART 2: MY CONTRIBUTION 71

CHAPTER 6: METHODOLOGY 73

CHAPTER 7: YOUR RIGHT TO KNOW 91

CHAPTER 8: THE SILENT STATE 105

CHAPTER 9: MPS' EXPENSES 115

CHAPTER 10: THE DIGITAL REVOLUTION 131

CONCLUSION 143

BIBLIOGRAPHY 147

APPENDICES 161

SUPPLEMENTARY PUBLICATIONS 163

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Abstract

Information is the essence of democracy and the lynchpin of power-ownership. Possession and control of information allows us to demarcate who controls or influences the political system. Freedom of Information (FOI), rooted in Enlightenment values, contains within it a key principle of democracy that there must be access to information (and knowledge) for all equally. My approach in my 25-year journalistic career has been to use FOI as a means of testing the promise and practice of democracy. It serves here as a 'canary in the coalmine' to measure how well citizens can access the political system.

Introduction

The purpose of this exegesis is to reflect on my published material resulting from reporting and investigating the public's right to know. Specifically it uses a lens of power and democratic theory to think about a body of work that includes articles from the author's 25-year career; three books: *Your Right to Know* (2004, 2007), *The Silent State* (2010, 2011) and *The Revolution Will Be Digitised* (2011, 2012), and a year-long investigation as a member of the Independent Surveillance Review Panel that led to our report, *A Democratic Licence to Operate* (RUSI, 2015), on state surveillance. The published works I have put forward for this PhD by prior publication detail my investigations into the state, particularly the secret state, and the ways in which access to information impacts power relations between citizens and those entrusted with governance. Additionally I explore the way technology affects information flows between citizen and state both as a means of opening up government but also as a tool for surveillance.

This exegesis will examine these issues in two parts. In Part One, I explore the existing academic literature on democratic theory, political science and information theory. Part Two is a summary of my work including detail on the methodologies I used and my unique contribution in the fields of politics and journalism.

I demonstrate that access to information is an intrinsic value, essential for the fulfilment of human potential and the proper functioning of democracy, and that investigative journalism plays a crucial role in testing and ensuring that democratic rhetoric is matched in reality. Investigative journalism plays a vital democratic role as a "tribune of the commoner, exerting on her or his behalf the right to know, to examine, and to criticise" (de Burgh, 2000: 315). While there are several themes in my work they all revolve around a central interest: the relationship between citizen and state, specifically looking at the inequality of power between the two. I link democracy, freedom of information, privacy and surveillance through this central organising principle as they all reflect the power dynamic in action. I see transparency as "essentially a power-reducing mechanism",

(Grimmelikhuijsen, 2013: 583), a means for citizens to hold the powerful to account if the powerful are transparent, or to control citizens when they are made transparent.

I used mixed methodologies in my work, primarily research and reporting. In particular I made extensive use of the UK's new Freedom of Information Act passed in 2000 but in force only in 2005. From that date until mid-2010, I filed approximately 500 FOIs and wrote more than 60 newspaper and magazine articles (approximately 45,000 words) about democracy and/or FOI.

My approach has been to use FOI as a means of testing the promise and practice of democracy. It serves here as a 'canary in the coalmine' to test how well citizens can access and participate in the political system. My method has been to focus on those with and exercising power and hold them to account for the power they wield. An important mechanism for this accountability is transparency, but perhaps more accurately described as the 'right to know' which holds within it the added aspect of accountable and democratic culture. Information is the essence of democracy and the lynchpin of power-ownership. Possession and control of information allows us to demarcate who controls or influences the political system. Freedom of Information is rooted in Enlightenment values, and contains within it a key principle of democracy that there must be access to information (and knowledge) for all equally.

Too often freedom of information is looked upon in a utilitarian way - a means to an end - and the end is defined not by citizens but by those in power. I use and conceptualise FOI in a different way. First, as a research tool it is a symbolic and 'political' act, a form of empowerment, and I used it as such to enlighten both myself and society. It may exist in "the humdrum world of administrative laws" but it is a "foundational element of democratic participation and accountability" (Fenster, 2015). Secondly, FOI is an indicator of democratic reality as opposed to rhetoric. Based on my wide use of FOI and responses, I contend that the UK is an elitist political system that is in need of substantial democratic reform. It is not a government for the people by the people, but rather a government for the elite by the elite. Westminster is a "hermetically sealed theatre of politics" (Richards and Smith, 2015: 48) that "legitimates the concentration of nearly all of

the power in the Executive, very little in the legislature, and practically none at all with the people; a kind of 'retrospective' democracy at best" (Tant, 1993: 30). There are two main types of democracy: 'participatory' or 'direct' democracy involves the direct participation of all citizens who vote on decisions that affect their lives; and 'indirect' or 'representative' democracy in which the people elect a representative to decide matters on their behalf. As technology has created new ways for citizens to have their rights and interests represented in the polis this has led to a "clash between twenty-first century expectations, technologies and transparency challenging a nineteenth-century model of democracy and participation" (Richards, and Smith 2015: 46). Political theorist John Keane identified a new form of democracy that utilises technology to enable greater public influence and participation in politics, which he calls 'monitory democracy'. This involves "surveys, focus groups, deliberative polling, online petitions and audience and customer voting" among other things (Keane, 2008:10). These methods of participation and accountability often run parallel but outside the traditional mechanisms of party-based representation and institutional oversight and as such I believe FOI can be counted as one of these methods in this new form of participatory democracy.

Contribution to knowledge

Ted Gup suggests it would be a "terrific investment of reportorial resources, not to mention a valuable public service" to dedicate an entire beat to secrecy. That was essentially my 'beat' from 2004 to 2015. Gup accurately summarised the results of reporting in this beat: "If nothing else, it would produce some remarkable stories, and it might just help the public grasp the wider implications of unchecked secrecy" (Gup, 2010: 26). My work at the interface of technology, politics and journalism has led to transformative policy and legal changes in the UK. I used the UK's FOI law to map and monitor public bodies for the first time in a citizen-friendly way. My FOIs flagged up current and future problems such as secrecy in food safety regulation, the postcode lottery for criminal justice, the amounts police spend on public liability claims and propaganda. I took two important FOI cases through the legal appeals process: one seeking the minutes to a BBC Board of Governors Meeting after the Hutton Inquiry (*Guardian Newspapers Ltd and Heather Brooke v IC and the*

BBC (2007) EA/2006/0011; EA/2006/0013), and my notable legal victory against the House of Commons for details of MPs' expenses (*Corporate Officer of the House of Commons v Information Commissioner & Heather Brooke, Ben Leapman, Jonathan Michael Ungoed-Thomas [2008] EWHC 1084 (Admin)* (16 May 2008). This victory in the UK High Court fundamentally changed law and policy, and for the first time in its history Parliament had to account to an outside body over how MPs' claimed expenses. The court ruling and subsequent leak of the data led to a number of high-level political resignations as well as full-scale reform of the parliamentary expense regime and passage of the Recall of MPs Act 2015. A new government was elected in May 2010 on a mandate of transparency in part due to the scandal.

Seeing the disruptive effects of digitising parliamentary records gave me a deep understanding of the impact of digitisation on political power. I saw how new technologies would make it easier to leak important information and broadcast it to the world. Freedom of information exists on a continuum with mega-leaks at the far end. I identified the most pressing issues of the emerging digitised world: digitisation and why it is revolutionary, hackers and hackerspaces, the law in a globalised world, the role of journalism in an information free-for-all, information ownership, privacy, anonymity and internet surveillance, and national security and wrote about them in *The Revolution Will be Digitised.* As a direct result of my reporting, I was leaked a copy of the US diplomatic cables. The leaked information and subsequent articles (see appendix) changed public views about politics, diplomacy and corruption. I argue it gave people a greater understanding of the reality of all three and contributed in some measure to the Arab Spring.

Security services are adamant that digital technology and communications have led to a vast number of emerging threats not just international terrorism but industrial, military and state espionage, organised criminality, and child sexual exploitation. When he was Prime Minister, David Cameron supported expanded surveillance powers for the police and intelligence agencies. "As prime minister, I would say to people, 'Please let's not have a situation where we give terrorists,

criminals, child abductors, safe spaces to communicate."[1] When she was Home Secretary Theresa May put it even more bluntly: "this is quite simply a question of life and death, a matter of national security. We must keep on making the case until we get the changes we need."[2] Bulk and mass surveillance has been the state's 'answer' to the problem of digital technology and online criminality and the disclosures by Edward Snowden reveal that intelligence agencies did not wait for a democratic mandate to set up these surveillance systems, which led to concerns they were operating outside the law. When the citizen not the state is made transparent, transparency can become a tool of oppression. I contributed to one of the key independent investigations (RUSI, 2015) set up by the government to investigate the intelligence agencies and mass surveillance after the Snowden revelations and I outline this work in Chapter 10.

Challenging an Elitist Political System

I have lived equal parts of my live in the US and UK. I moved to London after completing a double BA degree in international politics and journalism at the University of Washington and working as a political and then crime reporter for local newspapers. I completed an MA in English Literature at the University of Warwick and then worked for various British media organizations before becoming a freelance writer of articles and books as well as teaching journalism at City University London. My transatlantic experience enabled me to 'live' the reasons underlying the American Revolution. I came to understand why the founders abolished Crown Copyright and writs of assistance and mandated freedom of speech in the form of the First Amendment. Proprietorial copyright was still being used up until 2010 to stop citizens in Britain from publishing official information, which I document in my books and later chapters. Without an equivalent of the First Amendment, British people are routinely prosecuted or injuncted for speaking inconvenient truths, while journalists must contend with a multitude of laws that criminalize publication from the

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[1] 'Cameron: Surveillance powers will deny terrorists 'safe space'. BBC. 2 November 2015. http://www.bbc.com/news/uk-politics-34697535 (Accessed 7 July 2016)

[2] 'Theresa May: There is no surveillance state'. BBC. 24 June 2014. http://www.bbc.com/news/uk-politics-28006739 (Accessed 7 July 2016)

[2] 'Theresa May: There is no surveillance state'. BBC. 24 June 2014. http://www.bbc.com/news/uk-politics-28006739 (Accessed 7 July 2016)

Official Secrets Act to reporting restrictions and contempt of court. It is difficult to measure and compare the impact and costs of secrecy because it requires proving a negative. Instead research has focused on failures of openness, for example the Society of Professional Journalists organise 'FOI audits'[3] in the United States and academic Greg Michener is pioneering Transparency Audits[4]. I hope to collaborate with Michener in future to conduct a democracy audit of the UK. As it is, I note that in my American media law classes we learned how laws gave us the power to report; in media law taught to journalism students in Britain the focus is on the numerous laws and regulations that restrict reporting.

I was determined in my work not only to investigate but also push for real democratic reforms. My journalism had a purpose, which was to expose and test what I identified as an entrenched system of secrecy and elite rule. I set out to challenge this belief: that a set group of people - an elite - knew best what is best for the rest, for the entire polis. The triumph of elitism is not just that is shapes the outcomes of proposed reforms but that it shapes what the reformers themselves imagine possible. I believe it is precisely because I was not immersed in this milieu that I had vastly different expectations about the role of government and citizenship and this inspired my determined challenge to the political system.

Toward democratic reform

Democracy is based on informed citizens (Dahl, 1989:93). Without access to information we cannot be informed, and a society without informed citizens cannot be called a democracy. In modern democracies, the people hold government accountable not just on election day but continuously (Schudson, 2015: 25). The rise of 'monitory' democracy (Keane, 2009) has faced active resistance in the UK from an elitist political system where executive dominance is prized and public consent is retrospective. I used FOI as a way to 'monitor' government in a more dynamic and democratic way. I have brought into the public domain a great deal of previously secret information and thus added to our ability to debate and better understand various issues.

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[3] See http://www.spj.org/foitoolkit.asp

[4] See http://transparencyevaluation.net

> Getting information is only the beginning. Transparency in government must be accompanied by the public's right to be heard and to influence government policy. The first objective is to get the facts, for without facts we are powerless to oppose government decisions or bring about change. The next step it to open up the decision-making process so we finally have a government accountable to those it serves. (Brooke, 2007: 8).

I will begin by looking at the existing academic literature in my chosen fields. Part One is comprised of five parts: definitions of transparency, its origin, why it matters, its relationship to privacy, and surveillance.

Part One: Literature Review

Transparency, openness, access to information and democracy are the focus of a number of disciplines and a growing theoretical and empirical literature. Here I will concentrate primarily on the literature of political science and political theory as my journalism is predominately focused on power and the role it plays in how information flows or does not, and how this flow impacts the informed citizen. Additionally, I draw on some of the literature from information science, a burgeoning field of academia in its own right. In the first chapter I explore what transparency is, what it is not, its value as an instrument or right and its link to power.

Chapter 1. What is Transparency?

What is Transparency? Towards a Definition

Transparency has become a consensual and administrative norm in public life according to many scholars (Schudson, 2015; Fenster, 2015; Meijer, 2012, Hood, 2006). The word "transparent" has its origin in the late 16th century via Old French from medieval Latin: transparere, from trans- 'through' + parere 'appear'. The etymological meaning of the word is 'shining or showing through'. In relation to objects it is light that is shining through. In the political sense the objects are organisations and/or the people within them and what shines through are their thoughts, emotions, actions or behaviours. Transparency thus requires both an object and an observer. It is bound up with ideas of democracy. Democracy scholar Robert Dahl lists as one of the five criteria for measuring democracy 'enlightened understanding', that is the ability of citizens to be meaningfully informed about matters up for debate or decision (Dahl, 1989: 122). He also includes the availability of 'alternative information' as one of his seven factors for polyarchy: "Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by laws" (Dahl 1989: 221). Dahl describes polyarchy as necessary to large-scale democracy, notably in a modern nation state (Dahl, 1989).

Transparency "tells a transformative narrative" as it "enables – and, indeed forces [a] virtuous chain of events" towards more accountable and democratic government (Fenster 2015: 151). In one of the most extensive reviews of open government academic literature, Albert Meijer and his colleagues defined government openness as "the extent to which citizens can monitor and influence government processes through access to government information and access to decision-making arenas." (Meijer et al, 2012:13). They identified the 'building blocks of openness' as transparency and participation (Meijer: 11). The Meijer team analysed 103 articles on open government and found the common terms used in relation to transparency were "freedom of information, Internet, active dissemination of information, access to document and usability of websites" (Meijer: 11). They quote Curtin and Medes (2011) who refer to these building blocks as respectively 'vision' and 'voice'

based on Albert Hirschman's concepts 'exit' and 'voice' as the options available to consumers/citizens. The concept extends into the private sector to include information that helps citizens/consumers regulate markets, companies, products and services.

Hood defines transparency as denoting "government according to fixed and published rules, on the basis of information and procedures that are accessible to the public…" (Hood, 2001:701). Such governmental transparency is often created by Freedom of Information (FOI) or Right to information (RTI) policies which allows citizens to access official information through a system of controlled and independent oversight (Birkenshaw, 2006b). Schudson uses the term 'disclosure' for the actual practices of transparency mandated by lawmakers and though the term 'right to know' is also acceptable he believes it reflects "more of a cultural current rather than a specifically legal claim" (Schudson, 2015: 18). FOI "is only a mechanism…a bureaucratic legalistic procedure for obtaining information, the (ultimate) object is 'open government'. Freedom of Information is the only way (we can think) of imposing this on a government that doesn't want it." (Frankel [5]interview cited in Tant, 1993: 244).

What Transparency Is Not

Another way to define transparency is to look at what it is not. *The Dictionary of Economics* states that: "[Transparency] is contrasted with opaque policy measures, where it is hard to discover who takes the decisions, what they are, and who gains and who loses." (Black 1997: 476 cited in Meijer, 2012: 26). Yet secrecy isn't simply the absence of knowledge or information. After all, at least one person must know something for it to be a secret. The absence of knowledge isn't secrecy but ignorance. If we think about 'access to information', transparency is about the breadth of access whereas secrecy is about its limits. Secrecy and openness both require information to be shared, the crucial factor is the exclusivity of the sharing (Pozen, 2010).

Bureaucracies and secrecy have a mutually beneficial relationship. The sociologist Max Weber wrote about the important role of secrecy in bureaucracies: "Every bureaucracy seeks to increase the

[5] Maurice Frankel, director of the UK's Campaign for Freedom of Information. See: https://www.cfoi.org.uk

superiority of the professionally informed by keeping their knowledge and intentions secret" (Weber, 1958: 233). Stiglitz also sees the incentives officials have for secrecy. It allows them to hide mistakes, gives them leverage with special interests, and gives incumbents in power an advantage over newcomers making the possibility for change or transition more unlikely thus leading to concentrations of power (Stiglitz, 1999). "Secrecy is the bedrock of this persistent form of corruption, which undermines confidence in democratic governments in so much of the world" (Stiglitz, 1999: 11). Secrecy is thus corrosive; it is "antithetical to democratic values, and it undermines democratic processes. It is based on a mistrust between those governing and those governed; and at the same time, it exacerbates that mistrust." We only have to look at the last century to see the results of secrecy says Stiglitz: "In country after country, it is the secret police that has engaged in the most egregious violations of human rights" (Stiglitz, 1999:2).

Critiquing Transparency

Transparency has taken on a "quasi-religious significance" (Hood, 2006: 2), though like an article of faith, it is more often preached than practiced. Also like faith, some academics believe its promise does not match its reality. Etzioni, for example, writes that:

> "the critical question is whether transparency constitutes a reliable mechanism of promoting good governance and sound markets under most circumstances—or whether it is a rather weak means that itself relies on other forms of guidance and can supplement regulation but not serve a main form of guidance." (2010:391)

Hood believes transparency has become "pervasive in the jargon of business governance as well as that of governments and international bodies…used to saturation point" (Hood, 2006:2). It can be argued that the rhetoric of transparency has become, as Hood says, a "pervasive cliché of modern governance" but in practice that is definitely not the case as I will show in Part Two of this thesis.

This universal aspect of transparency - the way it can be embraced both by Wikileaks founder Julian Assange and UK Prime Minister David Cameron - shows how the word means different things to different people. Ann Florini in the introduction to *The Right to Know* notes that while the word is widely used it is rarely well defined (1998:4). British philosopher Onora O'Neill points out that an emphasis on transparency "encourages us to think of information as detachable from

communication" and thus it becomes natural to view disclosure as a thing directed by those who control the supply of information (O'Neill, 2006:6). In such an environment, transparency can be achieved without actually communicating anything meaningful to the citizen. In a similar vein, Stubbs and Snell call FOI an 'empty signifier' in that you can pour into it whatever you wish (Stubbs, 2014). Claire Birchall also makes the point that when all political parties support transparency it has, in effect, become meaningless (Birchall, 2014). She notes that we live in an age of transparency rhetoric rather than transparency practice.

One of the problems with the widespread acceptance of transparency rhetoric is that not only does the word become meaningless, more worryingly, it can come to mean what the powerful want it to mean. The underlying democratic principles of the concept become detached from its meaning. This is evidenced in the way the UK Government can claim to be in favour of transparency while simultaneously seeking ways to curtail it in practice, for example by appointing in 2015 only politicians critical of the Act to a review and setting terms reference to decrease the Act's power for citizens.[6] It is precisely because of such ongoing and continued actions by governments to restrict the public's right to know and the continued wilful withholding by governments of meaningful information to citizens, that I believe it is premature to say that transparency is "a pervasive cliché of modern governance" (Hood, 2006:2). Indeed in some areas, namely security and intelligence, secrecy is not only entrenched but is also expanding.

Transparency as Instrument or Right?

Academics view transparency as either a secondary 'instrumental' value or a value in itself. Heald argues that it should be viewed instrumentally and that "attempts to elevate it to intrinsic value should be resisted." (2006b: 1) There are clear benefits of transparency in especially secretive systems, he believes, but once systems are relatively transparent (he doesn't specify what criteria must be met to reach this point) then the costs of transparency become apparent and trade-offs

[6] The Commission sought evidence on deliberative space, collective responsibility, risk assessments, Cabinet veto, burdens on public authorities and enforcement and appeals. By contrast it could have asked for evidence on the citizen experience of FOI: abuse of the public interest extension, failure to provide advice and assistance to requesters, failure to abide by the law, the privatisation of public services, imbalance of resources in the appeal process.

must be made between transparency and other, possibly more important, values of trust, accountability, autonomy, confidentiality, privacy, fairness and legitimacy. The 'instrumental' use of transparency is predominantly focused on its use as a mechanism to build or increase public trust in government, often as a means of increasing public acceptance of official policies or increasing participation (Curtin and Meijer 2006; Heald 2006b; Coglianese 2009; Worthy 2010; Grimmelikhuijsen 2012a; O'Neil 2006).

There are a number of problems with this utilitarian argument for transparency. First, legitimacy or trust built upon a foundation of enforced ignorance is illusion at best. Secondly, viewing transparency as a 'fix-it' for broken governments or broken trust in governments is to ignore the importance of reality, or for that matter the democratic principle of a citizen's right to see reality. Third, it may not even work in this way. Bauhr and Grimes (2014: 295) point out that "several of the elements" within the idealised cycle of how FOI work are "tenuous".

Transparency is the process by which we observe reality: it shows what is there. If corruption, greed and immorality are the reality, we trust what we see; however, precisely because of this, our trust in the people or institutions thus exposed may be lessened. I believe it is dangerous to democracy to view transparency in utilitarian terms for when government defines the parameter of transparency's success as 'trust in government' and then trust in government does not follow, those in power (who rarely like FOI to begin with) have a convenient excuse to undermine or abolish it. This is precisely what the UK government has attempted to do in numerous reviews since the Act's implementation. Those who view transparency in a utilitarian way often judge it to be 'overvalued' (Etzioni, 2010: 389). But behind this belief is an elitist assumption: that those with power are entitled to decide what the public should know. Politically, openness has also become a convenient action, an "apparently simple solution to complex problems—such as how to fight corruption, promote trust in government, support corporate social responsibility, and foster state accountability" and a "visible response to public disquiet" with "attractive, palliative qualities for politicians and CEOs who want to be seen to be doing rather than reflecting" (Birchall 2014, 77).

Contrasting the utilitarian argument is another concept that I find has more merit: that the 'right to know' is a fundamental human right (Banisar, 2005; Birkinshaw, 2006a,b; Florini, 2007a, McDonagh, 2013). Birkinshaw states that "within the framework of internationally agreed concepts of human rights, FOI deserves to be listed with those rights." (Birkinshaw, 2006b: 2). His argument rests on a strong legal basis. In its Resolution of the General Assembly December 1946, the United Nations signed up to the idea that: "Freedom of information is a fundamental human right and is a touchstone for all freedoms to which the United Nations is consecrated." (United Nations 1946). Article 19 of the Universal Declaration of Human Rights agreed in 1948 by the UN Assembly gives people, "the right to seek, receive and impart information and ideas through any media and regardless of any frontiers." Article 10 of the Human Rights Act 1998 grants a right to freedom of expression: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to *receive and impart information without interference by public authority* and regardless of frontiers" (emphasis mine). While this has not been interpreted as granting a right to government information, combined with other acts such as right to life (Article 2), access to justice (Article 6) and family and private life (Article 8) there is a growing argument that it should. And outside of Europe, this right is gaining ground. In 2006, the Inter-American Court of Human Rights ruled in Claude Reyes v Chile[7], that it follows from the Article 13 right to 'seek' and 'receive' 'information' that individuals have a right to request state-held information and for the state to provide it. Other international human rights policies focus on building participatory and representative models of democracy, which by definition requires that if citizens are to meaningfully participate they need to be informed and thus require access to information. In 2015 the United Nations General Assembly agreed on a new Sustainable Development Goal (target 16.10) that urges countries to ensure public access to information.

One of the strongest arguments for the intrinsic value of FOI was put forward by renowned economist and academic Joseph Stiglitz in a lecture given at Oxford in 1999 titled *On Liberty, The*

[7] 19/2006, IACtHR Series C 151 (2006); 16 IHRR 863 (2009)

Right to Know, and Public Discourse: The Role of Transparency in Public Life. Stiglitz equated free speech with freedom of information; both are intrinsic and essential rights in a democracy.

> "Free speech is both an end in itself—an inalienable right that governments cannot strip away from the citizenry—and a means to other equally fundamental goals…I want to push the argument one step further, and argue that there is, in democratic societies, a basic right to know, to be informed about what the government is doing and why." (Steiglitz,1999:2).

Proponents of this argument say that the right to know, like the right to speak, is necessary for the realisation of all other rights and so, for example, India's FOI campaign has as its slogan: "the right to know is the right to live."

Transparency and Power

Here we come to a crucial aspect of transparency: its relation to power both in its exercise and as an identifier of who has it and who does not. It is not an empty cliché to say that knowledge is power. The powerful know this and expend vast resources attempting to gather information and control its flow.

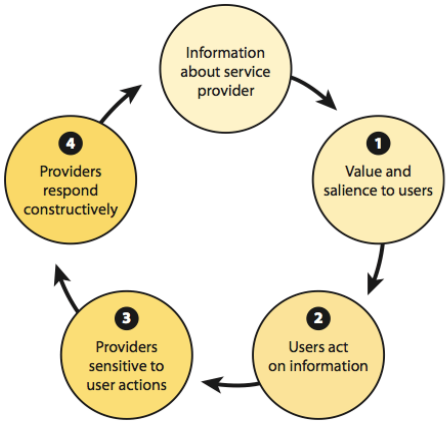
> "Power is more than communication, and communication is more than power. But power relies on the control of communication, as counterpower depends on breaking through such control. And mass communication, the communication that potentially reaches society at large, is shaped and managed by power relationships, rooted in the business of media and the politics of the state. Communication power is at the heart of the structure and dynamics of society." (Castells, 2013:3)

Castells writes in *Communication Power* about how information dissemination challenges hierarchies. He recalls a seminal experience as a youth, leafleting a movie cinema in Franco's Spain:

> "I did not know then that the message is effective only if the receiver is ready for it (most people were not) and if the messenger is identifiable and reliable…social and political change has always been enacted, everywhere and at all times, from a myriad of gratuitous actions, sometimes uselessly heroic (mine was certainly not that) to the point of being out of proportion to their effectiveness: drops of a steady rain of struggle and sacrifice that ultimately floods the ramparts of oppression when, and if, the walls of incommunication between parallel solitudes start cracking down, and the audience becomes 'we the people'." (Castells: 2013: 2)

This echoes earlier thoughts from O'Neil and others that for information to be meaningful it must meet certain criteria. I agree with O'Neill that transparency is meaningless when it becomes detached from actual communication to an audience. Transparency works when it gives citizens information they can use, in a way they can use it. Transparency is not just about data dumps or the

government deciding what can be released under 'open data' policies. It requires both proactive disclosure but also forcing the state to answer difficult questions from the public. For it to mean anything it must give power to the citizen: provide answers to the questions they ask and not merely spoon-feed them anodyne or propagandist information. "Whether and how new information is used to further public objectives depends upon its incorporation into complex chains of comprehension, action, and response." (Weil, Fung et al, 2006: 157). Kosack and Fung (2014: 71) describe a 'transparency action cycle' (see diagram below) with the most important dynamics that must be in place before a transparency policy or law can improve services.



Source: Kosack & Fung (2014:17)

Those who want to know have the best idea what is most meaningful to them. However, it is not the citizen but the state that gets to decide about FOI disclosure. In addition, the government's control of the legislative process gives it another potent and powerful weapon against change as evidenced during my campaign to disclose MPs' expenses (see Chapter 9 of this thesis). The fundamental democratic question about access to government information is summarised by Stiglitz: "Is it the private province of the government official, or does it belong to the public at large?" (Stiglitz, 1999: 8). His view is that information gathered by public officials at public expense is owned by the public. This is a philosophy that I share and was the guiding principle of my journalism.

Thomas Paine described pre-Enlightenment government as "an assumption of power, for the aggrandizement of itself," whereas the Enlightenment proposed instead a political system that was

"a delegation of power, for the common benefit of society." (Israel, 2010: 91). That promise never appeared more real then with the introduction of new technologies that reduced the cost of distributing information to near zero and connected people across the planet. Digitisation has enabled information about politics, government decision-making, policies and outcomes to be made available in new formants on an unprecedented scale. The internet and social networks mean that information can be spread far and wide, often in real time. (Grimmelikhuijsen, 2011, 2012, 2013). Meijer (2009) calls this phenomenon 'computer-mediated transparency' and it is now an "essential part of modern-day government transparency" (Grimmelikhuijsen, 2013: 575). The research on the impact of e-government and open data is still at an early stage (Andersen et al 2010) and the powerful haven't always adapted to the pressure to be transparent with open arms. Grimmelikhuijsen notes that citizens' demands for openness and information have "pushed spin control towards the centre stage of government" (2011: 36).

Technology has created new ways for citizens to have their rights and interests represented in the polis. "Party-centered representative democracy has now been substantially supplemented (but not replaced) with multiple forms of representing the public and holding governments accountable" writes Schudson in *The Rise of the Right to Know* (2015: 230). This new type of democracy has been given different names: 'post-representative', 'trans-legislative' (as a description of wider representation that is no longer exclusively centred in elections and legislatures) and what the Australian political and media scholar John Keane describes as 'monitory democracy' (Keane, 2009). Keane sees an evolution of democracy starting with the 'assembly democracy' of ancient Greece to 'representative democracy' of the 18th century and now 'monitory democracy'.

> "If assembly democracy is linked to the spoken word and representative democracy to print culture, today's democracy - what Keane calls 'monitory democracy' - emerges with the rise of multimedia society." (Schudson: 234).

Digital technology, the internet and social networks have created all kinds of new ways for citizens to monitor and participate in government.

> "In the era of monitory democracy, the constant public scrutiny of power by hosts of differently sized monitory bodies with footprints large and small makes it the most energetic, most dynamic form of democracy ever." (Keane, 2009: 743)

Democratic governments around the world are struggling to adapt to this potent new form of democracy. In the next chapter I look at the origin and nature of transparency and its relationship with politics.

Chapter 2: The Origins of Transparency

Rise of the Right to Know

Scholar Michael Schudson's thesis in his book *The Rise of the Right to Know* is that openness is a modern invention, a "key element in the transformation of politics, society and culture from the late 1950s through the 1970s" (Schudson, 2015: 5). It was coincident with, though not caused by, the civil rights movement and a general reaction against traditional social hierarchies along with an expansion of higher education that had within it a critical and egalitarian ethos. Specific American advocates ensured the right to know became institutionalised through law but the real impetus was cultural. Schudson gives numerous examples of how openness became a cultural phenomenon in the media, popular culture, economy and everyday life: The creation of the Securities and Exchange Commission; the publication of the Kinsey reports in 1948 and 1953 on adult sexual behaviour; Daniel Ellsberg's release of the Pentagon Papers to newspapers in 1971; the Automobile Disclosure Act of 1958 requiring itemised pricing stickers on car windows; the Automobile Safety Act and Truth in Packaging (1966) both spearheaded by consumer rights campaigner Ralph Nader, and the way doctors communicated with patients. In 1961 the Journal of the American Medical Association found only 12 per cent of doctors would tell their patient if they had cancer. By 1979 this figure had risen to 98 per cent (Schudson, 2015: 11).

Other academics view transparency as one of the oldest ideas in political thought (Hood, 2006), stemming from beliefs in intrinsic equality (Dahl, 1989). If we accept Hood's definition of transparency from *The Encyclopedia of Democratic Thought*, then the concept has certainly been around at least since Classical Greece. Pericles of Athens is famous for his remarks of around 430 BC in which he speaks of citizens' right to know: "Although only a few may originate a policy, we are all able to judge it." (Popper, 2003: 199, citing Thucydides, II 37-41). What Dahl calls 'intrinsic equality' Popper calls 'Equalitarianism' which he defines in *The Open Society and Its Enemies* as the ideology or

demand that citizens of the state should be treated impartially, without regard to birth, family, wealth and given no natural privileges.

Transparency & the Enlightenment

Political transparency was an important part of the Reformation movement as a means to combat the culture of secrecy inherent in the Roman Catholic Church. The English Revolution in the 1640s inspired a number of important political texts re-energising Classical Greek ideas about democracy and intrinsic equality, notably John Milton's defence of free speech in *Areopagitica* (1644) and John Locke's defence of natural rights in *Two Treatises of Government* (1689). The concept gained strength in the Enlightenment due to that movement's philosophy that the world was knowable and the way to know it was to gather information and study it. Sweden's Freedom of the Press Act of 1766 was the first FOI law and began a Scandinavian tradition of press freedom and access to information. In the 1770s and 1780s a 'veritable deluge of subversive literature' appeared in Europe, Britain and the New World (Israel, 2010: 87). These works took many forms - philosophical, satirical, literary, journalistic - but all contained a growing aversion to cultural and political oppression, leading to what Enlightenment scholar Jonathan Israel calls 'a revolution of the mind', that is a radical revolution in human knowledge and awareness.

Jean-Jacques Rousseau and Jeremy Bentham both cite transparency as a way of keeping those in power honest (Hood & Heald, 2006). Hood believes Bentham is the first to use 'transparency' in its modern governance-related sense in the English language. In *Writings on the Poor Laws* in the 1790s, Bentham wrote: "I do really take it for an indisputable truth, and a truth that is one of the corner-stones of political science - the more strictly we are watched, the better we behave." ([1790s] 2001:277). However this sounds more like surveillance than FOI, which I discuss in the surveillance chapter.

In *The Social Contract* Jean-Jacques Rousseau focused on the transparency of state officials to citizens rather than the other way around. Public servants, he argued, should do their business "in the eyes of the public". These public servants should be named and known by the people, the better

to be accountable to them. "I should like you to permit no office-holder to move about incognito, so that the marks of a man's rank or position shall accompany him wherever he goes…"(Hood, 2006: 4 citing Rousseau ([1772/1782] 1985:72). Such clarity on who is working on behalf of the public is very different from the culture of official anonymity that exists in modern-day Britain (Brooke, 2011: 95-117).

Not everyone was enamoured by Enlightenment values, even those professing to be its advocates. Voltaire and Frederick the Great were typical of those who believed in a narrow, elitist Enlightenment where the existing social order remained unchanged. Countering this was a Radical Enlightenment exemplified by the Bavarian professor Adam Weishaupt who argued in 1786 that enlightening the few only to keep the majority in ignorance was tyranny under a different name. Only "Aufklärung um andere wieder aufzuklären, giebt Freyheit" - enlightenment to enlighten others generates freedom. (Israel, 2010:85 citing Adam Weishaupt, *Apologie der Illuminaten* [Frankfurt and Leipzig, 1786] 46). I view this statement as one of the principle foundations for freedom of information: that all people, regardless of privilege, resource or power have the right to information that enables their enlightenment. It also follows from this statement that universal education is essential so that people can better identify and represent their own interests. As French philosopher Paul-Henri Thiry (Baron) d'Holbach wrote in 1772: "it is only by showing [people] the truth that they will come to know their most vital interests and the true motives which should incline them towards what is good." (Israel: 198 citing d'Holbach, *Le Bon-Sens*, vi–viii, 7).

While British intellectuals supported the Enlightenment, few could bring themselves to condemn the existing social order of rank, privilege and aristocracy. Many thought the British political system superior even to the nascent United States democracy, with conservative Enlightenment thinker Adam Ferguson, for example, boasting that the English constitution was better than the American one and "does actually bestow upon its subjects higher degrees of liberty than any other people are known to enjoy." (Israel, 2010: 41 citing Adam Ferguson, *Remarks on a pamphlet lately published by Dr Price* [London, 1776], 13). The facts, however, presented a different

picture: Britain had at the time an electorate of just 300,000 men out of 7 million (Israel: 59). Rather than fight for the enlightenment of the common man, the British became "helpless prey to the depredations of ministers of state" wrote the radical John Jebb in a letter of September 1785 (Israel: 59). It is interesting to note these elitist attitudes as I encountered similar ones during my campaign to open up parliament.

While rebuffed in England, the radical enlightenment ideology found a fertile home in the American colonies. Thomas Paine argued in *Common Sense* (1776) that all men are created equal and what an absurdity it was for Americans to pledge allegiance to a distant king. In July of that year Thomas Jefferson drafted the Declaration of Independence accusing King George III of tyranny and violating Americans' "self-evident…rights [to] Life, Liberty, and the pursuit of Happiness". Jefferson made what at the time was an extraordinary claim: that the power of kings came not from god but the consent of the people, and that people only granted consent insofar as kings delivered on the promise of life, liberty and the pursuit of happiness. After the revolution, the 13 American colonies adopted the most democratic constitutions ever seen, outlawing rank and title and other inherited privileges. The House, Senate and President would all be chosen, directly or indirectly, by citizens. Undoubtedly the American revolution inspired the French of 1789, but Israel's thesis is that both had their roots in the intellectual 'revolution of the mind' that culminated in a new model of government: constitutional, based on universal rights including free speech and a free press, and the consent of the governed.

Right to Know in the American Political System

The United States has been "the traditional proponent of transparency" (Florini, 2007: 9). Schudson traces the phrase 'right to know' to James Wilson who used it during the American Constitutional Convention to argue for an official record of House and Senate proceedings: "The people have a right to know what their agents are doing or have done, and it shouldn't be the option of the legislature to conceal their proceedings." (Schudson, 2015: 5 and O'Brien, 1981: 38). But the phrase did not appear in popular rhetoric until 1945 when the executive director of the Associated

Press, Kent Cooper, used it in a speech: "Citizens are entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country, or in the world, without respect for 'the right to know'." The New York Times, reporting on the speech noted Cooper's "good new phrase for an old freedom" and that "such freedom is not merely a right. It is a necessity for every country which intends to utilize to the full the creative powers of its citizens. In the long run it is the well-informed peoples who will be free." ('The Right to Know', *New York Times*, 23 Jan 1945). While the right to communicate information was specified in the in the First Amendment of the Bill or Rights ratified in 1791, the first federal 'FOI' law was the 1946 Administrative Procedures Act. Soon after, the American Society of Newspaper Editors (ASNE) created its first committee on FOI in1948. It was the combined power of the press and Congressional desire to stem Administrative secrecy that led, eventually, to passage of the US Freedom of Information Act. This act, "weak as it was when passed in 1966, was a landmark development of a more open society." (Schudson, 2015: 30). However, domestically, it quickly came to be seen as a 'paper tiger' and a 'relatively toothless beast' (Wald, 1984: 658; Roberts, 2006: 55). The Watergate scandal that let to President Richard Nixon's resignation marked a 'symbolic catalyst for a new law' (Worthy, 2014a) and in 1974 the law was amended and strengthened.

US FOIA & the 'Openness Revolution'

The importance of the US law can't be overestated. The US had produced "a small miracle for the world", that became the model for global FOI laws (Schudson, 2015: 62). It marked the beginning of what is called the 'Openness Revolution' and while FOI may have begun as a means to reign in the growing state's administrative power (Schudson, 2015; Florini, 2007), it soon expanded as a necessary means of ensuring other rights, most notably in the FOI campaigns of India and South Africa where secrecy bred such corruption that the most vulnerable were being deprived of life's essentials such as food, water and work. In the 1990s only about a dozen countries had FOI laws but by 2006 there were 70 countries and in 2012 there were 93 (Mendel 2008; Vleugels 2009, Florini, 2007).

Additionally, the American system of corporate disclosure was, by the 1990s, seen as the best economic model, which added to transparency's caché. While recent corporate scandals have cast doubt on the adequacy of these measures, no one seems keen to adopt the secrecy of markets in Russia or China, but rather to introduce greater transparency. The World Bank and IMF also adopted disclosure policies as a means to fight against corruption, and the leading anti-corruption organisation in the world was set up in 1993 with the name Transparency International. If secrecy was the ailment, transparency was increasingly seen as the cure, a "simple solution to complex problems" with "attractive palliative qualities for politicians and CEOs who want to be seen to be doing rather than reflecting." (Birchall 2014:77). As such it can have appeal across the political spectrum and be seen as a "pan-ideological good"[8] in the words of Jim Harper from the American libertarian CATO Institute.

The latest incarnation of freedom of information came with digitisation and the 'Open Data' movement. Open data leads to new collaborations between citizen and state (Lathrop and Ruma, 2010a) though not always beneficial to the citizen. The techno-utopianism of early thinkers (including myself) has more recently been tempered with greater skepticism. Lathrop and Ruma (2010a) edited a volume of mostly optimistic papers that viewed technology as democratic saviour. "Much of the optimism," writes Lawrence Quill, "can be reduced to one important factor: technology." (Quill, 2014:88). I myself espoused such a view when I wrote in *The Revolution Will Be Digitised*: "Instead of re-engineering the Internet to fit around unpopular laws and unpopular leaders, we could re-engineer our political structures to mirror the Internet" (Brooke, 2011). Internet skeptic Evgeny Morozov took issue with my contention: "Last time I checked, much of this proverbial 'Internet' was built by for-profit companies with the explicit objective of making money, not defending human rights. Why should we be reengineering our political institutions with this model in mind?" (Morozov, 2012: 125). Ever the skeptic, Morozov also points out the 'empty signifier' quality that open data shares with FOI so that a government can provide 'open data' on neutral

[8] Quoted in M. Triplett, *Media-ite*. 2010. 'Transparency Group taking government openness to the people'. (March 18). Retrieved from http://www.mediaite.com/online/transparency-group-taking-government-openness-to-the-people/

uncontroversial topics such as train timetables even as it remains deeply undemocratic and secretive. He notes that the Hungarian cities of Budapest and Szeged provide online machine-readable transit schedules. It is government data and it is open - but few would agree this makes the Hungarian government open. It is quite the opposite with an executive keen to demolish FOI and free press. So we should beware of cheerleading open data as it allows 'some governments to claim progress where there is none, while stalling on important reforms' (Morozov: 2013:96).

Some academics describe the government as merely a 'platform' for open data in the way Amazon is a platform for retailers (O'Reilly, 2010). I am skeptical of this idea as it appears to be a way for powerful actors to pretend powerlessness and thus avoid taking responsibility or being held to account for the power they posses. The information theorist Manuel Castell is keenly aware of the role communications technology has on institutions. He defines the network society as "a social structure constructed around (but not determined by) digital networks of communication." (Castells, 2013: 4). The structure of this network means, "the exercise of power relationships is decisively transformed in the new organisational and technological context derived from the rise of global digital networks of communication as the fundamental symbol-processing system of our time." In other words: the revolution will be digitised.

Right to Know and the British Political System

Although I initially trained as a journalist in the United States, the majority of my investigative work was conducted in the UK so it is worth providing some context about the right to know as it exists within the British political system. An assessment of Britain's political culture also sheds light on why Westminster has been so resistant to the Freedom of Information Act. There is a fundamental conflict between FOI and the British political system that has neither been fully acknowledged nor resolved. I argue that the democratic value of parity between ruler and ruled is at odds with the British political tradition. FOI embodies popular participatory and accountable democracy, which is the very opposite of the top-down, narrow and elitist British political system.[9]

[9] I do not have space for a deeper analysis of the British political tradition here but this can be found in chapters two and three of Tant's book as well as Anthony Birch's *Representative and Responsible Government* (1979), *The British Political*

The Westminster system is characterised by a strong central bi-partisan consensus, what Moran (2003) refers to as a system of 'club regulation' among the UK's political elite but also of what Vincent (1998) identifies as the principle of 'honourable secrecy'. Former MP and now political academic Tony Wright notes that "dominant traditions on both left and right in Britain for most of the twentieth century liked strong government: the left because it delivered state power for progressive purposes; the right because it was the guarantor of order and authority" (2009:324). Wright summarises three types of democracy:

> "The first is the ability to kick the rascals out, the democratic bottom line and never to be underestimated. The second is the ability to kick them while they are in, in a continuous process of accountability. The third is the ability of people to contribute actively to their own self-government." (325)

Of the first he says the British 'do rather well', the second is done well by the media but less so institutionally, and the third not done much at all. It is this third part that encompasses what Keane described as monitory democracy as referenced in the previous chapter. Among the many ways citizens can represent their interests is by using FOI as a means to gain knowledge and thus lobby on a more even footing with those making policies and decisions. What is evidenced from my work is how obstructive the Westminster system has been to monitory democracy in the form of citizens using FOI.

In British history "citizenship has more often appeared as something granted from on high to subjects rather than something gained from below as in the American, Dutch and French experiences…" writes Bernard Crick (2000: 6). In his *Essays on Citizenship* he states, "We in England have had considerable difficulties about the very concept of citizenship, let alone peculiar inhibitions" (3). He sees these as stemming from the fact that the English are in fact still subjects rather than citizens. "Put simply, a subject obeys the laws and a citizen plays a part in making and changing them" (4). As such, "sociologically and socially England is still in many ways a profoundly undemocratic society…certainly when compared to the United States." (2000: 193).

Tradition (1983), and John Dearlove and Peter Saunders' *Introduction to British Politics* (1984). An interesting investigation into elitism in British culture is also found in John Carey's *The Intellectuals and the Masses* (1992).

England's narrow and elitist understanding of democracy is inherited from a history in which political disputes were in the main limited to the claims of competing elites with the role of the public 'essentially a passive, legitimizing one' (Tant, 1993: 58). There have been challenges, but they were not successful. Battles have raged in British politics about who qualifies as an elite, but not how we are governed and whether elitism is acceptable in a modern democracy. The franchise of authority was expanded from king to aristocrat and later to some 'ordinary' people but Britain is still a ways from placing sovereignty in the people. Instead sovereignty has moved from monarch to a parliament acting with royal prerogative. It has always been the government's role to weigh particular interests: "Government and only government was arbiter of the 'national interest'" (Tant, 1993: 6). As such, the people's representatives have autonomy, freedom and discretion to make decisions 'on behalf' of the people. Constituents' views are neither sought nor listened to. It is government's independent task to consider options and decide policy. Any questioning of those decisions is to be done by parliament not ordinary people. Accountability to the people is retrospective, at elections. In the meantime, government is accountable to the people's representatives not to the people directly. What has evolved in Britain is a political system based on pre-democratic elitist concepts of representation, where the notion of 'responsible' (rather than responsive) government is dominant. (Tant, 1993: 2). This is 'government knows best' and it's clear why in such a system there is little value placed on informing the public. This also accounts for the British government's particular sensitivity to the sovereignty of parliament and ministerial responsibility, which I encountered in my battle for MPs' expenses. "In the British context, parliament has come to be seen as virtually the sole representative institution of democracy" (Tant,1993: 23). I agree with Geoffrey Robertson that concepts such as 'ministerial accountability' and 'parliamentary sovereignty' are nothing more than constitutional fictions designed to avoid accountability while pretending to do the opposite (Robertson, 1989: 130).

It was for all these reasons that FOI had a tough fight becoming a law in 2000 and faced a further five-year delay before coming into force in January 2005. Still there are politicians and a few

academics criticise who believe there is too much transparency and that the reason people are disengaged from parliament is due to the media or a too-demanding citizenry. Matthew Flinders, for example, believes the problem in Britain is not too little democracy but too much and it is 'binding the hands of politicians'. He says:

> "Could it be that if politics is failing it is easy to blame the politicians? Could it be actually that the public is to blame? I cannot help thinking that the public is fickle; they want pain free solutions to complex problems where none exist. They don't want politicians; they want supermen and superwomen that will find the magic wand, the technological fix, the pain free solutions." (Flinders, 2014, 'The problem with democracy', TEDx Houses of Parliament, Accessed March 2016: http://tedxtalks.ted.com/video/The-Problem-With-Democracy-Matt)

He believes the existing British system despite its failings remains the 'least worst' form of government and thus rejects demands for any major democratic overhaul. Flinders makes much of the 'boldness' of his argument but all he is really arguing for is maintenance of the status quo, which is the least bold argument there is. Tant, writing more than 20 years earlier is much bolder concluding that "fundamental change must therefore be attempted through the overthrow of the system itself or within this, at best, incremental context" (Tant, 1993: 91). Through my work it became obvious that parliament was incapable of reforming itself and instead reform had to be forced upon it. Richards and Smith (2015) provide a robust critique of Flinders' arguments. I would only add that arguments about the 'burden' of transparency and accountability reveal the author's own elitism and a disdain for the ordinary citizen's right to be informed and involved in politics. Flinders' critique of monitory democracy in *Defending Politics* (2012) is really a defence of English elitism. I argue throughout this thesis that if there is a crisis in British politics it is a result not of too much democracy but rather far too little: a clash between "twenty-first century expectations, technologies and transparency challenging a nineteenth-century model of democracy and participation" (Richards & Smith, 2015: 46). I will go further and say that democracy as defined in the 'traditionalist' manner in Britain is so narrow and limited that it is contrary to any real sense of what the word actually means. Next I will look in more detail at transparency's intrinsic democratic value, its instrumental value and how it is changing society.

Chapter 3: Why Transparency Is Important

The importance of transparency can be viewed in three main ways: as an intrinsic value, an instrumental value and as a quality that is changing society.

Transparency as an Intrinsic Democratic Value

Florini notes, "there are few more important struggles in the world today than the battle over who gets to know what." As such, it should come as no surprise that FOI, as the political manifestation of transparency, is "an essential first step in the exercise of political and economic power" (Florini, 2007: 2) The reason FOI has become a "good overall indicator of public sector transparency" (Stubbs & Snell, 2014: 143) is because of its intrinsic value to enable freedom of expression and democracy.

The right to know is important because it makes societies more democratic, and the more democratic a society the happier are the people in it (Orviska et al, 2012, Owen, 2008, Dorn et al 2007, Inglehart et al, 2008). To take just one study as an example: In 1999 Bruno Frey and Alois Stutzer analysed a survey of 6,000 people across Switzerland to see how direct democracy and autonomy in the 26 cantons affected their happiness. They found people were happier in democratic polities because they valued the political participation possibilities in a constitutionally guaranteed process and that the more decentralised the political decisions, that is the closer they were to the citizens, the happier people were. They also found that 'good government' contributed to happiness. There is a growing body of academic research linking democracy with life-satisfaction and it is for this reason the United Nations stated on the cover of its 2002 Development Programme that "democracy has proven to be the system of governance most capable of . . . securing and sustaining well-being" (UNDP, 2002, cover text). Satisfaction with democracy exists primarily as it provides opportunities for people to participate in the political process and have their interests heard and represented.

Happiness is not the sole metric for valuing democracy. Other factors include fairness, justice and self-actualisation. The democratic process promotes maximum freedom, personal development and opportunity to satisfy political concerns and for all these reasons it has become "virtually the only political model with global appeal" (Inglehart & Welzel, 2005: 264). If it is desirable that human beings be moral beings, then moral autonomy must be respected. We need the opportunity to make our own choices in life. To restrict or prohibit opportunities for people to live under laws of their own choosing and participate in making those laws is to "limit the scope of moral autonomy" (Dahl, 1989: 91). Furthermore, if the qualities of good citizenship are to be developed by a society then, argues Dahl, "it is necessary if not sufficient that the people govern themselves democratically." In order to do so they must have access to the information that allows them to be informed citizens, capable of participating in the decision-making process (Dahl 1989: 93). Peter Hennessy highlighted the role of access to information in a democracy in his evidence to the Justice Committee in 2012. He described FOI as "the completion of the circle" that began with extending the voter franchise: "It has to be seen as part of completing the virtues of the franchise in an open society" (HoC, 2012: 23). It thus follows that the rise of the right to know correlates to an increase in democracy. In America and many developing countries FOI was part of a deepening of democracy. Schudson describes the rise of the right to know in America: "American politics and society in this era became more fully democratic than they were before, and that for all the hazards and shortcomings of transparency, its expansion has made our politics more worthy of the name 'democracy'." (Schudson, 2015: 5). Florini adds that:

> 'As democratic norms become entrenched more widely around the world, it is becoming apparent that a broad right of access to information is fundamental to the functioning of a democratic society. The essence of representative democracy is informed consent, which requires that information about government practices and policies be disclosed. And in democracies, by definition, information about government belongs to the people, not the government." (Florini, 2007: 3)

Many of the arguments against freedom of information are actually arguments against democracy, revealing a prejudice and/or preference for elite or aristocratic rule. Plato provided a model of an elitist government, which he called "guardianship" in *The Republic* that endures down

the millennia. An elite is someone working for government and ruling organisations, "critical intermediaries between the state and the populace, organizing political, economic, religious and educational actives, reinforcing existing beliefs and behaviour and recruiting and training new elite members." (Goldstone, 2014: 13). Dahl recognised that, "hierarchy is democracy's most formidable rival; and because the claim of guardianship is a standard justification for hierarchical rule, as an idea guardianship is democracy's most formidable rival" (Dahl 1989: 52).

Information Elitism

Those who advocate guardianship believe the average person is unqualified to govern. They have a low view of the common man, both intellectually and morally. Instead, they believe only an 'elite' possess the special knowledge and skill necessary to govern. For the philosopher Plato, the elite were philosopher kings. For Karl Marx and Vladimir Lenin they were members of the vanguard communist party, entitled - even required - to rule due to their special knowledge. For B.F. Skinner, a behavioural psychologist, psychologist kings were the answer (Skinner, 1971). What all these divergent actors have in common Dahl states is that "each in its own way poses an alternative to democracy and challenges the assumption that people are competent to govern themselves" (Dahl, 1989: 55).

Dahl explores the idea that such potentially superior politically competent people exist. If they do, their special status must rest on two propositions: 1) that knowing the public good is a science that can be measured, so we can judge that certain people are more or less adept at identifying it, and 2) that this knowledge can only be obtained by a minority of adults. Plato himself was unable to explain why the 'royal science' he admired in *The Republic* could only be learned by an elite of philosopher kings, and the argument has failed to withstand examination. Dahl determines that sound policy judgements require both moral understanding (virtue) and instrumental (or technical) knowledge, but that the one does not entail the other. A technocrat may have expert knowledge but they "are not more qualified than others to make the essential moral judgments. They may be less so" (Dahl, 1989: 69). Even more noteworthy is the fact that policy-making is done by taking what

has gone before and making predictions about what will happen in the future. Because the future is unknown to all humans, no one can have superior knowledge of it. Political judgments cannot be based on rational certainty. Instead they are "based on assessments of risk, uncertainty, and trade-offs" (Dahl, 1989: 75). They require making choices about alternatives where the outcomes are based only on probabilities. Often, even the probabilities are unknown. So logically, elites are no better at governing that the rest of humanity.

The reason the guardianship model is anathema to democracy is that authority is not delegated, but permanently alienated from the public. If elites are seen as having a 'natural' right to rule, it follows that the populous 'naturally' must follow. In such circumstances those without voice are likely to have their interests unrepresented. For as John Stuart Mill noted in 1861:

> "The rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them…Human beings are only secure from evil at the hands of others in proportion as they have the power of being, and are, self-protecting." J.S. Mill[10]

Instrumental effects of transparency

The other way to value transparency and FOI is instrumentally. The majority of empirical research takes an instrumentalist approach, mostly because the symbolic and principled aspects of FOI such as 'freedom', 'democracy', 'happiness' or 'self-actualisation' lie in a less measurable realm than the instrumental effects. The downside of this is that it is like examining racism only in terms of economic while ignoring the fundamental issue of human rights, justice and fairness.

Meijer et al's (2010) study of transparency research found that most studies examine transparency for its instrumental rather than intrinsic value. Even in the studies where transparency is the main conceptual framework, and the substantive value is at its highest, the majority of research - 78.6% compared to 19.6% - focused on the functional aspects of transparency. This is evidence of a preference amongst academics for what can be measured more precisely over what cannot: the functional, utilitarian value of transparency over its democratic substantive value. On the

[10] Mill, John Stuart. [1861] 1958. *Considerations on Representative Government* Ed. C.V. Shields. Indianapolis: Bobbs-Merrill. Cited in Dahl, 1989: 76.

other hand it may be that the substantive value of transparency to democracy is so obvious as to be taken for granted by academics and thus not emphasised (Flanagan, 2007). This is not to completely negate the utility value of transparency. Transparency clearly has some useful by-products. Open government will reduce conspiracy theories according to a report from the think tank Demos (Bartlett & Miller, 2010). Birchall finds that transparency is a more 'enlightening, honourable mode of disclosure' than narrative interpretive forms of disclosure (Birchall, 2014: 77).

In the past decade a series of detailed studies have sought to map to what extent transparency has met goals of improving governance and democracy amid a global explosion of new access laws (Roberts, 2006; Ackerman and Sandoval-Ballesteros, 2006). National studies have examined the use and impact of FOI laws in countries, focusing on the effects within public bodies of being opened up, in countries as diverse as New Zealand (White, 2007), South Africa (Darch and Underwood, 2005), Brazil (Michener, 2015), and China (Weibing, 2010). A series of large-scale projects examined the way India's Right to Information law of 2005 has worked in a sometimes hostile environment (NCPRI/Raag 2011; NCPRI/CES 2014; Sharma 2015).

Focus has also moved to regional and local government in the UK, USA, South Africa and South America (Hazell, Worthy and Glover, 2010; Worthy, 2010b; Piotrowksi, 2010; Berliner, 2015) all the way up to supranational bodies such as the European Union (Curtin et al, 2014). The emphasis has been frequently on the impact of new transparency systems on the operation of public institutions and organisation behaviour. Some of the most recent studies seek to better delineate and identify the conditions under which transparency improves governance (Kosack & Fung, 2014, and the Transparency for Development research project).

Some of the most common 'utilities', such as the economic or political advantages of openness, can work in tandem with intrinsic values as Stiglitz exemplifies (below). Problems arise, however, when the instrumental value is entirely detached from the intrinsic value in much the way authoritarian regimes create a veneer of democracy to give an illusion of legitimacy. In China, for example, FOI was adopted for its instrumental rather than intrinsic value, as an administrative

reform to increase efficiency and productivity and decrease corruption. When FOI becomes an 'empty signifier' I view that as a problem to be fixed rather than a model for the future as Stubbs & Snell (2014) seem to imply. In these cases, the implementation of an 'instrumental-only' FOI law could actually be a way of undermining democracy and human rights from within and thus we are right to be skeptical of such laws.

Three main utility arguments are commonly made about the value of transparency according to Meijer et al (2010):

1. Economic - a free and open market requires access to information and transparency in order to work efficiently (Crombez, 2003, Florini, 1998, Garcia Lorenzo, 2003, Stiglitz, 1999).
2. Political - Similar to the economic argument but the state is considered 'the market' and citizens the actors seeking to participate in it. (de Licht 2014, Worthy 2010, Piotrowski and Borry, 2010). Within this area, researchers attempt to measure such things as public trust, good governance, legitimacy, and participation.
3. Legal - if we are to act within the law we need to know what the law is. It is the 'code' of our society. (Lessig, 1999, O'Neill 1998)

Economic effects of transparency

Stiglitz comes to freedom of information from an economist's standpoint noting that imperfections of information lead to agency problems. He adapts Albert Hirschman's ideas of 'exit' and 'voice' as the tools used to discipline organisations. As most public organisations are monopolies, there is no chance to 'exit'. If we don't like the way the local police force is operating we can't go to another. Hence greater importance must be given to 'voice' to identify and fix organisational issues. In economics it is widely accepted that "better, and more timely, information results in better, more efficient, resource allocations" (Stiglitz, 1999: 15). Therefore to restrict access to official information is to forgo making the best, most efficient use of resources. But the main economic argument against secrecy is that it is so strongly linked to endemic corruption, which

negatively impacts investment and economic growth. Openness means the public can be assured that decisions were made in the public, not private, interest (Stiglitz, 1999).

There is also the paradox of stability. Too much effort made to control information flows for the sake of stability - for example in dictatorships, authoritarian or totalitarian regimes - may give the appearance of stability but the cost is catastrophic future instability. This is precisely the loop parliament was in when it refused gradual reform or the release of information about the expenses system.

> "Just as the economy is likely to be more stable with frequent small adjustments in exchange rates than few large ones, so too is the economy more likely to be stable with a steady flow of information. With a flow of information, less attention would be paid to any single piece and there would be smaller revisions in posterior distributions." (Stiglitz, 1999: 21)

Political effects of transparency

Transparency has become an accepted cure for all manner of political problems from corruption and poor performance to injustice, inefficiency and even voter apathy. (Fung, Graham, and Weil 2007; Roberts 2006). While such empirical studies were few there are now a growing number examining the effects of transparency (Etzioni 2010: 394). Researchers focus on three main functional effects: increased legitimacy, trust and participation.

I will begin with increased legitimacy as that has been the main driving force behind the transparency rush (de Licht, 2014: 112). De Licht believes this promise "is in fact based mainly on intuition" (2014: 112), though it seems more based on Dahl's 'intrinsic equality', that the more a polis represents equally the interests of all, the more legitimate those people will find it. De Licht tests the hypothesis that transparency generates legitimacy for public and political institutions using Tom R. Tyler's (2006: 375) definition of legitimacy as "a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just." She finds that the "common notion of a straightforward positive correlation between transparency and legitimacy is rather naïve. The effect is highly dependent on the context and may indeed be negative as well as positive." (2014: 112). In terms of faith in the decision-making process, she finds a strong causal relationship, however the transparency need not be 'fishbowl

transparency'. If decision-makers carefully explain their reasoning afterward, even if the decision was made behind closed doors, there is an increase in legitimacy.

There are three theories about decision-making and legitimacy:

1. Agency Theory - within a rational choice framework, when the principal (citizen) can "see for itself" how well the agent completes its tasks this gives them confidence in delegating powers to the agent, reduces suspicion and therefore increases the legitimacy of the agent.
2. Deliberative Democracy Theory - transparency may contribute to a better understanding of the reasons behind a decision and, therefore, to higher levels of legitimacy for both decisions and decision makers. It can lead to a better quality of argument and toleration for alternative views (de Licht, 2014: 114). Previous studies have found that people prefer decisions made based on deliberation rather than bargaining (Elster, 1998; Gutmann and Thompson, 1996) and thus transparency is seen to have a civilising affect as it shifts decision-making from bargaining to deliberation (de Licht, 2014: 122).
3. Procedural Fairness Theory - how a decision comes about contributes to legitimacy. Decisions made in smoke-filled back rooms are considered to be less legitimate than those debated in the open. De Licht cites social psychology research (Ambrose, 2002; Napier and Tyler, 2008; Thibaut and Walker, 1975; Tyler 2000, 2006; Tyler et al. 1997) indicating people are more likely to accept decisions arrived at by a procedure considered fair, and are more satisfied with authorities and institutions using such procedures regardless of the outcome (de Licht 2014: 115).

De Licht's findings showed:

> "fairly strong support for a positive link between transparency and legitimacy to be found in several general theories of decision making…There is a good theoretical reason to believe that transparency can generate legitimacy. The more open the decision-making process, and the more information the participants get concerning the reasoning behind the chosen policy, the higher the procedure acceptance. (2014:124)

Grimes (2012) looked at existing research on the role of civil society in holding public officials to account and stopping corruption. She found certain factors were decisive: political competition,

government transparency, and press freedom. If these factors are absent, even a rich civil society would not be effective (p380).

What if the public never use the law some scholars ask (Roberts, 2006; Worthy, 2010b)? Studies are divided between those who see laws as having an effect by their very existence (Hibbing and Theiss-Morse, 2002) and others that laws need to be used (Meijer et al, 2012). The former argue that the mere presence or potential of a law creates better outcomes through 'anticipated reactions'.

Another of transparency's promised effects is to increase participation in politics. The idea here is that in order to be informed citizens we first need information and only then can we meaningfully engage in politics. Information empowers citizens as rational actors. The rational actor theory supposes that if people are given enough information they will make good choices and decisions (Florini, 2007). This omits people's ability to process the information and take reasonable action as a result. There is a good deal of psychological research showing that humans do not make decisions based solely on reason but rather a mixture of 'wired in,' congenital, systematic cognitive biases. (Etzioni, 2010: 398, referencing the work by Daniel Kahneman among others). As O'Neill stated earlier, knowledge requires more than simply the disclosure of information. Thus we find in the corporate world, "disclosure documents . . . are written by corporate lawyers in formalized language to protect the corporation from liability rather than to provide the investor with meaningful information," (O'Neill cited in Ripkin, 2006: 186) It is for these reasons, among others that Etzioni concludes that strong transparency cannot replace regulation.

Grimes (2012) found that as transparency increases, so does the "strength of the relationship between civil society density and government probity." She notes a similar pattern with press freedom; "increasing press freedom incrementally strengthens the connection between a vibrant associational life and good government". Her findings corroborate the hypothesis of Dahl and others that public oversight and the right to demand access to government documents are "needed preconditions for societal accountability to occur. Government transparency in the form of access to information laws can enable societal actors to substantiate grievances regarding abuses and in so

doing present a more plausible call for investigative and punitive actions on the part of formal institutions of accountability." (Grimes, 2012: 398)

Trust & Transparency

Trust is also a factor in participation and legitimacy. In my view, this is the least relevant or useful. Transparency is a condition that allows us to better see reality as it is. Therefore it is a mistake to try and measure its success in such a way that the condition for seeing reality supersedes reality itself. It would be like determining the value of spectacles by whether or not they showed the viewer more beauty. The value of the glasses is simply to see clearly. It is also incorrect to assume trust is an absolute good. We might argue that humanity's greatest progress came not through trust but skepticism, that is to say, distrust. The Enlightenment, and specifically the scientific method, rejected "truths", even those handed down by authority if they could not be experienced with one's own senses or verified through evidence. In politics, too, there was an Enlightenment view that skepticism was superior to trust, hence the famous quote attributed to Thomas Jefferson (among others) that "the price of freedom is eternal vigilance."[11] It cannot be a bad thing that we no longer place blind faith in authority figures as so many abuse scandals occurred precisely because deference was valued over equality or accountability. Nevertheless, there are plenty of academics and politicians who prefer to focus on transparency as a means to increase public trust in government rather than the reality that transparency exposes. The value must be on citizens' ability to see reality.

Alasdair Roberts (2006) believes transparency has little effect on trust because other factors are more important. He found trust did not increase in either Canada or the United States after adoption of FOI laws but noted that such a causal conclusion could be spurious (Roberts 2006: 119), and to me this seems highly likely. Worthy (2010b) studied the effects of the UK FOIA and found that it had "made government more open and, in certain situations, more accountable. It has not achieved many of the wider democratic goals its supporters hoped because the goals were not

[11] The quote is most often traced back to John Philpot Curran: "The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.[11]"See the Thomas Jefferson Encyclopedia: http://wiki.monticello.org/mediawiki/index.php/Eternal_vigilance_is_the_price_of_liberty_Quotation and also Suzy Platt, ed., *Respectfully Quoted* (Washington, D.C.: Library of Congress, 1993), 200.

realistic and the political environment presents too many obstacles." (p563) The Justice Committee (2012) also felt it was incorrect to set a goal of increasing trust for FOI. Grimmelikhuijsen (2013) summarises trust in government as comprised of competence, effectiveness, benevolence and honesty. He finds in a 2011 study that objective copy on a government website may not increase trust as much as positive propaganda. To my mind this is yet another reason why trust is the wrong metric to gauge FOI effectiveness. In a 2013 study Grimmelikhuijsen finds that transparency has "a subdued and sometimes negative effect" on trust in government (2013: 577). He presents what he calls transparency optimists and pessimists. The former are those who believe transparency will increase trust in government (he cites Bok, 1997; Cook et al, 2010 as examples); the latter are those who believe transparency either has no effect or a negative effect on trust (he mentions O'Neill, 2002, Bannister and Connolly, 2011 and I would also add Schudson, 2015). Grimmelikhuijsen (2013) studied the effects of transparency and trust on South Korea versus the Netherlands (2013) and found transparency had a greater negative impact on South Koreans than the Dutch which he attributed to the fact that South Korean culture is paternalistic with a 'high power distance' between leaders and citizens, where power inequalities in society are accepted and seen as normal (p 579). Precisely because they are so dependent and vulnerable to government, the South Koreans were more unsettled by information that showed their leaders to be anything other than omniscient or all-powerful. The Dutch by contrast took such information in stride, seeming to view their leaders as fallible human beings just like them. The Netherlands is a more established democracy with a 'low-power distance'. Power is decentralised and citizens value being independent and having equal rights. Grimmelikhuijsen concludes that if trust is the metric, then transparency "fits less in cultures that possess higher power distances" (p583) which is yet another reason why trust is not the correct metric. It is precisely in those political systems of high-power distance where transparency is most necessary and needed. The reason the South Koreans reacted more negatively to transparency is because their perceptions were further from actual reality. Enforced ignorance had given them the delusion that their leaders were omniscient and superior - a 'natural elite' - and this myth kept them

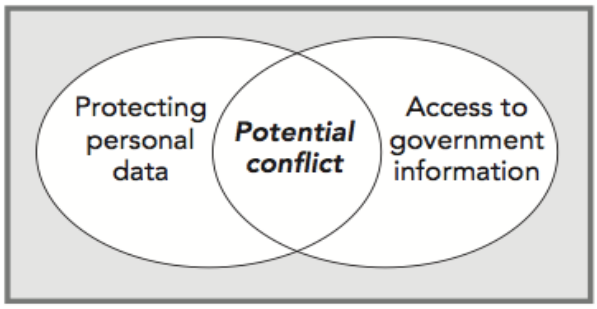
subordinate. Here we see the Radical Enlightenment aspect of transparency. It is "essentially a power-reducing mechanism", a means to hold the powerful to account (p 583).

More recent studies show that increased trust through transparency is an overly optimistic proposition. "The main lesson is that public officials and political leaders should expect no wonders from transparency. It is no magic or universal cure for trust in government." (Grimmelikhuijsen, 2013: 584) To sum up: a good reality may lead to a good public perception of reality. A poor reality is likely to lead to a poor public perception of reality. Thus officials and politicians would do better to focus more on improving reality itself and less on manipulating how that reality is perceived by the public.

Chapter 4: Privacy

Privacy and Freedom of Information

It strikes some people as odd that with my track record for opening up governments and publishing previously secret state data, that I should be actively involved in Privacy International[12], an NGO that campaigns for privacy rights. I have been an advisor to that group since 2004 and a Trustee since 2013. A greater understanding of both topics makes it clear that these two rights are more complementary than in conflict. "They are both laws designed, in part, to ensure the accountability of the state" (Banisar, 2011: 16) and for this reason the Council of Europe recommend that the roles of FOI and privacy are "not mutually distinct but form part of the overall information policy in society" (Banisar, 2011: 9 citing Council of Europe 1986). Some states implement the two rights using one law, as is the case with Mexico and Thailand, whereas others have two separate laws. Where the laws are separate, conflict can arise if the laws are not designed in harmony with one another as shown in the diagram below.



Source: Banisar, 2011: 9

The UK provides an example of a state with two laws: the Freedom of Information Act 2000 and the Data Protection Act 1998. Additionally, in December 2015, a new EU General Data Protection Regulation was finalised along with a new Data Protection Directive that covers law enforcement, and in November 2015 the UK Government published a new Investigatory Power Bill covering surveillance, interception and the use of bulk personal datasets. In the current UK FOI law, personal information is exempt but only in the sense that its release is covered by the data

[12] Privacy International is an organization that fights for people's privacy as a human right. See: https://www.privacyinternational.org/node/5

protection principles outlined in the DPA 1998. The primary principle is that of 'fairness' which includes such factors as how the information was obtained, the data subject's expectation of privacy, the effect of disclosure, consent, and, importantly, the public interest. The final point means that even if the data subject refuses consent and believes some harm might occur, disclosure is warranted if it is in the public interest. It was on these grounds that I fought my legal case for parliamentary expenses. In fact, much of my work – particularly the title and theme of *The Silent State* (2011) – focuses on the inversion of the rights to information and privacy: with the private citizen going about their private business made transparent through state surveillance while the powerful state cloaks itself in opacity and public officials use the privacy exemption to avoid public accountability.

The European Ombudsman warned as early as 2001 that the EU data protection rules were "being used to undermine the principle of openness in public activities[13]". The UK Information Commissioner, too, issued guidance in 2004 warning that public bodies were using the DPA incorrectly: "The purpose of the Data Protection Act is to protect the private lives of individuals. Where information requested is about the people acting in a work or official capacity then it will normally be right to disclose" (FOI Awareness Guidance No. 1: Personal Information, 2004[14]). Australian freedom of information expert Nigel Waters noted a similar pattern: "There is a continued problem of privacy exemptions in FOI law being misused and getting privacy a bad name. This makes a major contribution to the widespread jaundiced media view of privacy law, even though it is not actually privacy law that is to blame." (Cited in Banisar, 2011: 16). The EU Ombudsman concluded that many public officials believe they have a fundamental right to participate anonymously in public activities, however, "Article 8 of the European Convention on Human Rights does not establish such a right. Furthermore, any such right would be incompatible with the principle of openness and the right of public access, because to conceal the identities of

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[13] European Ombudsman, 2001, The misuse of data protection rules in the European Union. Case: 713/98/(IJH)GG. http://www.ombudsman.europa.eu/cases/correspondence.faces/en/3538/html.bookmark. Last accessed 15 March 2016

[14] This guidance was replaced to include my case High Court victory for MPs' expenses. (See https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

those participating in public activities would deprive the citizen of the possibility to understand and monitor those activities effectively[15]."

This view is certainly endemic among UK public officials from my experience, which I document in Part Two. Former U.K. Cabinet Secretary Sir Richard Wilson, the highest-ranking U.K. civil servant, articulated this belief in 2002, testifying, "I believe that a certain amount of privacy is essential to good government[16]." It is perhaps not surprising therefore that the privacy exemption has been, and remains, the most commonly cited by public bodies according to the U.K. Ministry of Justice (FOI Statistics: Implementation in Central Government 2015[17]).

The publication of registries and civic information is also affected by views on privacy. In the second part of this thesis I discuss the vastly different journalism practices and cultures between the US (where I trained and initially worked as a reporter) and the UK where I subsequently lived and worked. I will argue that US journalism is practiced in a more professional, empirical manner due in large part to the volume of registries and civic information that can be legitimately accessed by the public. As a crime reporter in the US, I could listen to emergency services dispatch, see all arrest bookings and police incident reports, all of which are illegal to access in the UK due primarily to stated privacy concerns. To me, it was odd that in a country where suspicionless surveillance is endemic, the state had decided citizens weren't 'allowed' to know the details of the crimes that were happening around them. While there are certainly privacy considerations to be made they must be balanced with expectations of privacy and the best interest of society. The net result in the US has been that the American public are able to see the machinery of government in a way that is simply not possible in the UK. Additionally, because British journalists cannot legitimately access such civic records and information, they are necessarily reliant instead on sources, innuendo, rumour and leaks. Their reporting is often not grounded on facts that can be independently verified. I will argue that

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[15] European Ombudsman, 2001, The misuse of data protection rules in the European Union. Case: 713/98/(IJH)GG. http://www.ombudsman.europa.eu/cases/correspondence.faces/en/3538/html.bookmark Last accessed 15 March 2016).

[16] Testimony of Sir Richard Wilson before the Select Committee on Public Administration, U.K. House of Commons, July 11, 2002.

[17] These are available at: https://www.gov.uk/government/collections/government-foi-statistics.

one of the ways to professionalise journalism and make it more fact-based and empirical is to increase the amount of civic information easily accessible to the public in a timely way. We are already seeing this with a beta trial of Companies House, which provides instant and free access to the companies register.

What is Privacy?

Andrew McStay in his book *Privacy and Philosophy* contends that privacy is a "basic and primal premise" (p1) that has no finite meaning but rather is a "rallying word for a cluster of interests" (p2). It "modulates and informs the principles of connection with others" (p159) in terms of control, dignity and respect for self/others. As such privacy comprises both openness and seclusion. It may be implemented differently in different communities but as a way of establishing norms of interaction with others, he argues – and I agree - it is universal (p159). It is, he writes, an "emergent protocol that contributes to the governance of interaction among people and objects" (p4). It does not have substance but it does have real affects on behaviour, psychology, organisations and individuals. McStay argues that liberalism gave privacy its modern form focused on consent and for this reason he argues that the ethical onus for modifying or altering privacy norms must make the case for such change and obtain the full consent of community members. "To do otherwise is an act of force" (159). Privacy is always open for redefinition but as McStay says we should examine carefully the "motives of those who seek to redefine privacy protocols." (160).

Another modern definition of privacy was developed in the 1890s, a time of great technological change. Samuel Warren and Louis Brandeis wrote their famous article, 'The Right to Privacy' in 1890 which is credited with the creation of modern privacy law, especially in the United States. It framed discussion of privacy throughout the 20th century (Solove, 2002: 1100). Warren and Brandeis defined privacy as "the right to be left alone" and their article was noteworthy for attempting to translate the harm of privacy invasion into tort law. Unlike loss of income or even reputation, the harm from privacy invasion was psychological rather than material, a fact which remains a difficulty in legislating against privacy invasion today. Courts find it difficult to define both

the invasion and the harm. However, in the 1928 the US Supreme Court case Olmstead v. United States [277 U.S. 438 (1928)] Brandeis, by then a Supreme Court Judge, wrote a robust dissent disagreeing with the Court's ruling that wiretapping was not a violation of the Fourth Amendment protecting against unwarranted search and seizure because it was not a physical trespass on the home. He argued that the framers of the US Constitution "conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." (id. at 478 (Brandeis, J., dissenting.) His dissent set a benchmark for privacy law and policy, changing the way people think about privacy and setting in motion a movement to develop privacy as a 'right'. Today privacy is considered a qualified, fundamental human right, articulated in all of the major international and regional human rights instruments, including the:

- United Nations Declaration of Human Rights (UDHR) 1948, Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."
- International Covenant on Civil and Political Rights (ICCPR) 1966, Article 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

According to Privacy International and Banisar (2011) over 130 countries have constitutional statements regarding the protection of privacy, in every region of the world. Over 100 countries have some form of privacy and data protection law. More than 60 countries have comprehensive data protection acts based on the fair information practices and most of these laws follow the structure of the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and the European Union (EU) Data Protection Directive (recently updated as mentioned earlier). The UK adopted its first Data Protection Act in 1984. This was replaced in 1998 in order to implement EU Data Protection Directive 95/46/EC. In 2000, the

FOIA was adopted and the data protection commissioner became the information commissioner in charge of overseeing both acts. Personal data is defined in the UK Act as: "data which relate to a living individual who can be identified—(a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller" (Data Protection Act 1998[18] c. 29 Part I Section 1).

Today's privacy advocates define privacy more as a set of attributes (or as McStay calls them 'affective events') rather than a static state. Gus Hosein, the CEO of Privacy International defines it as:

> "an essential way we seek to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us, while protecting us from others who may wish to exert control…Privacy helps us establish boundaries to limit who has access to our bodies, places and things, as well as our communications and our information." (2015).

David Banisar, Senior Legal Counsel for Article 19 and author of the World Bank's report *The Right to Information and Privacy* defines privacy as being "essential in protecting an individual's ability to develop ideas and personal relationships" and that it is "commonly recognised as a core right that underpins human dignity and such other values as freedom of association and freedom of speech" (Banisar, 2011: 6). Privacy scholar Daniel Solove writes of privacy as a " sweeping concept" that can encompass many things including freedom of thought, control over one's body, solitude in one's home, control over information about oneself, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations - essentially the Brandeis right to be left alone (Solove, 2002:1089).

Privacy is contextual and dynamic rather than static (Solove, 2002; Cohen, 2013). In *Your Right to Know,* I write that privacy is not a fixed concept but operates on a continuum "with private individuals going about their private lives having the greatest expectation of privacy, and public officials conducting the public's business having the least" (Brooke, 2007: 280). Bakir and McStay advanced a similar idea with their visibility slider (2015). What is considered private and/or personal

[18] Accessible at: http://www.legislation.gov.uk/ukpga/1998/29/section/1

information varies among cultures and even among individuals within the same culture, affected by cultural norms and past experiences. Some cultures place the needs of the collective above the needs of the individual, while in Germany, for example, there is great sensitivity to individual privacy due to past abuses by the state. Even so the dynamic aspect of privacy and the difficulty of showing tangible 'harm' from its invasion continues to make it challenging in both legal and legislative arenas.

Cohen (2013) believes the difficulty is exacerbated due to the way legal scholarship, starting with Brandeis, conceptualised privacy as a form of protection for the liberal self.

> "So characterized, privacy is reactive and ultimately in-essential. Its absence may at times chill the exercise of constitutionally protected liberties, but because the liberal self inherently possesses the capacity for autonomous choice and self-determination, loss of privacy does not vitiate that capacity." (Cohen, 2013: 1905).

Instead, she argues that the 'self' is not a fixed rational actor but rather dynamic and socially constructed, hence privacy is essential in the formation of this emergent subjectivity away from the state and corporate desire to "render all individuals fixed, transparent and predictable" (Cohen: 1905). Solove (2002) also views privacy as dynamic with the self operating in a social environment. His practical suggestion for thinking about privacy is to look at instances where privacy invasion interferes with or destroys certain practices we want to protect. Instead of trying to conceptualise privacy as a fixed thing, it is better to focus on the specific practices we want to protect and specific invasions that interfere with them. What most advocates and scholars agree should be protected are the formation of personal beliefs, identify and opinion - all practices of self determination which are so essential in a democracy. I used this model when making arguments for privacy protection while participating on the Independent Surveillance Panel that examined state surveillance.

Privacy and technology

Privacy and technology are interconnected. Brandeis and Warren were spurred to write their article on privacy due to the arising threat they saw from new technologies. In the information age, privacy has evolved to address new issues related to new technologies, such as the collection, use, and sharing of personal data in networked information systems. In the early days of digitisation and the internet, the benefits of these new technologies dominated discussion. Writers such as Clay

Shirky, Jeff Jarvis and Tim Wu produced numerous books, articles and talks extolling the virtues of the digital revolution. Internet skeptic Evgeny Morozov calls this tendency to glorify new technology, "techno-utopian solutionism" (Morozov, 2013). Gradually it became apparent that the technology that was supposed to 'set us free' could also help lock us up. As I wrote in *The Revolution Will be Digitised*: 'We have the technology to build a new type of democracy but equally we might create a new type of totalitarianism." (Brooke, 2012: xi). Morozov made a similar observation in *The Net Delusion* (2011) about the resilience with which authoritarian and secretive, hierarchal regimes were countering the promised digital 'Age of Openness'. Cyber utopians "did not predict how useful it [the Internet] would prove for propaganda purposes, how masterfully dictators would learn to use it for surveillance, and how sophisticated modern system of Internet censorship would become." (Morozov, 2012: xiv). Technology is and always will be amoral. It is up to us how we use it. As Morozov notes, technology "penetrates and reshapes all walks of political life, not just the ones conducive to democratisation." (xiv).

Dahl made a similar observation about technology: "It can be used to damage democratic values and the democratic process, or it can be used to promote them. Without a conscious and deliberate effort to use the new technology of telecommunications in behalf of democracy, it may well be used in ways harmful to democracy." (Dahl, 1989: 339). As other critics have subsequently pointed out, it is perfectly possible to bend technology to suit the needs of bureaucracies and power. Thus the same technology invested with so much promise by democracy advocates, also became the means to fulfil dreams of omniscience as discussed in the next chapter. While Silicon Valley was on a mission to organise the world's information, American and British intelligence agencies were attempting to "master the internet". More than at any other time in history, the state can match its desire to know "with the means to collect, monitor, and (even) predict the behaviours of their subjects/citizens." (Quill, 2014: 10). Whether or not this makes 'us' safer depends on who this 'us' refers to and how we define safety and freedom. The idea that we can identify bad people from algorithms is simplistic. McStay posits that a variety of innovations in data analyses have increasingly

given machines "a verisimilitude of knowing" by means of their predictive capacities with veracity measured in "the extent to which they can pass-off understanding" by predicting what we might click or purchase (McStay, 2014: 87). He writes that while we can assume for now that "machines do not understand being-in-the-world" their evolving capacity to preempt and map 'being-in-the-world' raises questions about the nature of self and knowledge (McStay, 2014: 154). Ambitious projects such as the Brain Activity Map aim to map the activity of every neuron in real time and if successfully funded could be as ground-breaking as the Human Genome Project. Even so, biologist Edward O. Wilson maintains that even if the project succeeds, the 'self' can never be known because it is an illusion, confabulated by the physical brain. To know the mind of an individual would require opening up all memories both conscious and unconscious and taking into account random chance and the:

> "legions of communicating cells, which shift in discordant patterns that cannot even be imagined by the conscious minds they compose. The cells are bombarded every instant by outside stimuli unpredictable by human intelligence. Any one of these events can entrain a cascade of changes in local neural patterns, and scenarios of individual minds changed by them are all but infinite in detail. The content is dynamic, changing instant to instant in accordance with the unique history and physiology of the individual." (Wilson, 2014: 169-70)

There is an argument, made primarily by those in the intelligence services or senior officials, that if most of the 'looking' is done by computers, there is no privacy invasion. Former director of the UK signals intelligence agency GCHQ David Omand routinely made this case: "These computers are not conscious beings: they will only select that which they are lawfully programmed to select. To describe this process as monitoring all our communications or 'the surveillance state' or a 'snooper's charter' is wholly misleading and a perverse reading of the situation." (Omand, 2013). In the U.S. courts have often interpreted the Fourth Amendment (protection against unreasonable search and seizure) as applying only when information is exposed to possible human observation, rather than copied or processed by a computer (Deeks, 2015). However, European courts are increasingly ruling that surveillance starts from the moment information is collected. The European Court of Justice condemned interception systems that provide states with 'generalised access' to the content of communications in Schrems v Data Protection Commissioner [2014 IEHC 310]. This

has been followed by the European Court of Human Rights decision in Zakharov v. Russia[19] and Szabó and Vissy v Hungary[20], which took a similar view of surveillance and its impact on privacy. Additionally in his first report the UN Special Rapporteur on Privacy, Joseph Cannataci, argued strongly that, "legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the [EU] Charter." [21]

A substantial difficulty in measuring the success and/or proportionality of mass/bulk surveillance is the lack of transparency or accountability about information processing practices (both corporate and state) so claims are not testable. In *The Revolution Will be Digitised* I argue the safety promised by mass government surveillance is more comforting illusion than reality and it also has a number of downsides both for democracy and human autonomy. Cohen argues that effective privacy protection requires "regulatory scrutiny of information processing activity on both sides of the public-private divide" (Cohen 2013: 1931).

Technology has the ability to magnify power in general but rates of adoption vary. Small groups and individuals can adapt faster to new technology than large institutions, and so for a time, technology was able to empower small groups and individuals in relation to the state. Noted security engineer Bruce Schneier[22] estimates that it took about a decade for traditional power to adapt to new technologies but once they did, their vast powers were magnified exponentially. Tom Steinberg, the creator and founder of civic technology organisation My Society, writes in his essay 'The Pill versus the Bomb: What Digital Technologists Need to Know About Power':

> "few people are less happy these days than privacy campaigners. The fact that everyone carries sensor laden mobile phones makes national security agencies more powerful than they were before. Even where privacy protecting technologies exist, they cannot be said to be equal and opposite in effect to the ubiquitous computing we now live amongst. Mobile

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[19] *Roman Zakharov v Russia* [2015] ECHR, App no 47143/06 (4 December 2015): http://hudoc.echr.coe.int/eng?i=001-159324

[20]Szabó and Vissy v Hungary [2016] ECHR, App no. 37138/14 (12 January 2016): http://hudoc.echr.coe.int/eng?i=001-160020

[21] Report of the Special Rapporteur on the right to privacy, Human Rights Council, Thirty-first session, 8 March 2016.

[22] The future of Internet, Privacy & Security by Bruce Schneier (October 2013). Tedx Cambridge. https://www.youtube.com/watch?v=1ZnKcDnapuY Last accessed 15 January 2015.

> computing is a permanently power shifting technology that permanently empowers the security services." (Steinberg, 2015)

The technology now exists to enable companies and governments to monitor our conversations, commercial transactions and movements and to make predictive decisions about us based on this data. Not only are there more technologies to surveil citizens, but also more entities that want to do so. The internet's business model has become one based on surveillance (Richards, 2013: 1936). It used to cost states money and resources to spy on its citizens, now thanks to technology we have a variety and scope of surveillance that is "unprecedented in human history" (Richards, 2013: 1936). I will turn to that now.

Chapter 5: Surveillance

In his essay, 'On Publicity' Bentham focused on transparency of the state rather than the citizen: "Secrecy, being an instrument of conspiracy, ought never to be the system of a regular government." Although he is best known for his epistolary essays on the panopticon, an imagined prison where "the essence of it consists in the centrality of the inspector's situation, combined with the well-known and most effectual contrivances for seeing without being seen." (Bentham, 1995: 43), the power of the inspector is checked by the public. Bentham makes the case for the sort of public disclosure that is common today. The prison official, he writes, would be required to "disclose and even to print and publish his accounts - the whole process and detail of his management…" and that "From the information thus got from him, I derive this advantage [no corruption]. In the case of his ill success I see the causes of it, and not only I, but every body else that pleases may see the causes of it…In the case of his good success, I see the causes of that too; and everybody sees them…" (Bentham 1995:53). We might therefore credit Bentham as being the precursor to Transparency International, an NGO whose remit is to use transparency as a means to stop corruption.

Even so, it is worth taking a further look at the panopticon as it can be credited with inspiring more than just transparency of the state. First, we should note that the prison inspector/contractor is allowed a good deal more privacy in relation to the public than the powerless prisoners have in relation to him. The purpose of the panopticon is to make prisoners believe they are truly transparent at all times, the better to control them using their own self-censorship. The fundamental advantage of the panopticon is 'the apparent omnipresence of the inspector…combined with the extreme facility of his real presence.' (45) More worrying, Bentham identified a "new mode of obtaining power of mind over mind"(1995, preface).

In the panopticon, Bentham provides a symbolic structure of top down transparency or what Heald calls 'transparency upwards', which he defines as when "the hierarchical superior/principal

can observe the conduct, behaviour, and/or 'results' of the hierarchal subordinate/agent." (Heald 2006a: 3). This is the opposite of 'transparency downwards' which is when the ruled can observe their rulers. McStay (2014) calls this type of transparency where the state is transparent and the citizens opaque 'liberal transparency'. This is a feature of democratic life. Heald has two further classifications: transparency outwards - when the hierarchical subordinate or agent can observe what is happening 'outside' the organisation, and transparency inwards - when those outside an organisation can see what is going on inside. This type of transparency is relevant to FOI (Birkinshaw, 2005: 16-73) but also surveillance. As Heald notes, East Germany under the Stasi was a highly transparent society as citizens informed on each other. Privacy involves setting limits on this type of transparency. Bakir and McStay (2015) integrate such concerns over control and choice in their transparency topology and visibility slider. In addition to 'liberal transparency described above, they use the term 'radical transparency' when all are made transparent with the utilitarian aim that this will be for the greater good. They posit that in such an environment, resistance to transparency is seen as a sign of guilt with arguments that "if you've nothing to hide, you've nothing to fear". This leads to 'forced transparency' where people are made transparent without their knowledge or consent. From their consultations with academics and others they found the common view was that "we are in a position of forced transparency" (p33).

Transparency must enable 'inward observability' and Grimmelikhuijsen defines this as "the availability of information about an organisation or actor that allows external actors to monitor the internal workings or performance of that organisation." (2013: 576) This is what John Keane called 'monitory democracy' and was discussed in previous chapters. By contrast, the Panopticon embodies a long-held desire by those in power for total knowledge of their subjects. The belief rests on an idea that if rulers could only identify, mark and watch those they rule, they could control the population and thus secure safety and stability for the themselves and state. It is a belief that became popular as the police and security services professionalised in the nineteenth century and criminology became a discipline that promised scientific identification of criminals (Quill, 2014).

Such identification required an increase in the data gathered on citizens. It thus became possible to "see like a state" (Scott, 1999). Michel Foucault identified the way modern states were increasingly turning individuals into scientific cases to be studied, and the least powerful in society were also becoming the most transparent: "the child is more individualised than the adult, the patient more than the healthy man, the madman and the delinquent more than the normal and the non-delinquent." (Foucault, 1977: 193). Mass surveillance was a more subtle and more effective means of controlling people by creating a prison of their own minds. Gilles Delueze called these "societies of control" which replaced "disciplinary societies" (Deleuze, 2002: 4). In the disciplinary societies "power individualises and masses together, that is, constitutes those over whom it exercises power into a body and molds the individuality of each member of that body." (Deleuze, 2002: 5). In the societies of control, all are reduced to data.

Seeing like a state

Lawrence Quill contends that modern states have an insatiable desire to know about their populations (Quill, 2014:69). At best to better serve their needs by providing efficient services, at worst to keep them under control and check any and all challenge to their power. Mass democracies combined with industrial capitalism "cemented bureaucracy as the modern form of human organization" (Quill: 77), thus an intimate link exists between knowledge production, secrecy and bureaucracy. Some academics say that modern societies are by definition surveillance societies (Dandekar, 1990; Lyon, 2003).

James C. Scott in his book *Seeing Like a State* sums up the desire of the modern state for omniscience into a belief he calls "high modernism' that is man's attempt to design society not based on practical intelligence, deliberation or debate but rather what are considered to be scientific laws. So the first goal is to make the subject population fixed, transparent and readable. Second, to fit people into administrative categories for their continuous surveillance. Third to mould people through a process of 'internal colonisation'. "The builders of the modern nation-state do not merely describe, observe, and map; they strive to shape a people and landscape that will fit their techniques

of observation." (Scott, 1999: 82). There is an inherent conflict with the principles of democracy in this way of thinking. As Quill writes:

> "The state's 'desire to know' the lives of its citizens and the officially sanctioned knowledge that is developed and promulgated throughout the institutions of society produce an irresolvable tension between a commitment to scientific improvement and management of that society and those of publicity, the principles of individual liberty, and deliberative democracy." (Quill:76)

With such a powerful structure Quill asks: "Can 'publicity' make any inroads within this technocratic fantasy?" (76).

There is a 'reason of state' tradition put forward initially by the sociologist Max Weber, which views the state as having a life of its own with its own desires for survival and growth that can put it in opposition to the demos. Weber identified 'the internal dynamic of specific power structures' that manifest in a political culture that emerges in all institutions. He characterised this culture as competitive, paranoid and insecure, and posited that institutions will react just as any organism in nature would, to feelings of endangerment by seeking to protect itself at all costs: usually through the mechanism of secrecy, deception and lies. Weber believed war illustrated this dynamic most clearly as there was always an 'official' version of events that was inevitably laden with secrets and lies that hid the true reality, but that this practice was common, if less obvious, even in peacetime.

> "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of the 'secret session'; in so far as it can, it hides its knowledge and action from criticism." (Weber, 1946: 233).

For Weber, secrecy was utilised anywhere "the power interests of the dominant structure towards the outside are at stake," which grants to the powerful wide latitude. Quill writes of how, "state officials came to recognize that states possessed interests independent of their populations," and as a result they set themselves apart from the rest of society (Quill: 73). Also, in Weber's view the often conflicting interests of politicians versus bureaucrats came together in their common desire to carefully manage the demos. Both had a tendency to view themselves as superior to the masses who were seen as emotional, politically naive and easily manipulated by secrecy and lies, which if done in the interests of the state was deemed morally justifiable. (Weber, 1946).

Quill also makes the case that secrecy is part of the "epistemic project of statehood" (10), and that the state's desire to know about its inhabitants is matched only by an equal compulsion to remain hidden from them. I came to a similar view from my journalistic investigations into the British state, summing up these opposing desires of making citizens transparent while remaining cloaked in secrecy, with the title of my second book *The Silent State*. The power of the state derives not just from its monopoly of force, but also its monopoly over secrets and secret collection. This is in contrast to the citizens' powerlessness to keep secrets from the state or discover those the state doesn't want the people to know. (Quill: 69). The state views the disclosure of its own secrets as a matter of the utmost seriousness, as an existential threat and this is the reasoning behind the often brutal and disproportionate response which I saw first-hand while reporting on Wikileaks and subsequent leaks. In 2013 Boston hacktivist Aaron Swartz who features in my *Revolution* book, committed suicide after he was arrested for downloading academic articles from JSTOR and facing up to 35 years in prison[23] for this crime.

Attitudes toward official secrecy are paradoxical. Pozen says, "The use of state secrets appears both more pervasive in practice and more discredited in the public mind than at any point in history." (Pozen, 2010: 260) The openness and spread of FOI that developed after the Cold War came to an abrupt end after September 11th. Ironically, while politicians pronounced that terrorists would not destroy our democratic values and way of life, they simultaneously began to dismantle the very policies that set democracies apart from dictatorships. Peter Hennessy described the years following 9/11 as an "unprecedented extension of the legal and technical capacity of the state as a result of its counter-terrorism strategies" (Hennessy, 2010). Quill makes the point that the state's ability to collect and analyse information gives it power over the production of accepted and acceptable knowledge in a process he calls 'political epistemology'. Thus the state can determine and entrench orthodoxy. It makes certain ideas unthinkable in the same way Orwell describes in his novel *1984*:

[23] See my blogpost about this: http://heatherbrooke.org/2013/a-few-thoughts-on-the-death-of-hacktivist-aaron-swartz/

> "The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of through impossible. It was intended that when Newspeak had been adopted once and for all and Oldspeak forgotten, a heretical thought - that is, a thought diverging from the principles of Ingsoc - should be literally unthinkable, at least so far as thought is dependent on words. (Orwell:312)

Surveillance scholars agreed that while surveillance by government and others can have many purposes, a recurrent purpose is to control behaviour. Reviewing the vast surveillance studies literature, David Lyon concludes that surveillance is primarily about power, but it is also about personhood. Lyon offers a definition of surveillance as "the focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction" (Lyon, 2007:14). Gathering information affects the power dynamic between the watcher and the watched, giving the watcher greater power to influence or direct the subject of surveillance. This is because personal information is powerful. Lyon identifies three main dangers of systematic, focused and routine surveillance: blackmail, discrimination, and persuasion. (Lyon, 2007 also cited in Richards, 2013: 1937, 1953).

Surveillance and democracy

There are benefits to surveillance, otherwise people would not accept it. All three reports commissioned after the Snowden disclosures – the Intelligence and Security Committee (2015), Anderson (2015) and RUSI (2015) – accepted the position of the security services and government officials that bulk surveillance is an important and necessary tool in the fight against terrorism and cyber crime. Recommendation 8 in the RUSI report of which I was a member notes: "The capability of the security and intelligence agencies to collect and analyse intercepted material in bulk should be maintained with stronger safeguards as set out in the Anderson Report. In particular, warrants for bulk interception should include much more detail than is the case currently and be the subject of a judicial authorization." I had reservations about this blanket acceptance (Brooke, July 2015) but it was difficult to argue a contrary case in the absence of data that could either verify or disprove officials' claims that bulk surveillance was an essential tool in the fight against crime and terror.

In the commercial arena, we have a seemingly 'free' internet and online services that people can enjoy. By tracking our preferences and location, companies can offer convenience and more relevant services. However, often customers are not aware, nor have meaningful choice, of what personal information is collected and how it is used and shared. Why should this matter?

Several scholars have examined the relationship between surveillance, particularly large-scale surveillance, and democracy. Not only does surveillance impact on individuals but also liberal democracy. Cohen argues that a society that permits "the unchecked ascendancy of surveillance infrastructures cannot hope to remain a liberal democracy." (Cohen, 2013: 1912). Richards (2013) identifies two main harms resulting from surveillance:

1) It chills human thought

2) It leads to abuse of power

Psychological studies have shown that humans resort to more conformist and compliant behaviours when they think they are under surveillance (Richards, 2013). They make decisions based less on their own thought processes and agency but rather on what they believe is expected of them. Two recent studies have provided empirical evidence of the 'chilling effect' of surveillance. Elizabeth Stoycheff (2016) found that a majority of participants, when made aware of government surveillance, were significantly less likely to speak out in hostile opinion climates. Jonathon Penney (2016) found a large, statistically significant, and immediate drop in total views for privacy-sensitive Wikipedia articles after June 2013 (the publication date of Snowden articles), and that the drop continued long-term. What these studies show is that the chilling effect is not imaginary. If people are deterred from informing themselves or researching matters of law, security and policy related to 'terrorism' or other controversial subject matter, they will inevitably be less informed and "our broader processes of democratic deliberation will be weakened" (Penney: 51). Surveillance also threatens a value Richards calls "intellectual privacy", which is the breathing space people need in order to experiment with new, controversial, or subversive ideas. The thinking is that "free minds are the foundation of a free society" (Richards, 2013: 1946).

The second harm Richards identifies results from the inherent power dynamic between watcher and the watched. This disparity increases the likelihood of a variety of harms occurring, including discrimination, coercion, and the "threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance." (Richards, 2013: 1935). Surveillance is routinely used to sort people into categories and this is a major theme among surveillance scholars. The danger arises because sorting isn't restricted to targeted ads or marketing; it aids internment, concentration camps and targeted killing (Richards, 2013: 1957). Due to these dangers Richards proposes four principles to guide surveillance law (p1935-6) which guided my work as both investigative journalist and panellist on the Independent Surveillance Review:

1. An awareness that surveillance transcends the public/private divide and that much surveillance is outsourced to corporations.
2. Secret surveillance is illegitimate. "In a democratic society, the people, and not the state apparatus, are sovereign." (Richards, 2013: 1959).
3. Total surveillance is illegitimate.
4. Recognize that surveillance is harmful.

As technology has made it easier, cheaper and more convenient for states and corporations to conduct large-scale surveillance operations, so too, has their power increased "to blackmail, selectively prosecute, coerce, persuade, and sort individuals" (Richards, 2013: 1961). It is for these reasons that surveillance must be constrained by strong legal and social rules. Whether the laws and rules are up for this challenge remains to be seen.

Part 2: My Contribution

My work evolved over time with one idea and action leading to the next. It is for this reason that I present my contribution in chronological order. Each chapter focuses on one main publication as well as selected articles that best illustrate the summation of my work.

An introductory chapter on methodology outlines general motivations, processes and difficulties, followed by 'Your Right to Know' which was the title of my first book and my first interaction with the British state as an active citizen and journalist. In it, I attempted to discover and comprehend the British political system: how power flowed and how and where decisions were made (Chapter 7). I subsequently took action based on my research, specifically I began making many hundreds of FOI requests. The responses I received from public bodies led me to form a hypothesis that the British political system was elitist. This was based on witnessing the way information was parsed and controlled. I then researched around my hypothesis by conducting numerous interviews, made various targeted and 'meta' requests to discern more detail about how the machinery of government operated, and litigated these requests (Chapters 7 and 8). This work culminated in my legal case against the House of Commons for the disclosure of MPs' expenses (Chapter 9). Although I won my legal battle against Parliament (High Court 2008 [2008] EWHC 1084 (Admin) Case No: CO2888/2008). Parliament nevertheless delayed and obstructed publication, creating a black market for this information. The market demand was met by an inside whistleblower who, because of digitisation, was able to make a copy of the entire dataset of MPs' allowances. This person then offered the disc to various national newspapers and finally sold it to the *Daily Telegraph* for a reported £110,000. I learned several interesting things from these events, but most pertinent to this PhD was the realisation that digitisation made it much more difficult for those in power to control information. This led me to begin work on my third book *The Revolution Will Be Digitised* (2012) (see Chapter 10) in which I researched the people at the forefront of digitisation and

technology, specifically hackers and technologists. As a result of my reporting on Wikileaks, I was leaked a copy of the entire set of US diplomatic cables and thus had a front-row seat on their publication and impact. Initially, I was optimistic about this new era of 'radical transparency' but soon my utopian view changed as it became increasingly clear that traditional political institutions were able to harness the same new technologies that promised democratisation and use them to conduct mass surveillance of entire populations. My work for this thesis ends with my appointment to the Independent Surveillance Review Panel in which I conducted with my colleagues a year-long investigation into modern surveillance and intelligence agency oversight (Chapter 10). This is the narrative arc of the second half of this thesis.

Chapter 6: Methodology

In this chapter I will explore general elements of my overall methodology; specific examples are contained in subsequent chapters. I will discuss my main motivations, journalism tradecraft, the difficulties I encountered and the processes and techniques I used to overcome these difficulties within a journalistic framework.

Motivations

Aufklärung um andere wieder aufzuklären, giebt Freyheit - only Enlightenment to enlighten others generates freedom - Adam Weishaupt, 1786.

The above quotation encapsulates the political philosophy that drives my journalism. In his book *A Revolution of the Mind*, Jonathan Israel gives a description of an ideology that came to prominence in the Radical Enlightenment of the 18th Century and that informs my work:

> Radical Enlightenment is a set of basic principles that can be summed up concisely as: democracy; racial and sexual equality; individual liberty of lifestyle; full freedom of thought, expression, and the press; eradication of religious authority from the legislative process and education; and full separation of church and state. It sees the purpose of the state as being the wholly secular one of promoting the worldly interests of the majority and preventing vested minority interests from capturing control of the legislative process. Its chief maxim is that all men have the same basic needs, rights, and status irrespective of what they believe or what religious, economic, or ethnic group they belong to, and that consequently all ought to be treated alike, on the basis of equity…and that all deserve to have their personal interests and aspirations equally respected by law and government.' (Israel, 2010: viii)

These principles were "broadly accepted nowhere in the world before the American Revolution" (viii) and even today are not always accepted in practice. I agree that democracy requires informed citizens (Dahl, 1989: 25) and that without information, citizens cannot meaningful contribute to government nor hold it to account. If they are unable to do so, then we cannot call such a society a democracy. It is at best a benevolent guardianship, with an elite class deciding what is best for the public rather than the public meaningfully contributing to ideas about what is the 'public good'.

Enlightenment requires truth. I believe truth is desirable and also possible. To see clearly the world around us is the ultimate civic act, a responsibility shared by everyone. And everyone is capable of it. Truth-seeking is profoundly democratic. The largest events and most important people

can be examined for consistency and held to account. Transparency creates a set of conditions that ensure reality and perceptions accurately mirror each other. By having a clear understanding of reality we have a clear idea of what works and what doesn't and can set to work fixing or improving flaws, injustices or abuses.

For me the appeal of journalism is that it is a profession of discovery and truth-seeking. One of my first jobs was working as a crime reporter in Spartanburg, South Carolina. This was a city which on the surface was full of upright and righteous people, loudly proclaiming the Bible and godly virtue, in the churches, in schools, on the streets, in garden parties and clubs. As a crime reporter, I saw the 'secret' city. A city where the local corporate park - filled with family picnics during the day - turned at night into a cruising ground for closeted homosexuals, who continued to exist despite a county law making their activity illegal. I saw in police incident reports, a city where violence against women was endemic, alcohol and drug abuse common and rape and sexual offences frequent. These things may not have been caused by secrecy and hypocrisy, but they were certainly not helped by it. Secrecy and self-deception, says the academic Lawrence Quill are "curiously wedded together." (Quill, 2014: 4).

My view is that for problems to be fixed they first need to be seen clearly. Only then can the hard work to find solutions begin. An example can be seen in the way child sex abuse in the Catholic Church was kept hidden for decades, which ensured its continuation. Secrecy and wilful blindness meant the problem remained unidentified and thus unfixed. Only after victims spoke out, making their experience known to others, was the problem finally identified. Once identified, calls for action followed. Colm O'Gorman a child abuse victim of a priest who went on to head Amnesty International in Ireland speaks of the danger of succumbing to secrecy:

> "For fear of the worst of ourselves, what we do or people close to us do or institutions do, is we deny the best of ourselves - which is our capacity to respond. We make ourselves powerless by pretending we don't know…If a whole society is in denial, you are really in trouble - because you believe your survival depends on turning a blind eye to the truth. So the thing that we feared most as a society - that our sense of self would come crashing down - that turned out to be valid. But what we didn't question at the time was whether that might be a good thing. We had a sense of ourselves as a good pure Catholic society, where good exists and always wears a collar. But when we finally understood the cost of that illusion, then we had to let it go.' (O'Gorman cited in Heffernan, 2011: 38).

Journalism at its best seeks to follow and tell the truth no matter what interests it disrupts or disturbs, and it will disturb and disrupt.

I formed an initial hypothesis about British democracy as a result of my personal dealings with a local council soon after moving to London. My hypothesis was that the British political system was hierarchal and elitist, at best a benevolent guardianship. In order to test my hypothesis in a more empirical fashion I decided to investigate the British state for my first book *Your Right to Know*.

Uncovering what we don't know

Writing about political power is not easy. As discussed earlier, power is naturally drawn to secrecy, and state power all the more so. Max Weber's 'reason of state' explains the inevitable turn bureaucratic administrations make toward secrecy, eager to go into 'secret session' to preserve a monopoly on knowledge (power) and avoid criticism. Thus there were many times during my reporting when I found "not even the darkness is visible" (Quill, 2014: 2), that is to say I often wasn't sure what questions to ask because I did not know what I did not know. *New York Times* reporter Nina Bernstein summed up this state of affairs in her 2010 acceptance speech for a journalism award: "The best stories," she said, are "the stories nobody knows they want or need because they don't yet know that they exist" (Cited in Schudson, 2011: 216). This is often as true for the reporters of those stories as anyone else. What a reporter relies on in these instances are indicators or 'clues' and a gradual accretion of knowledge using a mixed methods approach.

The world of investigative reporting is not navigable by clear signposts or citable references. The former US Secretary of Defence Donald Rumsfeld described this territory in a news conference when he was asked about Iraq's weapons of mass destruction. He described a world where there are known knowns (things we know we know), known unknowns (things we do not know) and unknown unknowns (things we don't know we don't know.[24]) The majority of my investigations delve into known unknowns but also unknown unknowns. Sometimes I 'know' because I've had

[24] Department of Defense news briefing 12 February 2002 with Secretary Rumsfeld and Gen. Myers. http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636) (Accessed 16 December 2015)

privileged access to partial information. For example, in the case of my investigation into MPs' expenses, I was aware of the type of documentation that underlay politicians' expense claims because I had seen similar expense claims with my own eyes as a reporter covering the Washington State legislature. I had an awareness and expectation of what I wanted to see. I have seen various types of documents such as police incident reports, arrest logs, autopsy reports, fire reports, and line-item budgets for police and local authorities while reporting in the US. British reporters (like British citizens) rarely see this 'machinery of government'. American journalism (both daily and investigative) is based largely on public records. In fact, so common is this way of practicing journalism in the US that one speaks of a 'document state of mind', that is, to think always of what public documents lie at the root of any story. Such a state of mind was of no use to a reporter in the UK prior to the implementation of the Freedom of Information Act in 2005, and arguably even today, due to the continued difficulty accessing official information. British journalists, I discovered, had different methods of obtaining information, some more illegitimate than others[25].

When reporting on the 'deep state' (the heart of power and especially the security services), I was dealing with unknown unknowns. Here historians and journalists agree that sourcing is difficult, often impossible (Fung & Weill, 2007; Roberts, 2006). I found this particularly so in the UK where the security services have an absolute exemption from FOI, meaning there are few legitimate ways to gather or confirm information. Former investigative journalist and now academic Paul Lashmar writes of the particular challenges covering the secret state, specifically the UK intelligence agencies where the "information flow takes place almost entirely outside of the public sphere and is not attributed" (Lashmar, 2013: 1027). He gives an informative account of the accreditation system that intelligence agencies use to liaise with specific journalists and the conditions for these relationships. The primary condition is non-attribution which creates problems not just for the reporter and public but in the case of the 7/7 suicide bomber 7/7 Mohammed Sidique Khan, he shows how it hurt the agencies as well. Non-attribution also leads to reporters presenting information from these

[25] For an extensive look at the inner workings of British journalism see Davies 2008, 2014.

unattributed briefings as independently verified evidence rather than simply something someone said, which misleads the public. An example of this is Tom Harper's article in *The Sunday Times*[26] in which he passed off anonymous briefings that the Chinese and Russians had obtained and 'cracked' the Snowden documents as 'fact'. There was no evidence this was true as Harper admitted on CNN: "that's not something we're clear on, so we don't go into that level of detail in the story. We just publish what we believe to be the position of the British government at the moment." [27] This raises the other danger that journalists in this cosy arrangement quickly become co-opted or seduced by their high-level access and "it can be hard to resist the danger of 'going native' (Lashmar, 2013: 1032).

When the "focus of journalism shifts from objective, verifiable 'facts' to myth: in effect, there is a crucial epistemological shift" (Keeble, 2004: 49). To report in this difficult terrain I used a 'mixed methods' approach drawing on various sources to build up a picture of reality.

Understanding Reality

Schudson writes in *The Sociology of News* that "journalists not only report reality but also create it." (Schudson, 2011: xiv). He makes clear this does not mean they 'conjure' the world from imagination, they work with the material real people and real events provide, but "through the process of selecting, highlighting, framing, shading, and shaping what they report, they create an impression that real people - readers and viewers - take to be real and to which they respond in their lives." (2011:xiv). This is very similar to the motivation and methods of historians. They, too, are in the business of telling stories that are meant to be read and so also focus on being "interesting, well written, dramatic and compelling" (Brennan: 104). They can similarly fall prey to the dangers of story-telling that can beset journalists: exaggeration, making up facts for the sake of a better story, simplifications or dumbing down complexity.

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[26] 'British spies betrayed to Russians and Chinese'. 14 June 2015.

[27] 'Sunday Times reporter on Snowden story: We don't have a clue!' *The Washington Post*. Erik Wemple. June 15, 2015.

My definition of reality is the ability to see things as they *actually* are. The difficulty in much of my work is that because institutions have incentives to perpetuate themselves and protect their reputations, they often manipulate or restrict information to shape public opinion in ways that favour their continuation. There are many people pushing out information with a vested interest in shaping public perceptions: public relations (PR) firms, press officers, political spin doctors, the publicity and marketing staffs of corporate, charitable and government institutions. Schudson (2011) calls such people 'parajournalists' and they play an increasingly central and powerful role in today's journalism. In 'The invasion of corporate news[28]' the *Financial Times* pulled together a number of findings to paint a grim portrait of modern news: US newsrooms had lost a third of their employees since 2006, global PR revenues increased 11 per cent in 2013 to almost $12.5bn, and for every working journalist in 2014 in America, there were in 4.6 PR people.

Information is not put into the public domain by PRs in an even-handed manner but weaponised to serve the interests of the institution as I discuss in *The Silent State*. Information that is critical or challenging is held back or, if it must be put into the public domain, is done so in a limited or 'spun' manner. PR makes not just dissent but alternative views heretical. When public bodies are obsessed with 'lines to take' and refuse to admit the variety of options and divergent opinions that exist in reality, it shuts down possibilities. It is for this reason that I chose to rely on FOIs, interviews and documentation for my methodology, the better to get my information 'raw' and unspun.

Using FOI

Information from FOI requests provides the type of previously unpublished primary source documents that historians agree can give "a more detailed record of an issue or event than published reports or official documents" (Brennan: 101). This can be seen in my FOI for the minutes of the BBC Governors meeting (see next chapter) and certainly for the information on MPs' expenses (see chapter 9). Primarily I used FOI (where organisations were covered by the law), both for the

[28] Edgecliffe-Johnson, 2014.

empirical evidence it could provide but also as a means of testing how officials responded to queries from the public. Journalists innovate with the Freedom of Information Act: "They push boundaries, they put through the case law, they do all sorts of interesting things with it" (Ben Worthy interviewed in Burgess, 2015: 137). I was one of the first and primary journalists doing this. I chose to specialise in FOI because it produces evidence of a high standard - the institution's own documentation. This means the institution cannot disprove what the documentation reveals without calling itself either incompetent or a liar. Even so, some public bodies are so attached to the tactic of trying to shut down a journalist's story by discrediting her source material that they do exactly that. For example, when I asked for a quote from Cleveland Police to accompany an investigation I did into public liability payouts, they responded by saying my information was factually incorrect. I told them it came from their own office so could I quote them as saying they gave out incorrect figures? They admitted the initial figures they'd given me were incorrect (see Appendix).

A media analysis done by Worthy found that across a diverse range of subjects "FOI had been used to obtain an explanation." (Worthy 2010b: 9). He adds that through FOI "we can go behind political rhetoric to see the true state of affairs" (p4) and that "requests are often used to put together a wider series of information, like a jigsaw, or as a lever to obtain influence in a campaign, frequently alongside other mechanisms. (Worthy 2010b: 16). Responses to FOI reveal officials' views of democracy and uncover what Tant calls 'traditionalists'. This is key to understanding the vehement obstruction to some FOI requests such as the 10-year FOI battle *The Guardian*'s Rob Evans fought for Prince Charles's lobbying letters to government departments. Evans said the case (which he eventually won but which prompted yet another government FOI review) was worth fighting because, "what it does show…is how society works really. It shows the lengths they want to go to protect his letters." (Interview Rob Evans, cited in Burgess, 2015: 141).

Interviews and case studies

The goal of good journalism is to reflect reality as accurately and truthfully as possible. In order to do this, reporters seek sources close to the action. Just as a detective seeks to interview

those people who actually witnessed a crime rather than those who read about it in a newspaper, reporters seek to interview those people with immediate and direct knowledge of events or actions rather that rely on second-hand accounts. It is not surprising that journalists, as the producers of the 'first draft of history', share many similarities with historians both in method and motivation. History is "the oldest qualitative method" (Brennan: 93) and historical documentation is presented as evidence using names, dates and places for corroboration and credibility. As with journalism it also uses many types of primary and secondary source material. Traditional historians define primary sources in a way that matches journalism: an eyewitness or observer of an event or action. (Brennan:100, Smith, 1989: 321).

An interview is simply "a focused, purposeful conversation between two or more people" (Brennan: 27). There are many ways to conduct an interview but the preferred method in journalism is face to face and the majority of my interviews were done this way with follow-up questions continued either by telephone or electronic communication. I document in more detail how I found my interviewees and verified their claims in the chapters that follow. Through in-depth semi-structured and unstructured interviews I was able to gain expertise, context and perceptions, and with more in-depth case studies (for example in *The Silent State* and *The Revolution will be Digitised*) to see how policy impacted people's lives. It seems obvious to say it, but "the best way to find out what the people think about something is to ask them" (Bower, 1973: vi). In my work I have both an inductive approach - going from real-world example (a case study) to general point - and a deductive approach where I go from the principle to find real-world examples. My goal was to blend the British emphasis on human interest (primarily scandal-based or personality) stories with the social science techniques found in the best American investigative reporting.

I usually prepare for interviews by reading about the person and their work and possibly interviewing people in their circle. It is often the case that I have been given an introduction by one source to another. This is how I managed to track down the associates of Chelsea (formerly Bradley) Manning, which I outline in chapter 10. I usually prepare a few thematic questions with one or two

specifics then let the interview range widely. I have found from being on the receiving end of several academic 'structured' interviews that sets of rigid questions usually fail to get the full story or establish any meaningful source relationship. The assumptions made to formulate a rigid list of questions leaves little opportunity for the interviewer to understand that his or her assumptions were wrong. Nor is it conducive for an interesting or lively conversation. I am an intensely curious person and from my experience this is what draws people out so they can articulate what they may not have before. For example it was through interviews that I learned about the trade in personal data as well as mass online surveillance by states and companies, a topic we came to know much more about a few years later in 2013 with Snowden's disclosures. It was also through interview that I first established a relationship with the source who would leak me the entire set of US diplomatic cables.

I cultivated a number of sources. Some were specific to the books or articles on which I was working, others were regulars whose knowledge I respected and trusted. All journalists must develop trusted sources (Randall, 2011). These people could be "sounding boards" (Weitkamp, 2003), such as the lawyers who helped me interpret the law, or people who were on the rock face of reality, such as the volunteers of MySociety who were trying to build civic technology tools using official data. There is a dependency relationship between journalists and their sources, especially where sources are slim or the reporter needs to file regular stories. I had arranged my career so that I did not have to file regular stories, thus I could remain independent. I also sought to corroborate my sources' claims either through other sources or documentation, which I outline in detail in subsequent chapters.

Attribution

One aspect of interviewing that appears to differ between journalism/history and media studies/social science is in relation to attribution. Journalists and historians eschew anonymity as it introduces unverifiability into a narrative. This makes the narrative less credible and for this reason pseudonyms are actively discouraged. The gold-standard of responsible reporting is 'on the record' where a source is identified with their full real name so the reader knows who is saying what and can

judge the statement accordingly. Journalism, if it is to be considered professional, should offer the audience access to independently existing reality not a secret reality that only the reporter and source can verify. Of course there are exceptions:

1) where the source will face some actual harm (either to their livelihood or person) if they are identified;
2) where the information is of such importance that there is a strong public interest in publishing it and no other way to do so.

Basically anonymity is a privilege and not a right and a reporter needs to explain to the reader the reason for granting anonymity[29]. However, one need only read a British newspaper to see that anonymous sourcing with no explanation is commonplace. I address this issue in some detail in chapter 4 of *The Silent State*. Suffice to say that anonymous sourcing (outside of the exceptions noted above) has a tendency to be associated with partisan reporting or propaganda as with the Tom Harper article mentioned above.

Media studies and social science interviewers must "protect the person's identity when he or she requests it" (Brennan: 29) and if the person does not want to be named then "ask the person to choose a synonym in place of his or her real name" (p29). This easy use of pseudonyms would be frowned on in journalism. There is more common ground around the interviewer's "moral responsibility to protect their respondents from physical and emotional harm" (Brennan: 29). I would argue this is similar to journalistic 'source protection' and shield laws. Brennan lists informed consent as another important principle. I believe this is similar to the journalistic practice of setting the ground rules with the source at the beginning of the interview for how it will be conducted: on-the-record, off-the-record for attribution (e.g. a vague type of attribution such as 'Whitehall source'), or off-the-record no attribution. Usually the journalist has to negotiate getting a source on the record. Anecdotally I have noticed that in the US where anonymous sourcing in the media is less

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[29] Jack Schafer discusses journalistic use of anonymous sourcing in 'Ratting out the Anonymice'. Slate. 15 June 2004. http://www.slate.com/articles/news_and_politics/press_box/2004/06/ratting_out_the_anonymice.html (Last accessed 7 July 2016).

common interviewees are more likely to agree to an on-the-record interview, whereas in the UK where the media routinely use anonymous sourcing, interviewees are more reluctant to be named. I can make no causal claim about this but it is noteworthy. It is considered a professional and ethical breach for a journalist to promise anonymity and then name the source. However, if someone knowingly speaks to a journalist and then later says 'but this was all off the record', that journalist is usually considered within their rights to publish. For the more sensitive aspects of my reporting such as in *TRWBD* I conducted quite a number of off-the-record, not-for-attribution interviews in order to gain knowledge and the trust of a source. Once I had established this, if I wanted to cite something, I would either corroborate the information elsewhere or return to the source and negotiate further. In journalism which operates in a more political and 'high-stakes' environment, there is a distinction made between being fair to a source and granting 'copy approval'. Agreeing to copy-approval can quickly move a journalist from independent reporter working for the public interest to co-opted propagandist working for a private interest. I would sometimes show small sections of my work to a source if the material was particularly sensitive or technical but I did not grant full copy approval of an article or book to any source.

Archival and documentary research and content analysis.

Although there remain different ways of doing journalism, "what reporters young and old take to be journalism's gold standard" is holding the powerful to account through original, fact-based, well-sourced and analytically sophisticated reporting (Schudson, 2015: 267). I would argue that the 'analytically sophisticated' aspect has been missing in British journalism due in large measure to the lack of access to official data and information. This is where I made my biggest contribution to British journalism and British civic life by opening up whole tracts of previously secret civic information, which I document in the chapters that follow.

Evidence is 'particles of reality" (Kellner, 1989: 10) and this can either be uncovered or found. In addition to finding and publishing much new information, I also made extensive use of existing information stores. For *Your Right to Know* I trawled through public inquiry reports, global

laws on FOI and privacy, newspaper cuttings and directories. I examined the content of inquiries, for example, to see whether secrecy was identified as a cause or exacerbation of the scandal investigated. I made FOIs for documents but also for large civic datasets such as restaurant inspections, public prosecutions and London Underground incidents and did some of the first large-scale data reporting based on my analysis of these datasets. I sought out court documents and other official documentation to verify interview claims. For example, I obtained a copy of the Common Assessment Framework to see what information it collected on children to verify what my source had told me it contained.

Journalistic and historical verification are similar: both collect material and then "analyze the evidence they have obtained for its authenticity and credibility" and "assess the creator of the evidence as well as his or her intention, original purpose and intended audience." (Brennan: 102-3). Reporters call this process 'standing up a story'. The method Brennan outlines for historians is identical to that of reporters: "They evaluate evidence for inconsistencies, omissions, contradictions and/or distortions and attempt to verify the information from other sources… they look for accidental and intentional errors of fact, forgeries, and cases of plagiarism, and worry about the misuse of evidence and information that is taken out of context…also consider the loss and/or suppression of evidence and problems with identify, motives and the origin of documentary evidence" (p103). An example of this is my attempt to 'stand up' the oft-quoted statistic that the average Londoner is caught on camera 300 times a day. Eventually, I traced this back to Simon Davies who was then director of Privacy International. When I interviewed him, he told me this was just a rough guess based on extrapolation and not at all a scientific fact. One of the main problems with 'facts' made about national security such as Theresa May's claim that "in the past twelve months alone six significant terrorist plots have been disrupted here in the UK, as well as a number of further plots overseas"[30] is that the claim cannot be independently verified or 'stood up'. It is

[30] Oral Statement to Parliament. 4 November 2015. https://www.gov.uk/government/speeches/home-secretary-publication-of-draft-investigatory-powers-bill. Last accessed 7 July 2016.

similar to allowing drug companies to put forward claims without mandating they publish the underlying clinical trials data on which the claims are based.

Sociologist Gaye Tuchman, defines news as "a depletable consumer product that must be made fresh daily" with the main ingredients facts. Facts he defines as "pertinent information gathered by professionally validated methods specifying the relationship between what is known and how it is known…In news, verification of facts is both a political and a professional accomplishment." (Tuchman, 1978: 82-3). News is therefor something manmade. This is certainly true in my experience. Facts don't fall from the sky, nor are they always willingly handed over. A journalist's credibility and reputation is based not just on her ability to find a good story, but also on her tenacity to 'stand it up', that is, to substantiate claims or allegations. In my mind this is the real craft of journalism. Rumours, gossip, accusations and claims are numerous and easy to find, the difficulty and the craft of journalism is substantiating claims or hypothesis with provable evidence that stands up to public scrutiny. It is also worth mentioning that due to the challenging material of *The Silent State and TRWBD* both books were checked for libel by a London law firm. A folder of evidence accompanied the manuscripts to document and support claims.

Mapping exercises and network analysis.

Cultural historians seek to study their own cultures as alien: "We constantly need to be shaken out of a false sense of familiarity with the past, to be administered doses of culture shock" (Darnton, 2009: 325). For me this was no thought experiment. I suffered very real culture shock when I moved to the UK and I believe it was for this reason I was able to see aspects of British culture that went unseen by those for whom it was all too familiar. I set about researching the British state for my first book *Your Right to Know* and my research (documented in detail in the following chapter) enabled me to create some of the first citizen-friendly organigrams of British bureaucracy including all departments, executive agencies and quangos along with their affiliations and powers. I created a directory of nearly 200 public bodies with direct contact details for their FOI officers. In *The Silent*

State I read and interviewed widely to create one of the most accurate and comprehensive maps of secretive and unaccountable government databases of citizens' personal information.

Strategic litigation

Strategic litigation is useful for achieving broad systemic change, either through the success of the action and setting legal precedent or by publicly exposing injustice and raising wide public awareness of an issue such as FOI. However, it is also a high-risk strategy with no guarantee of victory and one that demands a good deal of resources (both time and money). During most of my British journalism career I worked as a freelancer so finding these necessary resources was challenging. I supplemented the costs of my investigations by writing commentary pieces and books, teaching, and providing consultancy and training services. Additionally I was able to find lawyers to represent me pro bono as I was at the vanguard of an emerging aspect of law, however I did write a large amount of my case documents myself including my skeleton arguments and grounds for appeal (see appendix). Litigation involves bringing a case against a party. I appealed about a dozen cases to the Information Commissioners Office. Of these, I took two to the Information Tribunal: one seeking the minutes to a BBC Board of Governors Meeting after the Hutton Inquiry (*Guardian Newspapers Ltd and Heather Brooke v IC and the BBC* (2007) EA/2006/0011; EA/2006/0013) in which I represented myself and did all of my own court filings, and my notable legal victory against the House of Commons for details of MPs' expenses (*Corporate Officer of the House of Commons v Information Commissioner & Heather Brooke, Ben Leapman, Jonathan Michael Ungoed-Thomas [2008] EWHC 1084 (Admin)* (16 May 2008). This case went further to the UK's High Court where I was represented by Hugh Tomlinson QC. This victory in the High Court fundamentally changed law and policy, and for the first time in its history Parliament had to account to an outside body over how MPs' claimed expenses.

'Clean-hands' journalism

I strive to conduct 'clean hands' journalism where I am not beholden to anyone for the information I need to investigate an issue or tell a story. What I discovered in the UK was a system

where this was not possible. There was no statutory law giving the public access to official information prior to 2000 even when it was collected in the public's name and with public money. As a result, journalists had to find other ways to obtain information that in the United States would have been available as a public record. For example, as a crime reporter working in South Carolina, my reporting relied heavily on access to police incident reports and arrest logs. Additionally, I listened to a scanner that broadcast communications from 911 dispatch to all emergency services, which is how I knew where to go to report the crimes that were happening. Access to these documents and listening to police dispatch are illegal in the UK. I wondered how British crime journalists did their jobs. Veteran investigative journalist Nick Davies provides a detailed account of the panoply of techniques in his books 'Flat Earth News' (2008) and 'Hack Attack' (2014) from phone hacking to bribing, blagging, buying information and sponsoring police events. These are not techniques that contribute to 'clean hands' journalism.

When I worked as a reporter in the US, hospitality was considered unethical, if not forbidden as per the Society of Professional Journalist's Code of Ethics[31]. The two newspapers I worked for, like most American newspapers, had signed up to the SPJ code and there was a prohibition on offering or accepting any hospitality above $25. This restriction did not in any way deter me from finding stories, as the information I needed was either publicly available or gained through (unpaid) interviews. Most of the English national press, and particularly the Westminster Lobby, was run on a patronage system where informal deals were continually made to access information (I'll scratch your back if you scratch mine[32]). For example, I saw and was told by other journalists that it was common practice for British journalists to "wine and dine" sources and to accept gifts and junkets offered by companies and PRs in exchange for coverage.

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[31] The Society of Professional Journalists Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. The code was updated in 1973, 1984, 1987, 1996 and 2014. It specifies that journalists work for the public so must not be seen to work for private interests. This means refusing all "favors, fees, free travel and special treatment, and avoid[ing] political and other outside activities that may compromise integrity or impartiality, or may damage credibility. http://www.spj.org/ethicscode.asp (Last accessed 22 December 2015.

[32] This is from my own experience. For a more academic study see Tunstall, 1970.

To be dependent on a leak or source in such a compromised way means one is made complicit not only in potentially illegal activity but also it is more likely the information itself will be "'contaminated' by human needs and desires as well as moral and political positions." (Birchall 2014: 78). Even so, few British officials seem to understand the benefits of FOI as an "enlightening, honourable mode of disclosure" (Birchall, 2014: 77), instead preferring to condemn themselves to a continuation of what Birchall calls "narrative-interpretive forms of disclosure" such as scandal, gossip and conspiracy theories. They seemed ignorant that by obstructing legitimate disclosure they were encouraging the illegitimate, which might then "'pollute' the rationality and knowledge necessary for citizens to be counted as 'well-informed' and capable of making a valuable contribution to the public sphere." (Birchall, 2014: 78). As well as being morally suspect, these illegitimate forms of disclosure are more likely to be subjective, unproven and unreliable, in a legal grey area or outright illegal and also lack legitimacy.

I did not want to take sources out to lunch, get them drunk, go under cover or practice deception. That is not how I was trained to be a journalist. But I did want to write in-depth stories that examined and challenged the powerful and tested official spin against reality. Therefore, I used FOI because it has a legitimacy and authority that other forms of disclosure lacked. As part of the judicial/legal process it has an authority and legitimacy anecdotal sourcing lacks. As Birchall writes "such illegitimacy can work at an ideological-discursive level so that contentious ideas are belittled as 'just' conspiracy theory, or gossip" (2014: 81). She notes the way Tony Blair tried to "align dissent with a stigmatised, inferior way of thinking" when faced with criticism over the decision to invade Iraq.

I encountered this attitude myself while doing an anti-corruption survey for the Open Society Institute in 2007. I made an FOI request to the Olympic Delivery Authority for their registers of gifts and hospitality. They claimed it would cost too much to provide these, but in my request I had said I would come and 'inspect the record'. So after half a dozen phone calls and chasing emails, I set up a time to do just that. On the appointed day, my assistant and I showed up ready to inspect,

only to be told we had no more than 90 minutes to inspect several hundred records. I had a digital camera and began taking photographs of the pages but was stopped by the employee tasked with watching us. She threatened to evict us from the building if we made any effort to make a duplicate of the pages. No legitimate reason was given for this prohibition, but the reason became clear later. I transcribed with my colleague as much of the registers as we could and gave our findings to Sunday Times reporter Jonathan Ungoed-Thomas who wrote an article about it ("2012 chiefs take contractors' junkets", *Sunday Times*, 14 October 2007) When Ungoed-Thomas phoned the ODA asking them for comment, they claimed my copy of the material was inaccurate. They refused to say what precisely was inaccurate, however, and fortunately the *Sunday Times* trusted me and my note-taking and so went ahead with the story. What this made clear to me was the importance of getting the actual record itself. Without it, bureaucracy has deniability.

In the next chapters I detail precisely how I used FOI, among other techniques, to test and challenge political systems.

Chapter 7: Your Right to Know

My interest in collective decision-making and the exercise of power began at the University of Washington's daily student newspaper (The Daily) run by and for students. I covered both the Associated Student Body of the UW and the Board of Regents (the university's governing body). Meetings and decisions were open and my experiences watching these political systems at work complemented the double degree in political science and journalism that I obtained in 1992. This formed my early understanding of political systems both in theory and in practice.

As part of my studies, I did a three-month internship with the *Spokesman-Review* newspaper covering the 1992 Washington state legislative session. This experience would be formative. As I wrote in The Times:

> "Nearly 15 years ago I found myself in a small office digging through boxes of receipts looking at the expense claims of local politicians. Everything was laid bare: all the trips, all the meals, all the hotel bills, all the contracts. I was a young trainee reporter covering the Washington State government, and my editor had suggested I look at these claims to see if there were any instances of corruption or personal enrichment." (Witch-hunt? MPs just don't get it, Feb 28, 2008).

It is worth going into some detail about why I was in that small office, digging through boxes of receipts as it materially influenced my subsequent journalism career and my ideas about the informed citizen and democracy. In 1992, I was in my final year of university, ambitious and anxious about finding a job as a newspaper reporter. Such jobs were thin on the ground and the way to get them was to have gained professional experience through internships and published articles. These published articles, or 'clips' made up your portfolio and a compelling portfolio showed an ability to report both daily or breaking stories (what the British call 'on diary'), and Sunday investigative or entrepreneurial ('off diary') stories. In the US, daily newspapers are published seven days a week and investigative or 'off-diary' stories are scheduled for Sunday (or sometimes Monday) because the weekend advertising revenue meant an increased number of pages while only a skeleton staff were on duty. As a young journalist, it was important to have Sunday pieces in your portfolio to show you were up to the challenge of filling the Sunday/Monday newspapers. Additionally, these stories most often win awards, so a paper likes to hire reporters who can both fill the paper and bring it

prestige. As such, while I was busily learning the ropes of the legislature and writing daily stories for the *Spokesman-Review*, I was also keen to publish a Sunday story. One of my editors at the paper, Joe Fenton, was an experienced newsman so I asked his advice on finding a Sunday story. He suggested I look into the expense claims of our local politicians. As he recollected some years later:

> "Fenton recalled giving Brooke, as a student, one of his favorite assignments — digging up documents on something. In this case, it was expense documents for the Washington Legislature. Her story wasn't earth-shattering because, as she recalls, the legislators did little more than take advantage of their frequent-flier miles. But it planted a seed. She was surprised that the expense records were handed to her almost immediately, on the first visit." (Kaufman, Ben L. "Maureen Dowd's Plagiarism, Cincinnati's Connection to a British Scandal and Problems at NPR[33]" Cincinnati CityBeat, 27 May 2009).

Indeed I was surprised to get the records. I learned that Washington state had a strong democratic ethos that was evident in its public records law, a law that was made even stronger during my time at the statehouse when amendments strengthened the people's right to know by adding this preamble which remains in the law today:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern. (Preamble to Washington State Public Records Law RCW 42.56.030 [2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW 42.17.251.])

This sentiment is directly opposed to the British political tradition where sovereignty rests in Parliament rather than the people and the role of government (whether performed historically by the Monarch alone or in combination with Parliament) is to weigh particular interests and decide what is good for the people. "Government and only government was arbiter of the 'national interest'" in Britain (Tant: 6). Politics in the UK, I came to discover, is 'top down', whereas in a participatory democracy like Washington state it is 'bottom up'.

When the Labour party was in opposition, its leader Tony Blair shared similar democratic ideals to those expressed in the Washington state law. Speaking at the Campaign for Freedom of

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[33] Last accessed 23 December 2015: http://citybeat.com/cincinnati/article-17897-maureen_dowds_plagiarism_cincinnatis_connection_to_a_british_scandal_and_problems_at_npr.html

Information's annual awards ceremony in 1996, Blair denounced the Whitehall and Westminster culture of official secrecy:

> "What is needed is a change in culture and a statutory obligation on government to make it a duty to release information to the people who elect the government…Freedom of Information is not some isolated constitutional reform . . . it is a change that is absolutely fundamental to how we see politics developing over the next few years. It is part of bringing our politics up to date." (Blair, 1996).

A strong FOI white paper was introduced soon after the election in 1997. Unfortunately, in the two years it took to become a bill, Tony Blair, then Prime Minister, and his fellow MPs had lost much of their enthusiasm for the people's right to know. A radical white paper was replaced by a watered down version, the Freedom of Information Act 2000.[34] As a further indication of the Establishment's view of FOI, it would be another five years before the law came into force, one of the longest implementation times of any country (Banisar, 2006). This is not surprising in light of the "uniform, elitist and top-down approach" of the British political system (Richards and Smith, 2015: 45). As discussed earlier, such a system is dependent on secrecy for its survival. My intent was to expose and challenge this elitist system and make the case for a properly democratic alternative.

Your Right to Know

The first edition of YRTK was published at the end of 2004 before the Freedom of Information Act came into force, so I relied on research and judgment (my own and other people's) to predict how the law would work in practice. I researched parliamentary debate to fill in the gaps of how the law would be used and enforced (Brooke, 2007: 48). Subsequently I amended and expanded my book by an additional 47 pages in a second edition published in 2007 and it is this version that accompanies this thesis and to which page numbers refer. During the time between editions, I busily made my own requests, following my advice that, "The next few years will set the boundaries for openness in our society. If you make a request now it is likely that you will be determining those boundaries." (286). I set about, and succeeded in large measure, establishing formative case law that would shift Britain from a culture of secrecy to openness (Arlidge, 2010,

[34] A summary of the law can be found here: https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/

Worthy, 2014a). I used five main methods for *Your Right to Know*. Reading and research; mapping and network analysis, original investigation (including filing FOIs); litigation and public awareness.

Researching the British state

To begin, I had to do a tremendous amount of reading to become familiar and knowledgeable with the British political system to authoritatively guide the reader through it. I had to know how decisions were made, who did what and where information was stored. I read relevant public inquiries of the time which I reference in YRTK such as the Hutton Inquiry (Brooke: 99; Hutton, 2004), Scott Inquiry (31, Scott, 1996), an inquiry into the deaths of 31 people at a fire in Kings Cross (177, Fennell 1988), the death of Stephen Lawrence (154, McPherson, 1999), the BSE Crisis (215, Phillips, 2000), the Marchioness ferry disaster (Clarke, 2001), the deaths of children undergoing heart surgery at Bristol Royal Infirmary (183, Kennedy, 2001), and the serial killings by Dr Harold Shipman (184, Smith, 2004). In all these inquiries, official secrecy was a common theme. In the Scott Inquiry that investigated the government's secret sale of weapons to Saddam Hussein, the judge concluded there was "consistent undervaluing by government of the public interest that full information should be made available to Parliament." (Scott, 1996: 211). In the BSE crisis, the government's failure to release accurate and timely data to the public was held to be directly responsible for extending the crisis. This all showed a pattern that in Britain "the government's privilege to conceal…[is] valued above the public's right to know" (Michael, 1982: 18 cited in Tant: 13). I clipped articles from various newspapers related to official secrecy and FOI. I also had a clip file for each of the chapters in my book and collected articles on structure, operation, information stores, and possible sources. From these I was able to gather various real-world examples such as the *Birmingham Post*'s battle to get details of city councillors' taxi and first-class rail journeys (p227).

I closely read a number of laws, not just the FOIA, but the Data Protection Act 1998, the EU Data Protection Directive on which it was based, the Human Rights Act 1998, Access to Medical Records Act 1990, and the Environmental Information Regulations 2004. I read all the legal books on FOIA that were available at the time, some of which are listed on page 54 of YRTK. In order to

fully comprehend the implication of laws, I consulted a number of lawyers who specialised in Information Rights. Jonathan Griffiths, senior law lecturer at Queen Mary University and co-author of *Blackstone's Guide to the Freedom of Information Act 2000* (Blackstone Press, 2001) kindly agreed to read and correct my proofs for the legal chapters. Gareth Crossman, author of *Your Rights* (Pluto Press, 2000) and policy director at Liberty[35] at the time, read and commented on the entire manuscript. I consulted barrister Hugh Tomlinson QC on the interface between FOI and the law of privacy and confidence. Additionally I read FOI, privacy and contempt of court laws from countries such as the U.S. (federal and various states), Canada, New Zealand and Australia so I could provide a comparative view. I read all the books I recommended in the sections 'For More Information' such as Courts (pp152-3), Health (p196) and Local Government (p250). Additionally, I also read the information stores I referenced such as the Electoral Commission's index of donors, and register of campaign expenditure (p73), or Parliament's staff handbook known as the Green Book (made available for the first time using FOIA: 70) in order to better identify what was most useful to readers. I read two years' of back issues of *Which?* Magazine to glean examples of public service performance issues citing, for example, their investigation into ambulance response times (p192) and problems with civil defence (p181). I also read sector specific trade magazines such as *Public Finance, Local Government Chronicle, Municipal Journal* to gain an institutional understanding of various bureaucracies.

Mapping and network analysis

As much as YRTK is a guide to accessing information it is also a guide to understanding the British state, how it is organised, how decisions are made and where information resides. This is because one first has to know where and how the information is stored in order to direct one's query to the right place. To understand the complex and unwieldy beast that is British bureaucracy, I consulted a number of reference materials, most of which were prohibitively expensive (government websites were very minimal at this time) so I accessed them at the British Library. These included a

[35] The UK's leading civil and human rights organisation: https://www.liberty-human-rights.org.uk/

multitude of directories such as the *Civil Service Yearbook*, the *Municipal Yearbook*, *Shaw's Directory of Courts*, *The Whitehall Companion, Dod's Parliamentary Companion, The Solicitors and Barristers Directory, The NAPO Probation Directory, Binley's Directory of NHS Management,* and *Institute of Healthcare Management Yearbook*. Simply understanding the scale and scope of British bureaucracy was daunting, which is perhaps why so few, even within government itself, knew its full extent. I would no sooner research one government department then I would find a vast number of executive agencies, non-departmental public bodies, committees, or other affiliated quasi-autonomous non-governmental organisations (quangos) hidden within. That these fiefdoms were allowed to grow and spend public money with few being aware of their existence was an example of the cost of secrecy. My book marked one of the first instances where these quangos, their affiliations and powers, were mapped out. It was during my research that I came across, for example, the Government Car and Despatch Agency, a division within the Cabinet Office responsible for providing chauffeur-driven cars to central government. In 2004, I filed a request under the precursor to FOI, the Open Government Code, and wrote a subsequent story about my findings for the *Daily Telegraph* (Brooke, 31 December 2004) which helped shine a light on this little known agency. I interviewed Nigel Bennett, the GCDA's director of corporate and business affairs, who told me this was the first time his office had ever been asked to collect the information in a way that showed the full cost charged to each department.

I created some of the first citizen-friendly organigrams of British bureaucracy such as the health system (p195), police (p161), local government (p240) and military (p106). Distilling down all the necessary history, law and policy was not easy due to frequent re-organisations. Local government reform, for example, had created a system where authorities had been in 'perpetual motion' for the past 30 years (Wilson and Game 2006: 11). The same was true of the NHS.

I was not the only one demanding more openness and scrutiny of these public bodies, and I sought to make allies where I could. The Taxpayers' Alliance, a low-tax campaign group, was also interested in stripping away bureaucratic secrecy (Elliott & Rotherham, 2006) and together we filed a

number of FOIs to various public bodies to better shine a light on the true cost and scope of bureaucratic sprawl. Our combined campaigns raised public awareness and as a result of this consciousness-raising about bureaucratic sprawl and waste, one of the first reforms of the Conservative government in 2010 was a so-called 'bonfire of the quangos'. In *Public Bodies Reform — Proposals for Change*[36] the government outlined how these myriad and sprawling public bodies so long operating under the radar, were to be put under the spotlight, their functions and role examined so they could be streamlined and merged.

One of the most challenging parts of the book proved to be something I had imagined would be simple: creating a directory of nearly 200 public bodies with direct contact details for their FOI officers. My goal was to list every FOI officers' name, email, direct telephone number and postal address. There was almost no direct contact information available online so my first port of call was again the British Library and their stock of public and private directories. After finding as many names and telephone numbers as I could, I then began telephoning into the government edifice, speaking to whoever answered the telephone and asking to be put through to an FOI officer. After a series of phone calls, emails and constant chasing, I tracked down and spoke to the majority of all central government FOI officers and many of those in executive agencies and other public bodies. Some FOI officers were very helpful and told me about preparations for FOI (for the first edition) and how it had worked (for the second edition), yet they all had a great reluctance to have their names and direct contact details published in the book. When appeals to democratic accountability failed, I shifted to an argument found by closely reading the legislation: Section 16 of the FOIA mandates that officials have a statutory obligation to provide advice and assistance to requesters to help them formulate their request. Obviously if officials refuse to provide any contact details, they are in effect failing this statutory duty. I found most officials wanted to abide by the law and so they agreed. Where they did not and I knew their names, I published these regardless, judging that their expectation of privacy was minimal and, in any case, over-ridden by the public interest. One or two

[36] Available at: https://www.gov.uk/government/publications/public-bodies-reform-reports.

were so "mired in secrecy they refuse[d] to even disclose the name of their openness officer." For example The Highways Agency refused even to put me through to their FOI unit claiming the public had no business knowing who this person was (p3).

To individually identify someone is to make them accountable for their actions. This is all the more relevant if the person is a public official working on behalf of the public and paid for with public funds. It is customary in the USA for staff directories of public bodies to be publicly available[37]. The obstruction I encountered from FOI officials alerted me to a power differential between British citizens and their public servants. It told me that officials were well aware that naming made them directly accountable and answerable to the public, and that they viewed such accountability as unacceptable. I discovered that even official spokespeople in the UK objected to being named (Brooke, 2011: 92-117). Bureaucracies and the people working in them have an inherent bias for secrecy as it enables them to maintain and expand their power base. By pushing for and publishing the names of FOI officials, I had unexpectedly set a new precedent, one that challenged the Establishment orthodoxy of collective responsibility and official anonymity.

Original investigation and analysis

My investigations relied primarily on information gathered through interviews and FOIs. I identified a number of useful sources. For example, I contacted MySociety (www.mysociety.org), a non-profit group building civic technology tools such as TheyWorkForYou (www.theyworkforyou.com) and Pubilcwhip.com (www.publicwhip.org.uk). I spoke frequently with then-director Tom Steinberg and developers Francis Irving and Julian Todd, hearing about their difficulties accessing the Hansard data feed and other official records. I used their stories in the book (64, 135) but also wrote longer articles about Irving's unsuccessful attempt to create a statute law database (see Brooke, 23 May 2006 and 17 August 2006) and parliament's obstruction to Hansard (Brooke, 8 June 2006).

[37] See for example (Brooke, 1996) for which I compiled a list of all state and local officials and their exact salaries.

Having read David Leigh's book *The Frontiers of Secrecy* (1980), I phoned him up and asked to meet. Through this meeting I also met other *Guardian* reporters such as Rob Evans who were interested in FOI and once the law came into effect, I cited their experiences in YRTK (68, 100, 103). I cultivated relationships with many other journalists I identified as 'prominent users' of FOI such as Michael Crick, then at the BBC now at Channel 4 News (136), Tony Collins at *Computer Weekly* who used FOI to seek contracts secretly tendered for multi-million pound government IT projects (p186), and Matthew Davis who ran his own news agency (p14). I also identified and cultivated a relationship with Phil Michaels of Friends of the Earth as they vigorously used FOI and its sister law the Environmental Information Regulations (15, 208). Of course, some of my main sources were freedom of information officers (72, 86) such as the clerk of records at the House of Lords (p72) or those tasked with dealing with FOI such as the Church of England's spokesman or Queen's press secretary (p93). I also kept in regular contact with the UK and Scottish information commissioners.

Testing for Truth

Skepticism is an essential element of good journalism. Just because someone says something is true - even if (especially if) that person has authority or power - that doesn't mean it is. Journalists are not stenographers, and we are supposed to question what is said and test it for truth. As such, I tested a number of claims in YRTK, for example that the five-year delay from the law's passage to implementation was necessary 'preparation' time. My hunch was that this was bogus, and when I made my calls in 2003 and 2004 to the various FOI officers I found very few public bodies were prepared. Some agencies did not even know who was handling FOI and had never heard of the law. Often I had the impression that preparations began only after I made my inquiries.

I speculated that one of the ways public bodies might be 'preparing' was by eliminating embarrassing or controversial documents. As such I made requests to central government departments before the act was in force using the voluntary Code of Practice of the Open Government Initiative. My findings are detailed in a package of articles in the *Daily Telegraph* that I

did with Ben Fenton (Brooke, Fenton, 29 November 2004). I tested the government's purported 'commitment' to FOI by asking UK and Scottish Information Commissioners for their promotion spending and discovered that just £218,000 was spent by the UK commissioner compared to £369,000 in Scotland. Both are small amounts for a national public awareness campaign. I tested the then Lord Chancellor Charlie Falconer's promise that new organisations would be frequently added to the list of public bodies covered by FOIA and found that none had (p35). When in 2006, Falconer claimed public bodies were being 'overwhelmed' with vexatious FOI requests so that fees would need to be introduced (Cracknell, 2006), I sent his office an FOI for a listing of these 'vexatious' requests. In response, they cited just six (out of a total of 150,000 requests) and these were ones that had been written about in newspapers (p10[38]). When the minister in charge of FOI told a parliamentary committee that "there's nothing that is a systemic problem in relation to delay" (p11), I tested this out by making my own FOI requests, interviewing other requesters and studying official figures. The minister's claim was categorically not true. Delays were systemic and debilitating. As I state in YRTK, "Out of seven cases I put through to the Commissioner, just one had been processed after more than a year." (p12) Other requesters told me they'd had similar experiences (p12). The public interest extension was a common ruse used to delay. I waited four months for the Metropolitan Police to respond to my FOI for their shoot-to-kill policy. Testing the ICO's claim of rigorous enforcement, I found instead that he had issued zero practice recommendations and zero enforcement notices. It was not until ICO Richard Thomas was replaced by Christopher Graham in June 2009 that these delays were dealt with and practice recommendations and enforcement notices started appearing.

Using FOI

When the necessary information to test claims was not available, I asked for it using FOI. By using the act, I could both gather empirical data and also witness the government's attitude toward the

[38] Baroness Ashton of Upholland giving evidence to Constitutional Affairs Committee, 18 April 2006. http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/991/6041803.htm. Last accessed 16 March 2016.

public's 'right to know'. I made approximately 50 requests in the first six months of the law's implementation and around 500 in the first four years. Several of these were 'national' requests, for example to 40+ police forces, asking, for example, for costs spent paying out public liability claims (Brooke, 3 December 2007), for PR and propaganda (Brooke, 23 May 2008) and chief police officers pay and perks (Brooke, 10 August 2009). As I told the *Observer* : "I am trying to set precedents for public authorities and change the culture of secrecy in the UK" (Robins, 24 July 2005). I successfully requested waste management contracts in the London borough where I lived and crime statistics for Victoria Park in East London where Margaret Muller, an American artist, was fatally stabbed while out jogging. "I used to be on the neighbourhood committee and a policeman would come to our group," I told the *Observer*. "When I asked him about it he gave me no information at all and then I asked a question under the Freedom of Information Act and they gave me the answer straightaway." (Robins, 24 July 2005).

Importantly, I was watching how the law was being used in Scotland, particularly by Paul Hutcheon, political editor of the *Sunday Herald*. I phoned him and he became a useful source and ally in my own subsequent battle for MPs' expenses. Hutcheon's tenacious pursuit of detailed taxi receipts of Scottish politicians revealed numerous abuses in that system and led to the first resignation resulting from FOI in October 2005 of Scottish Conservative Leader David McLetchie. This inspired my own battle to open up parliament.

My FOIs flagged up current and future problems such as secrecy in food safety regulation (Brooke, 22 November 2004) which I identified by making the first FOIs to London's local councils for restaurant inspections. I donated this data to the Centre for Investigative Journalism and it was the first relevant UK data trainers had used to train British journalists in data analytics. I received three-year's worth of prosecutions data in response to my FOI to the Crown Prosecution Service and, after analysing the data, produced a series for *The Times* revealing for the first time the disparities in conviction rates nationally (O'Neill, Gibb, Brooke, 23 November 2005). This was also the first time I had received a large digitised data set in response to my FOI and it forced me to

quickly learn Excel, Access and various data analysis programs. I did another data story after receiving a large database from Transport for London of all incidents on the London Underground (Singh, Brooke, 20 March 2006). I also began making FOIs to parliament (Brooke, 27 March 2005) and for their expenses and allowances. Judging that getting contracts would be tough, I made a number of FOIs for these which I cited in my chapter on Private Companies where four of the five contracts I list were released as a result of FOIs I filed.

By making so many FOIs I was also testing out the appeals process. I made approximately a dozen appeals to the Information Commissioner. I also appealed an FOI request for the minutes of a BBC Board of Governor's meeting to the Information Tribunal. Usually these minutes were published but the minutes from meetings after the Hutton Inquiry, from January 16-31, 2004 were not. Director General of the BBC Greg Dyke resigned on 29 January 2004. I represented myself at the Information Tribunal (p90) and won the case[39] (Brooke, 11 January 2007).

Public awareness

In the first year of FOI, I wrote many explanatory articles about the law with the aim of educating various audiences (Brooke, 13 January 2005, 4 December 2005, 11 January 2005, 26 January 2005). For people to exercise their right to access information they must first understand they have such a right. This is what academics call 'citizenship literacy' (Breit et al 2012: 12). Therefore, for a right to be effective people have to know of its existence and how to use it. As such, public awareness was an important aspect of my work. With YRTK I gave people "some understanding about what types of matters are administered by the different levels of government"(Breit et al: 13). As Ian Hislop, editor of *Private Eye*, wrote in the introduction to the second edition of YRTK: "Brooke does not merely want to conduct investigations herself. She wants you, the general public, to go out and find out about issues that concern you" (vii).

It was for this reason I contacted the National Union of Journalists to offer to teach a series of courses on using FOI. As I wrote in YRTK: "Journalists have an important role in representing

[39] Guardian Newspapers Ltd and Heather Brooke v IC and the BBC (2007) EA/2006/0011; EA/2006/0013

and expanding the rights of the public, but in Britain too few take this responsibility seriously. They are the final check on state power, but too often the noble goals of public enlightenment are forsaken for an easy story." (vii). I trained hundreds of working journalists who went on to publish a great many revealing articles such as Adele Waters, the campaigns editor at *Nursing Standard* who used FOI for their investigation into attrition rates of student nurses (Kirby, 2010; Cook, 2006) and David Gordon, the *Belfast Telegraph*'s investigations reporter who used the Act to dig into Ian Paisley Jr's business connections (Gordon, 2008). Gordon's revelations ultimately let to Paisley's resignation as a Northern Ireland minister. Apart from my courses at the NUJ, I also trained journalists at the BBC, Channel 4, Trinity Mirror and the Centre for Investigative Journalism. My classes on FOI were used by the researchers and producers of shows such as Watchdog, Rogue Trader, Panorama, Dispatches, Inside London. British journalism academic Tony Harcup recommended YRTK as an 'extremely helpful book' for practical advice on using FOI. (Harcup, 2015: 109). Many of the journalists I trained sought advice and/or sent me examples of their work. The cumulative effect was that a new norm was created, one in which stories were based on verifiable official information rather than unverifiable anonymous personal sources. In this way YRTK and my teaching around the YRTK methodology was instrumental in shifting British journalism toward a practice of using documented evidence to get to an objective truth.

What changed?

When it was published, YRTK was the first and only book on access to information in the UK written for citizens. YRTK was a reference book but it was also infused with a political philosophy: that in a democracy the citizen is paramount and public servants are precisely that, there to serve the public not the other way around. Many of the issues I campaigned for in the first edition came to pass. Restaurant inspections began to be released (albeit not proactively but in response to individual FOIs) and 'scores on the doors' were published (Worthy 2010b: 14). Contracts for public services were released, some information about crime was published, some amalgamated information about MPs' expenses and allowances were released, though another battle

loomed for the detailed receipts (see Chapter 9). My legal research had identified some 400 existing laws prohibiting disclosure, which I wrote about in *The Times* (Brooke, May 24, 2005). This pressured the Department of Constitutional Affairs (now the Ministry of Justice) to review these laws, repeal or amend them (Coppel, 2007: 921). As a result of my own campaigning, FOIs and research regarding the deleterious effect of imposing fees, the Government dropped its plans to do so in 2007[40]. I identified a problem with proprietorial copyright and how that was obstructing the free flow and re-use of official information (Brooke, 27 September 2005) and the law was eventually amended to create an open public licence for official information[41].

YRTK presented an alternative to the elitist model of politics. This was based on my own experience with public records as a journalist in the US where I saw the difference it made both in the practice of journalism but also citizens' relationship to the state. Citizens in England were made impotent by their lack of information. They were in no position to have a conversation of equals with officials. They were kept wilfully ignorant. YRTK was designed to usher in not only a new way of doing journalism but also a new way of being a British citizen.

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[40] Press notice No. 35 of Session 2006-07, Constitutional Affairs Committee, 21 June 2007. http://www.parliament.uk/business/committees/committees-archive/conaffcom/cac35-240607/

[41] An overview of the licence can be found here: http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/licensing-for-re-use/

Chapter 8: The Silent State

The Silent State is a collection of political essays and investigative reports inspired - in the words of Thomas Hobbes – "by the disorders of the present time". (Hobbes: 496). I wrote the book in the immediate aftermath of the MPs' expenses scandal as an angry riposte to a political system that had proved to be elitist and paternalistic. I used a collection of case studies and evidence to illustrate the problems inherent in such a system and boldly made the case for substantial democratic reform.

From 2003 to mid-2010, I had filed about 500 FOIs and written more than 60 newspaper and magazine articles (approximately 45,000 words) about democracy and/or FOI. I had witnessed first-hand official propaganda and obfuscation and heard stories from scores of citizens who, like me, had been obstructed by a truculent state from exercising their democratic right to be enlightened and informed. The philosophical drive of the book was to boldly challenge what I saw as the state's distrust and suspicion of citizens and its overarching belief in its own superiority. This was the very opposite of the democratic ethos I had witnessed in Washington state.

I had long wanted to write a political treatise, being a great admirer of George Orwell (his *Tribune* columns, essays and books), Bernard Crick's *In Defence of Politics* (2005), Karl Popper's *The Open Society and its Enemies* (2003), Thomas Paine's *Common Sense* (1776) and *Rights of Man*' (1791) and Mary Wollstonecraft's *A Vindication of the Rights of Woman* (1792). I presented a Channel 4 *Dispatches*, "The Westminster Gravy Train" on 19 April 2009 detailing expense abuses of some MPs, but the expenses story did not take off until the *Daily Telegraph* began publishing articles based on a leaked disc of the unredacted expenses. On 15 May 2009, I published a 2,000-word article about my battle with parliament in *The Guardian* (Brooke, 15 May 2009) and a few days later, the BBC approached me about doing a docu-drama about this story. I signed a contract for *The Silent State* in June 2009 with publishers William Heinemann (Random House), delivered the manuscript six months later and it was published April 2010 with a second edition in 2011 (it is the second edition to which page numbers refer).

What changed?

The secret state was a bit less secret after I did my work. In the course of my activities I opened up parliament, Transport for London, the police and attempted to do the same for the courts (though less successfully). I also shined a light on intrusive state databases. *The Silent State* was a bestseller going into a second print run within its first weeks of publication and selling more than 30,000 copies. I believe it tapped into a nationwide discontent with 'politics as usual'. I offered not only a take-down of the existing system but also a 'Manifesto for a new democracy' (254-260). The Conservative Party reflected the nation's mood with a manifesto titled 'Invitation to Join the Government of Britain.' Transparency, democratic reform and citizens' rights all featured in their election rhetoric. On 19 May 2010, the new Deputy Prime Minister Nick Clegg gave a speech on the Big Society in which he promised, "this government is going to trust the people". He criticised the 'intrusive' nature of the state and pledged to govern in an "open, transparent [and] decent' manner." Clegg's speech exactly mirrors all the concerns identified in *The Silent State*, notably he announced that the state would no longer be silent; the citizen no longer serf:

> "This government is going to transform our politics so the state has far less control over you, and you have far more control over the state. This government is going to break up concentrations of power and hand power back to people, because that is quite simply how we can build a society that is fair. (Nick Clegg, 19 May 2010. http://news.bbc.co.uk/1/hi/8691753.stm Last accessed 27 January 2016)

Political promises are one thing, but I outline some practical results from the democratic push in the introduction to the second edition (ix-xii). Notable among these: the abolition of ContactPoint, the National Identity Register and ID card. The campaign to 'Free Our Data' was taken up by the new government, proprietorial licenses abolished and a new system of public licenses created along with various open data initiatives such as creation of the London Data Store, Data.gov.uk and the Open Data Institute all tasked with making official information more readily accessible to the public. Mandatory publication of all government contracts above £25,000 and local government spending above £500 was introduced. The COINS database was opened. Crime maps became more timely

and detailed and senior salaries were proactively published. The UK went from being an open data backwater to ambitious world leader (Moss and Coleman 2014).

Methodological approach

Although the manuscript was written at speed with an intensity that matched the political turmoil of the time, I had been accumulating sources and stories over the past six years. My methodology for this work was more heavily weighted towards case studies as I saw them as essential in showing the costs inherent in an elitist political system. I did about 30 in-depth interviews (plus a dozen or so inquiries to press officers) that fed into the book. These interviews were supplemented or corroborated by secondary sources to ensure accuracy. For example, my interview with Jane Clift (209-220) was supplemented by court documents used in her libel case against Slough. Interviews with Mark Kearney and Sally Murrer (188-202) were supplemented with material from the criminal case brought against them by Thames Valley Police. This material was not available from the courts but rather I obtained it from the lawyers involved in the case. This in itself provides more evidence of the patronage-based system endemic in England, whereby important civic information is not readily accessibly to the public who pay for it and in whose name it exists but instead relies on 'elite' connections and patronage. Luckily Sally Murrer and I had lawyers from the same firm. The same was true of Jane Clift who I came across by chance on a visit to the High Court. Slough's violent incident form (re-produced on page 217) was part of Clift's libel case but this documentation was unavailable to the public despite being part of the 'bundle' used in court. Instead, I relied on the patronage of her lawyers. Dependence on personal patronage for civic information is not consistent with a democratic regime. Britain may be the 'mother of all parliaments' but as I state in the introduction to *The Silent State* the reality is that it trades on a "mythical view of itself, because basic information paid for by the public and collected in our name is off-limits to the very people it is meant to benefit." (p2).

I found my sources in various ways. Those mentioned above were facilitated through lawyers. Simon Briscoe (73-5) and Rupert Collins-White (34-5) had attended my FOI training courses. I

conducted a long, in-person interview with Chief Statistician Michael Scholar (80-83) in order to get a full account of government influence of official statistics. Through my news cuttings, I identified other stories of interest and contacted the reporters directly by telephone for a more detailed account of the behind-the-scenes activities. Journalists such as Ben Leach of the *Sunday Telegraph* (p78), Sam Coates of *The Times* (108-112), Simon Walters of the *Mail on Sunday* (108-112), Paul Staines of Guido Fawkes website (112-115), Matthew Davis (p89), and Rob Evans of *The Guardian*, provided a detailed description of the events and incidents discussed.

Other sources included Tom Loosemore and Stefan Magdalinski (119-133) of UpMyStreet; Julian Todd and Francis Irving who had joined MySociety; Richard Pope and Harry Metcalfe (135-141) who were technologists interested in democratic reform. From Pope and Metcalfe I learned that Royal Mail had sued the directory company 192.com over the postcode database and so interviewed CEO Alastair Crawford (138-141) to hear his full account of that litigation.

Stories about people are effective because they illustrate the real impact of policy and political systems. The cost of reputation management is made clear reading about how West Yorkshire police silenced Philip Balmforth because he was too successful at raising public awareness about forced marriage and honour killings (39-44). In order to preserve the intensity and pace of the book it is not laden with excessive footnotes or endnotes. Instead, I cite my sources or evidence in the body copy where I can. It is worth mentioning, too, that due to the challenging material in this book it had to go through a libel read and a folder of evidence accompanied the manuscript to support all my claims. The lawyers examined the manuscript and approved it with only a few small changes, mostly relating to the police. I was told the police are extremely litigious and well funded by the Police Federation so great care is needed when writing about them.

What I found out

The Silent State documented, among other things, the state's collection of citizen data in the form of secretive and unaccountable databases. I focused particularly on databases that collected

intrusive data on children such as ContactPoint. Partly as a result of publication and subsequent publicity, the worst of these overly intrusive databases were scrapped including ContactPoint.

My list of state databases in Chapter 1 was compiled based on interviews with experts and sources, and extensive reading of news articles and reports such as the Foundation for Information Policy Research and the Lords Report *Surveillance: Citizens and the State* from the 2008-9 session. I went back to the Cabinet Office's 2002 *Privacy and Data-sharing* report and saw the early desire to collect data on children and their families (p27). In order to get to the bottom of school pupil surveillance (19-23) I had to read across the parliamentary record to see how the same unsuccessful policies had been recycled and re-branded into 'Every Child Matters'. Terri Dowty, director of Action on Rights for Children, was an important source, as she had been campaigning in this area for years and had an institutional memory of the legislative changes. I checked her statements against the parliamentary record and confirmed, for example, the recycled re-branding of the ContactPoint database. I obtained a copy of the Common Assessment Framework (24-5) to see what information it collected from children and found it exactly matched what Dowty had told me.

I wanted to challenge state surveillance both on moral and practical grounds. Some ideas I expanded from articles I had written earlier (such as Brooke, 13 October 2005, 30 October 2006 and 4 September 2007) and for CCTV I wrote an in-depth investigation on the effectiveness of CCTV for *Wired* magazine. I wanted to test state officials' claims that surveillance made us safer. As I wrote in *Wired*:

> "The UK has more CCTV cameras per capita than any European country, yet figures released in July 2009 by the European Commission and United Nations showed Britain's recorded rate of violent crime surpassed any other country in Europe. Does CCTV do anything to make us safer? If so, at what cost?" (Brooke, 1 April 2010).

I tracked back to find the original source for the oft-quoted statistic that the average Londoner is caught on camera 300 times a day to Simon Davies who was then director of Privacy International. He told me it had been just a rough guess based on extrapolation. Yet it was treated as scientific fact by most journalists. I challenged the idea that the state knows best by juxtaposing it against examples of how it does not. I looked at the targeting of Haringay social worker Nevras Kemal (32-

33) and the tragedy of Baby P's death as well as Rupert Collins-White's Kafka-esque argument with his council to give him back his identity (34-36).

I continued to test what officials said against reality. So when they claimed FOI was a burden, I checked to see how much they were spending to tell the public what they wanted us to know. Expanding on from my investigations into police PR (Brooke, 23 May 2008), I collaborated with the Taxpayers' Alliance to collect and analyse local government spending on PR and external communications (45-56). I also looked at central government PR and discovered unlike the mandated registers of PR and marketing expenditure local governments had to keep, central government had exempted itself from this requirement. Therefore, to get these figures I put in FOIs, the results of which I include in pages 53-57. Scholars agree that government web sites are historically rose-tinted (Davis, 1999; Etzioni, 2010: 398; Porumbescu 2013) and the same was found with local freesheets (Gilligan, 2009). An informed public need access to the information *they* want, not only what officials want them to know.

In Chapter 5 of *The Silent State*, I examine cost as a means of restricting access to information and what effect this has for democracy and innovation. I cite case studies showing the economic damage, for example, of the government's use of proprietorial copyright for information collected or stored on behalf of the public. Words like 'protected' and 'safeguarded' were often used by officials in relation to official information, revealing an attitude of entitlement and ownership. They reveal a belief that official information 'belongs' not to the people but to officials and as such it is their prerogative to decide what is good for the people to know and not to know. Again, this is directly counter to the democratic philosophy expressed in the Washington state public records law mentioned earlier.

My investigation of public access to court information comprised interviews with court journalists such as Guy Toynes and Scott Wilford (Central News), James Brewster (Strand News) and court sketcher Priscilla Coleman as well as lawyers who advised me on policy and procedure. I then tested the principle of open justice against reality by visiting both the High Court and Central

Criminal Court (The Old Bailey) as a member of the public, attempting to both see justice being done and obtain court records. My experiences are related in Chapter 6 of *The Silent State*.

From FOI to data journalism

By the time I came to write *The Silent State*, I was frustrated with the obstructive attitude I encountered when asking for even basic civic information such as the salary and perks of the top public servants. For example, City of London Police, along with many forces, refused to disclose the full pay and perks of their Chief Constable stating in their FOI response: "We do not believe that disclosing the exact value of the commissioner's bonus will add significantly to the public interest". (Brooke, 10 August 2009). I had to fight even such basic requests through to the Information Commissioner. Twice the Government had attempted to scale back FOI and/or introduce fees. The Royal Family was secretly lobbying ministers to give them an absolute exemption from FOI, which they received in May 2010. (Brooke, 25 May 2010). Even after my High Court victory, MPs voted against implementing reforms. It was clear that parliament was not going to reform willingly.

Journalistically, I was also becoming disillusioned with FOI. I had invested large amounts of time and resources trying to base investigations on solid facts gleaned through FOI. While these were often successful at shedding light on important aspects of civic life such as the criminal justice system or transport, payment did not reflect the effort involved. I spent hours analysing Transport for London's incident database obtained using FOI. I had to learn Microsoft Access and SQL in order to analyse and query a database that comprised 38, 448 rows of incidents, yet I received less then if I had written a comment piece. Similarly my large-scale investigations for *The Times* such as "Justice by Postcode", Police PR, and "Police misconduct costs forces £44m" (23 November 2005, 23 May 2008, 3 December 3, 2007) took months yet I made the same amount as for a quick comment piece and had to share bylines with staff reporters. These perverse incentives have only increased as news organisations cut back on news staff. Apart from Chapter 8 (Brooke, 2011) about my FOI battle with parliament, I used FOI sparingly in *The Silent State*.

My work had also evolved. YRTK was a reference book about FOI so by necessity it entailed making extensive use of the Act in order to gain experience and knowledge of it. I also did a lot of training and for YRTK as discussed earlier. By now this was paying off. Many other journalists were using FOI to break their own stories. The Taxpayers' Alliance was now well versed in the Act and had created its own system for making targeted and nationwide requests, the results of which were successfully getting on the front pages of national and local newspapers. Director Jonathan Isaby told me recently that it now routinely teams up with the *Daily Mail* and *Mail on Sunday* to do FOIs for public sector rich list investigations (7 March 2016).

As a result of being one of the first practitioners of data journalism in the UK, I set up a three-week course in data journalism at City University London's graduate journalism department. Through this class and my lecturing on FOI, I was able to educate a new generation of journalists about FOI and data journalism. Many of them became the first data journalists in British newsrooms such as James Ball (Bureau of Investigative Journalism, Wikileaks, *Guardian*, *Buzzfeed*), George Arbuthnott (*Sunday Times*) and Sebastian Payne (*Spectator, Financial Times*). My student and intern James Ball became Data Editor at *The Guardian* and was part of the team that won the Pulitzer Prize for reporting on the Snowden stories.

Another great dissemination came with the creation of the website What Do They Know. In 2004, I met with Tom Steinberg and Francis Irving of the newly formed MySociety. I pitched to them the idea of a Freedom of Information filer and archive modelled on the National Security Archive at George Washington University. I had visited the Archive and met Director Thomas S. Blanton who talked me through its origins and operation. I explained all this to Steinberg who took it back to his team and they voted to create it. I then worked with developer Francis Irving while he built the website: http://whatdotheyknow.com. There are now 311,706 FOI requests to 16,883 authorities on the site.

British 'democracy' exposed

The strongest chapters of *The Silent State* are 5 and 8 illuminating the elitist attitudes held by those in power toward citizens. The way the Department of Education stymied public access to school test results or MPs blocked access to the parliamentary record to hide from constituents how they voted is illustrative. "There was no sense of this being a collaborative effort between the electorate and those they elected."(Tom Loosemore, creator of TheyWorkForYou.com cited in Brooke, 2011: 131). If not for the work of the civic volunteers detailed in chapter five of *The Silent State*, the British public would have little to no idea how to contact their MP, how they voted or their attendance in parliament. And instead of official information being used to incentivise start-up businesses, the state used all its might to maintain an absolute monopoly not just on the collection of official information but also its presentation. In no way was this stranglehold of public information consistent with the criteria of democracy laid out by Dahl (1989). The dissonance between democratic rhetoric and reality was clearly untenable. Something had to give. For state copyright of public information there could be no compromise. "The law simply had to be changed" (p121) which it did with the election of a new government and creation of public licenses. Parliament, however, was far from willing to give up its sovereignty and share power with the people.

Chapter 9: MPs' expenses

The scandal that resulted from the disclosure of MPs' expenses has been described in superlative terms both for its journalistic and political impact. It was "one of the biggest stories in modern British history", a story that "rocked cultural, political and journalistic spheres" (Burgess, 2015: 138). Politically, it was an "incendiary device thrown directly at the political establishment" (Kelso 2009: 334) and produced a scandal that "shook Westminster to the core" (VanHeerde, 2014). It led to reform of the system of MPs' allowances and, with the Parliamentary Standards Act 2009, the establishment of the Independent Standards Authority. According to Worthy (2014a) and Hazell et al (2012) the scandal also led to "intense discussion of constitutional reform" with Gordon Brown and David Cameron vying in the General Election of 2010 over who could offer the most. Cameron's reform platform included public recall power of MPs (which became the Recall of MPs Act 2015), a decrease in the number of MPs[42], and after the election, a move to change the voting system (which contributed to the 2011 Alternative Vote referendum). Most notably, the Commons Fees Office was replaced by the Independent Parliamentary Standards Authority (IPSA). *The Times* summed up the changes with a front page article headlined 'New order':

> Parliament was forced to surrender its ancient right to run its own affairs on a momentous day in which the Speaker, Michael Martin, paid for the scandal over MPs' expenses with his job. The Prime Minister announced that the financial affairs of MPs would be taken over by independent regulators." (Philip Webster, 'New order' *The Times*, 20 May 2009: 1)

This scandal resulted directly from my five-year investigation into MPs' allowances and expenses outlined in Chapter 8 of *The Silent State* and the articles attached in the appendix (Brooke, 15 May 2009; Barkham, 29 May 2008). My work eventually led to a High Court case against parliament that fundamentally changed law and policy (High Court [2008] EWHC 1084 (Admin) Case No: CO2888/2008), and for the first time in its history, parliament had to account to an

[42] The Parliamentary Voting System and Constituencies Act 2011 called for the abolition of 50 constituencies. However, in January 2013 MPs voted to delay this decision. It was back on the table by February 2016. See: http://www.theguardian.com/politics/2016/feb/12/number-of-mps-to-cut-from-650-to-600

independent judiciary and then to a regulator over how MPs' claimed expenses. The court ruling and subsequent leak of the data led to a number of high-level political resignations as well as full-scale reform of the parliamentary expense regime.

While some credited the *Daily Telegraph* for this sea change, others credited my work, stating that I "did more to rid us of a corrupt, anachronistic and unjust system of governance than anyone and, if there is a hero of our troubled political times, it is her" (Arlidge, 2010). The net result was that a new government was elected in May 2010 on a mandate of transparency, which they have delivered in part. The title of their Manifesto, "Invitation to join the Government of Britain" reveals an understanding that elitist politics were no longer acceptable to the British public.

FOI wins the day

As Worthy notes, "Far from being a 'simple' story of 'information disseminated', the expenses scandal represents FOI working within a complex chain of events in very particular circumstances." (2012: 2) While the Freedom of Information Act directly led to the scandal (it was through this Act and my High Court victory that parliament was forced to collate and digitise all MPs' expenses into one record), Worthy notes how FOI "also worked alongside other, more old-fashioned accountability instruments; investigative journalists doggedly pursuing an issue" (2014: 20).

What was unusual about my FOIs to parliament was that I targeted the entire system rather than a few 'bad apples'. As mentioned previously, British journalists focus primarily on individual cases of wrongdoing. I had wider ambitions and preferred to focus on whole systems. As such, I asked for the expense receipts for all parliamentarians not just one or two whom I suspected. From my research doing YRTK, I gained access to the rulebook of parliament (the Green Book) and by reading this, it was clear to me there was very little accountability for how MPs spent public money. As I noted in an interview with the *Guardian*, "If any of us were faced with a huge bag of free money and very little accountability, it would be human nature that you would make the most of it."(Barkham, 29 March 2008). It was on this hunch that I began to target parliament. As there were no public records laws similar to the one I'd used in Washington state, I relied on FOI as my lever

to prise out data. One of the key purposes of FOI is to prevent and detect corruption and the abuse of power. FOI has "long played a part in uncovering expenses misuse and other dubious activities in many other regimes" (Worthy, 2014a: 11), and once the UK Act came into force, requests to parliament overwhelmingly focused on the House of Commons, specifically the activities of MPs. (Worthy and Bourke, 2011).

The way in which the scandal unfolded is not solely a story about FOI, however. There are other factors involved including the coincident publication of the claims at the height of the 'age of austerity' during an economic crisis, as well as news values. Even so, the most obvious cause for the escalation and catastrophic consequences of the scandal was parliament's trenchant and continued resistance to reform based on an attitude that the public did *not* have a right to know.

The House of Commons was locked in a textbook vicious cycle. The more they maintained secrecy, the more mistakes were made. "With more mistakes, public officials become more defensive; to protect themselves, they seek even more secrecy, narrowing in the circle still further, eroding still further the quality of decision-making." (Stiglitz, 1999: 15). To change the vicious cycle to a virtuous one required either reform and regular release of information or, if secrecy were continued, a dramatic disclosure. Sir Christopher Kelly, Chairman of the Committee on Standards in Public Life lamented parliament's inability to reform itself: "Speaking as a citizen, I would have much preferred parliament to sort out this issue for itself some years ago so democracy would not have been damaged in the way it has." (Evidence given to the Public Administration Committee, 4 February 2010[43]), I take issue with the contention that transparency damages democracy (an idea we have not heard the last of), but the main thrust of what Kelly says is true: that all the energy spent trying to stop the public seeing reality, would have been better spent ensuring reality could withstand public scrutiny.

A fuller narrative of the MPs' expenses investigation is found in Chapter 8 of *The Silent State*. I detail here aspects of my main methodologies: the use of sources, FOI and litigation.

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[43] http://www.publications.parliament.uk/pa/cm200910/cmselect/cmpubadm/332/10020406.htm).

FOI as crowbar of reform

I was aware of the work of Paul Hutcheon, political editor of the *Sunday Herald* who made FOI requests for Scottish MSPs' expenses. I corresponded and eventually met Hutcheon in person and we shared advice and tips. While I learned from the Scottish example, the UK parliament did not. As Kevin Dunion noted when he was Scottish Information Commissioner, "rather than resist further disclosure, the presiding Officer of the Scottish parliament agreed to the extensive publication of all expense claims, which occasioned no further scandal" (Dunion 2011: 440). Resist is exactly what the UK parliament decided to do, which energised and intensified the issue. As Stiglitz notes, "secrecy raises the price of information" (1999: 13), however, it is also the case that political institutions tend to be resistant to change as formal rules 'lock in' the status quo, making reform almost impossible (Pierson 2000, 490–491). Historical institutional theory, for example, "conceives of public policymaking and political change as characterized by extended time periods of considerable stability, referred to as 'path-dependency', interrupted by turbulent 'formative moments'" (Peters et al 2005: 1276).

I understood from my experience in Washington state that an open system incentivised good behaviour, so I surmised the opposite must be true of a secret system. Every defensive reaction from parliament further signalled an internal anxiety that the parliamentary system could not withstand public scrutiny. As such it increased my own, and eventually others', interest in seeing what was so exhaustively fought to conceal. Some academics take the view that "parliament was already a very open institution" (Worthy, 2014a: 15) and cite examples such as TheyWorkForYou.com. However, as discussed in previous chapters, parliament was in no way friendly to the creators of that website and this obstruction also served to attract my attention.

On 2 February 2004 I began an email correspondence with Judy Wilson who was in charge of FOI in parliament at that time. I asked about MPs' expenses and she told me that they would be published in October 2004 in preparation for the passage of the Act. I waited and in the meantime, made a few requests using the Open Government Code. What came out in October 2004 was only

bulk and amalgamated figures which are useless for determining if claims are legitimate or not. In order to determine a claim's legitimacy, one has to know the details and this was precisely what parliament refused to publish. So I sent my first official FOI to parliament in January 2005 for the names and salaries of MPs' staff. I chose this query after interviewing political reporter Michael Crick (then at BBC Newsnight) who said it was an 'open secret' in the parliamentary lobby that MPs had family members on the payroll, some of whom did little or no work. This request was refused by parliament. I appealed internally and then to the Information Commissioner. However, my case eventually came to a dead end on 4 September 2006 when the Speaker of the House issued a certificate providing an absolute exemption on the grounds that the release of this information would be 'likely to prejudice the effective conduct of public affairs'. The certificate is referred to in Information Commissioner Decision Notice FS50073128: *Heather Brooke vs House of Commons.*

I moved on and began asking for details of other types of allowances. According to the Green Book, the Additional Costs Allowance (ACA) "reimburses Members of Parliament for expenses wholly, exclusively and necessarily incurred when staying overnight away from their main UK residence…for the purpose of performing parliamentary duties." (2006, Green Book: 294). At this time the ACA was £23,000 a year in addition to an MP's basic salary of £60,000. The following is a brief synopsis of the journey for this particular FOI request (see Appendix for supplementary documentation).

March 20 2006	I file FOI for a breakdown of all MPs' ACA claims
28 April 2006	HoC rejects my request stating "disclosure of anything more detailed than a bulk figure would be 'unfair' to MPs." I ask for internal review.
12 June 2006	My internal review is rejected and I appeal to the Information Commissioner
Sept-Oct 2006	In internal correspondence with the ICO, the Commons now add an additional exemption that my request goes over the cost limit. This leads the ICO to instruct the Commons to assist me in formulating my request so that it falls within the cost limit.
7 November 2006	The Commons write to me saying my request would fall within the cost limit if it 'required the House to examine no more than 25-30 files.'
30 Nov 2006	I submit an amended request for the detailed ACA claims for 2005-2006 of Tony Blair, David Cameron, Ming Campbell, Gordon Brown, George Osborne,

	John Prescott, George Galloway, Margaret Beckett, William Hague, Mark Oaten.
18 May 2007	David Maclean MP's Private Members' Bill passes in the Commons. It would exempt parliament from FOIA. It fails to find a sponsor in the Lords. Maclean is later found to have claimed more than £20,000 under the ACA to improve his farmhouse before selling it for £750,000 (Patrick Hennessy and Melissa Kite, *Sunday Telegraph*, 16 May 2009).
13 June 2007	ICO issues their decision that rejects my demand for detailed receipts but orders disclosure broken down by artificial categories. Both myself and the House of Commons appeal this decision to the Information Tribunal.

Litigation

From the ICO decision notice I learned there were three other people with similar FOIs. I contacted them all to see if they were going to appeal and if not, try and persuade them to do so. I had been at the Information Tribunal before (to fight for disclosure of the BBC minutes in January 2007) so I knew the importance of having allies when taking on the state. I emailed the other requesters suggesting we should appeal together so "it would show we were all in it for the public interest, not for our own scoops." (Brooke, July/August 2009). I had met Nicola Beckford from my BBC training courses. She told me she would not be appealing. Jonathan Ungoed-Thomas from the *Sunday Times* also told me he was unlikely to appeal. That left Ben Leapman from the *Sunday Telegraph*. He was not sure but we arranged to meet for lunch. I laid out our case as I saw it and told him I had obtained the services of Hugh Tomlinson QC. He said his newspaper would not pay for legal representation but if he and I could proceed together he would go to the Tribunal. I agreed.

I wrote the first draft of my grounds for appeal and gave them to Tomlinson who put it into legal language (see Appendix) and shared this with Leapman who used it as a model for his own filing. I arranged for a statement from David Banisar, a noted expert on global FOI and privacy law, and compiled evidence on the case law from Scotland and the United States. At the last minute, Ungoed-Thomas was granted an 'out-of-time' appeal and joined our case with his own legal representation paid for by his employer. The hearing took place over two days in February 2008. The main witness was Andrew Walker, Director General of Resources at the House of Commons

(otherwise known as the Fees Office). It was the first time I was able to interrogate (through my lawyer) such a senior official responsible for information control. His responses revealed the entitlement I had suspected existed among the privileged elite. Walker was taken aback by the very idea that the public should have a right to look at MPs' receipts.

> "What you are doing is preparing a peephole into the private lives of a member, which will either distract them or lead them into additional questions which they feel they have to defend themselves." (Brooke, 2011: 240).

When he said, "MPs should be allowed to carry on their duties free from interference" it was an encapsulation of the "narrow and elitist nature of the British political system" described by Tant (1993: 1), and a political ideology that "legitimates the concentration of nearly all of the power in the Executive, very little in the legislature, and practically none at all with the people; a kind of 'retrospective' democracy at best." (Tant: 30). Walker made this perfectly clear when he said: "Public confidence is not the overriding concern per se ..." Finally he used the oft-repeated claim made by defenders of an elite political system: "Transparency will damage democracy." (Brooke, 2011: 240-243[44])

As stated previously, it is in the details that one gets to the truth, so this was an excellent opportunity to probe the detail of the expenses system. We asked Walker how the receipts were checked.

"There is checking where there are receipts. Where there are no receipts there is no checking." (p241)

We asked about the Green Book, which stated that receipts were required but only for claims greater than £250. Why £250?

Walker: "If it's below £250 the assumption is that it's going to be reasonable." (p242)

We asked for more detail about the 'food rule' allowing members to claim £400 without a receipt. Was that daily, weekly, monthly?

[44] I made this transcript during the Tribunal hearing. No official written or oral record was made public and I was refused permission to record my own hearing.

"My understanding is that members are well aware. I am unable to tell you how they are well aware of it," Walker said. Under cross-examination he admitted that he had no idea.

We learned about the 'John Lewis list' and asked to see it but Walker refused on the grounds that "if it was made public, the maximum price we'll allow for an item, that would become the going rate."

My lawyer made the obvious point: "What you seem to be saying is that you don't trust them. And yet this entire system is based on trust." (p243)

A contentious part of our case was asking for the second and main home addresses of MPs along with their detailed claims for those homes. Leapman and I decided these were essential for without these addresses one could not determine whether the claims made for the 'second home' were legitimate or not. We put forward evidence of how 'flipping' from main to second home was one way ACA claims had been abused in the past, citing such cases as that of former MP Michael Trend who was exposed in a *Mail on Sunday* investigation December 15, 2002: "MP took £100,000 in Bogus Home Claims". A report by the Select Committee on Standards and Privileges in February 2003 found Trend did not have a second home and had been using the ACA to pay the mortgage on his own family home in Windsor. This abuse only came to light due to the journalist following Trend for days.

On 26 February 2008 the Tribunal ruled in our favour that the parliamentary expense system was 'deeply unsatisfactory' and the:

> "laxity of and lack of clarity in the rules for ACA is redolent of a culture very different from that which exists in the commercial sphere or in most other public sector organisations today…in our judgment these features, coupled with the very limited nature of the checks, constitute a recipe for confusion, inconsistency and the risk of misuse…the shortfall both in transparency and in accountability is acute." (Information Tribunal EA/2007/0060 and others, 26 February 2008).

I thought that was the end of it. However, on the last day allowed, the Commons filed an appeal to the High Court. Parties are obliged to have formal representation at the High Court and must pay costs if they lose. While the Commons were funded by the public purse, I was not. I would have to cover my own costs and would be personally liable for all costs if I lost. After speaking with

my lawyers, I took out legal insurance and switched from a pro bono agreement to a conditional fee arrangement. On 7 May 2008 we began our hearing before three of the most senior High Court judges. I was not overly optimistic. But, after hearing parliament's case, the Court upheld the Tribunal's ruling and issued a strong judgment of their own ordering the disclosure not only of detailed expense claims but also MPs' second and main addresses.

> "We have no doubt that the public interest is at stake. We are not here dealing with idle gossip, or public curiosity about what in truth are trivialities. The expenditure of public money through the payment of MPs' salaries and allowances is a matter of direct and reasonable interest to taxpayers ... In the end they bear on public confidence in the operation of our democratic system at its very pinnacle, the House of Commons itself. (High Court 2008 [2008] EWHC 1084 (Admin) Case No: CO2888/2008)

I received the details of the MPs involved in my case and worked with the *Sunday Times* on a multi-page splash. Of more interest to me, however, was seeing the full workings of the entire system. Parliament had committed to digitising and publishing *all* MPs expense receipts by October 2008 as a result of the High Court ruling. The scale of this publication was set out in the following parliamentary answer by Nick Harvey to a question about the digitisation process:

> It is therefore planned that the scanning of some 1.3 million documents and first stage redaction to remove details such as addresses, telephone numbers, banking details and account numbers will be undertaken under secure conditions by a contractor familiar with providing services to Government and Parliament whose staff have been security cleared. (HC Deb 1 July 2008 c741W)

MPs were particularly adamant about withholding their home addresses. Although we had been through all this in the High Court and won the argument, that didn't stop MPs from using secondary legislation to exempt their addresses. The Freedom of Information (Parliament and National Assembly for Wales) Order 2008 was passed 17 July, 2008.

In spite of this, the October deadline came and went without publication. A new date was given of December 2008. I grew suspicious that too much was being redacted in spite of the narrow constraints provided by the High Court ruling. My previous dealings with parliament led me to conclude they were up to something. This turned out to be accurate. On 15 January 2009, Leader of the House Harriet Harman announced that motions would be brought forward on 22 January to exempt parliament from the FOIA in a repeat of MacLean's earlier failed bill.

TheyWorkForYou.com and WriteToThem.com started a Facebook campaign against the proposals while I briefed all the lobby journalists I had come to know over the years. As with the Maclean bill, this one capsized under the weight of its own negative publicity.

On 19 April 2009, I presented the Channel 4 *Dispatches* documentary about MPs' expenses titled 'The Westminster Gravy Train'. During the previous two months of research we had pieced together as much as we could from the public record. However, we could only tell a very partial story because we did not have MPs' addresses or the actual claim forms. What this evidences is how whole areas of public life are made unaccountable because the information needed for checking and verification is unavailable. This closed system creates a type of journalism reliant on patronage and leaks, traded for favour or money.

Leak & publication

Leaks are often committed with the hope of 'destabilizing the epistemic space' (Quill, 2014: 84). They create an existential challenge for the secret state but can act as a restorative for democracy. John Wick, the middleman who brokered the deals between an unknown parliamentary insider and various newspapers, explained the source's motivation for leaking:

> "critical information—particularly the removal of addresses from the files—would lead to many of the scams never being publicly exposed. The source was adamant that the key thing was that both the information and the way in which it was handled should be in the public domain and that its release was in the public interest." (Wick, 22 May 2009).

A few newspapers picked one or two items from the discs but it wasn't until the *Daily Telegraph* paid for the entire dataset and proceeded to roll out weeks of stories from its investigations that the scandal reached critical mass. Media and public attention focused on high-profile and unusual claims such as a duck house and Douglas Hogg's moat cleaning, however there were many more serious abuses such as Elliot Morley's claims for a mortgage he'd paid off two years prior, and other instances of fraud. He along with former MPs Jim Devine, David Chaytor, Eric Illsley and Denis MacShane and former Lords John Taylor and Paul White went to prison for fraud. A review of the expenses system by Sir Thomas Legg reported a system that was 'deeply flawed' and ordered MPs to return £1.3milion. Legg noted a "prevailing lack of transparency" and that officials had a "culture of

deference" to MPs (Legg Report: 5, in House of Commons Members Estimate Committee, First Report of Session 2009–10).

The Commons did not release the official data until June 2009 but so much was blacked out, or redacted, that this, too, fanned public distrust and disdain as it provided concrete evidence of how parliament was using privacy to avoid accountability. According to *Daily Telegraph* reporters Winnett and Rayner, "none of the scams uncovered by the newspaper would have ever come to light if there had not been a leak of the uncensored version" (2009: 347). The removal of home addresses hid the practice of 'flipping' first and second homes to maximise claims and tax avoidance (2009: 347).

It is worth mentioning that without the FOI and subsequent court battle there would have been no disk to leak. "Only the total claimed by each MP is kept in electronic format," stated the Commons' FOI Officer Bob Castle and "very little information relating to a detailed breakdown of the ACA is held electronically." (Letter, 10 October 2006 from Nicole Duncan to Bob Castle, See Appendix). Even the *Daily Telegraph* accepts it was my FOIA case that "led to the expenses data being compiled electronically" (Winnet and Rayner, 2009: 11).

Aftermath

The long, drawn-out process of publishing MPs' expenses served to stoke public interest in the issue and make parliament look secretive. As Kelly noted: "One of the more shameful aspects of the whole episode is the way in which the House of Commons fought for so long against the notion that the Freedom of Information Act should apply to them in the same way as it does to everyone else in public life." (2009: 2)

The main political impact of the scandal was stated at the beginning of this chapter but I will add a few final thoughts. Worthy writes that the "release of MPs' expenses destabilized the government" (Worthy, 2010: 562). It led to a wave of resignations (the Speaker plus six Ministers) and nearly a fifth of MPs (120) stepped down at the 2010 election. Eggers and Fischer (2011) found the decision to retire was influenced not so much by public opinion but an MP's judgment that the

public "would shoulder less of the cost of his or her second home in the future" (p2). Some academics have pointed out that those MPs who did stand again were not always punished for their expense abuse. Research has shown how the institutional makeup of British politics works against voters learning about the conduct of their specific MP (Cain et al., 1987; Carey and Shugart, 1995; Pattie and Johnston, 2004; Kam, 2009). However Vivyan et al (2012) showed this was not the case with the MPs' expenses scandal where voters *did* know about their MPs' behaviour yet, "the British-style party-centric political system works against voters conditioning their vote choice on MP behaviour" (p762). Open lists or primaries, they suggest, would allow voters to separate voting for party from voting for their MP. Eggers and Fischer (2011) note the degree MP's were punished for expense abuses was modest in comparison to voters' responses to corruption in the US and other settings.

I agree that in the current political system, citizens have limited options. Their power is restricted to voting for a pre-selected party candidate. Transparency only shows what is there, it cannot guarantee how people will feel about what is there and indeed De Licht finds that, "knowing more about what one's representatives do without being able to do anything about it—should one so wish—may instead lead to stronger feelings of powerlessness" (2014:116). De Licht calls this the 'frustration effect'. We can see in the recurrent 'theme' of MPs expenses a generalised expression of frustration with a system that people feel is unsatisfactory but are unable to change in any meaningful way.

In terms of the creation of IPSA, I gave evidence to the Committee on Standards in Public Life's Review of Members' Allowances on 30 June 2009 stating that IPSA was not my preferred solution to the problem. I wanted a direct link between ruler and ruled, so anyone could look at an MPs' expense receipts as I had with my politicians in Washington state. That is still not possible. Tony Wright MP, then chairman of the Commons Public Administration Committee, picked up on my criticism of the creation of IPSA saying: "you do not make a system more effective by increasing

the number of regulators; you improve it by making the lines of authority clear, simple and transparent so everyone knows exactly who is responsible for what" (Hearing, 4 February 2010[45]).

Journalistic Impact

Expenses have become a trope in modern investigative journalism. It continues to be an evolving story. Even after the initial round of resignations, investigations, sanctions, paybacks and retirements, parliament has continued to find itself in the news for all the wrong reasons. In May 2011 David Laws resigned as Chief Secretary to the Treasury after it was revealed that his rent payments went to his partner (*Guardian*, 29 May 2010). In October 2012, Speaker John Bercow wrote to IPSA asking them to keep secret the details of MPs' landlords citing 'privacy'. The press noted this would allow the continued cover up of MPs renting from each other. Minister of State for Europe, Denis MacShane resigned in November 2012 after he was found to have submitted false invoices for expense claims. The Standards and Privileges Committee[46] investigating the case said, "this is so far from what would be acceptable in any walk of life that we recommend that Mr MacShane be suspended from the service of the House for twelve months" (Standards and Privileges 2012: 24). Culture Secretary Maria Miller resigned in April 2014 over her second home allowances claims. Expenses have been investigated in other sectors too. Lords' allowances were reformed and changes made to peers' tax status (Hazell et al. 2012). Other public officials' expenses have similarly been investigated such as vice chancellors[47], police chiefs, and local authorities[48]. Other jurisdictions, too, have been inspired by the success of the MPs' expenses investigation to conduct their own. One example was *Belfast Telegraph*'s David Gordon who came on one of my early FOI courses and subsequently used the Act to dig into Ian Paisley Jr's business connections. His revelations ultimately led to the Northern Ireland minister's resignation.

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[45] http://www.publications.parliament.uk/pa/cm200910/cmselect/cmpubadm/332/10020406.htm)

[46] At the beginning of 2013, the Committee on Standards and Privileges was split to allow the Committee on Standards to employ lay members and is now a former Committee of the House of Commons. It has been replaced by the Committee on Standards and the Committee of Privileges.

[47] 'University vice-chancellor spent £42,000 of taxpayers' money jetting around the world in BUSINESS class in just one year' and 'Pay row over university chiefs on £260,000 a year', Daily Mail, 5 March 2015

[48] Worthy et al, 2011, recounting testimony from local councils that a 'wave' of FOI requests hit local government asking for allowances and salaries.

In my view, the solution to ending this cycle of expenses scandal is simply to proactively publish these figures. Yet there appears to be a cultural dislike among a majority of English public officials to tell the public how public money is spent. What one has to take into account is "the durability of the elitist British political system" that "derives not from inherent merit, but rather, from a capacity for self-defence against contrary, participatory challenges which amounts to effective self-perpetuation." (Tant, 1993: 199). This system has seen off many challengers before me. It is the reason it took the optimistically named 1984 Campaign for Freedom of Information until 2005 to get a law into force.

The ingrained elitist mentality that still exists within parliament exacerbated the damage of the scandal and continues to provide a regular stream of expense abuse stories. It feeds into a widely held view that the political class works for its own elite interests rather than the public interest. In my view it is the elites' continued refusal to adapt to a more egalitarian and democratic ideology that is most damaging to democracy. It feeds into an anti-politics, populist agenda (Flinders, 2015). If the institutions are unable to adequately reform they will be seen as part of the problem rather than the solution. "Decision makers need to understand why they are now so often besieged with demands to disclose" (Florini, 1998: 337) but the British parliament has less a desire to understand, as fight against what is viewed as an upstart demand from a public who ought to relearn its place.

The change that is needed may be structural but it is also cultural. We have not yet moved to a culture that believes in the people's right to know.

Data.gov

One of the biggest impacts from the expenses scandal was to bring in a new Transparency Agenda. I have discussed some of the main aspects of this agenda in the previous chapter but it is worth noting the emphasis the government placed on 'open data' rather than freedom of information. The stated goal was to create 'an effective Open Data ecosystem' (Cabinet Office 2011a: 12). The UK's Transparency Agenda comprises a whole series of different legal changes, codes of practice, recommendations, and experiments (Worthy, 2014b). It has led to publishing

contracts, officials' salaries, further development of the data portal data.gov.uk, online crime maps and tax transparency letters (Cabinet Office 2012, p. 5; Shakespeare Review 2013: 7; HMRC 2014; PASC 2014: 7). Companies House documents were opened up free for public access, and as part of the Open Government Partnership, Prime Minister David Cameron pledged to publish data on beneficial ownership so that from April 2016 there will be a public register of who owns or exercises 'significant control' over all UK companies. These are all great improvements, but by now I was looking beyond Britain. Having witnessed the ease with which the expenses database could be copied and removed from parliament, I had a new hypothesis - that the digitisation of information was about to massively disrupt political power structures worldwide.

Chapter 10: The Digital Revolution

Seeing the disruptive effects of digitising parliamentary records gave me a deep understanding of the impact of digitisation on political power. In this next stage of my work I took what I had learned and expanded it to the wider world of transparency and technology. Put simply, my previous work could be classed as transparency 1.0 – using existing journalistic techniques, some technology and national laws to affect a nation state. Version 2.0 was an expansion both in geographical and technological scope. I could see how new technologies would make it easier to copy important information and broadcast it to the world (Roberts, 2006; 73; Roberts, 2008: 167). Freedom of information exists on a continuum with mega-leaks at the far end. The revelations from Wikileaks in 2010 and Edward Snowden, a former systems administrator for the US National Security Agency, in 2013 can be seen as larger versions of MPs' expenses.

I began by researching hackers and information activists at the forefront of this new transparency vanguard, attending various hacker conferences in Germany, Scandinavia and America seeking out sources and tracking down the founder of Wikileaks when it was an unknown organisation. The culmination of my research became my third book, *The Revolution Will be Digitised* (Brooke, 2012, 2nd edition, to which subsequent page numbers in this chapter refer). In this book I presented my investigations into what I identified as the most pressing issues of the emerging digitised world: digitisation and why it is revolutionary, hackers and hackerspaces, the law in a globalised world, the role of journalism in an information free-for-all, information ownership, privacy, anonymity and internet surveillance, and national security. All of these issues have now moved solidly into the mainstream but at the time I was writing this book awareness was minimal. Raising public awareness of these issues was the main impact of my work as discussed below. My thesis in this book was that digitisation and technology have an awesome potential for disrupting elite political systems and enabling global enlightenment, but that the tide was turning and elite systems were harnessing this technological power to create a global Panopticon the likes of which had never been seen before.

Sourcing

The book is written in two parts woven together: factual investigations on the topics mentioned above, and a narrative account of the Wikileaks mega-leaks of 2010. I explain in the Foreword (xiii-xiv) how I constructed the narrative. The portrait of the leaker is based on US court records, media accounts and my interviews with people in Boston who knew Chelsea (nee Bradley) Manning[49]. Chapter Two is based on interviews with David House and Jim Stone from Boston University. The Icelandic sections are based on interviews with Birgitta Jónsdóttir, Smári McCarthy and Herbert Snorrason who worked on the Icelandic Modern Media Initiative and with Wikileaks. The Boston chapters are based on interviews with David House, Danny Clark (MIT student and friend of Manning), Aaron Swartz (Harvard academic, hacker and information activist), Benjamin Mako Hill (MIT scholar and information activist) and a few others who I spoke to off the record. The chapters about the Guardian's publication of the mega-leaks are based on my own interactions with staff and further interviews with investigations editor David Leigh, editor Alan Rusbridger, reporter Nick Davies and deputy editor Ian Katz. I also interviewed Wikileaks founder Julian Assange, Daniel Domscheit-Berg (Assange's right-hand man), Dutch technologist Rop Gonggrijp, reporter James Ball, and Jacob Appelbaum (hacker, Tor activist and Wikileaks supporter).

In the course of my research, I travelled from Scandinavia to Silicon Valley, Berlin to Boston, while based in London. In addition to the sources mentioned above, I sought out and interviewed various experts including technology writer Danny O'Brien in Palo Alto, California (31,44-5, 131, 195); Computer security researcher Ben Laurie in London (134-40, 159); Brian Alseth, who had been on the data team of the first Obama campaign, in Seattle about data dealing (152-7); Professor James Boyle of Duke Law School for my potted history of copyright law in the US and UK from the 17th century to the present day (84-89); Phil Zimmerman, military policy analyst and creator of PGP encryption and John Gilmore in San Francisco for the section on the 'Crypto wars' of the

[49] Manning was a US Army intelligence officer convicted in July 2013 of violating the Espionage Act and sentenced to 35 years imprisonment. Even while writing the second edition, Manning was still awaiting trial so I used the construct of 'the kid' to tell his side of the story as I understood it.

1990s (97-110). At the Center for Internet and Society at Stanford Law School I met the lawyer for Iranian journalist Isa Saharkhiz (107-9) whose case I used in the section on communications surveillance. I interviewed and drew on the work of Christopher Soghoian, academic and technologist specialising in wiretapping and the history of communications surveillance. I interviewed the staff at the Electronic Freedom Foundation in San Francisco including senior lawyer Kevin Bankston to inform my section on surveillance law and history. To illustrate the section on digital jurisdiction I interviewed Dan Matthews in Boston, Wikileaks' first volunteer, who bore the brunt of the 2008 lawsuit filed by Swiss bank Julius Baer against Wikileaks for publishing leaked documents (170-6).

My visit to Norway as recounted in Chapter Four of *TRWBD* marked my meeting with Julian Assange and here I became a more active participant in the story. It was in Norway that Assange told me about secret footage he'd obtained that showed, he said, "collateral murder by a major Western government" which he later said was the United States. This was the 'Collateral Murder' video (Wikileaks, 5 April 2010, https://collateralmurder.wikileaks.org). However, Assange's actions and statements were very inconsistent (as I document in the book) and alerted my skepticism. Even so, I was impressed with Wikileaks because their publication of previously secret information indicated to me a willingness and boldness to push the limits of transparency. I interviewed Assange in Norway and twice more in the summer of 2010 with subsequent interaction via email and encrypted messaging. As documented in the book, I discovered his actions did not match up with his ideology. As such, I came to view him as an inconsistent and unreliable source.

Impact

As a direct result of my reporting, I was leaked a copy of the US diplomatic cables, described by Wikileaks as "the largest set of confidential documents ever to be released into the public domain" (Wikileaks, 2011). Initially, I tried analysing the dataset myself but at 251,237 records, it was too vast. Also the material was of a sensitive nature and as such I needed legal, editorial and institutional support. I therefore partnered with *The Guardian* newspaper and together we worked on

a months-long investigation that culminated in a series of articles from November 28, 2010 to January 2011. We worked in teams according to interest and expertise. I went through cables related to the Vatican, Saudi Arabia, the UK and UK royal family as well as covering the unfolding Bradley Manning story (see for example Brooke, 30 November 2010; 7, 10, 11, 16 December).

The impact of this reporting and disclosure marked a definitive shift toward what some called "radical transparency" (Sifry 2011a) and others called "massive, vigilante disclosure" (Fenster, 2012). Some credited the cable publication with the Tunisian uprising of January 2011, which led to the Arab Spring[50]. An article in *Foreign Policy* magazine headlined 'The First Wikileaks Revolution?' claimed the site's disclosures "acted as a catalyst: both a trigger and a tool for political outcry"(Dickinson, 13 January 2011). However, Wikileaks itself did no reporting on the data. That was the job of the journalists. And it was the source who provided the information. Wikileaks was the middleman between source and media, similar to the role John Wick played as middleman for the MPs' expenses leaker. In time, the breathless over-excitement about this novel, leaking site was replaced with a more tempered view of its actual impact. "Wikileaks only created the illusion of a new era in transparency" said Roberts, and early advocates had "overstated the scale and significance of the leaks" (Roberts, 2011: 2).

I agree the significance of Wikileaks as a thing in itself was overstated, however, the leaked information and subsequent articles did radically change public views about politics, diplomacy and corruption. I argue it gave people a greater understanding of the reality of all three. For this reason it may have had an impact on the protests, in Tunisia especially, because it gave people an unvarnished view of their rulers as real, fallible human beings. Amnesty International's secretary general, Salil Shetty, has said that:

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[50] The publication of the following cable in particular was credited with radicalising an already angry and disenfranchised Tunisian population (Fenster, 2012): *Cable o8TUNIS6yç, Corruption in Tunisia: What's Yours Is Mine.* Wikileaks. https://wikileaks.org/plusd/cables/08TUNIS679_a.html (Last accessed 17 March 2016).

> "The year 2010 may well be remembered as a watershed year when activists and journalists used new technology to speak truth to power and, in so doing, pushed for greater respect for human rights." (Peter Walker, Guardian, 13 May 2011[51])

So much of elite political systems depend on an illusion of superiority. Publishing the diplomatic cables was like the moment in the *Wizard of Oz* when the little dog Toto pulls the curtain to reveal the wizard is just an ordinary man with the usual human foibles and weaknesses. Among the revelations we reported were many instances where elites were shown to be fallible humans (Brooke, 29 November; 7, 11 December 2010). The cables also revealed the US government's routine attempt to gather intelligence on senior United Nations diplomats, and numerous examples across the world where an elite few were privately benefiting from public resources.[52] I believe these revelations illuminated the costs of secrecy. Secrecy aided elite structures of governance and hindered public accountability. Our publication also challenged authoritarian views that tend to maximise the risks of disclosure while minimizing those of secrecy. Officials claimed publication would result in "untold incalculable damage to the nation's military personnel, national security, and diplomatic efforts" (Fenster, 2012: 806), however as no clear evidence emerged of significant damage they had to retreat from this position. Perhaps as a result, courts may be more skeptical in future of officials' claims of the catastrophic consequences of disclosure.

In addition to this reporting, in my book I revealed the trade in personal data (130-160) as well as online surveillance by states and companies, a topic we came to learn much more about due to the Snowdon mega-leaks in 2013. In numerous interviews and talks I spoke about the digital revolution to raise public awareness about the important issues of privacy, surveillance and their impact on democracy.

Hacking power

The hacker community may be small in number but as I state in the book, "it sits atop the technologies that are driving the global economies of the future"(p30). As we have shifted from an

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[51] http://www.theguardian.com/world/2011/may/13/amnesty-international-wikileaks-arab-spring

[52] An entire list of articles related to the US embassy cables can be found on the *Guardian* website: http://www.theguardian.com/us-news/the-us-embassy-cables. As of 6 March 2016 there were 1,491 articles listed.

industrial to a knowledge economy, "those who build the infrastructure and products of this economy have made their fortunes and found their values moving into the mainstream" (p30). It was for this reason I visited a number of hackerspaces to meet hackers and understand their culture including HACK (the Hungarian Autonomous Center for Knowledge) in Budapest, Sprout and BUILDS in Cambridge, Massachusetts, Noisebridge in San Francisco, the Chaos Computer Club and C-base in Berlin, and London's Hackspace. This first-hand reporting led me to understand hackerspaces as the digital age equivalent of English Enlightenment coffee houses and as with their 17th century counterparts, it was in the hackerspaces that "information previously held in secret and by elites was shared with an emerging middle class" (p22 and Brooke, 25 August 2011). It was from speaking to scores of hackers both in person and online that I distilled down the four basic principles of the hacker ethos: freedom of information, meritocracy of ideas, joy of knowledge, and anti-authoritarianism (p24). I interviewed one of the founders of Noisebridge, Jacob Applebaum, in Seattle where he was working as a researcher at the University of Washington who explained a political ideology that many hackers espoused. It was a kind of libertarian democracy based on computer structures that he called 'sudo leadership'. 'Sudo' is an abbreviation of 'substitute user do' and means that people take the lead on things in which they have an interest but without being the leader forever (p29).

Information in a globalised world

In Iceland I met the architects of a consortium of laws known as the Icelandic Modern Media Initiative. The aim was to take the strongest laws on freedom of speech, information and the press from around the world and implement them into Icelandic law thus creating the most advanced digital democracy. The resolution was passed by parliament on 16 June 2010. Then a process of editing the 13 pieces of legislation began[53]. The goal, as outlined to me by Icelandic MP Birgitta Jónsdóttir, was to "market ourselves as a country with a principled, holistic and modern set of laws

[53] This was part of Iceland's new constitution, drafted and approved October 2012 by 67% of voters in a public referendum. However, the government's term finished before the constitution could be passed and so far it has not been tabled by the current government.

fit for the digital age." (p37). Transparency was not a luxury but an imperative for Icelanders who held secrecy to be directly responsible for the country's financial crisis. I investigated the crash in order to make sense of this. During my research, I also reported and presented a BBC Radio 4 *World Tonight* documentary "Internet Free Speech Under Attack" broadcast on 16 Sept 2010. I interviewed various Icelandic politicians including the culture minister and Reykjavik mayor. Iceland was taking an idea from science fiction and making it fact. In the sub-section 'data havens' I explain the history of data havens in fiction and the physical world, which I based on news cuttings, wide reading and talking to experts and my sources in Iceland. In order to get the full story on how IMMI began and its passage in the Icelandic parliament, I conducted hours-long interviews with my sources, which I recorded, supplemented by notes and follow-up emails and online messages.

In the section 'Journalism's USP' I explore what happens when in-depth reporting decreases while the volume of information increases exponentially. I draw upon the work of Nick Davies in *Flat Earth News* (2008) to highlight the dangers to democracy when journalism of verification is replaced by 'churnalism'. Norway's solution is government subsidy. Assange, like many of the hackers I met, had a naive view of politics and journalism. One simply had to publish raw data online, which would easily find an audience, this audience would easily make sense of the information and their collective outrage would force law or policy change. This view failed to understand the importance of intermediation and journalism, which is described by Roberts as "the tasks of organizing, interpreting, and drawing attention to information" (2011:9). I saw first-hand how Assange struggled to accept the idea that in order for the information to have impact or meaning it couldn't just be dumped online but "data need to be interpreted, studied, made into a story" (Lanchester, 2010). This is the practice of journalism.

In California I visited Google and Facebook, meeting with managers and developers (140-50) and discovered that despite both companies making a living from harvesting personal information, they actively protected their own privacy by requiring visitors to sign non-disclosure agreements. I

also met with independent technologist Moxie Marlinspike, the founder and CEO of Open Whisper Systems, a leading encryption communications service.

My first insight into the booming trade of 'data dealing', that is the buying and selling of bulk personal data came from a personal experience I relate on page 150. From this and my conversations with various sources I understood this trade was vast and undocumented. I therefore set out to document it. This was easier to do in the US where such trade is legitimate and as such can be documented and reported. That is not to say it does not happen in the UK, but in the UK the trade, being mostly illegal, is cloaked in secrecy and criminality. As Richards (2013) points out, governments can "sidestep many legal restrictions on the collection of data by buying it from private databases" (p1959). For this reason, I thought it important to know what was available in the personal data marketplace and how it worked. At that time, I could only speculate how governments were using the data they purchased. But one of my sources, Brian Alseth, accurately predicted the Snowden revelations when he told me the US government was, "further along than we would ever imagine, especially the National Security Agency." (p157).

Digitisation & Democracy

Due to my experience with MPs' expenses, I understood the world was on the brink of realising Manuel Castell's idea that,

> "When resistance and rejection become significantly stronger than compliance and acceptance, power relationships are transformed: the terms of the relationship change, the powerful lose power, and ultimately there is a process of institutional change or structural change, depending on the extent of the transformation of power relationships." (2013: 11)

Digitisation was a means to shake the pillars of elite rule, not just in the UK but the USA, middle east and around the world. How successful these attempts have been is very much open to debate. What is certain is that political elites felt increasingly challenged and fought back. In some instances, such as the Arab Spring, the successful challenge of autocratic regimes did not lead to the promised expanding of the democratic franchise but rather a shift only to a different group operating in a similarly autocratic tradition (Morozov, 2013; Taylor, 2014). What I said at the time was prescient: "In the digital age we have the technological tools for a new type of democracy but

the same technology can also be used for a new type of totalitarianism. What happens in the next ten years is going to define the future of democracy for the next century and beyond (p15).

For our own good? National security vs public security

In the lead-up to publishing the US diplomatic cables, the UK Government issued a Defence Advisory (DA) notice asking editors to seek advice before publishing any of the materials. The D Notice may appear gentlemanly and informal but is in fact another way for government to widen its control even beyond the law. If the law were used it could be scrutinised in the courts. This 'back-channel' censorship is particularly insidious. As *The Guardian's* Investigations Editor David Leigh described in his 1980 book *Frontiers of Secrecy:* "Unpublished bullying beforehand is always a more effective censorship tactic than efforts at revenge after the event. Those inevitably have to be conducted more or less in the open, in a courtroom, and be unsympathetically reported by the professional colleagues of the people in the dock." (Leigh, 1980: 26). In the US such practices would be unconstitutional and this was a leading factor in *The Guardian* partnering with the *New York Times* and accelerating efforts to start its own US office.

The culture in the UK has undoubtedly changed radically since I began my work in 2004. Opposing openness or freedom of information now carries a political cost as evidenced by the outcry when the government most recently attempted to scale back the law in 2016. However, that is not to say the elitist political tradition is vanquished, rather arguments have shifted (Richards and Smith, 2015). Transparency is accepted on its face but still resisted in its administration. Smart officials are unlikely to claim, as Andrew Walker did, that "transparency will damage democracy," however, they continue to claim it is a burden and make little effort to streamline, expedite or expand the law. Most notably in the UK, "freedom of information has barely touched the national security state" (Banisar and Fenucci, 2013: 179). There is an absolute exemption in the FOIA not only for the security services but any information that in any way passes through or relates to the named agencies. (I discuss the term 'national security' in TRWBD: 213-8). The danger is that without adequate information, democratic oversight diminishes and the secret services become

"virtually a law unto themselves" conducting surveillance on both "real and imagined enemies of the state". As such, "the security services represent a major worry for those concerned about the erosion of civil liberties in Britain" (Dearlove and Saunders, 1991: 545). Security services have the potential, more than any other part of the state, of subverting the democratic process. Thus, "the challenge to our law posed by the Age of Surveillance is immense" (Richards, 2013:1964).

Snowden revelations and the Independent Surveillance Review Panel

It was to bring scrutiny to the security agencies that I agreed to sit on the Independent Surveillance Review Panel. Former Deputy Prime Minister Nick Clegg set up the panel to investigate the allegations by Edward Snowden that the UK and US governments were conducting mass surveillance programmes and lacked adequate oversight. There were 12 on our panel assisted by the secretariat of the Royal United Services Institute: Jonathan Evans, former Director General of MI5; John Scarlett former Chief of MI6; tech entrepreneur Martha Lane Fox; former director of GCHQ David Omand; Computer Science professor Wendy Hall; historian Peter Hennessy; philosopher Onora O'Neill; former director of intelligence for the Metropolitan Police, John Grieve; Ian Walden professor of information and communications Law, and Lesley Cowley, Chief Executive of Nominet. From June 2014 until the publication of our report July 14, 2015 we met, took evidence and had site visits to assist our investigation.[54]

There were two other reports done alongside ours that I read to inform my work: the Intelligence and Security Committee of Parliament's March 2015 *Privacy and Security: A Modern and Transparent Legal Framework* (ISC 2015) and David Anderson's *A Question of Trust: Report of the Investigatory Power Review* (Anderson, 2015). The main bulk of our work came in the last two months. This involved reading, extensive annotating and debating multiple drafts of the report. These were sent back and forth between panel members and the secretariat. With such a varied range of panellists, suffice to say there were many differences of opinion. Some battles I won such as adding the word 'democratic' to the report's title and pushing the panel to consider Richards' (2013) four

[54] A full list of our site visits and evidence sessions can be found in the appendix.

principles of surveillance. I made a strong case that secret surveillance and total surveillance is illegitimate by definition for "in a democratic society, the people, and not the state apparatus, are sovereign." (Richards, 2013: 1959). I pushed hard for the security services to be more transparent about their activities, writing later:

> "if we are to be an informed citizenry – a prerequisite in a democracy – we need the agencies to avow their most intrusive un-targeted surveillance practices. Otherwise, they do not have a public mandate for them. In effect, they are acting outside the democratic system (Brooke, 14 July 2015).

I moved the panel away from the intelligence-led belief that privacy is only engaged when an analyst examines data. Instead, "the ISR Panel consider that our privacy rights as individuals are engaged whenever these agencies embark upon such intelligence activity, including when the public's data is accessed, collected, filtered and eventually examined by an intelligence analyst" (RUSI: xii). Our report recognised that surveillance transcends the public/private divide and that much surveillance is outsourced to corporations (RUSI: 26, 32, 42). I half-won the debate about warrantry, getting judges into the process but without the full independent oversight I felt necessary. In my view the report did not place enough emphasis on the harm resulting from mass, or bulk, surveillance and I did not agree with the statement "we have seen no evidence that the British Government knowingly acts illegally in intercepting private communications" (RUSI, 2015: xi). That is true only because we didn't see enough evidence to make a judgment either way. As I wrote afterwards, "A good deal of assumptions were made that, in my view, gave the benefit of the doubt to those whom we were supposed to be investigating" (Brooke, 14 July 2015).

The three reports were intended to inform the government's Investigatory Powers Bill which was laid before parliament on 4 November 2015. I was not enamoured with this new bill and outlined my objections in another article (Brooke, 8 November 2015). However, one area of vast improvement was that the agencies *did* avow their most intrusive powers. This marked a shift from the agencies' pervious 'neither confirm nor deny' position. In many of our panel sessions we debated the competing interests of operational effectiveness (aided by secrecy) versus the need for a democratic mandate (requiring openness). I believe these discussions fed back to the agencies and

the need for a democratic mandate was reinforced by various lawsuits brought before the Investigatory Powers Tribunal in 2015[55]. After the IP bill was published, Home Secretary Theresa May revealed that the security services had been secretly harvesting data from phone calls, texts and emails of a huge number of British citizens since 2005 using powers under national security directions hidden in the 1984 Telecommunications Act (O'Neill, 5 November 2015). Nick Clegg said he had been "astonished that such a powerful capability had not been declared either to the public or to parliament," and was only known to "a tiny handful" of Cabinet ministers (Clegg, 5 November 2015). I am not at all happy with the bill as it stands, however, at least now we know what MPs are voting on.

As I come to the end of this account of my work there is much to cheer but also much to provoke anxiety. The secret state is moving into the light on many fronts, but at the heart of power there are long shadows. It is in those dark spaces that I worry the political tradition of elitist rule goes unchallenged and gains strength.

[55] See for example IPT/13/77H, Liberty & Others vs. the Security Service, SIS, GCHQ; IPT 14/85/CH, 14/120-126/CH, Privacy International and Greennet & Others vs The Secretary of State for Foreign and Commonwealth Affairs and GCHQ.

Conclusion

When US Congressman John Moss retired in 1978 he told his local paper that his main disappointment was that he hadn't made "government totally effective". He spent decades pushing for the Freedom of Information Act and even though he eventually succeeded he was not content: "You like to see ready evidence of improvement (but) that's very difficult. You work a long time on something and you back away with a feeling that you've punched a balloon and it bounces back." (Cited in Schudson: 63). Similarly, Karl Popper looked back at his earlier work, hearing the "voice of one of the hopeful social reformers of the eighteenth or even seventeenth century." (Popper xii). These sentiments reflect my own as I look back on my efforts to democratise the British political system and introduce a method of journalism based on an eco-system of openness and public records rather than patronage and private favours.

What I set out to do was a kind of consciousness-raising of the British public. To raise awareness of an elitist and paternalistic political system that disadvantaged the public through enforced ignorance. "It is only by showing [people] the truth," wrote d'Holbach in 1772, "that they will come to know their most vital interests and the true motives which should incline them towards what is good." (cited in Israel: 197-198). Initially, I wasn't fully aware of the entrenched tradition of elitism in the British political system. However, once I started asking questions, filing FOIs and doing investigative journalism it became clear. The philosophical drive of my work was to boldly challenge what I saw as the state's distrust and suspicion of citizens and its overarching belief in its own superiority.

Democracy is more than just rhetoric. The real test comes in practice. Do officials practice what they preach? Freedom of information is like the canary in the coal mine - it indicates one of the key pre-requisites of democracy: transparency. It also indicates who has power in a society and who doesn't. Who has the 'right' to know? When FOI is curtailed or hobbled, we should view these actions much as miners did when their canaries dropped dead, as an indication that our democracy is in fatal danger. Truly empowered individuals don't passively wait to receive the answers or

information officials chose to give them. They are able to ask their own questions - and, importantly, get answers. They can then use these answers to hold the powerful to account and take meaningful action.

> 'It is the longing of uncounted unknown men [and women] to free themselves and their minds from the tutelage of authority and prejudice…It is their unwillingness to sit back and leave the entire responsibility for ruling the world to human or superhuman authority, and their readiness to share the burden of responsibility for avoidable suffering, and to work for its avoidance. " (Popper 1995: xiii)

My unique contribution through my investigations, campaigning, training and teaching not only changed the way FOI and investigative journalism was viewed in the UK but, one could argue, had an impact on British culture and the British political system. I wanted to usher in not only a new way of doing journalism but also a new way of being a British citizen. Obviously many factors converged to create a window of opportunity for widespread cultural and political change during the MPs' expenses scandal. Not least MPs shortsighted decision to fight against reform so that when the full dataset of expenses was leaked it coincided with a time of austerity. We can see in the recurrent 'theme' of MPs' expenses a generalised expression of frustration with a system that people feel is unsatisfactory but are unable to change in any meaningful way. It is not the scandal that was the problem but rather the reality it exposed, that of an elitist institutional structure. The energy parliament spent trying to stop the public seeing reality would have been better spent ensuring reality could withstand public scrutiny. It is in this area of state propaganda that my next investigations are now focused.

The British political system has evolved from sovereignty in the sovereign, to sovereignty in parliament. The next evolution is to vest sovereignty in the people. Yet the elitist tradition stands in the way of all manner of reforms including the full potential of e-democracy (Moss, Coleman 2014). Technology can create spaces for new direct popular power and control but the obstructionist attitude evidenced in parliament's reaction to early efforts to digitally democratise Hansard does not bode well. The danger is that by not reforming in line with people's changing expectations of participatory, or as John Keane defined it 'monitory democracy' (Keane, 2009), the institutions of

deliberative democracy become themselves an empty signifier, no longer representing democracy in the eyes of citizens.

Transparency is a power-reducing mechanism. It matters who is made transparent and who is not. Making the citizen transparent through surveillance destroys individual privacy, which is also a pre-requisite for democracy. That is why my work paid particular attention to *who* was made transparent. Transparency downwards, when the ruled can observe their rulers is a feature of democratic life. The opposite makes for an anti-democratic surveillance society. Transparency alone does not ensure democracy but transparency of the state is certainly a pre-requisite. Citizens are made powerless by their lack of information. The next stage in the evolution of democracy is to go further and give to citizens not just information but an ability to make meaningful decisions with the power that knowledge provides.

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APPENDICES

The following is a list of publications by Heather Brooke submitted as part of this PhD by prior publication.

Books

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Chapters

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