



Experience of the right to information

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The environmental movement was at the forefront of the movement which brought about FOI rights. Denied access to information to expose levels of air, land and sea pollution, species loss, deforestation it pressed for European and national legislation. What follows are my personal reflections on how rights were won and questions as to whether the environmental movement has made full use of them



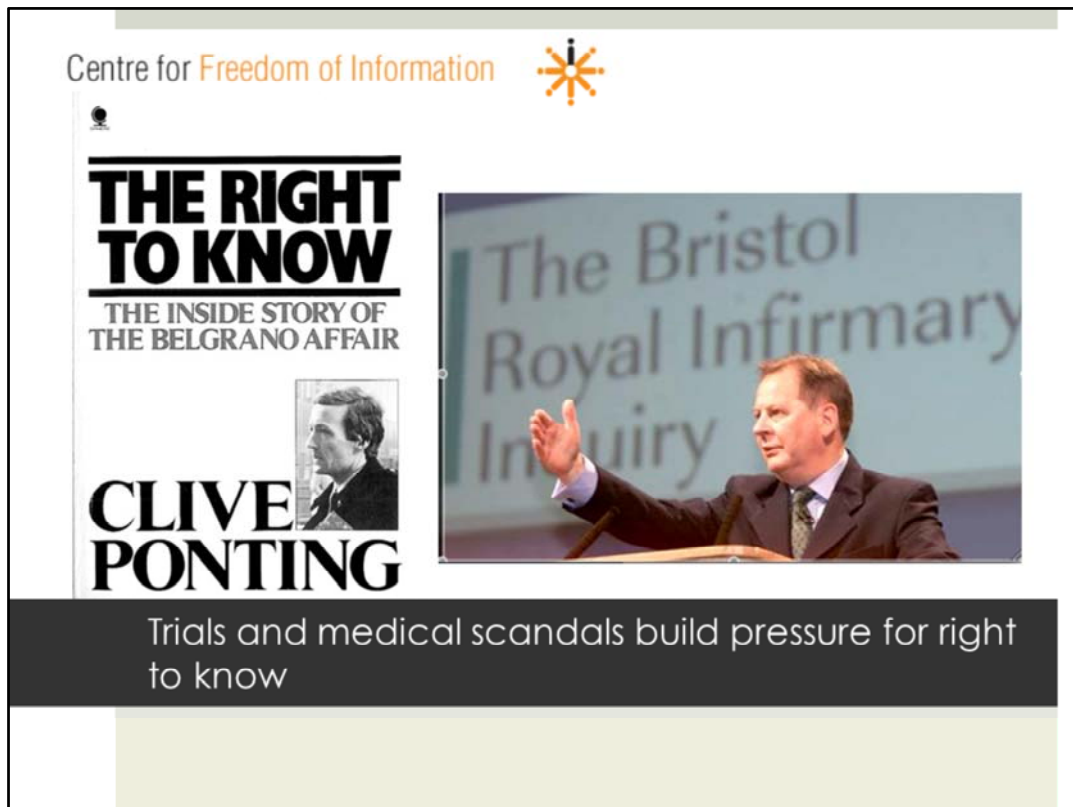
Sardar Sarovar Dam, Narmada

Environmental justice issues hampered by lack of information on cost benefit analysis, compensation for tribal people, incidence of disease, quality of assurance

In 1985 I returned from a 2 month field trip, in which I had researched environmental degradation caused by aid projects in India – including the Narmada dam. I was inspired by environmental justice approach which brought together a coalition of scientists, economist, NGO campaigners, local tribal leaders, local activists. In my follow up work as Campaigns Manager for Oxfam, Frustrated by the difficulty in accessing information from UK government, I went to a conference in London organised by the newly formed Campaign for Freedom of information, launched by Friends of the Earth's Director Des Wilson and senior campaigner Maurice Frankel – (30 years later Maurice is still there , now fighting to prevent UK government from watering down the law by e.g. making internal Ministerial correspondence exempt from disclosure.)



They were not alone in raising concerns, and over the years journalists and academics documented the overwhelming secrecy inhibiting access to official information of public interest



Events such as the acquittal of Clive Ponting who leaked information about the sinking of the Belgrano and the scandal over medical failings uncovered in the Bristol Royal Infirmary Inquiry piled pressure on governments to accede to demands for a statutory right to information

When I joined FoE Scotland in 1992 , one of the first applications made secured funding from JRCT to employ Scotland's only full time FoI campaigner. In that same year the EIRs came into effect so we tested public authorities responses to request for information –documenting delays, and complete failure to respond. But we also gathered information to produce air pollution maps of Scottish cities, detail serial polluters of rivers and expose illegal dumping in landfill sites.



Institutionalised Environmental Secrecy

Alkali Act - 1863 world's first environmental inspectorate

1864 world's first environmental secrecy policy



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The culture of secrecy is ingrained in public administration – and environmental information is no exception. Historically an assurance of secrecy was the quid pro quo for securing cooperation of polluters, a mentality which dominated the approach to environmental protection for over 140 years and continues to this day. Chronic river pollution in industrial towns gave rise to Alkali and Clean Air Inspectorate in 1863 (subsequently the Inspectorate of Pollution from 1987; now EPA and SEPA). The first Inspector Robert Angus Smith (who was an undergraduate in Glasgow Univ at the age of 13) determined that no information gathered from factories regarding emissions should be disclosed in case it should inhibit factory owners from cooperating. The Inspectorate was not very effective throughout most of the 20th Century: between 1920 and 1967 there were only 3 prosecutions under the Act.



Out with the old; in with the new?

Named fishfarms identified as source of escapes, using EIR right to environmental information, overturning previous prohibition on disclosure.



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The clash between the traditional way of doing things and brash new rights came to the fore during my time as Scottish Information Commissioner. A request to identify a fish farm from which there had been a significant escape of salmon was refused by the Scottish Government. The Diseases of the Fish Act prohibited disclosure of information supplied by fish farms even under Freedom of Information (Scotland) Act. However I ruled that the information sought was environmental and so came under Aarhus Convention and EC Directive on Access to Environmental Information, which does not permit such absolute prohibitions. Given that EU law is superior to domestic law, the information could be, and was, released.

This and other decisions on requests for environmental information (more recently the disclosure of information on the shooting of seals by fish farmers) show the benefit of utilising the right to information. It also highlights the importance of recognising that rights are even stronger under the EC Directive and Environmental Information Regulations 2004 than under the general Freedom of Information Scotland Act. But testing the relative strengths of the law often only happens if an individual or an organisation takes the initiative to make a request and, if refused, to pursue an appeal to the Information Commissioner.

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Network Rail



Network Rail - public or private?

- Is running a railway seen nowadays in the United Kingdom as a function normally performed by a government authority?

The EC Directive on access to Environmental Information seemed to hold out the prospect that it would apply to natural monopolies or to contractors delivering public services. However in practice here in the UK tortuous discussion of the interpretation of the directive has ensued.

Take railways infrastructure . Network Rail is the single body which provides and maintains UKs rail infrastructure. But a UK Information Tribunal found that it was not subject to the UK EIRs. In the coming to that decision the judge said "...running a railway is not seen nowadays in the United Kingdom as a function normally performed by a government authority". Actually it turns out that it is a public body after all. Last year on 1 September 2014 Network Rail was reclassified as a public body by the Office of National Statistics, to meet EU accounting rules.. At a stroke its £35 bn debt was added to the UK debt. And it is now subject to FOIA and EIRs



Do water companies have to comply with access to environmental information requests ?

when considering whether an entity is carrying out 'public administrative functions' under national law, "it should be examined whether those **entities are vested ... with special powers** beyond those which result from the normal rules applicable in relations between persons governed by private law."

[62012CJ0279](#) Judgment of the Court (Grand Chamber) of 19 December 2013. *Fish Legal and Emily Shirley v. Commissioner and Others.*)

What about private monopolies? A request for information from an English water company under the UK EIRs has worked its way through the Commissioner, Tribunals, European Court of Justice and back to the Tribunals before it was eventually determined that -by virtue of special powers which they exercise (such as entering property imposing hosepipe bans)- they are conducting public functions and so are subject to the EC Directive and EIRs.

This seminal decision would not have been possible without the dogged determination of Fish Legal on behalf of the anglers which made the original request and appeals.



One man ; 355 requests ...so far

- 78 requests to the Scottish Government,
- 65 requests to the Ministry of Defence.
- 33 to the Health and Safety Executive,
- 29 to the Scottish Environment Protection Agency,
- 14 to Scottish Natural Heritage,
- 6 to Transport Scotland,
- 3 to the Food Standards Agency,
- 7 to the Environment Agency.
- http://www.robedwards.com/freedom_of_information_ap.html

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Others closer to home have made good use of the rights – Rob Edwards website details 355 requests made since the laws came into effect in 2005. I see also from SIC website that 29 Decisions on appeals made by him to Commissioner have been made – rewarded by 25 being upheld in his favour in full or in part.



Voluntary Organisations- Shy users?

- 50.8% surveyed had made a request for info but only 13.4 % did so regularly
- 49.6% stated that they would be discouraged from making a request because of a fear that it might harm working relations or funding relations or both.
- 27.5% disagreed that public authorities treat all FOI requests equally, regardless of who is requesting the information.

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But a surprising aspect of FoI in Scotland is how little established voluntary organisations, including environmental, have explored the limits of EIRs and made use of FoI . Research commissioned from University of Strathclyde showed that :

- 50.8% of those voluntary bodies surveyed had made a request for info but only 13.4 % did so regularly
- 49.6% stated that they would be discouraged from making a request because of a fear that it might harm working relations or funding relations or both.
- 27.5% disagreed that public authorities treat all FOI requests equally, regardless of who is requesting the information.



Environmental Organisations' Appeals to Scottish Information Commissioner – 2005-2015

LINK members –

- RSPB - 3,
- Sustrans - 1
- SWT, FoES, Ramblers, MCS, Soil Assoc, WWF, APRS – 0

Non- LINK

- Animal Concern -3
- Fish Legal - 3
- Protect Wild Scotland 1
- JMT 0

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Very few appeals are made to the Scottish Information Commissioner by voluntary organisations. In the 10 years since the FOI laws have been in effect, only 4 appeals in total have been made by LINK members (compared to 7 by three non-LINK members)



What is your experience?

- Have you got all the information you wanted from authorities without need to invoke Fol rights?
- Would you formalise an information request if refused, by requesting review or making an appeal
- Would you be concerned that your funding or relationship would be harmed by insisting on Fol rights?
- What information would you ask for if no concerns about negative reaction or time consuming appeal process?
- What alternative routes to getting it e.g..using third parties?

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Thank you

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