PRIVATISATION AND PUBLIC ACCESS TO INFORMATION IN THE UNITED KINGDOM

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A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy,

University of Strathclyde Law School

December 2019

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

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December 2019

Abstract

This thesis examines the relationship between privatisation and public access to official information in the United Kingdom. Through a combination of theoretical and empirical analysis, it addresses two main questions: (1) How does privatisation, broadly defined to include outsourcing, affect information access under freedom of information legislation (FOI) and the Environmental Information Regulations 2004 (EIR)? (2) If privatisation negatively affects access to information, then which legal mechanisms are most effective in preserving information rights?

The research is grounded in a theoretical framework that considers the historical development and conceptual underpinnings of open government and access to information (ATI) legislation within the UK. This framework provides the context for two case studies and sets out a democratic-expansive vision for extending ATI obligations to private bodies delivering public services or performing 'functions of a public nature'. To that end, the thesis is situated within the wider scholarly literature on the public-private distinction in administrative law.

The two case studies focus on the water industry within the UK and the free schools programme in England. These empirical investigations demonstrate the different ways in which different forms of privatisation affect information access. Through a combination of stakeholder interviews, FOI/EIR requests, and doctrinal analysis, the findings of the case studies indicate that privatisation affects both the scope and the operation of the ATI legislation. The thesis concludes, based on the normative claim that information rights should be preserved in privatised public services, that both legislative reform and amendment to the UK's ATI laws are needed.

Acknowledgements

I would like to thank my supervisors, Professor Aileen McHarg and Dr Chris McCorkindale, for their support and advice over the years. This has been a longer process than I think any of us anticipated, but one that has made me a much stronger researcher and teacher. I now find myself asking my students 'what work is this doing in your essay?' and can clearly see the impact that their rigorous and thoughtful approaches to scholarship have on my work.

I am also grateful for the Campbell Burns Scholarship, which allowed me to undertake this research, and for the many colleagues and friends I have made during this time. In particular, I would like to thank Claire Cassidy and Sandra Clarke for their support as I juggled work and PhD commitments; the late Chris Bartter of the Campaign for Freedom of Information in Scotland, who was always generous with his time and knowledge; and Steven Dick, who encouraged me to begin the PhD journey. I never imagined I would be finishing it without him, but I am thankful for sixteen years of friendship, adventure, ceilidhs, and prosecco.

Finally, thank you to my parents, William and Kathleen Ferguson. From a young age, they always encouraged me to justify my arguments, reminding me that 'because isn't an answer' anytime I tried to give a weak explanation for my behaviour. Little did I know, this would turn out to be great preparation for a PhD. In the interest of transparency, it is important to note that much of my academic success can be attributed to my parents' financial support for my education. I am both eternally grateful for the support they have given me, and acutely aware of the privileges this has afforded me.

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Acronyms

ACHR	American Convention on Human Rights
ALEO	Arm's-length external organisation
ATI	Access to Information
CJEU	Court of Justice of the European Union
DfE	Department for Education
DPA	Data Protection Act 1998
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIR	Environmental Information Regulations 2004
EISR	Environmental Information (Scotland) Regulations 2004
ERA	Education Reform Act 1988
FOI	Freedom of Information
FOIA	Freedom of Information Act 2000
FOISA	Freedom of Information (Scotland) Act 2002
GDPR	General Data Protection Regulation 2018
HRA	Human Rights Act 1998
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICO	Information Commissioner's Office
IFI	International Financial Institutions
LCF	Leonard Cheshire Foundation
LEA	Local Education Authority

NHS	National Health Service
NPM	New Public Management
NSN	New Schools Network
PFI	Private Finance Initiative
PPP	Public-Private Partnership
OSIC	Office of the Scottish Information Commissioner
RSL	Registered Social Landlord
RWA	Regional Water Authority
UDHR	Universal Declaration of Human Rights
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNECE	United Nations Economic Commission for Europe
WIA	Water Industry Act 1991
WICS	Water Industry Commission for Scotland
WASC	Water and Sewerage Companies
WOC	Water Only Companies

Chapter One

Introduction

1.1 Research Questions

This thesis examines the relationship between privatisation and public access to information in the United Kingdom. Through a combination of theoretical and empirical analysis, it addresses two primary research questions:

1. How does privatisation affect access to information under Freedom of Information (FOI) legislation and the Environmental Information Regulations (EIR)?
2. If the involvement of private bodies in the delivery of public services does in fact threaten access to information, then which measures would be most effective to ensure that information rights are not weakened as a result of privatisation?

1.2 Statement of Research Problem

Public access to official information is increasingly regarded as an essential feature of a democratic society.[1] The public right to information held by public authorities is thought to enhance democracy in several ways: it supports the transparency and accountability of public bodies and public services;[2] it can reduce

[1] See eg Colin Darch and Peter G Underwood, *Freedom of Information and the Developing World: The Citizen, the State, and Models of Openness* (Chandos 2010); Alasdair Roberts, 'Structural Pluralism and the Right to Information' (2001) 51 UTorontoLJ J 243; John M Ackerman and Irma E Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 AdminLRev 85; Robert Hazell and Ben Worthy, 'Assessing the Performance of Freedom of Information' (27) GIQ 352; Patrick Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights' (2006) 58 AdminLRev 177.

[2] See eg Robert Hazell, Ben Worthy, and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan 2010); Craig D Feiser, 'Protecting the Public's Right to Know: The Debate over Privatization and Access to Government

corruption through increased oversight;[3] and it can support public participation in governance through the development of an informed and engaged public.[4] Chapter Three of this thesis will include a critical analysis of these assumptions, but, as a starting point, these justifications are indicative of the discourse surrounding ATI legislation and transparency.

The collective, democratic right to information has been called 'the most fundamental of our civil and political rights'.[5] It can be used to support other fundamental rights, such as the right to freedom of expression, by allowing the public to access information needed for the enjoyment of other rights.[6] Beyond this instrumental function, it is also said to have intrinsic value.[7] This is because the right to information alters the relationship between citizen and state, acknowledging that the information held by public authorities is not owned by the authorities for their own sakes, but rather that public authorities are custodians of information that is collected and stored on behalf of the public.[8] The public right to know is essential in supporting democratic citizenship and has the potential to strengthen citizen participation in democratic governance.[9]

Information under State Law' 27 FSULRev 825; Richard Calland and Kristina Bentley, 'The Impact and Effectiveness of Transparency and Accountability Initiatives: Freedom of Information' (2013) 31 DevPolRev 69.

[3] See eg Ackerman and Sandoval-Ballesteros (n 1); Krishna Chaitanya Vadlamannati and Arusha Cooray, 'Transparency Pays? Evaluating the Effects of the Freedom of Information Laws on Perceived Government Corruption' (2016) 53 JDevStud 116.

[4] See eg Hazell, Worthy and Glover (n 2); Darch and Underwood (n 1).

[5] Carol Harlow, 'Freedom of Information and Transparency as Administrative and Constitutional Rights' (1999) 2 CYELS 285.

[6] Maeve McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13 HRLRev 25.

[7] See eg Birkinshaw (n 1); Ann Florini, *The Right to Know: Transparency for an Open World* (ColumUP 2007); McDonagh (n 6).

[8] Birkinshaw (n 1).

[9] Irma E Sandoval-Ballesteros, 'Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico' in David E Pozen and Michael Schudson, *Troubling Transparency: The History and Future of Freedom of Information* (ColumUP 2018) 291.

In the United Kingdom, access to official information is regulated by the Freedom of Information Act 2000 (FOIA), the Freedom of Information (Scotland) Act 2002 (FOISA), the Environmental Information Regulations 2004 (EIR), and the Environmental Information (Scotland) Regulations 2004 (EISR). Both FOIA and FOISA are domestic legal instruments that apply to designated public authorities, which are listed in Schedule 1 of each Act. The EIR and EISR apply to all of the bodies subject to FOI legislation, as well to environmental information held by private bodies that perform functions of public administration.[10] In other words, FOIA and FOISA have adopted an institutional approach to coverage, whereas the EIR and EISR follow a functional approach.

Access to information (ATI) legislation allows the public to make requests for information held by public authorities, and requires public authorities to make certain types of information proactively available.[11] The introduction of ATI legislation, specifically FOIA and FOISA, was of great constitutional significance in the UK because it gave the public a legally enforceable, general right of access to information for the first time.[12] It was seen as a deliberate challenge to the traditional 'culture of secrecy' within government in the UK, which had been

[10] Environmental Information Regulation 2(1); Environmental Information (Scotland) Regulation 2(1). An exception to this is the British Broadcasting Corporation (BBC). The BBC (and BBC Scotland) is subject to FOIA, but only information 'held for purposes other than those of journalism, art, or literature'. It is not subject to the EIR and any requests for information are processed as FOI requests.

[11] The term 'ATI legislation' is used throughout this thesis as an umbrella term to refer to FOIA, FOISA, the EIR, and the EISR. Though 'FOI' is the acronym more commonly used in the scholarly literature, I chose 'ATI' to reflect both FOI legislation and the EIR.

[12] Patrick Birkinshaw, 'Information: Public Access, Protecting Privacy and Surveillance' in Jeffrey Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019) 358.

upheld by constitutional principles including Cabinet collective responsibility, as well as official secrecy legislation.[13]

However, many public services in the UK are no longer delivered directly by public authorities. Privatisation has resulted in a diverse landscape of public service provision. Services and functions once performed by public authorities have been transferred to private bodies, in a variety of ways. Some services have been outsourced to private contractors, whereas others have been transferred to arm's-length external organisations (ALEOs), set up by public authorities to deliver services on their behalf.[14] As ATI laws typically apply to public authorities, it becomes necessary to ask: what happens to the public right to access information when public services are privatised?

The research project was designed to investigate this question. The prevailing argument put forward by the Information Commissioners,[15] FOI campaigners,[16] and some politicians[17] is that privatisation poses a threat to information rights

[13] See eg David Vincent, *The Culture of Secrecy: Britain, 1832-1998* (OUP 1999); Stephanie Palmer, 'Freedom of Information: A New Constitutional Landscape?' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (Hart 2003); Patrick Birkinshaw, *Freedom of Information: The Law, the Practice, and the Ideal* (4th edn, CUP 2010); Hazell, Worthy, and Glover (n 2).

[14] In December 2018, the Institute for Government reported that the government spends £284 billion per year on goods and services from external suppliers, amounting to approximately one-third of the total government expenditure. See Institute for Government, *Government Procurement: The Scale and Nature of Contracting in the UK* (IfG 2018).

[15] Office of the Scottish Information Commissioner, *FOI 10 Years On: Are the Right Organisations Covered?* (OSIC 2015); Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law* (ICO 2019).

[16] The Campaign for Freedom of Information (CFOI) and the Campaign for Freedom of Information in Scotland (CFOIS) have long advocated for the extension of FOI legislation to private contractors and additional bodies delivering public services and/or in receipt of public funds. See eg CFOI, 'Extending FOI to Contractors' (2018) <https://www.cfoi.org.uk/campaigns/extending-foi-to-contractors> accessed 26 August 2019.

[17] See eg Freedom of Information (Extension) Bill 2017-19 (sponsored by Andy Slaughter MP); Freedom of Information (Private Healthcare Companies) Bill 2013 (sponsored by Grahame Morris MP as a ten minute rule bill).

because it limits the scope of ATI legislation, particularly FOIA and FOISA, which apply to designated public authorities. Although both Acts contain a mechanism (the 'section 5 order', which will be explained in detail in Chapter Two) that allows ministers to designate additional bodies for coverage if they perform 'functions of a public nature',[18] the extension of FOI legislation has not kept pace with the changes in public service delivery.[19] Moreover, even though the EIR and the EISR have adopted an apparently broader, 'functional' approach to coverage, cases like *Fish Legal v Information Commissioner* have demonstrated that the process of determining which bodies are 'public authorities' for EIR purposes is complex and the approach might in fact be much narrower than it appears.[20]

1.2.1 Background on FOI Extension

The research was conducted against the backdrop of ongoing debates on the potential extension of FOIA and FOISA to additional bodies. It also coincided with the extension of FOISA to a limited number of private and voluntary bodies delivering public services, as detailed below. In addition, the Information Commissioner's Office (ICO) and the Office of the Scottish Information Commissioner (OSIC) reported (to the Westminster and Scottish Parliaments respectively) on the need for greater transparency in privatised services.[21] The calls for greater transparency were echoed by groups like the Campaign for

[18] Freedom of Information Act 2000, s 5(1)(a).
[19] OSIC (n 15).
[20] *Fish Legal v Information Commissioner* [2015] UKUT 0052; *Fish Legal and Emily Shirley v Information Commissioner and others* (Case C-279/12). This case is examined in detail in Chapter Five.
[21] ICO (n 15); OSIC (n 15). The ICO also produced a 2015 report on the need for greater transparency in outsourced public services. See ICO, *Transparency in Outsourcing: A Roadmap* (ICO 2015).

Freedom of Information (CFOI),[22] the UK Open Government Civil Society Network,[23] and 38 Degrees,[24] as well as a number of politicians, some of whom have introduced private members' bills aimed at extending FOI obligations to private bodies.[25]

In a 2015 special report, the OSIC recommended that greater use of the s 5 powers be made in order to extend FOISA to private and voluntary organisations delivering public services.[26] The report noted that whilst FOISA had led to greater transparency in general, as well as increased public expectations of public sector openness, privatisation and outsourcing had created a gap in information rights protection. For example, the report noted that 15,000 households had lost ATI rights as the result of the transfer of local authority-owned social housing to registered social landlords (RSLs), which, at the time, were not subject to FOISA.[27] The OSIC reported that there had been a 'gradual erosion' in transparency due to privatisation and recommended greater use of the s 5 designation powers as the solution to this problem, a point that I will return to in Chapters Two and Four.[28]

[22] Campaign for Freedom of Information, 'Extending FOI to Contractors' <https://www.cfoi.org.uk/campaigns/extending-foi-to-contractors> accessed 7 June 2019.
[23] UK Open Government Civil Society Network and CFOI, 'Extend Freedom of Information to All Public Contractors: A Proposal for the UK's 2016-18 OGP National Action Plan' (UK Open Government CSN 2016).
[24] As of 2019, 38 Degrees is not actively campaigning for FOI extension to private contractors and their webpage on the issue is no longer available. For an example of their previous campaign work, see Megan Bentall, 'FOI: Public Opinion Revealed' (8 February 2016) <https://home.38degrees.org.uk/2016/02/08/foi> accessed 7 June 2019.
[25] See (n 17).
[26] OSIC (n 15).
[27] ibid 8. The RSLs were brought under the scope of FOISA in November 2019 following the introduction of the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019.
[28] OSIC (n 15) 8.

The ICO issued a similar report to Parliament in February 2019.[29] Noting that public authorities are not the only entities responsible for public services, the report also recommended greater use of the s 5 powers, as well as legislative amendment of FOIA and the EIR.[30] According to the report, this would help to alleviate some of the challenges that have arisen from privatisation and the use of private contractors, such as difficulties in accessing information from public authorities when the information was held by the contractor, rather than the public authority.

Whilst there is a stated commitment from the UK and Scottish Information Commissioners to extend the scope of the Acts to additional bodies, considerably more progress has been made in Scotland than in the rest of the UK. Indeed, even the ICO has recognised that the rest of the UK is 'falling behind' Scotland with regards to extending FOIA to additional bodies.[31] Initially, progress on the extension of FOISA was slow, with no new bodies designated under s 5 until 2013. That year, FOISA was amended to require ministers to report to Parliament every two years on their use of the s 5 powers, including a requirement to explain their reasoning if no new bodies had been designated for coverage.[32]

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[29] ICO (n 15). Indeed, since taking up the position in 2016, the current UK Information Commissioner, Elizabeth Denham, has repeatedly expressed a commitment to bringing additional bodies, such as private contractors delivering public services, under the scope of FOIA. Shortly after appointment, Denham gave an interview with the BBC's FOI specialist, Martin Rosenbaum, arguing that 'the government could do more to include private bodies that are basically doing work on behalf of the public'. See Martin Rosenbaum, 'New Commissioner Sets out FOI Plans,' (31 August 2016) <https://www.bbc.co.uk/news/uk-politics-37201283> accessed 27 August 2019.

[30] ICO (n 15) 8.

[31] ibid 7.

[32] Freedom of Information (Scotland) Act 2002, s 7A, amended by Freedom of Information (Amendment) (Scotland) Act 2013, s 1(2) and s 7A(4)(b)(ii).

Since 2013, three s 5 designation orders have been made in Scotland. In September 2013, FOISA was extended to include arm's length organisations set up to deliver culture and leisure services on behalf of local authorities.[33] In 2016, FOISA was extended again to independent special schools, grant-aided schools, providers of secure accommodation for children, privately managed prisons, and Scottish Health Innovations Ltd. (SHIL).[34] In November 2019, after years of debate and formal consultations, the Scottish government extended FOISA to RSLs.[35] And, as this thesis was being finalised the Scottish government was consulting the public on the possible extension of FOISA to additional bodies providing services on behalf of the public sector.[36]

Meanwhile, progress on the extension of FOIA has stalled, and the private member's bills that have been introduced in recent years have mostly failed to get a second reading.[37] This suggests that the challenge of extending FOI legislation to additional bodies in the UK is one of political will, rather than a technical legal challenge. It is not that the Acts do not include a suitable mechanism for extending coverage to additional bodies, but rather that there is a lack of consensus on if and when the s 5 powers should be used. As will be discussed in the following chapter, the Conservative Party in particular has a longstanding resistance to ATI

[33] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013, Sch.1. The order came into effect on 1 April, 2014.
[34] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016, Sch. 1 and 2. The order came into effect in September 2016.
[35] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019. The order was originally scheduled to come into effect on 1 April, 2019, but this was postponed to November 2019 to allow RSLs additional time to prepare for their new duties.
[36] Scottish Government, 'Freedom of Information Coverage Extension: Consultation' <https://www.gov.scot/publications/freedom-information-extension-coverage-consultation> accessed 10 December 2019. The consultation was open between 30 August and November 2019.
[37] See (n 17).

legislation and instead favours voluntary transparency mechanisms, such as non-statutory codes of practice.[38]

For example, in July 2018, the Cabinet Office published a new code of practice under s 45 FOIA designed to, inter alia, increase transparency in contracting and outsourced public services.[39] The s 45 code of practice is based in part on recommendations by the ICO and the 2016 review carried out by the Independent Commission on Freedom of Information.[40] The code provides guidance for clarifying which information is held by contractors on behalf of public authorities, which is subject to FOIA, in the hope that this will make it easier for both contractors and the public to know which information should be publicly accessible. However, the code of practice is a guidance document and is not legally binding, and it remains to be seen whether the code will have a noticeable impact on transparency.[41]

1.3 Justification for the Research Project

When this project began in 2013, scholarly work on ATI legislation in the UK was limited, and very little empirical research on ATI had been conducted. Most of the academic literature on the relationship between privatisation and ATI had been written by US-based scholars, with a significant peak in activity between the late 1990s and early 2000s.[42] As noted in section 1.2 above, there is a growing

[38] For example, the 1994 Code of Practice on Access to Official Information (updated in 1997), which will be examined in Chapter Two.
[39] Cabinet Office, Freedom of Information: Code of Practice, 4 July 2018.
[40] Independent Commission on Freedom of Information, Report March 2016.
[41] A further evaluation of the Code of Practice and its likely efficacy compared with that of legislative extension is provided in Chapter Seven of this thesis.
[42] See eg Feiser (n 2); Roberts (n 1); Bass and Hammitt, 'Freedom of Information Act Access to Documents of Private Contractors Doing the Public's Business' (2002) 35 JPovL&Pol 607; Christine Beckett, 'Government Privatization and Government Transparency: What Happens

consensus that transparency obligations should be extended to private bodies delivering public services or receiving public funds, but there is little evidence to indicate whether and how privatisation affects information access under ATI legislation in the UK. This research project was designed to gather and evaluate evidence on how privatisation (in its various forms) affects information access, with a view towards providing evidence-based recommendation for the reform of the UK's ATI framework, thereby filling a gap in the scholarly literature.

1.3.1 The Existing Literature

The US literature is a useful starting point for considering how privatisation affects public access to information. Whilst this is not a comparative thesis and differences between legal and political systems must be taken into account, the literature provides a framework for identifying the challenges posed by privatisation and some potential legal solutions. In the US, the Freedom of Information Act (FOIA), enacted in 1966, provides public access to federal agency records or information, except where refusal to disclose can be justified under one of the Act's nine exemptions.[43] All of the 50 US states also have their own FOI laws, which apply to information at state and local level.

The federal FOIA does not apply to private entities or contractors, though many states have adopted approaches to extend FOI responsibilities to private actors, at least in limited circumstances. Matthew Bunker and Charles Davis were the first

when Private Companies Do the Governing?' (2011) 35 News Media & the Law 21; Feiser, 'Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law' (1999) 52 FedCommsLJ 21; Matthew D. Bunker and Charles N. Davis, 'Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance' (1998) 75 J&MassCommsQ 464.

[43] Freedom of Information Act, 5 U.S.C. § 552.

to map the states' various approaches to FOI and private bodies, focusing on the legislation itself, rather than judicial interpretation.[44] The authors found that, in 1998, six states had open records laws with statutory language that could be interpreted to include privatised functions. For example, Rhode Island and Florida had defined 'public bodies' in the statutes to include businesses acting on behalf of public agencies.[45] The Arkansas Freedom of Information Act focuses on the records, rather than the body holding the records. It extends to records on 'official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds'.[46] Bunker and Davis concluded that a 'public function' test was required to establish a better balance between public access to information and the interests of private companies.[47]

Craig Feiser built on this analysis by mapping the statutory and judicial approaches taken by 34 states, which he divided into two categories: flexible and restrictive approaches.[48] Among the flexible approaches, he identified the 'totality of factors', 'public function', and 'nature of records' approaches'.[49] The restrictive approaches were termed the 'public funds', 'prior legal determination', 'possession', and 'public control' approaches. The terms 'flexible' and 'restrictive' are used to refer to the court's approaches. 'Flexible' approaches are those that consider a number of factors, whereas 'restrictive' approaches are those in which a specific

[44] Bunker and Davis (n 42).
[45] ibid 467.
[46] Ark. Code Ann. 25-19-103 (1993)
[47] Bunker and Davis (n 42) 473.
[48] Feiser (n 2) 825.
[49] ibid 836.

factor must be present (eg public funding) for a court to decide that access to information should be granted.[50]

Feiser's mapping exercise, though limited to the US, made two significant contributions to the literature on privatisation and ATI legislation. First, it recognised and provided an evaluation of the different criteria that can and have been used when determining whether to extend ATI legislation to private bodies. Second, it highlighted the difficulty in defining 'public bodies' in the US, a challenge that has also been identified by, inter alia, Jody Freeman[51] and Harry Hammitt.[52] Both of these contributions provide the foundation for examining similar challenges that have arisen within the UK, to which I will return in Chapter Four.

Drawing in part on the work of Feiser and Bunker and Davis, Alasdair Roberts examined the US approaches in comparison with several international jurisdictions, including Canada, Australia, and South Africa.[53] Rather than focusing on *whether* or not ATI laws extend to private bodies, Roberts's aim was to establish a framework for considering *when* ATI laws *should* apply to private bodies. He argued that access to information should be granted when organisational opacity would have a negative effect on the fundamental rights or interests of citizens. In other words, the question is not whether an organisation is a public body, or is assuming responsibility for a function once performed by a

[50] ibid 836.
[51] Jody Freeman, 'The Private Role in Public Governance' (2000) 75 NYULRev 543.
[52] Harry Hammitt, 'Privatization: Its Impact on Public Record Access' (2006) 2 National Freedom of Information Coalition White Paper Series.
[53] Roberts (n 1).

public body. Instead, it is important to consider the conceptual justifications for ATI legislation and whether transparency will help protect fundamental interests.

The volume of US academic literature on this topic has waned since the early 2000s, but the gap in the literature has begun to be addressed by scholars from other jurisdictions.[54] Most notably, Irma Sandoval-Ballesteros has written on transparency in Mexico and the need for ATI obligations to be extended to private bodies that provide public services.[55] Her democratic-expansive vision for transparency and ATI legislation has been particularly influential in the development of the conceptual framework for this thesis, which is explored in Chapter Three.

In the UK, the academic literature on privatisation and ATI legislation is less developed, but it in recent years the volume of research on ATI generally has increased. The first major empirical study on the impact of FOIA on UK central government was completed by the University College London (UCL) Constitution Unit in 2010.[56] Though the study was limited to Whitehall, it made a substantial contribution to ATI research by identifying the six objectives for the UK's FOI laws. Neither FOIA nor FOISA include a purpose clause, which is significant because any empirical research on their impact requires a clear understanding of what the laws are meant to achieve. In the absence of a purpose clause, the UCL

[54] See eg David Banisar, *Freedom of Information Laws Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International 2006).
[55] Irma E Sandoval-Ballesteros, 'Rethinking Accountability and Transparency: Breaking the Public Sector Bias in Mexico' (2014) 29 AmUIntlLRev 399; Sandoval-Ballesteros (n 9).
[56] Hazell, Worthy, and Glover (n 2). Although the study did not directly address the issue of privatisation and access to information, it is important to discuss it and related FOI research from the Constitution Unit here because it established a baseline for empirical FOI research in the UK.

research team devised the list based on the most frequently mentioned objectives in ministerial speeches, White Papers, and parliamentary debates.

The researchers found that the two over-arching objectives for FOI are (1) increased openness and transparency and (2) increased accountability.[57] The four additional objectives are improved decision-making in government, better public understanding of government decision-making, increased participation, and increased public trust in government.[58]

The Constitution Unit found that FOIA has increased transparency in central government, leading to more proactive disclosure of information and encouraging government openness.[59] They also found that FOIA has worked to increase accountability, though the extent to which it has done so is circumstance-dependent. According to the researchers, this is because FOIA itself is not an 'accountability tool', but rather a mechanism that can be used to obtain information that can be used to hold public bodies or officials to account.[60] The majority of government officials and information requesters interviewed did not believe that FOIA had *led to* increased accountability, though the researchers concluded that it can be used *to support* accountability, especially when used in conjunction with traditional transparency mechanisms, such as Parliamentary questions and media oversight.[61]

[57] ibid 7-8.
[58] ibid 7-8.
[59] ibid 103.
[60] ibid 131.
[61] ibid 132-133.

In 2011, researchers from the Constitution Unit followed up the Whitehall study with the first systematic evaluation of the impact of FOIA on local government in England.[62] The project surveyed local authorities across England as well as FOI requesters to examine the benefits and consequences of FOIA at the local government level. The researchers found that local government was already reasonably transparent prior to 2005, but that FOIA has helped improve transparency by complementing existing mechanisms. The study provided a comprehensive analysis of 17 case study local authorities, thereby furthering understanding of how FOIA works at local government level. However, the response rate from FOI requesters was low (the team received only 60 completed surveys).[63] Therefore, the results cannot be treated as statistically significant, but the study generated baseline data and a questionnaire that can be used for future research on FOI requesters.

Yet, the literature on the relationship between privatisation and access to information in the UK has remained sparse. Patrick Birkinshaw and Stephanie Palmer have both addressed the topic, though their writing coincided with the introduction of FOIA and FOISA and therefore focused on how privatisation *might* affect the scope of ATI legislation, rather than on an evaluation of privatisation is affecting their operation.[64] There is far less empirical evidence to indicate how privatisation *is* affecting ATI legislation in the UK.

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[62] Ben Worthy, Jim Amos, Robert Hazell and Gabrielle Bourke, *Town Hall Transparency?: The Impact of Freedom of Information on Local Government in England* (Constitution Unit 2011).
[63] ibid 9.
[64] Palmer (n 13); Patrick Birkinshaw, 'Freedom of Information in the UK: A Progress Report' (2000) 17 GIQ 419.

Following the extension of FOISA to ALEOs in 2013, the Campaign for Freedom of Information in Scotland conducted a study in 2014 to evaluate the compliance of the newly-added organisations.[65] They submitted FOISA requests to all of the bodies that had been subject to the s 5 order. Five trusts failed to reply within the required 20 working day limit, and four trusts were discovered not to have the required publication scheme in place. The campaign group argued that the problem was partially due to local authorities transferring services to ALEOs without first ensuring that adequate transparency mechanisms are in place.

Whilst 'mystery shopper' exercises such as the one described above are useful n generating quantitative data on compliance, they are not designed to examine the reasons for lack of compliance, nor are they designed to capture longitudinal data on the transparency practices of public authorities over time. The lack of academic research on privatisation and access to information in the UK, combined with the ongoing debates over legislative extension of FOIA and FOISA, demonstrated the need for an empirical study on how privatisation affects information access. When the initial literature review revealed 'conceptual confusion' over the meaning and purpose of ATI laws, the project expanded to include an in-depth analysis of the historical and conceptual underpinnings of ATI in the UK.[66]

[65] The research was jointly conducted by the Campaign for Freedom of Information in Scotland (CFOIS) and Calum Liddle, then a PhD researcher at the University of Strathclyde Department of Computer and Information Science. Results of the study were presented in September 2014 at a Right to Know Day event hosted by CFOIS and the Centre for the Study of Human Rights Law at Strathclyde University, but have not been published in an academic journal. For more information, see: Mark Aitken, 'Arm's Length Organisations Set Up to Deliver Public Services are Keeping too Many Secrets Claim Campaigners' (31 May 2015). <https://www.dailyrecord.co.uk/news/politics/arms-length-organisations-set-up-5793051#Z7d4m6A3ygy1Uyvb.97> accessed 18 September 2019.

[66] Harlow (n 5).

1.3.2 Original Contribution to Knowledge

This thesis makes an original contribution to knowledge in two main ways. First, it provides an empirical analysis of how different forms of privatisation affect access to information under ATI laws in the UK. As explained in the previous section, this question has not been addressed in the academic literature. Second, it provides recommendations, based on the finding of the empirical investigation, for extending and amending FOI legislation to protect public access to information in privatised public services.

1.4 Explanation of Terms

The analysis must be preceded by an exploration of three commonly used, yet frequently debated terms: 'information rights', 'official information', and 'privatisation'.

1.4.1 Information Rights and Official Information

The term 'information rights' can be used to refer to a range wide range of rights, including the right to data protection and the right to freedom of expression. The broad field of information law and policy examines, inter alia, mass surveillance, digital rights management, artificial intelligence, net neutrality, and intellectual property. However, in this thesis, the term 'information rights' is used narrowly to refer to the right of the public to access 'official' information.

Why, then, am I not simply using the term 'access to official information', particularly if 'information rights' is usually a broader term? Traditionally, access to information has been understood in the context of information held by

government bodies.[67] Terms like 'government information' or 'government-held information' have typically been used.[68] ATI laws in many jurisdictions reflect this understanding; they have been designed to apply to information held by government bodies or agencies working on behalf of government bodies.[69]

However, the term 'government information' emphasises the holder of the information: is it a governmental or a non-governmental body? Much of the information held by public authorities that could be released under FOI is not strictly 'government information', eg university financial records or NHS data. The term 'official information', is less precise, though it is often used synonymously with 'government information'. Official information is generally understood to be information held by public authorities in relation to the functions or services they provide on behalf of the public.[70] Information held by private actors has not traditionally been thought of as official information. In the private sector, information is more readily understood as property, and withholding information is justified in order to protect private actors' commercial interests.[71]

Because of the power exercised by government bodies and other public authorities, ATI laws have been confined to support transparency and accountability within

[67] See eg Mark Bovens, 'Information Rights: Citizenship in the Information Society' (2000) 10 JPolPhil 317, 327; Sandoval-Ballesteros (n 9).
[68] See eg Moira Paterson, 'The Media and Access to Government-Held Information in a Democracy' (2008) 8 OUCmlthLJ 3; Norman S Marsh (ed), *Public Access to Government-held Information: A Comparative Symposium* (BIICL 1987).
[69] At the 10th International Conference of Information Commissioners (Manchester, September 2017), delegates passed a resolution on 'the right of access to information and accountability of public services'. The resolution was in recognition of the fact that the ATI laws in most member states were not designed and have not developed to apply to contracted out public services.
[70] Information Commissioner's Office, 'Accessing Official Information,' <https://ico.org.uk/your-data-matters/schools/official-info> accessed 3 December 2019. New Zealand's ATI law is the Official Information Act 1982.
[71] Palmer (n 13).

the public sphere. However, as the involvement of non-government actors in services and functions previously undertaken by public bodies, from refuse collection to security to care home management, means that the exercise of power has been dispersed. As the influence and power of private actors grows, legal scholars have begun to examine the extension of public law norms and instruments to private actors.[72]

The term 'information rights' is preferred to the term 'official information' for two reasons. First, it recognises that the concept of 'official information' has been complicated by privatisation. Information that would have been considered 'official information' when held by public authorities loses this distinction when the same services is provided by the private sector. Yet, this does not mean that the information is no longer sought out or capable of being covered under ATI legislation, even if it is not 'official'. Second, 'information rights' does not privilege the information itself, but rather the people who are seeking the information. It de-emphasises the holder of the information, and instead emphasises the public right to information.

1.4.2 Privatisation

Privatisation poses both 'what' and 'how' questions. In other words, what is privatisation? And how did it emerge as the dominant economic and social philosophy in the UK during the 1980s? The first question is necessary in setting out the parameters of this research project and establishing a working definition

[72] See eg Laura Dickinson, 'Public Law Values in a Privatized World' (2006) 31 YaleJIntlL 387; Jody Freeman, 'Extending Public Law Norms through Privatization' (2003) 116 HarvLRev 1285; Nicholas Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58 CLJ 159.

for this thesis. The second question helps contextualise the research project, explaining the political and economic motivations for privatisation and how a preference for private enterprise has emerged alongside a consumerist justification for transparency (which will be discussed further in Chapters Two and Three).

In this thesis, 'privatisation' is defined broadly to refer to a variety of arrangements designed to transfer public assets, industries, services and functions, to the private or voluntary sectors.[73] This broad definition includes government contracting, outsourcing and public-private partnerships. It also includes the use of non-profit or voluntary organisations to deliver services very recently provided by public authorities (eg free schools, community libraries).

I acknowledge that my use of the term is much broader than the 'traditional' definition of privatisation, which has been narrowly defined as 'the transfer of responsibility for an industry or the ownership of a company from the public to the private sector'.[74] This was the dominant form of privatisation in the UK under the Conservative governments from the 1970s to the 90s. During this period, many of the UK's national industries were privatised, including British Telecom (1984), British Gas (1986), British Petroleum (in stages between 1979 and 1987), and the water industry in England and Wales (1989).[75] These early privatisations were motivated primarily by financial concerns,[76] bolstered by the Conservative Party's

[73] See eg Freeman (n 72).
[74] House of Commons Library, *Privatisation* (Research Paper 14/61, 2014).
[75] ibid 2.
[76] David Parker, the UK government's official historian of privatisation, explained that although the Conservative Party is generally in favour of private enterprise, it made little mention of privatisation in its 1979 election manifesto. Instead, privatisation was introduced as a response to the 'dire state' of public finances. Not wanting to raise taxes to support public expenditure,

longstanding belief in the inherent efficiency of the private sector and the societal benefits of private ownership and the 'entrepreneurial society'.[77]

However, this narrow definition of privatisation does not reflect the current landscape of public service provision, nor does it adequately capture the myriad ways in which private bodies (both for-profit and non-profit) have become involved in providing services on behalf of government. Services that were once provided directly by public bodies (eg local authorities, central government) have been outsourced to a range of providers, including private companies, voluntary organisations, social enterprises, and arm's length external organisations (ALEOs). Both the rapid spread and scale of this form of privatisation require attention; in 2017-18, the government spent £284 billion on contracts with external suppliers, or approximately one-third of its total expenditure.[78]

Therefore, 'privatisation' is used as an umbrella term throughout this thesis to capture the different ways in which non-state actors are involved in the delivery of public services or the performance of public functions. The common thread is that they all involve the rolling back of the state and the encroachment of private interests in public services. That said, there are some distinctions between different forms of privatisation that require clarification. This is because (1) there are significant technical differences that need to be understood and (2) the UK's

Conservative Treasury ministers began identifying assets to sell during the early 1980s. See David Parker, 'Privatization of the UK's Public Utilities: The Birth of the Policy 1979-1984' (2016) 87 Annals of Public and Cooperative Economics 5, 7.

[77] HC Library (n 74).

[78] Institute for Government, *Government Procurement: The Scale and Nature of Contacting in the UK* (IfG 2018).

motivations for engaging in different forms of privatisation have varied, a point to which I will return after presenting the following typology of privatisation.

Outsourcing in the public sector (also known as contracting out) refers to 'the assumption by private operators of what were formerly exclusively public services'.[79] In an outsourcing arrangement, ownership remains with the public sector, but the service is provided by private firms or voluntary organisations, under contracts of varying lengths.[80] Unlike traditional forms of privatisation, where responsibility is completely transferred from public to private, outsourcing forces public authorities to engage in an ongoing contractual relationship with the private sector, sometimes for several decades. And, unlike traditional procurement practices, in which government (public) bodies simply purchase goods or services from private bodies, outsourcing can complicate the relationship between purchaser and provider.[81]

As Anne Davies has pointed out, this can cause problems, particularly in sectors like healthcare where the manner of provision has changed over time.[82] Long-term contracting means that the NHS could find itself with a 30 year commitment to pay not only for a hospital building, but also related services (eg cleaning, portering), even if the hospital no longer meets its requirements. This has

[79] Freeman (n 72) 1287. It should be noted that this thesis is primarily concerned with *public sector* outsourcing that engages the private or voluntary sectors. It is not concerned with, for example, the outsourcing of private business services to subcontractors or overseas agencies.
[80] Colin Crouch, *Commercialisation or Citizenship: Education Policy and the Future of Public Services* (Fabian 2003).
[81] Anne Davies, *The Public Law of Government Contracts* (OUP 2008) 231.
[82] ibid 27.

happened where moves towards community care rather than in-patient stays have left hospital trusts with estates too large for their actual needs.[83]

Moreover, outsourcing blurs the boundaries between 'public' and 'private'. For example, if a local authority contracts with a private care home provider to provide statutory services, the local authority is still 'public' and the care home provider is 'private' in the institutional sense. But, how do we classify the service being provided? Does a 'public' service or function become 'private' once responsibility for its delivery is transferred to the private sector? Outsourcing fundamentally changes the way that we think about 'public' services and requires public law instruments designed to apply to public bodies to adapt.[84] These questions are examined in further detail in Chapter Four.

Public-private partnerships **(PPP)** 'combine the resources of government with those of private agents (businesses or not-for-profit bodies) in order to deliver societal goals'.[85] Outsourcing can be a form of PPP, a broad category that also includes private finance initiative (PFI) projects. PFI projects include infrastructure and building projects, such as the building of new schools or hospitals, which previously would have been publicly funded. Under PFI, private building firms bid for the chance to build infrastructure using private capital. Private companies build and maintain the schools, hospitals, sewage treatment

[83] ibid 27.
[84] See eg Paul Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 551; Dave Cowan and Morag McDermont, 'Obscuring the Public Function: A Social Housing Case Study' (2008) 61 CLP 159.
[85] Chris Skelcher, 'Public-Private Partnerships and Hybridity' in Ewan Ferlie, Laurence E Lynn Jr, and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (OUP 2005).

centres, etc., which are then leased back to the public over a period of up to 40 years.

John Major introduced the PFI scheme in 1992, and the scheme was later expanded under New Labour. An advantage of the scheme is that it allows the government to transfer risk to the private sector because the contractor maintains responsibility for building and maintenance.[86] Moreover, the PFI scheme allows the government access to capital.[87] At a time when public sector expenditure is restricted, PFI is attractive because it allows the government to access expensive new buildings (eg schools, hospitals) for an annual sum, rather than providing all the capital for building projects upfront itself.

However, the scheme has been subject to criticism over its perceived failures, including lack of value for money and faulty construction.[88] For example, the use of PFI contracts in social housing regeneration has shown that the private sector is not necessarily more efficient than the private sector. Moreover, scholars have questioned the extent to which the PFI scheme affects the democratic rights of council tenants, ie with regards to participation in housing governance.[89] Considering that the PFI scheme changes the relationship between the state as service provider and the public as service recipients, it needs to be included under the privatisation umbrella. As Chapter Five will explain, PFI projects can also be

[86] Davies (n 81) 8.
[87] ibid 9.
[88] See eg Davies (n 81); Stuart Hodkinson, 'The Private Finance Initiative in English Council Housing Regeneration: A Privatisation too Far?' (2011) 26 Housing Studies 911; Mark Freedland, 'Public Law and Private Finance: Placing the Private Finance Initiative in a Public Frame' [1998] PL 288.
[89] Hodkinson (n 88) 929-930.

found in the water industry, which has potential implications for access to information.

Marketisation is 'the process by which market forces are imposed in public services'.[90] It involves the commodification of services, the commodification of labour, and restructuring in public services to introduce competition and market mechanisms.[91] Examples of marketisation include voucher programmes in education to facilitate school choice, or the restructuring of national industries to increase competition.[92]

Marketisation is not strictly a form of privatisation, but it can fall under the broad umbrella insofar as it suffuses the public sector with private sector values and practices, and allows private providers to enter the market. When this happens, the boundary between public and private interests will become blurred. As the case studies will demonstrate, the UK's FOI laws require public authorities to balance the public interest in transparency with the commercial interests of information holders, even when the information holder is the public authority. Compulsory tendering and internal contracting contribute to the marketisation of public services, in which commercial interests must be considered alongside social policy. The result is that public services are more likely to be run along commercial lines, with commercial interests potentially overriding the public interest.

[90] Dexter Whitfield, *A Typology of Privatisation and Marketisation* (European Services Strategy Unit 2006) 4.
[91] ibid 4.
[92] ibid 11-12.

1.4.2.1 Privatisation in the UK

Discussion of privatisation in the UK must begin with nationalisation and the creation of the welfare state after the Second World War. The state has never been entirely self-sufficient and has a long history of relying on the private sector for the provision of certain goods and services.[93] In fact, the private sector has long been considered, in certain schools of economic thought, as the key to economic prosperity. Adam Smith's 'invisible hand' thesis is based on the belief that economic and social equilibrium is best achieved when agents act in their own self-interest, with little to no interference from government.[94] These principles guided the early years of the Industrial Revolution in the UK, but by the mid-19th century, the state began to increase its involvement in regulation and in state enterprise. This typically occurred when the market had failed to provide services, or when state intervention was deemed necessary to achieve social or policy goals. For example, public health concerns over the cholera outbreaks in London during the first half of the 19th century led to state involvement in water supply and sanitation.[95]

Economic recession during the interwar period (1918-1938) led to criticism of the perceived failures of the private sector, and, by extension, to increased support for nationalisation.[96] In 1926, the Central Electricity Board and the British Broadcasting Corporation (BBC) were established. These early public enterprises were publicly owned and accountable to the public, but overseen by professional

[93] Davies (n 81) 5.
[94] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776, MetaLibri 2007).
[95] Colin Ward, *Reflected in Water: A Crisis of Social Responsibility* (Cassell 1997).
[96] Parker (n 76) 3.

managers and operated at arm's length from ministerial interference, as per the vision of Labour Party politician and nationalisation advocate Herbert Morrison.[97]

Nationalisation increased significantly during the 1940s. The post-war nationalisation strategy was primarily a mechanism for reconstruction and economic recovery.[98] The programme began with the nationalisation of the utilities, energy, and defence industries, followed by the Bank of England in 1946. This coincided with the expansion of the welfare state through the delivery of public services, including education, healthcare, and social care.[99] The role of the private sector was largely limited to the provision of goods, such as medicines and supplies for the National Health Service (NHS).[100] The welfare state remained largely intact over the next three decades, with subsequent governments only introducing denationalisation on a very small scale.[101]

But, by the late 1970s, the UK was in economic crisis.[102] The 1973 oil crisis had led to inflation, which directly contributed to soaring energy and commodity prices. In 1974, the Labour government was elected to power without an overall majority. The government attempted to address the growing financial crisis through public sector borrowing, rather than restriction. This did little to control inflation, and, in 1976, Prime Minister Harold Wilson resigned and was replaced by Jim Callaghan. Facing increasing economic challenges, Callaghan turned to the International Monetary Fund (IMF) for a loan of $3.9 billion, which was

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[97] ibid 3.
[98] Cento G Veljanovski, 'Privatization in Britain – the Institutional and Constitutional Issues' (1988) 71 MarqLRev 558, 560.
[99] Davies (n 81) 5.
[100] ibid 5.
[101] For example, the travel agency Thomas Cook was privatised in 1976. See HC Library (n 74).
[102] Cosmo Graham, *Regulating Public Utilities: A Constitutional Approach* (Hart 2000) 14.

granted on the condition that the UK reduce public expenditure and raise interest rates.[103]

The IMF loan was a turning point in the UK, both politically and economically.[104] It exposed the fissures within the Labour Party, specifically between those who accepted the terms of the loan and those who argued that the only way to maintain the post-war welfare state was through public spending. Economically, the financial crisis and the resultant loan was the impetus for rejecting the Keynesian economic policies that had dominated for nearly three decades in favour of market-based solutions.

This is the backdrop against which the Conservative Party launched its 1979 general election manifesto.[105] Perhaps surprisingly, given what shortly followed, the manifesto made little mention of privatisation (or denationalisation, as it was more commonly known at the time).[106] It did, however, claim that the country had 'lost its way' during the 15 years the Labour Party had been in power.[107] The manifesto argued that Labour had failed 'by enlarging the role of the State and diminishing the role of the individual', but pledged to reverse this through, inter alia, the promotion of home ownership and the restriction of welfare services to those 'in real need'.[108]

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[103] See eg Douglas Wass, *Decline to Fall: The Making of British Macro-economic Policy and the 1976 IMF Crisis* (OUP 2008); Mark D Harmon, 'The 1976 UK-IMF Crisis: The Markets, the Americans, and the IMF' (1997) 3 Contemporary British History 1.
[104] Vernon Bogdanor, 'The IMF Crisis of 1976' Lecture given at the Museum of London, 19 January 2016. Available <https://www.gresham.ac.uk/lectures-and-events/the-imf-crisis-1976> accessed 27 December 2019.
[105] Conservative Party, *1979 Conservative Party General Election Manifesto*
[106] Parker (n 76) 7; See also Andrew Gamble, 'Privatization, Thatcherism, and the British State' (1989) 16 JL&Society 1, 4.
[107] Conservative Party (n 104) section 1.
[108] ibid s 1.

Whilst it might have appeared that the Conservative government had initially 'stumbled into' privatisation, by the mid-1980s it was fully committed to rolling back the state.[109] The privatisation programme was not a coherent policy, but rather was rolled out in an *ad hoc* manner.[110] It took a variety of forms, from the sale of the public utilities to the sell-off of social housing stock through the 'right to buy' scheme.[111] Though the Conservatives did not formalise their reasons for privatisation in policy, scholars have noted that there were multiple justifications, including increased efficiency, the promotion of freedom of choice, the creation of a share-owning public, and the weakening of public sector unions.[112]

Thus, whilst privatisation is often described as an 'economic policy',[113] it should also be understood as a political phenomenon.[114] In the UK, privatisation has had the effect of reducing the role of the state in economic and social life, which has normative implications for which services should be delivered by the public sector and which are better left to the private sector. The case studies will examine these implications in greater detail, albeit in different ways. Chapter Five chronicles the history of water privatisation in England and Wales, as well as the commercialisation of the industry in Scotland, and Chapter Six examines the development of the free schools policy in England. These are different forms of

[109] Gamble (n 106) 4.
[110] ibid; Veljanovski (n 98).
[111] See eg Gamble (n 106); Aled Davies, '"Right to Buy": The Development of a Conservative Housing Policy, 1945-1980' (2013) 27 Contemporary British History 421.
[112] Gamble (n 106) 11; See also David Heald and David Thomas, 'Privatization as Theology' (1986) 1 PubPol&Admin 49.
[113] Paul Starr, 'The Meaning of Privatization' (1988) 6 YaleL&PolRev 6, 19.
[114] Veljanovski (n 98).

privatisation, motivated by different aims, and each has their own implications for access to information.

1.5 Methodology

This thesis is the result of a mixed-methods approach, consisting of an extensive literature review; analysis of court and tribunal judgments, Information Commissioner decision notices, statutes, and policy documents; stakeholder interviews with information holders, requesters, and adjudicators; and FOI/EIR requests. The approach was driven by the demonstrated need for more empirical research on ATI, as well as the need to develop a stronger theoretical framework for ATI.

When the project was initially proposed, I observed that the debate over FOI extension was largely concerned with the question of what *might happen* to information rights when public services are privatised. There was little empirical research to indicate how privatisation *is* affecting information access under ATI legislation in the UK. The research project was designed to address this question, and the methodology was carefully chosen to capture the different forms of privatisation and the different ways in which it could affect access to information.

The analysis of the Commissioners' decisions and the Information Tribunal judgments provided a useful starting point for identifying the cases that make it to the formal complaints and appeals processes. The decisions indicate, inter alia, the types of requests being made, the exemptions that public authorities apply, and the reasoning of the adjudicators when carrying out the public interest test. However, this analysis alone would have been insufficient to achieve the research

aims because the decision notices represent only a small number of complaints that have gone through the internal review procedures and reached the stage at which it is necessary for the Information Commissioners to adjudicate. The cases that are referred to the First-tier Tribunal (General Regulatory Chamber), Upper Tribunal (Administrative Appeals Chamber), or the Court of Session (in Scotland) represent an even smaller number of complaints and are narrower in scope, reflecting the points of law that the Tribunals have the power to investigate.[115]

The stakeholder interviews were therefore designed to provide greater insight into the research questions by speaking with information requesters, information holders, and adjudicators. Six interviews were conducted, with ten participants in total.[116] The interviews were semi-structured, with the interview schedules tailored to the participants' roles. The information requesters were asked about, inter alia, their experiences of using ATI laws, their experiences of the complaints processes, and their views on whether extending FOI legislation to additional bodies would allow for better access to the types of information they seek. The adjudicators (ie case workers) were asked questions about the types of complaints they receive, the complaints handling process, and their role in training and providing guidance to public authorities on their ATI obligations.[117]

The information holders were the most difficult to access. After the case study sectors were decided, potential interviews with responsibility for handling information requests were approached. The majority of the interview requests

[115] The complaints process and the role of the Tribunals and the Court of Session is explained further in Chapter Two (section 2.3.1.4).
[116] An anonymised list of interview participants is provided in Appendix D.
[117] The interview schedules are provided in Appendix E.

were declined, though one information holder agreed to provide written responses to interview questions after seeing the list of questions. Due to the difficulty in arranging interviews, I adjusted the methodological approach by sending information requests to Scottish Water and the private water companies in England and Wales. This ensured that each case study included some consideration of the perspectives of information holders, requesters, and adjudicators.

Due to the limited number of interview participants, the data gathered from this exercise is treated as supplementary.[118] Rather than analysing the interview data in isolation, I have considered it alongside the data generated from the information requests and the analysis of the decision notices. Together, these multiple data points are used to inform the case studies.

1.5.1 The Case Study Approach

A case study is 'an empirical enquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident'.[119] It is a social science research method that can be used on its own, or in combination with other methods, such as surveys, questionnaires, or field observations.

The case study approach has several advantages.[120] First, it allows for an in-depth study of contemporary issues where traditional experimental or survey methods

[118] Further particulars on how this data was used is provided in each case study.
[119] Robert K Yin, *Case Study Research: Design and Methods* (4th edn, Sage 2009) 18. See also Dawson R Hancock and Bob Algozzine, *Doing Case Study Research: A Practical Guide for Beginning Researchers* (Teachers College Press 2006).
[120] Yin (n 119).

would not be appropriate. Traditional experimental methods often involve an examination of independent variables, divorced from their real-life context. Case studies are useful where it is neither feasible nor desirable to isolate variables or to study phenomenon outside context.

Second, case studies are especially useful in answering 'how' or 'why' questions.[121] Because they are designed to examine phenomena in context, they are ideal for collecting and analysing qualitative data to help us understand social phenomena. Whereas surveys or statistical reports are useful in evaluating quantitative data (ie how many requests for information do the private water companies receive each year?), case studies contextualise this data. Finally, the case study approach can be used when incorporating two or more research methods. It can include, inter alia, questionnaires, focus groups, field observations, doctrinal analysis, and archival research.

Therefore, the case study approach was selected as the most appropriate method to address the research questions set out in this thesis, in particular the question of how privatisation affects access to information. A traditional impact study, designed to evaluate the *impact* of privatisation on access to information, would not have been feasible as there is no baseline data available to make an accurate comparison pre- and post-privatisation. However, the case studies can help us to understand the different ways in which privatisation *affects* access to information within two designated sectors.

[121] ibid 10.

Moreover, the case study allows for contextual investigation, which is necessary considering the current debate over legislative reform of the UK's FOI laws. As explained in section 1.2.1, the debate over FOI extension is ongoing, and, during the time the research was being conducted, three s 5 orders were introduced to extend FOISA to additional bodies. The research area was very much under development, with significant judgments (eg *Fish Legal*,[122] *Magyar Helsinki*)[123] changing the parameters of the project slightly. Rather than viewing this as a challenge, the case study approach allows these developments to become opportunities to examine the research questions in real-life context. The flexibility of the case study approach made it possible to take recent developments into account, and the case studies evolved to include richer data as the jurisprudence in the area developed.

Finally, the case study approach was chosen to examine two sectors in depth: the water industry and the free schools programme. These two sectors were chosen for several reasons. For one, they are very different types of privatised services and therefore facilitate an examination of how different types of privatisation might affect information access. Furthermore, the water industry case study analyses the definition of 'public authority' under the EIR, thereby providing a comparison between its 'functional' approach to coverage and the 'institutional approach' taken by FOIA and FOISA. It also allows for a comparison between the privatised water industry in England and Wales and the publicly owned Scottish Water.

[122] *Fish Legal* (n 20).
[123] *Magyar Helsinki Bizottság v Hungary* (2016) ECHR 975.

1.6 Thesis Structure

The rest of this thesis is divided into six chapters. Chapters Two through Four provide the historical and theoretical grounding for the case studies, which are presented in Chapters Five and Six. Chapter Seven evaluates the different mechanisms that can be used to extend transparency obligations to private bodies, using the case study data and theoretical arguments to support recommendations for legislative reform and amendment.

Chapter Two describes the development of ATI legislation in the UK and provides an overview of the current legal framework on public access to official information. The chapter begins with an exploration of the so-called 'culture of secrecy' that has been observed within government in the UK.[124] This discussion provides the historical and political context necessary for the next part of the chapter, which examines the significant open government and transparency reforms that were introduced in the UK leading up to and including the enactment of FOIA and FOISA. The third part of the chapter explains the operation and scope of the UK's ATI laws.

Chapter Three explores the conceptual underpinnings of ATI, focusing on three common justifications for ATI: the consumerist, human rights, and democratic-expansive justifications. Because of the close relationship between ATI and transparency, the chapter begins by defining what is meant by 'transparency' and providing a critique. This is followed by an examination of the three aforementioned justifications. I argue that whilst the right to information can be

[124] See eg Vincent (n 13); Hazell, Worthy, and Glover (n 2).

invoked to serve individualist and consumerist aims, it also serves collective, democratic-enhancing aims. Though the chapter adopts a much-needed critical approach in evaluating the recent 'explosion' in ATI laws, it remains optimistic that transparency obligations can and should be extended to private bodies to support public participation in democratic governance.[125]

Chapter Four examines the public-private distinction in the context of access to information. The chapter considers how the public-private distinction developed, how it has been affected by privatisation, and whether it is a useful concept for understanding current legal and social arrangements. It also explores the application of judicial review and the Human Rights Act 1998 (HRA) to private bodies in order to understand how 'functions of a public nature' have been understood in these contexts. The discussion demonstrates that the questions surrounding the extension of ATI to additional bodies are not new, nor is there is clear definition of what public functions or services are.

Chapter Five presents the case study on access to information and the water industry. Building on the analysis presented in Chapter Four, the case study first considers how public authorities are defined under the EIR, with a detailed analysis of the *Smartsource*[126] and *Fish Legal*[127] judgments. As the latter judgment established in 2015 that private water companies are public authorities for the purposes of the EIR, the case study then goes on to examine the subsequent performance of the water companies regarding their new responsibilities. This is

[125] Ackerman and Sandoval-Ballesteros (n 1).
[126] *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC).
[127] *Fish Legal v Information Commissioner* [2015] UKUT 0052; *Fish Legal v Information Commissioner* (C-279/12).

compared with Scottish Water, which, though under public ownership, has been subject to marketisation and operates commercially.

Chapter Six presents the case study on access to information and the free schools programme in England. The free schools programme allows non-state actors to open and operate publicly funded independent schools. It is the latest initiative in a long series of reforms designed to create a quasi-market in state education, raising important questions about the transparency of the programme itself, as well as the application process. The case study provides an overview of the policy context in which the free schools programme was introduced, including the Big Society agenda. It then examines 25 ICO decision notices to identify relevant decisions on free schools and the exemptions that have been applied when determining whether to disclose information. This data is used to support recommendations for the legislative reform of FOIA.

In Chapter Seven, I return to the question of which mechanisms are best suited to preserving access to information in privatised public services, in the light of the arguments presented in this thesis. Specifically, I consider the arguments for legislative extension against the arguments in favour voluntary disclosure mechanisms. The analysis and conclusion are supported by the empirical evidence from the case studies, as well as the theoretical arguments raised in Chapters Two through Four. This is followed by recommendations for legislative extension and amendment.

Chapter Two

The Development of Access to Information Legislation in the United Kingdom

This chapter seeks to answer two primary questions. First, how did access to information (ATI) legislation develop in the United Kingdom? Second, how does the current legal framework for ATI legislation operate?

In the previous chapter, I explained that the Freedom of Information Act 2000 (FOIA) and the Freedom of Information (Scotland) Act 2002 (FOISA) have been drafted to apply to designated public bodies, listed in Schedule 1 of each Act. The Environmental Information Regulations 2004 (EIR) and the Environmental Information (Scotland) Regulations 2004 (EISR) apply to bodies subject to FOIA and FOISA,[1] as well as to additional bodies performing functions of public administration.[2] Privatisation, in its various forms, has led to diverse arrangements in public service provision, creating challenges for the application of ATI legislation. The overall aim of this thesis is to examine precisely how privatisation affects ATI legislation, with the goal of identifying areas for legislative reform.

This chapter supports my analysis in two ways. First, it presents a legislative history of ATI in the UK. This is an essential component of this thesis because the UK has a multi-layered framework for ATI, due to decades of incremental open government reforms preceding the enactment of FOIA and FOISA, as well as

[1] Regulation 2(2)(b).
[2] Regulation 2(2)(c).

international legal obligations and the differential arrangements among the UK's three domestic legal systems. In this chapter, I explain what these incremental reforms were, how each was used to further the development of open government, and the motivations behind the reforms. This historical background will provide the context needed to understand not only the current framework for ATI in the UK, but how the current laws have been shaped by historical and political context.

Second, I explain the operation of FOIA, FOISA, the EIR, and the EISR. I describe, inter alia, the process for making and responding to information requests, the requirements for proactive information disclosure, the exemptions/exceptions to disclosure, the role of the Information Commissioners, and the mechanism for designating additional bodies as public authorities under FOIA and FOISA. This part is largely descriptive and supports the analysis presented in this thesis through its explanation of the technical aspects of ATI legislation.

The chapter is divided into three parts. The first part examines the so-called 'culture of secrecy' in government within the UK. The second part describes the legislative history, chronicling the legal and political steps taken towards open government prior to 2000.[3] The third part of this chapter explains the legal framework for ATI in the UK – FOIA, FOISA, the EIR, and the EISR.

[3] This section is organised thematically, rather than chronologically, in order to demonstrate how each step was introduced to support a particular justification for ATI. I build on this work in Chapter Three in the discussion on the conceptual underpinnings of ATI. A Timeline of Developments settling out the chronological history of ATI and open government in the UK is provided in Appendix A.

2.1 Government in the UK: A Culture of Secrecy?

Much has been made of the notorious 'culture of secrecy' within government in the UK.[4] The open government reforms of recent decades, including the enactment of FOI legislation, have been aimed at combatting 'excessive secrecy' and establishing a culture of openness and accountability.[5] Secrecy is seen as anathema to modern democratic governance, and FOI legislation in the UK was introduced with the explicit aim of curtailing secrecy, as a means of improving governance and restoring public trust in government.[6] The aim of this section is to explore *how* and *why* secrecy became so entrenched in government culture in the UK through an examination of the legal framework and the justifications for official secrecy. This thesis will not directly address the question of whether FOI legislation has made an impact on official secrecy,[7] but the following discussion helps explain what it is that FOI and other recent open government reforms have set out to change.

2.1.1 Joseph Mazzini Scandal

In 1844, Italian politician and activist Joseph (Guiseppe) Mazzini, then living in exile in London, conducted an experiment. Suspecting his correspondence was

[4] See eg David Vincent, *The Culture of Secrecy: Britain, 1832-1998* (OUP 1999); Mike Feintuck, 'Government Control of Information: Some British Developments' (1996) 13 GIQ 345; Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (4th edn, CUP 2010); Stuart Bell, 'The Culture of Secrecy' (1996) 146 NLJ 346.

[5] Cabinet Office, *Your Right to Know: The Government's Proposals for a Freedom of Information Act* (Cm 3818, 1997) para 1.1.

[6] ibid para 1.1.

[7] See Robert Hazell, Ben Worthy, and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave 2010) at 108-116 for discussion on this topic. The researchers found that there has been a shift from a 'culture of secrecy' to greater openness in Whitehall in recent years, though they suggested that this is likely due to broader cultural shifts brought on by the 'information society', and cannot be attributed solely to the influence of FOIA.

being monitored, he began writing letters to himself, enclosing small amounts of seed and sand to determine whether his post was being opened without his consent.[8] He discovered that it was. The British government had been secretly reading his letters, after being asked to do so by the Austrian ambassador.[9]

The discovery became the 'major political scandal of the year', resulting in widespread public and political debate on personal privacy and official secrecy.[10] The resultant inquiry shed light not only on the extent of government surveillance, but also on the government's attitude towards openness. When Parliament questioned Home Secretary Sir James Graham about the incident, he initially refused to answer, explaining that 'it was not for the public good to pry or inquire into the particular causes' of the government's postal surveillance programme.[11] His response was criticised by MP Thomas Dunscombe, who garnered support within the House of Commons and the Lords to investigate the government's stance on official secrecy and its justifications for postal espionage.[12]

The fallout from the Mazzini scandal led to the abolition of the Secret Department of the Post Office.[13] The elimination of this form of government surveillance was a major step forward in the recognition of the right to personal privacy. However, the debate over official secrecy was only beginning. Influenced by Jeremy Bentham and the English Utilitarian movement, there was growing awareness of

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[8] Vincent (n 4) 2.
[9] At the time, Mazzini's Young Italy activist group was organising to end Austrian occupation and create a unified Italy. See Kate Lawson, 'Personal Privacy, Letter Mail, and the Post Office Espionage Scandal, 1844' (2013) *BRANCH: Britain, Representation, and Nineteenth-Century History*, <http://www.branchcollective.org/?ps_articles=kate-lawson-personal-privacy-letter-mail-and-the-post-office-espionage-scandal-1844> accessed 17 February 2019.
[10] Vincent (n 4) 2.
[11] Lawson (n 9).
[12] Vincent (n 4).
[13] ibid 2.

the need for 'publicity' (Bentham's word for what would now be termed transparency) as both an antidote to corruption and as a mode of democratic governance. The argument held that the means of publicity, such as opening up meetings to the public and publishing transcripts of debates, would prevent corruption and allow for greater public participation in governance.[14] Despite the growing support for publicity and respect for personal privacy, the government's position on official secrecy remained largely unchanged. And, in the years following the Mazzini scandal, the legislative framework protecting official secrecy was strengthened.

2.1.2 Official Secrecy Legislation

The Official Secrets Act 1889 (OSA 1889) was designed to prevent the unauthorised disclosure of information[15] and made it an offence for civil servants to breach official trust.[16] It was introduced, at least in part, as a response to an incident that had occurred a decade earlier. When a civil servant revealed secret details of a treaty to a newspaper, the government faced a challenge in determining under which offence to prosecute.[17] Treason was ruled out because there was no evidence that the civil servant was involved in espionage (instead, it appeared that he had been motivated to disclose by job dissatisfaction). As he had memorised the information and not stolen any physical documents, he could not be charged with existing criminal law offences. As Helen Fenwick has explained, the incident, along with the expansion of the civil service and the expectation for

[14] ibid 3.
[15] OSA 1889, s 1.
[16] OSA 1889, s 2.
[17] Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 592.

civil servants to handle increasing volumes of information, provided the catalyst for the government to enshrine official secrecy in law.[18]

The OSA 1889 applied to the whole of the civil service, meaning that any government official who disclosed information without authorisation could be prosecuted. It provided the framework on which subsequent Official Secrets Acts were based: s 1 prohibited the unauthorised disclosure of information and s 2 dealt with breach of official trust. The original draft bill did not include a public interest defence, though this was later amended after Parliamentary debate raised concerns that the defence was needed to protect whistle-blowers from criminal sanctions.[19]

In subsequent years, few prosecutions were brought under the OSA 1889 and its efficacy was called into question. The War Office was particularly critical of what it deemed to be an inherently weak Act.[20] One apparent weakness was that the Act only applied to civil servants and government contractors.[21] This meant that journalists who published leaked information could not be prosecuted under the Act. Moreover, the onus was on government to prove that (1) information had been unlawfully disclosed and (2) it had been disclosed with the *intention* of breaching official secrecy.[22] As a result of these perceived deficiencies, the OSA 1889 was repealed and replaced with the Official Secrets Act 1911 (OSA 1911).

[18] ibid 590-593.
[19] House of Commons Library, *The Official Secrets Act and Official Secrecy* (CBP-7422, 2017) 12.
[20] Birkinshaw (n 4) 114.
[21] HC Library (n 19) 14.
[22] Birkinshaw (n 4) 114.

The OSA 1911 strengthened the anti-espionage provisions of the 1889 Act, in response to the concerns outlined above as well as to growing fears of German spying.[23] Section 1 of the Act was amended so that the government no longer had to prove that the accused's 'purpose was prejudicial to the safety or interests of the state'.[24] Section 2 of the Act was revised and expanded to cover *all* leaked information, whether it was harmful to the public interest or not.[25] The expanded scope of s 2(1) meant that virtually any unauthorised communication or retention of information by a civil servant could be prosecuted. As Birkinshaw has explained, the wording of the Act was ambiguous; even if it was not intended to cover all official information, that is how it appeared, and s 2 effectively became a strict 'catch-all' provision.[26]

Another controversial aspect of the OSA 1911 was that these strict changes were implemented with little debate. Section 2 was not discussed when the Bill passed through Parliament, nor did it attract media attention.[27] The government argued that it was not introducing any new principles, but rather that it was merely strengthening existing legislation to deal with the immediate threat of German espionage to national security.[28] However, s 2 appeared to extend to a wide range of information unconnected to national security, and even those who received unauthorised information would fall within its scope.

[23] HC Library (n 19) 14.
[24] ibid 15.
[25] Birkinshaw (n 4) 115.
[26] ibid 116.
[27] HC Library (n 19) 14.
[28] ibid 14.

By 1971, 23 prosecutions had been brought under s 2 of the OSA 1911.[29] After an unsuccessful attempt in 1971 to prosecute the *Sunday Telegraph* for publishing government documents concerning the Nigerian Civil War, a committee was appointed to review the legislation.[30] Chaired by Lord Franks, it found that the OSA 1911 was unsatisfactory, with s 2 in need of considerable revision. The Franks Committee argued that its scope was too wide and that any restriction on the flow of information in a democracy should be narrow, specific, and clearly communicated. The 1972 Franks Report recommended that s 2 be replaced with an Official Information Act.[31] The Conservative government accepted the recommendations, but they were never implemented. It would be nearly another 20 years before the controversial s 2 was repealed and replaced.[32]

The Official Secrets Act 1989 (OSA 1989) removed the controversial 'catch-all' provision and limited the scope of covered information to six categories.[33] The unauthorised disclosure of information is still a criminal offence, but the OSA 1989 introduced a harm test, meaning that conviction requires the Crown to prove that the unauthorised disclosure of information has resulted in harm. The harm test does not apply to the intelligence or security services. Unauthorised disclosure by

[29] ibid 18. See also Fenwick (n 17) at 593 for discussion on why there were 'surprisingly few' prosecutions under s 2.
[30] HC Library (n 19) 18.
[31] ibid 19.
[32] Shortly before s 2 was finally repealed in 1989, two high-profile prosecutions took place. The first involved the leaking of government documents to the *Guardian* newspaper in 1983 by Sarah Tisdall, a former Foreign and Commonwealth Office (FCO) officer. Ms. Tisdall pled guilty to the offence. In 1985, Cliff Ponting, a civil servant with the Ministry of Defence (MoD) was charged with a criminal offence for sending an MP documents regarding the sinking of the *Belgrano* ship during the Falklands War in 1982. Mr. Ponting was later acquitted. These incidents contributed to the decision to repeal s 2. See *R v Ponting* [1985] Crim LR 318.
[33] These are security and intelligence (s 1), defence (s 2), international relations (s 3), crime and special investigation powers (s 4), information resulting from unauthorised disclosures or entrusted in confidence (s 5) and information entrusted in confidence to other States or international organisations (s 6).

officials working in these services is still considered an absolute offence.[34] As with the previous Acts, there is no statutory public interest defence in the OSA 1989.[35]

The OSA has played a significant role in shaping government culture within the UK.[36] Traditionally, it was thought that 'government knows best' and that official information must be kept closely guarded.[37] Or, to paraphrase Home Secretary Graham's response to the Mazzini affair, 'it was not for the public good to pry' into the inner workings of government.[38] This attitude has been changing in recent decades, for various reasons, including the push for 'joined-up thinking' to tackle societal problems and the proliferation of information and information communication technologies (ICTs) resulting from the 'information revolution'.[39]

Whilst there is no evidence to suggest that FOIA has had a causal impact on reducing the culture of secrecy within central government, it can be seen as one of several steps taken to promote a culture of openness.[40] However, research by the UCL Constitution Unit revealed that some civil servants believe that it has had a 'symbolic effect' and it has reinforced the idea that the public have a right to ask for information.[41] As section 2.2 will demonstrate, the belief that the public have a right to know is a recent development, and, at times, there is still a reluctance for government officials and public sector workers to part with information. This

[34] HC Library (n 19) 20.
[35] ibid 26.
[36] See eg Hazell, Worthy, and Glover (n 7) 106-107; Tom Felle, 'Freedom of Information in the UK: Opportunity and Threat' (2016) 7 Political Insight 28.
[37] Hazell, Worthy, and Glover (n 7) 107.
[38] Lawson (n 9).
[39] Hazell, Worthy, and Glover (n 7) 108.
[40] ibid 111.
[41] ibid 112.

suggests that the OSA, whilst having a profound effect on civil servants and government contractors, is not the only factor that has contributed to secrecy.

2.1.3 Justifications for Secrecy

There are multiple justifications and incentives for official secrecy. Some are general and apply throughout most states, but others appear to be closely connected with the UK's political heritage and constitutional principles. In general, secrecy is frequently justified by the need to protect national security.[42] As the previous discussion on the OSA indicated, official secrecy has been justified where information disclosure would threaten the safety of the nation. The UK's FOI laws (as with most other jurisdictions) contain exemptions for national security.[43] There is a large volume of literature on national security and secrecy, including critical analysis of the national security exemption.[44] However, because national security does not feature heavily in the subsequent discussion on the relationship between privatisation and access to information, I will not discuss it at length here.

Indeed, there are other ordinary, pedestrian justifications for secrecy that are more likely to impact on the information that will be available under ATI laws. For example, as Joseph Stiglitz has argued, secrecy can be motivated by a fear of failure.[45] If a government policy fails to get results, it is much easier to cover up

[42] See eg David Goldberg, 'Executive Secrecy, National Security, and Freedom of Information in the United Kingdom' (1987) 4 GIQ 43; Michael Fordham, 'Secrecy, Security and Fair Trials: The UK Constitution in Transition' (2012) 17 JR 187; Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' (2016) 38 Hum Rts Q 58.
[43] FOIA, s 24; FOISA, s 31.
[44] See eg Rhona K M Smith, *International Human Rights Law* (8th edn, OUP 2018); Margaret Kwoka, 'The Procedural Exceptionalism of National Security' (2017) 97 BULRev 103.
[45] Joseph Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life' (Oxford Amnesty Lecture, Oxford, 27 January 1999) 10.

the failure and shield officials from public criticism if little or no information is available to the public. Even in the face of strong public interest arguments in favour of openness, it can be hard to overcome a natural inclination towards secrecy, even more so if it becomes culturally embedded within government or other institutions.

Moreover, secrecy is thought to allow for the creation of a safe space for policymaking. This is protected by the exemptions to FOIA and FOISA,[46] but the concept of the need to protect space for discussion among government officials has a much longer history. It can be traced back to William Gladstone's 1853 review of the civil service and subsequent restructuring to allow entry to the civil service based on merit.[47] As a result, the civil service was opened up to a much wider pool of applicants, whereas before nominations were typically made based on social background.[48] During this period, the volume of information held by the civil service was increasing, prompting the need to ensure that civil servants could be entrusted to handle information in confidence.

Then, there is the constitutional principle of ministerial responsibility. This is the principle that ministers bear ultimate responsibility for the actions of their departments and are directly accountable to Parliament.[49] This means that ministers are politically responsible for any errors that might be committed by civil servants in their departments. Ministerial responsibility also requires

[46] FOIA, s 35 and s 36; FOISA, s 29 and s 30.
[47] Vincent (n 4) 34.
[48] ibid 36-43.
[49] House of Commons Library, *Individual Ministerial Responsibility – Issues and Examples* (04-31, 2004).

minsters to keep Cabinet secrets and are expected to not attribute policies or decisions to any particular person (ie 'collective ministerial responsibility').

One effect of ministerial responsibility is that official decision-making within the UK has traditionally taken place behind closed doors. Policies are made public, but the debates and conversations that take place during the policymaking process are hidden from the public to create space for deliberation. On the one hand, it can be argued that this leads to better decision-making by allowing officials to exchange ideas and information without public scrutiny or external interference (the 'too many chefs in the kitchen' argument). However, it can also be argued that decision-making is enhanced through input from diverse stakeholders, which is one of the justifications for participatory democracy.[50] The exemptions in FOIA and FOISA suggest that they were influenced by the first argument, with protections for government deliberation and policy-making. These exemptions will be discussed later in section 2.3.2.1 (and in Chapters Six and Seven), but, first, it is important to examine the background of ATI legislation in the UK.

2.2 Intimations of Change: Towards Open Government in the UK

ATI scholars have frequently highlighted the long series of incremental reforms that took place prior to the enactment of FOIA and FOISA.[51] For over four decades preceding their enactment, a number of open government reforms were made, including both hard and soft law mechanisms, aimed at increasing public access

[50] See eg Renée A Irvin and John Stansbury, 'Citizen Participation in Decision Making: Is it Worth the Effort?' (2004) 64 PubAdminRev 55.
[51] See eg Ben Worthy, The Development of FOI in Britain' in T Felle and J Mair (eds) *FOI 10 Years On: Freedom Fighting or Lazy Journalism?* (Abramis UK 2014); Patrick Birkinshaw, 'Freedom of Information in the U.K.: A Progress Report' (2000) GIQ 419; Birkinshaw (n 4); Feintuck (n 4).

to information. The examination of these reforms in this section serves two purposes: (1) to explain why the UK has developed separate legislation for access of official information, access to environmental information, and the protection of personal data and (2) to demonstrate the multiple, sometimes competing, justifications for ATI legislation and open government reforms. Exploring these justifications and their associated reforms in depth will allow for greater understanding of the inherent tensions surrounding transparency, and how this affects the relationship between transparency and privatisation.

The following section is arranged thematically (rather than chronologically) in order to demonstrate the point that the open government and transparency reforms that took place in the years preceding FOI enactment have been motivated by disparate aims. The themes centre on three of the commonly cited justifications for access to information – democratic engagement, consumer choice, and the rights-supporting role of transparency. This chapter traces the historical development of these justifications in the UK, thereby setting up the following chapter on the conceptual underpinnings of ATI, which will also be discussed thematically.

2.2.1 Open Democracy

The Public Bodies (Admission to Meetings) Act 1960 was the first law to confer on the public a general right of access to information, albeit a limited category.[52] The Act required local authorities or 'other bod(ies) exercising public functions' to open

[52] Helen Morris, 'Access to Information and the Public/Private Divide' (4th Northumbria Information Rights Conference, Newcastle, June 2011).

up their meetings to the public.[53] Unlike earlier legislation, such as the Local Authorities (Admission of the Press to Meetings) Act 1908, which was restricted to members of the press, the Act extended the right of access to all members of the public equally. It is for this reason that I begin the analysis here, as it marked a turning point in openness and public participation, due to its general application.

The Act was initiated as a private members' bill by then-MP Margaret Thatcher and supported by the Newspaper Editors Guild.[54] It applied to a range of bodies in England, Scotland, and Wales, including local authorities within the meaning of the Local Government Act (LGA) 1933 or LGA 1939, parish councils, education committees, local water authorities, and regional health boards.[55] Members of the public could attend meetings held by any of these authorities, and the Act also required the authorities to make meeting agendas available to the press on request.[56] However, the authorities maintained the right to exclude the public from meetings if it considered that publicity 'would be prejudicial to the public interest', for example, if confidential business was discussed.[57] As such, the Act was limited in the extent to which the public could reliably gain access to meetings.

Significantly, the Act did not apply to central government, nor were there any serious reforms aimed at opening up central government at this time. Whilst it was an important development in open government, particularly as the right to access meetings was available to all, it was never intended to provide comprehensive access or a general right to information. The Act only applied to a

[53] Public Bodies (Admission to Meetings) Act 1960, s 1(1).
[54] Worthy (n 51) 5.
[55] The Act did not apply to Northern Ireland.
[56] Public Bodies (Admission to Meetings) Act 1960, s 1(4)(b).
[57] Public Bodies (Admission to Meetings) Act 1960, s 1(2).

limited type of information at the local authority level. Admission to meetings could still be restricted at the discretion of public bodies, with the public given little recourse when denied access. The fact that it applied to local, rather than central government, sheds some light on Thatcher's and the Conservative Party's attitudes towards open government.[58] Whereas local government was seen as inefficient and in need of increased transparency to hold officials to account, central government was to remain free from mechanisms designed to enhance public oversight.

The first proposal for a British FOI law came in 1972.[59] In evidence given to the Franks Committee, Professor Wade argued that the repeal of s 2 of the OSA 1911 was the minimum the government needed to do in order to transform the culture of secrecy. He later commented on (what he viewed as) the absurdity of s 2, which he said made it a criminal offence to 'disclose, without authority, how many cups of tea are consumed in a government department'.[60] Wade considered that what was needed was not only reform of the OSA, but also the introduction of a US-style freedom of information law, which he noted had made an impact on Washington and would be welcome in Whitehall.[61]

The Labour Party was in agreement that government needed to be more open. Whilst it has been reported that its October 1974 election manifesto made a pledge to introduce an FOI Act,[62] the manifesto itself did not make a specific promise.

[58] See eg Worthy (n 51).
[59] Select Committee on Draft Freedom of Information Bill, *First Report* (HL 27 July 1999).
[60] HWR Wade, *Constitutional Fundamentals* (Hamlyn Trust 1980) 53.
[61] ibid 53.
[62] Worthy (n 51); UCL Constitution Unit, 'What is Freedom of Information & Data Protection? <https://www.ucl.ac.uk/constitution-unit/research/research-archive/foi-archive/what-freedom-information-data-protection> accessed 27 September 2019.

Instead, it said that the party 'believes that the process of government should be more open to the public' and stated its commitment to replace the OSA to put the burden on public authorities to justify withholding information.[63]

The Labour Party won the election and came to power in 1974. However, there was little support for a FOI law within government, which was facing the economic pressures described in Chapter One. Prime Minister Callaghan was said to have been deeply uninterested in open government and progress stalled.[64] Nevertheless, pressure for increased transparency and a statutory right to information grew during the 1970s. In response to this pressure, the Croham directive was introduced in 1977 to facilitate openness through the voluntary disclosure of information.[65]

The non-statutory Croham directive was designed to provide access to background documents on central government decisions. The initial response seemed promising: over 200 items were disclosed between May and October 1978.[66] However, the flow of information soon dwindled, and when the Conservative Party came to power in 1979, Prime Minister Thatcher rescinded part of the directive, rendering it virtually ineffective. The little progress that had been made on

[63] Labour Party, *October 1974 Election Manifesto: Britain Will Win with Labour* (Labour 1974)
[64] Worthy (n 51) 2.
[65] ibid 3.
[66] Vincent (n 4) 260. However, it is important to exercise caution when relying on quantitative indicators to measure transparency. The statistical data does not provide insight into the quality of the information, nor is it possible to determine whether this information would have been released without the Directive. Indeed, Hansard debates indicate that it is 'not possible to distinguish documents published as a result of the Croham directive from those which would have been published in any event'. See Hansard vol 981 (24 March 1980) col 387.

garnering support within Parliament for a statutory FOI law was lost, as Thatcher objected to a US-style FOI Act, arguing that it would be 'inappropriate'.[67]

Historian David Vincent, an expert on official secrecy, deemed the Croham directive 'almost a complete failure'.[68] This failure can be attributed, at least in part, to the limitations of voluntary disclosure. Voluntary disclosure mechanisms lack legislative teeth and can be vulnerable to political change, as it is easier for a political party against openness to introduce changes to limit the efficacy of non-statutory instruments. They are not subject to the same level of scrutiny as statutory instruments.[69]

The 1980s were an interesting decade for open government in the UK. Whilst on one hand, there appeared to be a resurgence in official secrecy under the Thatcher-led government, there was also increasing public and political support for FOI.[70] Shortly before the 1979 Parliament dissolved, Labour MP Clement Freud had introduced the first FOI bill as a private members' bill. Though the bill was ultimately unsuccessful, it did receive widespread support among Parliament and the press, which carried over into the next decade. In 1984, the Campaign for

[67] Worthy (n 51) 3. In his keynote address at the June 2018 Edinburgh University FOI conference, Patrick Birkinshaw pointed out that Thatcher had received advice from then US President Ronald Reagan, counselling her to avoid enacting FOI legislation, suggesting a clear opposition to FOI from the political right.
[68] Vincent (n 4) 260.
[69] I will return to the discussion on voluntary versus statutory disclosure in Chapter 7 when I evaluate the potential mechanisms for extending FOI obligations to private bodies.
[70] The 'S*pycatcher* case' is one prominent example, concerning the publication of a book written by former MI5 officer Peter Wright. In writing the book about his time at MI5, Wright was in breach of the OSA 1911, and the government sought an injunction to stop the *Sunday Times* from publish excerpts in 1987. The House of Lords held that whilst government officials have a lifelong obligation of confidentiality, the government must also demonstrate that disclosure would harm the public interest. See *Attorney General v Observer Ltd and others* [1988] UKHL 6; Peter Cane, *Administrative Law* (5th edn, OUP 2011).

Freedom of Information (CFOI) was established with the aim of lobbying for FOI legislation.[71]

Meanwhile, there were also some significant legislative developments. The Data Protection Act 1984 (DPA) gave greater protections to individual privacy by regulating the use and storage of personal data. This was a noteworthy development in that it recognised that individuals have personal data rights, and the scope of the DPA extended to private, as well as public bodies.[72] However, as Birkinshaw has cautioned, this should not necessarily be interpreted as a sign that the UK government of the time was demonstrating a commitment to personal privacy.[73] He argued that the 1984 Act was 'forced' on the government by the 'realities of international commerce'.[74] The 1981 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data was a Council of Europe (CoE) treaty, signed and ratified by the UK, and provided the legal basis for the DPA. The DPA was necessary for the UK to engage in commerce with other countries that had adopted similar standards regarding the use of personal data. In other words, the enactment of data protection legislation was not primarily driven by an understanding of personal privacy as a right, but rather by the need to fulfil regional legal obligations.

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[71] The CFOI was closely involved with the writing of draft FOI bills and consultation reports. It remains active and has campaigned for legislative reform, notably on the extension of FOIA to private contractors. Their website is available at <https://www.cfoi.org.uk> accessed 28 September 2019.
[72] DPA 1984, s 5.
[73] Birkinshaw, 'Open Government – Local Government Style' (1988) 3 PubPolAdmin 46. See also Angela Daly, *Private Power, Online Information Flows and EU Law: Mind the Gap* (Hart 2016) 34 for discussion on the 'hybrid nature' of EU data protection legislation in simultaneously supporting fundamental rights and free trade.
[74] Birkinshaw (n 73) 46.

The Local Government (Access to Information) Act 1985, on the other hand, was a domestic open government reform, albeit one that focused on local, rather than central government. The Act applied to England, Wales, and Scotland. It opened up all council, committee, and sub-committee meetings to the press and the public, and it gave the public the right to view agenda and background reports.[75] In this way, it was an important development in open government, but the Act suffered from some significant limitations. Notably, the Act included 15 categories of exempted information, including business and financial information.[76] The power to decide whether to disclose or withhold information was given to local authorities, as they had discretion to appoint a 'proper officer' to make this determination.

When evaluating the efficacy of the 1985 Act, Birkinshaw observed that it did not appear to have been 'unduly burdensome' for local authorities to implement.[77] However, he also argued that it had done little to enhance public participation in local government. There had been little publicity surrounding the Act, so awareness and use was low. Moreover, local authorities were allowed to charge for information, though in practice the extent to which they did so varied. As Birkinshaw argued at the time, the charges effectively acted as a 'tax on information', one that disproportionately affected poorer citizens.[78] There were also inconsistencies in implementation among local authorities. Birkinshaw's evaluation showed that although some local authorities demonstrated high

[75] S 1, 100B – 100D.
[76] Birkinshaw (n 73).
[77] ibid 50.
[78] ibid 51.

compliance with the Act, others appeared to lack the motivation and will necessary for effective implementation.

The limitations of the 1985 Act (as well as the limitations of the 1960 Act discussed previously) illustrate an interesting paradox in open government in the UK. At the same time that local government was becoming more open to the public, local authorities were also losing many of their responsibilities through centralisation, privatisation, and the formation of public-private partnerships. However, transparency requirements were usually not extended to include these additional bodies, and, as above, the government maintained its opposition to FOI legislation.

The foundation for the UK's current ATI framework was laid during the 1990s. As I will explain later in this chapter, this includes the introduction of the right to access environmental information. This coincided with the growing recognition that 'open government is part of an effective democracy', as stated in the opening paragraph of the 1993 White Paper *Open Government*.[79] This statement was one of the first times that the government explicitly recognised the link between open government and democracy in a policy document, though it was quickly followed by the assertion that governments 'need to keep some secrets, and have a duty to protect the proper privacy of those with whom they deal'.[80]

The White Paper also revealed the competing aims of the open government movement. On one hand, increased openness was presented as a means to improve democratic functioning. However, many of the arguments made and the examples used in the White Paper are in fact more compatible with the consumerist vision

[79] *Open Government* (Cm 2290, 1993) para 1.1.
[80] ibid para 1.1.

for access to information. This point will become clearer in the following subsection when I discuss the Citizen's Charter initiative, though it is important to raise it here to demonstrate that the discourse on open government became entwined with the promotion of consumer choice under the Conservative-led government during the early 1990s.

Unlike the Public Bodies (Admission to Meetings) Act 1960 and the Local Government (Access to Information) Act 1985, the White Paper proposed extending open government obligations to central government. It pledged to provide 'timely and accessible' information to citizens to explain government decision-making and to restrict access 'only when there are good reasons for doing so'.[81] However, it must be stressed that the increased openness promised by the White Paper was designed to emulate a statutory FOI regime 'without the legal complexities such regimes entail'.[82] In other words, its open government reforms were presented as alternatives to FOI legislation, on the grounds that a statutory regime would introduce unwanted (and unspecified) complexities.

As with the earlier local government reforms, the White Paper recognised that 'unnecessary secrecy' was a problem, but focused its critique on secrecy within public services, rather than official secrecy.[83] This is an example of the way in which the democratic ethos surrounding open government in the UK was captured and repackaged as a tool to facilitate consumer choice, rather than to support democratic engagement. It is what Irma Sandoval-Ballesteros would call

[81] ibid para 1.7.
[82] ibid para 1.8.
[83] ibid para 2.3.

'bureaucratic transparency…with the purpose of improving control, surveillance, and the establishment of a so-called culture of legality among citizens and public employees'.[84] Whilst ostensibly the White Paper promoted the democracy-enhancing aims of open government, it presented public services as being unnecessarily secretive at the same time that it rejected legally enforceable transparency obligations for central government.

The 1994 Code of Practice on Access to Official Information arose out of the *Open Government* White Paper, with an updated Code of Practice introduced in February 1997.[85] The non-statutory Code was designed to support the government's policy of extending access to information. The types of information included facts and analysis 'which the Government consider(ed) relevant and important';[86] rules and internal guidance to help the public understand departmental action; and, in accordance with the Citizen's Charter, information about the operation of public services, such as costs, management, and redress procedures.

The Code applied to the civil service and to associated public bodies under the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman).[87] The Code also applied to functions performed by contractors on behalf of government departments or public bodies covered by the Code.[88]

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[84] Irma E Sandoval-Ballesteros, 'Rethinking Accountability and Transparency: Breaking the Public Sector Bias in Mexico' (2014) 29 Am U Int'l LREv 399, 415.
[85] The 1997 Code of Practice was generally perceived as 'more positive' as it made clear the principle that information should be disclosed, unless it could be shown that disclosure would not be in the public interest. See House of Commons Library, *The Code of Practice on Access to Official Information* (Research Paper 97/69, 1997) 9.
[86] Code of Practice on Access to Official Information, part 1, s 3(i).
[87] As listed in Schedule 2 of the Parliamentary Commissioner Act 1967.
[88] HC Library (n 85) 9-10.

Information requesters who believed their requests had not been handled properly were to make a complaint to the department or body in the first instance. They could also complain if they believed that unreasonable charges had been applied to the request, as the departments were allowed to set their own policies for charging for information requests.[89] If a requester was not satisfied with the outcome of the internal complaints procedure, they could appeal to the Ombudsman. However, this complaint had to be made through their MP as there was no direct right of appeal under the Code of Practice.

Whilst the Code did make progress in making certain types of information available, it suffered from some major limitations, and, ultimately, did not live up to its promise. First, the Code was non-statutory and did not confer a legally enforceable right of information.[90] Thus, it fell short of what the campaign groups and the Labour Party had advocated, and it did not reflect what was happening in other mature and emerging democracies, many of which already had ATI legislation in place or were nearing enactment.[91]

Second, the information covered by the Code was limited, and the government maintained the power to determine which facts and analyses it deemed important to release. It would typically not release information to the public until after policies were announced, thus limiting the scope for participatory governance.

[89] Code of Practice on Access to Official Information, Part 1, s 1.
[90] Birkinshaw (n 4) 239.
[91] Birkinshaw (n 4) 239 remarked that the Code of Practice was an unusual development in the sense that he was unaware of any other country that had introduced FOI, but not through a legally enforceable (either through the courts or a tribunal) mechanism.

Indeed, the Code appeared to be designed to allow the public to scrutinise policy, but not fully participate in the decision-making process.

Beyond these limitations in design, the Code of Practice suffered from challenges of implementation. Public awareness of the Code, and of the PCA in general, was low, perhaps due to the fact that the government did not undertake any paid advertising when the Code was introduced.[92] Whilst on paper the statistics appear promising (2,493 requests were made in 1994, increasing to 4,863 in 1999), it is understood that many of the requests were made by a core group of users.[93] Moreover, the number of complaints to the Ombudsman remained comparatively low, suggesting that either the requesters were satisfied with the responses, or that the lack of a direct right of appeal hindered the complaints process.

The campaign for a legally enforceable right of access to information gained traction during this time, in large part as a response to the Matrix Churchill 'arms to Iraq' scandal and the subsequent inquiry by Sir Richard Scott. In 1992, three directors of the engineering firm Matrix Churchill were prosecuted for the illegal sale of defence equipment to Iraq.[94] Though the firm had obtained the necessary export licenses, the prosecution argued that it had deliberately provided false information, concealing the true nature of the goods, in order to do so. The directors defended the charge, claiming that the government had been aware of the nature of the equipment at the time. During the trial, it was discovered that Alan Clark, the former Minister for Defence Procurement, did indeed have

[92] Feintuck (n 4) 349.
[93] David Wilkinson, 'Open Government: The Development of Policy in the United Kingdom in the 1990s' in Andrew McDonald and Greg Terrill (eds) *Open Government: Freedom of Information and Privacy* (Macmillan 1998) 16-17.
[94] Feintuck (n 4) 352.

knowledge of the equipment and had advised Matrix Churchill to emphasise the non-defence uses of the equipment, though he knew full well that it could be used for military purposes.[95]

This discovery led to the collapse of the trial.[96] In response, Prime Minister Major ordered an independent judicial inquiry, headed by Sir Richard Scott, which, inter alia, highlighted the problem of government secrecy.[97] Scott found that there had been a deliberate failure to inform Parliament of the government policy on the illegal sale of arms to Iraq.[98] Junior ministers had taken the decision to withhold information from Parliament and the public, ostensibly to protect the UK's foreign policy and trade interests. The ministers had signed public interest immunity (PII) certificates, which allowed the government to prevent certain documents from being used as evidence in the trial, and argued that it was their duty to claim immunity.[99] Gabriele Ganz later remarked that the use of PII certificates in an attempt to hide the government's actions was the 'worst aspect of the affair'.[100]

Scott concluded that the ministers had feared public reaction to the information, in particular criticism over the human rights implications of selling military equipment to Iraq. He held that the public should have been able to access the information in order to engage in democratic debate.[101] The Scott inquiry reignited the debates over whether FOI legislation was necessary in the UK. In his report,

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[95] ibid 354.
[96] Gabriele Ganz, '*Matrix Churchill* and Public Interest Immunity' (1993) 56 MLR 564. See also House of Commons Library, *The Scott Inquiry: Approaching Publication* (Research Paper 96/16, 1996).
[97] Birkinshaw (n 4) 162.
[98] Vernon Bogdanor, 'Freedom of Information: The Constitutional Aspects' in Andrew McDonald and Greg Terrill (eds) *Open Government: Freedom of Information and Privacy* (MacMillan 1998).
[99] Ganz (n 96) 565-566.
[100] ibid 568.
[101] Bogdanor (n 98) 9.

however, Scott did not provide his views on FOI legislation as he did not consider it within his remit to do so. For some, this was a missed opportunity, and the lack of strong recommendation for FOI legislation in the Scott report was disappointing.[102] As Adam Tomkins observed, a modern FOI law would not have prevented the scandal, but it could have made it easier identify the government's failings and hold officials to account.[103]

This was significant turning point in the history of open government in the UK, as the problems of official secrecy were magnified and demand for FOI legislation grew. However, no plans were made until 1997, when the Labour Party came to power for the first time since 1979. The party set outs its proposals for a statutory right of access to information in the White Paper *Your Right to Know: The Government's Proposals for a Freedom of Information Act*.[104] The FOI proposal was part of Labour's wider programme of constitutional reform and plans to 'modernise British politics'.[105] This included the decentralisation of power through devolution and the establishment of the Scottish Parliament and the Welsh Assembly, as well as the enactment of the Human Rights Act 1998 (HRA), which incorporated the European Convention on Human Rights (ECHR) into UK law.

The White Paper framed the proposed FOI Act as an antidote to excessive government secrecy.[106] It identified the perception of secrecy in government as having a negative impact on public confidence, thus the stated aim of the FOI Act

[102] Adam Tomkins, *The Constitution after Scott: Government Unwrapped* (Clarendon 1998) 125.
[103] ibid 126.
[104] Cm 3818 (n 5).
[105] ibid preface by Tony Blair.
[106] ibid para 1.1.

was 'to encourage more open and accountable government by establishing a general statutory right of access to official records and information'.[107]

Your Right to Know was openly critical of the previous Conservative government's open government reforms, claiming that 'the last government conspicuously failed' to introduce a 'statutory guarantee of openness'.[108] In particular, the Code of Practice was derided for being non-statutory and limited in scope. The White Paper acknowledged that the Labour government could have 'scored an early legislative achievement' by making the existing Code of Practice statutory.[109] However, they felt that this would not fulfil their commitment to open government and opted instead to perform a 'root and branch examination' of the existing ATI framework first.[110] Whilst this would be a longer process, it was one that the Labour Party argued would lead to a stronger and more sustainable FOI regime.

The government pledged in the White Paper that the FOI Act would, inter alia, apply to current and historic records; be overseen by an independent Information Commissioner; and include a 'simple' system for protecting sensitive information.[111] Significantly, the White Paper promised that the Act would apply 'across central government departments and their agencies, to local authorities, and to many thousands of public bodies and the NHS, *as well as to privatised industries and other private bodies that carry out statutory functions*' (emphasis added).[112] The public utilities were also to be included within the scope of the FOI

[107] ibid para 1.2.
[108] ibid para 1.5.
[109] ibid para 1.6.
[110] ibid para 1.6.
[111] ibid para 1.7.
[112] ibid para 1.7.

Act and 'FOI provisions' were to be applied to information regarding contracted out services, with the precise terms set out in the contracts between public authorities and contractors.[113]

However, when the draft bill was introduced in 1999, it was significantly different to what had been proposed. It faced criticism from scholars like Rodney Austin, who described it as 'a sheep in wolf's clothing'.[114] The bill appeared to be much weaker than what had been described in the White Paper. For example, the White Paper had proposed seven categories of exemptions, but the bill contained 24 exemptions.[115] The numbers themselves are not highly significant because the original seven categories were broad, but the range of exemptions was cause for concern. For example, whilst the White Paper had proposed an exemption to protect commercial confidentiality (ie trade secrets) this was later changed to an exemption to protect the commercial interests of any party.[116] Exemptions that had been introduced as being subject to a harm test (eg information supplied in confidence) had been replaced by absolute exemptions.

Perhaps most controversially, the bill introduced the power of ministerial veto. As a result, s 53 FOIA gives an accountable person, such as a minister, the power to issue a certificate overriding the decision of the Information Commissioner or tribunal. A similar provision was also introduced in FOISA, though to date it has

[113] ibid para 2.2.
[114] Rodney Austin, 'The Freedom of Information Act 2000 – A Sheep in Wolf's Clothing?' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th edn, OUP 2007).
[115] Select Committee on Draft FOI Bill (n 59).
[116] Cm 3818 (n 5) para 3.11.

not been used in Scotland.[117] I will return to the issue of the ministerial veto later in s. 2.3.1.5, during the discussion on the differences between FOIA and FOISA.

Some changes to the draft bill were made as the result of pre-legislative scrutiny in the House of Lords and the House of Commons. Notably, the enforcement powers of the Information Commissioners were strengthened. However, the exemptions remained unchanged. It is difficult to know precisely what happened between the publication of *Your Right to Know* and the introduction of the draft bill. Birkinshaw has suggested that the dramatic changes could have been the result of commercial lobbying and government restructuring that meant responsibility for FOI was transferred from Cabinet Office to the Home Office.[118] What is clear is that the original proposal of including the privatised utilities within the scope of FOIA did not go ahead.

Meanwhile, Scotland was in the process of developing its own FOI law.[119] As Jim Wallace explained, devolution had allowed the Scottish Executive to achieve 'the distinctive Freedom of Information regime…Scotland deserves'.[120] Like the *Open Government* and *Your Right to Know* White Papers, the Scottish consultation paper highlighted the importance of openness in a democratic society.

The proposed statutory provisions for FOISA were largely similar to FOIA (differences between the Acts are discussed in the following section). However, the policy memorandum that accompanied the draft FOISA bill included further information on the Scottish Executive's intentions for the extension of FOISA to

[117] FOISA, s 52.
[118] Birkinshaw (n 4) 301.
[119] Scottish Executive, *An Open Scotland: Freedom of Information* (SE/1999/51).
[120] ibid.

private bodies. It stated that the s 5 powers would be 'used to bring within the scope of FOI private companies involved in significant work of a public nature, for example private companies involved in major PFI contracts'.[121]

2.2.2 Consumer Choice and Access to Information

Whilst many of the open government reforms introduced during the second half of the 20th century were aimed at making central and local government more transparent and supporting public participation in governance, other reforms appear to have been motivated by rather different aims. Specifically, these reforms were designed to increase public access to information to facilitate consumer choice among the public services that had not been privatised. Though they often coincided with the democratic expansive reforms, the parallel development of choice-driven transparency reforms needs to be examined separately in order to make clear the differences in their aims.

Perhaps the most notable example of this in the UK is the Citizen's Charter programme. The programme, introduced by John Major in 1992, was part of a global phenomenon known as the New Public Management (NPM), which sought to transform the public sector through the introduction of private sector solutions.[122] The NPM philosophy takes as its starting point the assumption that

[121] Freedom of Information (Scotland) Bill Policy Memorandum, SP Bill 36-PM, Session 1 (2001), para 28. It is notable that Scotland's FOI proposals included an intention to extend FOISA to private companies involved in work of a public nature, whereas the 1997 White Paper expressed the intention to extend FOIA to private bodies performing 'statutory functions'.

[122] See eg Donald J Savoie, 'What is Wrong with the New Public Management?' (2006) 15 Research in Public Policy Analysis and Management 593; Christopher Hood, 'A Public Management for All Seasons?' (1992) 69 PubAdmin 104; Rodney Austin, 'Human Rights, the Private Sector, and New Public Management' (2008) 1 UCL HRRev 17; Laurence E Lynn, 'The New Public Management as an International Phenomenon: A Skeptical View' (2006) 15 Research in Public Policy Analysis and Management 573.

public services had been stifled by bureaucracy, leading to underperformance and were in need of improvement.[123] The solution, according to the NPM, lies in privatisation and contracting out services to the private sector. Where privatisation was not possible, private sector management techniques were introduced into the public sector. The Citizen's Charter facilitated the transformation of the public sector, primarily through the introduction of greater competition and consumer choice to drive service improvement. As with the global charter movement, the Citizen's Charter was aimed at altering the relationship between service providers and service users, empowering users to choose between providers and requiring operational transparency among providers to facilitate choice.[124]

The Citizen's Charter White Paper began with the simple, yet telling statement: '(a)ll public services are paid for by individual citizens, either directly or through their taxes'.[125] *Individual citizens* were thus presented as consumers in the marketplace of public services. Their relationship with the services was presented as transactional, something they pay for and receive with taxes, rather than existing for the common good.

The Charter outlined seven principles of public services: standards, openness, information, choice, non-discrimination, accessibility, and redress.[126] With regards to openness, the Charter stated 'there should be no secrecy about how public services are run, how much they cost, who is in charge, and whether or not they

[123] *Citizen's Charter* (Cm 1599, 1991).
[124] Gavin Drewry, 'Citizen's Charters: Service Quality Chameleons' (2005) 7 PubManRev 321, 323.
[125] Cm 1599 (n 123) 4.
[126] ibid 5.

are meeting their standards'.[127] Regarding information, the Charter stated, 'full, accurate information should be readily available, in plain language, about what services are being provided'.[128] It also encouraged the publication of information on service targets 'in comparable form, so that there is a pressure to emulate the best'.[129]

The Charter made an explicit link between information rights and public services. However, the right to information in this context was not presented as a collective, democratic right or as a fundamental human right, but rather as an individual consumer right.[130] Significantly, the Charter did not confer a legally enforceable right of access to information generally. Instead, it focused on narrow forms of information, selected by government officials, eg service targets, comparative data in health services, and school performance data. The purpose of the increased access to information was to enable citizens to compare data between services and exercise choice in a marketplace of public services.

The *Open Government* White Paper, whilst acknowledging the democratic principles underpinning access to information, also furthered the narrative on consumer choice and access to information.[131] As discussed in the previous section, the White Paper made some mention of official secrecy within central government, but it was largely focused on secrecy within public services, which it suggested had been used to 'cover up failures or mismanagement'.[132] Though Birkinshaw

[127] ibid 5.
[128] ibid 5.
[129] ibid 5.
[130] This point is developed further in Chapter Three.
[131] Cm 2290 (n 79).
[132] ibid para 2.62.

observed that the White Paper was evidence that the 'government had become convinced that "open government is part of an effective democracy,"' much of the document was actually devoted to presenting open government as a solution to the perceived failures of public services and local government.[133]

Furthermore, the White Paper argued that privatisation had resulted in greater transparency.[134] It explained that the new forms of regulation in the privatised utilities had led to greater openness not only for the utilities companies but for the regulators themselves, and claimed that privatisation in the water industry had 'greatly increased' environmental monitoring and information.[135] Without access to the data on which the White Paper based these claims, it is impossible to assess their accuracy, but it can be reiterated that access to performance data or other indicators set by the regulators is distinct from a general right of access to information.

This reveals a significant tension in the relationship between privatisation and access to information. On the one hand, privatisation can be viewed as a threat to information rights insofar as it limits the scope of ATI laws or other transparency mechanisms designed to apply to public authorities (indeed, this is the claim that this thesis has set out to investigate). On the other hand, as the next section will discuss, privatisation and transparency are not necessarily incompatible. In fact, procedural mechanisms like ATI laws can be used to facilitate, rather than challenge privatisation and marketisation.

[133] Birkinshaw (n 4) 238.
[134] Cm 2290 (n 79) para 2.5.
[135] ibid para 2.53.

2.2.3 The Development of the Right to Environmental Information

The right to environmental information links human rights with the protection of the environment. The recognition of a procedural right to environmental information emerged in the early 1990s. The 1992 Rio Declaration on Environment and Development (hereafter, 'Rio Declaration') was drafted at the UN Conference on Environment and Development, which aimed to bring member states together to cooperate on sustainable development. Based on the principle that the protection of the environment is the responsibility of all, the right to environmental information emerged as a means of supporting public participation in environmental governance.[136] Principle 10 of the Rio Declaration stated that all individuals 'shall have appropriate access to information concerning the environment that is held by public authorities'.[137] Though the Rio Declaration was not a legally binding instrument, it played a significant role in establishing the principle of environmental information disclosure as means to support environmental protection.

Around the same time, the UN Economic Commission for Europe (UNECE) launched the Environment for Europe initiative to promote environmental cooperation across Europe.[138] The Soviet Union had recently collapsed in 1991, and eastern European countries were undergoing a period of transition and integration. As Michael Mason has explained, this context is significant because UNECE's moves to facilitate environmental cooperation need to be understood as

[136] Principle 10, Rio Declaration on Environment and Development (1992).
[137] ibid. The principle was reaffirmed at the United Nations Conference on Sustainable Development ('Rio+20') in Rio de Janeiro, Brazil, in June 2012.
[138] Michael Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10 GlobalEnvtlPol 10.

part of its broader efforts to support democratic expansion in eastern Europe.[139] The tradition of social welfare among the former Soviet countries perhaps helps to explain the rights-based approach to environmental protection. But, at the same time, the emphasis on procedural, rather than substantive environmental rights is consistent with the transition to market economies and the western privileging of civil and political rights over social and economic rights.[140] Viewed in this way, the focus on environmental transparency is a sort of compromise in that it recognises the right to a healthy environment, but limits the positive, substantive obligations on states.[141]

In June 1998, UNECE held its Fourth Ministerial Conference as part of the Environment for Europe programme in Aarhus, Denmark.[142] At the conference, member states adopted the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly known as the Aarhus Convention.

2.2.3.1 The Aarhus Convention

The Aarhus Convention came into force on 30 October, 2001. It contains three pillars: the right of everyone to receive environmental information that is held by public authorities, the right to participate in environmental decision-making, and

[139] ibid 12-13.
[140] ibid 13.
[141] Ludwig Krämer offered a slightly different perspective. He explained that the CoE did initially consider whether it would be possible to establish a 'human right to a clean and healthy environment'. However, officials determined that a substantive right would be impossible due to differing legal cultures and practices across Europe and instead turned their attentions towards procedural environmental rights. See Ludwig Krämer, 'Transnational Access to Environmental Information' (2012) 1 TransEnvtlL 95.
[142] European Commission, 'The Aarhus Convention' <https://ec.europa.eu/environment/aarhus/index.htm> accessed 26 September 2019.

the right to review and challenge public decisions made without respecting environmental law.[143] The first pillar – access to environmental information – is the most relevant for the purposes of this thesis and is the subject of the discussion here.

The Aarhus Convention states that every person has the right 'to live in an environment adequate to his or her health and well-being'.[144] Public access to environmental information is presented as a necessary precondition for the protection of this right. This is because improved access to information is said to increase public awareness of environmental issues, provide stakeholders with the up-to-date information they need to make decisions, and allow consumers to make informed environmental choices.[145]

The Convention requires public authorities to make environmental information available to the public within the framework set out under national legislation.[146] The Convention defines 'public authorities' broadly to include not only government bodies, but also 'natural or legal persons performing public administrative functions under national law'[147] as well as persons 'having public responsibilities or functions, or providing public services, in relation to the environment' *and* under control of a public authority.[148] The Convention itself does not make any mention of privatisation, but the accompanying Implementation Guide explains that the broad definition was drafted in acknowledgement that privatisation has

[143] UNECE, *Aarhus Convention: An Implementation Guide* (2nd edn, UNECE 2014) 17.
[144] Art 1.
[145] Aarhus Convention, Preamble.
[146] Aarhus Convention, art 4(1).
[147] Aarhus Convention, art 2(2)(b).
[148] Aarhus Convention, Article 2(2)(c)

made defining 'public authorities' more difficult.[149] It states that the 'Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice'.[150]

In other words, the Aarhus Convention has adopted an apparently broad definition of 'public authority' in order to capture the wide range of bodies now responsible for public service provision. It does not, however, apply to private bodies' private activities. On one hand, the Aarhus Convention was transformative in that it made clear link between environmental rights and the right to information. This coincided with the recognition in the UK of a general right to information (*Your Right to Know*), though, of course, FOIA and FOISA had not yet been enacted. On the other hand, Mason has cautioned that the extension of transparency obligations to private bodies that carry out public functions is not a challenge to privatisation.[151] Instead, 'information disclosure by governmental and private actors is market-correcting rather than market-transforming: it is seen as reducing the incidence of environmental externalities by rectifying information deficits and asymmetries'.[152] Again, this demonstrates the conflicting motivations for information disclosure: transparency is presented as a means of supporting democratic engagement, whilst simultaneously being used to facilitate privatisation and marketisation. I will return to this critique in Chapter Three.

[149] UNECE (n 143) 46-47.
[150] ibid 46.
[151] Mason (n 138).
[152] ibid 13.

2.2.3.2 The Aarhus Convention and Domestic Law

The Aarhus Convention is the basis of European Directive 2003/4/EC on public access to environmental information.[153] The Directive requires member states to provide access to environmental information by responding to public requests for information and through active information disclosure. The Directive has applied since February 2003, and EU member states were required to incorporate it in national law by February 2005. In the UK, the Directive was implemented in domestic law by the EIR and EISR.

The EIR and the EISR will continue to apply after Brexit.[154] Though derived from European legislation, they have been implemented in domestic law and the UK has independently signed and ratified the Aarhus Convention. Therefore, unless the Regulations are repealed, they will continue to form part of the legal framework for ATI.

2.3 The Legal Framework for Access to Information

The aim of this section is to explain the operation of the UK's ATI laws: What information is covered? What is the procedure for accessing information? Under which circumstances can requests for information be refused? What systems of

[153] Directive 2003/4/EC repealed Council Directive 90/313/EEC and expanded the definitions of environmental information and public authorities.
[154] See eg ICO, 'Information Rights and Brexit Frequently Asked Questions' <https://ico.org.uk/for-organisations/data-protection-and-brexit/information-rights-and-brexit-frequently-asked-questions> accessed 30 November 2019; Susan Wolf, 'The EU Withdrawal Act 2018: What Does it Mean for Information Rights Practitioners?' (*Act Now Training*, 1 August 2018) <https://actnowtraining.wordpress.com/2018/08/01/the-eu-withdrawal-act-2018-what-does-it-mean-for-information-rights-practitioners> accessed 1 December 2019.

redress are available? How can FOIA and FOISA be extended to additional bodies? And what are the roles of the Information Commissioners?

FOIA covers information held by public authorities in England, Wales, and Northern Ireland, as well as by UK-wide public authorities operating in Scotland, such as the BBC. FOISA covers information held by Scottish public authorities. Likewise, the EIR apply to environmental information held by public bodies in England, Wales, and Northern Ireland, whilst the EISR cover information held by Scottish public authorities. Because there are many similarities between FOIA and FOISA, and between the EIR and the EISR, I have chosen not to devote a separate section to each. Instead, the discussion refers to FOIA and the EIR. Where the Scottish legislation diverges in approach or scope, this is highlighted in the following section. Where I have not pointed out differences between the Scottish legislation and the rest of the UK, it can be assumed that there is no significant difference between the Acts or Regulations.

2.3.1 Freedom of Information

FOIA came into force on 1 January 2005 and confers, for the first time, a general right of access to information held by public authorities.[155] Public authorities are listed in Schedule 1 of the Act and can also include bodies designed as public authorities under s 5 or publicly-owned companies defined by s 6.[156] The Act requires public authorities to provide information in two main ways. The first is by responding to requests for information (the following section explains this

[155] Freedom of Information Act 2000, s 1.
[156] FOIA, s 3(1).

process).[157] The second is through the active disclosure of certain types of information, as set out in a public authority's mandatory publication scheme.[158] The publication schemes must be approved by the ICO and list the types of information that a public authority will make routinely available, such as financial information, meeting minutes, and annual reports.[159]

The publication scheme requirement is significant for two reasons. First, it helps to explain why there was a significant delay from enactment to the time the Act came into force. This was designed to allow public authorities to 'acclimatize to the new culture' created by FOIA and to develop their publication schemes.[160] Second, it means that public authorities have transparency requirements under FOIA beyond responding to individual requests for information. Whilst the publication schemes tell the public what types of information they can expect to routinely receive, it does not replace the need to respond to requests for information as it would be impossible for any organisation to anticipate what types of information people might want to see. This is related to the earlier discussion on voluntary disclosure, as the types of information that public authorities might choose to make available are not necessarily the same types of information that would be sought through individual requests.

2.3.1.1 Making and Responding to FOI Requests

The second way FOIA requires public authorities to make information available is through responding to information requests. Requests can be made by anyone,

[157] FOIA, s 8.
[158] FOIA, s 19.
[159] Information Commissioner's Office, *The Guide to Freedom of Information* (ICO 2017) 13.
[160] Patrick Birkinshaw, 'Freedom of Information and Its Impact in the United Kingdom' (2010) 27 GIQ 312.

including commercial companies, and there is no requirement to be a UK citizen or even resident in the UK.[161] Requests must be made in writing, and requesters need to provide a name and correspondence address, but do not need to provide a reason for the request.[162] In fact, there is no need for requesters to cite the legislation or specify that they are making a request under FOIA, which means that any written request for information to a public authority could potentially be considered a FOI request and processed accordingly.

Public authorities must respond to FOI requests within 20 business days.[163] FOIA requires public authorities to confirm whether they hold the requested information, and, if the information is held, to provide it unless it is covered by a specific exemption. In addition to the exemptions listed in the following section (2.3.1.2), there are some circumstances in which public authorities can refuse requests. For example, if the cost of the providing the information would 'exceed the appropriate limit'.[164] The current financial thresholds are £600 for central government, Parliament, and the armed forces, and £450 for all other public authorities.[165] If the cost of compliance is estimated to exceed this limit, then public authorities can charge a fee for the request. However, there are no charges for information requests under FOIA generally.

[161] FOIA, s (1)(b) requires that applicants provide their name and address for correspondence, but does not require further proof of identity or residence status. See also ICO, *Considerations of the Identity or Motivations of the Applicant* (ICO 2015).
[162] FOIA, s 8(1).
[163] FOIA, s 10(1).
[164] FOIA, s 12.
[165] ICO (n 159) 34.

Additionally, public authorities are not obliged to comply with requests that are deemed vexatious, or with repeated requests from the same applicant.[166] 'Vexatious' is not defined within the legislation, the meaning was clarified in *Information Commissioner v Devon County Council & Dransfield*.[167] In that case, the Upper Tribunal concluded that vexatious is the 'manifestly unjustified, inappropriate or improper use of a formal procedure'.[168] The ICO has produced further guidance for public authorities in determining whether a request meets this threshold.[169]

When refusing a request for information, public authorities must provide requesters with a written notice stating the decision, the specific exemption that applies, and why the exemption has been applied.[170] The notice should also include details of the authority's complaints process.[171]

2.3.1.2 Exemptions under FOIA

FOIA contains 24 categories of exempted information, listed in Part II of the Act. The table on the next page summarises the exemptions. Absolute exemptions are marked with an asterisk (*).

[166] FOIA, s 14.
[167] *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC).
[168] ibid [27].
[169] Information Commissioner's Office, *Dealing with Vexatious Requests (section 14*) (ICO 2015).
[170] FOIA, s 17(1).
[171] FOIA, s 17(7).

s 21	Information accessible to applicant by other means*
s 22	Information intended for future publication
s 23	Information supplied by, or relating to, bodies dealing with security matters*
s 24	National security
s 25	Certificates under ss.23 and 24: supplementary provisions
s 26	Defence
s 27	International relations
s 28	Relations within the UK
s 29	The economy
s 30	Investigations and proceedings conducted by public authorities
s 31	Law enforcement
s 32	Court records, etc.*
s 33	Audit functions
s 34	Parliamentary privilege*
s 35	Formulations of government policy, etc.
s 36	Prejudice to effective conduct of public affairs
s 37	Communications with Her Majesty, etc. and honours
s 38	Health and safety
s 39	Environmental information
s 40	Personal information*
s 41	Information provided in confidence*
s 42	Legal professional privilege
s 43	Commercial interests
s 44	Prohibitions on disclosure*

Figure 2.1 List of FOIA exemptions

Exemptions are either qualified or absolute. If an exemption is absolute, a public authority can automatically decide to withhold the information without giving consideration to the public interest. However, if an exemption is qualified, then the public authority must carry out a balancing exercise, commonly referred to as

the 'public interest test' to determine whether the public interest lies in maintaining the exemption or in disclosing the information.[172]

The exemptions lists under FOIA and FOISA are largely similar, but there are some significant examples. For example, under FOIA, the s 36 and s 43 are subject to a 'harm test'. In other words, a public authority can withhold information under s 36 if it would, on the balance of probabilities, prejudice the effective conduct of public affairs. However, under the similar provision in FOISA, public authorities must demonstrate that disclosure would 'substantially prejudice' the effective conduct of public affairs.[173]

Similarly, the s 22 exemption under FOIA allows public authorities to withhold information if it plans to publish it at a future date. However, the 'future date', is undefined, meaning that public authorities can ostensibly hold information for as long as they deem necessary, leaving information requesters with legal recourse. By contrast, s 27(1) FOISA only allows public authorities to withhold information if they plan to publish it within the next 12 weeks and only if it is 'reasonable' to delay disclosure until the planned publication date. The implications of these differences in exemptions will be discussed further in Chapters Five and Six.

2.3.1.3 Freedom of Information and the Public Interest

The legislation does not define the 'public interest' as it is understood that the public interest can change over time and, often, there are multiple, competing public interests that need to be considered. Again, public authorities can refer to

[172] FOIA, s 2.
[173] FOISA, s 30.

the guidance produced by the ICO in carrying out the public interest test.[174] There is a general public interest in transparency to support accountability and to scrutinise the decisions taken by public authorities. This general public interest will always be a factor in favour of disclosure. Additionally, depending on the circumstances of a particular request, there might also be public interest in the issue or the information itself.[175]

However, the public interest does not mean anything that might be of interest to the public.[176] At times, the public interest might lie in withholding information, usually when disclosure would harm the public interest in some way. For example, s 36 – prejudice to the effective conduct of public affairs – is a qualified exemption. Public officials sometimes need space to exchange advice or views when making decisions. Disclosure, or releasing information earlier than intended, could harm the decision-making process if it hinders their ability to exchange advice. This, in turn, could negatively affect the public interest. Likewise, the efficient use of public resources and funds is in the public interest. Therefore, it can be argued that the s 43 exemption could be justified in the public interest if disclosure would prejudice the commercial interests of a public authority. In both examples, the onus is on the public authority to consider the arguments for and against disclosure and to demonstrate whether disclosure would, or would be likely to, harm the public interest.

[174] Information Commissioner's Office, *The Public Interest Test* (ICO 2016).
[175] ibid 12.
[176] ibid 6.

2.3.1.4 Complaints and Appeals

The ICO oversees the enforcement of FOIA.[177] However, if an information requester is not satisfied with the way their request has been handled, they are encouraged in the first instance to resolve the issue directly with the public authority. The legislation does not place an obligation on public authorities to have an internal complaints process, but the ICO recommends it as good practice (and has reported that the majority of authorities have chosen to do so).[178] If the requester is not satisfied with the outcome of the internal review, they can make a complaint to the ICO.

The ICO will first consider whether the complaint can be resolved informally between the requester and the public authority. If not, it will begin an investigation, considering information submitted by both parties. Upon completion, the ICO will issue a legally binding decision notice.[179] The notice will state whether the public authority acted in compliance with FOIA, and, if not, outline the next steps it should take. This will likely involve disclosing the information within 35 calendar days, unless the authority intends to appeal. Non-compliance with an ICO decision notice is contempt of court and punishable by fine.

In the event that either the requester or the public authority is not satisfied with the ICO's decision, they have the right to appeal to the First-tier Tribunal (Information Rights).[180] The appeal should normally be lodged within 28 days of

[177] FOIA, s 50.
[178] ICO (n 159) 57.
[179] ibid 61.
[180] FOIA, s 57. The process is different in Scotland, as explained in the following section.

the decision notice being issued, though complainants can ask for more time to appeal. If the Tribunal finds that the ICO has not correctly applied the law, it will overturn the decision and issue a substitute decision notice.[181] Particularly complex cases can be transferred to the Upper Tribunal (Administrative Appeals Chamber), which also hears appeals against the First-tier Tribunal. In England and Wales, the Court of Appeal hears appeals against decisions of the Upper Tribunal.

However, the appeals process in Scotland is significantly different. The complaints procedures are largely unchanged, though there is a requirement under the Scottish legislation for public authorities to have an internal review system in place for refused requests.[182] If a requester is not satisfied with the outcome of the review, they can make a complaint to the OSIC.[183] If the requester does not believe that the Commissioner has applied the law correctly, they can appeal to the Court of Session. Complaints can also be made to the Scottish Public Services Ombudsman (SPSO), though these will usually regard (for example) the service provided by the OSIC, rather than matters that should be handled by the courts.

The distinction between the two systems is significant because the tribunals will review the merits of the complaint, whereas the Court of Session can only adjudicate on a point of law. On the one hand, this gives the OSIC greater authority as its decision is final and the volume of appeals is lower. Whilst this means that the ICO must allocate more resources to handling appeals than the

[181] FOIA, s 58(1).
[182] FOISA, s 20.
[183] FOISA, s 47.

OSIC, it also means that requesters to Scottish public authorities potentially face greater barriers in accessing justice. Whereas the information rights tribunal is free, the applications to the Court of Session require a fee.[184] Future empirical research in this area is needed to evaluate whether and/or the differential fee structures affect access to justice.

2.3.1.5 Ministerial Veto

As discussed earlier in section 2.2, FOIA and FOISA controversially include executive veto powers. Under FOIA, an accountable person, such as a government Minister, has the power to issue a certificate overriding the decision of the Information Commissioner or tribunal.[185] Under FOISA, the First Minister, in consultation with the Scottish government, has the power to override a Commissioner decision.[186] The controversial veto power has never been used in Scotland, but it was used by Westminster seven times during the first 10 years of FOIA operation,[187] including during the high-profile *Evans* case.[188]

After *Evans*, the Independent Commission on Freedom of Information, investigated, inter alia, whether the executive should have veto power over the

[184] The Court of Session etc. Fees Order 2018.
[185] FOIA, s 53.
[186] FOISA, s 52.
[187] McCullagh (n 45) 68.
[188] *R (Evans) v Attorney-General* [2015] UKSC 21 concerned the release of correspondence written by Prince Charles to government Ministers. The case involved the question of whether it had been lawful for the Attorney General to use the s 53 veto powers to overturn the Upper Tribunal's order to release the letters to Mr. Evans, a journalist. The majority concluded that it had not been lawful. For further analysis, see eg Mark Elliott, 'A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture' [2015] PL 539; Robert Craig, 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' (2016) 79 MLR 166.

release of information.[189] The Commission found that the ministerial veto was in keeping with the legislative intention of the Act, but recommended a narrower veto to limit its application. As a result, the government can only use the veto after an Information Commissioner decision.

2.3.1.6 Extending the Scope of FOI Legislation

It is possible to extend FOIA and FOISA under the provisions set out under s 5 of each Act. Additional bodies may be designated as public authorities for FOI purposes if they appear to ministers to 'exercise functions of a public nature'[190] or provide 'under a contract made with a public authority any service whose provision is a function of that authority'.[191] The Acts require a stakeholder consultation to be undertaken prior to making a designation order.[192]

As discussed in Chapter One, the s 5 powers have been used with greater frequency in Scotland than in the rest of the UK. The scope of FOISA has been expanded under s 5 to include arm's length culture and leisure services, privately managed prisons, independent special schools, grant-aided schools, providers of secure accommodation for children, Scottish Health Innovations Ltd (SHIL), and registered social landlords (RSLs).[193] Each of these designations has been made during or after 2013, which is the same year that FOISA was amended to introduce

[189] Independent Commission on Freedom of Information, (March 2016) Available <https://www.gov.uk/government/publications/independent-commission-on-freedom-of-information-report> last accessed 24 December 2019.
[190] FOIA, s 5(1)(a).
[191] FOIA, s 5(1)(b).
[192] FOIA, s 5(3).
[193] Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2013; Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016; Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019.

a reporting requirement for Scottish ministers to provide Parliament with bi-annual reports on the exercise of the s 5 powers.[194] Since 2013, ministers have been required to state whether the s 5 powers have been used during the reporting period, and, if not, explain their reasons for not exercising the powers.[195]

There is currently no such reporting requirement under FOIA, though the ICO recommended in 2019 that one be introduced.[196] The Commissioner argued that this would help facilitate the extension of FOIA to additional bodies delivering public services. Given the fact that FOISA has been extended on three occasions since bi-annual reporting was mandated, the ICO could very well be correct that this will support legislative extension. However, it cannot be ruled out that Scotland's reporting requirement and legislative extension are both indicative of greater political will to expand the scope of FOISA, and that introducing a reporting requirement under FOIA will not necessarily guarantee greater use of the s 5 powers in the rest of the UK.

2.3.2 Access to Environmental Information

As with FOIA and FOISA, the EIR and EISR require public authorities to provide access to information in two ways: (1) through the active disclosure of certain types of environmental information[197] and (2) by responding to public requests for information.[198] Public authorities are not required to have a publication scheme, though Directive 2003/4/EC does require the routine publication of information

[194] FOISA, s 7A(1).
[195] FOISA, s 7A(4).
[196] Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law* (ICO 2019).
[197] Regulation 4.
[198] Regulation 5.

including policies, progress reports, and data derived from environmental monitoring activities.[199]

Requests for information under the EIR can be made verbally or in writing (in contrast to FOIA requests, which must be made in writing). Public authorities must respond to information requests within 20 working days,[200] unless an extension to 40 days can be justified.[201] Public authorities are permitted to charge requesters for making information available, as per Regulation 8.

2.3.2.1 EIR Exceptions

The exceptions to the duty to disclose information are listed in Regulation 12 of the EIR and Regulation 10 of the EISR. Additionally, public authorities do not have a duty to disclose personal data to applicants who are not the subject of the data request.[202] The public interest test must be applied when deciding whether to apply an exception under Regulation 12(4) or 12(5).[203] The full text of each exception is as follows:

> 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
>
> (a) it does not hold that information when an applicant's request is received;
> (b) the request for information is manifestly unreasonable;
> (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
> (e) the request involves the disclosure of internal communications.

[199] Directive 2003/4/EC, Article 7(2).
[200] Regulation 5(2).
[201] Regulation 7(1).
[202] EIR 13; EISR 11.
[203] Or the similar provisions under the EISR, 10(4) and 10(5). See Information Commissioner's Office, *How Exceptions and the Public Interest Test Work in the Environmental Information Regulations* (ICO 2016).

12(5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;
(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
(c) intellectual property rights;
(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
(f) the interests of the person who provided the information where that person –
    (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
    (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
    (iii) has not consented to its disclosure; or
(g) the protection of the environment to which the information relates.

According to Regulation 2(2), the presumption must be in favour of disclosure, unless a public authority can demonstrate the information falls under Regulation 12(4) or would have an adverse effect as set out under Regulation 12(5). The term 'adverse effect' is understood similarly to 'prejudice' in FOIA, but the test for determining what this means is different.[204] To demonstrate that disclosure would have an 'adverse effect', four elements must be met: (1) the effect must be 'adverse;' (2) refusal to disclose is limited to the extent of the adverse effect; (3) it must be shown that disclosure would have an adverse effect. It is not sufficient to claim that disclosure might have an adverse effect; (4) where it can be shown that disclosure would have an adverse effect, it must still be demonstrated that the

[204] The threshold test for determining 'adverse effect' was developed in *Benjamin Arthur v Information Commissioner and Salisbury District Council* (EA/2006/0037) 9 March 2007.

public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test under the EIR and EISR is largely similar to the process under FOIA and FOISA. Again, it is understood that there is a general public interest in transparency and accountability to support good governance. Additionally, there is public interest in sustainable development and ensuring that environmental resources are managed properly.[205] However, there is also a public interest in maintaining exceptions in some circumstances, for example when withholding information is necessary to provide space for policy-making.

The distinguishing feature of the EIR, as compared with FOIA, is the high threshold for determining whether disclosure would have an adverse effect. When conducting the public interest test under the EIR, additional weight is given to the likelihood and the severity of the adverse effect.[206] It is not sufficient to claim that disclosure would be likely to cause harm, as is the case under some FOIA exemptions (eg s 36 and s 43). Another significant difference between the EIR and FOI is that the EIR trump other laws.[207] In other words, legislation that would prevent a public authority from disclosing information does not apply. Under FOI, information is exempt from disclosure if it is prohibited by other laws.[208]

[205] Information Commissioner's Office, *How Exceptions and the Public Interest Test Work in the Environmental Information Regulations* (ICO 2016) 12.
[206] ibid 23-24.
[207] Regulation 5(6) states, 'Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply'.
[208] FOIA, s 44; FOISA, s 26.

2.3.2.2 A Functional Approach to Coverage

As explained in Chapter One, the scope of the EIR and EISR is apparently broader than the scope of FOIA and FOISA, as it has adopted a 'functional approach' to coverage. They apply to all bodies that are defined as public authorities for the purposes of the FOI Acts. In addition, Regulation 2(2) sets out the following definition of 'public authority':

> Subject to (3), "public authority" means –
>
> (a) government departments;
> (b) any other public authority as defined in section 3(1) of the Freedom of Information Act (the Act) disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
> (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified descriptions;
> (ii) any person designated by Order under section 5 of the Act;
> (c) any other body or person, that carries out functions of public administration; or
> (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and -
> (i) has public responsibilities relating to the environment;
> (ii) exercises functions of a public nature relating to the environment; or
> (iii) provides public services relating to the environment.

Regulations 2(2)(c) and 2(2)(d) require further explanation. For EIR purposes, entities are considered to be performing functions of public administration if they have been given 'special legal powers to carry out services of public interest'.[209] The test is not based on the nature of the organisation's function, but rather on the legal powers conferred on the organisation to carry out the function(s). 'Services of public interest' are not defined.[210] Private bodies that have been given

[209] Information Commissioner's Office, *Public Authorities under the EIR* (ICO 2016) 5; Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others* [2013].
[210] ICO (n 209) 6.

special legal powers have additional powers beyond those normally permitted by private law.

'Special legal powers' include, inter alia, compulsory purchasing, access to and use of private property, the power to create new laws and criminal sanctions, as well as the holding of advisory roles (eg if an organisation has the ability to formally advise public authorities).[211] And though it is not a 'power' as such, amenability to judicial review can also indicate that a body is carrying out a function of public administration.

With regards to Regulation 2(2)(d), organisations will be considered public authorities for EIR purposes if they are 'under control of another public authority and have public responsibilities, exercise functions of a public nature, or provide a public service relating to the environment'.[212] This explanation raises some important questions, specifically regarding what 'control' means in this context and what constitutes a 'function of a public nature'. For EIR purposes, 'control' is interpreted narrowly, meaning that the functions an organisation performs must be directly controlled by another public authority. Regulation alone is not considered to be 'under control'.[213]

'Functions of a public nature' are not defined by the EIR. The ICO advises that the term should be 'looked at in the context of the bodies' activities'.[214] The phrase 'relating to the environment' is also unclear, though the ICO advises that this should be interpreted broadly to mean functions that have an effect on the

[211] ibid 8.
[212] ibid 9.
[213] ibid 9.
[214] ibid 10.

environment, regardless of whether the function was performed specifically for 'environmental purposes'.[215] This leaves room for interpretation, which, perhaps unsurprisingly, has led to uncertainty and disagreement. I will return to this point in Chapter Five in the discussion of the *Smartsource* and *Fish Legal* judgments.[216]

2.3.2.3 Complaints and Appeals

Requesters may complain if they believe that a public authority has not dealt with their request properly.[217] Under the EIR and EISR, this is known as 'making representations'. Complaints must be made in writing, normally no more than 40 days after the response has been received.[218]

In the first instance, public authorities will carry out an internal review to determine whether they have acted in compliance with the Regulations. After receiving representations, the public authority has 20 working days to carry out the review and communicate the outcome to the requester. If the requester is not satisfied with the outcome of the internal review, they may appeal to the ICO (or OSIC, if applicable). The ICO and OSIC follow largely the same procedures for investigating complaints under the EIR and EISR as they do with FOIA and FOISA.[219] Appeals against a Commissioner's decision will be heard by the relevant tribunal (England and Wales) or the Court of Session (Scotland).

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[215] ibid 10.
[216] *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC); *Fish Legal v Information Commissioner* [2015] UKUT 0052; *Fish Legal v Information Commissioner* (C-279/12).
[217] EIR 11(1); EISR 16(1).
[218] EIR 11(2); EISR 16(2).
[219] Information Commissioner's Office, *The Guide to the Environmental Information Regulations* (ICO 2017); OSIC, *Handling Requests for Environmental Information* (OSIC 2019).

2.3.3 The Role of the Information Commissioners

The Information Commissioner and the Scottish Information Commissioner are independent public officials, appointed for a period of up to six years each.[220] The Information Commissioner is nominated by the Department for Digital, Culture, Media and Sport (DCMS), which is the sponsoring body of the ICO in government. The Scottish Information Commissioner is nominated by the Scottish Parliament, which funds the position and the OSIC.

As discussed in the previous section, the role of the Information Commissioner involves monitoring and enforcing compliance with legislation. This includes FOIA and the EIR as well as the Data Protection Act 2018 (DPA), the EU General Data Protection Regulation (GDPR), the eIDAS Regulation, the NIS Regulation, and the INSPIRE Regulations.[221] The remit of the Scottish Information Commissioner is much narrower, with responsibility only for FOISA and the EISR. This is due to historical arrangements. Data protection legislation in the UK was first introduced in 1984, and responsibility has not been devolved. However, the ICO does have an office in Edinburgh, which deals with, inter alia, data protection in Scotland.[222]

In addition to the enforcement powers, both Information Commissioners and their offices have responsibility for training and advising public authorities on best practice. This includes overseeing and approving the adoption of publication schemes. In recent years, the OSIC staff have begun to deliver outreach training

[220] FOIA, s 47; FOISA, s 42.
[221] ICO, 'Legislation we Cover' <https://ico.org.uk/about-the-ico/what-we-do/legislation-we-cover> accessed 2 December 2019.
[222] The ICO also has regulatory power over UK public authorities based in Scotland, including BBC Scotland and the Northern Lighthouse Board.

throughout Scotland through its roadshows.[223] The roadshows were designed to meet the needs of public authorities throughout the country (ie beyond the heavily populated Central Belt) and provide the opportunity for entire organisations to receive training, rather than sending one or two representatives to a training. The ICO is unable to provide the same level of outreach due to geography and the volume of public authorities, but handles enquiries from public authorities to support compliance.

The Commissioners also have the authority to suggest additional bodies for designation, though power to designate additional bodies ultimately lies with ministers. The Commissioners and their staff, however, will conduct research and make reports setting out their recommendations, including the recent reports to Parliament on the extension of FOIA and FOISA to additional bodies delivering public services.[224]

2.4 Conclusion

This chapter has examined the origins and current structure of ATI legislation in the UK. Throughout the chapter, there are two key points that I have tried to emphasise. First, the UK's current legal framework for ATI has been shaped by several factors, including EU law, devolution, and political disagreements over the need for a legal right to know. This helps explain why the UK has developed a relatively complex system for providing access to official information. One result of this complexity is that the scope of the EIR and the EISR is apparently wider

[223] Focus group interview with OSIC staff (St Andrews, 8 November 2016).
[224] Office of the Scottish Information Commissioner, *FOI 10 Years On: Are the Right Organisations Covered?* (OSIC 2015); ICO (n 196).

than the scope of FOIA and FOISA. Therefore, this research project has been designed to examine how privatisation affects access to environmental information, as well as the general right to information, through the two case studies.

Second, the chapter has demonstrated that open government in the UK has been motivated by multiple justifications, which have been shaped by historical and political context. Whilst FOIA and FOISA were introduced with the explicit aims of challenging excessive secrecy and supporting democratic engagement, other open government reforms (eg the Citizen's Charter) have emphasised the role of transparency in supporting individual consumer choice. In this way, the historical development of ATI legislation within the UK has mirrored developments in other parts of the world. ATI laws (and related transparency mechanisms) have been introduced with an emphasis on their democracy-enhancing aims, but, at the same time, have served a neoliberal function insofar as they have been used to support transitions to market-based economies and facilitate a consumerist vision of public services. This suggests that the relationship between privatisation and ATI is mutually reinforcing, which the following chapter on the conceptual underpinnings of ATI will explain in greater detail.

Chapter Three

Access to Information: A Conceptual Framework

> Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming.[1]

In delivering the judgment in *Kennedy v Charity Commission*, Lord Mance touched upon one of the central issues of this thesis: what is the purpose of access to information (ATI) legislation?[2] Answering this question is crucial in understanding what ATI legislation is for, why its scope has traditionally been confined to public authorities, and under which circumstances the extension of ATI legislation to private bodies can be justified.

Over the past thirty years, there has been a global 'explosion' in ATI laws,[3] which has been accompanied by ambitious claims about the importance of ATI legislation

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[1] *Kennedy v Charity Commission* [2014] UKSC 20 [1] (Mance LJ).

[2] By 'purpose' I am not referring here to stated objectives, but rather the overall reasons for ATI legislation, not only in the UK, but throughout the world. As explained in Chapter One, the UK's FOI laws do not have purpose clauses, but the UCL Constitution Unit has developed a list of six objectives, based on government reports and ministerial speeches. The six objectives are: increased openness and transparency, increased accountability, improved decision-making in government, better public understanding of government decision-making, increased participation, and increased public trust in government. In this chapter, I am examining the theoretical basis for these objectives, with particular emphasis on transparency. See Robert Hazell, Ben Worthy, and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan 2010).

[3] John M Ackerman and Irma E Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 AdminLRev 85. As the authors explain, only ten countries had ATI legislation in place in the mid-1980s. This number jumped to 66 in 2005, and, as of July 2019, 112 countries have enacted FOI legislation. See also David Banisar, 'Freedom of Information

in supporting transparency, accountability, and public participation.[4] Access to information is presented as the solution to a host of challenges, from corruption to climate change, and is frequently claimed to be a fundamental human right.[5] However, this 'romanticised' view fails to provide a rigorous critique of ATI legislation and its underpinning principles.[6] As the number of ATI laws and related transparency mechanisms increases, so do the questions about their purpose and impact, as well as the limits of transparency.

This chapter aims to clear up the 'conceptual confusion' surrounding ATI by analysing three common justifications that have been made in support of ATI.[7] These are the consumerist, human rights, and democratic-expansive approaches. In doing so, the chapter builds on the historical analysis presented in the previous chapter, but where Chapter Two focused on the 'what' of ATI legislation within the UK, this chapter examines the 'why' of ATI legislation generally and the global transparency movement.

The chapter is divided into five sections. The first clarifies what is meant by 'transparency' and explains its relationship to freedom of information. The

around the World: A Global Survey of Access to Government Information Laws' (Privacy International 2006); Gregory Michener, 'FOI Laws around the World' (2011) 22 JDemocracy 145.

[4] See eg Colin Darch and Peter G Underwood, *Freedom of Information and the Developing World: The Citizen, the State, and Models of Openness* (Chandos 2010); David E Pozen and Michael Schudson, *Troubling Transparency: The History and Future of Freedom of Information* (ColumUP 2018); Irma E Sandoval Ballesteros, 'Rethinking Accountability and Transparency: Breaking the Public Sector Bias in Mexico' (2014) 29 AmUIntlLRev 399.

[5] See eg Patrick Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights?' 58 AdminLRev (2006) 177; Maeve McDonagh, 'The Right to Information in International Human Rights Law' 13 HRLRev 25; Cheryl Ann Bishop, *Access to Information as a Human Right* (LFB Publishing 2012); Toby Mendel, 'Freedom of Information as an Internationally Protected Human Right' <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> accessed 16 August 2019.

[6] Pozen and Schudson (n 4) 5.

[7] Carol Harlow, 'Freedom of Information and Transparency as Administrative and Constitutional Rights' (1999) 2 CYELS 285.

following three sections examine each of the theoretical justifications for access to information in turn. The chapter concludes by setting out a case for the democratic-expansive approach and arguing that it can be applied to private actors delivering public services.

3.1 Shedding Light on Transparency

Elizabeth Fisher once observed that 'transparency is a scholar's worst nightmare'.[8] That is to say that transparency remains under-theorised by scholars, whilst simultaneously being invoked by, inter alia, politicians, policymakers, international financial institutions (IFIs), and human rights groups as a sort of panacea for a broad range of political and social challenges. Transparency is demanded in personal relationships, financial transactions, political campaigns, and government operations, to give just a few examples.[9] However, there is little consensus on what transparency is meant to achieve, or even what it is.[10]

This lack of clarity has two main consequences. First, efforts to conduct empirical research on transparency and freedom of information have been hindered by the lack of a clear operational definition for transparency.[11] Second, as Mark Fenster has argued, ATI laws have failed to meet expectations when they rely on assumptions about the meaning and scope of transparency.[12] This can lead to a

[8] Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 CLP 272, 274.
[9] Pozen and Schudson (n 4) 5. See also Andrea Bianchi and Anne Peters, *Transparency in International Law* (CUP 2013); Mark Fenster, 'The Opacity of Transparency' (2006) 91 Iowa LRev 885.
[10] See eg Clare Birchall, 'Transparency, Interrupted: Secrets of the Left' (2011) 28 Theory Culture and Society 60; Christopher Hood, 'Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?' (2010) 33 WestEuroPol 989; Harlow (n 7).
[11] Richard Calland and Kristina Bentley, 'The Impact and Effectiveness of Accountability and Transparency Initiatives: Freedom of Information' (2013) 31 DevPolRev 69.
[12] Fenster (n 9) 885.

sense that ATI legislation is not working and a loss of institutional confidence. For these reasons, it is necessary to define transparency at the outset of any discussion on the subject.

Broadly defined, transparency is 'the conduct of business in a fashion that makes decisions, rules and other information visible from outside'.[13] Similarly, Amitai Etzioni defined it as 'the principle of enabling the public to gain information about the operations and structures of a given entity'.[14] Or, as Hazell, Worthy, and Glover put it, transparency is a mechanism that 'allows individuals to find out what is happening inside government'.[15] Each three of these similar definitions presents transparency as a way of making internal processes visible to outsiders.

Building on these technical definitions, transparency is positioned as the opposite of opacity or secrecy. It is often illustrated through a variety of evocative metaphors, such as 'lifting the veil', or, to paraphrase United States Supreme Court Justice Louis Brandeis, 'letting the sunlight in'.[16] According to Brandeis, transparency ('sunlight') is a means of countering the social or industrial ills associated with secrecy, such as corruption. Both metaphors suggest that something that was once hidden in darkness or under a veil has now been opened up to public scrutiny.

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[13] Hood (n 10) 989.
[14] Amitai Etzioni, 'Is Transparency the Best Disinfectant?' (2010) 18 JPolPhil 389.
[15] Hazell, Worthy, and Glover (n 2) 88. The authors specifically referred to government transparency in their study on the impact of FOIA and central government in the UK. The removal of the word 'government' in this definition could be used to broaden the definition to refer to transparency in a general sense.
[16] Louis Brandeis, 'What Publicity Can Do' in *Other People's Money and How Bankers Use It* (first published 1914, Seven Treasures Publications 2009). Brandeis wrote: 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman'.

But perhaps these metaphors, illustrative as they might be, are too simplistic to explain what transparency actually is, and what is has the potential to achieve.[17] As Fisher has argued, they suggest that transparency involves little more than allowing the public to view information or processes that were once closed to them. This obscures the fact that transparency requires resources, infrastructure, and the conscious decision to allow (or not allow) information to be made public.

Taking this into account, the definition of transparency that I find most fitting is Fisher's: 'the decision to make visible, or to provide access to, the resources on which an exercise of public or private power may be based'.[18] This definition recognises that transparency is an active, negotiated practice that has the potential to alter the relationship between information holders and information recipients. It is not a matter of simply 'lifting a veil' or opening curtains to allow in sunlight. Real transparency requires a commitment to making information accessible, with the knowledge that this has the potential to transfer power from the information holder to the recipient.

The 'transfer of power' is an important component of transparency that is often left out of the general definitions, but it needs to be explicitly addressed if one is to understand the intended purpose(s) of transparency. Transparency makes the power exercised by institutions visible to the public.[19] Any discussion of transparency is, by extension, a discussion of power and whether and how it is shared through access to information. Seen through this lens, information is a

[17] Fisher (n 8) 278.
[18] ibid 274.
[19] ibid 275.

resource, and the decision to make this resource visible and accessible through the implementation of transparency mechanisms is inherently a decision to relinquish some control through power-sharing.

3.1.1 Transparency and Accountability

However, transparency on its own is generally not sufficient to alter the power dynamic between information holder and recipient.[20] Instead, its potential to disrupt the status quo is due to its relationship with another good governance value, accountability.[21] As Christopher Hood has explained, transparency is often used to complement or support accountability - 'the duty of an individual or organisation to answer in some way about how they have conducted their affairs'.[22] Accountability typically requires access to information on how affairs have been conducted or decisions have been made. Though transparency can exist and has value outside of its role in supporting accountability, it is frequently understood as a necessary precursor to accountability, and the two values are often presented as two sides of the same coin.

There is, however, a growing body of literature that is critical of the relationship between transparency and accountability, in particular the argument that increased transparency will lead to greater accountability.[23] In fact, there is some evidence that ATI laws and associated transparency mechanisms might actually have a 'chilling effect', whereby public officials engage in 'off the record' forms of

[20] Jonathan Klaaren, 'The Human Right to Information and Transparency' in Anne Peters and Andrea Bianchi (eds) *Transparency in International Law* (CUP 2013) 221.
[21] Hood (n 10). See also Hazell, Worthy, and Glover (n 2).
[22] Hood (n 10) 989.
[23] See eg Jonathan Fox, 'The Uncertain Relationship between Transparency and Accountability' (2007) 17 Development in Practice 663; NG Jayal, 'New Directions in Theorising Social Accountability' (2007) 38 IDS Bulletin 105.

communication in order to avoid scrutiny.[24] This has the effect of reducing available information and making it more difficult to hold officials to account.

In addition, although transparency does often support accountability, it has uses beyond this function. For example, the right to access personal data can support self-actualisation (see section 3.3.2.1 for further discussion). It is not always about holding public officials to account. In summary, transparency has the power to alter the relationship between citizen and state when it is used to hold officials to account, though this is not its only use, nor is it the only way that transparency can be valuable.

3.1.2 Transparency and Freedom of Information

Transparency and freedom of information enjoy a close relationship, but they are not synonymous. Transparency is a much broader term, as the definitions above have indicated, that refers to the entire process of making internal processes and decision-making visible. Transparency mechanisms include a range of laws and guidelines, including food labelling standards, financial reporting obligations, and campaign contribution disclosure. Freedom of information (the principle, rather than the law) specifically refers to public access to information, in whatever form it is held.

Perhaps more importantly, transparency is a political and social theory. It goes well beyond the 'humdrum world of administrative laws'[25] (eg FOI legislation) and

[24] Fenster (n 9) 922; This is admittedly a 'contentious' claim and there is little evidence to suggest that FOIA and FOISA have directly contributed to a chilling effect in the UK. See Judith Townend, 'Freedom of Expression and the Chilling Effect' in Howard Tumber and Silvio Waisbord (eds), *The Routledge Companion to Media and Human Rights* (Routledge 2017).
[25] Mark Fenster, 'Transparency in Search of a Theory' (2015) 18 EurJSocTheory 150, 151.

is more than a more 'fashionable' word for openness.[26] Alongside public participation and accountability, it is part of a triad of 'good governance' values that are now expected of public institutions and public officials.[27] ATI laws are used to enhance transparency, but the purpose of transparency itself is harder to articulate and is frequently overstated. It is therefore not surprising that over the past decade, transparency has gone from an apparently 'superior' principle to a concept in need of rigorous critique.[28]

3.1.3 Critiquing Transparency and Freedom of Information

In May 2018, US President Donald Trump declared 'I was the most transparent – and am – transparent president in history'.[29] The veracity of this claim notwithstanding, it is notable because it demonstrates the extent to which transparency has become embedded in political discourse, though sometimes used as little more than a buzzword. Transparency is presented is an 'unalloyed good'.[30] Very few people in the public eye would admit to being against transparency, as the implication would be that they are pro-secrecy. However, there is a growing body of literature that takes a critical look at transparency and freedom of

[26] Harlow (n 7) 285.
[27] Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 EJIL 187.
[28] Fisher (n 8) 276.
[29] Donald Trump, Remarks by President Trump before Marine One Departure, 24 May 2018 <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-44> accessed 3 August 2019. The remarks to reporters were in response to questions about the investigation by Special Counsel Robert Mueller regarding alleged interference by Russia in the 2016 US Presidential elections and Trump's involvement. The speech followed an 18 April, 2018 tweet in which Trump wrote, 'I allowed White House Counsel Don McGahn, and all other requested members of the White House Staff, to fully cooperate with the Special Counsel. In addition we readily gave over one million pages of documents. Most transparent in history. No Collusion, No Obstruction. Witch Hunt!'
[30] Pozen and Schudson (n 4) 5.

information.[31] These critiques range from the practical (eg compliance with ATI laws is expensive) to the philosophical (eg transparency threatens the separation of powers because statutory disclosure requirements impose unconstitutional demands on the executive branch).[32]

Transparency theory assumes that information disclosure will automatically lead to a more engaged and informed public, thereby enhancing democracy. As Fenster has explained, this assumption relies on a classic, linear model of communication.[33] The government holds information, it is compelled to release information through FOI laws or similar transparency mandates, and the public, upon receiving the information, 'will act in predictable, informed ways'.[34] However, the reality is far more complicated than this model suggests for several reasons.

First, the meaning and role of the state is not clear, a point that was raised in Chapter One during the discussion on privatisation. The modern bureaucratic state is sprawling, comprised of many governmental and quasi-governmental agencies. And, more importantly for the purposes of this thesis, the role of the private sector in performing 'government' functions and services has increased, blurring the distinction between the public and private spheres.[35] Thus,

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[31] See eg Fenster (n 9); Birchall (n 10); Pozen and Schudson (n 4); Sandoval-Ballesteros (n 4); David E Pozen, 'Transparency's Ideological Drift' (2018) 128 Yale LJ 100; Aarti Gupta, 'Transparency under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8 GlobalEnvtlPol 1.

[32] Fenster (n 9) 909. Here, Fenster is referring to an argument made by the late US Supreme Court Justice Antonin Scalia, who explained that government in the US is already designed to support institutional checks and balances. Scalia argued that the harms caused by additional transparency requirements (eg inefficiency, costs, hindrance to deliberation) outweigh the benefits, particularly as government oversight mechanisms already exist. For more, see Antonin Scalia, 'The Freedom of Information Act Has No Clothes' [1982] Regulation 14.

[33] Fenster (n 9) 914-915.

[34] ibid 914.

[35] I will discuss this point at length in the following chapter on the public-private distinction.

'information holders' are not only state or government agencies, but also include a wide range of private actors. However, the dominant model of transparency theory relies on traditional notions of the state and its role in social and economic life. It oversimplifies the role of government as 'information holder' and fails to take into account either the complexity of state institutions or the transformation of the state through privatisation.

Second, the concept of 'information' has been problematised by scholars from a wide range of disciplines, who have done the topic greater justice than I can within the scope of this chapter.[36] At the risk of oversimplifying, this critique is based on the argument that information is neither static nor neutral. Texts are open to interpretation. Statistics are vulnerable to manipulation. Information is shaped not only by its creator or holder, but by the media channels that disseminate information. As Fenster has explained, profit-driven media outlets have an incentive to focus on political scandals or ephemeral stories that generate revenue.[37] Though the mainstream media *can* contribute to a more informed public, the traditional channels through which information flows from state to society are not neutral. Therefore, it should not be assumed that more information will necessary lead to a more informed public or improve the quality of democratic debate.

[36] See eg Colin Crouch, *The Knowledge Corrupters: Hidden Consequences of the Financial Takeover of Public Life* (Polity 2015); Marshall McLuhan, *Understanding Media: The Extensions of Man* (MIT Press 1994, first published 1964); Eamon C Tewell, 'The Practice and Promise of Critical Information Literacy: Academic Librarians' Involvement in Critical Library Instruction' (2018) 79 College & Research Libraries 10.
[37] Fenster (n 9) 926.

Finally, the model assumes that the public is interested, eager to be informed, and will make use of the information to enhance democratic engagement.[38] Though very little empirical ATI research has been conducted to test this hypothesis, research from disciplines including psychology, information science, and education suggests that this does not reflect how people seek, process, and interpret information.[39] There are a wide range of factors, including ability, time, and interest that will affect whether people engage with and understand information. Furthermore, people do not behave as predictably or rationally as the model assumes. Receiving information does not mean that people will necessarily use the information to act in democracy-enhancing ways.[40]

As an extreme example, the existence of conspiracy theories indicates that at least some people will wilfully disregard available information and seek out or insist on the existence of secret information that supports their theories.[41] At a more pedestrian level, the act of choosing to read the *Guardian* over the *Telegraph* (or vice versa) demonstrates an active choice to be informed by specific newspapers that are consistent with one's existing beliefs. Both examples show that the public are not blank slates, eager to be informed, and only in need of additional information to fully engage in the democratic process.

These critiques of transparency are a necessary and expected response to the rapid diffusion of ATI laws that occurred throughout the world at the end of the 1990s

[38] ibid 928.
[39] See eg Lauren Smith, 'Information Literacy as a Tool to Support Political Participation' (2016) 40 LibInfoRes 14; Jessica Critten, 'Ideology and Critical Self-Reflection in Information Literacy Instruction' (2015) 9 CommInfoLit 145.
[40] Fenster (n 9) 928.
[41] ibid 931.

and 2000s. As the number of countries with transparency laws increases, so too does the body of literature in the emerging field of critical transparency studies. This is not to say that these critiques necessarily limit the potential of transparency laws, but critical analysis is necessary to help clarify their meaning and purpose. As the following section demonstrates, the broad 'right to information' has been simultaneously presented as a consumer right, a fundamental human right, and a collective, democratic right. In order to fully understand the relationship between privatisation and information rights, and to develop mechanisms for the preservation of information rights in privatised services, it is important to understand how these justifications developed.

3.2 Citizens or Consumers? : The Consumer Right to Information

As explained in Chapter Two, the provision of information has been at the heart of public service reforms like the Citizen's Charter, in which the public were promised increased information about the operation of public services in a bid to drive improvement.[42] This argument has its roots in public choice theory, which involves the application of economic theory to explain political and social behaviour.[43] It is based on the argument that individuals act in their own self-interest in the private marketplace. To do so effectively, they require information to avoid the hazards that can arise from asymmetries of information. Information asymmetries occur when one party in a (usually, contractual) relationship has more information than another. This leads to a power imbalance, which can

[42] See eg Anne Barron and Colin Scott, 'The Citizen's Charter Programme' (1992) 55 MLR 526; Gavin Drewry, 'Citizen's Charters: Service Quality Chameleons' (2005) 7 PubManRev 321; Chris Willett (ed), *Public Sector Reform & The Citizen's Charter* (Blackstone 1996).
[43] See eg Norman D Lewis, *Choice and the Legal Order: Rising above Politics* (Butterworths 1996).

contribute to market failure if the information holder uses it to exploit their position.

In other words, access to information is used to facilitate consumer choice. A classic example of this is a customer purchasing a used car. The seller of the car has more knowledge about the condition and quality of the car than the customer, and therefore has power over the customer in the marketplace. The more information the customer can obtain about the car, the more the customer can enhance their bargaining power. They are less likely to be taken advantage of by an unscrupulous salesperson, and more likely to make a sound purchase.

The Charter movement, driven by the broader New Public Management (NPM) phenomenon, was designed to introduce private sector management techniques and principles into public services.[44] It was based on the argument that public services were failing and in dire need of improvement. Privatisation was one such way the Conservative governments under John Major and Margaret Thatcher sought to improve services.[45] Where public services could not be privatised, private sector values such as choice and competition were introduced to create a marketplace of public services. By allowing the public to choose public service providers, the providers would be incentivised to become more competitive, and the service would improve through increased efficiency.[46]

[44] Drewry (n 42); Barron and Scott (n 42).
[45] Drewry (n 42); Andrew Gamble, 'Privatization, Thatcherism, and the British State' (1989) 16 JL&Society 1.
[46] Philip Rawlings and Chris Willett, 'Consumer Empowerment and the Citizen's Charter' in Willett (n 42) 25.

Access to information supports the so-called marketplace of public services by acting as a tool to facilitate choice.[47] If service users are to be consumers of public services, then, much like the hypothetical used car buyer, they will need information about the operation and performance of the service to make an informed choice. Without adequate information, the service provider would maintain its position of power, thus upholding an imperfect marketplace.

The Citizen's Charter was explicit when it set out the Conservative government's intentions for 'better information and more choice' to improve services, particularly within healthcare and education.[48] For example, general practitioners (GPs) were required to produce and distribute leaflets about the services available at their practice, and changing providers was to become easier, with clear information available to patients on how to change doctors.[49]

Within education, schools were required to report annually on the progress of pupils and publish the results achieved in schools. Beginning in 1991-92, schools, further education colleges, and sixth-form colleges were required to publish exam results, which would be aggregated into 'league tables' to facilitate comparisons between schools and colleges.[50] Similar data was collected on placements in higher and further education, as well as the destinations of graduates. In this context, the provision of information served three purposes: to assist parents in choosing

[47] Barron and Scott (n 42) 530.
[48] *The Citizen's Charter* (Cm 1599, 1991). Caveat: The Citizen's Charter was not and is not the only initiative to draw a link between access to information and improved public services. However, I have chosen to emphasise the Charter because the Major-ere open government reforms were an immediate precursor to FOIA and FOISA, and coincided with the introduction of the EIR.
[49] ibid 12.
[50] ibid 14.

between schools, to inform the public of the quality of education in a school, and to support the assessment of financial efficiency in schools.[51]

This consumerist vision has been critiqued for its conceptualisation of citizenship as an aggregation of individual, private interests.[52] In doing so, it sets up an adversarial 'us versus them' relationship between the public and public officials. The implicit assumption underpinning this vision is the belief that the public sector is inherently inefficient, but that it can be made more efficient through consumer choice and competition. Therefore, the consumerist vision is not concerned with establishing a *right* to information, but rather reflects a neoliberal understanding of public services and citizenship.

The Conservatives' consumerist vision was furthered during the 1990s and early 2000s as part of the Labour government's 'modernisation agenda'.[53] Catherine Needham has chronicled the transition from the post-war public service user as 'client' to the modern framing of citizen-consumers in a marketplace of public services.[54] Rather than reforming public services for the collective good, New Labour's modernisation plans emphasised the individual and furthered the narrative of consumerism.

[51] Barron and Scott (n 42) 530.
[52] Janet McLean, 'Public Functions Tests: Bringing back the State?' in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009).
[53] Catherine Needham, *The Reform of Public Services under New Labour: Narratives of Consumerism* (Palgrave 2007).
[54] ibid 78.

3.2.1 The Neoliberal Turn and Individual Consumer Choice

The UK experience needs to be understood within the context of neoliberalism, the economic doctrine that maintains that competition, private property rights, and free trade are the keys to individual and social prosperity.[55] Neoliberalism originated in the 1930s as a response to totalitarianism, as well as to the European focus on collective economic planning that emerged during the interwar period.[56] It grew in prominence as an economic and political philosophy after World War II and the infamous 1947 conference in Mont Pèlerin, Switzerland, which led to the establishment of the Mont Pèlerin Society.

The Mont Pèlerin Society was comprised of liberals with a commitment to individual freedom, as well as the free market principles of neoclassical economics.[57] The founding members, including Friedrich Hayek and Milton Friedman, were strongly opposed to Keynesian economics and the state interventionist policies that had emerged during the post-war reconstruction period. They believed that centralised state planning was politically biased and vulnerable to interference by special interest groups, such as trade unions.[58]

The first significant example of the neoliberal experiment in practice occurred in Chile after the military coup by Augusto Pinochet in 1973.[59] Chilean economists trained under Friedman at the University of Chicago (and largely funded by the

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[55] See eg David Harvey, *A Brief History of Neoliberalism* (OUP 2005); Philip Mirowski and Dieter Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (HarvUP 2009); Kean Birch and Vlad Mykhnenko, *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (Zed Books 2010).
[56] Birch and Mykhnenko (n 54) 2-3.
[57] Harvey (n 55) 20-21.
[58] ibid 21.
[59] Bob Jessop, 'From Hegemony to Crisis? The Continuing Ecological Dominance of Neoliberalism' in Birch and Mykhnenko (n 55) 171, 173.

US government) introduced a programme of liberalisation, deregulation, and privatisation. The economic and political regime change in Chile was achieved largely by force; the coup led to the installation of an authoritarian military dictatorship that lasted until 1990.[60]

However, the neoliberal turn in the US and the UK was accomplished through less violent, though nevertheless destabilising, methods. As David Harvey has explained, the public would not have consented to the concentration of wealth and power into the hands of the few if it had been presented in those terms.[61] Instead, the neoliberal policies introduced under the Reagan and Thatcher governments emphasised individual freedom. Capitalising on the civil rights and anti-war movements of the 1960s, proponents of neoliberalism appropriated anti-government sentiment and the push for personal freedom in order to drive forward their anti-interventionist economic policies.[62] In other words, the state was cast as the villain, encroaching on both civil liberties and corporate interests, which made it easier to introduce deregulation and flexible labour market policies.

In the US, the neoliberal turn ushered in the rise of the rise of the religious right and a neoconservative shift within the Republican Party, but events in the UK unfolded somewhat differently. The UK had developed an expansive welfare state after the Second World War, which by the 1960s was facing criticism that the 'bureaucratic ineptitude of the state' was interfering with individual freedom and liberty.[63] This, combined with the economic stagflation of the 1970s, contributed

[60] ibid.
[61] Harvey (n 55) 40.
[62] ibid 42.
[63] ibid 57.

to the widespread programme of privatisation discussed in Chapter One of this thesis.

Neoliberalism in the UK was characterised not only by the privatisation of state assets, but also by the erosion of the welfare state under the Thatcher-led Conservative government.[64] The sectors that could not be privatised, including the National Health Service (NHS), education, and social housing, were subject to restructuring. Perhaps the most prominent example of this transformation is the sell-off of public housing through the 'right to buy' scheme.[65] In order to fulfil the Conservatives' vision for a 'property-owning democracy', the scheme allowed social housing tenants to purchase their homes from local authorities, thus transferring capital from the state to private individuals.[66] Though many individuals benefited from the scheme, the consequences included a large reduction in available social housing and increased stigma surrounding council housing.[67]

Thus, as Irma Sandoval-Ballesteros has argued, 'neoliberalism should not be conceptualised as an economic project with political implications, but as a political project with economic implications'.[68] It effectively transforms the role of the state and the relationship between state and citizen, and transparency reforms like ATI laws have assisted with this transformation.[69] As discussed previously in section

[64] ibid 61.
[65] ibid 61.
[66] UK Conservative Party, *General Election Manifesto 1979* (Conservative Party 1979).
[67] It should be noted that both Scotland and Wales have recently abolished 'right to buy' through the Housing (Scotland) Act 2014 and the Abolition of the Right to Buy and Associated Rights (Wales) Act 2018.
[68] Irma E Sandoval-Ballesteros, 'Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico' in Pozen and Schudson (n 4) 291, 303.
[69] Gerry Rodan, 'Neoliberalism and Transparency: Political Versus Economic Liberalism' (2004) Murdoch University Asia Research Centre Working Paper 112.

3.2, increased access to information is used to facilitate consumer choice, which suggests that public services can be delivered like private goods. This is a dramatic departure from the view of public services as public, social goods and is in need of critique.

3.2.2 Consumer Choice: A Critique

The provision of information to facilitate choice in public services is problematic for several reasons. Fundamentally, public choice theory erroneously assumes that all human activity can be reduced to an 'aggregation of private preferences'.[70] It is based on the elevation of the individual as a self-interested actor over the collective interests of society. It assumes that transactions in the marketplace of public services can be likened to those in the private market, such as the purchase of a used car. However, public services are designed to support social goals, which can be in conflict with individual consumer rights.

One problem with the emphasis on consumer choice is that it assumes that performance data is more important to the public than other values.[71] For example, school league tables assume that parents will seek out the 'best', most highly ranked schools for their children. University league tables based on the projected earnings of graduates make the assumption that this is one of, if not the most important, factors taken into consideration when students decide where and what to study. However, this ignores factors like community and family ties,

[70] McLean (n 52). See also Martha Chamallas and Jennifer B Wiggins, *The Measure of Injury: Race, Gender, and Tort Law* (NYU Press 2010) 14 for a discussion on 'rational choice' within legal scholarship.
[71] Barron and Scott (n 42) 530.

location, and (for university students) interest in a subject, which are all important considerations when making educational decisions.

Relying on narrow performance data to construct league tables for auditing purposes is also questionable. It assumes that the public have the inclination, time, and skills to understand the data and use it to make informed decisions. It also leaves the decisions on which data to include to technocrats, who might not have experience of working in the fields they are auditing and will likely need to prioritise the collection and analysis of quantitative over qualitative indicators. As a result, the data presented in the tables is the data that the public get, but it might not be what they need or want to make decisions.

Moreover, the use of school performance data to drive educational improvement is particularly problematic because research indicates that children's educational performance is strongly correlated with their parents' socio-economic background.[72] Thus, the facilitation of school choice through increased access to information might not only fail to drive educational improvement, but also further entrench social inequalities. Societal issues that could be addressed through collective action (eg increased funding for schools) are reconceptualised as individual problems that can be remedied by more and better information.

The consumer choice model also assumes that the public can easily 'vote with their feet'.[73] That is, if they do not like the education their child is receiving at the local

[72] See eg R Bradley and R Corwyn, 'Socioeconomic Status and Child Development' (2002) 53 AnnRevPsych 371; J Brooks-Gunn and G Duncan, 'The Effects of Poverty on Children' (1997) 7 The Future of Children 55; C Laar and J Sidanius, 'Social Status and the Academic Achievement Gap: A Social Dominance Perspective' 4 SocPsychEd 235.
[73] Barron and Scott (n 42).

school, or they are not happy with their GP, they can easily move to another service provider. The reality is often very different. School places are often limited, which means that even if changing schools is desirable, it is not always possible. And even if it is possible, if an exodus of pupils (or service users in other contexts) leads to a reduction in funding, the remaining pupils (or service users) will likely be left with an increasingly deteriorating service, rather than one that is improving.

When increased information is used to support increased choice and competition in public services, it might result in increased transparency, but this is a limited form of transparency. It reflects a neoliberal understanding of transparency and should not be conflated with the human rights or the democratic-expansive justifications.

3.3 Is there a Human Right to Information?

At its first meeting in 1946, the United Nations (UN) General Assembly, proclaimed: '(f)reedom of information is a fundamental human right and is the touchstones of all the freedoms to which the United Nations is consecrated'.[74] Since then, the right to information has been recognised by a number of international and regional treaties and principles.[75] There is also a growing body of case law demonstrating that the courts and treaty bodies have begun to

[74] United Nations General Assembly, 14 December 1946, Resolution 59(1).
[75] Article 10 European Convention on Human Rights (ECHR); Article 19 International Covenant on Civil and Political Rights (ICCPR); Article 9 African Charter on Human and People's Rights (ACHPR); Article 13 American Convention on Human Rights (ACHR); Principle 10 Rio Declaration on Environment and Development (1992); United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

recognise the existence of a right to information, at least to the extent that it supports other fundamental rights.[76]

Nevertheless, there is still considerable debate over whether the right to information is in fact a human right. Whilst Toby Mendel has argued that 'the importance of freedom of information as a human right is beyond question',[77] other scholars are sceptical.[78] Colin Darch and Peter Underwood, for example, have questioned the circular arguments that are often made in support of a human rights-based approach to freedom of information.[79] They argue that the right to information claims are often made by appealing to the authority of Article 19 of the Universal Declaration of Human Rights (UDHR), despite the fact that the traditional interpretation of human rights treaties and instruments has been to recognise *negative* duties not to interfere with freedom of expression, rather than *positive* obligations on states to provide access to official information. Moreover, discussions on the theoretical basis for the right to information have been overlooked in the recent commentary on the case law and the recognition of a (limited) human right to information by the international and regional courts.

Taking this into consideration, this section has two main aims. The first is to examine the theoretical arguments on the human right to information. The second aim is to examine the extent to which the right to information has been recognised by the courts. This part is structured chronologically (rather than by state or

[76] See eg *Guerra and Others v Italy* [1998] ECHR 7; *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v Hungary* ECHR 14 April 2009; *Kenedi v Hungary* ECHR 26 May 2009; *Magyar Helsinki Bizottság v Hungary* [2016] ECHR 975.
[77] Mendel (n 5).
[78] See eg Darch and Underwood (n 4); Pozen and Schudson (n 4).
[79] Darch and Underwood (n 4) 127.

region) in order to emphasise the recent shift that has taken place towards the recognition of the right to information, particularly by the European Court of Human Rights (ECtHR).

3.3.1 Theorising a Human Right to Information

The human right to information is frequently positioned as an instrumental right, and, less frequently, as an intrinsic right.[80] Regarding the former, the right to information is usually understood as a corollary of the right to freedom of expression.[81] In other words, one requires access to information in order to be able to develop an opinion to be expressed.[82] The argument that the right to freedom of expression should encompass the right to information is based on the idea that information is essential in formulating views, creating knowledge, and developing evidence-based opinions.

However, as the following subsection on the relevant case law will explain, this theory is based on a somewhat expansive understanding of the right to freedom of expression. The classic liberal framing of the right to freedom of expression places a duty on states not to interfere with individuals' enjoyment of the right, but *does not* impose positive obligations to facilitate the exercise of the right, such as

[80] McDonagh (n 5).
[81] See eg, Jack Beatson and Yvonne Cripps (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (OUP 2000); Kimberli M Kelmor, 'Legal Formulations of a Human Right to Information: Defining a Global Consensus' (2016) 25 JInfoEthics 101; Juliana Zuluaga Madrid, 'Access to Environmental Information from Private Entities: A Rights-Based Approach' (2017) 26 RECIEL 38; Cheryl Bishop, 'Access to Information as a Human Right: Analysis of the United Nations Human Rights Committee Documents' (2006) International Communication Association Conference. In addition to the scholarly literature, ATI campaign and activist groups such as Article 19 and the Campaign for Freedom of Information have expressed this view. See <https://www.article19.org> accessed 12 December 2019; <https://www.cfoi.org.uk> accessed 12 December 2019.
[82] This argument is sometimes explicitly recognised in constitutions or in statutory ATI laws. For example, Article 16(2) of the Swiss Constitution (Bundesverfassung) states that 'every person has the right *to form*, express, or disseminate his or her opinions freely' (emphasis added).

information provision. Therefore, the traditional understanding of the right to freedom of expression focuses on the speaker or the disseminator of information. The state does not play an active role. The correlation of the right to freedom of expression with the right to information therefore requires a major shift in traditional thinking about the right to freedom of expression and the role of the state.

The right to information has also been connected with other fundamental rights, such as the right to private and family life or the right to a fair trial. The rationale is that the right to information should be recognised when it is necessary for the protection of fundamental rights. In Kenya, the right to information is enshrined as a constitutional right and even extends to private actors who are 'in possession of information which is of significant public interest due to its relation to the protection of human rights…or where the release of information may assist in exercising or protecting any rights'.[83] Here, access to information is not viewed as an intrinsic right, but rather valued for the instrumental role it plays in supporting other fundamental rights and freedoms.

But can an intrinsic right to information exist independently of its instrumental function? Scholars including Ann Florini and Maeve McDonagh have suggested that an intrinsic right to information should be recognised beyond the role in plays in supporting other fundamental rights. For Florini, information is strongly connected with power, and the right to information allows the public to challenge the power dynamic between citizen and the state.[84]

[83] Constitution of Kenya 2010, Art 35(1); Kenya Access to Information Act 2016.
[84] Ann Florini, *The Right to Know: Transparency for an Open World* (ColumUP 2007).

Unlike Florini, McDonagh is sceptical that the instrumental right to information and an intrinsic right to information can co-exist.[85] She has argued that there are two main benefits to classifying the right to information as an intrinsic, rather than an instrumental human right. First, by removing the need to connect the right to information with other rights, it would extend the right to information beyond the political domain and would strengthen the right to information in other contexts. Second, it would remove the unforeseen negative consequences of aligning the right to information with other rights. This point will become clearer in the following section, which explains that judicial recognition of the right to information has been often been contingent on factors like the identity of the information requester (eg the right to information under Article 10 has been recognised in cases involving journalists and others performing social watchdog functions). According to McDonagh, this would ensure that the right to information is enjoyed by all and not dependent on the identity of the information requester.

However, other scholars are cautious of framing the right to information as a human right at all. David Pozen and Michael Schudson are wary of the uncritical elevation of transparency and access to information as fundamental human rights. They have argued that although the exercise of human rights will likely require access to information in some cases, this does not mean that access to information is itself a human right.[86]

[85] McDonagh (n 5).
[86] Pozen and Schudson (n 4) 5.

Similarly, Fenster has made a case for a statutory, rather than a constitutional right to information'.[87] He explained that in the US, the decision not to frame access to information as a constitutional right was a strategic one, as a statutory right to information would be more likely to be accepted given the political and legal culture. Though constitutionalising the right to information in the US would have meant that it would have extended to more institutions (ie legislature and judiciary) and could not be overridden by statutory repeal, Fenster argued that this does not necessarily mean constitutional rights are better than statutory rights. In fact, statutes can be more flexible, and, in the US at least, the federal Freedom of Information Act (FOIA) is better known and understood than many constitutional guarantees. The point is that statutory rights of access are not necessarily inferior to constitutional or human rights to information, though the following section demonstrates that there is an increasing recognition of the right to information.

3.3.2 The Right to Information in Human Rights Law

All of the major human rights instruments and treaties recognise the right to freedom of expression, and most incorporate the right to information as part of this right, eg the European Convention on Human Rights (ECHR),[88] the International Covenant on Civil and Political Rights (ICCPR),[89] the American Convention on Human Rights (ACHR)[90] and the African Charter on Human and People's Rights (ACHPR).[91]

[87] Mark Fenster, 'FOIA as an Administrative Law' in Pozen and Schudson (n 4).
[88] Article 10 ECHR.
[89] Article 19 ICCPR.
[90] Article 13 ACHR.
[91] Article 9 ACHPR.

The 'right to receive' information is found in each of these four instruments.[92] The ICCPR and the ACHR also include the right to 'seek', information although, significantly, the ECHR and ACHPR do not. This is an important distinction because, as will be discussed in this section, the omission of the word 'seek' from the ECHR has been cited as one of the reasons not to recognise a positive obligation on states to provide information.[93] Interestingly, the first draft of the ECHR did in fact include the right to seek information, but it was later omitted from the final version.[94] Unfortunately, there is no record of why this decision was taken, but it is possible that the omission was deliberate, reflecting the liberal preference for negative rather than positive human rights.

3.3.2.1 The Right to Information: Traditional Interpretation

The 1987 *Leander v Sweden* judgment was the first to illustrate the traditional approach by the ECtHR on the right to information.[95] The applicant, a Swedish national, had made an unsuccessful application for a job at an army museum. During the employment application process, secret police files about the applicant's private life had been assessed to determine his suitability for the role. After being rejected for the role, the applicant requested his personal files from the Swedish Security Department, on the grounds that he should have the opportunity to review (and possibly refute) the information that had led to his

[92] The relevant text of each instrument is listed in Appendix C.
[93] For example, the Hungarian government argued in *Magyar Helsinki* (n 90, below) that it had not acted in violation of Article 10 in restricting information because Article 10 does not encompass a right to seek information.
[94] *Magyar Helsinki Bizottság v Hungary* [2016] ECHR 975, paras 45-46.
[95] *Leander v Sweden* [1987] 9 EHRR 433.

rejection. The Department denied the request, and the applicant complained that this was a violation of the right to receive information under Article 10 ECHR.

The ECtHR held that there had been no violation of the applicant's Article 10 rights because 'the right to freedom to receive information basically prohibits a Government from restricting that which others wish or may be willing to impart to him' and does not 'embody an obligation to impart such information'.[96] In other words, the ECtHR recognised that states have a negative obligation not to interfere with information that one party wishes to communicate to another, but not a positive obligation to provide information. This became known as the *Leander* principle.

The *Leander* principle was applied in subsequent cases, including *Gaskin v United Kingdom*[97] and *Guerra and Others v Italy*.[98] In *Gaskin*, the applicant sought information about his time in foster care. Again, the ECtHR held that there had been no violation of the applicant's Article 10 rights because the 'right to receive information' does not extend to a positive obligation on states to provide access to information.[99] However, the Court did find that there had been a violation of the applicant's Article 8 right to respect for private and family life.[100] In its judgment, the Court explained that the applicant and others with similar experiences of the care system have a 'vital interest' in receiving information that allows them to understand their childhood experiences and development.[101] That the proper

[96] ibid para 74.
[97] *Gaskin v United Kingdom* [1989] 12 EHRR 36.
[98] *Guerra and Others v Italy* [1998] ECHR 7.
[99] Gaskin (n 97) paras 52-53.
[100] Article 8(1) ECHR states that 'everyone has the right to respect for his private and family life, his home and his correspondence'.
[101] *Gaskin* (n 97) para 49.

procedures had not been carried out with respect to whether the applicant's files should be disclosed amounted to a violation of the applicant's Convention rights.

Similarly, the Court decided in *Guerra* that Article 10 was not applicable, but that Article 8 was applicable and had been violated. The applicants were from the same town in Italy, located approximately one kilometre from a chemical factory.[102] The factory produced hazardous emissions, leading to air pollution. An investigation found that the local inhabitants had not been properly informed of the associated health and safety risks.[103] The applicants complained that their Convention rights under Articles 10, 8, and 2 (right to life) had been breached.

The Court took the same approach as in *Leander* with regards to Article 10. It reiterated its position that the right to receive information does not impose a duty on states to 'collect and disseminate information of its own motion'.[104] However, in considering whether the applicants' Article 8 rights had been breached, the Court recognised that although the role Article 8 is traditionally understood as preventing the arbitrary interference by the state into private life, it is not a purely negative right.[105] Article 8 can also impose positive obligations on the state to ensure the effective protection of the right to private and family life. In this case, the Court explained that because the applicants had waited for several years for vital information that would have helped them to assess the risks of living near

[102] *Guerra* (n 98) para 12.
[103] ibid paras 27-27.
[104] ibid para 53.
[105] ibid para 58

the factory, the state had failed to fulfil its Article 8 obligations by not providing the residents with necessary information.[106]

These cases raise two notable points for discussion. First, they demonstrate that the right to 'receive and impart' information, as enshrined in Article 10 of the ECHR, has traditionally only extended to information that one party wishes to impart to another. It has not meant that the state has a positive obligation to provide information, but rather that the state is prevented from interfering with the dissemination of information.

Second, they demonstrate that the traditional interpretation by the ECtHR has been to recognise an instrumental 'right to information', at least in specific circumstances, where it can be shown that the failure to provide information has failed to ensure the protection of the applicant's Convention rights. Though the traditional approach to Article 10 did not impose a positive obligation on states to provide information, the Court recognised that states might have obligations to provide information when not doing so would interfere with the exercise of Convention rights, such as the right to private and family life. This was the approach taken by the ECtHR for over two decades, until it appeared to reconsider its stance on the *Leander* principle in the 2006 *Sdruženi Jihočeské Matky v Czech Republic* judgment.[107]

[106] ibid para 60. Because the Court concluded that there had been a violation of Article 8, it did not go on to consider the applicants' article 2 complaint.
[107] *Sdruženi Jihočeské Matky v Czech Republic* 19101/03 ECHR 1205 (10 July 2006).

3.3.2.2 The Right to Information: Turning Points

The *Matky* judgment is significant because it was the first time that the ECtHR recognised that Article 10 can be applied in cases where an applicant has been refused access to documents. In this case, an environmental NGO was refused access to information concerning plans for a nuclear power station. Contrary to its earlier position established in *Leander*, the Court recognised that the refusal to disclose documents of public interest could amount to an interference with the right to receive information. However, it also explained that Article 10 is not an absolute right, and, in this case, the Court found that the Czech authorities had sufficient grounds for withholding the information (ie national security and protecting the rights of others) and therefore *had not* breached the applicant's Article 10 rights.

The Inter-American Court of Human Rights (IACtHR) judgment in *Claude Reyes v Chile* furthered the idea that the right to freedom of expression *can* encompass a positive obligation on states to provide information.[108] The case involved an information request made by Marcel Claude Reyes, the director of an environmental non-governmental organisation (NGO), to the Foreign Investment Committee, concerning a development project. When the Committee provided some, but not all, of the requested information (and refused to provide justification for withholding the information), the applicants filed a petition with the Inter-American Commission of Human Rights.

[108] *Claude Reyes and Others v Chile* 19/2006 IACtHR Series C 151 (2006); 16 IHRR 863 (2009).

The IACtHR determined that Chile had interfered with the applicants' right to freedom of expression under Article 13 of the ACHR. Unlike the ECHR, the ACHR includes both the right to 'receive' and to 'seek' information. Therefore, the Court held that Article 13 protects the rights of individuals to receive information, and it imposes a positive obligation on signatory states to provide information, except where restrictions on disclosure can be justified. Because Chile did not have laws regulating restrictions on access to state-held information at the time, the Court held that it had violated the applicants' Article 13 rights.[109]

As this brief synopsis has indicated, the *Claude Reyes* case has significant differences to the cases discussed in the previous section. Notably, the ACHR is apparently broader in scope than the ECHR as it explicitly includes the right to 'seek' information. Moreover, the *Claude Reyes* judgment was affected by the fact the Chile did not have an ATI law in place at the time. It is therefore not entirely surprising that the IACtHR reached a different conclusion than the ECtHR regarding the relationship between freedom of expression and the right to information.

Nevertheless, following the *Matky* and *Claude Reyes* decisions, the ECtHR demonstrated a noticeable shift towards the recognition of a positive right to information. Two 2009 judgments demonstrate this shift: *Társaság a Szabadságjogokért v Hungary*[110] and *Kenedi v Hungary*.[111] In *Társaság,* the applicant NGO (the Hungarian Civil Liberties Union; HCLU) had requested to

[109] The IACtHR also found that there had been a breach of the applicants' rights under Article 8 ACHR – the right to respect for one's private and family life, his home, and correspondence.
[110] *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v Hungary* ECHR 14 April 2009.
[111] *Kenedi v Hungary* ECHR 26 May 2009.

view a complaint that had been submitted to the Hungarian Constitutional Court by a Hungarian MP.[112] The Court refused to disclose the requested information on the grounds that the document contained personal data.[113] The applicant complained that this was a violation of his Article 10 right to receive information 'of public interest'.[114]

The Hungarian government acknowledged that Article 10 protects the right to information, but, as the Czech government had in *Matky*, argued that it was justified in withholding the information based on the limitations set out in Article 10, paragraph 2.[115] The Court concluded that there had been an interference with the applicant's Article 10 rights, and that the Hungarian government was not justified in withholding the information.[116] It observed that disclosing the information would be unlikely to interfere with the MP's right to privacy, and, furthermore, it warned that creating obstacles to information could hinder the work of journalists who perform 'public watchdog' functions and therefore require access to information to keep the public informed.[117]

In *Kenedi*, the applicant was a historian researching the Hungarian Security Service. He requested information from the Ministry of the Interior. His requests were initially refused, but after several years of legal battles, he managed to obtain a court order granting access. However, the government continued to obstruct access through other means, such as requiring Kenedi to sign a confidentiality

[112] *Társaság* (n 109) para 7.
[113] ibid paras 9-10.
[114] ibid para 17.
[115] ibid para 18. See Appendix B for the full text of Article 10 ECHR.
[116] ibid para 39.
[117] ibid 38-39.

clause that had not been part of the agreement. Though the applicant initiated domestic enforcement proceedings, he still had not obtained all of the requested information after eight years and thus the case reached the ECtHR.

The ECtHR found that there had been a violation of the applicant's Article 10 rights. Reiterating its position in *Társaság,* it explained that access to documents for historical research purposes is an 'essential element' of the right to freedom of expression.[118] The Court found that the Ministry's refusal to comply with domestic court orders was 'in defiance of domestic law and tantamount to arbitrariness'.[119]

The *Társaság* and *Kenedi* decisions have been considered indicative of a change in the 'direction of travel' of the ECtHR towards the recognition of a human right to information.[120] However, it is important to consider the individual circumstances of each case, as it should not be assumed by these judgments that the ECtHR was in fact recognising a *general* right to information. For example, one of the main factors in *Kenedi* was the refusal by the Hungarian Interior Ministry to comply with the domestic court orders granting Kenedi access to the requested documents. And, in both *Társaság* and *Kenedi*, the identity of the applicants' was taken into consideration by the Court. Both applicants, a human rights NGO and a historian, are considered to perform social 'watchdog' functions. They both intended to publish their findings, which contributed to the Court's view that they be granted the same freedom of expression protections as the press.

[118] *Kenedi* (n 111) para 43.
[119] ibid para 45.
[120] *Kennedy v Charity Commission* (n 1) [9].

3.3.2.3 A Common Law Right to Information: *Kennedy v Charity Commission*

In 2014, the UK Supreme Court considered whether Article 10 encompasses a right to information in *Kennedy v Charity Commission*. The facts of the case involved a request for information made by a journalist (Kennedy) to the Charity Commission, concerning its inquiries into a charity set up by controversial MP George Galloway.[121] The Charity Commission withheld the information, citing an absolute exemption under FOIA s 32 – court records, etc.[122]

Thus, the issue before the Supreme Court was whether Article 10 ECHR required FOIA s 32 to be read down to allow the applicant to access the requested information. The Supreme Court found that Article 10 was not engaged because, despite the *Társaság* and *Kenedi* judgments, it did not create a general right to information held by public authorities. Furthermore, the Court held that the applicant had not exhausted his domestic information rights and therefore could not appeal to his Convention rights. In other words, FOIA was not the 'be-all and end-all' of information access.[123] The Supreme Court indicated that the applicant could have explored other avenues to information access, specifically the Charity Commission's powers to disclose information under the Charities Act 1993.[124]

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[121] *Kennedy* (n 1) [4]-[5].
[122] The s 32 exemption allows public authorities to withhold information if it relates to court proceedings, inquiries, or arbitration. The full text of s 32 is listed in Appendix C.
[123] Anya Proops, 'The End of the Line for *Kennedy v Charity Commissioner*' (18 March 2019) Panopticon blog <https://panopticonblog.com/2019/03/18/the-end-of-the-line-for-kennedy-v-charity-commission> accessed 10 August, 2019.
[124] *Kennedy* (n 1) [32]. Section 78 FOIA states 'Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it'. In other words, FOIA does not preclude or limit other statutory powers of disclosure.

The Supreme Court unanimously agreed that there was considerable public interest in the information sought by the applicant.[125] The Justices also agreed that s 32(2) FOIA contained an absolute exemption on information held for the purposes of an inquiry and that the exemption did not cease to apply immediately upon completion of the inquiry. However, instead of first going on to consider the Article 10 question, the Court examined whether the Charity Commission might have other statutory or common law duties to provide information.[126] In addition to the statutory powers under the Charities Act 1993, the Court made the claim that the Commission had the power to disclose information 'under the general common law duties of openness and transparency incumbent on public authorities'.[127]

This was a surprising claim.[128] It was also slightly confusing because it was not clear whether the Supreme Court meant that the common law open justice principles applied in this case due to the statutory powers found in the Charities Act, or whether it implied a much broader common law duty of openness and transparency.[129] Mr. Justice Green provided his view in the *Privacy International v HMRC* judgment, noting that 'the Supreme Court was at pains to point out that the common law treated openness as very important'.[130] Indeed, he referred to the

[125] *Kennedy* (n 1) [30].
[126] ibid [32].
[127] ibid [32].
[128] See eg, Andrew Byass, 'Rights of Access to Information under the Common Law: *Kennedy v Charity Commission*' (2014) 19 JR 180; Christopher Knight, 'The Common Law and the Spirit of *Kennedy*' (20 May 2014) Panopticon blog <https://panopticonblog.com/2014/05/20/the-common-law-and-the-spirit-of-kennedy> accessed 10 August 2019; Tom Cross, 'FOIA's not all that: *Kennedy v The Charity Commission* [2014] UKSC 20' (28 March 2014) Panopticon blog <https://panopticonblog.com/2014/03/28/foias-not-all-that-kennedy-v-the-charity-commission-2014-uksc-20> accessed 10 August 2019.
[129] Knight (n 128).
[130] [2014] EWHC 1475 (Admin) [62].

Lord Mance quotation given at the beginning of this chapter and pointed out that it 'goes well beyond the narrow confines of the Charity Commission', suggesting that Lord Mance had intended to say that the common law transparency duties of public authorities should be broadly construed.[131]

Meanwhile, Mr. Kennedy's quest for information continued. Following the Supreme Court's decision, the applicant requested that the Charity Commission exercise its powers under the Charities Act 1993 to disclose the information. The Commission provided the applicant with some information, though many documents were heavily redacted, and the applicant complained that this response did not include all of the information that he had sought. The applicant could have made a claim for judicial review, but instead complained to the ECtHR that the approach set out by the Supreme Court was insufficient and fell short of providing the protections of Article 10.

The ECtHR declined to address the complaint because the applicant had not exhausted all available domestic remedies (ie judicial review). Thus, as information law barrister Anya Proops put it, the applicant had reached 'the end of the line'.[132] The *Kennedy* judgment is significant not only for the Article 10 issue, but also (indeed, even more so) because it raised the issue of a common law right to information. This means that FOIA is not the only method of obtaining information. The recognition of a common law right to information would create another route and offer additional remedies, such as judicial review.[133]

[131] ibid [62].
[132] Proops (n 123).
[133] Cross (n 128).

However, this should not necessarily be viewed as a positive development for information rights. Though it indicates the availability of judicial review as a remedy, judicial review is often prohibitively expensive. Furthermore, as discussed in Chapter Two of this thesis, one of the benefits of FOIA's institutional approach to coverage is the relative certainty over which bodies fall within its scope. Alternative avenues to information access lack this certainty, could be more costly, and would likely require greater intervention by the courts to enforce. Whilst in theory it appears to broaden the scope of redress when a FOIA exemption is engaged, in practice it might have limited effect.

Moreover, the *Kennedy* judgment demonstrated that the majority within the UKSC is not convinced that Article 10 encompasses a general duty to disclose information. In particular, Lord Mance was not convinced by counsel's argument that recent ECtHR decisions indicated that a right to receive information could arise under Article 10, even if there is no domestic right to information. Lord Mance dismissed this argument and said that Article 10 'would itself become a European-wide Freedom of Information law' if a general right to information were read into it. This reiterates the UKSC's earlier position established in *Sugar v BBC* that the Article 10 right to information is circumstance-dependent, not a general right.[134]

[134] *Sugar (Deceased) v British Broadcasting Corporation* (BBC) [2012] UKSC 4. In his judgment, Lord Brown wrote that the recent 'trio of cases' (ie *Matky*, *Társaság*, and *Kenedi*) *had not* established that Article 10 encompasses a general right of access to information. [94].

3.3.2.4 *Magyar Helsinki*: A (Limited) Human Right to Information

In November 2016, the Grand Chamber of the ECtHR further clarified the position on whether Article 10 encompasses a positive right to information in *Magyar Helsinki Bizottság v Hungary*.[135] The judgment is significant because it demonstrates the Court's current stance on the right to information. The case also raised some issues about the public-private distinction and access to information that are of general relevance to this thesis.[136]

The case involved the question of whether the names of *ex officio* defence counsel are personal data, or whether the defence counsel can be considered to be persons performing public duties, meaning that there is a public interest in revealing their names. It began in 2009, when the human rights NGO Magyar Helsinki Bizottság (MHB) made requests for information to Hungarian police departments as part of its work on access to justice and the development of a code of professional ethics for *ex officio* defence counsel. Two of the police departments (Hajdú-Bihar County Police Department and the Debrecen Police Department) refused to disclose on the grounds that the names of the defence counsel are personal data and not covered under s 19(4) of the Hungarian Data Act because they are not 'members of a public body performing State, municipal or public duties'.[137]

[135] *Magyar Helsinki Bizottság* (n 94).
[136] Specifically, the case involved the question of whether public defenders can be classified as 'other persons performing public duties' under Hungarian domestic law. Though this is not a comparative thesis and no direct comparison between the Hungarian Data Act and UK ATI legislation will be made, the case demonstrates the challenge of identifying 'public duties' or 'public functions'. I address this challenge within the UK in the following chapter on the public-private distinction and in the case studies.
[137] *Magyar Helsinki* (n 94) para 19.

The district court found that the defence counsel were exercising activities in the public interest, and therefore the public interest in releasing the information outweighed the need to protect privacy. However, the regional court overturned this decision and rejected MHB's argument that the defence counsel exercised public functions. The Hungarian Supreme Court upheld the regional court's decision that the defence counsel do not exercise public functions because they are not vested with any powers or competences defined by law. Therefore, they do not meet the threshold for classification as 'other persons performing public duties'.

The applicant complained the ECtHR that its Article 10 rights had been violated. The Hungarian government argued, inter alia, that Article 10 was not applicable because the ECHR does not include the right to 'seek' information. As discussed earlier in this chapter, the right to seek was in fact omitted from the final version. The UK government also intervened in the proceedings, submitting that the Court should follow the *Leander* principle, ie that Article 10 does not impose positive obligations on states to provide information.[138] With reference to the *Kennedy* judgment, the UK government argued that if the ECtHR were to recognise that Article 10 does encompass a right to information, this would exceed legitimate interpretation and amount to judicial legislation.[139]

The Grand Chamber responded that although the word 'seek' had indeed been omitted from the ECHR, the drafters' intention was unclear because there is no record of the deliberation.[140] Thus, it could not be ruled out that Article 10 includes

[138] ibid para 169.
[139] ibid para 103.
[140] ibid para 135. Judge Sicilianos offered a relatively liberal interpretation in his opinion. He argued that the phrase '*shall include*' is iterative, not exhaustive. In other others, the right to freedom of expression shall include the freedom to receive and impart information, but it is not

a right to seek information. The Court also acknowledged that there is now a 'high degree of consensus' at international level on the right of access information, citing Article 19 International Covenant on Civil and Political Rights (ICCPR) and the Council of Europe Convention on Access to Official Documents.[141] In the light of this, as well as the recent ECtHR Section judgments, the Grand Chamber considered it appropriate to clarify the *Leander* principles.[142]

The Court reiterated that Article 10 does not oblige states to impart information, but that the right to information might arise in specific circumstances. These are (1) when information disclosure has been imposed by judicial order and (2) when access to information is instrumental for the exercise of the right to freedom of expression and where denial would constitute an interference with that right.[143]

Determining whether denial of access amounts to an interference with the right to freedom of expression must depend on the individual circumstances of each case. Based on the case law, the Grand Chamber said that the following criteria will be relevant when making this determination: (1) the purpose of the information request; (2) the nature of the information sought; (3) the role of the applicant; and (4) whether the information is 'ready and available'.[144] In other

necessarily limited to these two activities. It is possible to include the freedom to seek information in this list.

[141] The Council of Europe Convention on Access to Official Documents (CETS No, 205) was introduced in 2009 and has been ratified by nine member states to date. Despite the relatively low number of ratifications, the Grand Chamber said that it 'denotes a continuous evolution towards the recognition of the state's obligation to provide access to public information'. paras 140-145.

[142] *Magyar Helsinki* (n 94) para 155.

[143] ibid para 156.

[144] ibid paras 158-169.

words, the ECtHR recognised that the right to information can arise under Article 10, albeit with some limitations.

The Court concluded that the Hungarian government had violated the Convention because they had failed to take account of the 'public interest character' of the information sought by MHB.[145] Significantly, the Court found that this was not affected by whether the public defenders could be classified as 'other persons performing public duties' under national law.

The judgment has been criticised for apparently limiting the right to information to those performing 'watchdog' roles, such as NGOs or journalists.[146] Moreover, the criteria listed by the Court (eg the purpose of the information request) is not consistent with the principles of the UK's FOI laws. As discussed in the previous chapter, the identity of the requester should not be taken into account, and one need not provide a reason for requesting information under FOI legislation or the EIR.[147]

Thus, despite the compelling argument for the recognition of a human right to information, these limitations expose the weaknesses in the framing of access to information as a fundamental human right. It is recognised as a human right, but only to the extent that it supports other fundamental rights, and is likely to be restricted to those acting in a watchdog capacity. Therefore, I argue that the value

[145] ibid para 176.
[146] See eg Sejal Parmar, 'Affirming the Right of Access to Information in Europe: The Grand Chamber Decision in *Magyar Helsinki Bizottság v Hungary*' (2017) 1 EHRLR 68; Maija Dahlberg, 'Positive Obligations and the Right of Access to Information in the European Convention on Human Rights: Yes or No?' (2019) 4 EHRLR 389.
[147] FOIA, s 8.

of access to information lies not in its (contentious) status as a human right, but in its democratic-expansive potential.

3.4 The Democratic-Expansive Approach

The democratic-expansive approach envisions transparency as a means to expand democratic governance. Unlike the consumerist approach, it is not concerned with providing limited forms of information to facilitate choice and competition. Instead, it argues that the goal of transparency is to strengthen citizen participation in democratic governance.[148] It is not only an individual right, but, as Carol Harlow has argued, is best understood as a 'collective, democratic right to access information in which all individuals share'.[149]

The democratic-expansive approach has some similarities with the human right-based justification. Indeed, it is based on an understanding of transparency as essential for active citizenship and playing an instrumental role in the protection of fundamental rights like the right to freedom of expression. However, it is distinct in that it is more concerned with collective, rather than individual rights.

The democratic expansive argument takes as its starting point the traditional assumption that governments 'own' the information they hold. The right to information reverses this assumption by positioning the public as the true 'owners' of the information. Governments become *custodians* of information, holding it on behalf of the public, who can be granted the right to access it through ATI laws. The role of the public is not to put a 'brake' on bureaucracy or to play a 'hygiene'

[148] Sandoval-Ballesteros (n 68) 305.
[149] Harlow (n 7) 285.

function to expose low-level corruption, but rather to support a collective project of enhancing democracy and accountability.[150]

The *Magyar Helsinki* judgment, whilst somewhat controversial from a human rights perspective, is actually consistent with the democratic-expansive approach. The Grand Chamber in *Magyar Helsinki* was willing to recognise that the right to information can arise under Article 10 when the applicants are performing 'social watchdog' functions because they will be using the information either to hold officials to account, to support human rights advocacy, or to create public broadcasts. In other words, the information is to be used to support public, rather than private goals.

Public goals are those that are for the collective well-being in a democratic society. For example, access to clean drinking water and universal primary education are public goals. Access to information can support public goals by allowing the public to participate in decision-making and oversee the institutions providing public services.

That said, the democratic-expansive approach has two notable limitations that need to be addressed. First, it relies on assumptions about the relationship between transparency and democracy that have not been supported by empirical evidence. As discussed earlier in this chapter, information disclosure will not automatically lead to a more informed or engaged public.[151] This account is based on a simplistic model of communication that fails to take into account, inter alia, the different ways in which people seek, use, and interpret information. However,

[150] Sandoval-Ballesteros (n 68) 292-293.
[151] Fenster (n 9).

this does not mean that the democratic-expansive approach is unworkable, but rather that it is important to be aware of untested or unrealistic claims and to continue to develop empirical research that will help further our understanding of transparency and its relationship to democracy.

Second, the democratic-expansive approach seems to focus on two categories of actors: the governors and the governed. Discussions on transparency often centre on 'government information' or 'official information' that is produced and held by state actors. This might suggest that the democratic-expansive approach is limited to information held by government officials or other public authorities. However, as Sandoval-Ballesteros has argued, the democratic-expansive approach can – and should – be extended to include private bodies.

3.4.1 The Democratic-Expansive Approach and Privatisation

Throughout the world, privatisation has resulted in important 'public' responsibilities, such as education, healthcare, and prisons, being taken over by private bodies.[152] In many jurisdictions, this results in a loss of accountability and oversight because these private bodies (which can include NGOs and charities as well as commercial companies) are not subject to the same transparency requirements as public sector providers.

The private sector is characterised by opacity.[153] Historically, it has been accepted that the private sector should be free from the constraints placed upon the public sector in order to promote competition and preserve the efficiency of the private sector, which is said to be one of its primary advantages over the bureaucratic

[152] Sandoval-Ballesteros (n 68) 302.
[153] ibid 303.

public sector. Moreover, as the state has traditionally wielded greater power over citizens than the private sector, there has been a need for mechanisms to protect citizens from the potential abuses of the state.

However, these explanations, if they were ever justified, are no longer sufficient in an era of privatisation, outsourcing, and public-private partnerships. As private bodies take on an increasingly important role in social and economic life, the balance of power shifts from public to private.[154] This can be seen in high-profile examples like the 2018 collapse of construction firm Carillion, which held £1.7 billion in public contracts when it was forced into liquidation due to debt.[155] The collapse raised important questions of corporate accountability, and the ICO submitted evidence to Public Administration and Constitutional Affairs Committee, citing this as a prime example of the need for greater transparency in outsourced services.[156]

In the democratic-expansive vision, the goal of transparency is to strengthen citizen participation in democratic governance.[157] This vision cannot be achieved if ATI laws and other transparency requirements are only imposed on public authorities. Instead, transparency obligations must be extended to private bodies that have assumed responsibility for the performance of public services or functions. The next chapter will clarify what is meant by public services and functions.

[154] Sandoval-Ballesteros (n 4) 406.
[155] *The Collapse of Carillion* (CBP-8206, 14 March 2018).
[156] Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law* (ICO 2019) 4.
[157] Sandoval-Ballesteros (n 68) 305.

3.5 Conclusion

In this chapter, I have presented three broad justifications for ATI legislation: consumerist, human rights, and democratic-expansive. The consumerist justification has its roots in public choice theory and is strongly associated with the neoliberal conceptualisation of citizen as consumer. It assumes that access to certain types of information, such as performance indicators or league tables, will help individuals to make better decisions on public services, such as schools or healthcare providers.

The human rights justification offers a compelling argument and is largely based on an understanding of access to information as a prerequisite for the exercise of the right to freedom of expression. There is also a substantial body of case law in which the right to information has been recognised as playing an instrumental role in the exercise of other fundamental rights, such as the right to a fair trial or the right to private and family life. Recent developments, particularly the *Magyar Helsinki* judgment, demonstrate the growing recognition by the ECtHR of the human right to information, at least in limited circumstances, such as when the applicant plays a 'social watchdog' function.

However, it is this limitation that weakens the position of the human rights justification, particularly if one considers that fundamental human rights must be available to all equally. Furthermore, the theoretical basis for the right to information is in need of further development, with particular attention paid to whether the right to information is in fact an intrinsic *right* or whether it merely has intrinsic value.

The chapter then discussed the democratic-expansive approach to transparency. This approach has some overlap with the human rights-based approach, particularly regarding the role of access to information in supporting freedom of expression, media oversight of government, and public participation in democratic governance. However, it is distinct in that it positions access to information as a collective, rather than individual right, with the goal of strengthening citizen participation in democracy.[158]

The next chapter builds on this analysis by asking: 'to whom should ATI obligations apply?' This question was previously introduced in Section 3.4.1 of this chapter during the discussion on why the democratic-expansive approach to transparency must extend to private actors providing public services or performing public functions. Chapter Four will further this discussion by placing it within the wider scholarly literature on the public-private distinction. Specifically, it will examine how 'public' and 'private' have emerged as separate spheres in law and what this means for the extension of ATI legislation to private bodies performing functions of a public nature.

[158] ibid 305.

Chapter Four

Access to Information and the Public-Private Distinction

The public-private distinction is one of the most enduring dualisms in legal scholarship. It can take on separate, yet sometimes inter-related meanings depending on context. In feminist legal scholarship, for example, the public-private distinction has been used to explore how social and legal constructions of the public (the state) and private (the home) spheres affect women.[1] Critical legal studies seeks to expose the artifice of the public-private distinction to demonstrate that private power should not be treated differently from public power.[2] In recent decades, public law scholars have been preoccupied with the impact of privatisation on the application of public law norms and instruments.[3] What each of these has in common is the understanding that 'public' and 'private' have emerged as separate spheres in law, and this distinction has both practical and normative implications.[4]

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[1] See eg Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 StanLRev 1; Jane Scoular, 'Feminist Jurisprudence' in Stevi Jackson and Jackie Jones (eds) *Contemporary Feminist Theories* (EdinUP 1998) 62; Catharine MacKinnon, *Toward a Feminist Theory of the State* (HarvUP 1989); Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 Constitutional Commentary 319.

[2] Jody Freeman, 'The Private Role in Public Governance' (2000) 75 NYULRev 546, 566.

[3] See eg Dawn Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] PL 476; Stephanie Palmer, 'Public Functions and Private Services: A Gap in Human Rights Protection' (2008) 6 I-CON 585; Paul Craig, 'Contracting Out, the Human Rights Act, and the Scope of Judicial Review' (2002) 118 LQR 551; Mark Aronson, 'A Public Lawyer's Reponses to Privatisation and Outsourcing' in Michael Taggart (ed) *The Province of Administrative Law* (Hart 1997); Frank Meisel, 'The Aston Cantlow Case: Blots on English Jurisprudence and the Public/Private Law Divide' [2004] PL 2; Catherine M Donnelly, 'Leonard Cheshire Again and Beyond: Private Contractors, Contract and s 6(3)(b) of the Human Rights Act' [2005] PL 785; Anne Davies, *The Public Law of Government Contracts* (OUP 2008); Nicholas Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58 CLJ 159; Elizabeth Palmer, 'Should Public Health be a Private Concern? Developing a Public Service Paradigm in English Law' (2002) 22 OJLS Studies 663.

[4] Aileen McHarg, 'Chapter One: Privatization and the Public/Private Distinction' (unpublished chapter, cited with permission of author).

The aim of this chapter is to examine the public-private distinction in the context of access to information. The analysis is divided into two broad parts. The first part examines the definition and function of the public-private distinction. It is a political and legal construction that has evolved alongside values and expectations about what should be deemed 'public' or 'private'. However, many scholars have argued that this rigid binary is outdated, having been rendered obsolete as privatisation in its various forms has transformed the role of the state.[5] Therefore, my first task in this chapter is to explain what the public-private distinction is and whether it is still a useful concept for describing legal and societal structures.

The second part examines the construction of 'functions of a public nature' in public law. As I explained in Chapters One and Two, FOIA and FOISA have taken an institutional approach to coverage and can be extended to additional bodies that appear to perform 'functions of a public nature' through a Section 5 order. The EIR and EISR have taken a functional approach to coverage, meaning that they apply to all bodies subject to FOI, as well as bodies that carry out 'functions of public administration'[6] or bodies under the control of a public authority that exercise 'functions of a public nature related to the environment'.[7] This prompts the question: what are 'functions of a public nature?' In explaining how these functions have been constructed, I seek to evaluate whether 'functions of a public

[5] See eg Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (Hart 2003); Dave Cowan and Morag McDermont, 'Obscuring the Public Function: A Social Housing Case Study' (2008) 61 CLP 159; Carol Harlow, ' "Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241; Daphne Barak-Erez, 'Civil Rights in the Privatized State: A Comparative View' (1999) 28 Anglo-AmLRev 503.
[6] Environmental Information Regulation 2004 2(2)(c).
[7] Environmental Information Regulation 2004 2(2)(d)(ii).

nature' is an effective concept for extending public law norms and instruments to private bodies.

4.1 What is the Public-Private Distinction?

The public-private distinction assumes that there are two broad categories of law: public law and private law. Put simply, public law regulates the vertical relationships between individuals and the state, and the relationships between state institutions. Private law regulates the horizontal relationships between individuals.[8] Both public law and private law are about the control of power.[9] Public law concerns the control of state power, whereas private law regulates the exercise of private power.

First year law students usually learn that public law encompasses, inter alia, criminal law, human rights law, and constitutional law, whilst private law includes subjects like commercial law and intellectual property law.[10] However, these neat disciplinary boundaries obscure some important questions about the normative meanings of 'public' and 'private', as well as the challenges posed by privatisation to the operation of public law norms and instruments.

Unpacking the public-private distinction first requires an understanding that there are different versions of the public-private distinction.[11] As Peter Cane has argued, one is institutional/functional, and the other is values-based.[12] I suggest

[8] See eg Lorenzo Casini, '"Down the Rabbit Hole:" The Projection of the Public/Private Distinction Beyond the State' (2014) 12 ICON 402; Morton J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 UPaLRev 1423.
[9] Dawn Oliver, *Common Values and the Public-Private Divide* (CUP 1999) 1.
[10] ibid.
[11] Cane (n 5) 249.
[12] ibid 249.

that Cane's classification can be broken down further to distinguish the *institutional* from the *functional*. The institutional divide is descriptive, as it explains which bodies are 'public' and 'private' in an organisational sense. The functional divide *could* also be descriptive in so far as it explains which functions are 'private' and 'public', but this is not a value-free classification. As I will explain throughout this chapter, the classification of functions as either 'public' or 'private' involves normative claims about the role of the state in economic and social life.

The institutional divide suggests that there is a distinction between public bodies and private bodies. In some legal systems, this has led to the development of separate bodies of law and legal institutions.[13] This is not the case in the UK, where scholars like A.V. Dicey famously rejected the institutional public-private distinction, arguing that both the 'governors and the governed' should be subject to the same legal rules and judged by the ordinary courts. To create separate bodies of law administered by different agencies could result in governing bodies being given special privileges and immunities. Because government bodies and other public agencies have traditionally wielded great power over the public, public law within the UK has developed to control this power.

Privatisation has blurred the boundaries between public and private. As discussed in Chapter One of this thesis, non-governmental bodies are now responsible for a range of activities and functions that have been thought of previously as 'governmental'.[14] Accordingly, legal scholars in recent decades have shifted their

[13] For example, in France, a civil law jurisdiction, the *Conseil d'État* is an administrative judicial body that arbitrates cases 'relating to executive power, local authorities, independent public authorities, public administration agencies or any other agency invested with public authority'. See <http://english.conseil-etat.fr> accessed 6 February 2019.
[14] Cane (n 5) 253.

focus from discussing the public-private distinction in *institutional* terms to talking about the *functional* public-private distinction.[15]

This suggests that there are certain functions that can be thought of as 'public' and others as 'private'. Whereas the institutional distinction is made by considering factual criteria (ie is it a government institution or a private body?), the functional distinction depends on value-based judgments about which functions a society deems 'public' and which are 'private'. I will return to the differences between institutional and functional approaches in section 4.2, when I expand on how this has been interpreted in the context of judicial review and human rights legislation. But, first, I want to consider the normative argument that certain activities or functions can be classified as 'public' versus 'private' and therefore treated differently.

4.1.1 Critiquing the Public-Private Distinction

Critiques of the public-private distinction are common amongst legal theorists, from Marxists to the American legal realists to critical legal scholars.[16] These theories demonstrate that there is nothing given or neutral about the distinction. Examining these critiques can help demonstrate both why the labels of public and private have developed, and why these are problematic (both in theory and in practice). Rather than providing a brief overview of various theories, this section uses the feminist critique of the public-private distinction to expose the normative underpinnings of the divide.

[15] See eg Oliver (n 9); Cane (n 5).
[16] Juan Maneul Amayo Castro, 'Human Rights and the Critiques of the Public-Private Distinction' (2010) VU Migration Law Series 7.

The feminist critique of the public-private distinction does not focus on the differences between public law and private law, but rather on how the characterisation of power as either 'public' or 'private' has led to the subordination of women. It starts from the premise that 'public' and 'private' are not neutral descriptors.[17] Rather, these are politically, legally, and socially constructed categories that have been deliberately chosen and have had significant consequences for the regulation of public and private power. To classify an activity as 'private' is to afford it some degree of protection against interference from the state.[18] In this way, the public-private distinction operates as a limit on public – or, state – power, preventing interference in either commercial or domestic life. The private sphere has become associated with 'freedom', as it is understood in liberal societies that the personal aspects of one's life should be free from external interference.[19]

As Catharine MacKinnon has argued, 'privacy is the ultimate value of the negative state'.[20] To say that an action is private is to say that it ought to be free from state interference, thereby limiting public scrutiny or accountability. In the United States, the Supreme Court found in the landmark *Roe v Wade* decision that the criminalisation of abortion violated the constitutional right to privacy.[21] That is, the privacy doctrine was used to support the right of women to choose whether or

[17] Olsen (n 1).
[18] The extent to which private bodies or activities will be immune from state interference is dependent upon context. In the United States, for example, the state action doctrine is the principal that the U.S. Constitution only applies to state action, not private action. State action is typically understood to be all governmental action, carried out by the executive, judicial, and legislative branches, where private action is non-governmental. See eg Olsen (n 1).
[19] Gavison (n 1).
[20] MacKinnon (n 1) 190.
[21] *Roe v Wade* 410 U.S. 113 (1973).

not to terminate a pregnancy. However, the right to privacy did not extend to a positive obligation on states to provide funding for medically necessary abortions. In other words, the state recognised that it has a negative duty *not to* intervene, but does not have a positive duty *to* intervene.

In this way, the privacy doctrine and the notion of the private sphere operate to protect individual, rather than collective rights. Whilst an individual woman's right to privacy grants her the right to choose, it does not require social change on a systemic level.[22] The *Roe* decision recognised that abortion is a personal, individual choice and to criminalise it would be unconstitutional. But in positioning abortion as a privacy issue, it undermined the collective claim for state support for medically necessary abortion.

Similarly, Frances Olsen has observed that privacy is valued precisely because it invokes notions of individualism and choice.[23] Liberalism assumes that all individuals enjoy the freedom to choose and the right to privacy equally, but, as Olsen argued, privacy is actually a hierarchy. Whilst the powerful benefit most from the right to privacy, the less powerful are more likely to experience the private realm as 'a sphere not of freedom but of uncertainty or insecurity'.[24] Or, as MacKinnon put it, the right to privacy 'looks like a sword in men's hands presented as a shield in women's'.[25] In other words, freedom from public interference does not benefit women in the same way it benefits men in patriarchal society.

[22] MacKinnon (n 1) 192.
[23] Olsen (n 1) 325.
[24] ibid 325.
[25] MacKinnon (n 1) 191.

In analysing the feminist critique, it becomes clear that the public-private distinction is an ideological divide, one that has been constructed to protect the interests of the dominant group (in this case, men's subordination of women). For Olsen, the solution is not to 'tinker around' with whether something is or should be classified as 'public' or 'private'.[26] Instead, one of the main tasks of feminist legal scholars has been to think critically about how these categories are constructed, thus exposing the ideology that underpins the public-private distinction.

4.1.2 What is 'Public' about the Public Sphere?

If we accept that 'public' and 'private' are socially and legally constructed categories, and the private sphere has been designed to shield it from external influence, then how do we understand the public sphere? What is it about this realm that warrants its classification as 'public?' And how do we distinguish public institutions from public services and public functions?

The history of the public-private distinction reveals that it is a creation of the modern liberal state.[27] It has evolved not only to protect individuals from abuses of state power, but also to highlight the public character of the state, with the expectation that the public sphere be open to scrutiny in a way that the private sphere is not. As discussed in Chapter Three, scrutiny of government actions was thought necessary to ensure that representative government is acting in the best interests of the public.[28] This is why ATI mechanisms (both in the UK and

[26] Olsen (n 1) 327.
[27] See eg Paul Starr, 'The Meaning of Privatization' (1988) 6 YaleL&PolRev 6; Horwitz (n 8).
[28] Paul Starr, *Freedom's Power: The True Force of Liberalism* (Basic 2007) 55-56.

internationally) have been designed to apply to public bodies, as public bodies have traditionally exercised powers beyond those normally granted to private bodies.

The underlying belief is that public bodies must be constrained so as not to abuse their power and interfere with the rights of individuals. They must also be subject to public oversight to ensure that they are acting in the public interest. This describes an institutional arrangement. Public bodies are government bodies or closely associated government agencies that have the authority to act on behalf of the state.

However, privatisation has increased the number of 'hybrid' public bodies, which are distinct from 'core' public bodies (eg central government departments, local authorities). Hybrid public authorities are typically private commercial or charitable bodies that have been contracted by government to perform what are commonly thought of as 'public functions' (a concept that I will examine shortly) or to provide public services.

To that end, Brendan Martin has posed a provocative question: 'what is public about public services?'[29] Answering this question has been very difficult, in part because, as Janet McLean observed, 'public services' and 'public functions' were never clearly defined, even prior to privatisation.[30] In the UK, the architects of nationalisation were primarily concerned with how best to deliver goods and

[29] Brendan Martin, 'What is Public about Public Services' (2004) Background paper commissioned by the World Bank for the 2004 Word Development Report: *Making Services Work for Poor People.* See also Brendan Martin, *In the Public Interest? Privatisation and Public Sector Reform* (Zed Books 1993).
[30] Janet McLean, 'Public Functions Tests: Bringing back the State?' in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 185.

services, especially during the post-World War II reconstruction period. Lawyers gave little thought to what was 'public' about these goods and services. Whilst a service provided by the state is generally understood to be a 'public service', the term can also have a broader application, referring to, inter alia, services to the public, services provided on behalf of the public, services delivering public goods, and services that are accountable to the public.[31] As many 'traditional' public services are no longer provided directly by the state, it is necessary to identify the characteristics of the services that deem them 'public'.

However, this is a challenging task, and there is no clear definition or scholarly consensus on the 'public' character of services or functions, beyond the understanding that 'public services' can and do encompass a broader range of services than those now delivered directly by government bodies. Perhaps, then, public services should be defined as those delivered *for* the public? This idea has gained some traction in the academic literature, but, as Martin has argued, is incomplete. After all, a restaurant or public house that serves the public is unlikely to be characterised as a public service.[32] This suggests that the public nature of public services involves not only providing a service to the public, but providing a service that is for the public good.

The existence of public funding is another potential characteristic, ie services that are funded by taxes can be considered public services.[33] As the following section will demonstrate, this factor has been taken into consideration when determining

[31] Martin (n 29; 2004) 1.
[32] ibid 1-2.
[33] M Shamsul Haque, 'The Diminishing Publicness of Public Service under the Current Mode of Governance' (2002) PubAdminRev 65; Martin (n 29).

whether a body should be considered a 'public authority' for the purposes of the HRA 1998. Whilst this is a compelling argument in theory, there have been problems with its practical application. For example, private or hybrid public authorities like care homes often house a mixture of privately and publicly-funded residents. Office supply companies that provide goods to local authorities are also in receipt of public funds, and whilst monitoring the expenditure of the local authority could be justified, it would be difficult to argue that the office supply company is itself providing a public service.

I argue that a public service is one that serves the public, with the aim of delivering common, social goods, rather than private goods. Although, public services are often provided directly by the public sector, in part to ensure equitable provision, 'publicness' is not determined by the provider. The 'publicness' of public services is determined by the users and the nature of the service. This argument can be extended to the discussion on 'functions of a public nature', the term that is used in the s 6(3)(b) of the HRA and in s 5 of FOIA and FOISA.[34] The nature of a function is dependent upon the function itself, as well as those it serves. However, as the following section will demonstrate, this has not been how 'functions of a public nature' have historically been understood by the courts, particularly in the context of judicial review and the HRA. Instead, there has been a continued reliance on institutional, as opposed to functional, characteristics.

[34] The Environmental Information Regulations 2004 make a distinction between 'functions of a public nature' and 'public services relating to the environment'. Regulation 2(2)(d) applies to 'any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and – (i) has public responsibilities relating to the environment; (ii) exercises functions of a public nature relating to the environment; (iii) provides public services relating to the environment.

4.2 What are Functions of a Public Nature?

The concept of 'functions of a public nature' is central to understanding the scope of judicial review, the Human Rights Act (HRA) 1998, FOIA, FOISA, and the EIR. There is no single definition of what constitutes a 'function of a public nature', and just because a function is deemed public in one context does not mean that it will be classified as such in a different context. In other words, if a function is considered to be of a public nature under the HRA, it does not necessarily follow that it would be considered a function of a public nature for FOI or EIR purposes.

That said, it is worthwhile to examine how 'functions of a public nature' have been interpreted with regards to judicial review and the HRA. As this section will demonstrate, there is an extensive body of case law, as well as considerable scholarly literature, that highlights the challenges that have arisen with regards to interpretation.[35] The cases introduced in this section have been chosen to examine these challenges, focusing on the reasoning given by judges in making their determinations. This provides some interesting parallels with the current debate over FOI extension that warrant further analysis.

First, a brief note on terminology: I have deliberately chosen the somewhat unwieldly phrase 'functions of a public nature' over the more concise 'public functions'. Like Dawn Oliver, I do not believe that these two terms are synonymous, and they should not be used interchangeably, though they sometimes are in the literature.[36] Using the term 'public functions' as shorthand can alter the meaning, as any and all functions performed by a public authority could be

[35] See eg Oliver (n 3); Donnelly (n 3); Bamforth (n 3); Cowan and McDermont (n 5).
[36] Dawn Oliver, 'Functions of a Public Nature under the Human Rights Act' [2004] PL 329, 337.

described as a public. The term 'functions of a public nature', emphasises the nature of the function performed, rather than the body performing the function. Likewise, terms like 'hybrid bodies' or 'functional authorities' can be misleading, as they focus on that nature of the body, rather than the nature of the function.

4.2.1 Judicial Review and Functions of a Public Nature

Judicial review is a process by which the courts review the lawfulness of a decision or action taken by a public authority. It allows the public to challenge the way a decision has been made, rather than the substantive issues of the decision itself. Since *O'Reilly v Mackman*, it has been established that judicial review is the appropriate remedy for investigating decisions taken by public bodies in England.[37]

The scope of judicial review has traditionally been determined by the 'source of powers' test in English law.[38] An organisation was considered to fall within the scope of judicial review if the source of its powers were derived from statute, the royal prerogative, or, in some cases, the common law. The test is still in existence, but as the result of privatisation, including the outsourcing of public services, it is no longer the only relevant factor taken into consideration when determining the scope of judicial review.

The traditional approach was called into question in the landmark case *R v Panel on Take-overs and Mergers, ex parte Datafin*.[39] The Panel on Take-overs and

[37] [1983] APP LR. 11/25.
[38] The process of judicial review in Scotland is different, and, arguably, there has been less emphasis on the distinction between 'public law rights' and 'private law rights'. It was established that private bodies could be subject to judicial review in *West v Secretary of State for Scotland* [1992] CSIH 385.
[39] *R v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] QB 815.

Mergers (now known as the Takeover Panel) is a private body tasked with regulating the acquisitions and mergers industry in the City of London. It exercises significant powers within the financial services industry, though these powers are not derived from statute or the royal prerogative. The applicant sought to complain about a decision taken by the Panel, but the High Court refused the appeal on the grounds that the applicant was not susceptible to judicial review. However, in December 1986, the Court of Appeal held that the Panel was in principle subject to judicial review due to the nature of the powers it exercised.[40]

In the *Datafin* judgment, Lord Justice Lloyd said that whilst the source of powers is often decisive in determining whether a body is subject to judicial review, he did not agree that it was the sole test.[41] Instead, it is important to consider the nature of the power. If a body is exercising 'public law functions' or the exercise of functions has 'public law consequences', then it is possible that the body will fall within the scope of judicial review.[42]

The *Datafin* principles were subsequently applied in a number of cases. In *R v Disciplinary Committee of the Jockey Club, ex p. The Aga Khan*, the applicant sought judicial review of the Jockey Club's decision to disqualify a horse from competition.[43] The Jockey Club was a private body, but one that exercised considerable power in regulating a 'significant national activity'.[44] The club regulated the horseracing industry, and, by extension, supported the horserace

[40] ibid. However, the Court also found that the facts of this particular case did not satisfy the grounds for judicial review.
[41] ibid [64].
[42] ibid [65].
[43] [1992] APP L R 12/04.
[44] ibid [43].

betting industry, thus wielding significant economic influence. However, the judges were not convinced that this power was sufficient to bring the Jockey Club within the realm of public law. As a private club, it was operating entirely in the private sector and thus governed by private law. Lord Justice Hoffman dismissed the appeal on the grounds that adequate private law remedies were available, and the denial of judicial review would not prevent the applicant from accessing justice.[45]

In *R v Servite Houses & London Borough of Wandsworth*, two elderly residents of a care home operated by Servite Houses, a charitable housing association, challenged its decision to close the home.[46] The residents had been placed in the care home by Wandsworth Council, pursuant to its duties under the National Health Service and Community Care Act 1990.[47] The residents claimed that they had been promised a home for life and that the decision to close the home was in breach of their legitimate expectations, which led to their application for judicial review.

The Court held, however, that Servite Houses was not amenable to judicial review, as it was not acting as an agent of Wandsworth Council, nor was there sufficient statutory underpinning for its actions.[48] The local authority did not have the power to delegate its statutory obligations, though it did have the authority (under s 26 of the National Assistance Act 1948) to contract with the private or voluntary sectors for community care. However, this does not mean that the function itself

[45] ibid [87].
[46] *R v Servite Houses & London Borough of Wandsworth, ex p Goldsmith* [2001] LGR 55.
[47] Craig (n 3) 551.
[48] *Servite Houses* (n 46) [30]-[31].

was underpinned by statute. Moses J then considered whether the functions could still be considered public, even without any statutory underpinning. Referring to the *Datafin* and *Aga Khan* judgments, he concluded that the courts cannot impose public standards on a body which derives its powers from contract. Because Servite had a purely commercial relationship with Wandsworth Council, it was not amenable to judicial review.

Servite was distinct from *Jockey Club* in that alternative private law remedies were not available to the applicants. The case had proceeded on the basis that there was no contractual relationship between Servite and the applicants, who had been assessed and placed in the care home by Wandsworth.[49] Without access to judicial review, they were effectively without a legal remedy. Thus, in conclusion, Moses J observed that 'the case represents more than tension between public law and private law rights, but a collision'.[50] The case highlighted the challenges that arise when public authorities contract with the public sector to provide statutory services.

Dyson LJ subsequently considered the nature of the relationship between a local authority and a non-profit company in *Hammer Trout Farm*.[51] In deciding that the company, Hampshire Farmers Markets Ltd (HFML), was amenable to judicial review, Dyson LJ noted that HFML had been created by and was being supported by the local council. Referring to the *Donoghue* judgment (which will be discussed in the following section), the close nature of the relationship between the local

[49] ibid [32].
[50] ibid [40].
[51] *R (on the application of Beer t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056.

authority and HFML, as opposed to the purely commercial relationship in *Servite*, was a significant factor.

These reasoning in these judgments demonstrates a focus on institutional characteristics, and particularly on the nature of the relationship between a public authority and the body carrying out the function. The closer the relationship between a public authority and the body carrying out the function, the more likely it is that the contracting body will be considered amenable to judicial review. The fact that an organisation has been contracted by a public authority to provide a service that the public authority is statutorily obligated to provide is not sufficient on its own. Based on the reasoning given in the above cases, this appears to be based on a reluctance to impose public law standards on private bodies that are engaged in merely contractual relationships with public authorities.

However, the emphasis on institutional characteristics does little to clarify the *public nature* of a function. The *Servite* judgment perhaps illustrates this most clearly, as the commercial relationship between Servite and the local authority was a deciding factor, rather than the question of whether providing a care home service is a function of a public nature. This reasoning has had an influence on the reasoning in human rights cases, even though it is accepted that the HRA should have a broader application than judicial review.[52]

4.2.2 Human Rights Act 1998 and Functions of a Public Nature

As explained in Chapter Three of this thesis, the HRA 1998 was designed to 'bring rights home'.[53] It incorporates the rights enshrined in the European Convention

[52] S Palmer (n 3) 600.
[53] *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).

on Human Rights (ECHR) and sets out the fundamental rights to which everyone in the UK is entitled. Section 6(1) of the Act makes it unlawful for any public authority to act in a way that is incompatible with a Convention right.

The HRA was drafted in acknowledgement of the challenges posed by privatisation and with the understanding that private bodies responsible for carrying out public functions must be held accountable for respecting human rights, at least with respect to those functions.[54] Therefore, s 6(3)(b) defines a public authority for HRA purposes as 'any person certain of whose functions are functions of a public nature'.[55] The goal of this was so that so-called 'hybrid bodies' (ie those bodies that carry out both public and private functions) would be covered by the HRA for the functions they performed that were public in nature, though not for their private activities.[56]

In practice, the application of the approach has been complicated, and it has proven difficult to determine what, exactly, constitutes 'functions of a public nature' for the purposes of the HRA. A significant body of case law illustrates this point, in particular: *Poplar Housing and Regeneration Community Association Ltd v Donoghue*;[57] *R v Leonard Cheshire Foundation and another*;[58] and *YL v Birmingham City Council*.[59] These cases have been selected to highlight some of the controversial decisions that have been made when determining whether a body

[54] Lord Bingham, in the *YL v Birmingham City Council* judgment pointed out, '(w)hen the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well-known fact in mind'. [20] (Bingham LJ).
[55] Human Rights Act 1998, s 6(3)(b).
[56] Human Rights Act 1998, s 6(5); S Palmer (n 3) 588.
[57] [2001] EWCA Civ 595.
[58] [2001] EWHC Admin 429.
[59] [2007] UKHL 27.

is performing functions of a public nature. What is interesting here is not so much the substantive facts of each case, but rather the reasoning of the judges in making their decisions.

Poplar Housing and Regeneration Community Association Ltd v Donoghue

The question of whether a private body could be a public authority within the meaning of the HRA was first considered in *Donoghue*.[60] The facts involved a housing association tenant, who claimed that the housing association's decision to evict her from accommodation was in violation of her Convention rights under Article 8(1) ECHR – the right to respect for family and private life.[61] When the defendant had moved into her accommodation in 1998, the tenancy was granted by the London Borough of Tower Hamlets, a local authority, pursuant to its duties under the Housing Act 1996. Its housing stock was later transferred to Poplar Housing, a housing association created by Tower Hamlets.[62]

Upon determining that the defendant was intentionally homeless, Poplar Housing initiated eviction proceedings in October 2000.[63] The defendant argued that this was a violation of her Article 8 rights. The question before the Court of Appeal was whether Poplar Housing was a public authority for the purposes of the HRA.

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[60] *Donoghue* (n 57).
[61] Article 8(1) ECHR states, 'Everyone has the right to respect for his private and family life, home and correspondence. Article 8(2) states, 'There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.
[62] *Donoghue* (n 57) [11].
[63] The eviction proceedings were first brought by Tower Hamlets in early 2000. However, these were withdrawn when it transpired that Poplar Housing was in fact the landlord.

In delivering the judgment, Lord Woolf acknowledged that the meaning of 'function of a public nature' is unclear and that it should be interpreted broadly by considering a range of factors.[64] The factors that supported the claim that Poplar Housing was carrying out a function of a public nature included its charitable status, the provision of public funding, the extent to which Poplar was under the control of the Housing Association, and the extent of local authority involvement. However, it was also important to Lord Woolf to 'step back and look at the situation as a whole'.[65] In other words, it is necessary to consider not only the aggregation of factors, but also the circumstances surrounding the provision of the service.

In this case, the Court of Appeal found that Poplar Housing was performing a function of a public nature, largely because of its close relationship with Tower Hamlets and the extent to which its activities were 'enmeshed in the activities of the public body'.[66] As Stephanie Palmer has pointed out, the Court's restricted reasoning in this case had significant implications for the future interpretation of s 6 (see the following discussion on *Leonard Cheshire*).[67] Lord Woolf's reasoning implied that the close relationship between Poplar and Tower Hamlets was an essential factor, and that 'a contractual relationship alone would be insufficient for a private entity to be bound by the HRA'.[68] In other words, if a public authority contracted with a third party to deliver services on its behalf, the existence of the contract alone would not be enough to classify the third party provider as a public

[64] *Donoghue* (n 57) [65].
[65] ibid [66].
[66] ibid [65].
[67] Palmer (n 3) 590-591.
[68] ibid 591.

authority for HRA purposes. Additional criteria would have to be met before the obligations set out under the HRA would apply to the provider.

R (Heather) v Leonard Cheshire Foundation (A Charity)

The appellants in *Leonard Cheshire* were residents in a care home owned and operated by the Leonard Cheshire Foundation (LCF), a charitable foundation providing care and support for people with disabilities.[69] When LCF decided to close the home, where the appellants had lived for seventeen years, they claimed that this was a violation of their rights under Article 8. Taking into consideration the *Donoghue* judgment, the Court decided that, in this case, the LCF was *not* a hybrid public body under the meaning of the HRA.

In contrast to *Donoghue*, there were no 'special characteristics' of the relationship between LCF and the contracting local authority that would deem it a hybrid public authority.[70] In delivering the judgment, Lord Woolf conceded that had the local authority entered into a contract with LCF after the HRA had come into force, then it likely would have been under an obligation to ensure that the residents' Article 8 rights were fully protected.[71] However, this was not the case. LCF had been contracted to provide the care home several years before the HRA had been enacted, so to deem it a hybrid body for HRA purposes would effectively turn what had been a private function before the HRA into a public function, which would be a retrospective application of the law.[72]

[69] *Leonard Cheshire* (n 58) [4].
[70] S Palmer (n 3) 591.
[71] *Leonard Cheshire* (n 58) [34].
[72] ibid [34].

YL v Birmingham City Council and Others

The House of Lords first confronted the issue of whether a private care home is a public authority under the meaning of s 6(3)(b) in *YL v Birmingham City Council and Others*.[73] The facts of the case involved a care home operated by Southern Cross Healthcare Ltd., which decided to terminate its contract with the appellant, an elderly patient suffering dementia, following a dispute between her family and the care home staff. The majority decided that in this case, Southern Cross was not a public authority for the purposes of the HRA.[74]

The dissenting judges, Lord Bingham and Lady Hale, considered that s 6(3)(b) should be interpreted broadly to comply with the intended purpose of giving effect to Convention rights in domestic law.[75] Thus, Lord Bingham identified the relevant factors used to determine whether a body is carrying out 'functions of a public nature'. These include the role and the responsibility of the state with regards to the function,[76] the nature and extent of any statutory power,[77] the extent to which the state regulates the performance of the function,[78] whether the state is willing to pay for the performance of the function,[79] and the extent to which the improper performance of the function could violate an individual's Convention rights.[80] On the other hand, he also identified the factors he considered irrelevant, such as whether or not an authority is amenable to judicial review.[81]

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[73] *YL* (n 59).
[74] ibid [170].
[75] S Palmer (n 3) 593.
[76] *YL* (n 59) [7].
[77] ibid [8].
[78] ibid [9].
[79] ibid [10].
[80] ibid [11].
[81] ibid [12].

In giving the majority judgment, Lord Scott identified the features relied upon by YL and the interveners that he believed 'carried little weight' when decided whether Southern Cross was exercising a public function under the meaning of the HRA.[82] Firstly, the fact that most of the residents of the care home (including Mrs. YL) had their fees to Southern Cross paid for by local authorities did not mean that Southern Cross was publicly funded. Lord Scott found that Southern Cross is a private commercial business whose role is to deliver services to customers, which, in this case, happened to be a local authority.

Lord Scott conceded that the situation might be different if private care homes enjoyed statutory powers that allowed them to discipline or restrain patients, but this was not the case. Though they have private law duties and responsibilities to protect their patients, which might sometimes involve exerting control over patients for their own safety or the safety of others, this falls short of the power granted to, for example, managers of private prisons.

But what about the argument that if a local authority operating its own care home is performing a function of a public nature in doing so, then it should follow that the function will still be of a public nature when performed by a private care home?[83] Lord Scott was of the opinion that 'there are very clear and fundamental differences' that weaken this argument. By way of explanation, he observed that when local authorities carry out these functions, they do so pursuant to their statutory duties, which are imposed by public law. The costs are covered by public

[82] ibid [27].
[83] ibid [29].

funds. On the other hand, private care homes provide services under contract and are governed by private law.

The majority judges took the view that there are already sufficient regulatory and contractual mechanisms in place to oversee the provision of private, commercial services.[84] Thus, it would be neither necessary nor desirable to extend public law obligations to a commercial private body in this instance. Lord Neuberger, in his conclusion, passed the question back to the legislature, explaining that he was 'in no position to express an opinion' as to whether it would be desirable for residents in privately owned care homes to be given Convention rights against the owners.[85] He suggested that it would be up to the legislature to decide whether and how to extend Convention rights to care home residents (ie whether the rights would apply to all care home residents, or just those funded by a local authority).

Analysis

The reasoning in *YL* has been sharply criticised, as it has also been in *Donoghue* and *Leonard Cheshire*.[86] Janet McLean argued that both the majority and the dissenting judges in *YL* appeared to have 'struggled with methodology', focusing too narrowly on the function itself, rather than rights, and relying on the reasoning previously demonstrated in the judicial review cases.[87] For example, Lord Scott applied the 'source of powers' test, reasoning that public authorities carry out

[84] McLean (n 30) 199-200.
[85] *YL* (n 52) [171]. Since then, the Care Act 2014 has strengthened protections for care home residents. Section 73 makes clear that registered care providers, when providing care that has been arranged or funded by a public authority, are exercising functions of a public nature for the purposes of the HRA 1998.
[86] See eg S Palmer (n 3); E Palmer (n 3); Craig (n 3); Oliver (n 3); McLean (n 30).
[87] Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012) 306.

functions pursuant to their statutory responsibilities, whereas private bodies carry out functions under tort or contract.[88] This reasoning is flawed as it fails to explain the substance of the function – or, in other words, whether the *nature* of the function is public.

In response to the *Donoghue* and *Leonard Cheshire* judgments, Paul Craig has argued that the rights-based protections found in the HRA ought to still apply if a function is performed by a private body.[89] As Craig explained it, the reasoning in *Leonard Cheshire* was that just because a function is deemed public when it is carried out by a public body, it cannot necessarily follow that the same function will be public when carried out by a private body. He argued that this was 'counter-intuitive', as he found it difficult to understand why the nature of a function would change once contracted out, rather than performed in house.[90]

Stephanie Palmer found the *YL* decision 'disappointing', explaining that she had expected the courts to take a broader approach to the application of s 6(3)(b).[91] Like McLean, she also noted that the majority judges' reasoning reflected the reasoning of the judicial review cases. Whilst the judicial review case law has apparently been influential in understanding the public-private distinction, it is somewhat 'worrying' that it has impacted upon judicial reasoning in HRA cases, if we accept that the scope of the HRA should be wider than the scope of judicial review.[92]

[88] McLean (n 30) 199.
[89] Craig (n 3) 3.
[90] ibid 3.
[91] Palmer (n 3) 604.
[92] ibid 601.

Moreover, the reasoning in *YL* revealed an emphasis on the commercial motivations of Southern Cross.[93] Again, this reasoning is flawed as it does not explain whether the function itself is (or is not) public, but rather that the body carrying out the function has a commercial aim. Given that both public and private bodies can operate commercially, I agree with Palmer that this factor should have been given far less weight.[94]

Like McLean and Palmer, Rodney Austin also argued that the reasoning in *YL* was 'erroneous'.[95] Specifically, he criticised the Court's decision that s.21 of the National Assistance Act 1948 made a distinction between arranging care and accommodation for the elderly, and arranging for the *provision* of the accommodation (with the former being a function of a public nature, but not the latter).[96] Noting that the government ministers responsible for enacting the HRA 1998 had done so in full knowledge of the challenges posed by privatisation for the application of public law instruments, he argued that the Court should have adopted a more liberal approach in order to protect human rights in an era of privatised service delivery.[97]

This criticism remains highly relevant as the Court of Session (Inner House) very recently followed the *YL* judgment in *Ali v Serco*.[98] The appellant was a failed asylum seeker who argued that her Article 3 and Article 8 Convention rights had

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[93] ibid 601.
[94] The outcome of the *YL* decision was later overturned by the introduction of the Health and Social Care Act 2008, replaced by the 2012 Act. S 145(1) made the provision of certain types of social care and support public functions. See also Brendon Orr, 'Functions of a Public Nature and Judicial Review: *YL v Birmingham City Council*' (2009) 15 AuckULRev 239.
[95] Rodney Austin, 'Human Rights, the Private Sector, and New Public Management' (2008) 1 UCL HRLRev 17, 21.
[96] ibid 20-21.
[97] ibid 23.
[98] [2019] CSIH 54.

been breached by Serco, a private contractor that had contracted with the Home Office in 2012 to provide accommodation for asylum seekers, a function previously performed by local authorities.[99] The Court held that Serco is *not* a public authority under the HRA, overturning a previous decision by the Outer House.[100]

Referring to the majority opinion in *YL*, the Court reasoned that there is a 'fundamental distinction' between entities with public law responsibility (eg local authorities) and private bodies that contract with the entity to provide services.[101] Private bodies have private law obligations and responsibilities. Even if they enter into a contract with the public sector to provide services, the public law duty remains with the public body. The Court explained that Serco has a private law contract with the Home Office and its provision of accommodation services is performed on a private law basis. However, this does not mean that Serco is responsible for the Home Office's public law obligations to provide or arrange accommodation for asylum seekers.[102]

This decision demonstrates the impact of *YL* on the extension of human rights obligations to private contractors. Because of the distinction between the provision of services and arranging for the provision of services, the case established a high threshold for private contractors to meet in order to fall within the scope of the HRA. The Courts have demonstrated a reluctance in adopting a broader approach to the application of the HRA when services are provided under contract.

[99] ibid [1].
[100] ibid [52].
[101] ibid [54].
[102] ibid [53] – [57].

4.2.3 Freedom of Information and Functions of a Public Nature

As explained in previous chapters, FOIA and FOISA can be extended to additional bodies that appear to perform 'functions of a public nature'.[103] Again, there is no fixed definition of 'functions of a public nature', leaving it open to interpretation. Unlike the HRA, this is generally not a matter for the courts to interpret, but rather the relevant ministers, who have the power to extend the legislation to additional bodies under s 5 of FOIA or FOISA, as explained in Chapter Two of this thesis.[104]

In 2015, the Scottish Information Commissioner observed that the s 5 powers had been 'woefully underused', in Scotland.[105] As a result, the Office of the Scottish Information Commissioner (OSIC) proposed a factor-based approach to FOISA extension, with the aim of providing ministers with greater support in identifying 'functions of a public nature'.[106] Recognising that there are multiple factors that could be considered indicative of whether a function is public in nature, the Commissioner compiled a list of ten factors that Scottish Ministers can take into account when making this determination. In lieu of a fixed definition, the list would be used to ensure consistency in Section 5 deliberations and to enhance the transparency of the designation process. Below is the list of suggested factors:[107]

[103] FOIA, s 5; FOISA, s 5.
[104] That said, if a body subject to a section 5 order disputed that it was performing 'functions of a public nature', the courts would then intervene.
[105] Office of the Scottish Information Commissioner, *FOI 10 Years On: Are the Right Organisations Covered?* (OSIC 2015).
[106] ibid 16.
[107] ibid 18.

1. The organisation is exercising 'public functions' that were previously exercised by a public body, or is responsible for areas of activity which were previously within the public sector, eg privatised utilities.
2. The organisation is authorised to exercise the regulatory or coercive powers of the state, eg privately run prisons, or has extensive or monopolistic powers which it would not have it were not carrying out the function.
3. In carrying out the relevant function, the organisation is taking the place of a public authority, ie the functions are of a nature that would require them to be performed by a public authority if the organisation did not perform them.
4. The activities or decisions of the organisation affect the public because it is providing a service that is public in the sense of being done for, by or on behalf of the people as a whole, versus 'private' in the sense of being done for one's own purpose.
5. The function carried out is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay.
6. The particular functions carried are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities.
7. The state (directly or indirectly) regulates, supervises or inspects the performance of the function, or imposes criminal penalties on those who fall below publicly stated standards in performing it.
8. By carrying out the functions, the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.
9. Designating the organisation would improve civic engagement, or remove or mitigate the effects of inequality.
10. The organisation's decision makers are appointed, directly or indirectly, by the state.

The development of a factor-based approach reflects the view that there is no single characteristic that can determine whether a function is of a public nature.[108] It is an intentionally flexible approach, designed to adapt over time as legal and public understanding of public functions changes. The primary benefit of this

[108] E Palmer (n 3).

approach is that it provides ministers with an indicative, but not exhaustive, list to support them in identifying whether a body if performing a function of a public nature. As the OSIC (under the leadership of previous commissioner Rosemary Agnew) hypothesised, this is one of the main barriers to the legislative extension of FOISA as ministers need more support in understanding what functions of a public nature are so that they can make better use of the s 5 powers.[109] However, the suggested factors require further scrutiny, as not all of the above are what I consider to be functions of a *public nature*, echoing the arguments made in previous discussions of the HRA.

To begin, the first factor in the list is ahistorical. Very few functions have been exercised solely by public bodies throughout history.[110] For example, the next chapter in this thesis chronicles the provision of water and sewerage services in the UK, which have gone from a mixture of public and private provision, to a predominantly nationalised service, before the privatisation of the industry in England and Wales in 1989 (with Welsh Water later becoming a non-profit commercial company). Similarly, many of the state-owned industries privatised during the 1980s and 90s (eg coal, steel, and British Rail) were privately run prior to post-World War II nationalisation.

Therefore, if 'previously exercised by a public body' is to be a relevant factor, then it prompts the obvious question: how far back in history do we mean? Even if a suitable threshold could be established, it still does not explain how the factor

[109] OSIC (n 105).
[110] See eg Alasdair Roberts, 'Structural Pluralism and the Right to Information' (2001) 51 UTorontoLJ 243.

relates to the *nature* of the function. It merely describes who has performed the function or provided the service. Whilst the decision of a state to directly provide a service could very well imply a normative claim that the service should be provided by the state (eg publicly provided education reflects an understanding of education as a social good), historical arrangements in and of themselves do not. I contend that the nature of function can be public regardless of who performs the function, and relying on this factor obscures the nature of the function.

Likewise, Factors 3, 6, 7, and 10 refer to institutional, rather than functional characteristics. Factor 3 appears to rely on circular logic – if the functions are of a nature that they would have to be performed by a public authority if a private organisation did not 'take their place' in performing them. However, this does little to shed light on what the *nature of the function* is.

Factor 6 is a familiar one, as it is reminiscent of the 'source of powers' test, and it echoes the reasoning given in some of the HRA judgments. It is therefore not surprising to find this factor on the list, but, like Factor 1, it is not entirely clear what is meant by 'the functions for which the state has generally assumed responsibilities'. This suggests an emphasis on *whom* is responsible for performing the functions, rather than the *nature* of the functions themselves.

Factor 7 concerns how the function is regulated, rather than the nature of the function itself. Factor 10 focuses on the composition of an organisation's board, rather than the functions it carries out. Whilst these are important considerations due to the power exercised by the state in regulating the function, or appointing board members, these factors are still institutional, rather than functional.

On the other hand, Factors 4, 8, and 9 are more closely connected with the nature of the function, offering compelling reasons for the legislative extension of FOISA. Factor 4 puts the 'public' in public functions when it argues that functions performed on behalf of the public should be considered public function (or be given weight in a factor-based approach), reflecting Haque's argument that the 'publicness' of a public service can be determined, at least in part, by its service users.[111] This is a sharp contrast from Factor 1, which refers to how a function has been delivered in the past, as opposed to for whom the function is intended to serve.

Similarly, Factors 8 and 9 eschew institutional characteristics, instead emphasising the intended outcomes of the functions. Factor 8 suggests that 'functions of a public nature' are those that are carried out for the *collective* benefit of the public. The body carrying out the function has been entrusted by the public to do so. Likewise, Factor 9 suggests that designation should be considered where doing so would improve civic engagement, or mitigate the effects of inequality. Both of these factors come far closer to getting at the *nature* of the function, offering a radical alternative to the circular reasoning previously demonstrated in the *Leonard Cheshire* and *YL* judgments.

If the factor-based approach is adopted, I recommend a greater emphasis on Factors 4, 8, and 9, as these factors directly address the *public nature* of the functions performed. This approach would be consistent with the intended objectives of ATI legislation, ie supporting democratic governance and public

[111] Haque (n 33) 66.

participation. FOISA was introduced with the explicit aim of using the section 5 provision to extend the legislation to 'private companies involved in significant work of a public nature', such as companies engaged in private finance initiative (PFI) contracts with the public sector.[112] The factor-based approach should be reflective of this aim, focusing on the work or the functions carried out.

Moreover, I recommend eliminating or attaching limited weight to the factors that describe institutional characteristics. Or, if they are to be included, they can be altered to more closely reflect the nature of the function. For example, Factor 1 could be updated to consider not only *whether* a function has been exercised by a public body, by *why* the functions have traditionally been exercised by a public body. If the reasons for assigning public bodies responsibility for the function include the fulfilment of policy objectives, social justice aims, or collective goals, then there is a greater likelihood that the nature of the function is public.

4.3 Conclusion

In this chapter, I have demonstrated that the public-private distinction is not and has never been a rigid binary. Whilst it is useful in so far as it provides a vocabulary for describing two spheres of law, the problems are that (1) the use of the public-private distinction as a descriptive tool obscures its ideological underpinnings and (2) the public and private spheres have often overlapped, and this overlap has only been exacerbated by privatisation.

[112] Freedom of Information (Scotland) Bill Policy Memorandum, SP Bill 36-PM, Session 1 (2001), 7.

The functional approach of deciding whether a private body should be subject to public law instruments by determining whether it performs functions of a public nature suffers from significant flaws. First, as the cases presented in this chapter have shown, determining what constitutes a 'function of a public nature' is a matter of interpretation. Whether the power to interpret be given to the legislature or the judiciary, the public function test is yet another way to 'tinker around' with the boundaries between public and private.[113] It does not sufficiently enhance our understanding of what should be classified as 'public' or 'private', nor does it provide any justification for why this distinction continues to be made.

Second, the characteristics associated with 'functions of a public nature' continue to conflate institutional and functional characteristics. Though the OSIC's proposed factor-based approach includes some compelling factors that emphasise both the nature of the functions and the service users, many of the factors continue to rely on the characteristics that have arisen in the judicial review and HRA cases. I argue that this is a mistake, and that the factor-based approach presents an opportunity to radically rethink the concept of 'functions of a public nature', and create a list of characteristics that emphasises the *public nature* of the functions.

In the next chapter, I will examine the *Smartsource*[114] and *Fish Legal*[115] decisions to illustrate further the challenges that arise when determining whether a private body is a public authority under the meaning of the EIR. Specifically, the case

[113] Olsen (n 1) 327.
[114] *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC).
[115] *Fish Legal v Information Commissioner* [2015] UKUT 0052; *Fish Legal v Information Commissioner* (C-279/12).

study examines the definition of 'functions of public administration' and how the private water companies in England and Wales have been categorised for the purposes of the EIR.

Chapter Five
Case Study One: The Water Industry

The aim of this chapter is to examine access to information in the water industry within the United Kingdom. The divergent arrangements in water provision contribute to a rich, complex case study: the water industry in England and Wales was privatised in 1989.[1] Scottish Water, however, remains under public ownership, though privatisation has been seriously considered in the past, and it currently aims to operate as efficiently as its private sector counterparts. The case study therefore aims to demonstrate how different forms of privatisation affect information access.

Moreover, the case study provides the opportunity to examine the scope of the Environmental Information Regulations 2004 (EIR) and the Environmental Information (Scotland) Regulations 2004 (EISR), with particular emphasis on how the functional approach to coverage works in practice. In Chapter Four, I critically examined 'functions of public nature' and the associated challenges of relying on the concept to extend public law norms and instruments to private bodies. I build on the analysis in this chapter with a discussion of the *Smartsource*[2] and *Fish Legal*[3] judgments, both of which concerned the question of whether private water companies are public authorities for the purposes of the EIR. In this way, it serves

[1] However, Welsh Water (Dŵr Cymru) has operated as a non-profit company since 2001.
[2] *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC).
[3] *Fish Legal v Information Commissioner* [2015] UKUT 0052; *Fish Legal v Information Commissioner* (C-279/12).

as a practical example to illustrate the theoretical questions raised in the previous chapter.

Finally, the case study provides an empirical investigation into the private water companies and how they have responded to their new transparency obligations since the 2015 *Fish Legal* decision, when it was decided that they are public authorities for EIR purposes. This investigation addresses one of the two main research questions in this thesis: how does privatisation affect access to information?

The chapter is divided into nine sections. The first section examines the commodification of water globally, including the alleged tensions between privatisation and the right to water. The next section explains the history and current structure of the water industry in England and Wales. This sets up the third section, which analyses the legal judgments that led to the conclusion that the private water companies are public authorities for EIR purposes. Section 5.4 considers the legal implications of this decision, and what this means for other private companies delivering public services. Section 5.5 presents the results of the empirical investigation into how the private water companies have responded to their new transparency requirements under the EIR. Section 5.6 turns to Scotland, first examining the history of the water industry, including the decision not to privatise, and then setting out the current organisational and regulatory framework. Section 5.7 discusses the information access issues that have arisen from Scottish Water's commercial activities and engagement with private sector partners. Section 5.8 presents data and analysis on Scottish Water's information requests and responses. Section 5.9 concludes by reflecting on the arguments made

throughout this chapter and offering a critique of the apparently broad 'functional' approach of the EIR.

5.1 Water: Common Good or Commodity?[4]

It is not an exaggeration to say that life depends upon water. Water is necessary for, inter alia, sanitation, agriculture, hydration, and transportation. Access to clean water and sanitation is necessary for public health, but, globally, the need for universal access has not been met. The World Health Organization (WHO) reported in 2015 that 844 million people lack access to a drinking water service, and more than two billion people use a contaminated source.[5] Water contamination leads to an estimated 485,000 deaths annually.[6]

Expanding access to clean water is imperative, but, at the same time, water is a finite resource. Climate change, population growth, and urbanisation contribute to immense pressure on water services. It is estimated that by 2025, half of the world's population will be living in water-stressed regions.[7] In a March 2019 speech, the Chief Executive of the Environment Agency warned that by 2050, many parts of England (particularly in the highly populated South East) will face 'significant water deficits'.[8] Sustainable water governance must therefore balance the need to increase access to clean water to those who need it, whilst protecting a finite resource for future generations.

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[4] The section heading was inspired by the title of Chapter 1 in Colin Ward, *Reflected in Water: A Crisis of Social Responsibility* (Cassell 1997) – 'Sharing a Common Good'.
[5] World Health Organization, 'Drinking-water' (7 February 2018) <http://www.who.int/news-room/fact-sheets/detail/drinking-water> accessed 14 June 2019.
[6] ibid.
[7] ibid.
[8] Sir James Bevan, 'Escaping the Jaws of Death: Ensuring Enough Water in 2050,' (19 March 2019) Waterwise Conference speech, <www.gov.uk/government/speeches/escaping-the-jaws-of-death-ensuring-enough-water-in-2050> accessed 18 July 2019.

International financial institutions (IFIs) like the World Bank and the International Monetary Fund (IMF) have encouraged the commodification of water as a solution to the challenges of water supply, with privatisation in some instances a necessary condition for receiving an IMF loan.[9] Privatisation is presented as an effective and efficient way to deliver water services, particularly in developing countries, where states are considered lacking in the necessary resources and skills to provide adequate water and sewerage services directly.[10] However, privatisation has been met with resistance by those who view water as a common good, with some arguing that water is a fundamental human right.[11]

Perhaps more so than any other service or utility, the water industry delivers a vital resource, one that must be delivered equitably, affordably, and in accordance with environmental standards. Sustainable and equitable water governance requires transparent and accountable service provision. Privatisation is therefore seen as a potential threat because it transfers responsibility from the public to the private sectors. The private sector is profit-motivated and is not usually subject to the same transparency laws or standards as public bodies.

Privatisation is often accompanied by an expanded regulatory system, designed to provide oversight in the absence of traditional public sector controls. However, traditional regulatory frameworks for transparency have been deemed insufficient

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[9] Christine Cooper, William Dinan, Tommy Kane, David Miller, and Shona Russell, Scottish Water: The Drift to Privatisation and How Democratisation Could Improve Efficiency and Lower Costs (University of Strathclyde, October 2006) 8. See also Susan Spronk, 'Water and Sanitation Utilities in the Global South: Re-centering the Debate on "Efficiency"' (2010) 42 Review of Radical Political Economics 156; Joseph Stiglitz, 'Foreword' in Gérard Roland (ed), *Privatization: Successes and Failures* (ColumUP 2008).

[10] Khulekani Moyo and Sandra Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability' (2015) 37 HumRtsQ 691.

[11] See eg Henri Smets, 'The Right to Water as a Human Right' (2000) 30 EnvtlPolyL 248; Moyo and Liebenberg (n 10).

because (1) powerful private companies can weaken the effectiveness of regulatory agencies and (2) regulatory agencies do not necessarily hold all of the environmental information that the public might require.[12]

Moreover, voluntary disclosure mechanisms suffer from a lack of strong redress procedures. An information requester has no legal recourse should their request be denied, and instead must rely on the goodwill of the information holder to provide the requested information in a timely manner. Therefore, if water is understood as an essential public good, even if it is privately provided, then a public right of access to information should also be a component of the regulatory framework.

5.2 The Water Industry in England and Wales

Historically, water and sewerage services within the UK have been provided by a mix of public and private providers.[13] State involvement in the water industry increased after the cholera outbreaks in London and other major urban areas in the mid-19th century claimed tens of thousands of lives. After epidemiologists determined that the disease and its spread were the direct result of poor sanitation, the government accepted that it has a 'binding moral duty' to provide clean water and waste disposal services to all households.[14] The public health imperative led to widespread engineering projects, designed to deliver water to Britain's growing urban centres and surrounding towns.

[12] Uzuazo Etemire, 'Public Access to Environmental Information Held by Private Companies' (2012) 14 EnvtlLRev 7, 11-12.
[13] See eg Colin Ward (n 4).
[14] ibid 6.

By the early 20th century, private sector involvement in the water industry became less common as public sector provision increased.[15] In most cases, water services were provided directly by local authorities, with over 1400 such authorities existing during the early 20th century. After World War II, successive governments sought to improve efficiency through the amalgamation of water suppliers. As a result, the number of municipal water authorities has been reduced to 150 in 1974. Joint water boards, comprised of neighbouring local authorities, took control over the water authorities. Before then, each local authority had maintained control over its own supply.

Water supply, however, is not the only task of the water industry. It also provides sewerage treatment and maintains the water environment, eg through controlling water abstraction, regulating water use for recreational purposes, and maintaining infrastructure.[16] Amalgamation did not occur as it had with the water supply companies, so, in 1974, there were still 1393 sewerage authorities in England and Wales, most of them very small and suffering from underinvestment. Local authorities at the time were more likely to invest in visible public works projects, rather than improving the sewerage system. This led to environmental consequences, as without the resources to treat water effectively, dirty water was pumped back into rivers and seas.[17]

The third function of the water industry, maintaining the water environment, was also traditionally the responsibility of local authorities in England and Wales. In

[15] Peter Saunders and Colin Harris, *Privatization and Popular Capitalism* (OpenUP 1994).
[16] ibid 34-35.
[17] ibid 36.

1948, 32 River Boards were created to manage the water environment. These were replaced in 1963 with 29 River Authorities.[18] The Water Act 1973 was introduced to address the fragmentation of the industry through a systematic restructuring, replacing the 29 River Authorities with ten Regional Water Authorities (RWAs). The newly created RWAs were tasked with taking over all three functions of water industry management. The local authorities fought to maintain some control over sewerage services, but, ultimately, they could not compete with the larger, better resourced RWAs.[19]

5.2.1 Water Privatisation in England and Wales

The first suggestion to privatise the water authorities came in 1985 and was motivated by several factors. Frustrated by financial constraints and government pressure on the nationalised industries, the Chairman of Thames Water was among the first to publicly declare that the RWAs would be better off free from government control. In addition, the aging infrastructure needed upgrading, and since central government had taken over in 1974, capital expenditure had been cut by one half.[20] At the same time, public utilities including gas, electricity, and telecommunications had been or were being privatised in the UK, and the water industry was seen as the 'last frontier' of privatisation.[21]

[18] ibid 36.
[19] ibid 36-37.
[20] Ward (n 4) 93-94.
[21] Moyo and Liebenberg (n 10) 692. The privatisation of the water industry was not, however, the final industry to be privatised in the UK. Perhaps most notably, the Royal Mail was privatised in October 2013 through a public flotation, in which the government sold off 70% of its shares. See David Parker, 'Privatisation of the Royal Mail: Third Time Lucky?' (2014) 34 Economic Affairs 78.

The process of water privatisation was fraught with numerous challenges. First, it was a politically charged issue, one that was very unpopular with the public. Privatising water, a vital natural resource and common good, was anathema to many people, who argued that the private sector should not be allowed to profit by commodifying water, a criticism that Margaret Thatcher later dismissed as 'emotive nonsense'.[22] Thus, in order to privatise the water industry, the government had to first overcome public resistance to privatisation.

Then, there were the practical challenges, such as determining how to charge for water.[23] Meters would need to be installed to monitor water usage. Moreover, underinvestment in infrastructure meant that some of the RWAs were less attractive investments than others, with most of the RWAs in need of upgrading in order to comply with EU and domestic environmental regulation.

Most importantly, as indicated above in section 5.2, the RWAs had responsibility for both *utility* and *regulatory* functions.[24] In addition to supplying and treating water, the RWAs were responsible for granting water abstraction licences to private companies. If the RWAs were to be privatised, the private companies would become responsible for regulating other private companies, an unprecedented arrangement.

Between 1985 and 1987, there was considerable debate on how to address these challenges, and whether privatisation should go ahead. The water industry managers were in support of privatisation, but on the condition that the RWAs

[22] Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 682.
[23] Saunders and Harris (n 15) 39.
[24] ibid 39-43.

maintained control of their existing powers and functions. A 1986 White Paper confirmed that the RWAs *would not* be restructured prior to privatisation, meaning that the new private water companies would be responsible for granting water abstraction licences to other private companies, with the Secretary of State for the Environment mediating complaints.[25]

The government's plans were met with opposition from a range of stakeholders, including the chemical, agricultural, and brewing industries.[26] These industries rely on water abstraction and did not want the privatised water companies to be given the power to grant licences. Public opinion was also strongly against privatisation, and, in July 1986, the government announced that it was putting its privatisation plans on hold.[27]

However, the pause was short-lived. In its May 1987 election manifesto, the Conservative Party asserted its intention to 'continue the successful programme of privatisation', including water privatisation.[28] The manifesto included a significant change to its initial proposals. It pledged to establish a new National Rivers Authority (NRA) to take over responsibility of the regulatory and safeguarding functions of the water industry.[29] The water supply and sewerage

[25] *Privatisation of the Water Authorities in England and Wales* (Cmnd 9734, 1986).
[26] Saunders and Harris (n 15) 47; See also Richard Macrory, 'The Privatisation and Regulation of the Water Industry' (1990) 53 MLR 78.
[27] Emanuele Lobina has suggested that this was a tactical move. Due to public criticism of privatisation, the Conservative Party put its plans on hold until after it won the 1987 general election. I am not entirely convinced by this argument, as the Conservatives did state their intentions to privatise the water industry in their 1987 election manifesto (see below). Nevertheless, privatisation was a politically charged issue and has become emblematic of the free market ideology now known as Thatcherism. See Emanuele Lobina, 'UK Water Privatisation – A Briefing' February 2001.
[28] Conservative Party, *General Election Manifesto 1987: The Next Moves Forward* (Conservative Party 1987).
[29] ibid.

functions would be privatised. In other words, the Conservatives had decided to move away from the principle of integrated river basin management so that the privatised water companies would not have regulatory powers.[30] The water industry was finally privatised in 1989.[31]

5.2.2 Water Industry Regulation in England and Wales

The water industry is a prime example of a 'natural monopoly', in which high start-up costs and technical infrastructure means that one firm will usually dominate service provision in a particular area.[32] As a result, competition from other firms will be limited or non-existent. To combat the problems that can arise from private monopolies (eg higher costs for consumers, poor customer service, and lack of incentive to innovate), a regulatory framework was developed to provide oversight for the industry where the market could not.

The Water Act 1989, later replaced by the Water Industry Act 1991 (WIA), provided the legal basis for privatisation. A new regulatory framework was established, comprised of, inter alia, the NRA, the Drinking Water Inspectorate, and the Office of Water Services (Ofwat).[33] Ofwat is a non-ministerial government department, established to promote competition within the water industry and protect consumer interests. The Director General of Water Services, supported by Ofwat and directly accountable to Parliament, was appointed to oversee the

[30] Macrory (n 26).
[31] The Water Act 1989, later replaced by the Water Industry Act 1991 (WIA) provided the legal basis for privatisation.
[32] OECD, 'Natural Monopoly' <https://stats.oecd.org/glossary/detail.asp?ID=3267> accessed 18 July 2019.
[33] Tony Prosser, *Law and the Regulators* (Clarendon 1997) 139.

industry, protect customers, and ensure that the water companies were able to finance their functions.

Regulatory oversight of the newly privatised industry required increased transparency.[34] The water companies were required to supply the Director General with information on service quality and performance, such as water availability, hosepipe restrictions, and responses to complaints.[35] They were required to make annual performance reports to independent reporters and create codes of practice on customer service, including customer disconnections for non-payment, arguably one of the most controversial aspects of privatisation. The first Director General, Ian Byatt, made his 'Dear Managing Director' letters to the water company directors open to the public, thereby demonstrating a level of transparency that had not previously been present in the RWAs.[36]

The Water Act 2003 made significant changes to the regulatory framework in England and Wales, amending the WIA 1991 and the Water Resources Act 1991. The Act established the Consumer Council for Water to represent consumer interests.[37] It also abolished the office of the Director General for Water Services, replacing it with the Water Services Regulation Authority (still known by the Ofwat acronym).[38] As the economic regulator, Ofwat continues to monitor the transparency of the water companies. It publishes information on water company performance and has created the company monitoring framework as a tool to

[34] As Richard Macrory (n 26) argued at the time, privatisation was likely the impetus for the new transparency requirements, though transparency was becoming more important within the environmental law field, specifically with regards to European Community regulation.
[35] Prosser (n 33) 132-133.
[36] ibid 125.
[37] Water Act 2003, s 35.
[38] Water Act 2003, s 34.

evaluate the water companies' information sharing and transparency practices. The regulatory framework has contributed to increased transparency within the industry, though it is important to make a distinction between regulatory transparency and public transparency. Whereas regulatory transparency has developed with the aims of reassuring investors and promoting competition, public transparency is broader and is more compatible with the democratic-expansive view. The former is not a substitute for a general public right to information, which is the argument that underpinned the *Smartsource* and *Fish Legal* cases discussed in the following section.

5.3 Are Private Water Companies 'Public Authorities' under the EIR?

As explained in Chapter Two of this thesis, the EIR provide access to environmental information held by public authorities. And, unlike the UK's FOI laws, which have adopted an institutional approach to coverage, the EIR take a functional approach. The EIR apply to all public authorities listed in Schedule 1 of FOIA or FOISA, as well as additional organisations that perform 'functions of public administration'. Regulation 2(2) sets out the definition of 'public authority:'

Subject to paragraph (3), "public authority" means –

(a) government departments
(b) any other public authority as defined in section 3(1) of the Freedom of Information Act (the Act) disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
  (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description;
  (ii) any person designated by Order under section 5 of the Act;
(c) any other body or person, that carries out functions of public administration;
(d) any other body or other person, that is under the control of a person falling within subparagraphs (a), (b) or (c) and –
  (i) has public responsibilities relating to the environment;
  (ii) exercises functions of a public nature relating to the environment; or
  (iii) provides public services related to the environment.

Again, as discussed in Chapter Two, the broad definition is in keeping with the Aarhus Convention and Directive 2003/4/EC, which has been transposed into domestic law by the EIR. Recognising that environmental information is held by a range of bodies, not just traditional state or public sector organisations, the aim is to promote transparency, for its own sake and to support participatory democracy and access to justice in environmental matters.

5.3.1 *Smartsource v Information Commissioner*

But, despite the apparently broad definition of 'public authority' under the EIR, determining whether it applies to the private water companies has been complicated. In 2012, the Upper Tribunal (UT; Administrative Appeals Chamber) determined that the water companies *are not* public authorities when it dismissed an appeal made by Smartsource Drainage and Water Reports Ltd, a private business that provides comparison data on water billing.

Smartsource had requested information from 16 private water companies, which provided some, but not all, of the information. Smartsource complained to the ICO, who declined to adjudicate on the grounds that the water companies were not 'public authorities' for EIR purposes.[39] When the appeal reached the UT, it applied a multi-factor approach to determine whether the private water companies were indeed performing 'functions of public administration' as defined in Regulation 2(2)(c), or met the criteria set out in Regulation 2(2)(d).[40]

Without any binding case law to draw on, the UT began by considering the definitions provided in the Aarhus Convention and the European Directive 2003/4/EC.[41] Regarding privatised public services, the Aarhus Implementation Guide explained that 'such innovations cannot take public services or activities out of the realm of public involvement, information, and participation'.[42] The guidance recognised that what is considered a public function will vary from country to country, but stated that any person 'authorised by law to provide a public function of any kind' is to be considered a public authority.[43] According to the guidance, the types of bodies that might be covered under this definition include 'public utilities and quasi-governmental bodies such as water authorities'.[44]

[39] *Smartsource* (n 2) [9]. The ICO sent a letter to Smartsource on 12 March 2010 explaining its decision. No reference is available as a decision notice was not issued.
[40] ibid [66].
[41] ibid [30].
[42] ibid [32]; UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, UNECE 2014) 46.
[43] UNECE (n 42) 47.
[44] ibid 47.

However, the language of the Implementation Guide does not exactly reflect that of the EIR; it referred to 'public functions' rather than 'functions of public administration', which is the term used in regulation 2(2)(c) and is apparently narrower in scope. This created a challenge for the UT, who correctly noted that 'a body will not be a public authority under regulation 2(2)(c) simply because it carries out public functions; they must be "functions of public administration."'[45] Thus, the UT was still left with the task of determining what these are.

In making this determination the UT examined two Information Tribunal decisions: *Network Rail*[46] and *Port of London Authority*.[47] Neither case is binding on the UT, but these cases help illustrate the decision-making process for determining whether a body is a public authority for EIR purposes. In the latter case, the Tribunal concluded that the Port of London Authority was a public authority under the meaning of regulation 2(2)(c) because if it did not exist, then the government would have to carry out its administrative functions.[48] That is, the functions were of such importance that the government would have to step in as service provider to avoid failure.

However, the Information Tribunal determined that Network Rail *is not* a public authority under the meaning of the EIR. The Tribunal referred to the HRA jurisprudence, specifically *YL*[49] and *Aston Cantlow*,[50] and the factors that had

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[45] *Smartsource* (n 2) [35].
[46] *Network Rail Ltd v Information Commissioner and Network Rail Infrastructure* [2007] UKIT EA/2006/0061.
[47] *Port of London Authority v Information Commissioner* [2006] UKIT EA/2006/0062
[48] Richard Moules, *Environmental Judicial Review* (Hart 2011) 353.
[49] *YL v Birmingham City Council* [2007] UKHL 27. As discussed in Chapter 4, the House of Lords determined that the private care home was not exercising functions of a public nature under the meaning of the HRA 1998, a decision that prompted considerable criticism.
[50] *Parochial Church Council for the Parish of Aston Cantlow and Wilmcote with Billesley v Wallbank and another* [2003] UKHL 37.

been used to determine whether a body fell within the scope of s 6, such as the extent of public funding or whether the body is taking the place of central government or local authorities in performing the functions.[51] Moreover, the Tribunal considered that operating a railway is no longer viewed as a function *performed by* government, and, since the Railways Act 1993, it has been accepted that responsibility for providing train services 'belong(s) in the private sector'.[52]

Taking this into consideration, the UT noted the similarities and differences between the water companies and Network Rail.[53] Whilst both own and manage a major utility industry, the UT observed that there are considerable differences and that the water companies have even fewer of the characteristics of a public authority than Network Rail and thus do not fall within regulation 2(2)(c). These differences include the fact that the water companies do not receive public funding, have institutional and private shareholders, and do not have government nominees on their boards of directors.[54] Moreover, the UT rejected the appellant's argument that the fact that the water companies are prevented by law from disconnecting customers for non-payment should be taken into consideration.[55] The UT was not convinced by this factor, pointing out that London black cab drivers are also under a statutory obligation to provide services and cannot 'pick and choose' customers, but are not performing functions of public administration.[56]

[51] *Smartsource* (n 2) [48].
[52] *Network Rail* (n 46) [29].
[53] *Smartsource* (n 2) [66].
[54] ibid [67].
[55] ibid [73].
[56] ibid [73].

The reasoning of the UT, however, is in need of critique. First, the argument that railway operation is no longer performed by government and therefore is not a 'function of public administration' is somewhat circular and relies on the identity of the service provider, rather than the nature of the function.[57] It is difficult to follow the reasoning that because it was decided that rail and train services should be provided by the private sector (a normative claim that is currently being challenged), then they are not performing functions of public administration.[58] If public administration is understood as the implementation of government policy, a responsibility that private and public actors have long shared, then the focus on who is performing the function is misplaced.

Furthermore, as Uzuazo Etemire has argued, the comparison with London taxi drivers was flawed.[59] Unlike the private water companies, which cannot lawfully discriminate between customers, taxi drivers do in fact have some freedom to choose their customers. Though they are generally required to accept fares at formal taxi ranks, they can choose whether to stop when flagged down by a

[57] In Chapter 4, I provided a critique of the proposed factor-based approach to FOISA extension, and I argued that several of the factors relied on *institutional*, rather than *functional* characteristics. For example, I argued that Factor 1, which considered historical arrangements in service delivery, was of limited relevance because it does not provide a principled argument for why a service should be deemed 'public' rather than 'private'.

[58] The renationalisation of railways in the UK has been the subject of considerable public and political debate. In its 2019 election manifesto, the Labour Party pledged to bring the railways back into public ownership. See Labour Party, *It's Time For Real Change* (Labour 2019) 20. Meanwhile, campaign groups like We Own It have continued to lobby for bringing a range public services, including rail and the water industry, back into public ownership. <https://weownit.org.uk/public-ownership/railways> accessed 26 December 2019. In March 2020, the government took over operation of Northern Rail, after private operator Arriva failed to deliver an adequate service. Arriva had been contracted to operate the franchise until 2025. See UK Government, "Government Decision on Northern Rail' (29 January 2020) <https://www.gov.uk/government/news/government-decision-on-northern-rail> accessed 18 June 2020.

[59] Etemire (n 12) 17. See also Sean Whittaker, 'Case Note: Access to Environmental Information and the Problem of Defining Public Authorities' (2013) 15 EnvtlLRev 230.

potential fare, or turn down a fare based on distance.[60] Moreover, as noted earlier in this chapter, the water companies have a duty to provide an essential service, one that is necessary for public health and must be delivered in accordance with environmental regulations. Taking this into consideration, the ability to select customers (or not) appears a relatively minor point compared with the nature of the service provided. When determining whether the private water companies perform 'functions of public administration', the UT could have considered not only *whether* they are prevented from 'picking and choosing' customers, but (more importantly) *why* they are prevented from doing so. It is the latter consideration that will shed light on the nature of the function.

The UT also found that the private water companies did not meet the criteria set out under regulation 2(2)(d), concluding that 'there is an important distinction to be made between regulation and control'.[61] Whilst the water companies are regulated by Ofwat, they also exercise a high level of commercial freedom. 'Control', according to the UT, implies a higher degree of command, including the power to determine how a body operates, and in this case, the threshold had not been met. In conclusion, the UT held that the private water companies did not meet any of the definitions of 'public authority' as set out under regulation 2(2) and this were not subject to the EIR, a decision that was almost immediately challenged in *Fish Legal*.

[60] ibid 18.
[61] *Smartsource* (n 2) [101].

5.3.2 *Fish Legal v Information Commissioner*

The facts of the *Fish Legal* case are complex, but briefly: the case involved two separate requests for information. One was made by a private individual, Mrs. Shirley, and the other by Fish Legal, the legal arm of the Angling Trust, a charitable body set up to protect anglers' rights and fish conservation.[62] Both requested information from private water companies, which eventually provided all of the requested information, but not within the 20-day time limit set out under the EIR. The requesters complained to the ICO about the way their requests had been handled, but the ICO declined to adjudicate on the grounds that the water companies were not subject to the EIR.[63]

The appellants appealed to the First-tier Tribunal (General Regulatory Chamber; Information Rights), and, following the *Smartsource* judgment, were given permission to appeal to the UT. The appellants argued that the question of whether a body is performing 'functions of public administration under national law' is a matter of EU law, not simply a matter of domestic law.[64] As such, the courts must consider the purpose of Directive 2003/4/EC as well as 'the precautionary and preventative principles which underpin EU environmental law generally', and the principles of access to information and public participation underpinning the Aarhus Convention.

The appellants maintained that the water companies *do perform* functions of public administration and are under the control of bodies falling within the scope

[62] Fish Legal, <https://www.fishlegal.net> accessed 16 June 2019.
[63] *Fish Legal* (n 3) [8].
[64] ibid [3].

of Articles 2(2)(a) and 2(2)(b) of the Aarhus Convention. Moreover, the appellants argued that since private water companies are public authorities for the purposes of the European Directive, it should follow that the private water companies in England and Wales also be classified as public authorities under the EIR.

5.3.2.1 Referral to the CJEU

Based on the appellants' submissions, the UT referred five questions to the Court of Justice of the European Union (CJEU) for clarification. The first three are the most significant for this thesis. The first two questions concerned the meaning of 'public administrative functions' and the criteria for determining what these are. The third question concerned the meaning of 'control' and whether it indeed differed from 'regulation' as previously decided.

The Grand Chamber of the CJEU responded in December 2013, establishing a test for determining whether bodies are performing 'functions of public administration' under national law. The test requires adjudicators to examine whether the bodies in question are vested with special powers 'beyond those which result from the normal rules applicable in relations between persons governed by private law'.[65] This is referred to in shorthand as the 'special powers test'. The CJEU did not elaborate on the meaning of 'special powers', leaving it instead to the adjudicating body to consider all parties' submissions and establish the relevant criteria.

Regarding Question 3, the Grand Chamber concluded that a system of regulation does not exclude control within the meaning of Article 2(2)(c) of the EU Directive (which is the corollary of EIR regulation 2(2)(d)). For example, if a regulatory

[65] ibid [56].

system involves a 'particularly precise legal framework' that sets out specific directions for how a private company is to perform its public functions, then it can be said that these companies are not fully autonomous of the state.[66] The Grand Chamber held that it is the responsibility of the UT to determine whether the regulatory framework set out in the WIA 1991 meets this standard.

5.3.2.2 Return to the Upper Tribunal

The case was then returned to the UT, which first had to establish the relevant criteria for the 'special powers' test. It rejected the respondent's suggestion that this could be determined, at least in part, by considering whether the private companies are exercising 'state powers' because 'the nature of the state is not sufficiently clear'.[67] As explained throughout this thesis (and in Chapter One especially), the role of the state in the UK economy and provision of social welfare has changed dramatically during the past century. Accordingly, the nature of 'state powers' has also shifted over time, to the extent that it cannot be effective criterion for defining 'special powers'.

Ultimately, the UT concluded that the private water companies *do exercise* special powers based on the following criteria: they have compulsory purchasing powers, the right to issue temporary hosepipe bans, and the right to decide (under strict conditions) whether to cut off customers' water supply.[68] None of these are powers normally granted under private law. However, the UT did not accept that susceptibility to judicial review is a relevant factor for the special powers test

[66] ibid [71].
[67] ibid [113].
[68] ibid [126].

because it concerns institutional characteristics (ie the argument would be that if a body is subject to judicial review, then it is exercising special powers).[69] This is a somewhat circular argument that emphasises the classification of the body exercising power, rather than the *nature* of the power or *why* the body is subject to judicial review.

Regarding the 'control test', the UT concluded that the criteria for establishing whether the water companies were acting in a 'genuinely autonomous manner' when proving services related to the environment had not been met.[70] Though the water companies were subject to strict regulation and oversight, the UT was not convinced that there was enough evidence to conclude that neither the Secretary of State for the Environment nor Ofwat exert a level of control over the water companies to prevent them from operating in a genuinely autonomous manner. For instance, though the regulatory agencies do have significant powers (eg Ofwat can withhold approval of a company's charging scheme),[71] these powers are largely due to the fact that the water companies' are effective monopolies, and the regulatory framework exists to ensure competition in the absence of a free market.[72]

The UT recognised that the threshold for meeting the control test is high and that very few commercial enterprises will meet it.[73] Whilst it would not be impossible for a commercial body to be under the control of a public authority, commercial bodies tend to operate autonomously, with an independent governance structure,

[69] ibid [127].
[70] ibid [154].
[71] Water Industry Act 1991, s 143(6).
[72] *Fish Legal* (n 3) [151].
[73] ibid [155].

subject to company law and in accordance with the Companies Act 2006.[74] Because the 'control test' is concerned with the *way in which the functions are exercised*, rather than the nature of the functions themselves, it is unlikely that many commercial bodies will be influenced by a public authority to the extent that they are prevented from operating in a genuinely autonomous manner. The broader implications of this narrow test will be discussed in Section 5.8 of this chapter.

5.4 The Implications of *Fish Legal*

The *Fish Legal* judgment established that the private water companies are public authorities under the EIR, but what are the implications of this decision? Before examining how the private water companies have responded to their new obligations under the EIR, this section first considers the legal implications of the tests set out by the CJEU in *Fish Legal*.

5.4.1 *Cross v Information Commissioner and the Cabinet Office*

In 2016, the UT had the chance to apply the functional tests set out by the CJEU in *Cross v. Information Commissioner*.[75] The facts of the case concerned whether the Royal Household is a public authority for the purposes of the EIR. Most importantly for the purposes of this thesis, it set out its interpretation of para 52 of *Fish Legal EU*, concerning the definition of public authorities, as defined in article 2(2)(b) of Directive 2003/4/EC:

> '…legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those

[74] ibid [153].
[75] *Cross v Information Commissioner and the Cabinet Office* [2016] UKUT 153 (AAC).

> which result from the normal rules applicable in relations between persons governed by private law'.[76]

The UT explained that, in order to meet this definition, the services of public interest and the special powers 'must be entrusted to and vested in the relevant entity by the legal regime applicable to that entity'.[77] In other words, it is not enough that a body be exercising 'special powers' not ordinarily available under private law. Instead, they must also be entrusted with the power to do so by the applicable legal regime, suggesting a necessary connection between the state and the service provider. A private body holding environmental information and exercising special powers would not fall under this definition, unless it had been entrusted to do so under national law.

That said, the UT cautioned that the tests set out by the CJEU should not be applied rigidly.[78] Instead, they should also be applied with consideration to the underlying objectives and purposes of Directive 2003/4/EC, including those relating to 'the public interest in environmental information being made available to the public'.[79] In this case, the UT held that the Sovereign does not have 'special powers' and is thus not a public authority for EIR purposes.

5.4.2 *Poplar HARCA v Information Commissioner*

In February 2019, the First-tier Tribunal (Information Rights) found that Poplar Housing and Regeneration Community Association Ltd. (Poplar HARCA;

[76] *Fish Legal* (n 3) [52].
[77] *Cross* (n 75) [98].
[78] ibid [99].
[79] ibid [99].

hereafter, 'Poplar') *is not* a public authority for EIR purposes.[80] Poplar is a charitable housing association that owns and manages approximately 9,000 homes in East London.[81] It was set up in 1998 by the London Borough of Tower Hamlets transfer its housing stock and is now registered with the Homes and Communities Association (HCA) as a registered provider of social housing.

The decision reversed an August 2018 decision by the ICO, who decided that Poplar was a public authority because it carries out 'functions of public administration', as it exercises powers not ordinarily available to private landlords, such as the power to apply for injunctions to prevent evictions.[82] Poplar appealed to the Tribunal on the grounds that (1) the provision of social housing is not a 'function of public administration' and (2) it does not exercise 'special powers'. Counsel argued that whilst the appellant does have some powers not available to private landlords, this does not confer *an advantage*.

To determine whether Poplar carries out functions of public administration, the Tribunal asked three questions: (1) Has Poplar been entrusted with the performance of services under a legal regime? (2) Are those services of public interest? (3) Has it, for the purpose of performing those services, been vested with special powers?[83]

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[80] *Poplar Housing and Regeneration Community Association v Information Commissioner and Peoples Information Centre* EA/2018/0199.
[81] As discussed in Chapter Four, Poplar was also the respondent in *Donoghue v Poplar HARCA* [2001] EWCA Civ 595. In that case, the Court of Appeal held that Poplar was exercising a public function under the meaning of s.6(3)(b) HRA 1998, in large part due to the close relationship between Poplar and the London Borough of Tower Hamlets.
[82] ICO Decision Notice FER0735350.
[83] *Poplar* (n 80) [95].

The Tribunal concluded that although Poplar does exercise 'special powers', it *has not* been entrusted to perform functions of public administration 'by virtue of a legal basis specifically defined in national legislation'.[84] The requirement for the services to be performed under the entrustment of a legal regime is not mentioned within the EIR, and instead comes from the Directive and the Aarhus Convention guide.[85] Explaining that it was bound by the requirement by *Fish Legal EU* and *Cross*, the Tribunal concluded that Poplar had not been 'empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation'.[86]

The Tribunal acknowledged that this requirement 'puts an artificially narrow interpretation on the phrase "under national law."'[87] It explained that had they not been bound by *Fish Legal UK* and *Cross*, the Tribunal would have taken a broader approach in interpreting 'entrustment by a legal regime'.[88] As it stands, bodies that carry out public services on behalf of the state will fall outwith the scope of the EIR, unless it can be demonstrated that they have been entrusted to do so under the applicable legal regime.

At the time of writing, this decision has not been challenged, but it is likely that it will in the future. The 'special powers' and 'control' tests already established a high threshold, and the requirement for a legal basis specifically defined in national legislation creates an additional barrier. This appears contrary to the stated objectives within the Aarhus Convention and the European Directive to

[84] ibid [101].
[85] ibid [97].
[86] ibid [101].
[87] ibid [102].
[88] ibid [103].

establish a broad right to environmental information to support transparency and public participation. It is counterintuitive that the legacy of *Fish Legal*, which gave the public the right to environmental information held by private water companies, is to effectively narrow the scope of the EIR so that very few other non-state actors will meet the criteria.

5.5 How Transparent are the Private Water Companies?

The decision that private water companies are public authorities for EIR purposes raises the question: how transparent is the water industry in England and Wales? The aim of this empirical investigation is to determine how the private water companies are performing with regards to their new transparency obligations since the 2015 *Fish Legal* judgment.

Because baseline data is not available, the investigation does not attempt to evaluate whether the water companies are 'more' or 'less' transparent than they were prior to 2015. Rather, the objectives were to (1) gather data on the number and types of information requests received, exceptions engaged, and charges applied, and (2) establish whether (and/or how) the water companies had adapted their previous transparency practices to comply with the EIR.

5.5.1 Methodology

The project was designed to collect and analyse qualitative and quantitative data, through the submission of information requests to 16 water companies in England and Wales. 11 requests were sent via email, and four were sent via online forms

in the absence of a publicly listed email address. The request to Severn Trent Water was sent via post, as requested on its website.[89]

The water companies were asked to provide the following information:

1. How many requests for information have you received since it was determined that [water company name] is a public authority for the purposes of the Environmental Information Regulations?
2. Are you able to provide statistics on the types of information requested and number of requests?
3. What percentage of requests are successful requests (meaning the requested information was disclosed)?
4. Which exceptions are most commonly engaged when deciding whether to withhold information? Are you able to provide data that details the number of times each exception has been applied?
5. What percentage of information requests incur charges?
6. How frequently are information requests withdrawn when the requester is advised of the fees?
7. Do you have a publicly available publication scheme?
8. Are you able to provide additional information on how becoming subject to the EIR in 2015 has changed your work (for example, with regards to staffing/resources or existing transparency practices)?

5.5.2 Results

13 out of 16 private water companies responded to the information requests. Ten companies (Affinity, Bristol, Northumbrian, Portsmouth, SES, Southern, South West, Welsh, Wessex, and Yorkshire) provided some or all of the requested information. Three companies (Severn Trent, South East, and Thames) responded, but declined to provide information on the grounds that the information requested is not environmental information according to the definition set out under

[89] Severn Trent Water, 'Environmental Information Regulations' <https://www.stwater.co.uk/about-us/environment/environmental-information-regulations> accessed 24 May 2019.

regulation 2(1). Three companies (Anglian, South Staffordshire, and United Utilities) did not provide any response.[90]

Northumbrian and South West provided raw data in spreadsheet (.csv file) format. The other companies responded in text format, with Wessex providing data since the (current) EIR came into force in 2005, rather than 2015. Likewise, Affinity provided data since 2016, when it began keeping records, and Bristol provided data since 2018, due to organisational changes.

[90] Notably, Thames, United Utilities, Severn Trent, and Anglian are among the UK's largest private water companies and regularly feature in lists of the world's largest water multinationals. See eg, David Hall and Emanuele Lobina, 'Water Privatisation,' Public Services International Research Unit 2008, 7; ETC Group, 'World's 10 Largest Water Companies' (18 January 2012) <https://www.etcgroup.org/content/worlds-10-largest-water-companies> accessed 22 July 2019.

Questions 1 and 2: Number/Types of Information Requests

Company Name	No. of Requests	Types of Information Requests
Affinity Water	35*	Low water pressure
Anglian Water	---	---
Bristol Water	9**	Does not record
Northumbrian Water	338	Wastewater infrastructure Wastewater treatment Water quality Water pollution Drainage and sewers Flooding
Portsmouth Water	12	"All environmental"
SES Water	9	Water treatment Street works Water quality Company assets
Severn Trent Water	---	---
Southern Water	285	Development enquiries Flooding Discharges Incidents
South East Water	---	---
South Staffordshire Water	---	---
South West Water	143	Waste water Water resources Corporate Drinking water Personal/private data
Thames Water	---	---
United Utilities	---	---
Welsh Water	360	Does not record
Wessex Water	504***	General environmental information about the company (for example, from students interested in our environmental work) Information about our discharges to the water environment (related to sewage treatment) Information on the quality, amount or effects relating to supply of drinking water Information about other emissions from our assets (eg odour, carbon or other emissions) or sustainability data. Enquiries about the environmental effects, status or other details of our treatment works or other operational sites, land or assets. Information about our assets (or company activities) related to specific environmental aspects (for example, biodiversity, recreation, plastics, waste management etc.).
Yorkshire Water	156	Does not record

Figure 5.1: Private Water Companies: Number and Types of Information Requests

* Affinity Water hold records since 2016.

** Bristol Water provided data since January 2018, due to changes in organisational processes.

*** Wessex Water provided data since 2005, rather than 2015.

Questions 3 and 4

What percentage of information requests are disclosed? And which exceptions are most frequently engaged when deciding to withhold information?

Company Name	Successful requests (%)	Frequently engaged exceptions
Affinity Water	77.1	Regulation 12(5)(g) x1 Requests for other organisations (x7)
Anglian Water	---	---
Bristol Water	100.0	N/A
Northumbrian Water	64.2	Regulation 12(4)(c) (x55) Regulation 12(4)(a) (x50) Regulation 13 (x33) Regulation 6(1)(b) (x23) Regulation 12(4)(b) (x12)
Portsmouth Water	83.0	Regulation 13 (x2) Regulation 12(5)(a) (x1)
SES Water	86.0	Regulation 12(5)(a) (x1)
Severn Trent Water	---	---
South East Water	---	---
South Staffordshire	---	---
Southern Water	93.0	Does not record
South West Water	81.1	Regulation 13 (x9) Regulation 2(1) (x5) CON29DW (x3) Regulation 12(4) (x3) Regulation 12(5)(a) (x2) Regulation 6(1)(b) (x2)
Thames Water	---	---
United Utilities	---	---
Welsh Water	Does not record	Does not record
Wessex Water	85.0	Regulation 2(1) (x11) Regulation 13 (x7) Regulation 12(5)(a) (x3)
Yorkshire Water	75.6	Does not record

Figure 5.2: Private Water Companies: Successful Requests and Exemptions

Questions 5 and 6: Charging for Information

The water companies are allowed to charge for information requests, as set out under Regulation 8 and in accordance with the Information Commissioner's Office (ICO) guidance.[91] On their websites, many of the water companies indicated that a charge might be applied to information requests. For example, Northumbrian Water and Wessex Water report that staff time spent locating information and handling requests will be charged at £25 per hour.

However, the majority of the water companies reported that they have not or have only rarely made charges for responding to EIR requests. Affinity, Bristol, SES, Southern, South West, Wessex, and Portsmouth reported that they have never made charges. Welsh Water responded that it does not routinely charge for EIR requests, though it has for one 'very large request' in the past (the cost was not provided). Yorkshire Water reported that it has made charges on five occasions, though only one resulted in payment (no amount provided). As no reason was given for withdrawing the information request, it is not possible to conclude whether the charge acted as a deterrent to the requester. The exception is Northumbrian Water, which has made 31 charges for responding to information requests, with total charges between £25.00 and £700.00.

This study did not attempt to evaluate whether the fees, or the potential fees, act as a deterrent to requesters. Future research can be conducted to determine whether listing or applying charges dissuade requesters from making or following

[91] Information Commissioner's Office, *Charging for Environmental Information (Regulation 8)*, (ICO 2016).

through with requests, and which categories of requesters are more likely to be affected by charges.

Question 7: Publication Scheme

The EIR do not require publication schemes, though the ICO recommends it as good practice to support bodies in compliance with the requirement to make certain types of information proactively available.

The vast majority of respondents do not have a specific publication scheme, but indicated that they proactively publish information on their websites. The exceptions are Wessex Water[92] and Welsh Water, which is currently reviewing its publication scheme.[93]

Question 8: Changes since 2015

The final question asked for additional information on how, if at all, becoming subject to the EIR in 2015 has changed the work of the water companies. Though most indicated that they had previously been committed to voluntary transparency, many introduced some changes to prepare for compliance with the EIR.

Affinity Water appointed an Information Officer in 2017, who is responsible for monitoring and responding to all EIR requests.

[92] Wessex Water, 'Environmental Information – Information Already Available' <https://www.wessexwater.co.uk/About-us/Environment/Protecting-the-environment/Environmental-information> accessed 7 December 2018.
[93] Welsh Water, 'Environmental Information Regulations – What information is already available to you?' <https://www.dwrcymru.com/en/Company-Information/EIR/Available-information.aspx> accessed 9 December 2018.

Bristol Water did not appoint any new staff or additional resourcing, but reported that its Environment Team take responsibility for handling EIR requests, with support from its Legal and Customer Service departments as needed.

Northumbrian Water reported that it has introduced five changes to comply with the EIR: (1) widened the remit of its Information Access team to handle requests; (2) recruited one full-time equivalent (FTE) staff member; (3) conducted an awareness campaign and trainings for staff members; (4) written new procedures; and (5) written a new policy.

Portsmouth Water reported that it 'did not make any significant changes'.

Likewise, SES Water reported that 'no real change has been required' due to the low volume of requests it receives, but it has a central compliance function for handling EIR requests on a 'case by case basis'.

Southern Water has set up a dedicated webpage and email address. They held a mandatory training session for all staff, and reviewed contracts to ensure compliance where third parties hold environmental information.

South West Water reported that it was 'well prepared' for the implementation of the EIR, due to its existing transparency practices, which included a 'very effective' contacts and complaints team. Within this team, they have created a specialist team to manage EIR requests. This work is overseen by a senior manager and the legal department, who review responses before they are issued. Employees across the organisation can get support via its intranet on identifying and responding to EIR requests.

Welsh Water has not appointed additional staff or resources, but has trained 'a number of staff' to handle EIR requests.

Wessex Water responded it does not keep factual records on this type of information and declined to provide an answer as 'any response would inevitably be an opinion/subjective view'.

Likewise, Yorkshire Water declined to provide a response due to organisational changes.

5.5.3 Discussion

The responses reveal several interesting points for discussion, which have been grouped into the following: exceptions, charging for information, implementation of the EIR, and voluntary disclosure. First, however, the limitations of the investigation should be noted. The response rate of 63% (10 out of 16 water companies), the fact that the UK's largest water companies declined to participate, and differences in recording practices (eg Wessex Water's inability to disaggregate data prior to 2015) need to be factored into the discussion.

Exceptions

All respondents indicated that the majority of information requests received are successful requests (meaning some or all of the requested information was disclosed). The most commonly engaged exceptions for withholding information concern requests for personal information (regulations 12(3) and 13); not environmental information (regulation 2(1)); requests that are too general (regulation 12(4)(c)); or information that is not held by the company (regulation 12(4)(a)). Beyond these, the most commonly engaged exception is regulation

12(5)(a), which allows for the withholding of information where disclosure would adversely affect international relations, defence, national security, or public safety.

Interestingly, the regulation 12(5)(e) exception – 'the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest' – has not been engaged by any of the respondents, according to their reports. This contradicts my hypothesis that as for-profit commercial organisations, the water companies would need to apply this exception to protect their own commercial interests or those of their partner organisations. It is also interesting in light of the fact that Scottish Water has engaged this exception with greater frequency, as Section 5.7 explains.

The data suggests that the water companies have either not had cause to engage the exception, or they did not because they could not demonstrate the disclosure would harm a 'legitimate economic interest'. Future research, including qualitative research (eg interviews with the EIR teams) can be conducted to determine whether, and under what circumstances, the exception will be applied.

Charging for Information

The water companies have adopted very different practices with regards to charging for information. Regulation 8 sets out the rules for making 'reasonable charges' for information, but, in practice, very few of the water companies have yet made charges. As discussed in the previous section, a notable exception is Northumbrian Water, which has applied charges on 31 occasions. Again, future research can be conducted to determine the reasons for this and whether the

number and amount of charges stays consistent over time. Research can also be conducted with information requesters to determine whether the charges (or potential for charges) presents a barrier to making EIR requests.

Implementing the EIR

The water companies provided noticeably varied responses to Question 8, which is to be expected, considering the different sizes of the organisations and volume of information requests they receive. Interestingly, several of the smaller companies (eg Portsmouth, SES) indicated that they had made no or minor changes to prepare for EIR compliance. This is a significant finding, as it has been argued that transparency legislation is a 'burden', especially for smaller and under-resourced organisations.[94] These responses suggest that the perceived 'burden' might be minimal, and the volume of information requests received proportionate to the size of the organisation.

Nevertheless, the fact that the larger organisations reported introducing more significant changes (ie additional staffing, team restructuring) demonstrates that there are often costs associated with compliance. That changes do often need to be made for an organisation to transition from voluntary to legal disclosure supports the next point that voluntary disclosure is not a substitute for a legally enforceable right to information.

[94] See eg Mark Smulian, 'FOI Extension will Lead to Cost Burden, Scottish Landlords Warn' (December 2016) Inside Housing (online) <https://www.insidehousing.co.uk/news/foi-extension-will-lead-to-cost-burden-scottish-landlords-warn-48830> accessed 24 May 2019.

Voluntary Disclosure

When three of the water companies declined to provide information, there was no legal recourse. The water companies (accurately, in my view) determined that the requested information was not 'environmental information' under regulation 2(1) and did not disclose. Several of the other water companies had also noted that the information was not environmental information, but chose to respond anyway in the interest of transparency. Voluntary disclosure forces requesters to rely on the goodwill of information holders to provide information.

5.6 The Water Industry in Scotland

The water industry in Scotland remains under public ownership. Scottish Water is a statutory corporation, providing water and sewerage services to domestic and commercial customers.[95] It is wholly owned by the Scottish Government, which sets the objectives for Scottish Water. The Scottish Parliament holds Scottish Water to account. The Water Industry Commission for Scotland (WICS), a non-departmental public body, manages the regulatory framework. WICS has responsibility for setting prices, facilitating competition, and monitoring performance.[96]

However, privatisation has been seriously considered in the recent past. In the early 1990s, it seemed likely that the water industry in Scotland would follow

[95] Scottish Water, 'The Water Industry in Scotland' <https://www.scottishwater.co.uk/en/About-Us/What-We-Do/The-Water-Industry-in-Scotland> accessed 16 June 2019.
[96] Water Industry Commission for Scotland, 'Our Role and Remit' <https://www.watercommission.co.uk/view_Our%20role%20and%20remit.aspx> accessed 16 June 2019.

England and Wales on the path to privatisation.[97] Scotland's water and sewerage infrastructure was in need of upgrading to comply with European Community standards, and it was unlikely that the Treasury would approve the large-scale public borrowing necessary to do so. Privatisation would allow for investment in capital projects, whilst reducing pressure on public expenditure.

In addition, local government was going through a major restructuring process, replacing the former regional and local councils with a single-tier system of local authorities.[98] As water and sewerage services had traditionally been the remit of the councils, the service would have to be restructured as well. The extent of private sector involvement in the new water service was a matter of public and political debate, but, facing an infrastructure improvement bill of £2.5billion, the economic argument in support of privatisation was strong.

However, the public did not agree. In 1994, Strathclyde Regional Council organised a public referendum on the proposed water privatisation. With a voter turnout of 71%, 97% of the council electorate voted against privatisation. Numerous reasons have been cited for the resistance, not least of all the negative consequences of water privatisation in England and Wales. At the time, water bills in England were 70% higher than in Scotland.[99] 22,000 households had been disconnected from water services due to non-payment, a practice that was (and

[97] The mainstream press reported widely on the issue at the time, with the general consensus that water privatisation in Scotland was inevitable. See eg Mark Leishman and Ian Hernon, 'Treasury Will Insist on Water Privatisation,' *Sunday Times* (London, 12 July 1992) 1; James Buxton, 'Spectre of Water Privatisation Haunts Lang' *Financial Times* (London, 9 November 1992) 7.
[98] Buxton (n 97).
[99] 'Frozen Taps' *The Economist* (London, 31 May 2013) vol.467.

still is) banned in Scotland.[100] Meanwhile, salaries for water industry managers in England and Wales increased rapidly, far surpassing their counterparts' salaries in Scotland.

Scottish industry organisations also spoke out against privatisation, including the Scottish Landowners' Association and the Malt Distilling Industries Association, both representing water-reliant industries. They were joined by the Scottish Trades Union Congress (STUC), as well as a number of politicians, including the Scottish National Party's (SNP) Roseanna Cunningham, who went so far as to announce that she would go to jail to prevent privatisation.[101]

Clearly, water privatisation was a controversial issue, and not only because of the negative financial and service quality consequences.[102] Whilst privatisation in England and Wales had taken place over 15 years, Scotland would be given just two to three years to restructure and privatise.[103] The Scottish Association of Directors of Water and Sewerage Services reported that it would be impossible to transfer the industry to the private sector within the allotted timeframe.[104] Public health experts raised concerns that privatisation could lead to cholera outbreaks for the first time in over a century.

5.6.1 Legal and Regulatory Framework in Scotland

In the end, Scotland's water industry was not privatised. The restructuring of local authorities went ahead as planned, and three water boards were created: East,

[100] Buxton (n 97). Disconnection due to non-payment for household customers in England and Wales, as well as pre-payment meters for water, have been banned since 1 July 1999.
[101] Liza Donaldson, 'Rebellion North of the Border' *Independent* (1993).
[102] ibid
[103] Leishman and Hernon (n 97).
[104] Donaldson (n 101).

West, and North of Scotland Water. The three water boards had responsibility for water and sewerage services in Scotland until 2002, when the Water Industry (Scotland) Act created Scottish Water, thus amalgamating the existing water authorities.[105] The Act also established the new regulatory framework for the industry, including the Drinking Water Quality Regulator (DWQR) and the Consumer Protection Panels.

Three years later, the Water Services etc. (Scotland) Act 2005 had a profound impact on the regulatory structure of the Scottish water industry. It replaced the Water Industry Commissioner (originally established by the Local Government etc. Scotland Act 1994) with the Water Industry Commission for Scotland (WICS). The chair and board members of WICS are appointed by the Scottish government, and the organisation works independently of Scottish ministers. Its statutory responsibilities are to set prices for the water industry, facilitate competition, and monitor the performance of Scottish Water, much like Ofwat monitors the performance of the private water companies.[106]

Most significantly, the 2005 Act also created a new system of competition for non-residential customers. Scottish Water added a new retail arm, Scottish Business Stream (SBS), to supply water to commercial and industrial customers. SBS is a subsidiary of Scottish Water, though it operates at arm's length. Back in 2005, SBS was the main supplier of non-domestic water services, but this has since changed as additional suppliers have secured contracts to supply water services

[105] Cooper et al (n 9).
[106] Water Industry Commission for Scotland, 'Our role and remit' <https://www.watercommission.co.uk/view_Our%20role%20and%20remit.aspx> accessed 17 December 2019.

in Scotland. For example, Anglian Water Business, a private water company based in England, has been awarded several contracts since 2008 to provide water billing and efficiency services to commercial and public sector organisations in Scotland.[107]

Though the privatisation of Scottish Water has been resisted, there is a significant degree of private sector involvement in the water industry. Scottish Water has engaged in, and continues to engage in, a number of PPP and private finance initiative (PFI) projects. Its nine current projects were inherited in 2002 from the three former water authorities. These contracts are primarily with sewerage treatment facilities, which treat approximately 45% of the water waste in Scotland.[108] As the following section will demonstrate, the involvement of private contractors in the water industry can affect the availability of information under ATI legislation.

5.7 Scottish Water and Private Partners

Unlike in England and Wales, there has never been a question as to whether Scottish Water is subject to the EISR. It is publicly owned and is a public authority under both the EISR and FOISA. However, it does engage in commercial activities and in partnerships with the private sector. In order to understand how these arrangements might affect information access, I conducted a search of the OSIC

[107] Anglian Water Business, 'Anglian Water Business secures £3 million of water services contracts in Scotland' <https://www.anglianwaterbusiness.co.uk/anglian-water-business-secures-3-million-water-service-contracts-scotland> accessed 6 December 2018.
[108] 'Claim that Scottish Water is in Public Hands is Mostly True' Ferret (1 December 2017) <https://theferret.scot/scottish-water-public-ownership> accessed 21 December 2019.

decision notices database to identify complaints regarding Scottish Water and its commercial activities or private partners.[109]

Searching the database for 'Scottish Water' in all years, for both the EISR and FOISA, returned 23 decisions listing Scottish Water as the relevant authority. I manually reviewed each decision to identify which concerned the relevant FOISA exemptions or EISR exceptions. Specifically, I searched for decisions concerning FOISA sections 30, 33, and 36; and EISR sections 10(4); 10(5)(d); and 10(5)(e). I identified one decision relevant to this analysis, discussed below.

5.7.1 Unison and Scottish Water

In 2006, trade union Unison requested from Scottish Water copies of the Full Business Cases (FBCs) and final contracts concerning its PFI/PPP projects.[110] Its aim was to calculate the full costs of the projects. Scottish Water responded with partial information. It provided two full contracts and redacted copies of the other five contracts. Scottish Water advised Unison that it did not hold the full FBCs for the projects because the contracts had been negotiated by the three former water authorities.

Unison requested an internal review in May 2007. It complained that it had been unable to calculate the costs of the contracts based on the information provided and argued that the information appeared to have been supplied inconsistently.[111] Unison was also 'suspicious' that Scottish Water did not hold the full FBCs and

[109] The searchable decision notices database is available at <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/Decisions.aspx> accessed 25 July 2019.
[110] Office of the Scottish Information Commissioner, Decision 166/2011 (15 August 2011).
[111] For example, information on interest rates on one contact had been withheld, but supplied for all the other contracts.

asked for another search to be conducted.[112] Following the internal review, Scottish Water was able to supply Unison with alternative information to allow it to calculate the costs of the projects. However, the company reiterated that they did not hold the full FBCs and declined to provide further information, citing FOISA exemptions s 33(1)(a) (trade secrets) and (b) (substantial prejudice to commercial interests).

Unison then complained to the Office of the Scottish Information Commissioner in October 2007. The primary question for the Commissioner to consider was whether Scottish Water had properly applied EISR exceptions under Regulations 10(4)(a)[113] and (10)(5)(e).[114] The Commissioner was satisfied that Scottish Water had conducted an adequate search and did not hold the FBC information; thus, exception 10(4)(a) had been properly applied.

The question of regulation 10(5)(e) – which allows for withholding information if disclosure would, or would be likely to, substantially prejudice 'a legitimate economic interest' – was more complicated. This poses the question: what is a 'legitimate economic interest?' It is not defined in the EISR. Moreover, the onus is on the public authority to demonstrate that the harm caused by disclosure would be 'real, actual and of significant substance'. To that end, Scottish Water argued that the harm would be real because revealing details of the contractors'

[112] Decision 166/2011 [11].
[113] Environmental Information (Scotland) Regulations 2004, s (10)(4)(a) allows for an exception if the public authority 'does not that information when an applicant's request is received'.
[114] Environmental Information (Scotland) Regulations 2004, s (10)(5)(e) allows a Scottish public authority to refuse to provide information if its disclosure would, or would be likely to, prejudice substantially 'the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest'.

commercial activities would put contractors at a competitive disadvantage by weakening their position for future bids.

Scottish Water also argued that its own commercial interests would likely be prejudiced by disclosure because it is run as a commercial entity and its performance is benchmarked against the private water companies in England and Wales. At the time, the private water companies were not subject to FOIA or the EIR (though the position on the latter has of course changed since the *Fish Legal* decision). Scottish Water explained that it was legally obligated to ensure value for money for taxpayers, and argued that a competitive bidding process supports this because the selection criteria for awarding contracts includes both cost and innovation. Therefore, Scottish Water argued that disclosure would negatively affect the bidding process and potentially stifle innovation if contractors were to base future tenders on available information.

However, based on the information provided, the Commissioner was not convinced that Scottish Water's arguments were sufficiently persuasive in demonstrating that disclosure would, or would be likely to, prejudice substantially its own or the contractors 'legitimate economic interests'. Scottish Water had not provided evidence to support its claim that disclosure would stifle innovation. Thus, the Commissioner ordered Scottish Water to provide Unison with the withheld information.

This decision is notable for three reasons. First, it demonstrates the challenge of defining 'legitimate economic interest' and whether disclosure will, or will be likely to, cause substantial prejudice to that interest. The onus is on the information

holder to ascertain whether disclosure will result in 'substantial prejudice', which can be difficult to predict. As this example suggests, public authorities might err on the side of caution to protect its own economic interests, as well as those of their contactors. An information requester who is not satisfied with the decision can, of course, make use of the complaints process, but this can be onerous, both in terms of time and effort.[115] As a journalist interviewed for this project warned, information requesters have to be 'tenacious' to see a complaint through to completion.[116]

Second, the decision highlights the importance of the 'information holder', and not only whether they are subject to ATI legislation, but whether they still exist. In this case, the requested contracts were negotiated between Scottish Water's predecessor regional water boards and the contracting partners, which appears to have contributed to Scottish Water's inability to locate the FBCs. When services are outsourced, the information held by contractors *does* fall under the scope of FOI if it is held by the contractor *on behalf of* the public authority.[117] However, this can lead to uncertainty for requesters if they do not know who holds the information, or, as in this example, if the original public authority has since merged with another organisation or ceased to operate.

[115] Consider that in this example, Unison made its initial request in 2006. The OSIC decision notice was issued in 2011.
[116] Participant C, interviewed November 2016.
[117] Information Commissioner's Office, *Outsourcing and Freedom of Information – Guidance Document* (ICO 2017).

Finally, the decision is a reminder that Scottish Water, unlike the private water companies, has obligations under both the EISR and FOISA. This means that there is a broader range of information available to the public from Scottish Water.

5.8. Scottish Water and ATI Legislation

As with the private water companies, I submitted an information request to Scottish Water to obtain quantitative data on the number and types of information requests it receives, and the exemptions/exceptions it applies. Via email, I asked Scottish Water to provide the following information:

1. How many requests for information does Scottish Water receive annually?
2. What proportion of information requests are handled under FOISA compared with the EIRs?
3. What percentage of information requests are successful requests (meaning the requested information was disclosed?
4. Which exemptions (FOISA) or exceptions (EIRs) are most commonly engaged when deciding whether to withhold information? Are you able to provide data that details which exemptions/exceptions are applied and the number of times they have been applied?
5. What transparency obligations or information provision duties does Scottish Water have beyond FOISA and the EIRs?

5.8.1 Results

Scottish Water responded that it provides statistical information to the OSIC each quarter, which is publicly available on the OSIC website.[118] Between January 2013 and December 2018, Scottish Water received a total of 611 requests for

[118] Since 2013, the Scottish Information Commissioner has required public authorities to submit quarterly statistics on the FOI and EIR requests they receive, and the outcome of the requests. The statistics database is available at http://stats.itspublicknowledge.info.

information under FOISA and 2206 requests under the EISR. The annual breakdown is as follows:

	FOISA	**EISR**
2013	57	287
2014	170	310
2015	106	339
2016	123	379
2017	94	409
2018	61	482
Total	**611**	**2206**

Figure 5.3: Scottish Water: FOISA and EISR Requests, 2013-18

The following table illustrates the answer to Questions 3: What percentage of information requests are successful requests?[119]

	FOISA	**EISR**
2013	78.9	90.9
2014	82.8	92.8
2015	73.1	85.3
2016	78.5	71.7
2017	100.0	99.0
2018	98.2	95.0
Average 2013-2018	**85.3**	**89.1**

Figure 5.4: Scottish Water: Successful Information Requests (values in %)

[119] 'Successful' requests include both full and partial release of information. The figures do not include requests withdrawn by the initiator of the request.

The following table illustrates Question 4: Which exemptions (FOISA) or exceptions (EISR) are most commonly engaged when deciding whether to withhold information?

	FOISA	EISR
2013	s 25 (x4) s 30 (x2) s 36 (x2)	Regulation 11(2) (x2)
2014	s 25 (x10) s 33 (x5) s 36 (x2) s 38 (x16)	Regulation 10(5)(b) (x3) Regulation 11(2) (x19)
2015	s 25 (x3) s 33 (x5) s 38 (x2) s 39 (x3)	Regulation 10(5)(e) (x2) Regulation 11(2) (x8)
2016	s 25 (x39) s 33 (x5) s 38 (x5) s 39 (x4)	Regulation 10(5)(a) (x3) Regulation 10(5)(b) (x2) Regulation 11(2) (x113)
2017	s 25 (x20) s 33 (x4)	Regulation 11(2) (x127)
2018	s 25 (x8)	Regulation 11(2) (x183)

Figure 5.5: Scottish Water: Frequently Engaged Exemptions/Exceptions

As the table demonstrates, the most commonly engaged exemptions under FOISA include s 25 (information otherwise accessible) and s 38 (personal information). The s 33 exemption (commercial interests and the economy) has been engaged 14 times.

The most commonly engaged exception under the EISR is 11(2), which concerns third party personal data. This is consistent with the practices of the private water companies, though it is notable that Scottish Water has engaged this exception with more frequency and the application of the exception has increased significantly since 2016. This could indicate either a large number of similar

requests from the same requester (or core group of requesters) or increased efforts by Scottish Water to restrict access to personal data.

In response to Question 5, Scottish Water responded that, like all public authorities subject to FOISA, it is required to produce a publication scheme. It has accepted the Commissioner's model publication scheme and also publishes a Guide to Information. In addition, Scottish Water is subject to the following transparency requirements: General Data Protection Regulation 2018 (GDPR); Data Protection Act 2018 (DPA); Reuse of Public Sector Information Act 2015 (RPSIA); Inspire (Scotland) Regulations 2009; Public Records (Scotland) Act 2011.

5.9 Conclusion

This case study has raised several points for discussion on the relationship between privatisation and access to information. First, the apparently broader 'functional' approach to scope of the EIR and EISR (as compared with the 'institutional' approach of FOIA and FOISA) is not as broad as it might first appear. The tests introduced by the CJEU in *Fish Legal* establish high thresholds that must be met for private actors to be classified as public authorities for EIR purposes. The threshold for the 'control test' is particularly high, with the UT noting that very few private companies will meet this definition.[120]

The subsequent application of the *Fish Legal* tests in *Cross* further illustrates the limitations of the approach, as the requirement that bodies be 'entrusted' under national law to perform functions of public administration presents an additional hurdle. This will likely be challenged in the future, as this high threshold

[120] *Fish Legal* (n 3) [155].

effectively limits the scope of the EIR so that many private bodies contracting with the state to provide public services will not meet the criteria. This appears to be inconsistent with the principles underpinning the Aarhus Convention, which adopted a 'broad and functional' definition of public authority to make clear that privatisation 'cannot take public services or activities out of the realm of public information, participation or justice'.[121]

Second, the process of defining 'functions of public administration' has been challenging and has replicated some of the questionable reasoning seen in the HRA 1998 and judicial review cases, as discussed in Chapter Four. The arguments put forward in the *Smartsource* and *Fish Legal* cases illustrate this point. For example, the argument that 'special powers' could be understood as 'state powers' reflects a reliance on historical provision and the challenge of reconceptualising public functions and services in an era of privatisation. The cases examined in both Chapters Four and Five demonstrate that understandings of 'public' and 'private' are still based on institutional characteristics. This indicates a need for a new approach to both 'functions of a public nature' and 'functions of public administration' that emphasises the functions themselves.

Third, the empirical investigation inadvertently highlighted the downside of voluntary disclosure. When Severn Trent, South East, and Thames Water declined to provide me with the requested information on the grounds that it was not 'environmental information', I had no legal recourse or right of appeal. Whilst other water companies had made a similar assessment but chose to provide the

[121] UNECE (n 42) 46.

requested information in the interests of transparency, those three companies exercised their right to withhold the information. This is an anecdotal observation as the investigation was not designed to evaluate whether the private water companies would voluntarily disclose the information, but it is one that helps demonstrate why a legally enforceable right to information is preferable to voluntary disclosure mechanisms.

Finally, privatisation affects not only the scope of ATI legislation (ie whether or not an organisation is a 'public authority') but also its operation and the application of exemptions. As the examination of Scottish Water demonstrated, commercial activities and public-private partnerships can restrict access to information if disclosure would harm a 'legitimate economic interest'. This indicates that the discussion on privatisation and access to information should be expanded not only to include which bodies are (or should be) subject to ATI legislation, but also the circumstances in which privatisation restricts access to information held by bodies that are subject to ATI legislation.

The next chapter will examine access to information in the context of the free schools policy in England and will build upon some of the points raised here. Specially, it will provide further discussion on the use of exemptions within FOIA and how privatisation affects the application of these exemptions.

Chapter Six

Case Study Two: The Free Schools Programme

The aim of this chapter is to examine access to information in the context of the free schools programme in England.[1] The previous case study on the water industry examined how two types of privatisation - the 'traditional' sale of state assets to private companies as in England and Wales, and commercialisation and public-private partnerships (PPPs) in Scotland – have affected information access. This case study examines yet another form of privatisation - the involvement of non-state actors in the delivery of primary and secondary education, creating a quasi-market to support school choice and competition.

Launched in 2010 as the flagship policy of the Conservative-led coalition government's Big Society agenda, the free schools programme allows, inter alia, parent and community groups, religious organisations, or businesses to open and operate publicly-funded schools free from local authority oversight. The novel arrangement means that transparency of the programme is of utmost importance, for reasons outlined in section 6.2 of this chapter. Free schools themselves are subject to the Freedom of Information Act 2000 (FOIA) and the Department for Education (DfE) is responsible for providing information about proposed free schools, but the transparency of the department and the overall programme has been called into question.[2]

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[1] The free schools programme is limited to England. Scotland, Northern Ireland, and Wales have their own education systems and have not implemented the free schools programme.

[2] See eg Neville Harris, 'Local Authorities and the Accountability Gap in a Fragmenting Schools System' (2012) 75 MLR 511; Race on the Agenda, *Inclusive Schools: The Free Schools Monitoring Project 2012* (ROTA 2012); National Union of Teachers, 'Free schools' <https://www.teachers.org.uk/edufacts/free-schools> accessed 13 December 2018.

Therefore, this case study was developed to examine information access in the context of the free schools programme, focusing on central government and the free school application process. Through a combination of stakeholder interviews and analysis of Information Commissioner's Office (ICO) decision notices, the case study examines the performance of the DfE with regards to its FOIA requirements. It considers the public interest arguments for and against the transparency of the free schools programme, and examines the exemptions used by the DfE to withhold information and the justifications behind these decisions.

The chapter is divided into three parts. It begins with an explanation of the free schools programme, situating it within the broader context of the marketisation of education and the Big Society agenda. The next part describes the legal framework and governance structure of the free schools programme. The third part presents the results of the empirical investigation and discusses their implications.

6.1 What are Free Schools?

Free schools are 'publicly funded independent schools'.[3] Unlike traditional state schools (also known as 'maintained schools'), they are outwith the control of local education authorities (LEAs) and are operated by external sponsors.[4] Sponsors can be community or parent groups, religious organisations, groups of teachers, or businesses. Potential sponsors must make an application to the Department for Education (DfE), setting out their vision the new school. They cannot be run directly for profit.

[3] UK Government, 'Types of School' <https://www.gov.uk/types-of-school/free-schools> accessed 22 August 2018.
[4] Anne West, 'Academies in England and Independent Schools (*Fristående Skolor*) in Sweden: Policy, Privatisation, Access and Segregation' (2014) 29 Research Papers in Education 330.

Free schools are a type of academy. They are similar in that both operate independently of LEAs and are designed to be more autonomous than state schools. The primary distinction between free schools and academies is that free schools are *new* independent schools, whilst academies are previously maintained schools that have since converted to academy status.[5]

Historically, new schools in England have been opened in locations with a demonstrable need for additional school places.[6] The free schools programme changed this. Free schools can open in response to 'parental demand', subject to approval by the DfE.[7] Thus, even more so than the academisation of existing state schools, it represents a new frontier in the marketisation of education, where new schools are established to facilitate choice, rather than meet local need. For this reason, the case study focuses specifically on the free schools programme, as opposed to free schools *and* academies.

Free schools do not have to follow the English national curriculum, though they must teach a 'broad and balanced' curriculum including English, Mathematics, and Science and Information Technology.[8] They are allowed to set their own pay and conditions for staff, and teachers do not need to hold Qualified Teacher Status (QTS). They also have the freedom to change the length of the school terms and school day.[9] Free schools have control over their own admissions, though as 'all

[5] However, a minority of free schools are not new projects. Existing independent schools have also been invited to apply for free school status, something that a higher proportion of schools took advantage of in the first waves of free school applications.
[6] Rebecca Allen and Rob Higham, 'Quasi-markets, School Diversity, and School Selection: Analysing the Case of Free Schools in England, Five Years On' (2018) 16 LonRevEd 191.
[7] ibid 195.
[8] Adam Leeder and Deborah Mabbett, 'Free Schools: Big Society or Small Interests?' (2012) PolQ 133, 134.
[9] UK Government (n 3).

ability' schools they cannot use academic selection processes, as in the grammar school system.[10]

The first 24 free schools opened in September 2011.[11] As of January 2019, there were 442 open free schools, with another 261 approved and in the process of opening.[12] School census data from October 2018 revealed that just over half (50.1%) of pupils enrolled in a state-funded school attended either an academy or a free school.[13] This is a rapid increase in the proportion of pupils attending free schools and academies, as the following section explains.

6.1.1 The Marketisation of Education

To fully understand the context of the free schools programme, it is necessary to examine the recent history of marketisation in English state schools, beginning with the Education Reform Act (ERA) 1988.[14] Introduced by the Conservative government, the ERA 1988 transformed the role of the LEAs, which, until that point, played a central role in the allocation of school places.[15] The ERA gave schools the option to opt out of LEA control, instead becoming grant-maintained schools, funded by central government. It also introduced open enrolment and per

[10] ibid.
[11] Leeder and Mabbett (n 8).
[12] New Schools Network, 'Free Schools: The Basics,' <https://www.newschoolsnetwork.org/what-are-free-schools/free-schools-the-basics> accessed 29 January 2019
[13] Department for Education, 'The Proportion of Pupils in Academies and Free Schools, in England, in October 2018' (DfE 2019). The census reported that 8,166,038 pupils were enrolled in state schools. Of these, 4,091, 312 were studying in a free school or academy. The precise number of pupils enrolled in free schools (not including academies) is not known as the DfE did not report these figures separately. However, the NSN (n 12) reported that 400,000 pupil places have been created in free schools.
[14] See eg Allen and Higham (n 6); Geoff Whitty, 'Twenty Years of Progress? English Education Policy 1988 to the Present' (2008) 36 Educational Management Administration & Leadership 165; Paul Sharp, 'Surviving, not Thriving: LEAs Since the Education Reform Act of 1988' (2002) 28 OxonRevEd 197.
[15] Whitty (n 14).

capita funding, meaning that the school budgets are now determined by the number of enrolled pupils. As a result of the ERA, schools were placed into direct competition with one another to attract pupils, with the school intake directly connected to the school budget.

The rationale for the ERA 1988 and its associated reforms was that school choice and competition would create incentives for schools to improve. Popular schools would be able to enrol as many pupils as their capacities allowed, not just those pupils within their catchment area. It was thought that this would raise educational standards and reduce inequalities as disadvantaged families would be given greater choice. Failing schools that were unable to attract a sufficient number of pupils would be forced to improve or close.

Paradoxically, the marketisation of education coincided with the increased centralisation of education policy.[16] This was most apparent in the introduction of the National Curriculum in 1988 and standardised national assessments. The expansion of the school inspection system, including the creation of a new non-ministerial state department, the Office for Standards in Education (Ofsted), allowed central government to exert greater control over schools and the teaching profession.

The marketisation of education continued under New Labour, which attempted to reconcile social justice aims with the market-based principles of competition and choice. Upon coming to power in 1997, it launched an ambitious programme of education reform focused on raising educational standards, especially in literacy

[16] ibid 169; See also Colin Crouch, *Commercialisation or Citizenship: Education Policy and the Future of Public Services* (Fabian 2003).

and numeracy, and setting ambitious targets for pupil attainment and school performance.[17] 'Successful' schools, ie those that performed well with regards to the new targets, were rewarded with greater autonomy, whilst 'failing' schools were subjected to strict improvement measures.

Education researchers soon discovered that the separation of schools into 'winners' and 'losers' was having a negative impact on pupils from disadvantaged backgrounds.[18] Schools subjected to 'special measures' due to low performance were found to enrol a higher proportion of pupils from disadvantaged backgrounds than 'successful' schools.

New Labour's response was to pair its commitment to high standards with increased differentiation in schools, thereby increasing the choice introduced under the previous Conservative government. This approach was based on the belief that high standards are connected with school diversity. By giving families a choice not just in where to send their children to school, but a choice of different types of schools, such as specialist science and mathematics (STEM) schools, this would help to raise educational attainment.

To that end, New Labour established the academies programme. Building on the Conservative government's previous City and Technology Colleges scheme, whereby businesses would sponsor specialist secondary schools, the academies programme was at the heart of the Labour government's education reforms. Like free schools, academies are publicly funded, independent schools. Many of the early academies were introduced to replace failing local authority schools, and the

[17] Whitty (n 14) 173.
[18] ibid 174.

programme initially grew slowly. In 2003, there were only three academies.[19] By 2010, 6% of secondary schools were academies. Following the formation of the 2010 Liberal Democrat-Conservative government and subsequent enactment of the Academies Act 2010, the proportion soared to 50% in 2013.

6.1.2 Free Schools and the Big Society

> 'You can call it liberalism. You can call it empowerment. You can call it freedom. You can call it responsibility. I call it the Big Society'.[20]

The free schools programme was the flagship programme of the Big Society agenda, introduced in 2010 by David Cameron, following the 2007-08 financial crisis.[21] It was based on the belief that the public sector was becoming too large, thereby stifling local community initiatives through central government bureaucracy.[22] It promised to transfer power from central government to local communities, 'empowering' them to take on greater responsibilities for public services, such as libraries, post offices, and schools. Central to the Big Society agenda was the argument that top-down government had been acting as a barrier to civic engagement, preventing local communities – 'the man and the woman on the street' – from taking responsibility for their own lives and communities.[23]

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[19] West (n 4) 337.
[20] David Cameron, 'Big Society Speech' (Liverpool, 19 July 2010) Transcript available <https://www.gov.uk/government/speeches/big-society-speech> accessed 13 December 2018.
[21] The Big Society agenda should be understood as part of the broader programme of austerity, which was introduced in the UK in response to the financial crisis. The government sought to reduce expenditure across nearly all areas of public services, including police, libraries, legal aid, and social housing. The Big Society can be viewed as the government's attempt to make austerity measures more palatable, repackaging budget cuts as 'opportunities' for citizens to become involved in public service delivery. See eg Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2013; Thom Dyke, 'Judicial Review in an Age of Austerity' (2011) 16 JR 202.
[22] See eg Michael Lister, 'Citizens, Doing it for Themselves? The Big Society and Government through Community' (2015) 68 Parliamentary Affairs 352.
[23] Cameron (n 20) para 20.

Oversight for the free schools programme was granted to then Secretary of State for Education, Michael Gove, who promised that the free schools policy would deliver 'innovation, diversity, and flexibility'.[24] As with previous education reforms, state schools were viewed as too bureaucratic, resistant to change, and stifling educational achievement.[25] The free schools programme promised to change that by increasing school choice and limiting perceived barriers to innovation, such as standardised curricula and mandatory teaching qualifications.

The Big Society project is a form of privatisation through community empowerment.[26] It transfers responsibility for public services, once provided directly by the public sector, to individuals or community groups. Though central government disburses the funds for the project and maintains a degree of regulatory control, free schools are designed to have greater autonomy than local authority schools.

There are several problems with this approach. Firstly, it can encourage school providers to act in their own self-interest, in contrast with the aim of providing equitable, universal access to primary and secondary education. Higham examined the motivations of the first free school providers and found that the majority of respondents indicated that they were motivated by self-interest.[27] For

[24] Michael Gove, House of Commons, Hansard 15 November 2010, column 623.
[25] Susanne Wiborg, Francis Green, Peter Taylor-Gooby, and Rachel J. Wilde, 'Free Schools in England: Not unlike Other Schools?' (2018) 47 JSocPol 119, 120.
[26] Robert Higham, 'Who Owns our Schools? An Analysis of the Governance of Free Schools in England' (2014) 42 Educational Management Administration & Leadership 404, 407. See also Peter Berger and Richard Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (American Enterprise Institute for Public Policy Research 1977).
[27] Higham (n 26) 409-410.

parents this meant establishing schools for their own children, and for teachers opening a free school was seen as an opportunity for career development.

Secondly, though free schools cannot be run directly for profit, the programme creates a backdoor through which private companies are allowed access to the education market. School proposers can contract with non-profit or for-profit schools providers for services like school management or curriculum development.[28] Higham found in 2014 that the majority of free school providers have not taken this approach, and school governance remains with the original applicant.[29] However, it is possible that this could change in the future, for example, if parent groups which volunteered to open a free school for their own children want to move on when the children have left school and the group loses the skills and expertise it had when applying to open the school.

Finally, there is little evidence to suggest that free schools are meeting their intended objects. Wiborg et al found that, despite Michael Gove's promise, free schools are not actually more innovative than state schools, and, in fact, the relative isolation of free schools is inhibiting curricular and teaching innovations.[30] Additional research suggests that free schools are reinforcing existing social inequalities, a significant point examined in detail in the following section.

[28] ibid 410.
[29] ibid 411.
[30] Wiborg et al (n 25) 134-135.

6.1.3 Free Schools and Social Inequality

The free schools policy was introduced with the explicit aim of addressing social inequality through improved school choice. It was presented as an opportunity to improve education in the most deprived parts of the country, where maintained schools were deemed inadequate. However, international research on free schools in Sweden and charter schools in the United States, suggests that these types of schools can actually exacerbate social inequalities.[31] The free schools programme is newer in England and thus has not been studied as extensively, but a growing body of research suggests that it will reflect international findings.

Research conducted by Allen and Higham in 2018, the most recent study to date, found that there is no evidence to suggest that English free schools are reducing social inequality.[32] Using free school meal (FSM) eligibility as a proxy for social disadvantage, the researchers found that free school populations in both primary and secondary schools are not representative of their local communities. There are fewer pupils enrolled in free schools eligible for FSM than in their local communities, with primary school populations notably more affluent than their surrounding areas.

Moreover, Allen and Higham found that opening up free schools has an impact on existing state schools, particularly in rural areas and towns.[33] The nearest schools lost half a class of pupils once free schools had been established. Since school

[31] See eg Diane Ravitch, *Reign of Error: The Hoax of the Privatization Movement and the Danger to America's Public Schools* (Knopf 2013); Johan Wennström, 'Marketized Education: How Regulatory Failure Undermined the Swedish School System' (2019) JEdPol (forthcoming); West (n 3).
[32] Allen and Higham (n 6).
[33] ibid 205.

budgets are tied to per capita funding, the reduced school enrolment will have a negative financial impact on the existing state schools.

The findings reflect earlier research by Higham indicating that the free schools programme is not meeting its stated objective of improving education in areas of social deprivation.[34] One reason for this is that potential school providers which want to open schools in the most deprived areas are not getting application approval. In the most deprived areas, parent groups were the least likely to be proposers.[35] The majority of applications came from charities or social enterprises. Based on these findings, Higham argued that the DfE free school application process needs to be analysed. It appeared that relatively privileged groups were more likely to be granted approval, though the accepted proposals were not from groups located in and willing to serve the most disadvantaged populations.[36]

6.2 The Rationale for the Case Study

Education is a social good, and free, equal access to primary and secondary education is necessary in a democratic society. Yet, the marketisation of education in general, and the free schools programme in particular, presents several challenges to the equitable provision of education. Some controversial aspects of the programme include, but are not limited to: (1) the potential for de-professionalisation within the teaching profession;[37] (2) the potential for private

[34] Higham, 'Free Schools in the Big Society: The Motivations, Aims, and Demography of Free School Proposers' (2013) 29 JEdPol 122.
[35] ibid 129.
[36] ibid 135.
[37] See eg Johan Wennström, The Complex Roots of Deprofessionalization: A Case Study of New Public Management' (2016) 28 Critical Review; Adrian Hilton, *Academies and Free Schools in England: A History and Philosophy of the Gove Act* (Routledge 2019). The National Union of Teachers (NUT) is opposed to forced academisation and argues that the free schools programme undermines a 'coherent and locally accountable education system with a good school for every

interests to influence the curriculum; (3) the exacerbation of social inequalities; and (4) the rapid spread of the free schools programme, particularly as the benefits of the programme are still unclear.

For these reasons, there is a strong public interest in the transparency of the free schools programme overall and the application process in particular. It is important for stakeholders, including, inter alia, community groups, parents, education researchers, and politicians, to know who is applying to open new schools, whose applications have been rejected and why, and where the proposed new schools will be located.

After initial research indicated that information requesters had faced difficulty obtaining free school application information from the DfE, either by having their requests denied or not fulfilled within the statutory 20-day period, this case study was developed. Initially, it was unclear whether these challenges were widespread, or whether the reports were the result of a small number of vocal FOIA users dissatisfied with the DfE's handling of their requests. It was determined that further research was required to investigate the scale of the issue and to identify the primary challenges.

The case study is limited to an exploration of the free schools application process, and does not examine how free schools themselves are performing with regards to their FOI responsibilities. There are several reasons for this decision. First, there is no comparative data with local authority schools, and the scale of the research project precluded data collection to evaluate how local authority schools are

child'. See NUT, 'Free Schools' <https://www.teachers.org.uk/campaigns/freeschools> accessed 31 January 2019.

performing under FOIA. Second, interviews with caseworkers and campaigners suggested that such an approach would reveal limited insight because individual schools receive FOI requests infrequently.[38] As one caseworker explained, the infrequent nature of FOI requests means that they do not have a 'body of intelligence' on how schools of any kind are performing with regards to their responsibilities under FOIA.[39]

Moreover, by concentrating on the DfE and how it has handled requests for information about free schools, I am able to focus the analysis on the transparency of the policy and the practices of a central government department. Higham identified some of the challenges of the free schools application process, including the low success rate of parent and community groups in the most disadvantaged areas,[40] thus there is a need to examine national transparency separately from local transparency. At the local level, transparency and information sharing is essential for parents and governing bodies to hold their local free schools to account.[41] This requires access to a different type of information than is needed to hold central government to account for its policy decisions, or to support public deliberation on proposed free schools.

6.3 The Legal and Regulatory Framework

The Academies Act 2010 provides the legal basis for free school and academies. The Act enabled the expansion of the existing academies programme and established the free schools programme. As discussed in section 6.1.1, the

[38] Specifically, interviews with Participants B, G, H, and I. See Appendix D for full interview schedule and anonymised participant list.
[39] Participant I, interviewed January 2017.
[40] Higham (n 34).
[41] Centre for Public Scrutiny, *Free Schools: Challenges and Opportunities* (CFPS 2012) 24.

academies programme expanded rapidly after 2010, supported by the legislation making it possible for all state schools in England to become academies. Whereas New Labour had introduced academies to replace poorly performing schools in areas of high deprivation, at least in the early stages of the programme, the Conservative-led government turned its attention to highly performing schools.[42] The Act allowed for schools rated 'outstanding' by Ofsted to be automatically preapproved for conversion to academy status.[43]

The DfE provides the capital funding to establish a free school and is responsible for the oversight of the programme, though it plays a limited role in the daily management of schools.[44] Leeder and Mabbett have pointed out that the relationship between the DfE and free schools is contractual, albeit loosely. Free schools are funded directly by the DfE, and, in turn, they provide a service. Strict contractual control over the schools, however, is not desirable as the programme's intention is to give schools greater autonomy. In other words, the DfE does not directly monitor school performance to ensure quality. This is left to the 'quasi-market' (poor quality schools will not last in a competitive environment, so the theory goes) and the school's governance structure.[45]

[42] Mark Goodwin, 'English Education Policy after New Labour: Big Society or Back to Basics?' (2011) 82 PolQ 407.
[43] Ofsted is the Office for Standards in Education, Children's Services, and Skills. Amongst its duties includes carrying out school inspections to evaluate performance. See 'Education Inspection Framework' <https://www.gov.uk/government/publications/education-inspection-framework> accessed 26 December 2019.
[44] Leeder and Mabbett (n 8) 135.
[45] ibid 136.

6.3.1 The Free School Application Process

To make an application to set up a free school, potential providers must submit a bid to the DfE setting out their vision for the new school.[46] Applicants need to identify a location and a site for the proposed school. As per the most recent guidance published by the DfE, free school applications are now geographically targeted. The DfE is seeking to extend the free schools programme to 'areas that have not previously benefitted', and thus applications made in Wave 13 must be made in targeted districts.[47] If an applicant would like to apply to open a free school in an area that is not on the targeted list, they need to demonstrate that there is a 'very strong case for a free school'.[48] All applicants must demonstrate that there is a need for additional school places in the area of the proposed school.

If an applicant does not provide evidence of demonstrable need for school places, the DfE cautions that the application is unlikely to be successful.[49] If this prerequisite is met, the DfE will then consider the additional application information, including the vision for the new school, engagement with parents and the local community, the education plan, the curriculum plan, and proposed staffing arrangements.[50] The applicant must also demonstrate their capacity and capability to open the school and achieve their vision, as well as provide evidence of financial viability.[51] Decisions are made by the Secretary of State for Education.

[46] Department for Education, *How to Apply to Set up a Mainstream Free School* (updated July 2018).
[47] ibid 11.
[48] ibid 11.
[49] ibid 18.
[50] ibid 22-36.
[51] ibid 37-43.

All decisions are final, and there is no appeals process, though unsuccessful applicants will receive feedback.

The DfE recommends that applicants contact the New Schools Network (NSN) for support on making the proposal.[52] The NSN is an independent charity funded by the DfE and has reportedly worked with two-thirds of successful free schools.[53] The organisation provides 'hands-on' support to applicants, then later provides additional support to successful applicants as they prepare to open their new school.[54] As a registered charity, the NSN is not subject to FOIA, the significance of which will be discussed in section 6.5.[55]

6.4 Methodology

This case study was designed to empirically investigate how the free schools programme affects information access under FOIA. Unlike the previous case study, which examined the scope of the EIR and the legal reasoning that led to the decision that the privatised water companies are in fact public authorities for EIR purposes, the scope of FOIA is not in question here. The Academies Act 2010 established that free schools are subject to FOIA, and the DfE is responsible for handling requests for information about proposed free schools.[56] Therefore, the

[52] ibid 11.
[53] New Schools Network, 'Applying to Open: Development Programme' <https://www.newschoolsnetwork.org/applying-to-open/development-programme-0> accessed 11 June 2019.
[54] New Schools Network, 'About Us' <https://www.newschoolsnetwork.org/about-us> accessed 2 February 2019.
[55] The NSN has been criticised for its lack of transparency and objectivity. It was established in 2009 by a former adviser to Michael Gove, leading to accusations of cronyism and concerns over whether it could be entrusted to provide free school applicants with impartial advice. See Tom Clark, 'New Schools Network Lacks Transparency' *Guardian* (London, 6 July 2010) <https://www.theguardian.com/education/2010/jul/06/michael-gove-new-schools-transparency> accessed 29 January 2019.
[56] Academies Act 2010, Sch 2, s 10.

aim here is to determine *how* this form of privatisation (the involvement of non-profit, non-state actors in the delivery of compulsory education) affects the operation of FOIA, and whether these findings have implications for the extension or operation of ATI legislation in other privatised contexts.

The methodology involved two strands. First, I conducted a systematic review of the ICO decision notices database to identify relevant decision notices involving the DfE and free schools. Then, I conducted semi-structured with relevant stakeholders, including campaign groups, information adjudicators, and information holders.

6.4.1 Decision Notices Database: A Systematic Review

I searched the ICO decision notices database by keyword ('free school') and by authority ('Department for Education'), for all decisions taken until January 2019.[57] The search returned 25 decisions, which I manually assessed to identify 24 relevant notices for analysis.[58] During the analysis, an additional decision notice (FS50412840) that had not been returned in the initial search was identified after it was referenced in another decision notice, bringing the total to 25. Each decision notice was examined to identify the exemptions applied by the DfE, the reasoning for engaging an exemption, and the outcome of the Commissioner's investigation.

[57] The database is available at https://ico.org.uk/action-weve-taken. Accessed 4 December 2019.
[58] One decision notice concerned free school meals and was therefore eliminated from analysis.

6.4.2 Stakeholder Interviews

I conducted three stakeholder interviews with information campaigners and adjudicators, two in person and one via telephone. One of the interviews was a group interview with three participants; in total five people were interviewed for this case study. A sixth participant declined to be interviewed, but agreed to answer written questions via email. Attempts to arrange additional interviews, eg with an education researcher, politicians, a teaching union, and the New Schools Network (NSN) were unsuccessful.

The requests for interviews had been sent to a range of prospective participants with the aim of gathering views from multiple information requesters, information holders, and adjudicators. It was anticipated that the interviews would contextualise the doctrinal analysis and provide insight into the experiences of seeking information or handling information requests beyond what is typically recorded in an ICO decision notice or Information Rights Tribunal judgment. Though the interview participant rate was lower than expected, the interview data does reflect the views of the three targeted groups (requesters, holders, and adjudicators).

Each semi-structured interview lasted approximately one hour. The participants were asked questions on, inter alia, their roles within their respective organisations, their experiences of making information requests, their experiences of the Information Tribunal, and their thoughts on transparency within the free

schools programme.[59] The interviews are treated as supplementary to decision notices investigation and have not been analysed on their own.

6.5 Discussion of Results

The table on the following page (Figure 6.1) summarises the findings of the decision notice database review:

[59] Interview schedules are provided in Appendix E.

Reference	Date	Exemption(s) engaged	Outcome
FS50416867	16/1/12	s 22(1)(a)	Complaint not upheld
FS50412840	1/3/12	s 12 s 36(2)(c)	Complaint partly upheld – s 36(2)(c) correctly applied, but not s.12
FS50392220	26/3/12	s 22 s 35(1)(a) s 36(2)(b)(i) and (ii) s 36(2)(c) s 40(2) s 40(3)(a)(i) s 43(2)	Complaint not upheld
FS50427672	29/5/2012	s 35(1)(a) s 21 s 22	Complaint upheld
FS50415927	4/7/12	s 35(1)(a) s 21 s 22	Complaint upheld
FS50426626	9/7/12	s 35(1)(a) s 36(2)(c)	Complaint upheld
FS50460881	13/11/12	s 36(2)(b)(i) s 36(2)(c)	Complaint not upheld
FS50455925	28/1/13	s 36(2)(c) s.40(2) s 43(2)	Complaint partly upheld – s 43(2) correctly applied, but not others
FS50450769	5/2/13	s 36(2)(c) s 40(2) s 43(2)	Complaint partly upheld – s 43(2) correctly applied, but not others
FS50448179	26/3/13	s 36(2)(b)(ii) s 36(2)(c)	Complaint not upheld
FS50461086	26/3/13	s 36(2)(b)(ii) s 36(2)(c)	Complaint not upheld
FS50494802	13/8/13	s 36(2)	Complaint upheld
FS50496930	13/8/13	s 22	Complaint upheld
FS50498159	29/10/13	s 36(2)(b)(i) and (ii); s 36(2)(c)	Complaint not upheld
FS50478864	18/11/13	s 36(2)(c) s 40(2)	Complaint partly upheld – s.40(2) correctly applied
FS50504456	9/12/13	s 12(1) s 36(2)(b)(ii)	Complaint not upheld
FS5048639	9/12/13	s 35(1)(a)	Complaint upheld
FS50510560	13/2/14	s 36(2)(b)(ii) s 36(2)(c) s 40(2) s 43(2)	Complaint partly upheld – s.40(2) correctly applied, but not others
FS50521432	6/3/14	s 22(1)	Complaint not upheld
FS50513524	31/3/14	s 36(2)(b) and (c)	Complaint not upheld
FS50522685	12/5/14	s 22	Complaint upheld
FS50529321	12/6/14	s 36(2)(b) and (c)	Complaint upheld
FS50569987	18/6/15	s 36(2)(c) s 43(2)	Complaint not upheld
FS50565574	21/10/15	s 36(2)(c)	Complaint upheld
FS50611901	5/5/16	s 22	Complaint upheld

As the table demonstrates, the most frequently engaged exemptions by the DfE when withholding information about free schools and free school applications are s 22 and s 36(2).

6.5.1 Section 22 – Information Intended for Future Publication

As indicated in the table, the DfE applied the s 22 exemption eight times. Some of these are related information requests made by the same requester within a charitable organisation. The complaint was not upheld three times, but upheld on five occasions.

Section 22(1) states that information is exempt from disclosure if:

> (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
> (b) the information was already held with a view to such publication at the time when the request for information was made, and
> (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).[60]

It is a qualified exemption, so public authorities must be able to demonstrate that the public interest in maintaining the exemption outweighs the public interest in disclosure. An examination of the eight decision notices reveals some insight into how the public interest balancing test has been carried out by the DfE and how the Information Commissioner has responded.

[60] FOIA, s 22(1).

The first time the issue arose (FS50416867), the complainant requested the full business plan of a new, religiously affiliated free school.[61] The DfE withheld the information under s 22(1)(a), explaining that premature publication of the business case would prejudice the 'commercial negotiating strength' of the school.[62] Though there are public interest arguments in favour of disclosing the information (eg informing public debate, the general public interest in supporting government transparency), the DfE considered these were outweighed by the public interest arguments in maintaining the exemption. If the school's negotiating position were harmed by premature disclosure, then that could negatively affect the school's duty of ensuring 'best value for taxpayers' money'.[63] Moreover, the DfE argued that public scrutiny of the business case could deter potential applicants from coming forward in the future.[64]

On balance, the Commissioner decided that the public interest lay in maintaining the exemption.[65] The critical argument here was the fact that the business case, though approved, was still subject to change, so premature release of the financial information would be likely to harm the school's negotiating power, and, by extension, the effective use of taxpayers' money. These interests outweighed the general interests in openness and transparency.

[61] Or, to be more precise, the first time the issue progressed to the Information Commissioner. It is not possible to know whether s 22 had been engaged previously, but the requester chose not to proceed with an internal review and complaint to the ICO.
[62] FS50416867 [18]. At the time, the school was still searching for a permanent site, so the DfE argued that making its business case publicly available would negatively affect its negotiating power.
[63] ibid [24].
[64] ibid [25].
[65] ibid [33].

In the next decision (FS50392220), the matter was significantly more complicated, as the DfE sought to rely on a host of exemptions to withhold information in response to a complex request for information. The complainant requested information on proposed free schools, including the proposal forms; correspondence between the DfE and NSN; and minutes and agendas of meetings between the DfE and the NSN, or meetings at which funding for the NSN was discussed.[66]

Breaking this tall order down into individual requests, the DfE sought to engage s 22 for the first part, the request for copies of the free school proposal forms. Initially, the DfE withheld the information, stating that it had a 'firm intention' to publish all proposal forms at a later date.[67] However, during the course of the ICO investigation into the complaint, the DfE changed its stance and announced that it would instead only publish the successful proposals. It then sought to engage s 36(2) to withhold the unsuccessful proposal forms (see the following section 6.5.2 for further discussion).

The Commissioner decided that s 22 had been properly applied, a decision that was reached after first considering whether it was reasonable to withhold publishing the information until a future date. Noting the 'high level of media and political interest and debate' surrounding the free schools policy, especially at this early stage in 2012, the Commissioner accepted the DfE's argument that disclosure had the potential to disrupt the approval process for proposed schools.[68]

[66] FS50392220 [4].
[67] ibid [18].
[68] ibid [26].

The next step was to consider the public interest arguments for and against maintaining the exemption. The Commissioner acknowledged that the introduction of the free schools policy had led to considerable debate, not least because of the significant changes being made to educational policy, and there was clearly a strong public interest in making information available to inform public debate.[69] However, he concluded that this was outweighed by the public interest in maintaining the exemption, as releasing information in a piecemeal fashion would be undesirable, and, as before, revealing the proposers' plans at an early stage could jeopardise their 'negotiating positions in a competitive marketplace', which would not be in the public interest.[70]

The third decision (FS50521432) concerned a request for information on free school impact assessments. The DfE withheld the information, again citing its intention to publish the requested information in the future. This time, there were no commercial considerations taken into account, but the DfE argued that the piecemeal release of information to individuals before it planned to release the full information to the public could lead to confusion and inaccuracy.[71] After considering the balance of public interest arguments, the Commissioner again decided that the s 22 exemption had been properly applied. As the DfE planned to release the information in the future, the Commissioner was satisfied that the public would be able exercise oversight of the DfE's duty to conduct statutory impact assessments once the information was in the public domain.[72]

[69] ibid [30]-[35].
[70] ibid [32].
[71] FS50521432 [38].
[72] ibid [41].

On the other hand, the Commissioner decided on five occasions that the DfE *had not* correctly applied the s 22 exemption. Each case concerned requests for information on free school applications and proposals. In two instances (FS50427672 and FS50415927), the Commissioner decided that the exemption had not been correctly engaged because the DfE did not actually hold the information in question at the time the request was made.[73]

Decision notice FS50496930 is related to decision notice FS50494802. They concerned identical requests for information on proposed free schools, made by a charitable organisation. The request was made in March 2013, and the DfE published the requested information on its website in July 2013. Because the information had already been released by the time the Commissioner investigated the complaint, the decision notice did not include an analysis of whether s 22 had been properly engaged.[74]

Decision notices FS50522685 and FS50611901 again concerned similar requests for information by the charitable organisation cited above for free school proposals made during Wave 5 and Wave 10 respectively. In FS50522685, the DfE withheld the information with the argument that releasing the information before it intended to make it publicly available would result in the undesirable 'piecemeal' disclosure of information.[75] It argued that it would be preferable to release all of the information at the same time to ensure clarity and accuracy.

[73] FS50427672 [17]; FS50415927 [18].
[74] FS50496930 [14].
[75] FS50522685 [24].

Though this was similar to the argument made previously in FS50521432, the Commissioner decided that in this instance, the DfE had not made a convincing argument.[76] As the deadline had already closed and all applications for Wave 5 had been received, it was not clear to the Commissioner how this would result in piecemeal disclosure. Instead, there was a strong public interest in releasing the information, as the transparency of the free school application process is necessary to support public debate and participation.[77]

In decision notice FS50611901, the DfE referred to the Commissioner's decision in FS50522685 and the public interest argument in support of releasing the information to support public debate.[78] It countered that there are other opportunities for public participation and debate, and this does not commence upon publication of the list of free school proposals.[79] For example, there are local consultations during the free school proposal planning stage in which interested parties can participate. These consultations allow local residents and officials to discuss and provide input into the plans for free school with the proposer group.

Furthermore, the DfE argued that releasing the information at the end, rather than during, the proposal process would allow the proposer groups to focus on completing their applications 'without distraction from national lobbyists'.[80] The DfE believed that whilst it is important for local communities to be involved in the planning and proposal stage, it could be undemocratic to allow national lobbying

[76] ibid [27].
[77] ibid [26].
[78] FS50611901 [17].
[79] ibid [18].
[80] ibid [21].

organisations to 'bombard' proposers with questions.[81] Diverting resources from the application to handle requests for information would be unfair to the proposer groups.

With regards to the first argument, the Commissioner acknowledged that free school proposers are required to consult with the local community and relevant stakeholders, but this is 'likely to be limited in scope' as there could be interested parties who have not been identified as key stakeholders and/or have not been involved in the consultations.[82] Thus, public debate and participation could still be limited by not making the requested information available. Regarding the second argument, the Commissioner argued that free school proposers should be aware that there is both national and local interest in the free schools policy, and they should have the handle any attention or issues that arise during the application process.[83] Thus, the DfE had incorrectly applied s 22 to withhold the requested information. By the time this decision was taken, the information had already been published, so no further steps were required.

In analysing these eight decision notices, one of the most striking findings is that public authorities do not need to specify *when* they will publish the requested information. In other words, it is sufficient to state an intention to publish the information in the future, but the date of publication does not have to be determined. This means that requesters are left with some uncertainty, and no

[81] ibid [21].
[82] ibid [28].
[83] ibid [30].

recourse if the public authority does not publish the information within its estimated timeframe.

In an interview with an employee of the charitable organisation involved in several of these complaints, Participant B (see Appendix D for full list of interview participants) indicated that obtaining information from the DfE has been 'very difficult' over the years:

> When it comes to a particular series of requests that have gone to the Information Commissioner's Office where we've been trying to get the names of free school applicants in a timely manner, we found that the DfE was able, having initially resisted the matter, go to the Information Tribunal, losing there, being told that they have to start providing this information in a timely manner. They continued to not do so in the knowledge that by the time the Information Commissioner's Office could tell them that they have to again, they will have already – you know, the timely nature of the provision of information will have passed… It's quite problematic, really…that the Information Tribunal or some part of the enforcement process rules that information must be supplied in a timely manner in the future, and there's nothing that can actually enforce that to occur if the relevant public body doesn't want it to.

Participant B believed that s 22 was being used as a 'delaying tactic' by the DfE to avoid having to release the information. By the time a complaint has gone through the internal review process and reaches the ICO, it is entirely possible that the DfE will have already made the information publicly available on its website. To investigate whether the DfE engages in this practice would involve an examination of its use of the s 22 exemption beyond the free schools programme, but Participant B's perception suggests of a lack of public trust in the department and its willingness to comply with FOIA obligations.

Moreover, some of the arguments made by the DfE (and accepted by the Commissioner) to justify the application of the exemption reflect a neoliberal view of education that is at odds with the understanding of education as a social good. Whilst the latter view emphasises the collective societal benefit of education and the need for a well-educated populace, the neoliberal view positions education as a private good, emphasising individual benefits and promoting school choice.[84] To illustrate, in the first decision (FS50416867), the commercial negotiating strength of the school was cited as a reason to withhold the information, which, on balance, was considered to outweigh the public interest in disclosure. When competition and choice are introduced in education, confidentiality and secrecy become easier to justify.

6.5.2 Section 36 – Prejudice to Effective Conduct of Public Affairs

The most frequently engaged exemption in the decision notices is s 36, which was engaged 17 times.[85] In nine of the decisions, the Commissioner decided that the s 36 exemption had been correctly applied by the DfE. The relevant text is as follows:

[84] See eg Ravitch (n 31); Lawrence Angus, 'School Choice: Neoliberal Education Policy and Imagined Futures' (2013) 36 BJSocEd 395; Jessica Braithwaite, 'Neoliberal Education Reform and the Perpetuation of Inequality' (2017) 43 CritSoc 429.

[85] This reflects the DfE's overall FOIA statistics. In correspondence with the Department's FOI Team, they reported that the most commonly applied exemption in s 40(2), followed by s 36 and s 43.

36 Prejudice to effective conduct of public affairs

(1) This section applies to –
  (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
  (b) information which is held by any other public authority.
(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -
  (a) would, or would be likely to prejudice –
    (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
    (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
    (iii) the work of the Cabinet of the Welsh Assembly Government
  (b) would, or would be likely to inhibit –
    (i) the free and frank provision of advice, or
    (ii) the free and frank exchange of views for the purposes of deliberation, or
  (c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

The discussion begins by returning to decision notice FS50392220. As explained in the previous section, this was a lengthy request for a large volume of information, and the DfE applied several exemptions in its response. The complaint had asked for, inter alia, the correspondence between the DfE and the NSN.[86] The DfE withheld the information under s 36(2)(c), arguing that disclosure would be likely to harm the relationship between the DfE and the NSN, as well as relations with 'external partners, potential sponsors, and free school providers'.[87]

As s 36 is also a qualified exemption, the Commissioner was again required to consider the public interest arguments for and against maintaining the exemption.

[86] FS50392220 [4].
[87] ibid [70].

On the one hand, disclosing the information would have helped inform public debate by giving insight to the operation of the policy, and the type of free school proposals being submitted.[88] However, the DfE argued that the free schools policy and its relationship with the NSN were both in the early stages, and disclosing confidential communications would harm that relationship. If the requested information was released, they argued, it would likely lead to considerable media and public scrutiny, which would damage not only the relationship between the DfE and NSN, but also current and future free school proposers.[89] The Commissioner accepted this argument, noting that free school proposers would not have expected their communications with the DfE or the NSN to have been made publicly available.[90] This could deter potential applicants from coming forward in the future, undermining the programme. Thus, the Commissioner decided that the public interest favoured maintaining the exemption.

6.5.2.1 *McInerney v Information Commissioner and the DfE*

Similar arguments were made in other decisions.[91] The most complex case involved a series of requests made by an education researcher, which eventually led to an appeal to the Upper Tribunal (Administrative Appeals Chamber) in 2015.[92] The researcher first made a request to the DfE in October 2012, asking for (1) all decision letters sent to successful and unsuccessful free school applicants and (2) the application forms.[93] The DfE withheld the information, citing the

[88] ibid [75].
[89] ibid [85].
[90] ibid [86].
[91] See, eg FS50412840.
[92] *McInerney v Information Commissioner and the Department for Education* [2015] UKUT 0047 (AAC).
[93] FS50478864.

exemption under s 36(2)(c). The researcher complained to the ICO, who upheld the complaint in November 2013 and ordered the disclosure of the information.

The DfE appealed to the First-tier Tribunal (General Regulatory Chamber; GRC, Information Rights). In addition to the s 36 exemption, the DfE also relied on exemptions under s 43,[94] s 12,[95] s 13,[96] and s 14.[97] The Tribunal found that the appeal succeeded under s 14, though was quick to point out that there was 'no question here of anything in the tone of the request tending towards vexatiousness'.[98] The Tribunal held that whilst there is a legitimate public interest in the openness and transparency of the free schools programme, these considerations were 'dwarfed by the burden' that compliance with the ICO's decision would place on the DfE.[99] This is because the volume of information to be disclosed was immense: 839 letters, 322 expressions of interest, and 266 applications.[100] In total, the documents amounted to over 25,000 pages, with personal information redacted as set out under s 40(2).

As the task of redacting personal information would have led to considerable expenditure of resources in staff time and costs, the Tribunal concluded that this would place a disproportionate burden on the DfE.[101] The Tribunal did not go on to consider whether the other exemptions, including s 36(2)(c) had been properly applied. In light of the decision, the complainant refined and resubmitted her

[94] Prejudice to commercial interests.
[95] Cost of compliance.
[96] Fees for disclosure where cost of compliance exceeds limit.
[97] Vexatious requests.
[98] EA/2013/0270 [8].
[99] ibid [9].
[100] ibid [2].
[101] ibid [12]-[15].

request in July 2014. This time, the complainant did not request the applications, but only copies of the letters sent to the successful and unsuccessful applicants. Again, the DfE sought to withhold the requested information under s 36(2)(c) and s 40(2), and, after an internal review, the ICO began an investigation.[102]

The Commissioner's investigation focused on whether the exemption under s 36(2)(c) had been properly engaged. As this is a qualified investigation, the Commissioner considered the public interest arguments for and against maintaining the exemption. The DfE argued that disclosing the rejection letters could deter applicants from making future applications, or could deter new applicants from making submissions.[103] This could lead to a reduction in the number and quality of applications. Moreover, disclosure could negatively affect innovation. As the DfE explained, the free schools programme is designed to encourage innovation in education, with school proposals that might be at odds with 'conventional' school models.[104]

The DfE also argued that disclosure could undermine public support for the free schools project,[105] and potentially affect newly opened (or approved) schools that had previously been rejected.[106] The DfE expressed concern that this would affect teacher recruitment or pupil enrolment, which, by extension, would negatively impact the quality of education.

[102] FS5065574
[103] ibid [43]-[44].
[104] ibid [45].
[105] ibid [47].
[106] ibid [51].

The Commissioner, however, was not entirely convinced that this would prejudice applicants or deter others from applying. In fact, releasing the information could help future applicants develop their proposals as it would allow them to see previous applications and the feedback from the DfE.[107]

Moreover, the DfE's concerns needed to be considered against the public interest in disclosing the information, which support the openness, transparency, and accountability of the free schools programme.[108] Referring to the Tribunal's decision in a previous case,[109] the Commissioner noted that the free schools programme involves both significant public funds and substantial changes to the education system and therefore transparency and public debate are needed.[110] In conclusion, the Commissioner found that the public interest lie in disclosing the information. The exemption under s 40(2) had been properly engaged, and the Commissioner ordered the DfE to release the letters with the personal information redacted.[111]

6.5.2.2 Sandymoor Free School

In July 2013, the complainant wrote to the DfE for the application and supporting documentation from the Sandymoor Free School.[112] The DfE withheld the information, citing exemptions s 36(2)(b) and (c). The Sandymoor Free School was among the first to open in September 2012 with only 19 pupils.[113] Concerned that the pupil enrolment was far lower than expected, the complainant sought

[107] ibid [64].
[108] ibid [61].
[109] EA/2012/0136, 0166, 0167.
[110] ibid [62]
[111] ibid [70].
[112] ICO Decision Notice FS50513524 (31 March 2014).
[113] ibid [13]-[14].

information from the DfE to determine why, in his view, the school was being treated differently from other schools, which would be forced to close if they could not attract a sufficient number of pupils.[114]

In explaining its decision to withhold the information, the DfE made familiar arguments: disclosure would stifle innovation because future applicants might 'be encouraged to put forward similar applications or "borrow" sections from approved applications'.[115] Future applicants might use this information to develop applications that it thought would 'tick the right boxes', rather than develop a proposal in the best interest of the local community.[116] Furthermore, disclosure might deter future applications. If proposers know that their rejected applications and feedback from the DfE will become public knowledge, they might be hesitant to apply.[117]

The Commissioner considered these arguments, but noted that in this case, the request for information had been made *after* Sandymoor had already been approved and opened.[118] Thus, the Commissioner was not satisfied that there would be a prejudicial effect on the free or frank exchange of advice for deliberative purposes.[119] Furthermore, the Commissioner was not convinced that making application materials publicly available would encourage suitable applicants to 'borrow' or copy from previous applicants. Even if they did, the Commissioner argued that the DfE should have appropriate procedures in place to assess

[114] ibid [9].
[115] ibid [22].
[116] ibid [22].
[117] ibid [22].
[118] ibid [36].
[119] ibid [37].

applications, in which case any cheating or deficiencies in applications would become apparent.[120] Moreover, potential applicants should be 'well aware' that there is significant public interest in the free schools policy and application process, thus they should expect that application information will be made available to the public for scrutiny.[121] For these reasons, the Commissioner found that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.[122]

6.5.2.3 Reforming s 36 FOIA

The examination of the application of the s 36 exemption reveals an interesting pattern. In the early days of the free schools policy, the DfE engaged s 36, invoking the novelty of the policy and the need to protect its confidential communications with and about the NSN and free school proposers.[123] Later, the DfE argued that disclosure could negatively affect innovation and the quality of free school applications.[124] The broad wording of the s 36 exemption - 'would, *or would be likely to*, prejudice the effective conduct of public affairs' (emphasis added) – perhaps helps to explain the broad range of arguments that have been introduced by the DfE to justify its application.[125]

[120] ibid [42].
[121] ibid [44].
[122] ibid [51].
[123] eg Decision Notice FS50392220.
[124] eg Decision Notice FS50513524, concerning the Sandymoor Free School.
[125] Notably, the 'harm test' in FOISA requires public authorities to demonstrate that disclosure would 'significantly prejudice' the effective conduct of public affairs. I return to this point in Chapter 7.

This suggests that early concerns over the breadth of FOIA exemptions are justified, at least in this instance.[126] In 2000, Patrick Birkinshaw observed that the s 36 exemption had been criticised due to its potentially broad application.[127] This case study has shown just some of the ways in which the exemption can be engaged to withhold information, demonstrating that its use is very broad indeed.

Moreover, an information holder need only show that disclosure would 'prejudice' or 'would be likely to prejudice' the effective conduct of public affairs. This is a relatively weak harm test, much weaker than the 'substantially prejudice' threshold recommended by the Select Committee appointed to consider the draft FOI bill.[128] The weakening of the 'prejudice' test means that information holders are able to engage the s 36 exemption with greater frequency, as the DfE has done on some of the occasions discussed in the previous section. Information requesters then most go through the lengthy internal review and ICO appeal stage to determine whether the exemption has been properly applied.

6.6 Conclusion

The free schools policy represents a significant shift in the delivery of primary and secondary education in England. It is the latest in a long series of reforms to create a quasi-market in state education, and the diminishing of the role of the LEAs has

[126] Patrick Birkinshaw, 'Freedom of Information in the UK: A Progress Report' (2000) 17 GIQ 419, 421.
[127] ibid 421.
[128] 'Freedom of Information Draft Bill,' Public Administration Committee, 3rd Report Session 1998-99, HC 570-I; For further discussion, see Stephanie Palmer, 'Freedom of Information: A New Constitutional Landscape?' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (Hart 2003) 235.

raised important issues of transparency and accountability, at both local and national levels.

This chapter has highlighted some of the issues that have arisen regarding the transparency of the policy at central government level. The results of the decision notices database search suggest that the challenges of obtaining information from the DfE on free schools is not a widespread phenomenon, but there has been a profound effect on a small number of information requesters. Analysis of the decision notices has revealed the tension between the public interest in disclosing information and the public interest in maintaining exemptions to support the effective operation of the free schools policy.

The examination of the use of the s 22 exemption revealed that the timely release of information has been affected by the policy. Whilst the DfE made strong arguments in support of withholding the information until its planned release date, the complaints viewed it as a 'delaying tactic' to prevent public debate and deter future FOI requests. Though this is not unique to the free schools context,[129] it is likely that privatisation has at least some correlation with its engagement, as the impact on commercial negotiating strength has been cited as a reason for postponing disclosure. It would be difficult to raise this justification in a school system not based on competition and choice.

The examination of the application of the s 36 exemption was even more revealing of the tension between disclosing information to support transparency and public participation and withholding information to protect the effective conduct of public

[129] Interview with Participant C, November 2016.

affairs. The early decision notices showed that the DfE first relied on the novelty of the policy to withhold information, arguing that disclosure could damage its budding relationship with the NSN and free school proposer groups. Later, the DfE developed additional arguments to withhold information, such as the stifling of innovation and the deterrence of future applications.

Overall, the analysis has shown that privatisation (in this case, the involvement of non-state actors in primary and secondary education) affects the application of FOIA beyond the scope of coverage. For example, if one of the aims of the free schools policy is to encourage innovation in schools, then this can be used to justify withholding information. However, this is at odds with the need for transparency, which is justified not only by the general public interest in government openness and transparency, but also by the need to scrutinise a programme that has thus far not demonstrated that it is meeting its stated aim of improving education in the most deprived areas.[130]

Thus, one of my recommendations for reform, on which I will elaborate in Chapter Seven, is to amend s 36. This can be done either by removing the phrase 'or would be likely to' or introducing a higher threshold, requiring information holders to provide evidence that disclosure would be more likely than not to cause harm. As it stands, public authorities do not have to demonstrate that information disclosure would prejudice the effective conduct of public affairs, only that it 'would be likely to', even though the probability of that occurring is less than fifty

[130] See eg Higham (n 34); Allen and Higham (n 6).

percent.[131] The analysis suggests that this accounts for the frequent application of the s 36 exemption. A narrower exemption could restrict its application and place a greater burden on the public authority to demonstrate that disclosure will prejudice the effective conduct of public affairs.

[131] FS50513524 [25]. See also Information Commissioner's Office, *Prejudice to the Effective Conduct of Public Affairs (Section 36)* (ICO 2015).

Chapter Seven

Conclusion

Occasionally…what you have to do is go back to the beginning and see everything in a new way. ― Peter Straub

In the light of the arguments put forward in this thesis, it is time to reconsider the two research questions introduced back in Chapter One: How does privatisation affect access to information under ATI legislation? And, if the involvement of private bodies in the delivery of public services does in fact threaten access to information, then which measures would be most effective to ensure that information rights are not weakened as a result of privatisation?

This chapter provides an answer to each question in turn, followed by my proposals for the legislative reform of FOIA and FOISA. These proposals are based on the evidence collected and analysed in the case studies, and are grounded in the conceptual framework presented in Chapter Three. This is followed by an evaluation of the current application of the EIR and EISR to private bodies performing public functions. The chapter concludes by identifying areas for future research.

7.1 Privatisation and Access to Information

Throughout the thesis, I have made two main claims regarding the relationship between privatisation and access to information in the UK. First, the relationship is complex, and, at times, mutually reinforcing. The prevailing narrative on privatisation and FOI legislation is that privatisation diminishes information

rights by limiting its scope.[1] That is, privatisation erodes information access under FOIA and FOISA because they were designed to apply to designated public authorities. However, as the historical background discussed in Chapter Two and the conceptual underpinnings explored in Chapter Three demonstrated, this argument is incomplete. It does not take into account the fact that privatisation and transparency laws (in the UK and elsewhere) developed in parallel.[2] Whilst ATI legislation and related transparency instruments have been introduced to support democratic aims, they have also been used to justify, or even facilitate, the neoliberal transformation of the state. For example, the Citizen's Charter pledged to increase access to information about how public services are run not to support democratic engagement, but rather to facilitate the marketisation of public services through its emphasis on consumer choice and empowerment.[3]

Therefore, it is incomplete to argue that privatisation *necessarily* erodes access to information. In fact, privatisation could actually make certain types of information more readily available, particularly if the information is being used to facilitate competition between service providers. For example, it has been argued that privatisation in the water industry led to increased transparency as the new regulatory system introduced new reporting requirements that had been absent in the public utilities.[4] However, as I argued in Chapters Two and Three, these

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[1] See eg Office of the Scottish Information Commissioner, *FOI 10 Years On: Are the Right Organisations Covered?* (OSIC 2015); Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law* (ICO 2019).
[2] See eg Gerry Rodan, 'Neoliberalism and Transparency: Political Versus Economic Liberalism' (2004) Murdoch University Asia Research Centre Working Paper 112; Ben Worthy, 'Freedom of Information in Europe: Creation, Context, and Conflict' in D Mokrosinska (ed) *Contested Trade-Offs: Transparency and Secrecy in European Democracies* (Routledge 2019); Christina Garsten and Monica Lindh de Montoya (eds) *Transparency in a New Global Order* (Edward Elgar 2008).
[3] *The Citizen's Charter* (Cm 1599, 1991).
[4] *Open Government* (Cm 2290, 1993) 17-18.

will often be narrowly prescribed types of information, and regulatory transparency is not the same as a general right of access to information. Still, it is important to note that privatisation *can be* accompanied by transparency, but usually only insofar as transparency is required for the oversight of a privatised industry or service.

In addition, the philosophical underpinnings of privatisation and transparency are closely entwined. As critical transparency scholars have observed, the global 'explosion' in ATI legislation that took place during the 1990s is directly connected with the end of the Cold War and the transition to economic and political liberalism.[5] Likewise, open government reforms in sub-Saharan Africa have frequently been ushered in at least in part due to conditions set by the International Monetary Fund (IMF) and World Bank. Transitional states that wish to accede to international instruments or institutions have been required implement ATI laws or similar open government reforms. This is not to discount the democracy-enhancing role that ATI can play, but it would be remiss not to acknowledge the role it has also played in facilitating privatisation and marketisation. There is a need to distinguish between neoliberal transparency and 'political openness' or democratic-expansive transparency, as I explained in Chapter Three.[6]

The second claim I have made in this thesis is that privatisation affects not only the *scope* of FOIA and FOISA, but also its *application*. Specifically, privatisation

[5] See eg Garsten and Lindh de Montoya (n 2); Worthy (n 2); Byung-chul Han, *The Transparency Society* (StanUP 2015).
[6] Rodan (n 2).

affects the application of the exemptions, most notably s 22,[7] s 36,[8] and s 43(2).[9] In other words, extending FOI legislation to additional private bodies would expand the scope of the legislation, ensuring that privatisation does not create a gap in coverage where services are delivered by private providers. However, privatisation can also restrict access to information by increasing the likelihood of an organisation engaging an exemption to justify withholding information.

For example, in the previous chapter, I explained that the s 36 exemption (FOIA) has frequently been engaged by the Department for Education (DfE) to justify withholding information about the free schools programme. The DfE has justified its use of the exemption on the grounds that it requires space to deliberate on the free schools policy and to exchange advice. The exemption allows public authorities to withhold, on the balance of probabilities, information that would, or would be likely to inhibit the free and frank provision of advice,[10] or the effective conduct of public affairs.[11] The justifications for the exemption notwithstanding, the data presented in Chapter Six indicated that its broad drafting has allowed public authorities to apply it in a range of circumstances to withhold requested information. Because the case study was limited to the free schools programme, more research should be done to determine whether these findings are consistent with other sectors (see section 7.4), but, as an initial finding, it serves to

[7] Information intended for future publication.
[8] Prejudice to the effective conduct of public affairs.
[9] Prejudice to commercial interests.
[10] FOIA, s 36(2)(b)(i).
[11] FOIA, s 36(2)(c).

demonstrate that the early concerns over FOIA's broad list of exemptions are not unfounded.[12]

Likewise, the apparently broad functional definition of public authority in the EIR and EISR is narrower in practice than it seems. As the discussion in Chapter Five demonstrated, the so-called 'control test' and 'special powers test' devised by the Court of Justice of the European Union (CJEU) in *Fish Legal* established high thresholds that must be met in order for a private body to be classified as a public authority under the EIR.[13] The subsequent applications of the latter test in *Cross*[14] and in *Poplar*[15] demonstrate that the high threshold has had the effect of limiting the scope of the EIR. Again, this indicates that erosion of information rights caused by privatisation will not be stemmed solely by expanding the scope of coverage to include private bodies that perform public functions.

Based on the arguments presented throughout this thesis, as well as the evidence presented in the case studies, I argue that privatisation has the potential to restrict information rights by limiting the scope of FOIA and FOISA, as well as (though perhaps to a lesser extent) the scope of the EIR and the EISR. Moreover, even when bodies (private *or* public) are subject to ATI laws, information access can be restricted by broad exemptions that prevent disclosure if it would, inter alia, prejudice the effective conduct of public affairs or prejudice the commercial

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[12] See eg Patrick Birkinshaw, 'Freedom of Information in the UK: A Progress Report' (2000) 17 GIQ 419; Stephanie Palmer, 'Freedom of Information: A New Constitutional Landscape?' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-layered Constitution* (Hart 2003).
[13] *Fish Legal v Information Commissioner (C-279/12)*; *Fish Legal v Information Commissioner* [2015] UKUT 0052 (AAC).
[14] *Cross v Information Commissioner and the Cabinet Office* [2016] UKUT 153 (AAC).
[15] *Poplar Housing and Regeneration Community Association v Information Commissioner and Peoples Information Centre* EA/2018/0199.

interests of any party. In the following section, I evaluate the potential solutions to these challenges.

7.2 Which mechanisms are best suited for preserving access to information?

Before I can evaluate which mechanisms are best suited to ensuring that information rights are not lost as the result of privatisation, I must stress my argument that ATI legislation in the UK was *intended* to cover private bodies, as well as my argument that transparency obligations *should* be extended to private providers of public services. Regarding the first point, there is a host of evidence to support this claim. For example, the policy memorandum that accompanied the drafting of FOISA clearly stated its intention to extend the Act to 'private companies involved in significant work of a public nature'.[16] The s 5 provision was drafted to facilitate this. Likewise, the Aarhus *Implementation Guide* explained that privatisation 'cannot take public services out of the realm of public involvement, information, and participation'.[17] Though the precise meaning of these statements is open to interpretation, it is reasonable to surmise that the extension of transparency obligations to private bodies was the legislative intention.

The second claim is a normative one: transparency obligations should be extended to private bodies when they deliver public services or perform functions of a public nature. This is to ensure that decisions about public services (eg whether a free school application should be approved) or information on the performance of

[16] Freedom of Information (Scotland) Bill (SP Bill 36), Policy Memorandum, 27 September 2001, para 28.
[17] UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, UNECE 2014) 46.

essential functions (eg whether water companies are taking necessary measures to prevent flooding) is accessible to the public. Indeed, a wide range of stakeholders, including politicians of varying political stripes, have agreed that increased transparency in outsourcing or in privatised public services is needed.[18] Disagreements arise, however, in deciding how best to achieve this. As the following section demonstrates, there are two frequently cited potential solutions: contractual transparency and legislative extension.

7.2.1 Contractual Transparency

The use of contractual mechanisms to enhance transparency has been encouraged as an alternative to legislative extension. In 2015, the ICO (under the leadership of former Commissioner Christopher Graham), recommended that the definition of 'information held' be amended 'so that information held by a contractor in connection with their delivery of an outsourced service is always considered to be held on behalf of that public authority'.[19] The aim was to give greater clarity to (and therefore strengthen) the provision that already existed within FOIA that considered information to be held by a public authority if it is held by another person on behalf of the authority.[20]

The Independent Commission on Freedom of Information endorsed this recommendation the following year, explaining that it would reduce the 'burden' imposed on both contractors and public authorities by legislative extension, whilst still ensuring that information requesters could obtain information through

[18] ICO (n 1); OSIC (n 1); Independent Commission on Freedom of Information, *Report* (March 2016).
[19] ICO, *Transparency in Outsourcing: A Roadmap* (ICO 2015).
[20] FOIA, s 3(2). A similar provision exists under FOISA s 3(2).

requests to the contracting public authority.[21] In 2018, the Cabinet Office issued a new Code of Practice that, inter alia, set out the 'transparency and confidentiality obligations in contracts and outsourced services'.[22] Explaining that contracted out public services must be delivered in a transparent way, the Code states that information held by a contractor should be considered in the same way as information held by the public authority and therefore subject to FOIA.[23]

The Code of Practice advises that public authorities and contractors, when entering into a contractual agreement, agree on which information it considers held by the contractor on behalf of the public authority. This list should be included in the contract as an annex. They are also advised to 'think about' establishing procedures for public authorities to gain access to the information should it receive an FOI request.[24] The Code advises that as public authorities will be under a statutory requirement to respond to requests, the contractors must reply to requests from the public authority in a 'timely manner'.[25]

The Code of Practice has some distinct advantages. It clarifies the existing provision under s 3(2) FOIA, providing both contractors and public authorities with additional guidance on their responsibilities in storing information and responding to information requests. In this way, it could be seen as an example of Jody Freeman's 'publicisation' thesis, which argues that privatisation can be used

[21] Independent Commission on Freedom of Information (n 18) 52. The Commission was appointed in 2015 to review FOIA and held a public consultation between October and November 2015. The Commission had not specifically asked for evidence on FOIA and private contractors during the consultation, but it received a number of responses on the subject and chose to respond. Because it had not been part of the consultation, the Commissioner considered it beyond its remit to make a formal recommendation, but did set out its opinion at the end of the March 2016 report.
[22] Cabinet Office, *Freedom of Information: Code of Practice* (4 July 2018) 32.
[23] ibid 32. The Code of Practice extends to FOIA, and not FOISA.
[24] ibid 32.
[25] ibid 33.

to extend public law norms and values to private bodies.[26] Rather than being a threat, privatisation becomes an opportunity to extend democratic norms like accountability, due process, and equality to the private sector. The contract becomes a tool with which to achieve this.

However, there are several problems with the contractual transparency approach, both practical and conceptual. Starting with the practical, I explained in Chapter Two that FOIA and FOISA require public authorities not only to respond to information requests, but also require the active disclosure of certain types of information, which are set out in mandatory publication schemes.[27] The Code of Practice does not include a similar requirement for contractors to actively disclose information, meaning that transparency is reduced to that information which is actively sought by a requester.

Second, although the Code states that contractors must respond to requests from the contracting public authority in a 'timely manner', it is likely that the additional step will lengthen the amount of time it takes a requester to receive a response. As interviews with research participants indicated, receiving a timely response is often imperative (eg for journalists working on a story, or community groups seeking to scrutinise a policy before it is implemented).[28] Whilst the Code does not increase the potential for delay, it is unlikely to alleviate the temporal challenges posed when third parties hold information.

[26] Jody Freeman, 'Extending Public Law Norms Through Privatization' (2003) 116 HarvLRev 1285.
[27] FOIA, s 19; FOISA, s 23.
[28] Participants B and C; See Appendix D: List of Interview Participants.

Third, even with greater clarity over which information is 'held' and the responsibilities of contractors in providing this information, the contractual approach gives considerable power to the contracting public authority and contractor to decide which information to be included in the contract. The public is effectively left out of the decision-making process. Moreover, the approach leaves both public authorities and contractors potentially vulnerable to power imbalances. The approach appears to rely on the assumption that contractors and contracting bodies enter into negotiations on an equal footing. Often, this is not the case.[29] The party with weaker bargaining power could be persuaded to accept less than favourable contractual terms, which could have the effect of limiting the information included in the contract.

Finally, the argument for the contractual approach relies on the framing of FOI as a 'burden'. Of course, most (if not all) public authority workers and FOI officers will have stories of particularly burdensome or even bizarre requests (eg 'what is the local authority's emergency plan for a zombie attack?').[30] However, the repeated portrayal of the FOI Acts (much more so than the EIR) as unnecessary burdens requires further investigation. As I explained in Chapter Five, the responses from the private water companies indicated that the smaller water companies had not made significant changes as the result of being classified as

[29] See eg Colin Crouch, *Commercialisation or Citizenship: Education Policy and the Future of Public Services* (Fabian 2003).

[30] Surprisingly, this has not been an isolated request. Bristol City Council staff handled the FOI request with good humour, advising the applicant of the Council's contingency plans in the event of a zombie apocalypse. See Steven Morris, 'When Zombies Attack! Bristol City Council Ready for Undead Invasion' The Guardian (London, 7 July 2011) <https://www.theguardian.com/society/2011/jul/07/when-zombies-attack-bristol-city-council-undead-invasion> accessed 27 October 2019.

public authorities for EIR purposes in 2015. The volume of requests received was proportionate to the size of the organisation.

The nature and scale of the water industry investigation means that it is not possible to extrapolate the data for application to other sectors, but the findings are consistent with the existing academic literature. As Ben Worthy has pointed out, measuring the perceived burden is difficult because it requires quantitative indicators (eg the financial costs of compliance) to be considered alongside qualitative indicators or intangible goals, such as democratic benefits.[31] Moreover, data on the exact costs of FOI compliance is unclear, though research by the UCL Constitution Unit suggests that the costs of administering FOIA have fallen since 2005 as public authorities become more efficient in handling information requests.[32] Though it is possible that this trend will be reversed as the public appetite for transparency grows, the point remains that the characterisation of ATI laws as 'burdensome' is questionable and should not be uncritically cited as a reason for using contractual mechanisms in place of legislative extension.

7.2.2 Legislative Extension of FOIA and FOISA

Legislative extension of FOIA and FOISA through s 5 would ensure that the public retain the legally enforceable right to access information when public services are transferred to private bodies. This is consistent with the recommendations of the ICO and OSIC, as well as the original policy intentions of the Acts, as explained in Chapter Two. As discussed throughout the thesis, transparency supports the

[31] Ben Worthy, Evidence submitted to FOI Commission, November 2015. Available <https://opendatastudy.files.wordpress.com/2015/11/foi-commission-submission-2015-ben-worthy.pdf> accessed 28 October 2019.
[32] Gabrielle Bourke, Jim Amos, Ben Worthy, and Jennifer Katzaros, *FOIA 2000 and Local Government in 2010: The Experience of Local Authorities in England* (UCL 2011).

political health of the democratic state. FOIA and FOISA are statutes of 'great constitutional significance' precisely because they confer on the public a legally enforceable right to information.[33] As discussed in Chapter Two, this right was granted after several decades of incremental reforms that sought to challenge official secrecy in order to facilitate public participation. If the goal of ATI laws is to strengthen citizen participation in democratic governance, then all bodies – public *and* private – that exercise political, economic, and social power should be open to public scrutiny.

It should, of course, be noted that contractual transparency and legislative extension are not mutually exclusive. It is entirely possible for FOIA or FOISA to be extended to some service providers, whilst other private contractors are contractually bound to disclose specified information that they hold on behalf of a public authority. However, contractual transparency should not be used as a substitute where legislative extension would be preferable. Circumstances in which legislative extension would be preferable include sectors where there is a demonstrated public interest for it to be covered under the law (eg social housing) or when the contractor holds greater bargaining power than the contracting authority.

7.3 Recommendations

Based on the evidence and the arguments presented throughout this thesis, I recommend both legislative extension and amendment of FOIA and FOISA in

[33] Patrick Birkinshaw, 'Information: Public Access, Protecting Privacy, and Surveillance' in Jeffrey Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019) 358.

order to ensure that information rights are not weakened due to privatisation. This will involve a dual approach: (1) increased use of the s 5 order to extend FOI legislation to additional bodies that perform functions of a public nature and (2) amending legislation to narrow the scope of the s 36 and s 43 exemptions. I am not making recommendations for the extension or amendment of the EIR or EISR, though I anticipate that the application of the 'special powers' test will need to be revisited, particularly in the light of the First-tier Tribunal decision in *Poplar HARCA*.[34]

7.3.1 Section 5

Greater use of the s 5 powers by ministers to designate additional bodies as public authorities under FOIA and FOISA is needed. This approach is recommended by the OSIC and ICO.[35] However, this will require a greater understanding of the meaning of 'functions of a public nature'. As I explained in Chapter Four, the OSIC has sought to facilitate this through the development of a factor-based approach to legislative extension and a list of ten relevant factors. In 2019, the ICO published a similar list of relevant factors, including the extent of public funding a body receives and whether the body 'participates in a significant way in the social affairs of the nation, pursuant to the public interest'.[36]

The factor-based approach will give ministers guidance on how to determine whether or not a body is carrying out a function of a public nature. However, the

[34] *Poplar HARCA* (n 15).
[35] OSIC (n 1); ICO (n 1).
[36] ICO (n 1) 86. The ICO list was not included in the Chapter 4 discussion as it was published after the analysis had been completed. Moreover, the list of relevant factors was only included in the Annex of the ICO report and did not form a core part of the argument as it had in the 2015 OSIC report.

suggested factors indicate that the problems of interpretation that arose previously in the contexts of judicial review and the Human Rights Act 1998 (HRA) are in danger of being repeated. For instance, as I argued in Chapter Four, there is still a reliance on institutional, rather than functional characteristics.

Moreover, the Information Commissioners appear to disagree over whether receipt of public funds should be considered a relevant factor. In preparing its list, the OSIC 'deliberately avoided' funding or including a threshold.[37] It explained that 'the focus should be on the public interest in designating the organisation', not the extent of public funding received or whether or not it is 'significant'.[38] However, the ICO recommended that FOIA be extended to private bodies in receipt of public funds to deliver public services. It does not suggest a fixed financial threshold, but rather recommends that 'the amount of public funding an organisation receives' be considered 'a *guide* to identifying major contractors'.[39] Whilst it is understandable that the two Commissioners' offices would have different ideas on how to identify additional bodies for consideration, it does demonstrate the difficulty in developing a coherent, principled approach to FOI extension.

I recommend that the factor-based approaches emphasise the public nature of the functions being performed. For example, whether the body seeks to achieve collective benefit and is accepted by the public as being authorised to do so (suggested by both the OSIC and ICO). Or, if designation would be in the public

[37] OSIC (n 1) 17.
[38] ibid 17.
[39] ICO (n 1) 51.

interest to, for example improve civic engagement or address inequalities. The extension of FOIA and FOISA presents an opportunity for a renewed understanding of what makes public functions and services 'public'.

7.3.2 Amending FOI Legislation

However, legislative extension alone will not be enough to ensure that privatisation does not weaken information rights. The legislation can be amended, specifically the exemptions under s 36 and s 43.

As explained in Chapter Six, s 36(2) FOIA allows public authorities to withhold information if disclosure would, or would be likely to, inhibit either the 'free and frank provision of advice'[40] or the 'free and frank exchange of views for the purposes of deliberation'.[41] However, the threshold under the similar provision in FOISA is much higher: s 30(b) only allows for withholding information if disclosure 'would, or would be likely to, inhibit *substantially*' (emphasis added) either the provision of advice or exchange of views. In both cases, there is a harm test, but under FOISA the threshold is substantial harm.

Likewise, the threshold is similarly worded under s 43(2) FOIA and s 33(2) FOISA. Whereas s 43(2) FOIA allows public authorities to withhold information if disclosure 'would, or would be likely to, prejudice the commercial interests of any persons', s 33(2) FOISA states that information will only be exempted if it 'would, or would be likely to, prejudice substantially…' Again, the onus is on the public authority that *substantial* harm would be caused by disclosure.

[40] FOIA, s 36(2)(b)(i).
[41] FOIA, s 36(2)(b)(ii).

Amending s 36 and s 43 FOIA to reflect the drafting of s 30 and s 33 FOISA could therefore help to reduce its application. Though the meaning of 'substantial harm' is open to interpretation, as qualified exemptions public authorities will receive guidance from the Information Commissioners on how the test should be applied, and a public interest balancing test must still be carried out. This would likely increase access to information not only in privatised public services, but also where services are still delivered directly by public bodies. Because organisations would still have the option of withholding information if it could demonstrate that doing so would be in the public interest, the protections afforded by the exemptions would still be in place.

Similarly, the s 22 exemption could be amended to include a specific timeframe.[42] This was not an exemption that I had identified as potentially in need of reform at the outset of the study, but the interview with Participant B highlighted the challenge of trying to obtain information from UK public authorities when that information is intended for future publication.[43] Because the date of publication does not need to be determined, information requesters can experience uncertainty and have little redress if publication is delayed. By contrast, FOISA stipulates that the exemption should only be applied if publication is intended within 12 weeks, and then only if withholding the information until the intended publication date is 'reasonable'.[44]

[42] FOIA, s 22(1)(a) allows public authorities to withhold information if it is intended for future publication, even if that date has not yet been determined.
[43] See Appendix D: List of Interview Participants.
[44] FOISA, s 27(1)(a) and (c).

7.4 Directions for Future Research

The academic literature on ATI legislation in the UK, including empirical studies, has grown considerably since this research project was first proposed in 2013. Recent developments in the field include comparative studies between FOIA and FOISA,[45] theoretical analyses of the relationship between transparency and privacy,[46] and, of course, the implications of the UK's withdrawal from the EU for open government.[47]

Similarly, the broader field of transparency studies has expanded in recent years. This field examines not only the operation of ATI laws, but also corporate lobbying, developments in open data, and the ethical implications of artificial intelligence, to give just a few examples. The bi-annual Global Conference on Transparency Research now provides a regular forum for the dissemination of transparency researchers from, inter alia, academia, civil society, and government.[48] As the number of ATI laws throughout the world continues to grow, there is the need to monitor and evaluate their implementation. Scholars throughout the world are now engaged in various projects, either to support the public in their use of ATI legislation or to ensure that governments are effectively implementing and

[45] See eg Karen McCullagh, 'Information Access Rights in FOIA and FOISA – Fit for Purpose?' (2017) 21 EdinLRev 55; Calum Liddle and David McMenemy, 'An Evaluation of the United Kingdom and Scottish Freedom of Information Regimes: Comparative Law and Real-World Practice' (2014) 19 CommsL 77.
[46] See eg Birkinshaw (n 33).
[47] Ben Worthy, 'Brexit and Open Government in the UK: 11 Months of May' (2016) Draft available <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2988952> accessed 29 October 2019.
[48] The 6th Global Conference was held in Rio de Janeiro, Brazil, in June 2019. Programme and papers available: <https://eventos.fgv.br/en/transparency2019> accessed 29 October 2019.

enforcing the right to information. At the same time, there is a growing body of literature in the field of 'critical transparency studies'.[49]

In a rapidly developing field, it can be difficult to make concrete proposals for future research. However, in researching and writing this thesis I have identified several areas in which there is currently a need for further research.

Baseline Data

First, there is a need to gather baseline data from throughout the UK to support further research into the efficacy and impact of ATI legislation. In Scotland, there has been a requirement for all public authorities subject to FOISA and the EISR to submit quarterly statistics to the OSIC, which are then made publicly available through its statistics portal.[50] Anyone can access this portal to run reports on, inter alia, the number of requests received by any public authority, the number of disclosures made, and the number of times exemptions have been engaged. The portal gives transparency researchers easy access to (limited) quantitative data, which can be used to evaluate how the legislation is working, as I did in order to evaluate Scottish Water in Chapter Five.

However, there is no such requirement in the rest of the UK. This can make it more difficult for academic or independent researchers to evaluate the

[49] See eg Rodan (n 2); David E Pozen, 'Transparency's Ideological Drift' (2018) 128 YaleLJ 100); Irma E Sandoval-Ballesteros, Rethinking Accountability and Transparency: Breaking the Public Sector Bias in Mexico' (2014) 29 AmUIntLRev 399; Rachel Adams, 'The Illusion of Transparency: Neoliberalism, Depoliticisation, and Information as Commodity' (2018) Available Adams, Rachel, The Illusion of Transparency: Neoliberalism, Depoliticisation and Information As Commodity (November 8, 2018). Available < http://dx.doi.org/10.2139/ssrn.3281074 > accessed 26 December 2019.

[50] The portal is available online at http://stats.itspublicknowledge.info. Accessed 20 October 2019. The requirement to submit statistics has been in place since April 2013.

performance of public authorities under FOIA, as additional steps must be taken to collect relevant data. It also means that public authorities are not in the habit of regularly providing statistical indicators to the ICO, which could also mean that they are not in the habit of regularly recording accurate statistics. Or, even if each public authority collects its own statistics, if it does not have to report to the ICO, then it is possible that the types of data recorded will differ from one authority to another. Thus, even in the event that a researcher obtains the data from each public authority, differences in recording practices can make comparative analysis difficult.

Information Requesters

Second, more research is needed on the experiences of FOI/EIR users. They will be able to provide greater insight into the practical uses and struggles of obtaining information under ATI legislation, thereby allowing researchers to evaluate the efficacy of implementation and the extent to which privatisation is affecting requesters. However, as discussed in Chapters Five and Six, information requesters are notoriously difficult to identify and survey. Whilst the case studies did include the perspectives of some information requesters, the interviews were limited to journalists and campaigners as they are the most accessible (ie identifiable and willing to participate in research.

But the perspectives and experiences of information requesters are needed for two reasons. First, as I explained in Chapter One, the complaints and appeals processes are typically a last resort for information requesters. Most requests do not reach this stage. The ICO and OSIC decision notices are therefore only the 'tip

of the iceberg' when it comes to understanding how ATI legislation works in practice, reflecting only the most contentious cases. Qualitative research with information requesters can help fill the gaps in knowledge about their aims and experiences

Second, and more importantly in my view, the experiences of information requesters can help further our understanding of what ATI laws are for. Often, transparency is framed as an adversarial, 'us versus them' process.[51] As I explained above in section 7.2.1, ATI laws are described as 'burdens', tools used by 'lazy journalists', rather than ordinary people.[52] Further research into the demographics and motivations of information requesters could dispel this (likely) myth and potentially expose the broader range of uses for ATI laws and the reasons why information requesters rely on them.

Information Holders

Likewise, additional research with information holders will help to further understanding of how ATI laws work in practice. In particular, it would be useful to know their cognitive processes when responding to information requests and deciding whether or not to apply exemptions.

I had intended to conduct these interviews as part of this project, though, as indicated previously, virtually all of the information holders contacted declined to participate in the study. I therefore adapted my approach by conducting an email

[51] Irma E Sandoval-Ballesteros, 'Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico' in David E Pozen and Michael Schudson (eds), *Troubling Transparency: The History and Future of Freedom of Information* (ColumUP 2018).
[52] Tom Felle and John Mair (eds), *FOI 10 Years On: Freedom Fighting or Lazy Journalism?* (Abramis UK 2014).

'interview' with one participant and by sending Scottish Water and the private water companies written requests for information. This generated sufficient data for the present purposes, but semi-structured interviews could have contributed to a more complete picture of how the water companies handle their transparency obligations. Future research could include qualitative interviews or ethnographic research, ie with researchers shadowing or embedding themselves within organisations to understand how decisions are made in a real-life context.

Comparative Analysis: FOIA and FOISA

The differences *de jure* between FOIA and FOISA are not numerous, but where they diverge, they are significant. Additional research on how these differences affect public access to information is needed, particularly to determine whether FOISA provisions are in fact stronger than FOIA with regards to the protection of information rights.

For example, in section 7.3.2 above, I recommended that FOIA be amended to replace the 'harm test' under s 36 and s 43 with a test of 'substantial harm'. This would bring FOIA in line with the existing threshold under FOISA, and, I hypothesise, the higher threshold will reduce the application of these exemptions by public authorities. If FOIA is to be amended to include 'substantial harm tests', then further data on how these exemptions are being applied, and how 'substantial harm' is being interpreted, is necessary.

Monitoring and Evaluation

In November 2019, Scottish registered social landlords (RSLs) became subject to FOISA.[53] This followed many years of political debate and public consultation. The designation of RSLs as public authorities under FOISA provides an opportunity to evaluate how they are performing with regards to their new responsibilities, with a view towards identifying any issues or lessons that could be applicable when considering the designation of additional bodies. This evaluation will be particularly relevant as the ICO continues to recommend the extension of FOIA to RSLs in the rest of the UK.[54]

Critical Transparency Studies

Finally, the emerging field of critical transparency studies has highlighted the need to distinguish between neoliberal transparency and democratic-expansive transparency. The critical literature is a necessary and understandable response to the global 'explosion' of ATI legislation and the highly ambitious claims that frequently accompanied its introduction. Though it is likely that transparency scholars will not agree on a single operational definition of transparency, there is a need for a stronger conceptual framework that sets out the different categories of transparency. This will support the development of both theoretical and empirical research, including much-needed research into the relationship between ATI laws and democratic participation.

[53]Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019. The order came into force on 11 November, 2019.
[54] ICO (n 1).

7.5 Conclusion

This thesis has highlighted the challenges of access to information in privatised public services and has offered recommendations aimed at protecting information rights in the wake of privatisation. In doing so, it has demonstrated that the challenges currently facing the application of ATI laws in the UK are not limited to information access. Instead, they should be understood as part of the wider challenge of the application of public law norms and principles to private bodies, which is largely attributable to privatisation and the blurring of the public-private distinction.

Events in recent months have demonstrated that the challenges posed by privatisation for the application of public law norms and instruments are far from settled. In November 2019, a fire destroyed a privately operated student accommodation block in Bolton. Before the fire had even been extinguished, commentators began raising questions about fire safety and accountability in the private housing market.[55] Only two years after Grenfell, the incident highlighted the discrepancy between the obligations placed on local authorities versus private housing providers.[56] Whereas local authorities are now required to inspect and replace vulnerable cladding, the private market has not been subject to the same level of scrutiny.

[55] Stephen Bush, 'The Bolton Cube Fire is No Surprise At All,' New Statesman (London, 16 November 2019) <https://www.newstatesman.com/politics/environment/2019/11/bolton-cube-fire-no-surprise-all> accessed 4 December 2019.
[56] After the devastating fire at Grenfell Tower in 2017, the ICO raised concerns over access to fire safety information and the need to extend FOIA to housing associations. ICO (n 1) 4.

Shortly afterwards, the Court of Session (Inner House) decision that Serco is not a public authority under the meaning of s 6(3)(b) of the HRA raised questions about the human rights obligations of private bodies.[57] Relying on the reasoning given in *YL*, the Court held that Serco was not performing 'functions of a public nature' in its provision of accommodation to asylum seekers and immigrants.[58] As discussed in Chapter Four, the *YL* reasoning had been influenced by previous judgments concerning the definition of 'public function' in the context of judicial review, including the *Servite Houses* judgment, which cited the commercial motivations of the care home provider and its purely contractual relationship with the local authority as reasons for why the charitable housing association could not be subject to judicial review.[59]

The latest judgment in *Serco* demonstrates that the challenge of determining what constitutes a 'function of a public nature' has not yet been resolved. As I discussed in Chapter Four, this has been a barrier to the extension of FOIA and FOISA to additional bodies, as the criteria are still being debated, and there is a danger of replicating the flawed reasoning that arose in the judicial review and HRA cases. However, it also presents an opportunity to reconsider the 'public function test' and the concept of 'functions of a public nature'. It is an opportunity to move away from the institutional focus and centre 'the public' in public services and functions.

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[57] *Ali v Serco* [2019] CSIH 54; At the time of writing, the judgment is only one month old, and academic commentary is not yet available. The judgment has been reported in the mainstream media, see eg Libby Brooks, 'Serco's Evictions of Refused Asylum Seekers Lawful, Judges Rule,' Guardian (London, 13 November 2019) <https://www.theguardian.com/uk-news/2019/nov/13/scotland-high-court-rules-serco-evictions-of-asylum-seekers-lawful> accessed 19 November 2019; Karin Goodwin, 'Ruling Allowing Serco to Evict Asylum Seekers Sets "Dangerous Precedent"' The Ferret (13 November 2019) <https://theferret.scot/serco-judgement-evictions-glasgow-lock-change> accessed 19 November 2019.
[58] *YL v Birmingham City Council* [2007] UKHL 27.
[59] *R v Servite Houses and London Borough of Wandsworth, ex p Goldsmith* [2001] LGR 55.

Appendix A: Timeline: Development of ATI Legislation in the UK

1844	Joseph Mazzini affair
1889	Official Secrets Act (OSA) 1889
1911	OSA 1889 repealed and replaced with OSA 1911
1958	Public Records Act 1958
1960	Local Government (Access to Meetings) Act 1960
1972	Local Government Act 1972
1972	Publication of the Franks Report
1974	Labour pledges to introduce FOI Act
1977	Croham Directive introduced
1979-84	Four separate members' bills on FOI introduced
1984	Data Protection Act 1984
1984	Campaign for Freedom of Information (CFOI) founded
1984	Sarah Tisdall pled guilty to leaking official information
1985	Clive Pointing prosecuted for leaking official information
1985	Local Government (Access to Information) Act 1985
1988	Environment and Safety Information Act 1988
1989	OSA 1911 repealed and replaced with OSA 1989
1992	Environmental Information Regulations (EIR) came into force
1993	Publication of the *Open Government* White Paper
1994	Code of Practice on Access to Government Information introduced
1996	Publication of the Scott Report
1997	Code of Practice on Access to Government Information amended
1997	Publication of Your Right to Know White Paper
1998	Responsibility for FOI transferred from Cabinet Office to Home Office
1998	Data Protection Act 1998 replaced 1984 Act to bring UK in line with European Directive 95/46/EC
1998	Public Interest Disclosure Act 1998

1999	*An Open Scotland* consultation paper published
1999	Code of Practice on Access to Scottish Executive Information introduced
2000	FOIA enacted
2001	UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) came into force
2002	FOISA enacted
2004	Environmental Information Regulations
2005	FOIA and FOISA came into force on 1 January

Appendix B: Right to Information in International Law

Human Rights Treaties and Instruments – the Right to Information

Article 10 European Convention on Human Rights (ECHR)

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 19 International Covenant on Civil and Political Rights (ICCPR)

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 13 American Convention on Human Rights (ACHR)

Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputation of others; or b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provision of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 9 African Charter on Human and Peoples' Rights (ACHPR)

Right to Receive Information and Free Expression

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Appendix C: FOIA 2000, s 32

Section 32 FOIA – Court Records, etc.

(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

(4) In this section—

(a) "court" includes any tribunal or body exercising the judicial power of the State,

(b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,

(c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and

(d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

Appendix D: Interview Participant List

Name (pseudonym)	Role	Date Interviewed
Participant A	FOI campaigner	June 2016
Participant B	Campaign worker	August 2016
Participant C	Journalist	November 2016
Participant D	Caseworker	November 2016
Participant E	Caseworker	November 2016
Participant F	Caseworker	November 2016
Participant G	Caseworker	January 2017
Participant H	Caseworker	January 2017
Participant I	Caseworker	January 2017
Participant J	FOI Manager	[emailed response]

Appendix E: Interview Schedules

Questions for Information Requesters (Indicative List)

Can you tell me about your organisation, and your role within it?

And what are your general experiences with the Freedom of Information Act?

How frequently do you use it in your work?

Can you tell me more about the Tribunal cases you have been involved with? For example, how much work went into making these appeals? And what was your reaction when you discovered that your initial request had been refused?

How much time and energy gets directed towards information requests, complaints, and appeals? What kind of support do you get? And if you get discouraged, what keeps you motivated during the process?

How transparent do you think the free schools programme is? How do you think transparency could be improved?

Do you have any additional comments?

Questions for Information Adjudicators (Indicative List)

Could you tell me about your role within the organisation?

Can you tell me more about the organisations that you monitor and enforce?

How were the free schools prepared for their responsibilities under FOIA? Were they given any special guidance (ie with regards to publication schemes as well as responding to information requests)?

How frequently do you see cases relating to the free schools programme? Either regarding a free school itself, or a request that has gone to the Department for Education about the free schools policy?

Can you tell me more about the exemptions that are engaged and the tests that you apply to ensure that exemptions are being engaged correctly?

Questions for Information Holders (Indicative List)

What is your job, and can you tell me more about the duties of your post?

How many people within the department work on FOI?

What is the average number of information requests received each month?

What proportion of these requests would be considered straightforward? What proportion is more complicated? That is, requiring an unusual amount of time to answer or involving a challenge from requester?

Can you tell me more about the straightforward, uncontroversial requests for information you receive? What sort of information is requested?

What are the most commonly engaged exemptions when deciding to withhold information?

How frequently do you receive requests for information on the free schools programme?

What proportion of requests is related to the free schools programme?

What proportion of free schools requests goes to internal review? Further appeal to the ICO?

Can you tell me more about the tests you apply when deciding whether to release or withhold information?

From where have the above tests come? What has influenced them?

Can you tell me more about why there would be public interest in withholding information about the free schools programme?

Can you tell me about a particularly difficult case that you have faced? What impact did it have on your team, and did it change the way you work?

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