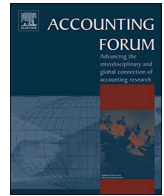


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Using freedom of information laws to frustrate accountability: Two case studies of UK banking frauds

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ABSTRACT

Freedom of information laws can arguably enhance public accountability of policymakers and check unethical and corrupt behaviour by the state and corporate elites. This paper provides case studies relating to the affairs of two fraud-infested banks in the UK. The information was secured through a direct engagement with ministers, courts, judges and the state apparatus via freedom of information laws. The cases draw attention to the politics of public accountability and show the difficulties encountered by anyone seeking information about banking frauds. The cases show that the state apparatus goes to considerable lengths to shield elites from public scrutiny.

War is Peace. Freedom is Slavery. Ignorance is Strength¹

1. Introduction

The dawn of modernity has been accompanied by concerns to “break up the patches of darkness that blocked the light, eliminate the shadowy areas of society, demolish the unlit chambers where arbitrary political acts, monarchical caprice, religious superstitions, tyrannical and priestly plots, epidemics and the illusions of ignorance were fomented” (Foucault, 1980: 153). Demands for public accountability are often considered to be a key mechanism for shedding light on dubious practices, fostering democratic governance and possibilities of greater citizen participation in public policymaking (Sinclair, 1995; Ahrens, 1996; Beck, 2003; Castells, 2010; Habermas, 1976; Hirst, 1994; Hood & Heald, 2007; Young, 2000). A populist view is that in neoliberal democracies every citizen “should know the events and circumstances that concern him, since this is the condition without which he cannot contribute to decisions about them ...” (Simmel, 1950: 337).

Due to social antagonisms, the meaning of accountability cannot be fixed in any permanent sense and its discussions frequently appeal to contested claims of serving the public interest. Despite disagreements, many protagonists share the view that the public provision of information and the right to know reasons for particular conducts and hold decision-makers responsible for their actions enhances accountability and possibilities of democratic governance (Broadbent & Laughlin, 2003; Roberts, 1991).

The state is a key actor in fostering frameworks of accountability and its credibility rests upon claim that it advances the collective welfare of its citizens, often referred to as the public interest, and is accountable to the people. Its legitimacy is bolstered by promises of eroding secrecy and providing meaningful information to citizens about the conduct of public policy. Therefore, in principle, it can be mobilised to investigate corporate collapses, frauds and accounting/auditing failures and inform citizens about the conduct of public policies. However, much of the state generated information remains private and its non-availability thwarts attempts to check on the efficiency, effectiveness and responsiveness of policymakers. In the case of the United Kingdom (UK), most Cabinet papers

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¹ George Orwell, *Nineteen Eighty-Four*, London: Penguin, 1954 (first published in 1949 by Secker and Warburg).

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have remained secret for around 30 years and their selective release depends on political prejudices. The UK is characterised as a pluralist democracy (Hall & Soskice, 2001), but has a “powerful and persistent culture of secrecy – reflecting the basic assumption that good government is closed government and the public should only be allowed to know what the government decides they should know” (Ponting, 1990: 1). The organised secrecy not only shields politicians and civil servants from parliamentary and public scrutiny, but also protects economic and business elites enmeshed in public policymaking (Cousins, Mitchell, & Sikka, 1993). In the absence of public information, people have often relied upon whistleblowers and conscientious objectors to bring some damning information to the public domain and fuel debates about the accountability of public policymakers (Ponting, 1985).

The faultlines between the citizens’ right to know and the tendency of the state to advance private interests behind a veil of secrecy have given rise to the politics of establishing new ‘regimes of truth’ culminating in freedom of information laws to control the flow of the state held information to citizens. Following persistent criticisms (Bennett, 1985; Birkinshaw, 2010; Vincent, 1998), the UK enacted the Freedom of Information Act 2000 (hereafter FOIA) to regulate the release of the state held information to the public. The FOIA, in principle, enables citizens to interrogate official documents relating to corporate collapses, frauds and accounting/auditing failures to build a richer picture of politics of regulation. However, critics claim that the FOIA is unlikely to “limit the deception and deliberate misinformation” (Brooke, 2010; O’Neill, 2002) as the neoliberal state is unlikely to be able to reconcile the tensions between public information and the desire to protect privileged elites by withholding information.

The tensions between neoliberal concerns about providing information to empower citizens and impulses to secrecy to protect elites can be examined with case studies that explore the capacity of the state apparatus to deliver the promised openness and accountability (Broadbent & Laughlin, 2003). The operations of the UK’s freedom of information laws provide such a site. This paper contributes to the literature by providing two case studies showing how calls for public accountability are arguably frustrated by government departments. The case studies are constructed from a direct engagement with ministers, lawyers, courts, judges and the state apparatus through the freedom of information laws. The research may loosely be described as ‘action research’ (McSweeney, 2000) where an inquiry is regarded as a dynamic process and a response to the problems encountered rather than the application of some predetermined set of rules. Such engagements are framed by situated understandings of the material in hand, the importance of the issues, reflexivity of analysis and a range of unexpected outcomes and pragmatic values.

The freedom of information requests were made in late 2005/early 2006 and were informed by concerns about regulation of banks. For example, by the late 2005 newspapers carried stories of the bursting of the housing bubble and a possible crisis for some banks. This had echoes of the mid-1970s secondary banking crash, which revealed fraud and audit failures (Reid, 1982). The state managed the crisis by appointing inspectors to investigate the collapses. One of these related to Ramor Investments Limited (previously known as Bryanston Finance), which owned a secondary bank (UK Department of Trade and Industry, 1983). The inspectors’ interim report criticised directors and auditors, but the final report remained unpublished (Sikka & Willmott, 1995). The unpublished report had the potential to provide insights into the politics of regulation and, therefore, became the subject of a freedom of information request. The second request related to the closure of the Bank of Credit and Commerce International (BCCI), considered to be the world’s biggest banking fraud of the twentieth century (Killick, 1998, p. 151). Despite anti money laundering legislation, UK-based banks have continued to enable elites to launder illicit funds (UK Africa All Party Parliamentary Group, 2006; United States Senate Permanent Subcommittee on Investigations, 2005). These instances echoed the operations of BCCI which had pleaded guilty to fraud and money laundering. BCCI was closed by the Bank of England in July 1991 (Bingham, 1992), but its closure has remained shrouded in secrecy. Prior research (Arnold & Sikka, 2001; Mitchell, Sikka, Cooper, Arnold, & Willmott, 2001) had identified some gaps in publicly available information, most notably a report codenamed the “Sandstorm Report”. It was prepared by BCCI’s auditors Price Waterhouse and enabled the Bank of England to justify closure of the bank (Bingham, 1992; United States Senate Committee on Foreign Relations, 1992). The freedom of information request, therefore, sought access to the Sandstorm Report.

This paper is organised in four further sections. The first section highlights some complexities and contradictions in the policies of the state, which arguably could enhance and/or frustrate accountability. The second section provides a brief overview of the UK freedom of information legislation. The third section provides the two case studies relating to the banking frauds. The fourth section concludes the paper with some discussion and reflections on the case studies.

2. Accountability and the state

The freedom of information laws are part of the processes that construct the feeling that the state apparatus is accountable to the people and that its inner workings can be scrutinised by citizens to ensure that it advances the broader interests of the general public. Such logics are frequently invoked by government officials. For example, in enacting the FOIA legislation, the UK government claimed that the “Act has profoundly changed the relationship between citizens, and their elected representatives and the media on the one hand, and the Government and public authorities on the other. It has, as intended, made the Executive far more open and accountable. The Act provides a regime for freedom of information which is one of the most open and rigorous in the world”.² However, the meanings of the terms such as “open” and “accountable” are contestable and cannot easily be fixed in any permanent sense.

The public administration of contemporary societies takes place in bureaucratic organisations characterised by rationalisation, calculation, efficiency and predictability (Weber, 1948, 1968). Government departments operate through hierarchical structures and management is primarily based on expert training and written rules. Civil servants are inculcated into the ethos of government

² Hansard, House of Commons, 24 February 2009, col. 153.

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