GLOBALIZATION AND ACCESS TO INFORMATION REGIMES

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The paper will attempt to address the following broad questions about the impact of globalization on access to information (or freedom of information) regimes.[1]

- What, if any, implications for access to information can be drawn from the implementation of increasing bi-lateral and multi-lateral arrangements and agreements, such as the North American Free Trade Agreement (NAFTA)?
- Will this increasing international interaction drive the standard for access to government-held information in some countries up to that in more open countries, or is the reverse more likely?
- To what degree will countries need to harmonize their access to information regimes with those of their international partners?
- Is there any indication that Canada's involvement internationally has had an impact on our standard of disclosure for government-held information?
- Does Canada's standard for access to government-held information have any impact on arrangements or potential arrangements with third parties (e.g., other governments, international organizations, private sector interests in other countries)? Specifically, is there any indication that government or corporate interests are concerned about Canada's protection of trade secrets and other commercially sensitive information?

The answers to these questions depend in large measure on understanding the dynamics behind the diffusion of FOI legislation around the world, and how patterns of globalization have influenced the ways in which these statutes are used and interpreted. The paper proceeds, therefore, by first outlining some of the major explanations for the adoption of FOI. It then reviews the ways in which FOI regimes have become increasingly interdependent as a result of some new patterns of usage. The paper concludes by addressing the larger questions concerning the "trading-up" of FOI standards.

Aspects of Globalization

In a "borderless world" public policies on access to government information are inextricably interdependent. This regulatory interdependence could hypothetically produce two possible broad dynamics. In one, countries would progressively fashion their public policies according to the highest possible standard, a "trading up" or a "race to the top." Conversely, countries might consider that a less regulatory climate would attract global businesses that would want to circumvent the higher standards at work elsewhere. This competitive deregulation would lead to a race to the bottom as countries progressively weaken their standards to attract global investment. One of the main research questions that directs the analysis is whether, in the field of access to

[1] The terms "access to information" and "freedom of information" are used interchangeably in the literature, and in this paper. Although the former is probably a more accurate designation, the latter and its acronym (FOI) tend to have more popular meaning and significance.

information legislation, there has been a "race to the top," a "race to the bottom," or something else.

At the outset, we should emphasize the obvious point that information now flows more freely, knows fewer national attachments, and indeed represents one of the significant forces behind "globalization," an ill-defined and controversial word that captures a number of different trends, all with implications for state power (Held et al. 1999, p. 3). Globalization implies, first, "a *stretching* of social, political and economic activities across frontiers such that events, decisions and activities in one region of the world can come to have significance for individuals and communities in distant regions of the globe." Second, globalization implies that these connections are not random or intermittent, but are regularized such as there is a "detectable *intensification."* Third, globalization implies a *speeding up* of global interactions as new communications processes increase the "velocity of the global diffusion of ideas, goods, information, capital and people." Fourth, each of these processes contributes to the deepening enmeshment of local, national and regional institutions, such that local events can come to have global *impacts.*

With respect to information policies of all kinds (privacy protection, intellectual property, access to information, the regulation of pornography and so on), these globalizing trends have had important consequences. In particular, one might hypothesize that these trends might lead to very similar public policies as a result of the increased interdependence – an overall process of *policy convergence*, in other words. But there are some deeper reasons to explain the sequential adoption of the same policies by different independent states. Three general arguments have appeared in the literature on comparative public policy.

The first explanation sees policy responses as the by-product of similar and wider socio-economic and technological forces. States at the same level of development face similar problems to which there are a limited number of feasible solutions. The sequential adoption of similar responses is then explained in terms of similar socio-economic characteristics.

A second explanation understands the sequential adoption of the same policies in terms of transnational communication. Through various channels of interaction, policy-makers learn of the programs of their counterparts overseas and this evidence enters and influences the domestic policy process. Some scholars have termed this process, "emulation" or "lesson-drawing" (Rose, 1991). Thus, similar responses flow from the export and import of knowledge through a transnational network of elites, who then develop shared assumptions and beliefs about how best to solve the problem at hand.

A final explanation arises not through the export of knowledge but through the export of costs. Policy adoption by one state can carry externalities, or costs that are then borne by others. The channels through which this influence is exerted may be multiple: international organizations or regimes, multinational corporations, bilateral negotiations, transnational policy communities and so on. Under this explanation, there is an obvious

interdependence and recognition that the implementation of domestic policy is more difficult because of policy developments elsewhere. The phenomenon of globalization suggests these more penetrative kinds of influences above the others (Bennett, 1991).

In relation to the closely related policy of information privacy or data protection, I have concluded that a process of international policy convergence has been at work, and is continuing (Bennett, 1997a). But I concluded that these different forces had a variable impact over time:

> At the level of principles, broad transnational forces transcended national characteristics. Furthermore, different forces had a variable impact over time. For the pioneers, the United States and Sweden, the convergence resulted from independent and indigenous analyses that traveled along the same learning curve and arrived at the same conclusion. For West Germany, and other countries such as Canada, France, Norway, Denmark and Austria that legislated in the late 1970s, the convergence followed from the mutual process of lesson drawing within an international policy community. For Britain, and other laggards such as the Netherlands, Japan and Australia, the convergence has resulted from a pressure to conform to international standards for mainly commercial reasons (1992, p. 222).

I describe this framework, because it may provide some important insights into the convergence of freedom of information policy to date, and perhaps suggests how the issue might progress in the future.

The Convergence of Access to Information Policy

There is no doubt that there has been an obvious convergence of access to information legislation. According to one source, there are now over 40 countries in the world that require the disclosure of government records on request.[2] On closer analysis, however, there are somewhat fewer countries with national statutes that provide: 1) a "public's right to know" all kinds of government information; 2) a set of exemptions for certain categories of information; and 3) a right of redress (either to the courts as in the US) or to a special "information commissioner" (as in Canada). Others (such as Germany) have access to information provisions for specific categories of information, or only for certain levels of government. Others stipulate somewhat dubious guarantees within their constitutions, as do some Latin American states. Nevertheless, there has been quite remarkable diffusion of freedom of information law since the enactment of the first modern FOI statute in the United States in 1967, and the pace of enactment seems to be accelerating (see Table One[3]). How can this diffusion be explained according to the framework above?

[2] http://www.privacyinternational.org/issues/foia/foia-survey.html

[3] Table One presents a simple overview of the diffusion of FOI legislation. The stated data represents the first time at which legislation was passed. Subsequent amendments are, therefore, excluded. Also

Table One
Statutory Provisions for Access to Government Information

Country	Provision	Date of Enactment
Australia	Freedom of Information Act	1982
Austria	Freedom of Information Law	1974
Belgium	Loi relative à la publicité de l'administration	1994
Canada	Access to Information Act	1982
Czech Republic	Freedom of Information Law	1999
Denmark	Access to Information Act	1970
Estonia	Access to Public Information Act	2000
Finland	Publicity of Official Documents Act	1951
France	Loi sur la liberté d'accès au documents administratif	1978
Greece	Code of Administrative Procedure	1995
Hong Kong	Code on Access to Information	1995
Hungary	Act on the Disclosure of Data of Public Interest	1992
Iceland	Freedom of Information Act	1996
Ireland	Freedom of Information Act	1997
Israel	Freedom of Information Law	1998
Italy	Freedom of Information Act	1990
Japan	Disclosure of Information Act	1999
Latvia	Law on Freedom of Information	1998
Lithuania	Law on Provision of Information to the Public	1996
Netherlands	Government Information Act	1978
New Zealand	Official Information Act	1982
Norway	Public Access to Documents Act	1970
Portugal	Access to Government Information Act	1993
S. Africa	Access to Information Act	2000
Sweden	Freedom of the Press Act	1766
United Kingdom	Freedom of Information Act	2000

excluded are partial rights of access (for certain categories of information), and statutes at sub-national levels.

The first explanation concerning broad levels of socio-economic development obviously has some merit. When one observes the range of countries that have adopted FOI statutes, it is readily apparent that they are virtually all advanced democratic states, which have experienced significant growth in the size of their state bureaucracies. Government growth is very difficult to conceptualize and measure. But rhetorical evidence suggests that a strong and widespread perception of the growth of a bloated, out-of-touch, unaccountable and intrusive state has necessitated greater levels of openness. An early, and very influential, report on reform of the British Civil Service in 1968 concluded:

> We think the administrative process is surrounded by too much secrecy. The public interest would be better served if there were a greater amount of openness. The increasingly wide range of problems handled by government, and their far-reaching effects upon the community as a whole, demand the widest possible consultation with its different parts and interests (Fulton, 1968).

These arguments appear in the debates surrounding FOI in many states (Bennett, 1997b). Given the growth in government personnel, share of the economy, functions, responsibilities, programs regulations and so on, a recognition has arisen that new instruments of openness are necessary. Despite the "downsizing" and "restructuring" of the state in the 1980s and 1990s, the pressure for FOI legislation does not seem to have abated, even thought the implementation of access principles in some jurisdictions has been challenged (Roberts, 2001).

Another "structural" characteristic of countries, which have adopted FOI legislation, is the development of liberal democracy. The justification for FOI law has always been couched in terms of strengthening liberal democratic institutions. Implicit, and often explicit, in this argument is a critique of the operation of traditional legislative mechanisms. As the size, powers and resources of legislatures have generally not kept pace with the expansion of executive institutions, supplementary mechanisms for openness and accountability have been deemed necessary. Again, there is plenty of rhetorical evidence that these considerations have entered the thinking of those who have fashioned the world's FOI legislation. Democratization has been described as a "process of institutionalizing uncertainty" (Przeworski, 1986, p. 58). FOI legislation adds new dimensions of uncertainty to the exercise of power.

It is obvious that there are two necessary conditions for the adoption of FOI legislation: a perception of state and bureaucratic power and remoteness, and a fundamental commitment to the institutions of liberal democracy. On the other hand, there are democratic states with large state bureaucracies that have not (yet) adopted FOI; Germany is a good example. So whereas these structural conditions operate as necessary conditions, they are clearly not sufficient conditions for adoption. Other forces must logically be at work.

The second set of explanations, having to do with the cross-national learning and emulation, is also very relevant. From the outset, nations have been very keen to learn from the experiences of other countries. The early pioneers (especially Sweden and the United States) have been held up as examples to follow. They precipitate the arguments in domestic policy debates: "they've got one, we ought to have one too" or "it works there, it can work here." For example, an early and influential article on Canadian government secrecy asserted that "the Americans are now far ahead of us in their determination to solve the problem of administrative secrecy, and we have much to learn from them" (Rowat, 1965, p. 486).

As the adoption of FOI statutes has progressed, the process of international lesson-drawing has obviously deepened to more detailed issues of legislative drafting concerning exemptions, costs, time-limits, oversight and so on. When the Canadian Access to Information Act was being conceived in the late 1970s and early 1980s, many lessons were drawn from the experience of the American FOIA. There were at least three official fact-finding missions to Washington by Canadian MPs, as well as a multiplicity of more informal contacts. Lessons were drawn about the wording of the national security exemption, about time limits, about the scope of exemptions, and about oversight. Canada emulated the American experience in the sense that policy-makers used the American example above any others and adapted that exemplar, despite the obvious differences, to Canadian constitutional, administrative and cultural conditions (Bennett 1991, p. 46). Since then, of course, Canadian access to information policy has been a focus of attention for fact-finding missions from other countries.

One of the most persuasive explanations for the diffusion of freedom of legislation around the advanced industrial world is, therefore, emulation. The larger the number of adopting countries, the greater the pressure on those without legislation. It thus becomes far harder to justify the non-adoption of a policy in domestic political debate when so many other jurisdictions have come to an opposite conclusion.

As far as the third explanation is concerned, however, there has so far been little recognition that the adoption of FOI legislation in one country has direct consequences for the information policies of another. So far there have been few obvious extra-territorial implications of enacting FOI. In the related case of personal data protection, the ease with which personal data can be transferred for processing to other jurisdictions meant an early recognition that domestic data protection legislation could easily be circumvented by moving data processing operations to countries with less stringent data protection regulations. This problem of "transborder data flow" set in motion a series of international agreements, through the Organization for Economic Cooperation and Development (1981), the Council of Europe (1981), and the European Union, which have attempted to thwart the creation of "personal data havens." The latter produced a Directive in 1995 which, among other things, stipulates that no personal data should be transmitted outside the EU for processing unless the receiving jurisdiction can ensure an "adequate level of protection" (EU, 1995). Some countries (such as Canada) have

responded to this requirement with data protection legislation.[4] The United States has negotiated a "Safe Harbor Agreement" to attempt to allow the continued free flow of personal information to the United States.[5] Privacy protection policy is squarely, therefore, an important trade-related issue, collaboration over which is crucial for the continued development of international electronic commerce.

Freedom of information policy in almost every jurisdiction other than Canada is treated as a very different issue from privacy protection. In Canada, the innovation of legislating simultaneously for both access to information and privacy protection (at least in relation to the public sector) at both federal and provincial levels, is not an approach that has been emulated elsewhere, although a few jurisdictions give both access to information and personal data protection responsibilities to the same "commissioner."[6] In most countries, the two sets of rights sit uneasily within one legislative regime. Because of the trade implications, there are now more states with privacy protection legislation than with freedom of information legislation.

However, there is evidence that freedom of information regimes are becoming increasingly interdependent. This interdependence may not have vital trade implications, but it is beginning to influence the way that domestic, including Canadian, access to information policy is implemented. The remainder of this paper provides some illustrations of this increasing interdependence, and concludes with some speculation on whether this dynamic will produce a "trading-up" of FOI standards, or the opposite.

Access to Information and Policy Interdependence

The paradigm for access to information policy in the past was framed by an assumption that citizen A, of jurisdiction A, would request information generated by the government of jurisdiction A. Citizen A was not expected to make requests of the government of jurisdiction B, nor to make requests for information that was generated outside of those borders. The FOI regimes were considered discrete, independent and bounded by a traditional conception about where "the state" began and ended.

Globalization has meant a significant increase in the policy activity that takes place at the international level, both governmental and corporate. By extension, therefore, the same kinds of information are likely to be found in the files of different agencies in different jurisdictions. The same reports on drug safety, on environmental conditions and hazards, on labour conditions, on trade negotiations, on comparative health and safety and so on, are shared. "Government information" is not something that is defined by any

[4] The recently enacted *Personal Information Protection and Electronic Documents Act* began to take effect in January 2001.
[5] The full text and supporting documentation for the Safe Harbor Agreement can be found at: http://www.export.gov/safeharbor
[6] The UK now has an "Information Commissioner" to oversee both the Data Protection Act, and the new Freedom of Information Act. Some German Länder (such as Brandenberg) have the same model.

one government. Information now knows fewer national attachments than it did 30 years ago when the first modern FOI legislation in the United States was enacted. Globalization has increased the level of interdependence between FOI regimes. But these pressures might militate in favour of greater openness, or greater secrecy. The subsequent analysis provides several illustrations that suggest that policy interdependence might be tugging in both directions at the same time.

Policy Interdependence and Pressures for Openness

The first phenomenon that might lead to greater openness, and that is obviously more prevalent today is that of "shopping around" different jurisdictions to find the records one wants. Some journalists, members of NGOs, as well as representatives from the private sector are now quite knowledgeable about foreign FOI laws, and make use of those procedures in a number of ways, and for a number of reasons.

For example, when some jurisdictions do not enjoy the benefits of FOI, diligent requesters then go to other countries to discover information on their own countries. Before Britain passed its Freedom of Information Act in 2000, the Campaign for Freedom of Information used to request documents under the US FOIA to find out about safety and environmental issues of critical importance to the British public.[7] Some of the documents released reveal the extent to which creative use can be made of foreign access to information legislation:

- Reports on hygiene on British cruise liners
- Information on the safety of British pesticides
- Details of safety related complaints about British cars
- Inspection reports from British poultry farms
- Inspection reports from the US Food and Drug Administration on British drug manufacturers
- Reports on fuel leaks at US Air Force bases in the UK.

Evidence such as this went some way to persuading the British government that it was futile to persist with policies of secrecy when such information was readily available overseas.

Other requesters shop around to obtain a different perspective on the same issue. For historical research, it is often important to find different national and cultural perspectives on important international events. The National Security Archives in Washington DC, for instance, has been compiling a history of the UN intervention in Rwanda. They have received a large volume of information through the Canadian Department of National Defence that, because of Canada's central role in the Rwanda campaign, was

[7] "What the American FOI Act reveals about Britain," *Secrets: Newspaper of the Campaign for Freedom of Information,* No. 22, July 1991.

unavailable from the Department of State or the Pentagon in Washington.[8] Moreover, the stipulation in the Canadian law that applicants should be citizens or permanent residents has never been an obstacle for determined and expert applicants from overseas.[9]

Another incentive has less to do with the formal process for application, and more to do with the informal culture of different agencies. Just as requesters can become accustomed to dealing with particular agencies rather than others in their domestic governments, so some have realized that counterparts overseas can be far more careful in record-keeping, forthcoming, sympathetic and speedy than are agencies in their own country. Some access coordinators may be more reasonable. Some may see less of a threat from a foreign journalist or other applicant, than they do from those who are constantly operating and requesting information from their own doorstep.

Ann Rees, a staff reporter with the *Vancouver Province,* has over several years researched into the adverse side-effects of certain stimulant drugs, especially those prescribed for Attention Deficit Disorders (such as Cylert, Ritalin, Dexedrine).[10] Over this period she has learned that the Food and Drug Administration in the United States has a far more comprehensive database on adverse drug incidents than does Health Canada. And she has generally received the relevant documents more quickly and cheaply from the FDA.[11] Martin Middlestaedt of the *Globe and Mail* has made similar use of the US FOIA to research the flows of hazardous waste materials into Canada. Documents about the activities of a particular company were retrieved through the Environmental Protection Agency in Washington after requests to Environment Canada were rebuffed.[12]

Another phenomenon that seems increasingly prevalent is the invocation of overseas experience during the more formal review process once a request has been refused. Applicants may sometimes use the argument that the same kind of information is available in another jurisdiction in order to counter arguments of national security, or financial and economic harm. And occasionally these arguments will persuade Information Commissioners and/or the courts that the same information should be released domestically.

In 1988, following requests under the Canadian Access to Information Act, the respondent, the Minister of Agriculture, released meat inspection team audit reports made in 1983 on several meat-packing plants in Kitchener, Ontario. The packing company concerned then applied to the Federal Court to resist disclosure, arguing that the material should not be released because it fell into the exemptions from disclosure provided for in s. 20(1)(c) of the Access to Information Act in that disclosure could reasonably be

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[8] Telephone conversation with Will Ferroggiaro, National Security Archives, July 5, 2001.
[9] Section 4.1. This Section was also extended by Order-in-Council to include those present in Canada. None of these restrictions, it appears, provides any obstacle to the determined applicant.
[10] An initial story appeared as: "Feds review use of ADD drug Cylert: Liver-failure risk will cause Health Canada to look `very carefully,'" *The Province,* Thursday, December 10, 1998. Her research is continuing in both Canada and the US.
[11] Personal communication, July 3, 2001.
[12] *Globe and Mail*, September 27, 1999.

expected to result in material financial loss to itself, and in s. 20(1)(d), in that disclosure could reasonably be expected to interfere with its contractual negotiations. The trial judge dismissed the application, finding that the statutory exemptions required a direct causation between disclosure and harm not present on the facts of the case. He did so, partly because similar American reports on the packing plants in issue had been available to the public and there was no evidence of harm arising from this publicity. The Federal Court of Appeal agreed with the trial judge.[13] Of course, the argument that "it's public there, it should be public here" can also work in reverse, as we shall see below.

Finally, the increase in the frequency of international litigation has also increased the use of freedom of information legislation. FOI applications, and thus the time and resources of public servants can be used to reduce legal costs during the often costly discovery process. Some international businesses have become quite expert at using FOI regimes to find out about the practices of competitors, the government contracting process, and so on. And there are a small number of commercial dealers in information that feed this process. The pharmaceutical industry, in particular, makes heavy use of FOI statutes to obtain information on drug-trials in different countries, and related matters.

The above illustrations all militate in favour of greater openness. It is impossible to measure and compare historical trends. But from anecdotal and impressionistic evidence, it is clear that the forces of globalization have increased the level of informational interdependence which in turn has meant a greater use of different FOI statutes by a greater range of overseas applicants.

Policy Interdependence and the Pressures for Secrecy

But the interdependence of FOI regimes can also produce a reverse effect when arguments are made that release of information would prejudice various national, organizational or commercial interests with world-wide adverse implications.

A particularly interesting case is currently being litigated in Ontario as a result of a decision by the Ontario Information and Privacy Commissioner to allow the release of certain inspection reports of Ontario Hydro carried out by an international trade association called the World Association of Nuclear Operators (WANO). The case involves some intricate and complicated issues concerning the jurisdiction of the Ontario Commissioner, which raises some wider issues of Canadian constitutional law.[14]

Of particular interest here, however, is the argument offered by WANO that "Disclosure of the Peer Review Reports will interfere with WANO's ability to schedule and conduct peer reviews at nuclear plants worldwide." They have argued before the Commissioner, and now before the courts, that the effectiveness of its role in improving the safety of nuclear facilities worldwide is dependent upon the confidence of peer review participants,

[13] Canada Packers Inc. v. Canada (Minister of Agriculture) 53 D.L.R. (4th) 246 Federal Court of Appeal, July 8, 1988.
[14] http://www.ipc.on.ca/english/orders/orders-p/po-1805.htm

including the facilities and their employees alike, in the confidentiality of the communications in the peer review process. This is an explicit argument that the interpretation of Ontario's FOIPPA could influence the conduct of nuclear inspection worldwide. WANO asserts that in no other jurisdiction are these reports publicized and points to the "Confidentiality Notice" that all facilities sign with WANO before an inspection is begun.[15] So here we see an example where the organization has argued that the information in question does not get released elsewhere, why should Ontario be any different?

Other illustrations occur in relation to the "third party" commercial information that government collects from the private sector. Canadian and overseas companies are regularly asked to provide voluntarily information to government, and particularly Industry Canada for forecasting and statistical purposes. It is reported that sensitivities over access to information have led to an increased reluctance on the part of some businesses to cooperate with government in this way, thus hindering government's analytical and forecasting abilities.

Fears of release under access to information law can also arise in the context of government contracting. Anecdotal evidence has suggested that some businesses are reluctant to bid on government contracts in jurisdictions that have a reputation for excessive openness. Fears that confidential proprietary information, or information that might reveal business vulnerabilities, might have to be revealed to government during the bidding process, and might then be revealed under FOI and fall into the hands of competitors have allegedly caused a reluctance to bid for Canadian contracts.

Whether or not these fears are real or hypothetical is difficult to judge. Certainly the Federal Information Commissioner has little patience with these kinds of arguments:

> This Commissioner has seen thousands of government-held records relating to private businesses. Real secrets are rare. Sounding the alarm of competitive disadvantage has become as reflexive in some quarters as blinking. Concern for the public interest in the transparency of government's dealings with private businesses has been almost abandoned by government officials.
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> New rules of the road are needed to govern the right to know more about government dealings with the private sector. First, the law should tell firms choosing to bid for government contracts that the bid details, and details of the final contract, are public for the asking.[16]

[15] "CONFIDENTIALITY NOTICE: Copyright - 1998 World Association of Nuclear Operators (WANO). All rights reserved. Not for sale. This document is protected as an unpublished work under the copyright laws of all countries which are signatories to the Berne Convention and the Universal Copyright Convention. Unauthorized reproduction is a violation of applicable law. Translations are permitted. This document and its contents are confidential and shall be treated in strictest confidence….."

[16] *Annual Report of the Information Commissioner*, 2000-2001, pp. 74-75

Access to Information and Participation in International Regimes

These and other cases raise the larger question about the implications for FOI of the increasing participation of nation states in international regimes and organizations. Some international organizations tend not to have highly developed rules concerning how to respond to access to information requests. With or without established rules, some international organizations might be more secretive than national governments; others might be more open. The rules and expectations of international organizations can and do clash with established FOI policy and procedure within nation states.

One recent example arises from the claim by lumber company, Pope & Talbot, Inc, against the Government of Canada under the Investment Chapter of the North American Free Trade Agreement. Pope & Talbot's complaint arose from the fact that it, like other companies operating in British Columbia, has had its duty-free export quota reduced by the Canadian Government each and every year since the Agreement came into force. These quota reductions allegedly resulted from the manner by which the Canadian government has implemented the Canada-U.S. Softwood Lumber Agreement. Having the burden of proof, Pope & Talbot needed to establish that Canada has chosen to implement this Agreement in an unfair manner and in breach of Canada's obligations under Chapter 11 of the NAFTA. A Tribunal was constituted under NAFTA to deal with the complaint.[17]

During part of the proceedings, the Canadian government refused to deliver certain documents to the Tribunal on the grounds that they contained cabinet confidences, and that they were covered by solicitor client privilege. The government relied mainly on S. 39 of the Canadian Evidence Act in making this decision, which is quite broadly drawn and which was designed to preclude Canadian courts from reviewing cabinet confidences. In response, the Tribunal disputed whether this particular legislation was relevant to this case, and requested that Canada justify its refusal in more concrete terms. Canada refused to do so. In its decision dated April 10, 2001 the Tribunal made the following comments about this secrecy:

> The tribunal deplores the decision of Canada in this matter….Canada's position could well be a derogation from the 'overriding principle' found in Article 15 of the UNCITRAL Arbitration rules, under which these proceedings have been conducted, that all parties should be treated with equality….As Canada's refusal to disclose or identify documents in these circumstances is at variance with the practice of other NAFTA parties, at least of the United States, that refusal could well result in a denial of equality of treatment of investors and investments of the parties bringing claims under Chapter 11.[18]

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[17] All relevant documents are found on the website of the law firm representing Pope and Talbot: http://www.appletonlaw.com/4b3P&T.htm

[18] Arbitral Tribunal, *In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement between Pope and Talbot Inc. and the Government of Canada*, April 10, 2001 at: http://www.appletonlaw.com/4b3P&T.htm . The United Nations Commission on International Trade Law (UNCITRAL) is the major legal body within the United Nations in the field of international trade law. It

Leaving aside the question of whether a presidential system such as the United States could in effect have any doctrine of "cabinet confidences", this dispute suggests a fundamental clash of sovereignty. Under both the Canada Evidence Act, and the Access to Information Act, any information relating to "cabinet confidences" is excluded from disclosure. The Arbitral Tribunal in this case was asserting a right to at least examine the documents in question to ascertain their relevance to the case at hand, a right that neither the Canadian Information Commissioner nor the Canadian courts can exercise. One might assume that this will not be the first NAFTA case where disputes over the production of official documents will arise.

NAFTA is the only international agreement, to which Canada is a party, through which private parties can bring cases against foreign governments. The parties in World Trade Organization disputes, however, are countries, which sometimes use FOI laws for discovery purposes during WTO disputes. For instance, documents retrieved through the Canadian Access to Information Act have played a role in the longstanding dispute between Brazil and Canada over whether or not the "Technology Partnerships Canada" program, and specifically its support of the regional aircraft industry, constitutes an export subsidy in violation of WTO rules. Arbitration panels, such as those established under the WTO, rely on a significant amount of collaboration, including the sharing with the other party of all relevant evidence. This dispute between Canada and Brazil has raised serious issues about what that means, about whether one party could make "shotgun requests" for large amounts of unspecified information, and about the appropriate rules for the protection of third-party commercial confidences.[19] In the context of trade disputes and arbitration, those countries with FOI statutes may well be at a disadvantage.

Some international, or supranational, institutions have been under increasing pressure to be more open about their practices. The clash between the interests of nation states and those of an international body has been first, and most notably, apparent in a long-standing and sensitive dispute within the institutions of the European Union about access to information. The previous EU Commission was forced to resign, partially as a result of criticism concerning excessive secrecy. Since then the Commission, the Council of Ministers and the Parliament have been engaged in a dispute over whether and how EU citizens should have a right of access to EU official documents.[20] With the advent of the Swedish presidency at the beginning of 2001, the movement for more openness gained an important champion, and a new code of access was then finalized in April. But critics have still pointed to vague exemptions and woolly classification categories.[21] The most

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has a broad mandate to promote the adoption of new international conventions, model laws and uniform laws and the codification and wider acceptance of international trade terms, provisions, customs and practices in international trade: http://www.uncitral.org/en-index.htm

[19] See, World Trade Organization, *Canada – Measures Affecting the Export of Civilian Aircraft: Report of the Panel,* 14 April 1999, WT/DS70/R at: http://www.wto.org/english/tratop_e/dispu_e/70r.doc

[20] "EU strikes new deal on freedom of information," *The Guardian*, April 26, 2001. http://www.guardian.co.uk/Archive/Article/0,4273,4176014,00.html

[21] The British organization "Statewatch" has been the most vocal critic: http://www.statewatch.org/news/2001/apr/08brussels.htm

recent development is that the European Parliament is to take the Council of Ministers to court over the introduction of wide-ranging security rules, which MEPs say violate the treaties and are overly secretive.

This ongoing dispute may foreshadow the kinds of issues faced by other international bodies. With the common recognition that an increasing amount of decision-making takes place at the international level, there will be an increasing pressure from a variety of quarters for more openness. International consumer, environmental, civil liberties and other groups will obviously be the most vocal critics of excessive secrecy, as is seen with the recent protests at international trade meetings in Seattle and Quebec City. But they will find some surprising allies in some sections of the corporate world, as well as in some national parliaments. The interesting feature of the EU dispute is how countries with traditions of openness, such as Sweden, have been concerned that documents that would normally be released under domestic FOI law, would be held confidential by the EU. Whereas countries with traditions of secrecy (such as Germany) have tended to oppose more openness at the EU level for fear that information held confidential under German law would all of a sudden see the light of day in response to access requests under the new European code.

A Race to the Top or the Bottom?

We have seen that the pace of enactment of FOI statutes has increased in recent years; the number of advanced industrial states with such legislation is fast overtaking the number without. We have also seen how the use or invocation of FOI legislation in other countries can affect domestic access to information policy. FOI policy is undoubtedly affected by globalization on a number of different levels. Does all this policy activity constitute, however, a race-to-the-top or a "trading-up" (Vogel, 1995)? Does this greater interdependence mean the international FOI policy dynamic is likely to harmonize FOI according to the highest, rather than the lowest, common denominator?

Some of the trends sketched above might lead one to speculate that more and more countries will be forced to pass FOI legislation, and that the standards for access will probably become more and more liberal: exemptions will be drawn more narrowly; time-limits will be shortened; fees will be minimized, and so on. The logic behind this process is as follows. The more "domestic government information" that finds its ways into the hands of foreign governments or international organizations, the less relevant domestic access to information policy becomes. The "shopping around" phenomenon, used by journalists, NGOs, lawyers, corporations and others will produce an increasing amount of information that might otherwise be kept confidential. Of course, this dynamic operates throughout the universe of countries with FOI. In the absence of any attempts at international harmonization, domestic (including Canadian) access policy can only, therefore, be as stringent as the most open regime in the world; if applicants cannot get what they want at home, then they will go abroad.

Furthermore, the examples from the NAFTA and WTO disputes suggest that there might be a considerable pressure from international capitalist interests to ensure that standards of openness are consistent, especially with regard to information on commercial confidences. The dispute at the WTO in Brazil demonstrates how a country with FOI, in this case Canada, might be put at a disadvantage by applications from foreign governments and interests for policy information generated at the domestic level that then finds its way as evidence into the trade dispute in question. The expectation, of both WTO and NAFTA, that parties should be as forthcoming as possible with information not only confronts certain domestic information rules, but also operates to push standards of openness higher. The logical response of an international business that feels that its interests cannot be properly represented in international trade arenas because of an imbalance of evidence, might be to lobby strenuously for similar access to information statutes in countries, like Brazil, that do not have such legislation, thereby leveling the playing-field.

At a certain point, therefore, the logic of policy harmonization might be irresistible when a critical mass of countries with FOI see their interests harmed in international trade fora because of these imbalances. The logic, observable in many other policy areas including privacy protection, would then try to force the "free-riders" in the international community to adopt FOI law according to a common pattern (Shaffer, 2000). Advocates for openness within those countries would also be able to point to higher standards elsewhere (as happened in the British debate over FOI for the last twenty years). A treaty could be developed and opened for ratification. The harmonization process would then operate to push standards of openness to the highest, rather than the lowest, common denominator. Thus, the liberalization of trade may actually provide nations with an economic incentive to strengthen FOI legislation.

To the extent that treaties or trade agreements provide formal mechanisms for establishing harmonized or equivalent standards, they provide an opportunity for richer, more powerful countries to play a greater role in setting those standards. In this respect, the interests of Canada are likely to be marginal. On the other hand, if there is a perception that American political and economic interests are being hurt in the international trade arena because of the use of US FOIA, that perceived imbalance might very well lead to the kind of "trading-up" dynamic discussed above. This has been one powerful argument for the "trading-up" of environmental standards within the American economy, and between the United States and Europe (Vogel, 1995).

There are, however, a number of qualifications to this argument, which might lead to scepticism about whether this "trading-up" logic would ever be relevant in the case of FOI. First, the illustrations provided above can also work in the opposite direction. For every international business that uses FOI to obtain information to advance its interests, there are at least as many that argue, and litigate, strongly to keep information confidential. Domestic FOI policy certainly has important externalities. However, there is no reason to believe that any pressure for harmonization would be exerted in the direction of more openness.

Second, as an increasing amount of policy making takes place at the international level, each government then has the capability to exempt more information from disclosure as a result of the applicable exemptions for international negotiations or diplomacy. In the Canadian Access to Information Act, therefore, the scope of Section 15 (1) is potentially broadened. [22] And so are the equivalent sections in other FOI statutes. The longstanding conflict over access to information within the EU suggests that officials in international and supranational organizations might be just as prone to resist openness as are their counterparts in some national administrations.

Third, if there is a logic of policy harmonization, then harmonization of what? This paper has not attempted a thorough comparison of access to information statutes. But other studies have noted an already high degree of convergence (e.g. Marsh ed. 1987). At the level of broad statutory principles all laws must logically provide a right of access, create a set of exemptions for international affairs, law enforcement, defense and national security, personal privacy, cabinet confidences, and so on, and then deal with the intricate procedural questions concerning time limits, costs and redress. The standard for "openness" within a community, however, will only be partially influenced by legislative language. More significant factors are the administrative culture and the interpretation of that statutory language by the courts and/or the information commissioners. And this will inevitably continue to vary according to institutional and legal traditions, as well as to national understandings of what is and is not a politically salient question.

The observation of similar statutory language should not signify similar levels of openness with regard to particular types of information. In other words, a harmonization effort could force a convergence on some basic statutory principles about legitimate exemptions from the right of access, but that process could not force the same interpretation of those principles. And the interpretation of contentious words such as "national security," "personal privacy" or "commercial confidences" means everything in this policy area.

Finally, it is not clear through what international organization such a harmonization effort would arise. In relation to privacy protection, a number have played an important role, including the OECD, the Council of Europe and the European Union. But it is very unlikely that the level of interdependence would reach the same levels to force similar harmonization efforts. More likely is a more pragmatic and incremental process of collaboration within those international regimes (such as WTO and NAFTA) where

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[22] 15.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada ….Including,

(*h*) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad…

observable discrepancies arise. And those negotiations will likely focus on quite specific exemptions, such as that relating to commercial confidences.

Conclusions

The preceding analysis has not attempted to provide a systematic overview of the impact of globalization and trade liberalization upon Canadian access to information policy. Certain trends have been noted, but the implications of those trends are still inevitably speculative. It is notoriously difficult to separate out the perception of harm, from actual harm. Nevertheless, the following broad conclusions can be reached.

- FOI policy is undergoing a paradigm shift. The traditional expectation has been that citizen A, of jurisdiction A, would request information generated by the government of jurisdiction A. Those assumptions are obviously breaking down, as "government information" now knows few national attachments. FOI regimes are no longer discrete, independent and bounded by a traditional conception about where "the state" begins and ends.

- There is an increasing tendency to "shop-around" for information by a greater range of applications: journalists, NGOs, lawyers, businesses and others. This process of shopping-around appears to happen regardless of the stipulation in Section 4.1 of Canada's Access to Information Act that applicants should be a Canadian citizen or permanent resident. This requirement seems redundant and out-of-step with the pattern in other FOI laws, which normally make no distinction as to the nationality of the applicant. For those foreign applicants who want to use the Canadian Act, there is no problem in finding a Canadian surrogate to make the request for them.

- The diffusion of FOI around the world is likely to continue, but mainly through domestic pressures and through the notable process of international "lesson-drawing." The more countries with FOI legislation, the more difficult it is to justify being in the minority that does not.

- Policy interdependence has obviously risen. But there are, as yet, few instances where the political and economic interests of those with FOI might be harmed by the "free-riders" who do not. The forces that would promote a general "trading-up" of FOI standards through a multilateral process of policy harmonization are not observable at the present time.

- However, if trading up occurs, it will likely only apply in very specific circumstances relating to certain categories of information that are invoked as evidence within trade dispute processes. This dynamic is most likely to occur if US interests are perceived to be threatened by foreign use of its own FOIA.

- The more policy-making activity that takes place at the international level, the more relevant become those exemptions in domestic access to information law concerning international relations, diplomatic confidences, the affairs of foreign states and so on. Thus, there is plenty of evidence that Canada's involvement in multi-lateral and bilateral international agreements has raised, and will continue to raise, questions about the operation of Canadian information policy. Canadian policy will continue to be brought into conflict with established, and emerging, information policy rules in international organizations.

- However, there is little evidence to date, that the Canadian "standard" is objectively any more or less open that than of other countries. Relative openness is extremely difficult to measure, and contingent on some highly elusive and fluctuating cultural factors. The argument that "it's available there, why not here?" is often heard. But so is the opposite: "It's secret elsewhere, why not here?"

- Canadian access to information policy will continue to be influenced by international developments and forces as a result of globalization. But those influences are very difficult to define, and they operate in complex and unpredictable directions. And there is no clear evidence that the existence of the Canadian Access to Information Act operates either to harm, or help, Canadian interests abroad.

- In conclusion, there is no pressing reason why international pressures should be influencing the way that we, as Canadians, shape our own access to information policy. Reform of the Access to Information Act should be based on the interests of Canadian citizens, and should be driven by the need to strengthen Canadian democratic institutions.

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