

detail and in ways in which the public can better understand the basis for those actions and policies. This part of openness comes more from affirmative disclosures than from the passive disclosure that is the hallmark of FOIA. To achieve this level of transparency, agencies must be willing to disclose more information more quickly and more frequently with a goal of educating and reassuring the public concerning government actions. Too often in the past, agencies have taken a proprietary interest in much of their information, believing that public disclosure was more a detriment than a benefit. That kind of institutional attitude is probably extremely difficult to overcome and will almost certainly not be changed in the near future. But steps like those taken by the FDA show a level of seriousness towards the matter of transparency, as well as a realization of the potential benefits of greater openness, that is both refreshing and exciting.

Thoughts from the Outside...

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

A Freedom of Information Story: Secrecy Gives Way to Transparency **By Dan Metcalfe**

The following is excerpted from a speech delivered at the “FOI Live” transparency conference, London, England, June 11.

Good morning. I bring you warm greetings from the United States, where our Freedom of Information Act has not yet toppled *our* government either—though it now seems like almost anything is possible.

What I bring to you today are words of hope from the Obama Administration, words and hopes that are wrapped within a little freedom of information story. And like many such stories it begins with four familiar words. No, not “Give me the records.” It begins with “Once upon a time . . .”

Once upon a time there was no freedom of information at all in the world—and yes, it was a very dark place. There were no papers in the post, no government clerks eager to please, no searches throughout the land for things people wanted to see. The people had to get by on just scraps of information that their government occasionally disgorged.

And, of course, Members of Parliament got by just fine: They were able to tend to their second homes and clean their moats as they saw fit—without anyone having a fit. Then again, this also was a time when if a Speaker of the House of Commons was forced to leave, it most likely would have been through a process of beheading—yes, this was before the year 1695.

And then there came upon the land a man, a single man, who held a vision of sunshine within him and cast this inner light upon the world. His name was Anders Chydenius, and he was truly a genius—a Finnish clergyman and Swedish parliament member who nevertheless was an enlightened liberal thinker. Almost singlehandedly, he gave the world its first Freedom of Information Act, in the year 1766, *hundreds* of years ahead of its time.

Indeed, it was exactly 200 years later that a somewhat less enlightened man named Lyndon Johnson, at the urging of no less a legislative back-bencher than a young Donald Rumsfeld, signed the U.S. Freedom of

Information Act into law. And so the worldwide enlightenment total stood at three: Sweden, Finland, and America, where we spelled it F.O.I.A. and pronounced it “FOIA,” as in: “It’s good FOIA.”

But it nevertheless took more time for that good U.S. FOIA to really take hold. In fact, it took nearly another decade, until another U.S. president, thinking himself more an emperor, spurred a generation of reform in the name of “Watergate.” So that good FOIA became even better, both on its face and as applied throughout that land. A cornerstone of democracy, it was.

And that improved law became the modern model for the world, as the light of openness, the very power of that idea, began slowly but surely to spread. First came three Commonwealth nations—Canada, Australia, and New Zealand—where there was less of an Official Secrets Act to stand in the way. And the world’s total stood, as of 1983, at six.

During *those* early years, emissaries from foreign lands began to appear in the City of Washington, and they would say: “Tell us of your good FOIA, so that we may replicate its success and, with luck, avoid its failures.” From the Empire of Japan and the Kingdom of United (or U.K. for short), they came to say: “Next year, at the latest, we will have a good FOIA of our own.” Year after year they said that, in one case for nearly as many years as they had fingers and toes.

But then all of a sudden a great curtain of iron fell, and with it that Wall of Berlin, leading to a rush to embrace freedom of information as an emblem of democracy—if not also a ticket to NATO. Yes, the light of openness became the subject of urgent, fervent campaigns around the world.

As the millennium closed, there was yet a second burst of sunshine activity, when the idea filtered down to the Second and Third Worlds that transparency is a mighty—even indispensable—tool which to fight the evils of corruption. “Sunlight is the greatest of disinfectants,” a wise American jurist once said. And the powerful truth of this propelled the world’s freedom of information total to more than seventy-five nations—with dozens more now poised to join the international transparency community sometime soon.

So by now you might be thinking: Is there going to be a happy ending to this story? Well, yes, there are at least two: One within the U.K. and the other within the U.S.

First, there ought to be happiness here in the U.K. in the fact that its freedom of information regime has matured so much within such a relatively short period of time. In just four years, it has reached across the land, to both the people and their government, from the very top to bottom, in a way that far exceeds what the U.S. was capable of when it began its comparable “culture change” in the late 1960s and early ‘70s. In the long run it is indeed a very *good* thing that your good FOIA has so dramatically—or is that “traumatically”—succeeded in, shall we say, gaining the acute attention of both the government and public alike of late. It is in the great and long-lasting value of those sensational disclosures as a strong *deterrent* to any such conduct—large, small, or medium-sized—in the future.

Yes, an ounce of dirty disclosure can be worth a pound of deep deterrence over time, no matter how many pounds it costs to clean one’s moat. So by my lights the U.K. ought to be happily celebrating its good FOIA, and its truly good fortune, in achieving such an extraordinary thing for good government, something that should reverberate with a powerful cleansing force for many, many years to come.

In the U.S., of course, we are celebrating, but cautiously so, what holds great promise for being a *reversal* of fortune in our transparency realm. Exactly 142 days ago (but who’s counting), we replaced a

president whose administration seemingly never met a secret it didn't like with one who says that he wants to have the most open administration in American history.

And for starters, President Barack Obama could not have been more promising—literally. On “Day One” of his Administration, otherwise known as January 21st, he stunned even the most hopeful of open-government advocates with the issuance of two memoranda that, combined, promised to bring about a new era of open government in all sorts of wonderful ways.

One of them promised the development of a multi-faceted “Open Government Directive” within 120 days—which, if you *are* counting, is a number less than 142—but that deadline was scrapped in favor of a more “participatory” developmental process that allows on-line “collaboration” with the interested public. So it remains ongoing.

The other promised that there soon would be a new major policy document to govern all decisionmaking under our Freedom of Information Act—both in litigation and administratively within each agency—as is traditionally issued several months into a new presidential administration by its “Ministry of Justice,” or “Justice Department” as we call it.

And indeed, with unprecedented speed, our new Attorney General Eric Holder issued a FOIA policy memorandum on March 19 that grandly restored the “foreseeable harm/discretionary disclosure” standard – according to which exemptions to disclosure are not employed just because they apply -- which we had developed and used to great success under former Attorney General Janet Reno during the Clinton Administration.

The swiftness of this action was highly laudatory in and of itself, and the new Holder FOIA Memorandum should lead to far greater information disclosure—*much* more sunshine—in the U.S., though for the time being, this unfortunately still remains to be seen.

The reason for this is largely because in its haste to act so swiftly, our Justice Department inexplicably failed to readily apply that very pro-disclosure “foreseeable harm” standard to all the cases that are pending in court, including the many “carry-overs” from the Bush Administration. This serious stumble appears to have been a result of such great haste, but it among other such things has led to growing demand within the U.S.’s openness-in-government community for at least some concrete evidence, early on as this may be, of increased FOIA disclosure. And for this, our folks are becoming increasingly anxious.

Then there is the closely related issue of what we call the state secrets doctrine, a judge-made principle of national security dimension that can be used—or in the case of the Bush Administration, abused—to give the government complete immunity from suit when challenged on such things as private-contractor military operations, warrantless domestic surveillance, the torture of detainees, and the like. And it goes without saying that the expectations for reform of this area of secrecy in the U.S. are very high as well, driven as they are by much pent-up feeling that President Bush’s abuses of his state secrets privileges were so extreme as to require immediate disavowal.

But there, too, the public demand for secrecy reform has been frustrated—just as has been the Obama Administration frustrated in struggling to navigate between its own intelligence agencies (which are its Justice Department’s clients in litigation) and the formal procedural constraints of our courts. These frustrations became so acute that they bubbled to the surface at a presidential press conference six weeks ago when even

someone as calm and cool as President Obama blurted out that his Administration just “[didn’t] have the time to effectively think through” its efforts at urgent secrecy reform.

In time, however, these early difficulties and frustrations will fade away. They will be overcome by enormous improvements and tangible results in the administration of our FOIA. And in time the U.S. will be known as the land of “good FOIA” once again.

So to answer a question implicitly posed in this story: Yes, secrecy *will* fully give way to transparency in the U.S. It will just take a bit longer than promised -- and it will take even longer to meet the exceedingly high expectations that eight years of Bush Administration secrecy inevitably spawned.

But when that awful secrecy legacy does finally give way—together with other post-9/11 vestiges of America’s standing on the world stage—the United States of America should be able to return to its position of leadership in the worldwide community of nations that care about best enacting or best implementing their own “good FOIAs.”

In short, the U.S. will be ready to serve as a worldwide model of freedom of information once again -- even if it now must defer to the U.K. on how to capture the rapt attention of a legislature, and make it care about transparency “big-time,” in what seems like no time at all.

Lastly, there is this story’s final question: Will everyone involved with freedom of information around the world live happily ever after? Well, no, not exactly. No one can predict or promise that. This is because true sunshine is a little bit like true liberty—it takes constant effort, sometimes even battles, and almost always at least some friction, to sustain it.

But those of you on the front lines of those battles—either on the inside of government just trying to do the right thing with what resources you have, or on the outside campaigning for greater openness—you all carry the torch of Anders Chydenius, that farsighted Finn.

And with it, as time goes by, you bring more and more light into the world.

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Views from the States...

The following is a summary of recent developments in state open government litigation and information policy.

Michigan

A court of appeals has ruled that a traffic citation issued to Thomas Lawrence by Troy police as well as information indicating whether the police have quotas on the number of tickets they are required to issue is not exempt under the FOIA and should be disclosed to Thomas’ brother Frank. The trial court denied access based on its conclusion that discovery in a civil infraction action was prohibited by court rule. But the appellate court noted that “a party may nevertheless seek information related to such actions under the FOIA unless the FOIA specifically exempts the information from disclosure.” The police also contended that