Introduction

Most introductions for previous editions of this book have been written in periods of high drama, crisis and feverish activity relating to secrecy or scandals connected to the release of information. The episode concerning MPs expenses' claims, which commenced with a freedom of information (FOI) request, continues that tradition. In May 2009, the promise of major constitutional change was uppermost in the minds of political leaders. A problem that had not been properly addressed by the authorities – what should MPs be paid for being an MP? – led to a disreputable system for expenses that was ill conceived, effectively un-policed and in which greed and cynicism were encouraged. I cannot recall the reputation of Parliament being at a lower ebb. Ministers and celebrated parliamentarians were standing down or faced de-selection. The affair led to the resignation of the Speaker, the first such resignation since 1695. Widespread reform was being promised including efforts to spread power more widely, reinvigorating local government, encouraging independent minded individuals to stand for Parliament, reforms of MPs expenses and independent audit and monitoring of those claims for expenses. The sights quickly moved to empowering MPs and select committees in their scrutiny of the executive (see chapter 9), proportional representation, an elected upper chamber, fixed-term parliaments and reining in the prerogatives of the prime minister (see chapter 9). That old chestnut, a written constitution, soon emerged. The latter would confront two shibboleths of the British constitution: the Crown and parliamentary sovereignty. The MPs saga has undoubtedly damaged the institutional sovereignty of Parliament. We shall see. It is in all our interests that Parliament is effective in its roles and comprises trustworthy members and peers.

MPs' expenses involving travel and the second home allowances' scheme (the former additional cost allowance (ACA) and presently the personal additional accommodation expenditure) has been the biggest news item concerning the Freedom of Information Act (FOIA). MPs and the Speaker and political leaders including the prime minster, had been slow to realise what living in a FOI environment meant – MPs do not know what juggernaut is coming their way, Jack Straw is reported to have said.[1] When it became apparent what that

[1] C. Mullin, *The Secret Diary of the Minister for Folding Deckchairs* (2009) p. 284.

environment meant for a cosy club-land existence at public expense, the reaction was tawdry. From January 2005 until January 2006, the parliamentary authorities received over a hundred FOI requests for information on MPs expenses most of which were refused on data protection grounds (see chapter 8).[2] In January 2007, the Information Tribunal (IT) ruled in favour of release of MPs' travel expenses – there had been publication of Scottish MPs expenses in Scotland. A Conservative MP, David Maclean introduced a Private Members' Bill into the Commons. This sought to remove Parliament from the ambit of FOIA. After various procedural manoeuvres, the bill failed in the Lords when it could not attract a sponsor. While conducting an enquiry into MPs expenses, the Speaker became embroiled over published stories of his and his wife's use of expenses. In February 2008, the IT rejected an appeal by the House of Commons concerning ACA allowances and ruled that the information that should be disclosed was in fact more extensive than in the decision of the Information Commissioner (IC) (see chapter 8, p. 309). This decision of the IT was upheld by the High Court. In January 2009, the government drafted an order that, in respect of Members of Parliament, would remove most expenditure information held by either House of Parliament from the scope of the Act. The order was dropped. Then in May 2009, ahead of the July deadline for release of the information to the public, the data were sold via a director of an intelligence company to the *Daily Telegraph*. In June the information was released by Parliament under FOIA – heavily redacted!

Loathed as the FOIA may be by parliamentarians, they had passed the bill after the government accepted the case by the Public Administration Committee to extend its provisions to Parliament. The Act has facilitated the righting of an aspect of 'old corruption'. The Committee on Standards in Public Life began a wide-ranging review of MPs' allowances in the spring of 2009. Political scientists and commentators often ask whether FOI has increased the public's trust in government and Parliament. Surely a question should be: has FOI increased your confidence in wrongs being outed and in appropriate action to remedy serious shortcomings?

On 10 June 2009, Prime Minister Brown announced to the Commons that there would be a new independent statutory Parliamentary Standards Authority to regulate allowances and a statutory code of conduct for MPs. The details are in the Parliamentary Standards Act 2009. Details of expenses would be publicly available. Legislation would cover sanctions for misconduct of Lords. A special all-party Parliamentary Commission will advise on parliamentary reforms including making select-committee processes more democratic, scheduling more and better time for non-government business in the House, and enabling the public to initiate directly some issues for debate. The prime minister announced that FOIA would be extended to a broader range of

[2] O. Gray, The Freedom of Information (Amendment) Bill, Bill 62 of 2006–7, House of Commons Research Paper 07/18.

bodies – private bodies performing public tasks (see chapter 4, p. 122) – and that following the Dacre Review (see chapter 9, p. 352), while there would be greater protection for 'particularly sensitive material' such as those relating to the royal family and Cabinet documents (see chapter 6, p. 205), the thirty-year rule would be relaxed to twenty years for other documents. It is not clear whether this means 'sensitive' documents will be given greater exemption or exclusion from FOIA or whether they will be subject to the thirty-year rule, or both. There would be greater access to government information on the Internet. He also announced steps for further reform of the Lords and its membership, a 'wide debate' on a written constitution, greater devolution and engagement of people in their local communities, proposals for taking the debate on electoral reform forward and increasing public engagement in politics. The plea was for 'integrity and democracy'. There was nothing specific on reforming prerogatives or fixed term Parliaments. (see http://www.number10.gov.uk/ Page19579). The Committee on Standards in Public Life's report, *MP's Expenses and Allowances* is Cm. 7724 (Nov. 2009). There are sixty recommendations. Just a week later, he announced that an enquiry would be established into the war in Iraq. It was to sit in private. Widespread criticism led to concessions.

Chapters six and eight detail the investigations by the IC and the appeals to the IT on requests under FOIA including personal data. Chapter 7 deals with the Environmental Information Regulations. Together with MPs expenses there have been disclosures on meetings between Rupert Murdoch and the prime minister before the Iraq war; and requests leading to eventual disclosure of the Attorney General's advice on the legality of that war and on numbers of missing sex offenders, and advice on reform of the pensions framework to Chancellor Brown in 1997 which had an adverse effect on pensions provision following a request in 2005. Disclosures led to the resignation of Ian Paisley Jr from office in Northern Ireland after he was shown to have lobbied on behalf of a close associate, and disclosures revealed the extent of Prime Minister Blair's involvement in exempting Formula One from the tobacco advertising ban after a donation was given to the Labour Party. The veto under s. 53 FOIA has been exercised in relation to the minutes of Cabinet meetings (see chapter 6, and see HC 622 (2008–9)).

Besides the sensational and state-shaking requests, there is a vast majority of mundane requests all of little importance to those other than the requester. Figures are given in chapter 6. However, the IC has stated that until May 2009 there had been a half million FOI requests, 11,500 complaints to the IC, 1,225 decision notices, 415 appeals to the IT.[3] For the vast majority of these requests, requesters now have a largely free and effective information service where before there was grace and favour – sometimes, perhaps, a very benevolent grace and favour, but one dependent on discretion and length of foot! With the increase

[3] Private Data, Open Government: Questions of Information, Conference, QEII Centre, 13 May 2009.

in numbers there comes an attendant delay in IC investigations, a matter on which the press have complained because of the damage to 'hot news items'.[4]

It came too late to include in the text that the plan to have secret inquests (see chapter 2, p. 64) had been modified, and that the government was to outlaw 'black lists' for employment purposes (see chapter 8, p. 272). Also the notification fee for data controllers has been increased to £500 for controllers with a turnover of over £29.5 million *and* over 250 staff (see chapter 8, p. 310) (SI 1677/2009).

The publication of the Intelligence and Security Committee's (ISC) Report into the London bombings (see chapter 2, p. 50) brought home the importance of data sharing and the dangers of such sharing where there is not in existence a secure framework of data retention and sharing. Sharing is beneficial where it prevents serious crime, assists in law enforcement, improves public service, protects the vulnerable and is used in the public interest for research and statistics. The public concern is over a lack of agreed and specific purposes for building databases. Two problems attend the practice: human negligence in failing to devise safe data systems and the inability of the Data Protection Act now to provide a reliable and appropriate framework of protection. A study commissioned by the Office of the Information Commissioner has made recommendations for a revision to the European Community Data Protection Directive on which the UK legislation for data protection is based.[5]

In June 2009, the IC retired from office to be replaced by Christopher Graham, head of the Advertising Standards Authority (see Justice Committee, *The Work of the Information Commissioner* HC 146 and Reply HC 424 (2008–9)). Relevant official reports cover *Protecting the Public in a Changing Communications Environment* (Home Office Cm. 7586) (see chapter 2, p. 58) a consultation on communications data and the government response to the House of Lords Constitution Committee's report on *Surveillance, Citizens and the State* (Cm 7616) (see chapter 8, pp. 271, 313). The latter report, in discussing numerous recommendations, did not accept an extension of investigation of private-sector data controllers without their consent by the IC as will be the case with public-sector data controllers. Private-sector controllers may be designated as public authorities. In the government Reply to the Public Administration Committee's report *Mandarins Unpeeled* (HC 428 (2008–9)) the Government did not accept the case for an independent body (the IC) to arbitrate disputes concerning publication of memoirs by former ministers or officials. The Committee recommended that contractual duties of confidentiality and assignment of copyright should apply to advisers and civil servants and the Radcliffe principles and the Ministerial Code should apply to ministers (see chapter 9, p. 326).

[4] J. Hayes, *A Shock to the System: Journalism, government and the Freedom of Information Act 2000* (2009).
[5] N. Robinson *et al., Review of the European Data Protection Directive* (2009).

In *Secretary of State for the Home Department v AF(FC) and another* [2009] UKHL 28, the House of Lords in an *en banc* committee of nine judges unanimously overruled (with obvious reluctance) the Court of Appeal's majority decision in *AF* (see chapter 11, p. 437) ruling that such a judgment was not consistent with the European Court of Human Right's (ECtHR) decision in *A v United Kingdom* (see p. 437). The committee declined to consider 'closed evidence' (see p. 432). The judgments of the House 'must be open to all' said Lord Hope (para. 88). To comply with Art. 6 rights to a fair trial the subject of a control order must have sufficient information to allow his special advocate to make an effective challenge to an allegation on which the Secretary of State relies. As Lord Hope said 'in two vitally important sentences [the ECtHR] made it clear that the procedural protections can never outweigh the controlled person's right to be provided with sufficient information about the allegations against him to give effective instructions to the special advocate' (para. 81). The procedures were not criminal trials so sources, methods and complete evidence may not have to be disclosed but providing sufficient information of an essential allegation to make an effective challenge may make it difficult at times to avoid this. The choice for the Secretary of State is then a stark one: proceed but disclose; don't disclose, orders will be quashed. The Law Lords believed that the majority in the Court of Appeal in *AF* had interpreted *MB* correctly so *MB* decided that an *irreducible minimum of evidence* did not have to be disclosed in every case but this holding was not consistent with the ECtHR's judgment in *A,* the Law Lords have now ruled. The Prevention of Terrorism Act 2005 could however be read down as the majority accepted in *MB* so that its provisions did not lead ineluctably to the imposition of a control order in a procedure requiring a breach of Art. 6 and the Human Rights Act and a declaration of incompatibility. What life remains in control orders we shall have to see. Lord Brown believed that the ruling in *AF* would make no difference to the procedures of the Special Immigration Appeals Commission (SIAC) in deportation cases and *RB* (see p. 435) where no other Convention rights applied apart from an effective remedy under Art. 13 (para. 113). Other procedures involving special advocates and closed material, such as forfeiture orders under the Counter Terrorism Act 2008, where Convention rights are in play requiring Art. 6 protection, will be affected.[6] It was emphasised that what was 'fair' would be for the judges at first instance with only an appeal on a point of law to the Court of Appeal.

Following the ECJ decision in *Kadi* (see chapter 11, p. 438) the Court of First Instance ruled in *Othman v Council* (Case T-318/01: 11 June 2009) that financial restrictive measures in Council Regulation EC 881/2002 (27 May 2002) which implemented UN Security Council Resolutions, and in which Othman was named, were unlawful for depriving the applicant of an effective

[6] They are also used in The Proscribed Organisations Appeals Commission, Pathogens Access Appeals Commission, planning inquiries, s. 57 Race Relations Act, in Northern Ireland, Parole Board hearings, judicial review, criminal proceedings and the Security Vetting Appeals Panel. Cf. *A v HM Treasury* [2008] EWCA Civ 1187.

right of challenge. He was given no opportunity to challenge the evidence. The Regulation was annulled.

The IT judgment *Guardian News and Media Ltd v IC and MoJ* EA/2008/0084 upheld the IC's decision (FS50145985 – chapter 8, p. 299) and ruled that details of disciplinary action against judges were rightfully refused under s. 40 FOIA and s. 31. The judgment has interesting details on procedures involved. The IC's annual report for 2008–9 is HC 619 (2008–9).

The House of Lords select committee on the EU published a report on access to EU documents (HL 108 (2008–9) (see chapter 10). Proposals for making the office of Attorney General more independent were dropped from the Constitutional Reform and Governance Bill in July 2009 (see chapters 2, p. 38, and 3, p. 116). A *Protocol between the Attorney General and Prosecuting Authorities* was published in July 2009 and the AG's consent for prosecutions will be retained where required by law (as in the Official Secrets Act) or where national security is involved (see www.attorneygeneral.gov.uk/attachments/Protocol%20between%20the%20Attorney%20General%20and%20the%20Prosecuting%20Departments.pdf).

The Public Administration Select Committee published its report on *Leaks and Whistleblowing in Whitehall* and recommended a greater role for the Civil Service Commissioners (HC 83 (2008–9)) (see chapter 9, p. 348). The Joint Committee on Human Rights published its report on *Allegations of UK Complicity in Torture* which included criticisms of a lack of accountability structures for intelligence and security (HL 152/HC 230 (2008–9)) (see chapter 2 and the Foreign Affairs Committee HC 557 (2008–9)).

In two cases the High Court has found the IT and IC in error in relation to information held by the BBC for the purposes of 'journalism, art or literature' (p. 142 below). The court ruled that the 'predominant purpose test' for holding information was not a part of the statutory language and that the expression 'journalism etc' was not to be construed narrowly as the IC and IT had done (*BBC v Sugar and IC* [2009] EWHC (Admin) 2349 and *BBC v IC* [2009] EWHC (Admin) 2348). The IT's decisions were reversed.

The decision in *Binyam Mohamed v Secretary of State* (see chapter 2, p. 33 and chapter 11, p. 426) was reopened in [2009] EWHC 2549 (Admin). In a redacted judgment, the court ordered release, pending appeal, of the seven paragraphs relating to interrogation of BM from the documents supplied by US intelligence to the UK. No details of any intelligence factors would be released by the order. 'We consider that, viewed objectively, a decision by a court in the United Kingdom to put the redacted paragraphs into the public domain in the circumstances of this case would not infringe the principle of [US] control over [US] intelligence . . . The information related to matters of great public importance' (para. 73). Evidence from the CIA and Secretary of State Clinton did not reveal a 'real risk' to national security in so far as future intelligence may not be given to the UK by the USA, the court believed. The court was not persuaded that co-operation would not continue. A different context now

operated in the USA. The seven paragraphs were of historical significance but no longer secret intelligence. The court made observations about the absence of a 'systematic archive' for closed judgments as well as any procedure to apply for access.[7]

The enforcement notices upheld by the Information Tribunal in *Chief Constable of Humberside etc. v IC* (pp. 13 and 287 below) were quashed by the Court of Appeal ([2009] EWCA Civ 1079) and the Tribunal's decision reversed.

Hansard HC vol. 496, col. 64 WS (16 July 2009) has a statement on a revised code under s. 46 FOIA, a reduction of the period of thirty years to twenty years under the Public Records Act and the designation of private bodies as public authorities under s. 5 FOIA (see chapter 4, p. 122). The Prime Minister has announced a programme to make public sector information available via the web to assist in service delivery: www.data.gov.uk following the White Paper Putting the Frontline First: Smarter Government Cm 7753 (2009) (see pp. 14 et seq infra).

Finally, chapter 2 has been significantly extended as a chapter in its own right covering national security, secrecy and information. Chapter 1 focuses on the contextual and theoretical context of freedom of information. A sobering thought on the contemporary information age is that the World Wide Web now contains a trillion pages growing at the rate of 3 billion per day.[8] Chapters 6, 7 and 13 are completely new and chapter 8 is significantly amended and extended. Chapter 9 is new but is based on chapters 4 and 5 from previous editions. All remaining chapters have been fully revised.

[7] See further [2009] EWHC 2973 (Admin).
[8] Peter Fleischer, Google Global Privacy Council, note 3 above.

1

Persistent themes and novel problems

The popular phrase 'Information Society' was coined to describe the essence of the computerised world. From globalised financial markets to government, from national and international security to education, from multinational corporations to small employers, from police to social welfare, medical treatment and social services, we are confronted by information repositories and retrieval systems whose capacity to store and transmit information is staggering. A moment's thought should make us appreciate that we have always been an information society. Anyone who has studied the constitutional history of Britain will appreciate that a major factor in the struggle between Crown and Parliament was the latter's desire to be informed about who counselled and advised the monarch in the formulation of policy. That monumental work in the history of our public administration, the Domesday Book, was basically an information exercise to assess the wealth and stock of the nation.[1] Our process of criminal trial by law constitutes an attempt to exclude unreliable evidence and to establish by rules of evidence a more reliably informed basis of fact on which to establish guilt or innocence. Lawmaking itself 'confessedly needs to be based on an informed judgment' requiring 'the widest access to information'.[2] The spread of information in the form of fact, opinion or ideas has variously been repressed, exhorted, victimised or applauded to advance the ideologies of those whose moment of power is in the ascendant. In this general sense, we can see previous societies as information societies. What is novel in our society, however, is the heightened awareness of the use, capability of collection, dissemination or withholding of information. Such functions are facilitated by artificial intelligence systems, advanced information technology and the opportunities which exist to influence public opinion through ever-more sophisticated telecommunications, information technology and information dissemination networks.

Many *causes célèbres* have involved information in the form of the giving or keeping of confidences. Socrates would have been in his element in discussing

[1] See Cm. 7022, HM Treasury on the National Assets Register with details of public assets worth over £1 million to a total in 2008 of £338 billion.
[2] R. Berger, *Executive Privilege* (1974), p. 3

the case of a civil servant deliberately leaking information to 'advance' the public interest (PI); the nature of informed consent before medical treatment;[3] the extent of the duty to inform parents of advice by doctors to their children;[4] a leak of a difference of opinion between the head of state and the prime minister on government policies;[5] the failure to inform those affected of the extent of nuclear accident and disaster;[6] seeking to prevent disclosure of information that would reveal the Government knew that defendants in a criminal trial were wrongfully indicted;[7] the use of allegedly unreliable information to support a case for armed invasion;[8] the loss of information about sensitive details on millions of individuals stored in electronic retrieval systems. For a Socrates, the details would be novel; there would, however, be a persistence in the nature of the problems they pose. The 'problems' surround the 'use' and 'abuse' of information. 'Use' and 'abuse' in this context are evaluative terms, and ones which I hope will be clarified in the course of this book. They are also relative terms. We may consider that a government abuses information when, without apparent justification, it refuses individuals access to information in its possession. This would not be the case in a system geared towards traditional representative democracy – where our representatives govern on our behalf and account to a collective assembly. It would certainly not be the case where government is absolutist and is accepted as such by those whom it governs.

A further comparative aspect of the terms 'use' and 'abuse' is present in two other features. One concerns the changing nature of the role of government not simply as an agent protecting and defending the realm from external and internal strife, but as a shaper of people's lives in almost every conceivable way. Government intervenes more and more in our society, whatever its political hue and whether to defend us or to influence us. Different roles require different sorts and amounts of information. The administrative regulatory state is the most acquisitive. In addition, the sophistication of information technology has made the collection, storage and retrieval of information not simply a national and corporate preoccupation, but a global one. The speed and ease with which

[3] *Sidaway v Board of Governors of the Bethlem Royal Hospital etc.* [1985] AC 871; *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771; *Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR P53.

[4] *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, HL, concerning contraception for girls under 16; *R (Axon) v Secretary of State for Health* [2006] EWHC (Admin) 37.

[5] Resulting from a leak by the Queen's Press Officer: *The Times*, 8 July 1986.

[6] And secret post mortems on bodies of former workers at the Sellafield plant, *The Times*, 19 April 2007.

[7] See A. Tomkins, 'Public interest immunity after Matrix Churchill' (1993) Public Law 650, and *The Constitution after Scott: Government unwrapped* (1998); these were the events behind the Matrix Churchill inquiry by Sir Richard Scott. See P. Birkinshaw, (1996) JLS 406; B. Thompson and F. Ridley, *Under the Scott-light* (Oxford University Press, 1997); (1996) Public Law Autumn Issue dedicated to The Scott Report.

[8] *Review of Intelligence on Weapons of Mass Destruction* under Lord Butler, HC 898 (2003–4).

information may be transferred across national boundaries, by governments or private concerns, or matched by computers for different purposes from those for which the information was collected, is seen by many as an abuse in itself. The 'abuse' would be in the creation of information systems which are incapable of effective regulation at a price that treasuries would be prepared to tolerate. Privacy protection has not traditionally been afforded a high political priority in the United Kingdom; the developments which I have referred to diminish it even further. The impact of the Data Protection Act 1998 (DPA) and Human Rights Act 1998 (HRA) will be examined but their contribution to privacy protection is qualified.

Things must be seen in perspective. The UK Government is a holder of vast amounts of manual (i.e. documentary) information, much of it on individuals.[9] But the movement towards a 'paperless environment', as IBM's administration was described over twenty years ago during the passage of the Access to Personal Files Act in 1987, is a distinct characteristic of our age. The characteristics of information technology, however, require further elaboration.

Computers and information

Information technology is often described in exceptional and dramatic terms. The following from more than twenty years ago and before the emergence of the Internet and its staggering implications is a vivid example:

> In the last hundred years, we see the rapidly accelerating advent of a technology so powerful, novel, widespread, and influential that we may indeed call it the Second Industrial Revolution. Its basis is electromagnetic, in many interconnected forms: photography, photocopying, cinematography, and holography; telegraphy, telephony, radio communication, radar, sonar, and telemetry; sound and video recording and reproduction; vacuum tubes, transistors, printed circuits, masers, lasers, fiber optics, and (in rapid succession) integrated circuits (IC), large-scale integration (LSI), and very large-scale integration (VLSI) of circuitry on a tiny semiconducting 'chip'; and, finally, the bewildering variety of electronic digital computers. All these devices are intimately interrelated, and any advance in one tends to generate advances in all of them.
>
> The progress has been truly amazing. In only about 40 years, electronic communications and news media have become commonplace and indispensable; computers have proliferated, becoming increasingly fast, powerful, small and cheap, so that now there is scarcely a human activity in which they are not to be found, bearing an increasing share of the burden of repetitive information processing, just as the machines of the First Industrial Revolution have taken over the majority of heavy and unpleasant physical labor (we may say, energy processing).

[9] www.ancestor-search.info/NAT-NatArchives.htm and see ch. 9, p. 351.