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Freedom of Information Legislation and Application: Japan and the UK

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Table of Contents

Acknowledgements	1
1. Introduction	2
2. Literature review	
2.1 Existing research on FOI and journalism in Japan and the UK	5
3. Media analysis	
3.1 How often have journalists used FOI in Japan and the UK?	8
4. Case studies in Japan	
4.1 Overview of the FOI legislation	12
4.2 Misuse of public expenses by Tokyo Governors	13
4.3 Misuse of disaster reconstruction money	15
4.4 Government letters to the US military	17
5. Case studies in the UK	
5.1 Overview of the FOI legislation	19
5.2 MPs' expenses scandal	23
5.3 Prince Charles's letters	25
5.4 The Government's Failed attempt to water down FOI	27
5.5 National security vs. FOI	28
5.6 A powerful tool for local journalists	30
6. Challenges of FOI for journalism	
6.1 Lazy journalism?	32
6.2 Less recording and the "chilling effect"	34
6.3 Delay and redaction	36
7. Conclusions and recommendations	38
Bibliography	40
Appendix	42

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Chapter 1: Introduction

In 2004, I published a story which revealed a misuse of public expenses by Tokyo's Governor based on public documents obtained by using a Freedom of Information (FOI) request for the first time in my career as a journalist.¹ This report led the Governor to express "regret"² and to start disclosing his expenses proactively on the Tokyo Metropolitan Government's website.³

It was an eye-opening experience. We could be a watchdog without special sources like "Deep Throat".⁴ Since then, I have believed in the power of FOI legislation as a tool for investigative journalists who strive to make public authorities accountable.

Journalists who conduct in-depth reporting often rely on leaks. But this means they are sometimes dependent on the sources' intentions, and there are risks of being controlled by sources. FOI enables journalists to be free from these pressures.

Indeed, the number of countries which have FOI legislation has been increasing. According to Article19, an NGO based in the UK, only 13 countries had FOI legislation in 1990.⁵ However, in 2016, freedom of information advocate group FreedomInfo.org counted 115 countries which have FOI laws or similar administrative regulations, including China and Russia.⁶ Article19 suggests that this means over five billion people are living under the FOI legislation.⁵

The first FOI legislation, the Freedom of the Press Act, was passed in the Swedish parliament in 1766. The second pioneer was the United States, which adopted the Freedom of Information Act in 1966. However, since the 1980s FOI legislation has spread rapidly across the world with legislation in both Japan and the UK part of this expansion.

Article19 has published an "FOI map" on its website.⁷ On that map countries with

¹ Satoshi Kusakabe, Osamu Ishimaru, Koji Yamane, Exploring Shintaro Ishihara, *The Sunday Mainichi* –Vol.4600-4605, 2004 (Japanese)

² Tokyo Metropolitan Government, Press Conference by the Governor, 2 February 2007 (Japanese),

<http://www.metro.tokyo.jp/GOVERNOR/ARC/20121031/KAIKEN/TEXT/2007/070202.htm>

³ Tokyo Metropolitan Government, Governor's Office (Japanese),

<http://www.metro.tokyo.jp/tosei/governor/governor/kosaihi/index.html>

⁴ Bob Woodward, *The Secret Man: The Story of Watergate's Deep Throat*, Simon & Schuster, 2005

⁵ Article 19, Freedom of information, <https://www.article19.org/pages/en/freedom-of-information-more.html>

⁶ FreedomInfo.org, <http://www.freedominfo.org/2016/04/105-foi-regimes-freedominfo-org-count-shows/>

⁷ Article19, *National Laws and Regulations on the Right to Information*,

FOI laws (shaded green) can be found on all the continents, except for substantial parts of Africa and the Middle East.

National Laws and Regulations on the Right to Information



Figure1. FOI map⁷

Under these circumstances, utilising FOI has become one of the most important tools for journalists today.

Moreover, in the midst of the “post-truth” era, the importance of an informed public and the risks of ignorance are increasing. This means reliable information from credible sources has become significantly more important. Thus the public record is one of the effective sources to scrutinise to discover whether governments and public authorities are working properly.

FOI is a key concept for guaranteeing people’s access to these records as well as protecting people’s fundamental right to information, which is at the heart of democracy. The 1946 United Nations General Assembly resolution declares:⁸

Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters.

<https://www.article19.org/maps/>

⁸ Calling of an international conference on freedom of information, 59(1), Resolutions adopted by the General Assembly during its first session at 1946

In this report, I explore how journalists utilise FOI, through a comparative analysis in both Japan and the UK. This paper aims to answer the following three major questions:

1. How have journalists in Japan used FOI legislation for investigative reporting?
2. How have journalists in the UK used FOI legislation for investigative reporting?
3. What are the current and future challenges of FOI legislation for journalists in Japan and the UK?

To answer these questions, firstly, I trace the current situation surrounding FOI in Japan. After presenting an overview of FOI legislation, I examine how journalists and other key players in Japan have used the legislation for investigative reporting.

Secondly, I explore the cases in the UK, and trace a history of the battle between the government and journalists over FOI.

Finally, I identify current and future challenges of using FOI requests for investigative reporting and suggest some options for the future.

Chapter 2: Literature review

2.1 Existing research on FOI and journalism in Japan and the UK

There has been very little research about the relationship between FOI and journalism in Japan, despite the first local government adopting FOI legislation in 1982. Despite searching a data base called NDL-OPAC, run by the National Diet Library,⁹ I could not find any academic publication concerning how journalists in Japan have used the FOI law.

Journalists have, however, published articles and essays which illustrate how they have utilised FOI for their investigation, encouraging other journalists to do the same.

A monthly magazine called *Journalism* published a special edition titled “Investigative reporting by using FOI” in 2009.¹⁰ In this edition, a campaigner, two fellow journalists and I contributed articles. These describe effective ways of filing FOI requests, how journalists utilised more than 7,000 pages of public documents to reveal illegal deforestation, and how the public documents which supported the campaign over the Tokyo governor’s expenses scandal were valuable for my investigation.

Yukiko Miki, head of the Access-Info Clearinghouse Japan campaigning group and one of the leading figures on freedom of information in Japan, published a series of three articles entitled “Seminar for journalists: Let’s start using FOI” from October to December 2016 in the same magazine.¹¹ In these articles, she explained how to make FOI requests and introduced some tips for journalistic use of FOI. She argued:¹²

To broaden FOI, “challengers” are needed. They file requests and fight against public authorities by using the appeal procedure when the authorities withhold the information. I believe utilising FOI by journalists would expand the possibilities of FOI.

In contrast, there is more academic research about FOI and journalism in the UK, and some journalists have published guide books or run websites to encourage journalists to use FOI as a practical tool for reporting.

⁹ The National Diet Library has been collecting almost all publications in Japan including books, magazines, newspapers and others in accordance with the Legal Deposit System.

¹⁰ *Journalism*, The Asahi Shimbun Company, March 2009

¹¹ *Journalism*, Asahi Shimbun Publications, October-December 2016 (Japanese)

¹² Yukiko Miki, Seminar for journalists: Let’s start using FOI, *Journalism*, Asahi Shimbun Publications, October 2016 (Japanese)

One piece of major academic research was conducted by Robert Hazell, Ben Worthy and Mark Glover, all from University College London, from 2007 to 2009, and published in 2010 as *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI work?*

The aim of this research was “a systematic evaluation of the impact of FOI on central government in the UK”¹³. In this research, interviews were conducted with 102 people, including civil servants, journalists, campaigners and others, and media analysis was conducted by using a total of 5570 articles from the national press in the UK.¹⁴

Ben Worthy, one of the authors and a leading researcher in the field of FOI, points out that journalists have played an important role in the UK. He puts it like this:¹⁵

Journalists are a core user group, with a disproportionate influence as their stories, or reporting of FOI requests made by others, gain wide publicity. ...the media use, innovate and protect FOI in the UK.

In 2015, ten years after FOI legislation came into effect in the UK, *FOI 10 years on: freedom fighting or lazy journalism?* was published.¹⁶ The book consists of 31 essays contributed by academics and journalists. One its editors, Tom Felle, acting director of interactive and newspaper journalism at City University London, explained the aim of this book:¹⁷

Our new book explores the impact of the law on British journalism and on how government and news is reported. FOI was a welcome development internationally, but many countries, including the UK, are rowing back on openness. And post Snowden governments are becoming ever more secretive.

London-based journalist Matt Burgess published a book called *Freedom of*

¹³ Robert Hazell, Ben Worthy and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI work?*, London, Palgrave Macmillan, 2010, Foreword

¹⁴ Ibid, pp53-57

¹⁵ Ben Worthy, *Freedom of Information and the Media*, *Routledge Companion to Media and Human Rights (in press)*, London, Routledge, 2017

¹⁶ Tom Felle and John Mair, *FOI 10 Years On: freedom fighting or lazy journalism?*, Suffolk, Abramis academic publishing, 2015

¹⁷ City University of London, *FOI 10 years on: freedom fighting or lazy journalism?* <http://www.city.ac.uk/news/2015/january/foi-10-years-on-freedom-fighting-or-lazy-journalism>

Information: A Practical Guide for UK Journalists in 2015. He wrote not only about how journalists make FOI requests but also about the historical context of FOI and journalism. He explained:¹⁸

This book aims to serve as a guide to the Act and provide as much digestible information as possible, while equipping you with the tools to successfully make requests, challenge their outcome and get the most out of the Act by using rights that are conveyed to individuals.

This book was based on his website *FOI DIRECTORY*.¹⁹ It contains lists and contact details of more than 10,000 public authorities, and lots of links to current reporting based on FOI requests.

David Higgerson, Trinity Mirror’s digital publishing director, collects on his website FOI-based stories from regional newspapers “which have the potential to be replicated elsewhere”²⁰. He says the FOI Act is “one of the most powerful tools at our disposal as journalists, and one which should be used more frequently”.²⁰

¹⁸ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, Preface

¹⁹ Matt Burgess, *FOI DIRECTORY*, <http://www.foi.directory/>

²⁰ David Higgerson, *Journalism, online, random thinking*, <https://davidhiggerson.wordpress.com/foi/foi-friday/>

Chapter 3: Media analysis

3.1 How often have journalists used FOI in Japan and the UK?

Many journalists in Japan and the UK have recently been using FOI requests for their reporting, especially investigative reporting. Tables 1 and 2 show selected headlines in national newspapers, and one headline used by a broadcaster, based on FOI requests in Japan and the UK respectively in March 2017.

Table 1 Selected news reports' headlines using FOI in March 2017 in Japan

<i>The Sanyo</i>	Takahashi City Board of Education have done nothing with 16 thousand donated books for 10 years	5 March
<i>The Yomiuri</i>	Arsenic detected in 2013 test at Tsukiji fish market	7 March
<i>The Mainichi</i>	Several parts of the wall of Nagano City's town hall have been broken	17 March
<i>The Asahi</i>	Evacuation plan may not work in case of accident at Tokai No. 2 nuclear power plant	24 March
NHK	The road subsided a year before the huge sinkhole opened in front of Hakata Station	27 March

Table 2 Selected news reports' headlines using FOI in March 2017 in the UK

<i>The Guardian</i>	Why the true scale of university harassment is so hard to uncover; A six-month investigation has revealed inconsistencies in how claims are handled, meaning data underestimates the problem	5 March
<i>The Sun</i>	151 MPs who hire relatives	13 March
<i>The Daily Telegraph</i>	MoD accused of covering up abuse claims at top Army school; Police launch review into alleged failure to examine complaints at leading military institution	18 March

<i>The Times</i>	Universities warn students: pay debts or there's no degree	22 March
<i>Mail Online</i>	Questions over millions of pounds of road safety money which is 'missing' from ex-police chief's private firm	26 March

But how often do they use FOI requests? I sought to calculate the numbers and percentages of reporting based on FOI requests or reporting about FOI itself in both countries.

To conduct the analysis, I selected three mainstream media sources in each of the two countries.

For Japan, I collected articles from *The Yomiuri*, *The Asahi* and *NHK* (Japan Broadcasting Corporation) News. *The Yomiuri* is the largest national newspaper in terms of its circulation and is regarded as a leading conservative paper. *The Asahi* is regarded as a leading liberal paper and NHK is a public broadcaster with similarities to the BBC.

As for the UK media, I selected *The Daily Telegraph* as a typical conservative national paper, *The Guardian* as a liberal one, and *BBC News*.

To obtain the articles, I used databases run by each Japanese media company and Nexis for UK media.²¹

I collected the articles for three years from 1 January 2014 to 31 December 2016 by using the search terms “information disclosure request” or “information disclosure law” or “information disclosure ordinance” for Japan, as the term “freedom of information” is usually called “information disclosure” and FOI laws in local governments are called “ordinances” in Japan. For the UK, I used “freedom of information request” or “freedom of information law” or “freedom of information act”.

According to the analysis, the selected British national media mentioned FOI five times more than their Japanese counterparts did. (The results are shown in Table 3). During these three years, 0.06% of stories published in the three Japanese sources were based on FOI requests or concerned FOI, while the figure for such stories in the British press was 0.3%. In other words, 1.05 FOI stories were published per day by these three media sources in Japan, while there were 2.64 such stories per day in the UK (see Appendix 1, Appendix 2).

²¹ I used the following databases for Japanese articles: Yomidasu Rekishikan (*The Yomiuri Shimbun*), Kikuzo II Visual (*The Asahi Shimbun*), @nifty Business Data (for NHK News). Regarding BBC News, I selected BBC News 24 in Nexis.

Table 3 Number of articles and percentage of reporting concerning FOI: Japan and the UK

2014-2016			
	FOI articles	All articles	FOI (%)
Japan	1040	1761065	0.06
UK	2896	977228	0.3

However, the fact that that the British government tried to review FOI legislation from July 2015 to March 2016, arguably made the numbers of FOI stories increase. However, the percentage of FOI stories published by the British media in 2014 is 0.21, which is four times as high as the figure for the Japanese media (0.05).

The difference in media reach between both countries also needs to be taken into account.

The Japanese papers have a much higher circulation than the British ones. The total circulation of *The Yomiuri* and *The Asahi* was 15,601,028²² in 2016, while *The Daily Telegraph* and *The Guardian* had a circulation of 636,196.²³ This means that these two Japanese papers reached at least 12.3% of the total population, while the two British papers reached 0.97%.²⁴ However, as many readers access stories online these days, further studies are needed to measure the percentage of the potential audience that read the FOI stories.

I also conducted an analysis on *The Mainichi*, a national newspaper I work for. It is regarded as a centre-left paper. *The Mainichi* reported FOI stories slightly more than other national press in Japan (see Appendix 3).

Focusing on the difference between conservative and liberal Japanese newspapers, the percentage of FOI stories published by liberal-leaning *The Asahi* and *The Mainichi* are

²² According to *The Yomiuri's* and *The Asahi's* websites, the circulations in 2016 are 9,017,238 and 6,583,790 respectively.

<http://adv.yomiuri.co.jp/m-data/english/print01.html>
https://adv.asahi.com/adv/other/ad_info/media_kit/DATA_FILE_2017_PDF.pdf (Japanese)

²³ According to *Press Gazette*, the circulations of *The Daily Telegraph* and *The Guardian* are 496,286 and 171,723 respectively.

<http://www.pressgazette.co.uk/abc-figures-national-press-sees-june-brexit-vote-boost-in-print-and-online/>

²⁴ According to the official statistics, the population of Japan was 126,790,000 in 2016, and the population of the UK was 65,110,000 in 2015.

<http://www.stat.go.jp/english/data/jinsui/tsuki/index.htm>
<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates>

constantly higher than conservative-leaning *The Yomiuri* during the three years.

However, there appears to be a major difference between Japanese and British media.

I calculated numbers and percentages for FOI stories in the *Daily Mail*, which is “seen as Britain’s most right-wing newspaper”²⁵ and which is regarded as one of the most influential tabloids in the UK.

The result shows that the *Daily Mail* mentioned FOI more frequently than other national media in the UK (see Appendix 4). The percentage of the FOI stories for the three years, 0.6, is twice as high as the averages of *The Daily Telegraph*, *The Guardian* and the BBC.

This result means that political positioning is not necessarily a decisive factor regarding whether or not journalists in the UK are interested in FOI.

²⁵ Matthew Smith, How left or right-wing are the UK’s newspapers?, *YouGov UK*, 7 March 2017, <https://yougov.co.uk/news/2017/03/07/how-left-or-right-wing-are-uks-newspapers/>

Chapter 4: Case studies in Japan

4.1 Overview of FOI legislation

FOI legislation has a relatively long history in Japan. The first local government to adopt FOI laws, in 1982, was Kaneyama, a town in the Yamagata prefecture, which is located in the northern part of Japan.

The first citizens' movement to call for FOI legislation began in the 1970s and was driven by concern over the lack of transparency surrounding the safety of the drug thalidomide, environmental pollution and political corruption. Campaigners and lawyers established the Citizens Movement for an Information Disclosure Law in 1980, and some local governments began introducing FOI legislation in the 1980s.

A national law, the Act on Access to Information Held by Administrative Organs, was finally enacted in 1999 and went into effect in April 2001. Separate legislation applies to public companies (quangos). This was adopted in November 2001.

Regarding local governments, all 47 prefectural governments and more than 99% of local governments (cities, towns, villages) had already adopted FOI laws by 2014, except for two towns out of a total of 1,739 local governments.²⁶

Under Japanese national FOI laws, anyone can request information and every administrative organisation, including intelligence agencies, is obliged to respond to the requests. Although the legislative body and judicial branches are excluded, they adopted similar information disclosure systems based on internal regulations.

Requesters must pay a basic fee at the time of the request and a subsequent additional fee which depends on the number of disclosed documents required.

The FOI legislation has roughly six categories of exemptions, including information concerning specific individuals, national security, interests of corporations, law enforcement activities, internal deliberations, and the concluding of contracts.²⁷

The Act does not stipulate the obligation of a public interest test (PIT) for authorities and all the exemptions are subject to a harm test. PIT is a test which “requires the public authority to balance the interests of withholding the information against the interests of

²⁶ Ministry of Internal Affairs and Communications, A survey on information disclosure legislation in local governments, 1 October 2014 (Japanese)

²⁷ Article19, *Country Report: The Right to Information in Japan*, 6 October 2015, <https://www.article19.org/resources.php/resource/38132/en/country-report-the-right-to-information-in-japan>

disclosing it”.²⁸

The Act allows requesters to make an appeal to the Information Disclosure Review and Personal Information Protection Review Board (the Review Board) when requesters do not get the information they request. The Review Board is an independent body established within the Ministry of Internal Affairs and Communications. All the local governments have a similar system as well.

The Review Board consists of lawyers, academics, former judges and others. They are selected and appointed by the Prime Minister and approved by the Parliament. Although the Review Board has power to inspect the original documents, its decision is not binding.

At the same time, requesters are allowed to appeal to the courts without appealing first to the Review Board. However, judges are not allowed to see the original documents. David Banisar, senior legal counsel for Article19, said:²⁹

It is very strange. Probably in some cases a junior person can access sensitive documents, but judges who are appointed by the Prime Minister and approved by the Parliament are not trusted. That means things are very much backwards.

The main reason why the courts have no power to inspect secret documents derives originally from the Constitution of Japan, which stipulates, “Trials shall be conducted and judgment declared publicly.”³⁰ However, in 2009, the Supreme Court decided that it would be possible for the court to see the original document if the FOI legislation were amended. Since then, revision of the system has been left up to Parliament.³¹

4.2 Misuse of public expenses by Tokyo Governors

In 2004, I wrote a series of articles about the misuse of public expenses by the Governor of Tokyo, Shintaro Ishihara, in a weekly magazine, *The Sunday Mainichi*. The six-part series of articles was published from January to March 2004.¹ Ishihara had been known as a novelist and a right-wing politician and was a celebrity in Japan. He stepped down

²⁸ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p.156

²⁹ Conference held by Access-Info Clearinghouse Japan in Tokyo, 6 October 2015

³⁰ Article 82, *The Constitution of Japan*, http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html

³¹ Motoaki Hatake, Freedom of Information Lawsuits and In-camera Inspection: Current Trends and Issues of FOI, *The Legislation and Research*, The House of Councillors, July 2010 (Japanese)

in 2012 to launch a new political party and retired from politics in 2014.

To prepare for the reporting, I filed FOI requests to the Tokyo Metropolitan Government about the Governor's personal expenses, official overseas trips, operational records of his official vehicle and his schedule since he took his seat in 1999. Three weeks later, the government disclosed a massive number of documents which filled three cardboard boxes.

As a result of this disclosure, I discovered that he had used government funds to pay for dinners with his friends on many occasions. Significant sums of money were spent on luxury accommodation and transportation during official overseas trips.

For instance, he spent ¥1,410,000 (£9,791) on dinners or lunches with politicians, business people, and other celebrities, including his friends, from April to October 2003.³² When he visited the United States to have a meeting with US government officials in 2002, he rented a limousine for four days at a cost of ¥832,000 (£5,777).³³

Although there were no clear statutory prohibitions on spending taxpayers' money on eating and drinking or on expensive accommodation, there had been many legal precedents in Japan involving local politicians and officials being ordered to return the public funds they had spent on such items.

In addition, the public documents revealed that Ishihara went to the Tokyo Metropolitan Government Office only three days a week on average.³³

Following the publication of my series of six articles, some citizens who read the stories filed legal cases against Ishihara to force him to return ¥4,640,000 (£32,222) of business trip expenses and ¥12,000,000 (£83,333) that he spent on social expenses, to the Tokyo Metropolitan Government. The Tokyo District Court ruled that Ishihara had to return part of the expenses relating to his business trip in June 2006,³⁴ and part of his personal expenses incurred in January 2007 too.³⁵ These court decisions prompted a similar investigation, conducted by members of the Tokyo Metropolitan Assembly, who belonged to the Japan Communist Party (JCP). Their investigation was based on FOI requests as well.³⁶

The result of the JCP's investigation hit the headlines, and the Governor faced tough criticism. Although he managed to win his third-term election in April 2007, he expressed "regret"² and started disclosing his expenses proactively on the Tokyo

³² Satoshi Kusakabe, Exploring Shintaro Ishihara, *The Sunday Mainichi*, 18 January 2004 (Japanese)

³³ Satoshi Kusakabe, Osamu Ishimaru, Exploring Shintaro Ishihara, *The Sunday Mainichi*, 25 January 2004 (Japanese)

³⁴ *The Mainichi*, 17 June 2006 (Japanese)

³⁵ *The Mainichi*, 31 January 2007 (Japanese)

³⁶ *The Mainichi*, 10 February 2007 (Japanese)

Metropolitan Government's website.³

Nine years later, another Tokyo governor's expenses scandal emerged.

In April 2016, the JCP revealed extraordinary expenses for official trips abroad by the then governor, Yoichi Masuzoe, including trips to London, Paris and New York, among others.

A major weekly news magazine, the *Shukan Bunshun*, dug deeper into this issue by using an FOI request for operational records of his official vehicle and political funds' records.

As a result, the *Shukan Bunshun* revealed that Masuzoe had used his official vehicle 48 times to travel to and from his holiday villa in Yugawara, a hot spring resort 100 kilometres away from the Tokyo Metropolitan Government Office,³⁷ as well as using ¥370,000 (£2,569) of political funds on staying at a hotel in another resort and calling it a "conference cost", and ¥300,000 (£2,083) on private dining.³⁸ He was forced to resign on 21 June 2016.³⁹

4.3 Misuse of disaster reconstruction money

On Friday 11 March 2011, at 2:46 pm, a magnitude 9.0 earthquake hit the Pacific coastline of the eastern part of Japan and was followed by a huge tsunami. The total number of confirmed deaths was 15,893, with 2553 missing, and 121,764 houses or buildings were completely destroyed. Damage was caused to 4,198 roads and 116 bridges.⁴⁰ The meltdowns caused by the tsunami at Fukushima No. 1 nuclear power plant forced many local residents out of their homes, and in 2017 109,008 people are still evacuated from the damaged area, including Fukushima.⁴¹

Since the earthquake, reconstruction of the damaged area has been one of the top-priority issues for the Japanese government, and it has been pouring a huge amount of money into this. The budget from 2011 to 2012 was ¥19 trillion (£130 billion).

However, a documentary called *Pursuing the ¥19 trillion Reconstruction Budget*, which was aired by the Japan Broadcasting Corporation (NHK) on 9 September 2012, revealed that at least ¥2.45 trillion (£16 billion) had been spent on projects that had little or nothing to do with the disaster victims, while the people who actually needed

³⁷ *Shukan Bunshun*, 5-12 May 2016 (Japanese)

³⁸ *Shukan Bunshun*, 19 May 2016 (Japanese)

³⁹ *The Mainichi*, 21 June 2016 (Japanese)

⁴⁰ Damage Situation and Police Countermeasures associated with 2011Tohoku district - off the Pacific Ocean Earthquake, National Police Agency of Japan, 10 March 2017

⁴¹ The Number of Evacuees in Japan, Reconstruction Agency, 28 April 2017

help were still struggling to reconstruct their lives due to the lack of financial support.

According to the documentary, the Ministry of Justice received ¥28 million (£1.9 million) for vocational training for inmates in prisons. The Ministry of Foreign Affairs got ¥7.2 billion (£49 million) for an exchange programme for overseas students to experience Japanese culture. Moreover, the Public Security Intelligence Agency received ¥28 million (£1.9 million) for “counter terrorism” activities.

This documentary also uncovered some disorganised spending of the reconstruction budget by the local governments. NHK journalists scrutinised the public documents and found out that some contractors which received orders for debris removal seemed to claim too much and fabricated invoices that were not properly checked by officials.

This programme prompted huge criticism from the public and was followed by other media reports. As a result, the government stopped implementation of ¥16.8 billion (£117 million) of the budget and established a new, strict standard that limited the use of the reconstruction budget to areas directly affected by the disaster.⁴²

This investigative reporting was mainly based on two types of official documents.

The first was the “Administrative Project Review Sheet”, which is published by every central government ministry and explains every single project’s purpose and how its budget will be used. These sheets have been disclosed proactively on each Ministry’s website. This system was introduced in 2010 as a part of the budget-screening project conducted by the centre-left Democratic Party of Japan administration, and was continued by the administration of the current conservative Liberal Democratic Party of Japan.

The second type of document was official documents obtained via FOI requests made to both central and local governments.

According to Yasunobu Kumada, the then NHK’s chief producer in charge of this investigation, they formed a team of ten journalists. They collected 50,000 review sheets and countless other documents via FOI requests and also conducted interviews with government officials, academics, contractors and victims.⁴³ Kumada commented that:⁴³

Open sources are treasure-trove. If you have had a good awareness, you would conduct a great investigative reporting without special skills. However, interviews and field works are also vital. The reason why our documentary had a huge impact on the society was that we combined the massive data, officials’ and victims’ voices into the programme to present a reality to audiences.

⁴² *The Mainichi*, 27 November 2012 (Japanese)

⁴³ Interview with the author, 26 May 2017

4.4 Government letters to the US military

Okinawa Prefecture is located in the southernmost area of Japan and consists of hundreds of the Ryukyu Islands. Although Okinawa Prefecture, which has a subtropical oceanic climate and beautiful coral reefs, occupies no more than 0.6% of the national land area, 73.9% of the land that is for the exclusively for the US forces in Japan⁴⁴ is concentrated in these tiny islands. As accidents and crimes caused by US service personnel, together with aircraft noise and other environmental pollution around the bases have been plaguing residents, most people in Okinawa, as well as local governments, have been demanding for years a reduction in the size of the US military presence.

On 5 August 2013, a US Air Force HH-60 Pave Hawk helicopter, which had four crew members on board, crashed into a mountain two kilometres away from a residential area.⁴⁵ Three crew members were injured, and one died. Although Okinawa's Prefectural Government and local towns and villages called for the suspension of the HH-60's flight training until the cause of the accident was identified, the US Air Force resumed training 11 days after the accident, despite its cause still being under investigation.⁴⁶

Three years later, a local newspaper, *The Okinawa Times*, uncovered that the chief of Okinawa's Defence Bureau, a branch office of the Ministry of Defence (MoD), sent a letter which approved the resumption of HH-60 flights to the commander of the US Kadena Air Base immediately after the US Air Force's official announcement on 14 August 2013.⁴⁷

According to *The Okinawa Times*, the letter said that the resumption was "understandable" and that the "HH60 has played an important role in Japan". The mayor of Ginoza village, in which the helicopter crashed, Atsushi Toma, strongly criticised both the Japanese and the US government in a *The Times* interview, stating: "MoD and the US secretly negotiated without letting local governments know".⁴⁷

This letter was disclosed under an FOI request filed by Dr Masami Kawamura, the director of the Informed-Public Project (IPP), and she offered the document to journalists from *The Okinawa Times*.

Kawamura, a sociologist and former director of an environmental protection

⁴⁴ Okinawa Prefectural Government, *U.S. Military Base in Okinawa*, 22 May 2015, <http://www.pref.okinawa.jp/site/chijiko/kichitai/25185.html>

⁴⁵ *The Ryukyu Shimpo*, 6 August 2013 (Japanese)

⁴⁶ *The Mainichi*, 16 August 2013 (Japanese)

⁴⁷ *The Okinawa Times*, 28 September 2016 (Japanese)

organisation, established the IPP in 2016 to investigate mainly environmental issues. She explained the reason why she established the organisation:

“I grew frustrated with the opacity of the US military, the Japanese government’s failure to hold the US accountable and Okinawa Prefecture’s overdependence on Tokyo to investigate the matter.”⁴⁸

Kawamura pointed out the advantages of an investigation based on FOI as follows:⁴⁹

Japanese FOIA is a very strong research tool in my investigations, even though the law itself has some weaknesses. The FOIA enables citizens to access official documents directly and conduct careful analysis of data produced by the experts. This process empowers citizens with knowledge that is absolutely vital to the strength of democracy. This is the very reason why I named our organisation “The Informed-Public Project”.

⁴⁸ *The Japan Times*, 19 November 2016

⁴⁹ Interview with the author, 8 May 2017

Chapter 5: Case studies in the UK

5.1 Overview of FOI legislation

The Freedom of Information Act 2000 was passed by Parliament in 2000 and came into force in January 2005. It was passed 38 years later than similar legislation in the United States and 4 years later than in Japan. It covers not only central government but also all local governments. Scotland has its own FOI law, which came into effect at the same time.⁵⁰

Ben Worthy described the background of the FOI in the UK:⁵¹

As seen in other FOI regimes, in the UK the media helped provide the vital momentum. In the 1960s and 1970s, through highlighting (and inadvertently triggering) scandals, exposing secrecy in local and central government level and allying with a strengthening lobby group, the media continually kept openness on the political agenda. By the 1980s it formed part of a growing network of NGOs and MPs pressuring for FOI.

FOI law had appeared as a major item on the political agenda for the first time in 1974 when the Labour Party pledged to introduce a Freedom of Information Act (FOIA) in its election manifesto. In 1984, the Campaign for Freedom of Information, which later played a vital role in lobbying politicians and government officials, was established.

The group attracted support from the leader of Labour Party and both national and regional newspapers.⁵² In 1994, John Major's Conservative administration introduced the non-statutory Code of Practice on Access to Government Information. Although "it received little publicity and was not greatly used",⁵³ journalist Matt Burgess points out that it was Conservative governments which increased openness and transparency, arguably helping to build the pressure for a desire for an FOI law.⁵⁴

In 1997, under Tony Blair's administration, the government published the FOI White

⁵⁰ The Freedom of Information (Scotland) Act 2002 (FOISA) was passed by the Scottish Parliament in 2002 and came into force on 1 January 2005. The Scottish government, local government and other public bodies in Scotland are covered by FOISA but other UK government departments are not.

⁵¹ Ben Worthy, *The development of FOI in Britain, FOI 10 Years On: freedom fighting or lazy journalism?*, Suffolk, Abramis academic publishing, 2015, p.40

⁵² *Ibid*, p.43

⁵³ The Campaign for Freedom of Information, *About us*, <https://www.cfoi.org.uk/about/>

⁵⁴ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p.3

Paper *Your Right to Know*, which offered information rights with a high-level harm test and no exclusions, and was widely praised, from *The Guardian* to the *Daily Mail*.⁵⁵ Although it led to the enactment of the FOIA in 2000, the Act was watered down.

In the background, Blair had changed his mind because of a fear about the political damage FOIA might cause.⁵⁶ Blair regretted the introduction of the FOIA strongly, as he described in his memoir:⁵⁷

Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naïve, foolish, irresponsible nincompoop.

The truth is that the FOI Act isn't used, for the most part, by "the people". It's used by journalists. For political leaders, it's like saying to someone who is hitting you over the head with a stick, "Hey, try this instead", and handing them a mallet. The information is neither sought because the journalist is curious to know, nor given to bestow knowledge on "the people". It's used as a weapon.

The UK's FOIA allows anyone to make requests and has a wide jurisdiction that includes more than 10,000 public authorities,⁵⁸ such as central government departments, Parliament, police forces, hospitals, and other bodies that receive public money, including the BBC.

However, some bodies, for instance intelligence and security services, including GCHQ, MI5 and the National Crime Agency, are exempted from the Act, as is the Royal Family.

Public authorities are also allowed to refuse requests on the grounds of 23 exemptions, including national security, personal information, information provided in confidence, the UK's economic interests and so on.⁵⁹

Public authorities can refuse requests based on a cost limit as well. The cost limit is set at £600 for central government, Parliament and the armed forces and £450 for all other public authorities. The staff time, the biggest cost, is calculated at £25 per hour

⁵⁵ Ben Worthy, *The development of FOI in Britain, FOI 10 Years On: freedom fighting or lazy journalism?*, Abramis academic publishing, 2015, p.46

⁵⁶ Ben Worthy and Robert Hazell, *Disruptive, Dynamic and Democratic? Ten Years of FOI in the UK, Parliamentary Affairs (2017) 70*, Oxford University Press, January 2017, p23

⁵⁷ Tony Blair, *A Journey*, Hutchinson, 2010, pp516-517

⁵⁸ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p.5

⁵⁹ *Ibid*, p.50

regardless of who does the work.⁶⁰

Moreover, public authorities can refuse to comply with a request that is vexatious.

On the other hand, the Act stipulates the obligation to comply with the public interest test when public bodies wish to apply qualified exemptions, which is not the case in Japanese FOI law.

The Act allows requesters to appeal when they do not get the information they request, or any response at all. The first step is asking for an internal review by the original authority, and if a requester is not satisfied with the result the second step is an appeal to the Information Commissioner's Office (ICO).

The ICO investigates the appeal and issues a Decision Notice (DN). As the DN is binding, if the requester or authority does not agree with it, both are able to appeal to the Information Tribunal, which has two levels: the First-Tier Tribunal and the Upper Tribunal. The requester or the public authority can take the case to the High Court if they do not agree with the Upper Tribunal's decision. This legal procedure can progress to the Supreme Court and the European Courts (for as long as the UK remains in the EU).

Scotland has its own FOIA (FOISA) and Information Commissioner. Although the Scottish Act is similar to the UK law, it is "generally regarded as being more liberal and progressive".⁶¹

In addition, the UK and Scotland introduced the Environmental Information Regulations in 2004, which allows people to access environmental information, with a similar legal structure to that of the FOIA.

5.2 MPs' expenses scandal

The "biggest political scandal for a generation"⁶² emerged in 2009. Widespread misuse of taxpayer-funded expenses by Members of Parliament (MPs) were revealed and this resulted in the resignation of the Speaker of the House and five members of the Cabinet. A total of 381 MPs, including both Labour and Conservative members, were forced to pay back over £1 million of wrongly claimed expenses, and three MPs and one member of the House of Lords faced criminal charges.⁶² Spending on their private houses or on

⁶⁰ Information Commissioner's Office, *When can we refuse a request for information?*, <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

⁶¹ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p.4

⁶² Robert Winnett, Gordon Rayner, *No Expenses Spared*, London, Transworld, 2010, About the book

specific items, included bizarre things like cleaning a moat at a manor house for £2,115⁶³ and buying a duck house for £1,645,⁶⁴ boosted voters' anger about politicians and also their mistrust of them.

The scandal led to the creation of the Independent Parliamentary Standards Authority, established to reform MPs' expenses system, enacted by the passing of the Parliamentary Standards Act of 2009.

The scandal hit the headlines of the UK media over several weeks because on 8 May 2009 *The Telegraph* began publishing the details of all MPs' expenses based on leaked documents. However, the story would never have surfaced without the FOIA.

Investigative journalist Heather Brooke started filing a series of FOI requests about MPs' expenses in January 2005, immediately after the FOI law came into force, because she aimed to do some field research for her book *Your Right to Know: A Citizen's Guide to the Freedom of Information Act*.⁶⁵

However, because Parliament refused to disclose the claims on the grounds of privacy, she, with two other journalists, appealed to the ICO and then the Information Tribunal. After a legal fight that lasted over four years, in May 2008, they eventually won at the High Court and Parliament announced that full documents relating to all MPs' expenses would be published.

Unexpectedly, in the process of digitising the documents and redacting the sensitive information, a massive amount of raw material was leaked to *The Telegraph*, and it started a month-long coverage and campaign.

According to *No Expenses Spared*, a book written by *The Telegraph* journalists, *The Telegraph* bought a disk containing every MP's expenses claims and receipts without redaction from PR consultant Henry Gewanter for £110,000. Gewanter, a former SAS officer, got the disk from soldiers who were temporarily engaged in the digitising work.⁶⁶

Brooke commented on *The Telegraph's* work:⁶⁷

The Telegraph did what the British papers do. It was a pragmatic approach. Once they got the disk, I think they did a great job. However, it was a very different journalism I

⁶³ *The Telegraph*, 12 May 2009, <http://www.telegraph.co.uk/news/newsttopics/mps-expenses/5310069/MPs-expenses-Clearing-the-moat-at-Douglas-Hoggs-manor.html>

⁶⁴ *The Telegraph*, 21 May 2009, <http://www.telegraph.co.uk/news/newsttopics/mps-expenses/5357568/MPs-expenses-Sir-Peter-Viggers-claimed-for-1600-floating-duck-island.html>

⁶⁵ Heather Brooke, *The Silent State: Secrets, Surveillance and the Myth of British Democracy*, Random House, 2011, p224

⁶⁶ Robert Winnett, Gordon Rayner, *No Expenses Spared*, London, Transworld, 2010, pp.55-116

⁶⁷ Interview with the author, 22 February 2017

got used to.

Brooke explained her original intention as follows: ⁶⁸

What I wanted to do was create a situation where not just a few MPs, but as a point of principle the entire dataset of all expenses were published proactively and that members of the public could go and look at that.

Brooke called her way of reporting “Clean Hands Journalism” and argued that conventional journalism which depends on transactions with sources sometimes becomes “grubby” and often “immoral”. She said she does not want to be compromised by relationships with sources ⁶⁹ and that using FOI is “a sort of scientific way of journalism”.⁷⁰

5.3 Prince Charles’s letters

One of the most symbolic cases which represents the relationship between British journalism and the government in terms of FOI is the Prince Charles’s letters case, aka the “Black Spider” memos which were sent from Prince Charles, in his distinctive handwriting, to government ministers. After a ten-year legal battle, the 27 pieces of secret correspondence were released in May 2015.

In April 2005, four months after the FOIA came into effect, *The Guardian* journalist Rob Evans put in FOI requests for the letters. According to his article, the whole process started with a simple email from the then editor-in-chief, Alan Rusbridger. It read “Could we submit freedom of information requests to ministers to see what letters they have received, and on what subjects, from Prince Charles?”⁷¹

For many years, the heir to the throne had kept writing to the government, and the letters were sometimes leaked. It “provoked a backlash among politicians furious that an unelected royal was meddling in the affairs of democratic government”.⁷²

⁶⁸ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p.138

⁶⁹ Seminar at the Reuters Institute, 22 February 2017, <http://reutersinstitute.politics.ox.ac.uk/news/seminar-report-freedom-information-and-informed-citizen>

⁷⁰ Interview with the author, 22 February 2017

⁷¹ Rob Evans, Prince Charles’s letters: single email set of tussle involving 16 judges’ rulings, *The Guardian*, 26 March 2015

⁷² Rob Evans and Robert Booth, Prince Charles faces fresh meddling claim over letters to ministers, *The Guardian*, 16 December 2009

Although the government disclosed some documents in 2009, it kept refusing to release the letters' contents. *The Guardian* fought against the government in the courts and eventually the Supreme Court ruled that the letters should be disclosed. During this battle, the then Attorney General, Dominic Grieve, vetoed the Information Tribunal's decision, which was in favour of *The Guardian*, but the Supreme Court ruled that the veto should not "enable a member of the executive to over-ride a judicial decision".⁷³

According to the released letters, Prince Charles expressed his views on various issues from improving equipment for troops fighting in Iraq to culling badgers to prevent the spread of bovine tuberculosis.

However, a ten-year legal battle cost a lot. According to *The Guardian*, the government spent more than £400,000 in legal expenses.⁷⁴ This means that if *The Guardian* had lost the case, they would have had to have paid a huge amount of money. Why did the newspaper decide to begin fighting in the courts? Evans said, "Because we thought it was important. Ultimately, it was [editor-in-chief] Alan's decision because he was in charge of money. The role of editor is very important."⁷⁵

On the other hand, in the midst of this legal battle, the FOIA was tightened in 2010 to exempt information concerning the Royal Family. This means that since the amendment, correspondence involving the monarch or heir to the throne cannot be made public for 20 years, or five years after the writer's death, whichever is longer. These changes were described as the "Prince Charles amendment" by an MP.⁷⁶

However, this reporting prompted another story.

Two months after the revelation of the letters by *The Guardian*, a Scottish newspaper, the *Sunday Herald*, revealed the contents of seven personal letters from the Prince to the then Scottish First Minister Alex Salmond, and Salmond's replies, written between July 2007 and July 2010. They were disclosed under FOI law⁷⁷ and the request was made by a Scotland-based journalist, Rob Edwards, on 14 May 2015.⁷⁸

In these letters, the Prince lobbied Salmond to give money and political backing to an organic food group and others. However, "the most interesting thing was not about the

⁷³ Rob Evans et al, Supreme court clears way for release of secret Prince Charles letters, *The Guardian*, 26 March 2015

⁷⁴ Rob Evans and Robert Booth, Second batch of Prince Charles's letters to be released, *The Guardian*, 4 June 2015

⁷⁵ Interview with the author, 3 March 2017

⁷⁶ Rob Evans, Royal pressure 'led to FoI ban on disclosure of lobbying by Charles', *The Guardian*, 13 September 2010

⁷⁷ The requester Rob Edwards filed a request under the Environmental Information (Scotland) Regulations 2004.

⁷⁸ Rob Edwards, 365 freedom of information applications, http://www.robedwards.com/freedom_of_information_ap.html

Prince. It was one of the replies from Salmond”, Edwards said.⁷⁹

In the relevant letter, Salmond wrote, “I have the honour to be, Sir, Your Royal Highness’s most humble and obedient servant”, although he told Edwards in an interview that that was the last time he used this traditional form because he thought it was “inappropriate to a democratic age”.⁸⁰ Edwards said, “It may have looked OK a century ago, but now, particularly from the Scottish First Minister who is going for independence it looked a little strange.”⁷⁹

As the Scottish government did not disclose all the letters, Edwards appealed to the Scottish Information Commissioner’s Office. On 30 March 2016, the commissioner, Rosemary Agnew, ordered the government to release the rest of letters, and the government released three more letters on 12 May 2016.⁷⁸

Edwards works for *The Guardian* as well and said he was inspired by the work of Rob Evans: “He is a good colleague of mine, so I was very influenced by what he did and paid attention to it. As the UK government changed the law, it was not going to happen again, but it gradually dawned on me that the Prince’s letters to Scottish ministers were still available.”⁷⁹

After the UK’s FOIA was amended to give senior royals an absolute exemption, the Scottish government submitted a proposal to the Scottish Parliament to introduce a similar exemption in the FOISA. However, the Scottish Parliament rejected it in 2012, so the letters from the Prince to the Scottish government can still be released.

5.4 The Government’s failed attempt to water down FOI

Four months after the Supreme Court’s decision which allowed publication of Prince Charles’s letters, on 17 July 2015, the Government announced the launch of the Independent Commission on Freedom of Information to review the Act. This was the result of concerns within the government that sensitive information had been inadequately protected. According to *The Independent*, its sources in Whitehall said “the concern in Whitehall was narrowly focused on a Supreme Court ruling ordering the publication of the correspondence between Prince Charles and ministers”.⁸¹

According to BBC journalist Martin Rosenbaum, when the commission was appointed, it was “derided by some as an ‘establishment stitch-up’ that would inevitably lead to

⁷⁹ Interview with the author, 6 February 2017

⁸⁰ Rob Edwards, Revealed: the ‘black spider letters’ from Prince Charles to Alex Salmond, *Sunday Herald*, 30 August 2015

⁸¹ Oliver Wright, Freedom of Information: Cabinet Secretary ‘broadly happy’ with existing rules amid calls for reform, *The Independent*, 22 December 2015

tough curbs on the public's right to know what its rulers are doing". However, the commission's report, published on 1 March, "has surprised many, being more sympathetic to greater openness than expected".⁸² Minister for the Cabinet Office Matthew Hancock announced that the FOIA "is working well" and that the government would not make any legal changes.

Why had the government appeared to change its mind?

Prior to the publishing of the commission's report, some Conservative MPs, including David Davis, the current Brexit Secretary, had opposed watering down the FOIA publicly, and had said that the fight to defend the legislation was "eminently winnable".⁸³

Rosenbaum, an FOI specialist, points out that "[t]here is the fact that the government would probably find it difficult to get restrictive change through Parliament. Its small majority in the Commons could easily be overturned."⁸²

Maurice Frankel, the director of the Campaign for Freedom of Information said, "I think [the government] had been struck by how powerful the opposition was both from the press, and in particular from the right-wing newspapers who are their own supporters. So then they had no supporters at all in the press."⁸⁴

On 21 September 2015, 140 media and campaign groups sent a letter to the Prime Minister, David Cameron, to express "serious concern" about the review of FOI law. The letter was signed by national newspapers ranging from the conservative-leaning *Daily Mail*, the Telegraph Media Group, *The Sun* and *The Times*, to the liberal-leaning Guardian News and Media Limited, and Trinity Mirror.⁸⁵

Paul Dacre, the long-serving editor-in-chief of one of the most powerful tabloids in the UK, the *Daily Mail*, wrote a seven-page official letter in response to the call for evidence by the commission. In this letter, he said:⁸⁶

In my 27 years as an editor I have never seen Britain's political process held in such low esteem by voters. Curtailing FOI will inevitably contribute to even greater voter

⁸² Martin Rosenbaum, FOI Commission: Why has it surprised observers?, 1 March 2016, <http://www.bbc.co.uk/news/uk-politics-35550967>

⁸³ Tory MPs will oppose watering down Freedom of Information Act, *The Guardian*, 30 November 2015

⁸⁴ Interview with the author, 10 February 2017

⁸⁵ Campaign for Freedom of Information, 140 press and campaign bodies urge PM not to weaken FOI Act, 22 September 2015, <https://www.cfoi.org.uk/2015/09/140-press-and-campaign-bodies-urge-pm-not-to-weaken-foi-act/>

⁸⁶ Independent Commission on Freedom of Information, *Call for evidence responses from organisations: M to P*, p130, <https://www.gov.uk/government/publications/independent-commission-on-freedom-of-information-call-for-evidence-responses>

cynicism about an elitist political class protecting its own interests, rather than the public”.

Megan Lucero, a data journalist from the Bureau of Investigative Journalism and former head of data at *The Times* and *The Sunday Times* pointed out:⁸⁷

Every journalist wants access to information; the moment that you limit that; that is invalid, that is not partisan. That is not privy to any party lines in this country. Some of the conservative papers are heavily dependent on it, as are the liberal ones. When you threaten access to that, you threaten journalism itself, so every paper sees it as an affront.

5.5 National security vs. FOI

Just hours before the government announced the review of the FOIA on 17 July 2015, the BBC published a report which revealed that UK pilots, with coalition forces, including the US and Canada, had conducted air strikes over Syria against Islamic State, despite the fact that the UK Parliament had voted against military action in Syria in 2013.⁸⁸ This news also hit the headlines in other media and caused controversy between MPs and the government.

This report was based on an investigation conducted by a London-based human rights organisation called Reprieve. Reprieve filed an FOI request on 20 March 2015 and the Ministry of Defence (MoD) disclosed this fact on 15 June 2015.⁸⁹

According to Jennifer Gibson, a staff lawyer who was in charge of this investigation, Reprieve has been conducting an investigation into the US drone attacks in Pakistan since 2010, and it became more of a UK-focused project in 2012 because the organisation became aware of the UK's involvement in the US drone programme. The FOI request was made as part of this project to find out how UK personnel were involved in joint operations with the US.⁹⁰

Reprieve used and continues to use FOI requests frequently for its investigation, and it has filed around 80-90 requests in the past year.⁹⁰ For these requests, Reprieve used the following wording:⁸⁹

⁸⁷ Interview with the author, 12 April 2017

⁸⁸ BBC, Syria air strikes conducted by UK military pilots, <http://www.bbc.co.uk/news/uk-33562420>

⁸⁹ Reprieve, UK pilots conducted strikes in Syria, 17 July 2015, <http://www.reprieve.org.uk/press/uk-pilots-conducted-strikes-in-syria/>

⁹⁰ Interview with the author, 27 February 2017

Have any UK military personnel conducted air strikes in Syria or Iraq using non-UK equipment? If so, how many, where and using whose equipment?

Gibson says the FOIA sometimes works and sometimes doesn't, and in this case, "I didn't think they would answer, so I was quite shocked". She argued:⁹⁰

FOIAs aren't useful unless you understand the context in which you are asking the question, so for me, the FOIAs have to be just one of the series of strategies of investigation.

Another strategy for Reprieve is collaboration with the media, as it has a press office. Gibson explained:⁹⁰

We see the media as essential to our work. It is the quickest way to get a message or story out to build pressure, to get governments to pay attention to that especially in the national security realm. We regularly approach journalists, and they regularly approach us to find out what we are working on. We don't tend to do a lot of reports like traditional human rights organisations. We tend to go to the media first.

Scotland-based journalist Rob Edwards, who has been working on mainly environmental issues for nearly 40 years, put an FOI request in to the MoD on 11 December 2006.⁷⁸ He requested reports created by internal MoD nuclear safety regulators on the safety of nuclear weapons. He explained the reason why he filed this request:⁹¹

There could hardly be anything more important than ensuring that the British government's 200 or so nuclear warheads don't go off by accident. Unfortunately, this job is left to a secretive set of faceless officials within the MoD, who are on the same payroll as those they are meant to be regulating. This is unlikely to make them tough, independent or accountable public watchdogs. But they are all we've got to protect us from an accidental Armageddon, and I wanted to find out what they've been doing.

However, the MoD only released heavily censored versions 14 months later, so

⁹¹ Rob Edwards, Prising open the MoD's secretive nuclear citadel, 17 October 2010, <http://www.robedwards.com/2010/10/prising-open-the-mods-secretive-nuclear-citadel.html>

Edwards appealed to the UK's ICO. The ICO issued a decision backing the MoD in February 2009, so Edwards took the case to the Information Tribunal, which he had never done before. He asked three experts, including a former senior MoD official, to work for free to help him create evidence for the court. Edwards said that the “[f]ormer MoD official was extremely helpful because he knew things inside”.⁷⁹

As a result, Edwards received an email from an MoD lawyer which said, “We are taking a pragmatic decision.” The MoD released all the information which Edwards had requested on 11 October 2010⁷⁸ before the Tribunal made a decision.

According to the articles which Edwards wrote for *The Observer* and the *Sunday Herald*, which were based on information contained in the disclosed documents, the internal report pointed out “dozens of potentially disastrous flaws”⁹² in the nuclear weapons programme. For instance, they included the following:⁹³

- hazards from the nuclear bomb convoys that regularly trundle around the country by road due to “crew fatigue”
- the risk that a warhead could leak radioactive tritium in an accident and that this could have a “potential impact on the workforce and public protection”

Edwards described this reporting as one of the most successful cases that he has worked on using FOI:⁷⁹

That was an important victory, not only to enable me to write stories but it meant all the subsequent annual reports have been made available to people. Now they are publishing it every year, sometimes after FOI requests, sometimes proactively. We are a lot more informed now than we were ten years ago.

5.6 A powerful tool for local journalists

The *Oxford Mail*, a local daily newspaper which covers Oxfordshire, published a 14 page special edition on 12 November 2015. There was a huge headline saying “THIS IS WHAT COULD BE LOST” in the centre of the front page and 12 pictures relating to past articles which were based on FOI requests; its subtitle read “The launch of our fight to

⁹² Rob Edwards, Revealed: how Britain's nuclear bases have bungled bomb safety, *The Observer*, 17 October 2010

⁹³ Rob Edwards, Botching the safety of nuclear bombs on the Clyde, *Sunday Herald*, 17 October 2010

protect the Freedom of Information Act”.⁹⁴ The special edition was published in the midst of the Government’s review of the FOI law and eight days before the deadline for responding to the call for evidence conducted by the Independent Commission on Freedom of Information.

Sara Taylor, the managing editor of the *Oxford Mail*, described the background to the special edition and its aim as follows:⁹⁵

The FOI law was under threat, so we decided we would show cases: what we do, how we use it, and how having FOI means we can do bigger stories, investigations, find out things that might not necessarily be easy to discover. It was an opportunity for us to show our readers the importance of FOI.

In this special edition, *Oxford Mail* journalists picked up some past reporting based on their FOI requests and added new comments from people. Here are two examples:⁹⁴

Tens of thousands of hushed-up crimes you are never told about

Thames Valley Police appealed for witnesses 22 times during a four-week period in July 2008, and it meant just one in 174 crimes was made public.

Trust made to reveal £12.3m cost of using private ambulance firm

Oxfordshire’s ambulance service had been forced to spend £12.3m in one year on private contractors to take patients to hospital between April 2014 and March 2015. The paramedics’ union said this reporting focused “attention on staff shortages in the ambulance service and the fact we are just not training enough people”.

After the government decided not to change the Act, a reporter and FOI specialist at the *Oxford Mail*, Luke Sproule, wrote, “The Act demonstrates the importance of local newspapers, which have the expertise and resources to challenge powerful institutions and tell the public what is being done in their names and with their taxes.”⁹⁶

Research conducted by Ben Worthy et al estimates the percentage of requests made to local government by journalists at 33%, four times higher than to central government, which accounts for 8%.⁹⁷ Table 4 shows the detail.

⁹⁴ *Oxford Mail*, 12 November 2015

⁹⁵ Interview with the author, 16 March 2017

⁹⁶ Luke Sproule, Freedom of Information Act campaign demonstrates importance of local press, *Oxford Mail*, 17 May 2016

⁹⁷ Ben Worthy et al, *Town Hall Transparency? The Impact of the Freedom of Information*

Table 4 Requesters for local governments and central government in the UK⁹⁷

	Local Government	Central Government
Members of the public	37%	39%
Journalists	33%	8%
Businesses	22%	8%
Academics	1-2%	13%

Paul Francis, a political editor of The Kent Messenger Group pointed out:⁹⁸

In my experience, the best FOI ideas often spring from attending council meetings, sometimes from the obscure nugget buried deep in a report, sometimes through the unguarded remark from a politician or officer.

Act 2000 on Local Government in England, London, The Constitution Unit, UCL, December 2011, p30

⁹⁸ Paul Francis, 'Churnalism' and FOI in local UK newspapers, *FOI 10 Years On: freedom fighting or lazy journalism?*, Suffolk, Abramis academic publishing, 2015, p128

Chapter 6:

Challenges of FOI for journalism

6.1 Lazy journalism?

“The problematic requests came from journalists looking for cheap stories”. So wrote Ian Marley, a responder to the call for evidence by the Independent Commission on Freedom of Information in 2015. According to his letter, he is a former FOI officer who worked in local government.⁹⁹

An anonymous local government FOI officer collected examples of “lazy” requests from journalists on a blog:¹⁰⁰

- The total cost of staff with “climate change” or “global warming” in their job title or job description. This should include, but is not restricted to, salaries, expenses, pensions, travel costs and other remuneration.
- I am writing to obtain details of the amount of money spent on refreshments. This would include things such as snacks, alcohol and biscuits that are given for free to councillors before or after meetings.

The information governance manager at Leicester City Council, Lynn Wyeth, said she believes this blog was written by a real FOI officer because “[i]t was a practice of the officer at the time. If you haven’t been the FOI officer, you wouldn’t know that it was like that, you wouldn’t know those requesters, etc.”¹⁰¹

‘Round robin’ and ‘fishing expedition’ requests have also been frustrating public authorities. The ‘round robin’ is a technique that involves sending requests to a large number of public authorities at the same time, asking the same question. A fishing

⁹⁹ Independent Commission on Freedom of Information, *Call for evidence responses from individuals: E – L*, p55

<https://www.gov.uk/government/publications/independent-commission-on-freedom-of-information-call-for-evidence-responses>

¹⁰⁰ *The Freedom of ‘Lazy Journalism’ Act*, 2010,

<https://welovelocalgovernment.wordpress.com/2010/10/18/the-freedom-of-%E2%80%98lazy-journalism%E2%80%99-act/>

¹⁰¹ Interview with the author, 21 March 2017

expedition is a request made in a speculative way in which the requester requests information but is probably hoping to discover other, more useful, information via that request.

Wyeth called this kind of approach a “gamble” and argued, “An excessive resource is used to cast the net around hundreds of authorities, with absolutely no guarantee of catching a big fish of a story.” She also pointed out “Many headlines resulting from FOI requests still revolve around repetitive, and yes, anodyne, topics” and “spend” and “costs” are the common words in their headlines. She writes:¹⁰²

From the anodyne headlines we are still seeing on a weekly basis, it would appear journalists are still not getting the best use from the Act. There is minimal evidence of detailed investigative journalism into local authorities, and there is a considerable lack of originality on subject matter.

Wyeth’s criticism of “lazy journalism” does not mean she opposes FOI and journalism. She said:¹⁰¹

I believe, as a public servant, we are just administrators of people’s information. It’s not our information. Citizens should have the information to be able to make informed decisions. Open democracy and freedom of the press are of real value in Britain.

You’ve got big national stories like the MPs’ expenses, the Prince Charles letters, where investigative journalists were digging, digging and digging. I think the FOIA is a really good tool for investigative journalists, and you have to be prepared for it to take a long time. If you want a quick answer, you go on a fishing expedition, and it’s worthless.

Maurice Frankel, the director of the Campaign for Freedom of Information, said:⁸⁴

Now there is quite a lot of criticism from some authorities about journalists making too casual use of freedom of information. From our point of view, we want people to make good requests. If people make bad or lazy requests, it adds to the pressure from the public authorities to restrict the right of access.

¹⁰² Lynn Wyeth, Fishing expeditions or serious investigations? The impact of media Freedom of Information Act requests on local government, *FOI 10 Years On: freedom fighting or lazy journalism?* Suffolk, Abramis academic publishing, 2015, pp.111-113

BBC's Martin Rosenbaum, who runs internal FOI courses for BBC journalists, said, "What I taught in my courses was phrase your request very carefully and specifically. That is the best way to make effective use of FOI."¹⁰³

By contrast, criticism that journalists who use FOI are "lazy" has rarely been heard in Japan at the time of writing. However, some local governments have introduced provisions which enable the authorities to reject requests when the requester "abuses the right".

6.2 Less recording and the "chilling effect"

The Cabinet Legislation Bureau, which supervises consistency between the Constitution of Japan and Japan's laws, has no records chronicling the decision-making process surrounding the Cabinet's endorsement of a constitutional reinterpretation to enable Japan to exercise collective self-defence, which was made on 1 July 2014.¹⁰⁴ This was a critical tipping point for Japanese foreign and security policy since the pacifist constitution came into force in 1947.

Although this news prompted controversy in Parliament, the Cabinet Legislation Bureau Director-General Yusuke Yokobatake stated, "I don't believe that they (the legislation bureau's deliberations over constitutional reinterpretation) are by nature something that should be archived as meeting minutes" in a House of Councillors' committee.¹⁰⁵

A former bureaucrat who has experience working in the Cabinet Legislation Bureau said, on condition of anonymity, "The more subtleties there were in a case, the more likely we were not to keep records on it."¹⁰⁶ Another former government official said, "When we had an official document which we did not want to release, we treated the document as a 'private note' to evade the FOI request."¹⁰⁷

In the UK, former education secretary Michael Gove used a private email account which was registered in the name of his wife for Government business, and the Department of Education did not disclose those emails under FOI requests because they

¹⁰³ Interview with the author, 10 January 2017

¹⁰⁴ Satoshi Kusakabe and Tetsuya Hioka, 'Cabinet Legislation Bureau has no record of Constitution reinterpretation deliberations', *The Mainichi*, 28 September 2015 (Japanese)

¹⁰⁵ Satoshi Kusakabe, Legislation bureau head admits not recording constitutional reinterpretation discussions, *The Mainichi*, 22 January 2016 (Japanese)

¹⁰⁶ Satoshi Kusakabe, As I See It: Not too late for Cabinet Bureau Legislation to right its egregious wrong, *The Mainichi*, 7 October 2015 (Japanese)

¹⁰⁷ Hiroyuki Oba, Is it an official document or private note? Interviews with former bureaucrats, *The Mainichi*, 18 May 2017 (Japanese)

were not able to find them. This case was revealed by the *Financial Times*' education correspondent, Chris Cook, in 2011.¹⁰⁸

Cook subsequently uncovered that Gove's office systematically deleted 130 official emails. At the same time, the ICO ruled in 2012 that an email sent by Gove to his staff from his wife's email account was official business and should be disclosed.¹⁰⁹

Matt Burgess argues that "[t]he emails hinted at the wide scale use of private email accounts to try to conduct government business in secret and away from the reach of the Freedom of Information Act".¹¹⁰

Politicians and government officials at high levels in the UK have often claimed that the FOIA does not give them a safe space in which to discuss things freely, resulting in officials becoming less likely to create proper records. In the midst of the review of FOI legislation, the Cabinet Secretary, Britain's most senior civil servant, Sir Jeremy Heywood said, "Clearly there are some extra costs that come with the Freedom of Information Act, there are some chilling effects, there's no doubt about it whatsoever."¹¹¹

However, Ben Worthy, from University College London, writes, "We concluded the chilling effect to be a myth."¹¹² He argues that there was no evidence of the chilling effect based on comprehensive research, including interviews with government officials:¹¹²

The majority of central and local government officials were more fearful of the consequences of not having a record rather than of a record being released. Many pointed to general shifts in the way decisions are made and use of electronic technology as the source of changed records, rather than FOI.

From the same point of view, the UK Information Commissioner Elizabeth Denham expressed a concern in December 2016:¹¹³

¹⁰⁸ Chris Cook, Gove under scrutiny for official use of private e-mail accounts, *Financial Times*, 20 September 2011

¹⁰⁹ Chris Cook, Destruction of emails by Gove staff raises doubts on disclosure compliance, *Financial Times*, 3 March 2012

¹¹⁰ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p142

¹¹¹ Laura Hughes, FOI has had chilling effect, says mandarin, *The Telegraph*, 25 September 2015

¹¹² Ben Worthy and Robert Hazell, Disruptive, Dynamic and Democratic? Ten Years of FOI in the UK, *Parliamentary Affairs* (2017) 70, Oxford, Oxford University Press, January 2017, p31

¹¹³ Elizabeth Denham, Freedom of Information and the digital world, A speech at the Holyrood FOI Conference in Scotland, 1 December 2016 <https://ico.org.uk/about-the->

Digital communication creates more records, in fact we're drowning in them, but less permanent records, and that is a worry for those of us who believe in access rights. FOI can only work if the right records are created in the first place. Smart phones, instant messaging and social media challenge our ability to ensure records and decisions are documented and preserved. We risk allowing employees to become their own records managers, with the inevitable end result that less information is preserved for the public in many, many cases.

Denham stressed the public authorities' "duty to document" and demanded that the government must provide a "legislative solution" to meet the needs of the digital age.¹¹³

6.3 Delay and redaction

Almost all the British journalists I interviewed said that the biggest problem is delay in disclosing information. In the UK, the FOIA requires that public authorities must respond to requests "promptly" within 20 working days, but the Act allows them to extend the limit up to a "reasonable" time.

BBC's Martin Rosenbaum pointed out the following:¹⁰³

A lot of journalists have never used FOI at all. I think the main reason for that is delay. Even if it is a very simple request you won't probably get a reply for 20 days and more complicated matters can take months, sometimes years.

Journalist Matt Burgess argues that "the delay in responses to requests is the biggest issue for journalists, as it can mean stories are no longer news by the time the authority replies to the request".¹¹⁴

Japanese journalists share the same experience. The national FOI law in Japan states that the deadline for the response to the request is 30 days, but that it may be extended to 60 days. Moreover, the law allows authorities a further extension when there is a "considerably large amount" of documents. As investigative journalists often request a large number of documents, it sometimes takes around a year.

If a public authority releases information in response to a FOI request, it will

ico/news-and-events/news-and-blogs/2016/12/freedom-of-information-and-the-digital-world/

¹¹⁴ Matt Burgess, *Freedom of Information: A Practical Guide for UK Journalists*, Abingdon, Routledge, 2015, p.150

sometimes black out parts of documents on the grounds of the exemption which is set out in the FOI law.

In Japan, a scandal concerning Prime Minister Shinzo Abe emerged in February 2017. A nationalistic private educational institution called Moritomo Gakuen bought land for a new primary school from the government at a suspiciously low price. As the head of the Moritomo was a supporter of Abe, this caused controversy about the involvement of Abe in the land deal, though Abe denies the allegation.

To investigate the scandal, a former opposition MP filed an FOI request at the Ministry of Finance (MOF), which administrates state-owned lands, to obtain the negotiation records between Moritomo and the MOF. However, the MOF released 100 pages of heavily blacked out documents which provided almost no information.¹¹⁵

Similarly, In the UK, Aberdeen City Council disclosed heavily redacted documents to a campaigner who requested information about the register of interests for officials in November 2016. Every word of an email which contained 20 lines was blacked out apart from “Hi” and “Kind regards”.¹¹⁶

¹¹⁵ *The Mainichi*, 16 May 2017 (Japanese)

¹¹⁶ Activists hits out after council redacts every word in FOI request email except “Hi”, *The Herald*, 4 November 2016

Chapter 7:

Conclusions and recommendations

Comparing Japan and the UK in terms of the application of FOI legislation to journalism, there are three key findings.

Firstly, British journalists have been using FOI more frequently and aggressively than Japanese journalists have been doing.

The British government has repeatedly been trying to water down the FOIA since it came into force in 2005 but most of its attempts failed because of strong opposition from the media. On the other hand, reporting which relies on FOI requests in the UK is sometimes criticised as “lazy journalism”. However, these phenomena mean that the FOIA in the UK has been used heavily by journalists.

In Japan, the FOIA has never changed at all in either a positive or a negative way, a reflection of the fact that journalism and the government have not paid much attention to the FOIA. Although some Japanese journalists have tried to improve how they use the FOI, much more effort is needed, including filing appeal procedures effectively.

The second finding is that the oversight body, such as the ICO, and the courts, have worked better and more independently in the UK than in Japan.

The Scottish Information Commissioner Rosemary Agnew said:¹¹⁷

The law provides for me being independent. We are very, very mindful of our independence. FOI would have less value if it wasn't operated with independence and I think it's one of the most valuable things about FOI. So I would say it's just the way we do business. The independence is built into the Act itself and it is important.

In Japan, decisions made by the Review Board are not binding. Judges are not allowed to see original documents which government withholds. Consequently, the FOI legislation needs to be amended to reinforce the watchdog organisations' independence.

Finally, there are common challenges both in Japan and in the UK. Public authorities seem to be increasingly reluctant to create and disclose public records. Although there is no evidence of the “chilling effect” in the UK, many journalists I interviewed expressed concern that public authorities have been getting skilful at evading release of public

¹¹⁷ Interview with the author, 27 January 2017

records, in particular those which contain sensitive information.

In Japan, there have been some cases in which government officials did not create public records from scratch or treated documents as “private notes” to avoid disclosure.

Therefore, journalists in Japan and the UK need to remain vigilant and should monitor whether FOI legislation works well. They will sometimes have to fight against the authorities by using legal procedures to push the boundaries of access to information.

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Appendix 1 Number and percentage of reports concerning FOI: Japan

	2014			2015			2016			3 years		
	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)
<i>The Yomiuri</i>	135	281504	0.05	87	268763	0.03	177	261081	0.07	399	811348	0.05
<i>The Asahi</i>	170	270373	0.06	159	264013	0.06	233	254163	0.09	562	788549	0.07
NHK	27	52155	0.05	17	53672	0.03	35	55341	0.06	79	161168	0.05
Total	332	604032	0.05	263	586448	0.04	445	570585	0.08	1040	1761065	0.06

Appendix 2 Number and percentage of reports concerning FOI: UK

	2014			2015			2016			3 years		
	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)
<i>The Daily Telegraph</i>	223	115203	0.19	218	107944	0.20	139	87812	0.16	580	310959	0.19
<i>The Guardian</i>	298	103360	0.29	691	127741	0.54	652	127197	0.51	1641	358298	0.46
BBC	163	103434	0.16	232	100068	0.23	280	104469	0.27	675	307971	0.22
Total	684	321997	0.21	1141	335753	0.34	1071	319478	0.34	2896	977228	0.30

Appendix 3 Number and percentage of reports concerning FOI: *The Mainichi*

	2014			2015			2016			3 years		
	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)
<i>The Mainichi</i>	193	306227	0.06	176	295175	0.06	283	291757	0.10	652	893159	0.07

Appendix 4 Number and percentage of reports concerning FOI: *Daily Mail*

	2014			2015			2016			3 years		
	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)	FOI	All articles	FOI (%)
<i>Daily Mail</i>	194	41951	0.46	302	43359	0.70	278	43290	0.64	774	128600	0.60