

## Access to Information: The Commercial Side

By Roderick Macdonell

*Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it.*

—Samuel Johnson

Transparency and Freedom of Information has made such robust inroads in two Southeast Asian nations that it cost Joseph Estrada his job as president of the Philippines two years ago, and it almost sparked the demise of Thailand's Prime Minister, Thaksin Shinawatra, shortly after he came to power in 2002. In both cases, corruption allegations unearthed through transparent government policies or freedom-of-information laws were central to the controversies.

With that kind of impact, it is no wonder the World Bank, the International Monetary Fund and other donors are "pressing countries to adopt access to information laws as part of an effort to increase government transparency and reduce corruption." (Bannisar, see [References](#)). There are now 48 nations that have access laws, with India being the latest to join the Freedom of Information Act (FOIA) club. Indeed, the World Bank Institute recently published *The Right to Tell*, in which contributors Roumeen Islam and Joseph Stiglitz argue that enacting a FOIA can be a signal of a government's commitment to openness, but that these laws can be effective only if there is a genuine commitment to transparency, or political will, backing them up.

The journalists in the Philippines and Thailand have clearly demonstrated the effectiveness of transparency laws in their countries and their probes into Estrada's and Thaksin's undeclared wealth have given high profile to the media and their use of access laws. In the U.S. and Canada, which respectively adopted access laws in 1966 and 1983, it was expected that the legislation would primarily provide citizens with an ability to hold their governments to higher levels of accountability, which it has.

### Commercialization of access law

But today the biggest users of those nations' laws are from the business sector, users who are either seeking government procurement contracts or are members of a regulated environment and are trying to divine their regulators' strategies. In both countries, an industry of business interests has evolved which peppers, and in some cases, bombards governments with FOIA requests. Developing nations pondering the enactment of FOIA laws could face a similar and unexpected outcome—that their FOIA officials will find themselves primarily servicing the access requests of commercial interests seeking to get a leg up on their competitors. Some might object to this

commercialization of access law use but a case can be made that the heightened transparency that leads to better prices for government procurement, translates into better value for taxpayers' money.

The volume of business users of the American and Canadian laws is so significant that a U.K. group carried out a study into the phenomenon prior to the 2000 enactment of the U.K.'s information act (more later on the U.K. study, titled Freedom of Information and Business).

The numbers from the U.S. and Canada speak for themselves. In the U.S., the federal government responded to 1,959,959 FOIA requests in 2000, an estimated 550,000 of which were filed by businesses (Hammitt). In Canada in 2001 there were 21,625 access requests made to the federal government, of which 9,237, or 43.4 per cent, came from business (Statistical Tables, 2001-2002). It cost the Canadian government \$23,361,545 (Cdn) in operating costs for that country's access law, or about 80 cents per citizen, while administering the U.S. act cost \$286 million or about \$1 per citizen (Access to Information, 2002).

### **The "suppliers"**

Who is making all these business requests and why? There are two classes of business FOIA users in the U.S., says Harry Hammitt, a former president of the American Society of Access Professionals, who publishes a semi-monthly newsletter titled Access Reports. These classes, he says, are the "suppliers" and the "regulated." The "suppliers" are those businesses seeking contracts to sell goods and services to government, the "regulated" are those subject to the monitoring and oversight of a wide array of government agencies such as the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA).

As government is the largest single purchaser of goods and services in the United States, there are thousands upon thousands of government suppliers, from those involved in NASA space launches to those who supply stationery to the Commerce Department—all of which have competitors and an interest in acquiring industrial intelligence that will better position them to win the next government procurement deal. Under the U.S. FOIA, the contract with the firm that tendered a winning bid is accessible to anyone who requests it, even foreign competitors. For obvious reasons, a supplier's Trade Secrets are not made available and are blacked out or otherwise removed from the documents made available to the requester. To reduce FOIA officials' labor costs, the U.S. law does not allow for copies of losing tenders to be accessible.

Hammitt says suppliers are typically anxious to review a winning bid, both to learn the unit prices of goods sold to the government, and since price is not always the sole factor in determining the chosen bid, to get a sense of what the government "liked and disliked" about a firm's tender. This information helps competing firms tailor their next bid when it comes time for a new contract to be

put out to buy computers or Jeeps or munitions, or whatever product or service is up for grabs. The U.S. Department of Defense (DOD) was hit with an avalanche of such FOIA requests in the 1980s during the last major American arms buildup under then president Ronald Reagan, with firms in a frenzy to determine why DOD preferred their competitor's tender, and what they should do to win the next contract. Hammitt opines that the same mad scramble will likely occur again this year as the U.S. gears up for a possible war with Iraq.

### The "regulated"

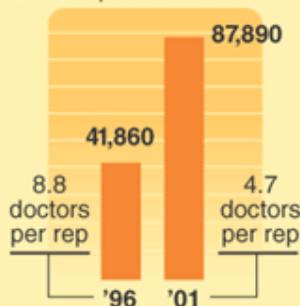
Thus, the motives and incentives behind the FOIA requests of government suppliers are quite clear. But what about those industries that have nothing to sell government, but who are regulated by government agencies? Drug firms which are regulated by the Food and Drug Administration (FDA), are one example of an industry with an insatiable need to know. The object of their hunger is pure regulatory intelligence, and they are prepared to pay thousands of dollars in FOIA search fees and wait many months to obtain reports of inspections carried out into their rivals' dealings with the FDA, a body that wields almost as much clout over drug companies as a prison warden over inmates. Hammitt cites the example of a Pharmaceutical Company "Y", which is the subject of an inspection by the FDA. By finding out what the FDA inspectors were seeking at Company "Y", Company "X" is able to prepare itself to ensure it will pass muster when FDA inspectors come knocking at its laboratory. It's called due diligence. The pharmaceuticals are "looking for insights of government policy as a practical matter."

## Marketing drugs to doctors

*The number of pharmaceutical sales representatives and the amount spent to promote drugs to doctors have increased significantly:*

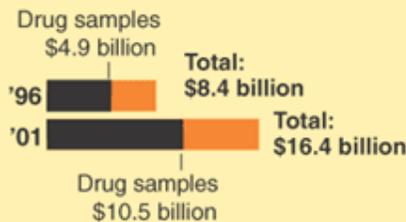
### Sales force

Sales representatives



### Promotional spending

Money for office and hospital promotion, medical journal ads, drug samples:



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The pharmaceuticals' appetite for FDA intelligence is such that FOI Services Inc., a ten-person firm in the Washington suburb of Gaithersburg, Md. has been mining the FDA for 27 years now, digging out a wealth of information for the drug industry. The firm's website ([www.foiservices.com](http://www.foiservices.com)) states that, "Since

## The big ones

If Pfizer's merger with Warner-Lambert is approved, the new company will be the world's second-largest pharmaceutical house. Top companies, by 1998 sales, in billions of dollars:



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1975, FOI Services has specialized in delivering unpublished U.S. Food and Drug Administration documents acquired under the Freedom of Information Act. To date over 160,000 documents have been acquired, covering the full range of products regulated by the FDA, including medical devices and diagnostics, pharmaceuticals, biologics, veterinary products and foods." Cinde Cuevas, a senior information specialist with FOI Services Inc., says the firm's clients "request through us to remain anonymous. They include pharmaceutical companies, medical device manufacturers and law firms. We make FOIA requests for clients primarily to the FDA for drug approval information, adverse drug events reported to FDA, medical device approval information and copies of FDA inspection materials."

The drug firms operate in a competitive and highly secretive environment and do not want the FDA or their competitors to know who is inquiring into their rivals' dealings with the federal regulator. So using firms like FOI Services gives them cover. The skill of firms such

as FOI is to have a sufficiently intimate understanding of government to know where to direct FOIA requests, an accomplishment in itself given the size of the U.S. government, along with an ability to draft access requests to ensure that the requests zero in on the specific documents needed by their customers.

### The case of Canada

In Canada, with one-tenth the population of the U.S., access experts are fewer in number, and the volume of requests is considerably lower. Ken Rubin of Ottawa, one of that country's expert FOIA applicants, has been making a living for twenty years making access requests. He reports that there too, pharmaceuticals are significant users of the act. As in the U.S., Canadian pharmaceutical firms also seek anonymity, he says; they are also adamant about protecting information they provide the federal regulator, Health Canada. Rubin says drug companies are so concerned about the sanctity of their trade secrets that they hire experts to submit access requests to the federal government into their own companies, just to see the kind of information the government releases, and whether any of that material is proprietary information that the government should not be providing to others.

Rubin has filed thousands of access requests in the 20 years of Canada's access law. Sometimes as an entrepreneur/activist, he seeks potentially explosive information that he then turns around and sells to a news organization for a few hundred dollars. This form of check-book journalism has served to inform Canadians about numerous issues and events of public importance including a controversial sale of nuclear reactors to China; the

abysmal safety standards of a Canadian airline that went out of business after one of its jets crashed in Saudi Arabia in 1991 killing 263 passengers and crew; and reports showing that many of Canada's soldiers are in poor physical condition.

The U.K. study found that, like the U.S., many Canadian businesses are "trying to determine the missing ingredients in their bids for government business or to find out what the government needs and wants." "There was a good measure of public interest in business users acquiring information that could lead to more competitive pricing," the report stated. "Business checking on business can help consumers."

Rubin and his counterparts, according to a government report, are resented by the federal civil servants responsible for implementing the access act because of the work they cause these officials and the resulting costs to Canadian taxpayers. Based on the \$23,261,5454 (Cdn) annual administrative costs of the act, and the 21,275 requests in 2001-2002, each access request cost taxpayers an average of \$1,093.

But Alasdair Roberts, an expert in Canada's access law, said the administrative costs of access need to be kept in perspective. For example, in 1998, when the administrative costs were \$22 million, the federal government spent \$350 million for procurement of advertising services, publishing and printing services and public relations and public affairs services. "Governments never complain about the high costs of public affairs services," says Roberts, who is the Director of the Campbell Public Affairs Institute at Syracuse University.

### **The case of the U.K.**

In the U.K. where the study was done on the business side of FOIA, Robert Hazell, director of the Constitution Unit of the School of Public Policy, University College London, wrote in the foreword to the think piece:

Freedom of Information is full of surprises. One of the surprises is that it is generally used far more by business than by public interest groups or campaigning organizations. I first discovered that when I studied the introduction of the new FOIA laws in Australia, Canada and New Zealand in the mid-1980s on a civil service travelling fellowship. Business there had initially viewed FOIA with hostility and suspicion but, while still regarding it as a threat, they also quickly learnt to exploit its opportunities.

The study contains some comforting words for British business people. One key message is that "FOIA enables business to find out more about the real needs of its public sector customers and the proposals and performance of its competitors. New entrants seeking government contracts have most to gain from FOIA. Established suppliers are likely to feel more threatened, and will

want their information protected."

The study has some useful words for a prime minister or justice minister of a nation contemplating an access law. "British companies can learn from the experience in the USA, Canada and Australia. In the USA there is substantial use of FOIA requests by business, particularly in relation to government contracts. After early problems and scare campaigns, American business is now well educated in how to protect its information."

To quote Andrew Carnegie: While the law [of competition] may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department.

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### **References**

Access to Information Conference Papers, March 4-6, 2002, Hua Hin Thailand, Global Trends in Access to Information, Thomas S. Blanton, <http://pcij.org>

Bannisar, David. Privacy International, <http://www.privacyinternational.org>. Interview with Harry Hammitt, the former president of the American Society of Access Professionals. Of the 2 million annual FOIA requests 1.2 million are Veteran's Administration service related. Of the remaining 800,000, Hammitt estimates that about 70 percent are business related.

*The Right to Tell: The Role of Mass Media in Economic Development*, The World Bank, 2002

Statistical Tables 2001-2002 Access to Information, <http://infosource.gc.ca>

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