**In this issue:** No. 41 - May 2005

- Why "business" and the "free market" often have very little in common
- Everything that you wanted to know about the Freedom of Information Act (but were too baffled to ask)
- And a scattering of libertarian wit and wisdom

SOCIETY FOR INDIVIDUAL FREEDOM

The Individual

# DIRECTING OUR ENERGIES AND FIGHTING OUR OWN BATTLES

Never let it be said that the SIF doesn't do its bit for civic society! Readers may have heard of the new Freedom of Information Act but be unsure about what it involves. Robert Henderson—a man with "the scars of battle" when it comes to dealings with a less-than-friendly state—brings his experience to bear on the subject and provides a very readable guide to both what the FoIA is and how people can make the best use of it. Cynic that I am, I assumed that the FoIA would be a paper tiger. Mr Henderson's analysis is a little more optimistic. We shall see…

We are also proud to publish Kevin Carson's historical analysis of corporate capitalism. Although written from a US perspective, and derived from his own mutualist beliefs, Mr Carson makes the surely universal point that "business" as it operates in the real world often has very little to do with a genuine "free market". Instead, it is just as likely to be part of a corporatist settlement between big business, NGOs (including collectivist-inclined pressure groups), and the state (including those in the public sector performing useless but "politically correct" work).

There are important lessons to be taken from Mr Carson's essay. For example, many libertarians and classical liberals have been co-opted into defending this corporatism on the grounds that it's been opposed to state socialism whether of the Marxist or even the milder "Clause 4" kind. No doubt corporatism is better than either. But libertarianism is better still. We need to fight our own battles, not someone else's.

Moreover, the constant confusion of terms such as "capitalism" (meaning here this corporatism where the state directly or indirectly controls much of the economy and more besides) with "free market" (meaning here a system of voluntary economic and social relationships between individuals and organisations) has been damaging to the cause of promoting genuine libertarian ideas. Many have assumed that the "free market" is to blame for what are actually the consequences of an interventionist (and increasingly authoritarian) corporatism. These consequences include millions of actual or hidden unemployed and environmental pollution caused by the socialisation of externalities or costs onto the taxpayer and/or the public at large.

I'm pleased to note that the 2004 AGM minutes are now available and printed in this issue. This should scotch the rumours that we

**(continued on page 18...)**



Edited by Nigel Meek and published by the Society for Individual Freedom. Contact details can be found on the back page.

**Inside this issue:**

Herbert Spencer's "Great Political Superstition" restated, and a rallying cry for freedom...

*Once upon a time it was believed that if the Pope excommunicated a country it would undergo a terrible catastrophe. Its citizens would be unable to marry, be buried, educated or healed by medicine. Hospitals (all church run) would be shut down, schools (likewise church run) would collapse and there could be no safe system of commerce because the priests administered the oaths. Times have changed. They sure have. These once firmly-held beliefs have now been transferred from the Church onto the State. If there was no government, the argument goes, there could be no schools, no hospitals, and so on.*

*Like it or not, men and women are essentially enslaved to this huge heavily-bureaucratised belief-system. It is alarming how easily people—through fear, misinformation and the distortions of history—are conscripted into this complicity. Everywhere people are tethered to the idea that the world has to be the way that it is because any change might appear to the authorities to be impertinent.*

*The Great Scam is that it hasn't been the Church or State who has built this world but* we the people *who have worked for everything there is. And had we not done so these institutions would not have provided for us.*

*Never surrender your faith in the common people! After all, what else are we to invest our faith in?*

*Although we are right to worry about the long-term collective psychological damage inflicted by servitude our trust in the fundamental freedom of the human spirit remains. For even after great disasters people will quickly start to organise themselves. There will be a period of confusion following a massive flood or earthquake but soon enough people begin to gather firewood, build shelter, arrange resources and start to look after one another.*

*Make the effort and you will find most people to be extraordinarily resilient, with qualities of strength, humour and creativity that go far beyond what [State] institutions choose to assume or even deem to permit.*

From *The Cunningham Amendment*, Vol. 7, No. 1, January 2005.
1005 Huddersfield Road, Bradford, West Yorkshire, BD 12 8LP

# NOTHING LIKE A FREE MARKET: CORPORATE CAPITALISM IN THE USA

## Kevin Carson

### SHARED DELUSIONS AND INSIGHTS

The mainstream right and left share, to a large extent, the same conventional understanding of 20th century history. According to both, the corporate system that emerged toward the end of the 19th century was the outcome of a predominantly laissez-faire system. According to both, the 20th century regulatory and welfare state was motivated by largely "anti-business" concerns. According to both, the regulatory-welfare state was created over the opposition of big business. This conventional understanding is, in its essentials, almost completely false.

**"The mainstream right and left share, to a large extent, the same conventional understanding of 20th century history… This conventional understanding is… almost completely false."**

Concerning the actual nature of the events, there is a surprising parallelism between the radical free market analysis of Murray Rothbard and some of his followers like Joseph Stromberg, and New Left historians of "corporate liberalism" like Gabriel Kolko and James Weinstein.[1] For example, Rothbard co-edited (with the New Leftist Ronald Radosh) a study of New Deal state capitalism entitled *A New History of Leviathan*.[2] Both Austrians and New Leftists portray state capitalism as a movement of large-scale, organized capital to obtain its profits through state intervention into the economy, although the regulations entailed in this project are usually sold to the public as "progressive" restraints on big business.

### THE ORIGINS OF US CORPORATE CAPITALISM

The economic crisis of the 1890s, for American political and economic elites, was the central formative event leading to the 20th century corporate liberal policy consensus. The political instability resulting from the depression caused a near panic in the ruling class. The Pullman Strike, Homestead, and the formation of the Western Federation of Miners (precursor to the Industrial Workers of the World (IWW)) were signs of dangerous levels of labor unrest and class-consciousness. Coxey's Army—a band of jobless men—marched on Washington, a small foretaste of the kinds of radicalism that could be produced by mass unemployment. The anarchist movement had a growing foreign component, more radical than the older native faction, and the People's Party loomed in the national elections. At one point Jay Gould, unofficial spokesman for big business leadership, was threatening a capital strike if the populists came to power. In 1894 businessman F. L. Stetson warned, *"We are on the edge of a very dark night, unless a return of commercial prosperity relieves popular discontent."*[3]

From that time on, there was a series of attempts by corporate leaders to create some institutional structure through which price competition could be regulated and their respective market shares stabilized.

Of course, the state had already created the preconditions for this crisis of overproduction. The very existence of a centralized corporate economy, with firms operating on a continental scale, would have been impossible without government intervention. Without the centralized transportation system created by railroad subsidies, there could have been no national industrial economy. Without patents enabling a handful of firms to monopolize production technology or consumer goods technology between themselves (e.g. the exchange of patents between GE and Westinghouse, or the virtual creation from scratch of the US chemical industry by the Wilson administration's wartime seizure of German patents), the economy would have been far less centralized. Likewise the tariff barrier, sometimes called the "mother of cartels".

The overproduction of the 1890s resulted directly from the cartelization of the Gilded Age. The 20th century regulatory state, far from being a radical break with the past, was merely a further response to the effects of earlier statism.

The first attempt by business leadership to counter the perceived destructive tendencies of competition and overproduction was the trust movement. The trusts are conventionally viewed as an outgrowth of "laissez-faire", and the Progressive movement as an attempt to restore competition. In fact, as Gabriel Kolko demonstrated, the trusts were a resounding failure. From their very inception, the inefficient and over-leveraged trusts started losing market share to smaller and more efficient firms.

The Progressive regulatory state, far from being an anti-monopoly "reform", was a corporate-instigated movement to achieve, through state action, the cartelization that the trust movement had failed to accomplish. Its central organizing principle was what Kolko called "political capitalism":

*Political capitalism is the utilization of*

> *political outlets to attain conditions of stability, predictability, and security—to attain rationalization—in the economy. Stability is the elimination of internecine competition and erratic fluctuations in the economy. Predictability is the ability, on the basis of politically stabilized and secured means, to plan future economic action on the basis of fairly calculable expectations. By security I mean protection from the political attacks latent in any formally democratic political structure. I do not give to rationalization its frequent definition as the improvement of efficiency, output, or internal organization of a company; I mean by the term, rather, the organization of the economy and the larger political and social spheres in a manner that will allow corporations to function in a predictable and secure environment permitting reasonable profits over the long run.*[4]

One central achievement of the Progressive agenda was the limitation of price-cutting as a competitive weapon. From the 1890s on, corporate leadership had realized the counterproductive nature of price wars, and the need for cooperative arrangements to stabilize prices and market shares among the dominant firms in each industry. The trust movement, as mentioned above, failed to achieve this end. It was only with the Federal Trade Commission (FTC) and Clayton Acts that the situation changed.

**"A regulation, in essence, is a state-enforced cartel in which the members agree to cease competing in a particular area… and instead agree on a uniform standard."**

The provisions of the new laws attacking unfair competitors and price discrimination meant that the government would now make it possible for many trade associations to stabilize, for the first time, prices within their industries, and to make effective oligopoly a new phase of the economy.

The Federal Trade Commission created a hospitable atmosphere for trade associations and their efforts to prevent price cutting.[5] The two pieces of legislation accomplished what the trusts had been unable to: it enabled a handful of firms in each industry to stabilize their market share and to maintain an oligopoly structure between them. This oligopoly pattern has remained stable ever since. The price surcharge passed on to the consumer, as a result of this state of affairs, is quite significant. According to an FTC study in the 1960s, *"if highly concentrated industries were deconcentrated to the point where the four largest firms control 40% or less of an industry's sales, prices would fall by 25% or more."*[6]

Another important effect of Progressive legislation was the regulatory cartelization of the economy. Quality and safety regulations served essentially the same purpose as the later attempts in the Wilson war economy to reduce the variety of styles and features available in product lines, in the name of "efficiency". Any action by the state to impose a uniform standard of quality (e.g. the Meat Inspection Act), across the board, necessarily eliminates safety as a competitive issue between firms. Thus, the industry is partially cartelized, to the very same extent that would have happened had all the firms in it adopted a uniform level of quality standards, and agreed to stop competing in that area. A regulation, in essence, is a state-enforced cartel in which the members agree to cease competing in a particular area of quality or safety, and instead agree on a uniform standard. And unlike non-state-enforced cartels, no member can seek an advantage by defecting.

The political motivation behind the New Deal, essentially, paralleled that of the Progressive era. The core of business support for the New Deal was, as Ronald Radosh described it, *"leading moderate big businessmen and liberal-minded lawyers from large corporate enterprises."*[7] Thomas Ferguson and Joel Rogers described them more specifically as *"a new power bloc of capital-intensive industries, investment banks, and internationally oriented commercial banks."*[8] Labor was a relatively minor part of the total cost package of such businesses; at the same time, capital-intensive industry, as Galbraith pointed out in his analysis of the "technostructure", depended on long-term stability and predictability for planning high-tech production. Therefore, this segment of big business was willing to trade higher wages for social peace in the workplace.[9] Under the terms of the Wagner Act, industrial unions were brought into a contractual framework in which both the union bureaucrats and the National Labor Relations Board (NLRB) could enforce discipline on the rank and file, and thus put an end the near-revolutionary turmoil of the early '30s: wildcats, sit-downs, and regional general strikes like those centered on the west coast Longshoremen.

The Social Security Act was the other major part of the New Deal agenda. Its most important result

> *from the point of view of the power elite was a restabilization of the system. It put a floor under consumer demand, raised people's expectations for the future and directed political energies back into conventional channels... The wealth distribution did not change, decision-making power remained in the hands of upper-class leaders, and the basic principles that encased the conflict were set forth by moderate members of the power elite.*[10]

Indeed, most of the New Deal legislative agenda was crafted by advisory organizations made up predominantly of senior corporate management (most notably Gerard Swope of General Electric). Democratic administrations since then have followed essentially the same pattern, with the Presi-

dent's domestic policy team composed largely of corporation lawyers, investment bankers, and CEOs (and of course, the obligatory Treasury Secretary from Goldman-Sachs). So much for the "anti-business" Democratic Party.

The New Deal and Great Society welfare state, according to Frances Piven and Richard Cloward, served a similar function to that of Social Security. It blunted the danger of mass political radicalism resulting from widespread homelessness and starvation. It provided social control by bringing the underclass under the supervision of an army of intrusive, paternalistic social workers and welfare case workers.[11] And like Social Security, it put a floor on aggregate demand. To the extent that the welfare and labor provisions of FDR's New Deal have benefited average people, their state capitalist drafters resembled an enlightened farmer who understands that his livestock will produce more for him, in the long run, if they are well treated. According to James O'Connor, the welfare state was a way to "control the surplus population politically."[12]

## THE EXTERNALISATION OF COSTS

One major tendency in American capitalism from the New Deal on was the increased externalization of corporate operating costs on the taxpayer. Much like the effect of safety and quality regulations, the provision of services by the state removes them as components of price in cost competition between firms, and places them in the realm of guaranteed income to all firms alike within the market. The overall tendency of 20th state capitalism, as the neo-Marxist James O'Connor described it in *The Fiscal Crisis of the State*, was that an ever-growing portion of the functions of the capitalist economy were carried out through the state.

**"One major tendency… was the increased externalization of corporate operating costs on the taxpayer."**

According to O'Connor, state expenditures under monopoly capitalism can be divided into "social capital" and " social expenses".

> *Social capital is expenditures required for profitable private accumulation.... There are two kinds of social capital: social investment and social consumption.... Social investment consist of projects and services that increase the productivity of a given amount of labor-power and, other factors being equal, increase the rate of profit... Social consumption consists of projects and services that lower the reproduction costs of labor and, other factors being equal, increase the rate of profit. An example of this is social insurance, which expands the productive powers of the work force while simultaneously lowering labor costs. The second category, social expenses, consists of projects and services which are required to maintain social harmony—to fulfill the state's "legitimization" function... The best example is the welfare system, which is designed chiefly to keep social peace among unemployed workers.[13]*

According to O'Connor, such state expenditures counteract the falling general rate of profit that Marx predicted. Monopoly capital is able to externalize many of its operating expenses on the state; and since the state's expenditures indirectly increase the productivity of labor and capital at taxpayer expense, the apparent rate of profit is increased.

> *Unquestionably, monopoly sector growth depends on the continuous expansion of social investment and social consumption projects that in part or in whole indirectly increase productivity from the standpoint of monopoly capital. In short, monopoly capital socializes more and more costs of production.[14]*

O'Connor listed several of the main ways in which monopoly capital externalizes its operating costs on the political system:

> *Capitalist production has become more interdependent—more dependent on science and technology, labor functions more specialized, and the division of labor more extensive. Consequently, the monopoly sector (and to a much lesser degree the competitive sector) requires increasing numbers of technical and administrative workers. It also requires increasing amounts of infrastructure (physical overhead capital)—transportation, communication, R&D, education, and other facilities. In short, the monopoly sector requires more and more social investment in relation to private capital... The costs of social investment (or social constant capital) are not borne by monopoly capital but rather are socialized and fall on the state.[15]*

We should briefly recall here our examination above of how such socialization of expenditures serves to cartelize industry. By externalizing such costs on the state, through the general tax system, monopoly capital removes these expenditures as an issue of competition between individual firms. It is as if all the firms in an industry formed a cartel to administer these costs in common, and agreed not to include them in their price competition. The costs and benefits are applied uniformly to the entire industry, removing it as a competitive disadvantage for some firms.

Especially vital, in the post-war period, have been the cartelization of research costs (see the material below on military R&D) and of scientific-

technical training (the GI Bill, guaranteed student loans, etc.) through the state.

Whether through regulations or direct state subsidies to various forms of accumulation, corporations under political capitalism act through the state to carry out some activities jointly, and to restrict competition to selected areas.

The cartelization of the economy, under the aegis of the state, had the perverse effect of worsening the crisis of over-production. An excellent article by Joseph Stromberg ('The Role of State Monopoly Capitalism in American Empire')[16] argues that the crises of overproduction and overaccumulation since the 1890s have been a very real phenomenon—but they have been the direct result of the state's intervention in the economy. The effects of government intervention, under state capitalism, are 1) to encourage creation of production facilities on such a large scale that they are not viable in a free market, and cannot dispose of their full product domestically; 2) to promote monopoly prices above market clearing levels; and 3) to set up market entry barriers and put new or smaller firms at a competitive disadvantage, so as to deny adequate domestic outlets for investment capital.

## THE IMPACT ON FOREIGN POLICY

**"… corporations… act through the state to carry out some activities jointly and to restrict competition in some areas."**

As a result, a major preoccupation of US government policy, from the 1890s, was finding ways to dispose of the corporate economy's surplus product.

In foreign policy, such policies took the form of aggressive action to obtain foreign outlets for American goods and capital; this is what William Appleman Williams called "Open Door Empire":[17] the use of American political power to guarantee access to foreign markets and resources on terms favorable to corporate interests, without relying on direct political rule. Its central goal was to obtain for US merchandise, in each national market, treatment equal to that afforded any other industrial nation. Most importantly, this entailed active engagement by the US government in breaking down the imperial powers' existing spheres of economic influence or preference. The result, in most cases, was to treat as hostile to US security interests any large-scale attempt at autarky, or any other policy whose effect was to withdraw a major area from the disposal of US corporations. When the power attempting such policies was an equal, like the British Empire, the US reaction was merely one of measured coolness. When it was perceived as an inferior, like Japan, the US resorted to more forceful measures, as events of the late 1930s indicate. And whatever the degree of equality between advanced nations in their access to Third World markets, it was clear that Third World nations were still to be subordinated to the industrialized West in a collective sense.

This Open Door system was the direct ancestor of today's neoliberal system, which is called "free trade" by its ideological apologists but is in fact far closer to mercantilism. It depended on active management of the world economy by dominant states, and continuing intervention to police the international economic order and enforce sanctions against states which did not cooperate.

Under the Open Door system, the state and its loans were to play a central role in subsidizing both the export of capital and of commodities. The primary purpose of foreign loans, historically, has been to finance the infrastructure which is a prerequisite for the establishment of enterprises in foreign countries. The state's financial policies, likewise, underwrote foreign consumption of US output.

These two functions were perfected in the Bretton Woods system after World War II.

The second Roosevelt's administration saw the guarantee of American access to foreign markets as vital to ending the Depression and the threat of internal upheaval that went along with it. FDR's ongoing policy of Open Door Empire, faced with the withdrawal of major areas from the world market by the autarkic policies of the Greater East Asia Co-Prosperity Sphere and Fortress Europe, led to American entry into World War II, and culminated in the postwar establishment of what Samuel Huntington called a "system of world order" guaranteed both by global institutions of economic governance like the IMF, and by a hegemonic political and military superpower.[18]

The problem of access to foreign markets and resources was central to US policy planning for a postwar world. Given the structural imperatives of "export dependent monopoly capitalism," the fear of a postwar depression was a real one. The original drive toward foreign expansion at the end of the nineteenth century reflected the fact that industry, with state capitalist encouragement, had expanded far beyond the ability of the domestic market to consume its output. Even before World War II, the state capitalist economy had serious trouble operating at the level of output needed for full utilization of capacity and cost control. Military-industrial policy during the war increased the value of plant and equipment by two-thirds. The end of the war, if followed by the traditional pattern of demobilization, would result in a drastic reduction in orders to this overbuilt industry at the same time that over ten million workers were dumped back into the civilian labor force. And four years of forced restraints on consumption had created a vast backlog of savings with no outlet in the already overbuilt domestic economy. Subsidies to commodity exports

through the IMF and Marshall Plan, and to capital exports through the World Bank, were absolutely crucial to preventing a depression.

But such promotion of the Open Door, no matter how vigorous, was not enough. Parallel to its Open Door foreign policy, the US government also attempted to absorb increasing quantities of surplus output by means of its own purchases. The civil aviation system and the interstate highway system (without which the auto industry, a major new investment outlet for surplus capital, would have been a shadow of itself) are two cases in point.

The ultimate example of state absorption of surplus output, of course, was the infamous "Military-Industrial Complex." The sheer scale of the perpetual warfare state, which began in WWII and has never since returned to prewar levels, can perhaps be grasped by considering that the total value of plant and equipment in the United States increased by about two-thirds (from $40 to $66 billion) between 1939 and 1945, most of it a taxpayer "gift" of forced investment funds provided to the country's largest corporations.[19]

Partial demobilization of the war economy after 1945 very nearly threw the overbuilt and government-dependent industrial sector into a renewed depression. For example, in *Harry Truman and the War Scare of 1948*, Frank Kofsky described the aircraft industry as spiraling into red ink after the end of the war, and on the verge of bankruptcy when it was rescued by Truman's new bout of Cold War spending on heavy bombers.[20] The Cold War restored the corporate economy's heavy reliance on the state as a source of guaranteed sales. Charles Nathanson argued that *"one conclusion is inescapable: major firms with huge aggregations of corporate capital owe their survival after World War II to the Cold War..."*[21] For example, David Noble claimed that civilian jumbo jets would never have existed without the government's heavy bomber contracts. The production runs for the civilian market alone were too small to pay for the complex and expensive machine tools. The 747 is essentially a spin-off of military production.[22]

**"... military R&D is often used for developing production technologies... that become the basis for production methods throughout the civilian sector."**

The heavy industrial and high tech sectors were given a virtually guaranteed outlet, not only by US military procurement, but also by grants and loan guarantees for foreign military sales under the Military Assistance Program. Although apologists for the military-industrial complex have tried to stress the relatively small fraction of total production occupied by military goods, it makes more sense to compare the volume of military procurement to the amount of idle capacity. Military production runs amounting to a minor percentage of total production might absorb a major part of total excess production capacity, and have a huge effect on reducing unit costs. And the rate of profit on military contracts tends to be quite a bit higher, given the fact that military goods have no "standard" market price, and the fact that prices are set by political means (as periodic Pentagon budget scandals should tell us).[23]

## R&D AT THE TAXPAYERS' EXPENSE

But the importance of the state as a purchaser was eclipsed by its relationship to the producers themselves, as Nathanson pointed out. The research and development process was heavily militarized by the Cold War "military-R&D complex". Military R&D often results in basic, general use technologies with broad civilian applications. Technologies originally developed for the Pentagon have often become the basis for entire categories of consumer goods.[24] The general effect has been to *"substantially [eliminate] the major risk area of capitalism: the development of and experimentation with new processes of production and new products."*[25]

This is the case in electronics especially, where many products originally developed by military R&D *"have become the new commercial growth areas of the economy."*[26] Transistors and other forms of miniaturized circuitry were developed primarily with Pentagon research money. The federal government was the primary market for large mainframe computers in the early days of the industry; without government contracts, the industry might never have had sufficient production runs to adopt mass production and reduce unit costs low enough to enter the private market. And the infrastructure for the worldwide web itself was created by the Pentagon's Defense Advanced Research Projects Agency (DARPA), originally as a redundant global communications system that could survive a nuclear war. Any implied commentary on the career of Bill Gates is, of course, unintended.

Overall, Nathanson estimated, industry depended on military funding for around 60% of its research and development spending; but this figure is considerably understated by the fact that a significant part of nominally civilian R&D spending is aimed at developing civilian applications for military technology.[27] It is also understated by the fact that military R&D is often used for developing production technologies (like automated control systems in the machine tool industry) that become the basis for production methods throughout the civilian sector.

## THE NEW BUREAUCRATIC ELITE

Indeed, the organizational ties between the state and the large corporation are what most distinguish state capitalism from earlier forms of state intervention (such as the 19th century). The centralized, bureaucratic state and the centralized, bureaucratic corporation came into existence at roughly the same time, and the two forms of organization quickly became interconnected. More-

over, they have been run by essentially the same circulating elites (a study of the careers of David Rockefeller, Averell Harriman, or Robert McNamara should be instructive in this regard). This phenomenon, the domination of society by an interlocking directorate of government agencies, large corporations, banks and insurance companies, universities, think tanks, and charitable foundations, has been ably described by such "power elite" sociologists as C. Wright Mills and G. William Domhoff.[28]

Under state capitalism (or political capitalism), this power elite acts through the state in a way reminiscent of what Marxists call an "executive committee of the ruling class". For example, consider the history of US government anti-trust action in light of this passage from the neo-Marxists Baran and Sweezy:

> *Now under monopoly capitalism it is as true as it was in Marx's day that the "executive power of the... state is simply a committee for managing the common affairs of the entire bourgeois class." And the common affairs of the entire bourgeois class include a concern that no industries which play an important role in the economy and in which large property interests are involved should be either too profitable or too unprofitable. Extra large profits are gained not only at the expense of consumers but also of other capitalists (electric power and telephone service, for example, are basic costs of all industries), and in addition they may, and at times of political instability do, provoke demands for genuinely effective antimonopoly action* [They go on to point out agriculture and the extractive industries as examples of the opposite case, in which special state intervention is required to increase the low profits of a centrally important industry]. *It therefore becomes a state responsibility under monopoly capitalism to insure, as far as possible, that prices and profit margins in the deviant industries are brought within the general run of great corporations.*
>
> *This is the background and explanation of the innumerable regulatory schemes and mechanisms which characterize the American economy today... In each case of course some worthy purpose is supposed to be served—to protect consumers, to conserve natural resources, to save the family-size farm—but only the naive believe that these fine sounding aims have any more to do with the case than the flowers that bloom in the spring... All of this is fully understandable once the basic principle is grasped that under monopoly capitalism the function of the state is to serve the interests of monopoly capital...*
>
> *Consequently the effect of government intervention into the market mechanism of the economy, whatever its ostensible purpose, is to make the system work more, not less, like one made up exclusively of giant corporations acting and interacting [according to a monopoly price system]...*[29]

**"In the US, the most famous antitrust cases have been… [in] cases in which excessive prices in one firm could harm the interests of monopoly capital as a whole."**

## US CORPORATE CAPITALISM AND EUROPEAN SOCIAL DEMOCRACY

It is interesting, in this regard, to compare the effect of antitrust legislation in the US to that of nationalization in European "social democracies". In most cases, the firms affected by both policies involve centrally important infrastructures or resources, on which the corporate economy as a whole is dependent. Nationalization in the Old World is used primarily in the case of energy, transportation, communication, and minerals. In the US, the most famous antitrust cases have been against Standard Oil, AT&T, and Microsoft: all cases in which excessive prices in one firm could harm the interests of monopoly capital as a whole. And recent "deregulation", as it has been applied to the trucking, airline and electrical power industries, has likewise been in the service of those general corporate interests harmed by monopoly transportation and energy prices.

## NOTES

(1) Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History 1900-1916*, New York, The Free Press of Glencoe, 1963; James Weinstein, *The Corporate Ideal in the Liberal State: 1900-1918*, Boston, Beacon Press, 1968.

(2) Murray Rothbard & Ronald Radosh, eds., *A New History of Leviathan: Essays on the Rise of the American Corporate State,* New York, E.P. Dutton & Co., Inc., 1972.

(3) William Appleman Williams, *The Tragedy of American Diplomacy*, New York, Dell Publishing Company, 1959, 1962, p. 26.

(4) Kolko, *op. cit.*, p. 3.

(5) *Ibid.*, pp. 268, 275.

(6) Mark J. Green, et al., eds., *The Closed Enterprise System*, Ralph Nader's Study Group Report on Antitrust Enforcement, New York, Grossman Publishers, 1972, p. 14.

(7) Ronald Radosh, 'Myth of the New Deal', in Rothbard and Radosh, *ibid.*, pp. 154-55.

(8) Thomas Ferguson & Joel Rogers, *Right Turn*,

New York, Hill & Wang, 1986, p. 46.

(9) Thomas Ferguson, *Golden Rule: The Investment Theory of Party Competition and the Logic of Money-Driven Political Systems*, Chicago, University of Chicago Press, 1995, pp. 117 et seq.; John Kenneth Galbraith, *The New Industrial State*, New York, Signet Books, 1967, pp. 25-37, 258-59, 274, 287-89.

(10) G. William Domhoff, *The Higher Circles: The Governing Class in America*, New York, Vintage Books, 1971, p. 218.

(11) Frances Fox Piven & Ricard Cloward, *Regulating the Poor*, New York, Vintage Books, 1971, 1993.

(12) James O'Connor, *The Fiscal Crisis of the State*, New York, St. Martin's Press, 1973, p. 69.

(13) *Ibid*., pp. 6-7.

(14) *Ibid*., p. 24.

(15) *Ibid*., p. 24.

(16) Joseph R. Stromberg, 'The Role of State Monopoly Capitalism in the American Empire', *Journal of Libertarian Studies*, Vol. 15, No. 3, Summer 2001, pp. 57-93, available online at www.mises.org/journals/jls/15_3/15_3_3.pdf.

(17) Williams, *op. cit*.

(18) Laurence H. Shoup & William Minter, 'Shaping a New World Order: The Council on Foreign Relations' Blueprint for World Hegemony, 1939-1945', in Holly Sklar, ed., *Trilateralism: The Trilateral Commission and Elite Planning for World Management*, Boston, South End Press, 1980, pp. 135-156.

(19) C. Wright Mills, *The Power Elite*, Oxford and New York, Oxford University Press, 2000 (1956), p. 101; David F. Noble, *America by Design: Science, Technology, and the Rise of Corporate Capitalism*, New York, Alfred A. Knopf, 1977; David F. Noble, *Forces of Production: A Social History of Industrial Automation*, New York, Alfred A. Knopf, 1984.

(20) Frank Kofsky, *Harry S. Truman and the War Scare of 1948*, New York, St. Martin's Press, 1993.

(21) Charles E. Nathanson, 'The Militarization of the American Economy', in David Horowitz, ed., *Corporations and the Cold War*, New York, Monthly Review Press, 1969, p. 214.

(22) Noble, *op. cit*., p. 181.

(23) Nathanson, *op. cit*., p. 208.

(24) *Ibid*., p. 208.

(25) *Ibid*., p. 230.

(26) *Ibid*., p. 230.

(27) *Ibid*., pp. 222-25

(28) Mills, *op. cit*.; G. William Domhoff, *op. cit*.; G. William Domhoff, *The Power Elite and the State: How Policy is Made in America*, New York, Aldine de Gruyter, 1990; G. William Domhoff, *Who Rules America?*, Englewood Cliffs, NJ, Prentice-Hall, 1967; G. William Domhoff, *Who Rules America Now?*, Prospect Heights, Ill, Waveland Press, 1983, 1997.

(29) Paul Baran & Paul Sweezy, *Monopoly Capitalism: An Essay in the American Economic and Social Order*, New York, Monthly Review Press, 1966, pp. 64-66.

▲▼△▽▲▼△▽▲▼

*Kevin Carson lives in Fayetteville, Arkansas. He works as a hospital orderly and operates a lawn-mowing service. He belongs to the Voluntary Cooperation Movement (a mutualist affinity group), and the Industrial Workers of the World. He runs the Mutualist blogsite (http://mutualist.blogspot.com) and recently published the book* Studies in Mutualist Political Economy.

**"Kevin Carson... [has] recently published the book *Studies in Mutualist Political Economy.*"**

**Never surrender a single freedom!**

**You'll never know if you'll need it in the future!**

# AGAINST ANTI-DISCRIMINATION LEGISLATION

## Christopher Awuku

Most developed nations possess laws that are designed to limit discrimination—or at least the *manifestation* of discrimination—within their societies. Such legislation is often justified by attempting to provide "a level playing field" for minorities of various sorts. However, to libertarians, such laws are coercive, unnecessary and unjust. Why is this exactly?

Since libertarianism is about living your life as you choose (whilst respecting the equal liberty of others), a natural extension of this is freedom of association. Freedom of association is the principle that one should be free to associate with, or not associate with, whomever one chooses, even if this is on the basis of what would generally be seen as "discrimination".

As an example of this in the world of business, let us imagine that I own a furniture store. Within a libertarian society, would it be wrong for me to refuse my services to anybody I didn't choose to serve? And on any basis I desire? It would not be wrong, as it would be in accordance with freedom of association. I own the business, and it is not unreasonable to suggest that I should have sole discretion in how I operate it, and this would include declining to offer services for whatever reason I thought fit.

**"… in practice it is hard to see a libertarian society being founded on the basis of a nation of bigots."**

Some may not consider this a "PC" attitude. However, to libertarians, what one thinks or believes is of no consequence. No one in a libertarian society should be censured by the state for his or her "bad" beliefs. Without causing offence to some who may read this article, as the owner of my furniture shop I should retain the right not to serve black people or homosexuals—or indeed white people or heterosexuals.

However, as the owner of the business, I should be aware that I compete in a market with other businesses. My discrimination may lose me custom to rivals. In a libertarian society, what is to stop businesses from serving all? Nothing. Those who choose to discriminate should recognise the negative consequences of doing so.

So, a libertarian-inclined government in the United Kingdom would repeal the various anti-discrimination laws on the statute book, which include the 1975 *Race Relations Act* and the 1995 *Disability Discrimination Act*. In a libertarian society, the right freely to choose with whom to associate is a right in one's business affairs as well as one's personal life.

The state's drive to prevent private businesses from discriminating is an example of big government. The state has no genuine need to interfere with honest businesspeople who simply desire the ability to run their business and make a profit in peace. Small business pressure groups have for years been crying out for limits to red tape and over-regulation. Sadly, successive British—and EU—governments have not listened to them.

Finally, four important qualifications or clarifications should be noted. Inasmuch as it retains any function at all, a libertarian government should never discriminate in its dealings with people. All should be equal before the law. Second, a person might take up some form of employment that includes contractual obligations *not* to discriminate. Third, "discrimination" in the "freedom of association" sense discussed here is not at all the same as a warrant for attacks on members of groups one dislikes. And lastly, whatever the formal merits of the right to discriminate against others in one's life, discrimination is just not very "nice", and in practice it is hard to see a libertarian society being founded on the basis of a nation of bigots.

▲▼△▽▲▼△▽▲▼

*Christopher Awuku is a libertarian and member of the Society for Individual Freedom. He resides in Bedfordshire and writes political articles from a libertarian standpoint as a hobby. He can be contacted at lapafrax@postmaster.co.uk.*

# A BRIEF GUIDE TO THE FREEDOM OF INFORMATION ACT

Robert Henderson

**CONTENTS**



**"They… allow any person to obtain any data held by a public body or any private body officially deemed by parliamentary order to be forming a public function."**

## 1: DATA ACCESS: WHAT IS HAPPENING IN 2005?

(1.1) The major provisions of the FoIA came into force on the 1st January 2005. They do, in principle, allow any person to obtain any data held by a public body or any private body officially deemed by parliamentary order to be performing a public function. It is not necessary to be a British citizen to apply or to be in the UK when the application is made.

(1.2) The FoIA 2000 (UK) has force in England, Wales and Northern Ireland. A broadly similar Act applies to Scotland: the FoIA Scotland 2002. Unless I state otherwise, when I write FoIA, I shall mean both Acts.

(1.3) In some respects the Scottish Act has strengthened powers, for example a more narrowly defined ministerial veto and a 20-day limit on internal appeals against a refusal whereas the UK FoIA has no limit. Consequently, there will be occasions where the use of the Scottish FoIA will be preferable to the main Act because its terms are more favourable to those making a request. Moreover, it is always worth remembering that information held in Scotland may be applicable to the rest of the UK, especially where this is shared information.

(1.4) In addition, the Environmental Information Regulations 2004 and the Environmental Information (Scotland) Regulations 2004 (I shall call them collectively the EIRs) are now in force. These have administrative provisions broadly similar to the FoIA, although they do have less onerous requirements attached to them in some respects. However, they are very much a specialist interest and, to keep matters simple, all I shall say about them is that the general rules which apply to the FoIAs are a good guide to how the EIRs should be used. I do include a section on their very wide scope at the end.

(1.5) Finally, the Data Protection Act 1998 (DPA) has been strengthened by extending to public authorities the rights of individuals to see files held on them. There is no change in the DPA powers with regard to private bodies and individuals.

## 2: HOW EFFECTIVE WILL THE FoIA BE?

(2.1) This is immensely difficult to assess in advance, but much public information can potentially be withheld (more on that in section 5 below). However, even where material should or can legally be withheld, there is always a chance that the person dealing with the request may send out something they should not, through ignorance, error or even a deliberate wish to blow the whistle on someone or something.

(2.2) There is also no obligation on public bodies to record or keep copies of data. However, it is an offence under the FoIA to destroy data after an FoIA request has been made with the intention of denying that information to the person making the request.

(2.3) There were persistent media reports leading up to the 1st January 2005 that public bodies had been engaged in a widespread destruction of data before the FoIA comes fully into force. Nothing can be done about that where the data destroyed is not held electronically. Even if you know or have good reason to believe data existed, if it was destroyed before the 1st January 2005 that is the end of the story.

(2.4) The position with regard to electronically stored data is different. Deleting computer files in the normal way does not destroy the data, it

merely removes the file from the index which allows normal identification. The file can in principle be recovered. I deal with this question in more detail at paras 11.3 to 11.5 below.

(2.5) Various Government spokesmen have admitted that much data has been destroyed, but claim that this was merely good administrative housekeeping which was largely the consequence of public bodies reviewing their record keeping to ensure that data can be readily identified and retrieved. If you will believe that doubtless you will also believe that there are fairies at the bottom of your garden. However, this claim by Government does have one important effect: it will make any refusal to supply information on the grounds of difficulty of identification or the cost of retrieval more difficult to sustain.

(2.6) A general effect of the FoIA has already been seen even before the FoIA has come fully into force: public bodies attempting to reduce the burden of FoIA requests by making previously secret data available for public consumption. The most notable instance of this is perhaps the decision of MPs to place their expenses in the public domain. However, many other public bodies either have begun a similar process or intend to in the near future. Much of such information will be available on websites so check those thoroughly before making an FoIA request.

**"Various Government spokesmen have admitted that much data has been destroyed..."**

(2.7) I would judge the experience of the first three months of the Act to be encouraging. It is not that Government and other public bodies have been falling over themselves to provide information. Rather, it is the difficulties they have experienced when they have failed to release information which provides reason to believe that a refusal to release information will be used sparingly and that persistence may often overturn an initial refusal.

(2.8) The continuing row over the legal advice given by the Attorney General, Lord Goldsmith, on the legality of the invasion of Iraq demonstrates this better than anything. The problem simply will not go away and, although Goldsmith's advice has at the time of writing not been formally disclosed, more and more details have slipped out. It has been effectively admitted that the written answer Goldsmith provided to a Commons question about his advice represented the totality of his advice. In addition, an FoIA request for the release of the resignation letter from Foreign Office lawyer Elizabeth Wilmshurst has pushed the matter further. An edited version of the letter was supplied by the government. Since then the full text has been leaked to the press. The unedited text of the letter showed that Wilmshurst was not merely of the opinion that the invasion was illegal without a second UN resolution, but that she believed Goldsmith agreed with her opinion until shortly before he gave the advice that a second resolution was not required (London *Evening Standard*, 24th March 2005). As the original response to the FoIA request edited out the fact of Goldsmith's change of mind, the Government now looks shiftier than it would have done if the full text had been released. The Information Commissioner, Richard Thomas, is currently investigating complaints about the refusal of the Government to release Goldsmith's advice and he may well find against the Government as it is by no means clear that legal privilege will apply in such a case.

(2.9) The other intriguing Government development has been the use of the FoIA to elicit information about what previous Governments have done. In February, Labour Ministers released information about the previous Tory Government which by convention they would never have seen because an incoming Government does not seek access to what might best be described as the private papers of previous Governments, e.g. cabinet minutes and confidential briefings by civil servants of ministers. It is not yet clear whether this will become a general practice, but it is difficult to see how such documents could be regularly excluded under the provisions of the Act. The Lord Chancellor, Lord Falconer, has offered former ministers a right of appeal against such disclosure (*Daily Telegraph*, 10th February 2005).

(2.10) There have, of course, been many failures to get what is sought. A serious example is that of Sussex police which has refused an FoIA request for the full documentation relating to the shooting of James Ashley in 1998. (Ashley was shot in the middle of the night when police forced their way into his bedroom without warning in the dark and shot an unarmed and naked Ashley who was in bed with his girlfriend.) The police have refused the request on the grounds of cost.

### 3: PUBLICATION SCHEMES

(3.1) The FoIA also places an obligation on public authorities to develop a publication scheme to advise the public on the classes of information it publishes or intends to publish and whether access to the information will be free or charged. Charges will be probably be applied where charges were made for the information before the FoIA provisions came into force. The purpose of this is to prevent people getting material for which they would previously have paid the full cost, for the cost of copying or free if the material can be supplied electronically.

(3.2) These schemes have to be approved by the Information Commissioner.

(3.3) There is no 20 day (or longer) waiting period for information from such schemes. The data must be readily available on request. If they fail

to do so, refer the failure to the Information Commissioner.

### 4: WHAT ORGANISATIONS DOES THE FoIA COVER?

(4.1) All Government Departments, Agencies (such as the Benefits Agency), local councils, Parliament, devolved Assemblies, state funded educational establishments, the police, the armed forces, state regulators, quangos, publicly owned companies, the BBC and Channel 4.

(4.2) In addition private bodies which perform a public or quasi-public function may be designated as coming within the FoIA by Parliamentary Order, for example the Law Society. The criteria used for deciding whether a body does come tests for deciding whether the Act will be (1) does it have public functions and (2) is it a contractor providing services which the authority for which it is working is required to provide as part of its functions.

(4.3) Importantly, Private Finance Initiative (PFI) companies are potentially subject to the FoIA—but only potentially until they have been designated as such by Parliamentary Order—because they are arguably performing a direct public function. In practice, there will probably be a distinction between a PFI company running something like a school, and one providing parts of the infrastructure, for example building a hospital. A private body merely providing a service to government, for example, one doing research for the Government, will probably not come within the FoIA.

**"The largest obvious fly in the ointment is the power of Cabinet ministers to veto the release of information relating to central government…"**

(4.4) The judgement as to whether a private body should be brought within the FoIA will be made by the Lord Chancellor's Department (LCD) on advice from the appropriate government department. Therefore, if a private body claims not to be subject to the FoIA, make an application for its designation within the FoIA to the LCD.

### 5: WHAT DATA IS EXCLUDED?

(5.1) There are no less than 23 exemptions. These include the obvious such as the security and intelligence agencies (but not Special Branch which is part of the police), the National Criminal Intelligence Service (NCIS), special forces, courts and tribunals.

(5.2) There is also the question of jointly owned companies, limited companies owned by one or more local authorities. A limited company owned solely by one local authority comes within the FoIA, one owned by several authorities probably will not.

(5.3) The largest obvious fly in the ointment is the power of Cabinet ministers to veto the release of information relating to central government (but not local authorities) regardless of rulings by the Information Commissioner or the Information Tribunal. However, the Lord Chancellor, Lord Falconer, stated in an interview with the *Daily Telegraph* on 1st January 2005 that "The whole cabinet, we have decided, must agree before it [the veto] is used. Where it is used, detailed reasons have to given to Parliament and those reasons and the use of the veto are subject to judicial review. It would be very exceptional". That would seem to be a substantial barrier to ministerial abuse. A greater threat to disclosure will probably be the wide exemption which applies to the formulation of Government policy, although this exemption is subject to the public interest balancing test (see section 6 below).

(5.4) Other potentially broad exemptions are (1) where it is judged that the release of information would constitute a danger to an individual and (2) if a request is judged to be "vexatious", a judgement akin to the idea of the vexatious litigant. Both grounds for refusal would seem to be ripe for appeals.

(5.5) Requests can be refused on the grounds of cost—see below—because they are unreasonably broad, badly constructed or repeated within a short period of time.

(5.6) Copyright should not be a problem, and consequently cannot be used as a reason for not providing information. However, reproducing data which you receive under the FoIA will be subject to normal copyright rules.

(5.7) Problems could arise in the case of defamation where data is derogatory, for example, a health officer's report on a restaurant. It will be a case of suck-it-and-see to establish case law. Always bear in mind that data can be incorrect and go out of date.

(5.8) Personal data will normally be out of bounds, not least because the public interest test will not apply (see section 6 below). However, the boundary between public and private data is frequently not clear cut and a refusal on the grounds that it is personal can be challenged by applying to the Information Commissioner or to the courts. What will not automatically be excluded are the details of what people have done in the process of work or other relationships which are deemed to be within the public service.

### 6: THE PUBLIC INTEREST TEST

(6.1) Although there are many exemptions, what is known as the Public Interest Test (PIT), may override an exemption.

(6.2) There are certain bodies and classes of data to which the PIT does not apply. These are: secu-

rity bodies, court records, where there is a statutory bar on disclosure, Parliamentary Privilege, most personal data, data which is already accessible to the applicant and where a breach of confidence (as legally defined) would occur.

(6.3) The PIT has to be balanced against (1) the possibility of prejudice to the proper running of public business, (2) the disclosure of trade secrets, (3) whether the information will be published in the foreseeable future and it is reasonable to wait for the publication and (4) national security issues.

(6.4) The PIT test applies to exemptions which involve a prejudice test, for example, defence, international relations, relations within the UK, the economy, law enforcement, audit functions, health and safety, commercial interests and the economic interests of the UK. It also applies to some exemptions which do not involve a prejudice test such as formulation of government policy and professional privilege.

(6.5) If Britain follows other common law based countries such as the Republic of Ireland, the presumption will be in favour of the PIT if the arguments for and against disclosure are deemed to be equal.

### 7: THE COST OF MAKING AN FoIA REQUEST

**"Any person may apply for information without giving a reason for the request."**

(7.1) Assuming no exemptions apply, central government bodies have to supply any data they hold provided it will not cost more than £600 in manpower to obtain. For local councils and private bodies deemed to have a public function, the figure is £450.

(7.2) If the cost of the request is deemed to be above the £600 or £450 figure, the public body may either refuse the request or charge for part or all of the cost.

(7.3) If a request is refused on the grounds of cost or the charge is thought to be unreasonable, the person making the FoIA request can appeal to the Information Commissioner.

(7.4) The recipient of an FoIA request may charge for the cost of copying such as photostatting.

### 8: HOW QUICKLY MUST A PUBLIC BODY REPLY TO A REQUEST?

(8.1) Other things being equal, the body to which you have applied must reply within 20 working days of you sending it. Exceptions are where the data is held in archives (30 working days allowed), the public body is a school (60 working days allowed) or the request involves troops on operational duty or the data is held abroad (60 working days with the consent of the Information Commissioner).

(8.2) However, commonsense suggests that there will be occasions where there are legitimate reasons for a failure to reply within the 20-day period: delay or loss of your request in the post (it is best to send any request by recorded delivery), staff absence and so forth.

(8.3) Legally, you would be entitled to complain to the Information Commissioner or go to court if the delay is longer than the statutory limits, but don't make this your first port of call. Ask yourself whether the delay is reasonable or not in all the circumstances.

(8.4) When you receive a reply, it must be a full one not merely a letter of acknowledgement or a holding letter.

(8.5) If an FoIA request is sent to an office which does not deal with the data, that office has a responsibility to direct your request to the correct office. They are not permitted to send you on a paperchase by writing back and saying you should have written to a different address or person.

### 9: HOW TO MAKE AN FoIA REQUEST

(9.1) Any person may apply for information without giving a reason for the request.

(9.2) Your request may be by letter, email or fax. In the case of the EIR, a request may be made orally.

(9.3) You do not need to cite the FoIA and or the EIR as the basis for your request but it is advisable to that you do so to remove any confusion.

(9.4) You should state the preferred format for the reply: e.g. photostats, email, newly compiled information by public body etc.

(9.5) The ideal format for most inquiry responses would be by email, because that will avoid any copying costs. However, if you wish the data for legal purposes, hard copy is advisable because you may need to produce it in court. It is also worth bearing in mind that many official documents end up with handwritten notes on them. You probably will not get that data if you simply ask for the information by email because the document will normally be copied to you from the hard disk or other electronic storage facility.

(9.6) If you do ask for data by email, unless you are absolutely sure that your virus protection is up-to-date you can minimise the chances of viruses by requesting that it is sent to you in plain text in the body of the email rather than by attachment.

## 10: GETTING THE MOST OUT OF THE FoIA

(10.1) Find out who is the official FoI officer within the organisation: all FoIA encompassed bodies should have one. Most public bodies will have a website containing the details of their FoI officer.

(10.2) Keep your requests as simple and concrete as possible.

(10.3) Use the FoI officer to help you target your enquiries. Public bodies have a legal obligation to advise and assist within the limits of what is "reasonable". The FoI officer can help you to identify the computer files and other data you require before you submit your request.

(10.4) When phrasing your FoI request, always keep to the forefront of your mind the fact that public servants will instinctively interpret your request in the narrowest possible way. Remove as much ambiguity as possible before you submit the request.

(10.5) Avoid sending the same type of broad request at the same time to a number of different bodies which cover the same general area of work, for example, those dealing with environmental issues. They are likely to be in contact with one another and if you get a reputation as a serial requester, it may damage your chances of getting anyone's co-operation.

**"Keep your requests as simple and concrete as possible."**

## 11: WHAT TYPE OF INFORMATION CAN I GET?

(11.1) The FoIA is retrospective. In other words, it does not merely cover data created since the Act came into force but all data.

(11.2) Assuming your request does not fall foul of one of the exemptions, potentially any information is available that a public body holds and which is deemed to be public rather than private information, including data supplied by private companies. The data may be held in any medium, including recordings of conversations on tape, floppy disk, CD etc.

(11.3) There is a very large grey area which the FoIA does not address which is the existence of data held electronically which has been deleted but which remains stored on computers. When a computer file is deleted it is not destroyed. All that happens is that it is removed from the index which allows normal identification of the file. Consequently, it can be recovered. This can be easily done if the file is in held in something like Windows' "Wastebin" and the "Wastebin" has not been emptied. Even if it has been emptied, the file can still be recovered by someone with the requisite IT knowledge.

(11.4) Any large public organisation will have its own IT department and should, in principle, able to recover a file. Whether they will be willing to do it is another matter, so at the moment it is a question of making a request and seeing what will happen. If a flat refusal results the matter can be referred to the Information Commissioner for adjudication.

(11.5) Even if it is established that such files are potentially within the FoIA, the question of practicality has to be addressed. If an FoIA request supplies dates when the file was likely to have been created, the names of people likely to have created the computer file and it tightly defines the nature of the information required, it will be a much more reasonable request than a blanket request for information about a subject. Because of the high cost of skilled IT work, the question of cost could quickly debar your request if it is too demanding. It should also be remembered that not all public bodies are large enough to have IT expertise on staff.

(11.6) Data does not have to be in the form you want for you to request it. If the basic data is held on a database it can be retrieved using the database's search program. This manner of requesting data also has the advantage of taking little time and being in a form which can be emailed to you. Hence, such requests should always fall with the cost limits of making an FoIA request and avoid copying charges.

## 12: WHAT MUST I BE TOLD IF MY FoIA REQUEST IS REFUSED?

(12.1) A public body cannot simply say it is refusing a request. It must give detailed reasons for refusing a request except in cases where harm might arise from not only the release of data but even from the detailed reasons for the refusal, for example, if the police are keeping someone under surveillance in anticipation of a crime being committed.

(12.2) The legitimate reasons for refusing a request are, as previously mentioned, (1) that the data is exempt under the FoIA, (2) an identical or substantially similar request has been made recently, (3) it is vexatious, i.e. the request is not primarily for information but to cause trouble for the public body, and (4) that to obtain it will exceed the cost limit.

(12.3) Any of these claimed reasons can be challenged by application to the Information Commissioner or to the courts.

## 13: ILLEGITIMATE REASONS FOR REFUSING AN FoIA REQUEST

(13.1) Public bodies cannot refuse a valid FoIA request for such reasons as (i) they will only re-

lease data if ordered to do so by a court, (ii) it is claimed the data is for internal use only, (iii) the request is deemed to be a "fishing expedition", (iv) that it creates a dangerous precedent, or (v) the request serves no useful purpose.

(13.2) Doubtless many other improper reasons will be dreamed up. The way to decide if they are improper is simple: just ask yourself whether the data is covered by an exemption. If not, the reason is bogus.

### 14: WHAT CAN I DO IF A REQUEST IS UNREASONABLY REFUSED?

(14.1) Public bodies are being encouraged to set up their own internal appeal procedures. Under normal circumstances this should be your first point of appeal against any refusal you consider unreasonable. However, if the public body either does not have such an internal process or if there is undue delay in hearing an appeal, you may go directly to the Information Commissioner.

(14.2) If a public body's internal appeal procedure comes down against you, you can appeal to the Information Commissioner to overturn their decision.

(14.3) If the Information Commissioner's decision goes against you and you believe it to be unreasonable, you may appeal to the Information Tribunal or seek a judicial review of his decision.

(14.4) If the Information Tribunal decision goes against you or a ministerial veto is used, you may seek a judicial review.

(14.5) The Information Commissioner has the power to order the release of information on the pain of legal penalties. Ultimately, a refusal to supply information would become a contempt of court, which in theory at least can result in imprisonment.

**"I have considerable experience of the Information Commissioner's Office over the past seven years… The experience has not been encouraging…"**

### 15: WILL THE INFORMATION COMMISSIONER BE WILLING TO ACT?

(15.1) I have had considerable experience of the Information Commissioner's Office over the past seven years. That experience has related to the DPA. That experience has not been encouraging for those who will be seeking information from public bodies, the disclosure of which would be for them embarrassing or worse.

Both the present commissioner, Richard Thomas, and his predecessor have been persistently unwilling to use their statutory powers to force the disclosure of information against any data holder who refuses to divulge information where the data holder is powerful or influential, for example, the police or national newspapers. The probability is that the same bad habits will exist with the FoIA.

If the commissioner will not use his legal powers, the only recourse a person making an application has under either the FoIA or the DPA is to take the culprit either to the Information Tribunal or the courts. However, both procedures potentially leave the complainant burdened with heavy legal costs even if they represent themselves because they may have to pay the costs of the other side. That decision will be up to the Tribunal or the court.

### 16: WILL THE INFORMATION COMMISSIONER BE ABLE TO COPE?

(16.1) The resources of his office—around 200 staff in total—have to deal not only with the FoIA but also with the DPA. The commissioner is responsible not only for dealing with complaints of non-compliance under both Acts, but also for the supply of information to the public about the Acts and the general oversight and administration of the Acts (the administration is considerable in the case of the DPA because all data holders have to register with the Commissioner).

(16.2) Because of the work remit and the limited staff, simple practicality suggests that the Commissioner's office may be overwhelmed by FoIA appeals and queries. This did not happen with the DPA but the FoIA is a different beast from the DPA which only refers to information held about the individual making the request. Hence, its attractions for journalists, broadcasters, writers, campaign groups and political parties is very limited. The FoIA allows general information to be sought and given and, consequently, will be of great interest to the likes of journalists and interest groups. Such people and groups will also tend to go for the information most likely to be sensitive and thus the most susceptible to refusal by the body to whom the FoIA request is made.

### 17: WHAT HAPPENS IF DATA HAS BEEN ILLEGALLY DESTROYED?

(17.1) If you believe that data has been destroyed after you sought it through an FoIA request, thus denying you access to it, you can report it to the police because it is a criminal act to destroy data in such circumstances. The Information Commissioner can also institute criminal proceedings for this offence.

(17.2) Whether the police will act on such complaints is debatable, so it is a case of simply trying them out with a case or two. It is also true that proving evidence existed and has been destroyed after a request was submitted will be next to impossible in many, probably most, instances.

(17.3) You can also refer the matter to the Infor-

mation Commissioner.

**18: THE FoIA AND THE DPA**

(18.1) When you make an FoI request the receiving body may decide that your request cannot be dealt with as an FoIA request because it refers to personal data about the person making the request and consequently comes under the DPA provisions. If this is the case they must treat the FoIA request as a DPA subject access request without requiring a further request by the enquirer. If they do, a £10 fee may be charged. However, if you do not agree that your request falls under the DPA, you should refer the matter to the Information Commissioner for adjudication.

**"The best advice is to suck-it-and-see."**

**19: ENVIRONMENTAL INFORMATION REGULATIONS (EIRS)**

(19.1) The remit of these is much broader than the common understanding of the word environment would allow. The remit ranges from the obvious such as pollution, GM releases and large-scale developments such as Heathrow expansion, to the less obvious such as foods and drugs and the downright improbable such as the condition of the Elgin Marbles and the effects of foxhunting.

(19.2) Because the remit is so broad, it is a reasonable assumption that anything which even potentially impacts on the environment or is potentially impacted upon by the environment comes within the regulations. The best advice is to suck-it-and-see.

**20: USEFUL CONTACTS**

**Information Commissioner's Office**
www.informationcommissioner.gov.uk
www.informationcommissioner.gov.uk/eventual.aspx?id=1041&expmovie=1
(The second URL is a direct link to the ICO's own introduction to the FoIA.)
Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

**Department for Constitutional Affairs**
www.dca.gov.uk
www.dca.gov.uk/foi/coverage.htm
(The second URL is a direct link to a list of organisations covered by the FoIA.)

Freedom versus licence...

*Despite the media's mission to blend two concepts together there is a wealth of difference between ... Licence and Freedom.*

*Licence means that anything goes. No ethical consideration is required. Just shrug your shoulders and walk away from the consequences of your actions.*

*By contrast, and it's a big contrast, Freedom demands you take responsibility for what you do. Every act has an effect on another. If you have chosen Freedom as a way to conduct yourself then you will know that it requires ethical negotiation every step of the way.*

From *The Cunningham Amendment*, Vol. 7, No. 1, January 2005.

**(...continued from the front page)**

were hiding a decision to send all members of the Executive Committee on a four-week fact-finding tour of the Seychelles… More seriously, on behalf of the SIF I must offer my apologies to all those inconvenienced by the rearranging and then cancellation of our 2005 luncheon at the House of Commons. Despite our best efforts, the problems caused by the general election called for the 5th May made it impossible to carry through with the event. However, we hope to reschedule the event for later in the year. Many thanks for your patience.

*Nigel Meek*

# SOCIETY FOR INDIVIDUAL FREEDOM: MINUTES OF THE 2004 AGM

**Date, time, and place:** The meeting was held at 5.15pm on the 27th October 2004 at the Westminster Arms, 9 Storeys Gate, London, SW1P 3AT.

**Members present and apologies for absence:** Paul Anderton, Dr Barry Bracewell-Milnes, Don Furness, Robert Henderson, Peter Jackson, Nigel Meek, Lord Monson, Fabian Olins, Michael Plumbe, Lucy Ryder, Jenny Wakley, Major Peter Wakley, and David Wedgwood. Apologies had been received from Professor Antony Flew and Howard Hammond-Edgar.

**The minutes of the 2003 AGM** held on the 8th October 2003 had been approved in Committee and published in the January 2004 issue of *The Individual*. There were no matters arising.

**"… it was reported that some members are now paying a ridiculously small annual subscription to the SIF: 87p in one case!"**

**Chairman's Report:** Michael Plumbe presented his report which was adopted and subsequently published in the February 2005 issue of *The Individual*. Robert Henderson offered a few additional remarks about the Campaign for Freedom of Information and the forthcoming Freedom of Information Act.

**Treasurer's Report:** Lucy Ryder's report was circulated and adopted. Amongst other things she noted that there had been bank charges that she had contested and which the Bank had agreed to refund. She had also transferred some money into a building society account. Overall the SIF is currently in a comfortable financial position. The chairman, Michael Plumbe, expressed the thanks of the meeting to Lucy Ryder for her work. Thanks were also given to Peter Curry and Professor David Myddelton for their continuing support. Lord Monson drew attention to the reduction in the membership fees being received. It was acknowledged by those most concerned—in particular Nigel Meek, Michael Plumbe, and Lucy Ryder—that this needed attention. For example, it was reported that some members are now paying a ridiculously small annual subscription to the SIF: 87p in one case!

**Election of Officers:** The following had been previously elected in perpetuity: Lord Monson (President), Sir Richard Body (Vice-President), Professor David Myddelton (Vice-President), and Dr Barry Bracewell-Milnes (Vice-President and Chairman of the National Council). The following were additionally elected at the AGM as the SIF's main officers: Michael Plumbe (Chairman of the Executive Committee), Lucy Ryder (Hon. Treasurer), Peter Jackson and Jenny Wakley (Joint Hon. Secretaries), Cynthia Campbell-Savours (Social Secretary), Nigel Meek (Hon. Editor and Hon. Membership Secretary), Howard Hammond-Edgar (Webmaster), and Don Furness (Hon. Chairman of Choice in Personal Safety). In addition, Paul Anderton, Martin Ball, Michael Champness, David Wedgwood, and Rhode Zeffertt were also elected to the Executive Committee. All were proposed, seconded, and elected *nem. con.* All members of the National Council are *ex officio* members of the Executive Committee.

**Election of Officers to the National Council:** The following were elected: Dr Barry Bracewell-Milnes (Chairman of the National Council), Lord Monson, Sir Richard Body, Cynthia Campbell-Savours, Professor David Myddelton, and Ralph Shuffrey. All were proposed, seconded, and elected *nem. con.* In addition, the following are *ex-officio* members of the National Council via the Executive Committee: Peter Jackson, Michael Plumbe, Lucy Ryder, and Jenny Wakley.

**Any other business:** Don Furness reported on a case taken up by Choice in Personal Safety that involved riding a motorcycle without a helmet. Regrettably they had been advised by a human rights lawyer not to pursue the case.

Peter Jackson gave a report on Tell-IT, the SIF's longstanding campaign to make information about the outcomes of drugs and treatments more widely available to doctors and patients alike. Tell-IT continues to support EPIC, the company founded by Dr Alan Dean to collect data from GPs for the General Practice Research Database (GPRD). This is the source of over forty million patient years of validated raw data that is needed to make available the information that we seek. EPIC aims to give researchers very cheap infor-

mation on which to work. This is totally in line with the aims of Tell-IT. EPIC recognises that Tell-IT helped to bring about a change in Government policy, but for the moment we can only give EPIC the moral support it needs and continue to maintain a "watching brief".

In view of the possibility of a general election being held soon, it was noted that the date of the House of Commons luncheon had been changed to the 12th April 2005.

The Chairman introduced the proposed new trifold brochure promoting the SIF that Nigel Meek had designed.

The Chairman closed the meeting at 6.25pm.

## SOCIETY FOR INDIVIDUAL FREEDOM: MINUTES OF THE 2004 NATIONAL COUNCIL MEETING

**"This has been a quiet year…"**

**Date, time, and place:** The meeting took place at the Westminster Arms immediately after the SIF AGM.

**Chairman's Report:** Dr Barry Bracewell-Milnes commented that this is a formality unless an unexpected situation occurs. This had been a quiet year as expected.

**Election of the Executive Committee:** The members of the Executive Council were duly re-elected.

The meeting closed at 6.40pm.

The "New Class" and the "Therapeutic State"...

*While the state has lost some of its ability to control the economy on a global s cale, it has moved into new areas of dominance. Education, child rearing, interpersonal-relations, at one time the purview of the family or the community, are now taken over by the "Therapeutic State". A New Class rooted in state bureaucracy, the media and the university uses the Therapeutic State as a job creation device. The state deliberately fosters dependency and creates client populations who become statist pressure groups.*

Larry Gambone, *Towards Post-Modern Anarchism*, Red Lion Press, 1999, p. 3.

**Society for Individual Freedom**

PO Box 744
BROMLEY
BR1 4WG
United Kingdom

Phone: 01424 713737
Email (general): chairman@individualist.org.uk
Email (editorial): editor@individualist.org.uk
Email (Tell-It): tellit@indivdualist.org.uk

www.individualist.org.uk

*The SIF's Aim:*

*"To promote responsible individual freedom"*

**The SIF is a "classical liberal" organisation that believes in the economic and personal liberty of the individual, subject only to the equal liberty of others.**

**The SIF promotes...**

- ✓ The liberty, importance, and personal responsibility of the individual.
- ✓ The sovereignty of Parliament and its effective control over the Executive.
- ✓ The rule of law and the independence of the Judicature.
- ✓ Free enterprise.

**SIF Activities**

The SIF organises public meetings featuring speakers of note, holds occasional luncheons at the Houses of Parliament, publishes this journal to which contributions are welcome, and has its own website. The SIF also has two associated campaigns: Tell-It, that seeks to make information on outcomes of drugs and medical treatments more widely known and available to doctors and patients alike, and Choice in Personal Safety (CIPS), that opposes seatbelt compulsion and similar measures.

**Joining the SIF**

If you broadly share our objectives and wish to support our work, then please write to us at the address on this page, enclosing a cheque for £15 (minimum) made payable to the Society for Individual Freedom.

## The Law of Equal Freedom

*"Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man."*

**Herbert Spencer, *Social Statics*, 1851**