

# RALPH NADER, LONE CRUSADER? THE ROLE OF CONSUMER AND PUBLIC INTEREST ADVOCATES IN THE HISTORY OF FREEDOM OF INFORMATION<sup>†</sup>

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## I. INTRODUCTION

This article examines the role of consumer and public interest advocates in the diffusion of freedom of information laws.

Scholarly study of this issue has been uneven. Ralph Nader is widely-known to have played a very important role in the 1974 amendments to the United States *Freedom of Information Act*

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(“FOIA”).<sup>1</sup> In other countries groups similar to Nader also contributed significantly to local laws by lobbying for access as a way of harnessing the state to address power imbalances in consumer markets.<sup>2</sup> These groups also became important users and supporters of access laws where they were introduced. But, aside from Nader himself, the role of these groups has only received attention in a few cases.<sup>3</sup> Moreover, these groups have not been featured prominently in systematic studies of the spread of access laws. Such studies have typically only emphasised the importance of groups like journalists and politicians, and the influence of institutional factors like the structure of electoral politics.

This article constitutes an initial contribution to efforts to redress this imbalance, through historical analysis, drawing loosely on comparative methods<sup>4</sup> and process tracing.<sup>5</sup>

This article begins by showing that consumer movements mattered, not just in the US but in many other countries as well, and that they contributed in three main ways. First, they responded to a widespread and increasing demand for information by consumers, and in so doing, fostered the development of expectations that information of many kinds, which had not formerly been widely available, should be publicly accessible. Second, in some of these countries, consumer movements actively supported proposals to introduce freedom of information laws once they were on the legislative agenda. And third, in a small number of what would turn out to be significant countries, they played a crucial role in putting the matter on the legislative agenda in the first place. The most prominent examples of this active mobilisation occurred in those English-speaking countries where con-

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1. See Sam Archibald, *The Early Years of the Freedom of Information Act—1955 to 1974*, 26 POL. SCI. & POL. 726, 730 (1993).

2. See, e.g., Martin Smith, *Open Government and the Consumer in Britain*, in FREEDOM OF INFORMATION TRENDS IN THE INFORMATION AGE 125, 127 (Tom Riley & Harold Relyea eds., 1983).

3. Principally in the USA and the UK. See, e.g., *id.*; A Consumer Consultant, *Freedom of Information: The Consumer Dimension*, in SECRECY, OR THE RIGHT TO KNOW? 17 (1980); James Michael, *Access to Official Information*, 7 BRIT. J.L. & SOC'Y 95 *passim* (1980).

4. See generally 1 JOHN STUART MILL, *A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE* (9th ed., 1875) (expounding an inductive logical methodology on how to approach the discussion of a subject).

5. See generally Andrew Bennett, *Process tracing: A Bayesian Perspective*, in THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY 702 (Janet M. Box-Steffensmeier et al. eds., 2008) (expounding an inferential method of analyzing historical and political events).

sumer movements were strongly influenced by public interest advocacy, particularly between the early 1960s and the late 1980s.<sup>6</sup>

The article then considers why consumer movements do not all appear to have mobilised to the same extent or equally decisively, despite having played an important role in distributing information and normalising access to the information in so many countries, and having a clear interest in freedom of information laws. The article will argue that this difference can be understood in terms of the intersection between biographical and structural factors. Mobilisation of consumer advocates on the issue was prominent in countries where important debates over access occurred between the 1970s and mid-1980s, and usually involved groups inspired by Ralph Nader's new style of advocacy, often in direct contact with him personally.<sup>7</sup> Their influence was short-lived for many reasons, including the fact that from the late 1980s onwards, governments began to adopt targeted transparency mechanisms as a mainstream tool for regulating many aspects of economic life.<sup>8</sup> Scholarly and professional discourse around these laws, and freedom of information in general, has tended to obscure the role consumer advocates played in identifying that transparency could be used in this way, and in pushing for the first of these laws to be introduced.

This study of the role of consumer advocates is a reminder that access laws are not merely significant for democratic relations between citizens and the state. They also have significant economic and social implications, and the state can be as much a means to an end as a participant in struggles over information. It also illuminates a particular, formative period in the modern regulation of relations between individual consumers and corporations.

## II. CONSUMER ADVOCATES MATTERED

The consumer advocacy movement pre-dated freedom of information in almost every country, often by many decades.<sup>9</sup> It developed

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6. See *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT* 175, 467-68, 535, 592 (Stephen Brobeck et al. eds., 1997).

7. See, e.g., Smith, *supra* note 2, at 127-28.

8. See ARCHON FUNG ET AL., *THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES EFFECTIVE?* 6 (2004), [https://ash.harvard.edu/files/political\\_econ\\_transparency.pdf](https://ash.harvard.edu/files/political_econ_transparency.pdf).

9. The main exceptions are the Scandinavian countries, particularly Sweden and Finland. Sweden's freedom of information laws date back almost two hundred years. See Tom Riley, *A Review of Freedom of Information around the World*, in *FREEDOM OF INFORMATION TRENDS IN THE INFORMATION AGE* 5, 5-6 (Tom Riley & Harold Relyea eds., 1983).

particularly early and was particularly strong in the United States, where several non-profit organisations were founded during the inter-war period. These included Consumers' Research<sup>10</sup> (1929) and Consumers' Union<sup>11</sup> (1936). Similar organisations, which also tested products available on the consumer market and published the results, began to emerge in Europe during the post-war era in response to the development of the post-war consumer society.<sup>12</sup> One prominent example of a similar not-for-profit group outside the US is the Consumer's Association in the UK, which began publishing *Which?* Magazine in 1957.<sup>13</sup> By 1960, these organisations were numerous and widespread enough to give rise to the International Organization of Consumers Union ("IOUC").<sup>14</sup> The IOUC, founded by groups from the US, UK, the Netherlands, Belgium, and Australia, followed a conference attended by seventeen organisations from fourteen countries.<sup>15</sup> In some parts of Europe, government agencies also came to play an important role in product testing and consumer information—such as the *Stiftung Warentest* in Germany.<sup>16</sup>

Consumer advocates from organisations such as these contributed to the development of freedom of information in three ways. First, they responded to demand for consumer-related information, and in so doing, both encouraged further demand and helped to legitimise the idea of access. This demand was considerable and widespread.<sup>17</sup> It can be seen in the UK, where, for example, *Which?*

10. See Lawrence B. Glickman, *The Strike in the Temple of Consumption: Consumer Activism and Twentieth-Century American Political Culture*, 88 J. AM. HIS. 99, 106 (2001); CONSUMERS' RESEARCH, <http://consumersresearch.org/about/> (last visited Nov. 25, 2017) (indicating that "Consumers' Research was incorporated in New York City in 1929.").

11. See Joachin Marcus-Steff, *L'information Comme Mode D'action Des Organisations De Consommateurs*, 18 REVUE FRANÇAISE DE SOCIOLOGIE, 85, 88 (1977), [www.jstor.org/stable/3320870](http://www.jstor.org/stable/3320870); *About Us-Mission*, CONSUMERS UNION, <http://consumersunion.org/about/mission/> (last visited Nov. 25, 2017) (indicating that Consumers' Union "[f]ormed as an independent, nonprofit organization in 1936 . . .").

12. See REBECCA J. PULJU, *WOMEN AND MASS CONSUMER SOCIETY IN POSTWAR FRANCE* 30-31 (2011).

13. See Marcus-Steff, *supra* note 11, at 103. See generally WHICH?, <https://www.which.co.uk> (last visited Oct. 19, 2017).

14. See *Who We Are*, CONSUMERS INT'L, <http://www.consumersinternational.org/who-we-are/our-history/> (last visited Nov. 25, 2017) (indicating that "Consumers International, formerly known as the International Organisation of Consumers Unions (IOCU), . . . started in 1960 by a group of five consumer organisations from the US, Western Europe and Australia").

15. ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 175-76; see also *Who We Are*, CONSUMERS INTERNATIONAL, <http://www.consumersinternational.org/who-we-are/our-history/> (last visited Nov. 25, 2017).

16. Marcus-Steff, *supra* note 11, at 86, 89.

17. See ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 6-9.

Magazine had 700,000 subscribers by 1977.<sup>18</sup> The contribution it made to legislative change was recognised by those involved. For instance, the technologically-driven rise of consumerism and consumer activism was cited as an important influence in the UK during parliamentary hearings on its access law almost two decades later.<sup>19</sup> In addition to this indirect role by stimulating demand and influencing norms, advocacy organisations occasionally exerted direct influence.<sup>20</sup> In France in the 1970s, a series of legal disputes involving the publication of technical information about beach pollution, pharmaceuticals and polystyrene packaging led to a line of jurisprudence that consumers had a right to know about consumer information, and that consumer advocates enjoyed an associated right to publish it.<sup>21</sup> By way of example, one of these cases arose out of a dispute between two medical laboratories and a publisher over the legality of a 1974 book containing the results of comparisons of the effectiveness of medicines.<sup>22</sup> The decision by the *Cour d'Appel* (Court of Appeal in Paris) in favour of the publisher was important because it established a clear legal precedent in favour of access.<sup>23</sup> It was also culturally significant because the circumstances of the case contributed to the delegitimisation of social and professional status as a rationale for restricting the availability of information. In this instance, the laboratories had argued that medical information was “the business of doctors” and was not appropriate for public release.<sup>24</sup> This argument, however, was undermined by the revelation that the laboratories were selling the same information as the publisher they had sued, only at 365F instead of 9F per copy.<sup>25</sup> This case, and others like it, constituted the legal context within which the government sponsored a suite of reforms in 1975 that aimed at admin-

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18. Marcus-Steiff, *supra* note 11, at 103.

19. SELECT COMMITTEE ON THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION (OPEN GOVERNMENT: MINUTES OF EVIDENCE), REPORT, 1994-5, HC 290—i-iii, at 33 (UK).

20. See MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 30 (1982); John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 25 (1998) (first citing MARK V. NADEL, THE POLITICS OF CONSUMER PROTECTION (1971); and then citing PERTSCHUK, *supra* note 20).

21. See Marcus-Steiff, *supra* note 11, at 95-96.

22. See *id.* at 96.

23. See *id.*; see also Jean-Yves Nau, *Avant Irène Frachon, qui se souvient du Dr Pradal?*, SLATE (Nov. 30, 2016, 11:40 AM), <http://www.slate.fr/story/129485/quarante-ans-irene-frachon-henri-pradal>.

24. Marcus-Steiff, *supra* note 11, at 96.

25. *Id.*

istrative liberalisation.<sup>26</sup> These opened the door to the French access law, under circumstances I have described elsewhere.<sup>27</sup>

Second, consumer advocates were usually a prominent constituency, supporting proposals for legal rights of access once legislatures began to formally consider them. In many countries, this support appears most obviously as testimony in the records of legislative committee hearings.<sup>28</sup> One example is Canada, where its Consumer's Association testified in favour of making product testing information available under what would become the *Access to Information Act of 1983*.<sup>29</sup> In other countries, their counterparts supported freedom of information by joining with other interest groups to campaign.<sup>30</sup> The countries discussed below are all examples of this, including Japan, where the Consumers' Federation joined several other civil society organisations in the Citizen's Movement for an Information Disclosure Law.<sup>31</sup> The support represented the crystallisation of an array of long-standing efforts by consumer groups to win access to specific sorts of information, such as the minutes of regulatory bodies, particularly pharmaceutical regulators.<sup>32</sup> The Movement played an important role in defeating the Liberal Democratic Party ("LDP") of Japan's proposals for an official secrets law during the 1980s,<sup>33</sup> as well as supporting positive rights of access in later years.<sup>34</sup> The link between support for consumer rights and freedom of information can also be seen in the frequency with which politicians and parties, particularly those at the progressive end of the spectrum, adopted both sets of concerns.<sup>35</sup> This occurred in both Germany and Japan, where each country's Green party strongly advocated for reform in both areas in the 1990s and

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26. *Id.* at 99.

27. See Tom McClean, *Why the French FOIA Failed*, 7 S.W. J. INT'L MEDIA & ENT. L. 31 (2016) [hereinafter *Why the French FOIA Failed*].

28. See, e.g., Riley, *supra* note 9, at 12, 43-44.

29. See *id.* at 43.

30. See, e.g., *id.* at 23, 31 (describing the efforts of freedom of information advocates in New Zealand and Australia, respectively, who joined other interest groups to campaign for freedom of information legislation).

31. Information Clearinghouse Japan, *Japan – Breaking Down the Walls of Secrecy: The Story of the Citizen's Movement for an Information Disclosure Law*, FREEDOMINFO.ORG (July 27, 2002), <http://www.freedominfo.org/2002/07/case-study-japan-breaking-down-the-walls-of-secrecy/>.

32. *Id.*

33. *Id.*

34. *Id.*; see also Katsuya Uga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law*, in *LAW IN JAPAN: A TURNING POINT* 276, 293-94 (Daniel Foote ed., 2007).

35. See Information Clearinghouse Japan, *supra* note 31.

early 2000s.<sup>36</sup> The deep elective affinity between a commitment to freedom of information and to consumer rights can also be seen in the US, although the manner in which this played out did not affect the development of access rights in the same way.<sup>37</sup> John Moss, a member of Congress who was instrumental to the passage of the original *Freedom of Information Act of 1966*,<sup>38</sup> went on to play an instrumental role in the passage of key consumer protection acts in subsequent years, including the *Consumer Product Safety Act*,<sup>39</sup> the *Motor Vehicle Information and Cost Savings Act*,<sup>40</sup> the *Toy Safety Act of 1984*,<sup>41</sup> the *Poison Packaging Prevention Act of 1970*<sup>42</sup> and the *Toxic Substances Control Act*.<sup>43</sup>

Third, in some countries, non-government consumer advocate groups went much further by actively campaigning to put freedom of information on the political agenda in order to further their advocacy goals, and often exercising a decisive influence over the legislative process.<sup>44</sup>

#### A. United States

The United States provides the clearest example of this active and decisive contribution to freedom of information on the part of public interest consumer advocacy. This nexus is particularly easy to

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36. See *An den Pranger stellen nutzt niemandem*, ALLGEMEINE FLEISCHER ZEITUNG, Feb. 1, 2006, LexisNexis; Diethard Wiechmann, *Am Ende war alles fuer die Katz*, LEBENSMITTEL ZEITUNG, Dec. 29, 2006, at 20; Information Clearinghouse Japan, *supra* note 31.

37. See generally ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 168-69.

38. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

39. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972).

40. Motor Vehicle Information and Cost Savings Act, Pub. L. No. 92-513, 86 Stat. 947 (1972).

41. Toy Safety Act of 1984, Pub. L. No. 98-491, 98 Stat. 2269.

42. Poison Prevention Packaging Act of 1970, Pub. L. No. 91-601 84 Stat. 1670.

43. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976); see *Congressman John E. Moss Overview*, JOHN E. MOSS FOUND. (Feb. 11, 2014), <http://www.johnemossfoundation.org/overview.htm>; George Kennedy, *How Americans Got Their Right to Know: Getting Congress to Guarantee Access to Federal Information Through FOIA 30 Years Ago was a Press Triumph*, JOHN E. MOSS FOUND. (1996), <http://www.johnemossfoundation.org/foi/kennedy.htm>, for discussions on US Congressman John Moss's involvement in the fight for freedom of information legislation in the US.

44. See, e.g., JOHN McMILLAN, FREEDOM OF INFORMATION AND WHISTLEBLOWER LEGISLATION: AN AUSTRALIAN PERSPECTIVE 1-2 (2005), [http://www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0021/34437/30-November-2005-Freedom-of-information-and-whistleblower-legislation-an-Australian-perspective.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0021/34437/30-November-2005-Freedom-of-information-and-whistleblower-legislation-an-Australian-perspective.pdf) (stating that "FOI and whistleblower protection are both now part of the legal framework to ensure open government in Australia," thanks to the efforts of organisations in the 1970s); *About Us*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.cfoi.org.uk/about/> (last visited Oct. 23, 2017) [hereinafter CAMPAIGN FOR FREEDOM OF INFO.] (stating that the organisation was established "in 1984 . . . to secure FOI legislation for the UK.").

identify because influence was largely exercised by one man, Ralph Nader, who was crucial to the 1974 amendments to the *Freedom of Information Act of 1966*.<sup>45</sup>

Nader emerged out of the “traditional” American consumer advocacy movement described earlier, although he was not entirely the typical consumer advocate for reasons which we will return to shortly. Nader first rose to prominence in the early 1960s by publishing a book that accused General Motors of selling cars it knew to be unsafe.<sup>46</sup> Over the next decade, he took up a broad range of other consumer and environmental issues, including health hazards from nuclear power, mine safety, meat inspection and food, to automotive safety.<sup>47</sup> These substantive issues were important in their own right, but they were also part of a broader strategic goal, which may have only become clear to Nader himself over time: attacking the capture of regulatory agencies by the very industries they purported to regulate and attacking such agencies’ unaccountability to any constituency.<sup>48</sup> In fact, he argued, they often actually protected themselves from scrutiny, despite the costs to the public on behalf of whom regulation was nominally undertaken.<sup>49</sup> Particular targets for his attacks were part of what he called “lobbying infrastructure” in Washington, which included private advocacy and law firms.<sup>50</sup>

Nader rapidly attracted considerable support, particularly from young lawyers and law students, and by the early 1970s, he led an increasingly large and well-organised movement.<sup>51</sup> This consisted of at least fifteen specialised organisations, which benefited from funding from a variety of sources including the Carnegie Corporation and the Medical Commission on Human Rights.<sup>52</sup> The structure of and rela-

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45. See, e.g., David E. McCraw, *The “Freedom From Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. F. 232, 232, 234 (2016).

46. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965) [hereinafter *UNSAFE AT ANY SPEED*].

47. See Marti Mueller, *Nader: From Auto Safety to Permanent Crusade*, 166 SCI. 979, 979 (1969).

48. See David Bollier, *Ralph Nader*, in *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT* 383 (Stephen Brobeck et al. eds., 1997); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. & CONTEMP. PROBS. 185, 193 (1994).

49. See Bollier, *supra* note 48.

50. JOSEPH C. GOULDEN, *THE SUPER-LAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* 385-86 (1972).

51. Bollier, *supra* note 48.

52. See J. Craig Jenkins & Abigail Halcli, *Grassrooting the System? The Development and Impact of Social Movement Philanthropy, 1953-1990*, in *PHILANTHROPIC FOUNDATIONS: NEW SCHOLARSHIP, NEW POSSIBILITIES* 229, 232, 252 (Ellen Condliffe Lagemann ed., 1999); see also

tionships between these organisations have evolved since then but the more important of them included Public Citizen (initially charged with fundraising, but is now the umbrella organisation for many others),<sup>53</sup> “Congress Watch” (lobbying),<sup>54</sup> “Information Clearinghouse” (campaigning for freedom of information reform),<sup>55</sup> “Public Interest Research Group” (research, but also involves some campaigning on issues such as airtime equity),<sup>56</sup> and “Nader’s Raiders” (an informal group of volunteer students who undertook research and publication on specific topics).<sup>57</sup>

Nader’s interest in freedom of information was a practical consequence of his substantive interests. His researchers were early and heavy users of the *Freedom of Information Act of 1966*, which they used to obtain technical information and data to support claims made in consumer reports.<sup>58</sup> Examples of such technical information and data include the safety of Firestone tires and Ford Pinto cars, “drug abuse among NASA employees,” and safety mishaps in nuclear power plants.<sup>59</sup> Nader’s supporters believed this kind of activity to be unusual in comparison with other NGOs,<sup>60</sup> but it was in fact not dissimilar from the work of contemporary investigative journalists who shared his public interest motivations.

Poor experience of using the law rapidly led Nader and his supporters to identify freedom of information as an issue worthy of attention in its own right. The catalyst appears to have been the realisation that regulatory agencies were selectively withholding information to favour particular interest groups and avoid the kind of scrutiny that

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*U.S. Public Interest Research Group (USPIRG)*, DISCOVERTHENETWORK, <http://www.discoverthenetworks.org/printgroupProfile.asp?grpId=6782> (last visited Nov. 27, 2017).

53. Bollier, *supra* note 48; see *About Us*, PUB. CITIZEN, <https://www.citizen.org/about/about-us> (last visited Nov. 27, 2017).

54. Bollier, *supra* note 48. See generally PUB. CITIZEN, CONGRESS WATCH, <https://www.citizen.org/congress-watch-0> (last visited Nov. 27, 2017).

55. Bollier, *supra* note 48. See generally PUB. CITIZEN, FREEDOM OF INFORMATION CLEARINGHOUSE, <https://www.citizen.org/freedom-information-clearinghouse> (last visited Nov. 27, 2017).

56. See *About*, U.S. PUB. INT. RES. GROUP, <https://uspig.org/page/usp/about-us-pirg-0> (last visited Oct. 21, 2017); see also *The Essential Nader*, RALPH NADER, <https://nader.org/biography/essential-nader/> (last visited Nov. 27, 2017).

57. See Bollier, *supra* note 48.

58. See David Bollier, *Citizen Action and Other Big Ideas: A History of Ralph Nader and the Modern Consumer Movement*, RALPH NADER (Jan. 5, 2004) [hereinafter *Citizen Action and Other Big Ideas*], <https://blog.nader.org/2004/01/05/chapter-4-let-the-information-flow/> (listing examples, such as the use of the FOIA “to discover that Eli Lilly pharmaceutical company was suppressing data on ‘adverse reactions’ to various drugs.”).

59. See *id.*

60. See *id.*

Nader's Raiders sought to apply.<sup>61</sup> One early and significant example of what would become a comprehensive attack on government secrecy was Nader's report on the Federal Trade Commission ("FTC").<sup>62</sup> The attack alleged that the Commission had been captured by industry interests, and was no longer regulating them in the interests of the public.<sup>63</sup> It also alleged that the agency was actively protecting these arrangements through the systematic withholding of important information.<sup>64</sup> Nader himself explicitly identified the need for stronger access laws in a press conference where he launched the FTC report, also published in an article at the same time.<sup>65</sup> In this report, he argued the FOIA was being "undercut by a riptide of bureaucratic ingenuity,"<sup>66</sup> which included dubiously citing exemptions in the Act as a rationale for not fully explaining decisions to withhold, incorrectly classifying files as "investigatory" or "internal communications," and delaying or simply ignoring inconvenient requests.<sup>67</sup> This also included mixing information that could be validly withheld with information the agency did not wish to disclose for other reasons and claiming an exemption for the whole, and selectively disclosing, hiding, destroying or simply not creating records containing sensitive information.<sup>68</sup> Nader and others also criticised the FOIA itself, alleging

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61. See Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-CIV. L. L. REV. 1, 8, 10 (1970) ("A typical tactic is to delay replying for several weeks to a request for information and then reply that it was not sufficiently specific," which then turns to "[m]ore primitive responses [when] an agency loses its last rationalizing props for withholding information.").

62. EDWARD F. COX ET AL., 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter THE NADER REPORT]. For instance, as claimed in Nader's report, "the Commission's behavior with regard to automobile advertising, drugs, auto warranties, food and gasoline games, tires, medical devices, and many other problem areas can be traced to purposeful delay aimed at protecting certain interests." *Id.* at 75.

63. See Ralph Nader, *Preface* to THE NADER REPORT, *supra* note 62, at vii (1969) ("On paper, the FTC was the principal consumer-protection agency of the Federal government. . . . In reality, the 'little old lady on Pennsylvania Avenue' was a self-parody of bureaucracy, fact with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by agents of commercial predators, impervious to governmental and citizen monitoring.").

64. See THE NADER REPORT, *supra* note 62, at 106 ("[W]hen 'average citizens' seek information on consumer problems and FTC performance of regulatory duties, the agency responds with total secrecy or minimal disclosure.").

65. Nader, *supra* note 61, at 13-15 ("The FOIA will remain putty in the hands of government personnel unless its provisions are given authoritative and concrete interpretation by the courts.").

66. *Id.* at 5.

67. See THE NADER REPORT, *supra* note 62, at 58-63, 71-73.

68. See Nader, *supra* note 61, at 9-10. Civilian agencies adopted the Pentagon's "contamination technique" to deny information requests. *Id.* at 10. This required taking "several batches of unclassified material that may prove embarrassing and mix them with other batches of classified information and the result is that the sum is entirely classified." *Id.*

that it placed too great a burden on the citizen to know about and comply with bureaucratic procedures, and provided insufficient incentives for agencies to meet requests in a timely manner and in the spirit of the legislation.<sup>69</sup>

The 1974 amendments to the *Freedom of Information Act* were not solely a response to either concern about consumer rights or to Nader's advocacy. They must be understood in the context of a country that was experiencing a profound crisis of popular trust in government, due to events such as the Watergate break-in,<sup>70</sup> press coverage of the Vietnam War (and in particular the massacre at My Lai),<sup>71</sup> and the legal battles over the Pentagon Papers.<sup>72</sup> They must also be understood in the context of American electoral politics. Members of Congress were facing an election in late 1974, and endorsing a strengthened FOIA may have provided a useful way of signalling to the electorate a willingness to act on the corruption and abuse of power, which Nixon's secrecy had facilitated. Indeed, when President Ford initially vetoed the amendments, citing concerns over national security,<sup>73</sup> the bill was passed a second time with a veto-proof majority.<sup>74</sup>

Nader and his supporters were, however, extremely important contributors to these amendments. They played an opportunistic role, working with and through Congress to ensure these broader circumstances produced the kinds of changes to the FOIA they had already been advocating for some time. Their contribution closely resembled

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69. See *id.* at 2.

70. See JAMES P. PFIFFNER, *THE MODERN PRESIDENCY* 208-14 (1994).

71. See SEYMOUR M. HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* 103 (1970).

72. See Harlow Uncer, *President Nixon and the Law*, *CANBERRA TIMES*, Jan. 26, 1974, at 2, <http://trove.nla.gov.au/newspaper/rendition/nla.news-article110758549.3.pdf?followup=C61c060d6961915c13508b74d998d70a> ("Ralph Nader and groups like the American Civil Liberties Union . . . all fill[ed] charges against Mr. Nixon before the Committee." President Nixon was charged with "crimes against people," including "ordering Internal Revenue Service to audit returns . . . and otherwise harass . . . leading opponents of the Vietnam War," and ordering the breaking and burglarizing of Dr. Daniel Ellsberg's office "while he was on trial for giving the Pentagon Papers to newsmen . . ." President Nixon was also charged with "crimes against justice," including the cover up of "involvement on White House officials in [the] Watergate affair by destroying documentary evidence . . .").

73. 120 CONG. REC. 36,243 (1974) (quoting Veto Message of Freedom of Information Act Amendments from Gerald R. Ford, President, U.S., to U.S. House of Representatives (Oct. 17, 1974) (on file with the American Presidency Project), <http://www.presidency.ucsb.edu/ws/index.php?pid=4477>).

74. See H.R. REP. NO. 93-876, at 119 (1974); S. H. REP. NO. 93-854, at 151 (1974); H. REP. NO. 93-1380, at 217 (1974). Note that it passed with a much narrower margin in the Senate, only one-third of which was due to face the electorate. See Archibald, *supra* note 1, at 730-31.

that of the press in the passage of the original Act around a decade earlier. Nader provided, first and foremost, a powerful critique from outside Congress of the shortcomings of the existing Act. This critique principally came from the Public Citizen's Freedom of Information Clearinghouse project, founded in 1972 to specifically assist individual citizens to make information requests.<sup>75</sup> It also came from Nader's Raiders, who lobbied members of Congress to ensure support.<sup>76</sup> Nader himself worked closely with Senator Edward Kennedy to overcome resistance from the bureaucracy once the amendments were being considered.<sup>77</sup> Even so, the passage of a strong bill was by no means a foregone conclusion. Agencies such as the FBI, the CIA and the Department of Justice supported an early draft that preserved broad exemptions for defence and investigatory files and opposed amendments designed to narrow these exemptions.<sup>78</sup> By the time the bill arrived on President Ford's desk for the first time, only the Department of Justice and a small but significant group of advisors still favoured a veto.<sup>79</sup> This opposition was eventually overcome by a second vote in the Congress.<sup>80</sup> Although Nader was not the only one involved in overcoming it,<sup>81</sup> his work was specifically cited by one of

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75. See *Obtaining Access to Government Records Since 1972*, PUB. CITIZEN (Jan. 1998), <https://www.citizen.org/our-work/litigation/obtaining-access-government-records-1972>.

76. Archibald, *supra* note 1, at 730.

77. *Citizen Action and Other Big Ideas*, *supra* note 58.

78. See Dan Lopez et al., *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE (Nov. 23, 2004), <http://nsarchive2.gwu.edu//NSAEPP/NSAEPP142/index.htm> (first citing Memorandum on the Freedom of Information Act Amendments – S. 2543 from Robert G. Dixon, Assistant Attorney Gen., Office of Legal Counsel, to William B. Saxbe, Attorney Gen. (May 7, 1974) (on file with the National Security Archive), <https://nsarchive2.gwu.edu//NSAEPP/NSAEPP142/050774%20OLC%20to%20Saxbe%20Memo%20on%20FOIA%20Amdts.pdf>; and then citing Memorandum from Assistant Legislative Counsel, C.I.A. to Patrick E. O'Donnell, Special Assistant to Presidents Nixon for Legislative Affairs (May 23, 1974) (on file with the National Security Archive), <https://nsarchive2.gwu.edu//NSAEPP/NSAEPP142/052374%20CIA%20to%20ODonnell%20Memo.pdf>) (“The Central Intelligence Agency was particularly concerned with the *in camera* review provision and its effect on the CIA's statutory obligations for the proper handling of sensitive information . . . [T]he DOJ also took issue with the investigatory files exemption, administrative time limits, sanctions, and the limited time in which to answer a requester's complaint in court . . . [T]he FBI ceased its negotiations with Congress because it wanted the bill to be ‘as bad as possible’ to make the case stronger for presidential veto.”).

79. These included Ford's Chief of Staff, Donald Rumsfeld, his deputy Chief of Staff, Dick Cheney, and the head of the Justice Department's Office of Legal Counsel, Antonin Scalia. See Lopez, *supra* note 78.

80. Archibald, *supra* note 1, at 730-31.

81. See S. H. REP. NO. 93-854, at 156 (1974) for the list of witnesses to hearings in the United States.

Kennedy's staff as crucial to the passage of a much stronger Act than the bureaucracy wanted, with a veto-proof majority.<sup>82</sup>

### B. *United Kingdom*

The United Kingdom is the other country in which the links between public interest/consumer advocacy and freedom of information are particularly clear. Public interest advocacy in the UK arose somewhat later than in the US—in the early 1970s. One leading organisation was the Public Interest Research Centre, founded in 1972 and inspired directly by Ralph Nader's work in the United States.<sup>83</sup> Its original purpose was to conduct "social" audits as a parallel to the financial audits that large corporations and governments were increasingly undertaking during that period.<sup>84</sup> Its original purpose was also to report on whether or not these organisations were fulfilling their duties to those beyond direct shareholders (including workers, consumers, and others affected by their activities).<sup>85</sup> The Centre focused particularly on standards for corporate reports and on environmental and medical safety.<sup>86</sup> But from the outset, it raised concerns over government secrecy.<sup>87</sup> Many of its campaigns became institutionalised as standalone organisations, and some of the campaigns went on to play an important role in advocating freedom of information in their own right. The two most important were the Campaign for Freedom of Information ("the Campaign")<sup>88</sup> and Public Concern at Work.<sup>89</sup>

Public Concern at Work was not primarily concerned with freedom of information, but deserves mention for its role in influencing public opinion. It was founded in 1993 to bring about a break with the prevailing British culture of "complacency and cover-up," and to provide support for members of the public service who wanted to publicly disclose information about mismanagement and poor government.<sup>90</sup> The organisation presented itself as a response to a number of scandals in which the government's cover-up or lack of disclosure was a

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82. See Archibald, *supra* note 1, at 730.

83. PUB. INT. RES. CTR., <http://publicinterest.org.uk/> (last visited Oct. 14, 2017).

84. See *About Us*, PUB. INT. RES. CTR., <http://publicinterest.org.uk/about/> (last visited Oct. 14, 2017) [hereinafter *About Us*, PIRC].

85. See *id.*

86. See *id.*

87. See *id.*

88. *Our Work, About Us*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.cfoi.org.uk/about/our-work/>.

89. See *About Us, Background*, PUB. CONCERN AT WORK, <http://www.pcaw.co.uk/about/background> (last visited Oct. 19, 2017).

90. See *id.*

factor. The Public Concern at Work sought the introduction of a whistle-blower's protection act to complement a freedom of information act.<sup>91</sup> To this end, the organisation worked jointly with the Campaign on drafting the *Public Interest Disclosure Bill*,<sup>92</sup> which was passed in 1998.<sup>93</sup> This period spans the transition between the Conservative Major government and Blair's New Labour administration, which introduced the British FOIA in 2005.<sup>94</sup>

The Campaign was founded in 1984, and primarily sought to work through the parliamentary system rather than through public advocacy.<sup>95</sup> Its links with the public interest movement can be seen in its support (which included over 190 different voluntary and professional organisations together with backbenchers from all the major parties) and its personnel.<sup>96</sup> Its founding chair, Des Wilson, had a background in public affairs and had worked as a campaigner for organisations such as Shelter, Friends of the Earth and the Campaign for Lead-Free Air.<sup>97</sup> Its founding vice-chair, Maurice Frankel, began his career working for Social Audit, the publishing arm of the Public Interest Research Centre, and was also a trustee of Public Concern at Work.<sup>98</sup> Frankel took over Wilson's position as chair of the Campaign in 1987.

The Campaign attacked secrecy in a range of contexts, including defence (which was historically a prominent basis of mobilisation against official secrecy in general in the UK) and apparently mundane matters of routine interaction between citizens and administration.<sup>99</sup> In its magazine *Secrets*, the Campaign catalogued waste, maladminis-

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91. See *id.*; see also S.W.R de A. Samarasinghe & Tissa Jayatilaka, *A Whistleblower Protection Act needs to Accompany Proposed Freedom of Information Act*, GROUNDVIEWS: JOURNALISM FOR CITIZENS (Jan. 28, 2015), <http://groundviews.org/2015/01/28/a-whistleblower-protection-act-needs-to-accompany-the-proposed-freedom-of-information-act/>.

92. Public Interest Disclosure Act 1998, c. 23, (Eng.).

93. *Id.*

94. See *More than 400,000 Freedom of Information Requests Made Since 2005*, BBC NEWS (Dec. 31, 2014), <http://www.bbc.com/news/uk-politics-30632221> (indicating that Blair's "government introduced FOI" to Britain).

95. See CAMPAIGN FOR FREEDOM OF INFO., *supra* note 44.

96. *Political Leaders Back Call for Freedom of Information 'Our right to know'*, SECRETS, No.1, 1984, at 2.

97. See *Des Wilson: We Can Only try to Edge the World in the Right Direction*, INDEP. (Feb. 28, 2011), <http://www.independent.co.uk/news/people/profiles/des-wilson-we-can-only-try-to-edge-the-world-in-the-right-direction-2227588.html>.

98. See *Who We Are, About Us*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.cfoi.org.uk/about/who-we-are/>; see also *About Us*, PIRC, *supra* note 84.

99. See *Whistleblowers and Journalists Face Prison for Revealing Information that Could be Obtained Under FOI*, CAMPAIGN FOR FREEDOM OF INFO., (May 8, 2017), <https://www.cfoi.org.uk/2017/05/whistleblowers-and-journalists-face-prison-for-revealing-information-that-could-be-obtained-under-foi/>.

tration, and even outright corruption in areas such as local government housing and planning, and the problems for individual self-determination, which flowed from secret files held by schools, universities, and health providers.<sup>100</sup> It also catalogued what might be called the spill-over effects and irrationalities of secrecy, such as establishing the condition for industry to pollute far more than would otherwise have been possible because it prevented markets from identifying polluters and factoring in the costs of pollution.<sup>101</sup> In particular, the magazine highlighted how polluters, under the guise of commercial concerns and legitimate trade secrets, argued against the establishment of polluters' registers and other environmental legislation covering water, air, explosives and so on.<sup>102</sup>

This focus on consumer information was partly a matter of conviction, and partly a result of pragmatism. The Campaign's proposal for a general right of access quickly met with hostility from the conservative Thatcher government, particularly after its second electoral victory.<sup>103</sup> The Campaign, therefore, opted for piecemeal reform via private members' bills on specific issues.<sup>104</sup> It was met with some success, thanks in part to good luck. The Campaign cultivated widespread support among backbench Members of Parliament.<sup>105</sup> Many of these supporters were successful in the Parliamentary ballot for the right to put forward such bills. Furthermore, the government proved remarkably willing to let access rights with a limited scope pass, in part because they tended to affect bodies outside central government. Examples include the *Access to Medical Reports Act 1988*<sup>106</sup> and the *Environment and Safety Information Act 1988*.<sup>107</sup> The *Environment*

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100. See, e.g., Maurice Frankel, *Files on Ourselves: Fact or Fiction?*, in *THE SECRETS FILE* 74, 75-76, 83-94 (Des Wilson ed., 1984).

101. See, e.g., Maurice Frankel, *How Secrecy Protects the Polluter*, in *THE SECRETS FILE*, *supra* note 100, at 22.

102. See, e.g., *id.*

103. See Jim Chandler, *Freedom of Information and Participation: Comparing Local and Central Government*, in *FREEDOM OF INFORMATION: LOCAL GOVERNMENT AND ACCOUNTABILITY* 106, 108 (Michael Hunt & Richard Chapman eds., 2010); *1993 Freedom of Information Awards*, CAMPAIGN FOR FREEDOM OF INFO. (Jan. 20, 1994), <https://www.foi.org.uk/1994/01/1993-freedom-of-information-awards/>.

104. See BEN WORTHY, *THE POLITICS OF FREEDOM OF INFORMATION: HOW AND WHY GOVERNMENTS PASS LAWS THAT THREATEN THEIR POWER* (2017).

105. See E-mail from Alexandra Crampton, Parliamentary Researcher and Assistant, Parliamentary Lab. Party to Lab. Members of Parliament (May 9, 2007) (on file with Campaign for Freedom of Information); see also *Attempt to Remove Parliament from the FOI Act*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.foi.org.uk/s/attempt-to-remove-parliament-from-the-foi-act/> (2017).

106. *Access to Medical Reports Act 1988*, c. 28 (Eng.).

107. *Environment and Safety Information Act 1988*, c. 30 (Eng.).

and Safety Information Act requires safety and environmental authorities to set up public registers of the enforcement notices they serve on factories, shops, and other premises where public hazards or breaches of safety or environmental laws have occurred.<sup>108</sup>

The Campaign was also a prominent participant in the legislative process, which led to the introduction of a full freedom of information act when that process eventually began in the late 1990s.<sup>109</sup> As in the US in 1974, its role was primarily one of skilfully exploiting the emergence of structurally-favourable conditions, which it had partly helped to create. In the UK, however, the conditions were a little different. The reforms introduced by Prime Ministers Thatcher and Major transformed the structure of the state in ways that substantially reduced electoral risks of transparency for governments in a Westminster system.<sup>110</sup> Indeed, these reforms actually relied on certain forms of transparency as a tool of public administration for disciplining and controlling state bodies.<sup>111</sup> Despite this, as noted above, the Conservatives consistently refused to consider full legislative rights of access. This refusal was not merely at odds with the Campaign, but it was also difficult to justify given their willingness to allow the piecemeal legislative reforms discussed earlier. These contradictions presented then-opposition leader Tony Blair with the opportunity to make an explicit commitment to introduce an access law as a way of distinguishing himself from the Conservatives at the 1996 election. It is a sign of the Campaign's influence over this issue that he had taken this opportunity at its annual award ceremony.<sup>112</sup> The Campaign was also featured prominently in the Parliamentary hearings over the law, as noted above, and its reputation and influence helped ensure the Blair gov-

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108. *Id.* §1.

109. See CAMPAIGN FOR FREEDOM OF INFO., *supra* note 44.

110. See KENNETH G. ROBERTSON, *SECRECY AND OPEN GOVERNMENT: WHY GOVERNMENTS WANT YOU TO KNOW* 141 (1999); see also Katharine Dommett et al., *Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis*, 29 *GOVERNANCE: INT'L J. POL'Y, ADMIN., & INST.*, 535, 542 (2016).

111. The epitome of this reform is John Major's "Citizen's Charter", an administrative right of access. See generally PUBLIC ADMINISTRATION SELECTION COMMITTEE, *FROM CITIZEN'S CHARTER TO PUBLIC SERVICE GUARANTEES: ENTITLEMENTS TO PUBLIC SERVICE, 2007-8*, HC (UK).

112. Tony Blair, MP Leader, Labour Party, Address at the Campaign for Freedom of Information's Annual Awards Ceremony (Mar. 25, 1996), in *Speech by the Rt. Hon. Tony Blair MP, Leader of the Labour Party at the Campaign for Freedom of Information's annual Awards ceremony, 25 March 1996*, CAMPAIGN FOR FREEDOM OF INFO. (May 25, 1996), <https://www.cfoi.org.uk/1996/05/speech-by-the-rt-hon-tony-blair-mp-leader-of-the-labour-party-at-the-campaign-for-freedom-of-informations-annual-awards-ceremony-25-march-1996/>.

ernment followed through on its commitment despite the resistance of the major departments of state.<sup>113</sup>

### C. *Australia*

The US and the UK are the two countries where the contribution of consumer advocacy to freedom of information has received the most sustained academic attention. But these are by no means the only two countries where such movements were active. A third example is Australia, where events resembled those in the UK and the US in a number of significant respects.

After more than two decades of conservative rule, the political debates around a legal right of access to government files emerged in Australia in the early 1970s, and coincided with the election of a progressive Whitlam government in 1972.<sup>114</sup> The idea of access rights was something of a niche interest in Australia, and found its principal support among a small group of young, well-connected but relatively junior members of politically-significant institutions in Australian public life.<sup>115</sup> The National Freedom of Information Legislation Campaign Committee was founded in the late 1970s,<sup>116</sup> and included lawyers, journalists, politicians, academics, and senior representatives of unions, consumer advocacy groups, conservationists, and welfare providers.<sup>117</sup>

Consumer advocacy played an important role in this movement. One year earlier, a small group of progressive bureaucrats and political staffers who would later go on to find the Committee had also established the Rupert Public Interest Movement.<sup>118</sup> Rupert, as it was colloquially known, shared the same broad concerns over public access to technical information as Ralph Nader's public citizens' groups

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113. See WORTHY, *supra* note 104; see also Tom McClean, *Shackling Leviathan: A Comparative Historical Study of Institutions and the Adoption of Freedom of Information 293* (Dec. 2011) (unpublished Ph.D. & M.Phil. dissertation, London School of Economics and Political Science) (on file with author).

114. See AUSTRALIAN LAW REFORM COMM'N, *OPEN GOVERNMENT: A REVIEW OF THE FEDERAL FREEDOM OF INFORMATION ACT 1982 chs. 3-4* (1995), <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf>.

115. See *id.* ch. 3.

116. See McMILLAN, *supra* note 44, at 1.

117. See AUSTRALIAN LAW REFORM COMM'N, *supra* note 114, ch. 3, n.7.

118. See John Wood, *The Origins of Rupert*, RUPERT PUB. INT. MOVEMENT J., Oct. 1984, at 4; see also Greg Terrill, *The Rise and Decline of Freedom of Information in Australia*, in *OPEN GOVERNMENT: FREEDOM OF INFORMATION AND PRIVACY* 89, 93 (Andrew McDonald & Greg Terrill eds., 1998). According to members of the movement with whom the author has spoken, the name was a joking reference to Rupert Murdoch, then the young proprietor of a growing newspaper empire in Australia.

in the United States, and the various UK bodies discussed above.<sup>119</sup> And, like them, its main substantive goal was the adoption of a freedom of information act.<sup>120</sup> The Committee also adopted similar campaign techniques, including publishing a short-lived journal.<sup>121</sup> In its ten issues, the journal addressed freedom of information in Australia and in other jurisdictions, privacy, media ownership and access, public libraries, administrative law, civil liberties, and a cluster of issues surrounding health, science, and safety such as food safety, pharmaceuticals and medicine, nuclear power, the environment, and the role of scientific expertise in policy-making and regulation.<sup>122</sup> It is also quite clear from the content and tone of the journal that the similarity with developments in the US and the UK were not a coincidence. It was a case of deliberate imitation, based partly on direct personal contact. Nader visited Australia and New Zealand in 1980 on a visit convened by Rupert.<sup>123</sup>

In Australia, this group was able to put freedom of information on the political agenda by exploiting their connections to institutionally powerful players, although in slightly different ways to their counterparts in other countries. Perhaps the clearest instance of this involves John McMillan, a founding member of both Rupert and the Campaign Committee.<sup>124</sup> McMillan went to become a Professor of Law at the Australian National University before serving as national Ombudsman and then as its inaugural Information Commissioner.<sup>125</sup>

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119. Wood, *supra* note 118; see also Nader in *Canberra – Part I*, RUPERT PUB. INT. MOVEMENT J., Nov. 1980–Feb. 1981, at 8 [hereinafter *Nader in Canberra*].

120. *FOIL is our Number One Issue*, RUPERT PUB. INT. MOVEMENT J., Mar. 1980, at 26 [hereinafter *FOIL is our Number One Issue*].

121. See generally RUPERT PUB. INT. MOVEMENT J.

122. See, e.g., *FOIL is our Number One Issue*, *supra* note 120 (discussing freedom of information legislation in Australia); John Nevill, *Mercury in Fish*, RUPERT PUB. INT. MOVEMENT J., Nov. 1981–Feb. 1982, at 16-22 (discussing mercury levels in fish and whether consumption is adverse to one's health); *Review of Administrative Decisions*, RUPERT PUB. INT. MOVEMENT J., Nov. 1981–Feb. 1982, at 34 (discussing administrative law); Tom Riley, *F.O.I. (1): New Zealand*, RUPERT PUB. INT. MOVEMENT J., Nov. 1981–Feb. 1982, at 28-29 (discussing freedom of information legislation in New Zealand).

123. *Nader in Canberra*, *supra* note 119.

124. Terrill, *supra* note 118 (“In 1976 the Rupert Public Interest Movement, whose founders included John McMillan, the prime author of the RCAGA Bill, helped form the Freedom of Information Legislation Campaign.”); see also Sean Parnell, *John McMillan to head FOI office*, THE AUSTRALIAN (Feb. 26, 2010), <http://www.theaustralian.com.au/archive/politics/john-mcmillan-to-head-foi-office/news-story/bf9adda6eb8a0e9323ec63daf36a6670> (“Professor McMillan . . . has extensive experience in law, and was a founding member of the Freedom of Information Campaign Committee in the 1970s . . .”).

125. *Our Executive*, OMBUDSMAN N.S.W., <https://www.ombo.nsw.gov.au/what-we-do/our-office/our-structure/our-executive> (last visited Oct. 25 2017).

While still a young legal academic in the early 1970s, he served as a research officer on the Royal Commission on Australian Government Administration, which was established under the Whitlam government.<sup>126</sup> In that role, he drafted the first proposal for an Australian Freedom of Information Act.<sup>127</sup> It appears he may have done this on his own initiative, but subsequently managed to convince one of the Commissioners of the merits of the idea, and the draft was included as an appendix to the Commission's report.<sup>128</sup> This draft formed the basis of the Bill that was eventually passed in 1982, over the objections of the bureaucracy but with broad, if uneven, support from across the political spectrum.<sup>129</sup>

These Australian activists were able to influence the shape of ideas, but exerted less influence over the course of events than their counterparts elsewhere. This was, in part, because they were organisationally weaker, and in part because they did not enjoy the same favourable circumstances. Rupert was a relatively short-lived venture, which never had the organisational strength or resources of its equivalents in the UK or US. It served primarily as a means for bringing this loose coalition together and raising support among low and mid-ranking bureaucrats.<sup>130</sup> It did not exercise a great deal of influence over broader public opinion, and senior public servants were generally opposed.<sup>131</sup> The Campaign Committee, too, served as an *ad hoc* coordinating mechanism among its own loose-knit members. It was influential enough over policy debates to be mentioned by a Senate inquiry into freedom of information in the late 1970s.<sup>132</sup> But the *Freedom of Information Act* passed in 1982,<sup>133</sup> ten years after the Campaign Committee was founded and well after it had petered out.

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126. See H. C. COOMBS ET AL., ROYAL COMM'N ON AUSTRALIAN GOV'T ADMIN., REPORT 465-66 (1976) [hereinafter ROYAL COMM'N REPORT] (indicating that "J. D. McMillan" worked under the Research Section of the Royal Commission between September 29, 1975 and January 12, 1976); Patrick Weller & R.F.I. Smith, *Inside the inquiry: Problems of Organising a Public Service Review*, in REFORMING AUSTRALIAN GOVERNMENT THE COOMBS REPORT AND BEYOND 5, 5 (Cameron Hazlehurst & J.R. Nethercote eds., 1977) ("In June 1974 the Labor Prime Minister, Gough Whitlam, announced the establishment of a Royal Commission to examine federal government administration in Australia.").

127. Wood, *supra* note 118 (indicating that John McMillan was "the prime author of the RCAGA [Royal Commission on Australian Government Administration] Bill . . .").

128. See ROYAL COMM'N REPORT, *supra* note 126, at 350.

129. See McMILLAN, *supra* note 44, at 2.

130. See Terrill, *supra* note 118.

131. See *id.*

132. SENATE STANDING COMM. ON CONSTITUTIONAL AND LEGAL AFFAIRS, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, FREEDOM OF INFORMATION REPORT 10 (1979).

133. *Freedom of Information Act 1982* (Cth) 215 n.3 (Austl.) (amended 2017).

The reasons for this delay emphasise the extent to which the Australian movement suffered from the absence of favourable circumstances, of the kind which arose in the US and the UK. This was primarily due to the fall of the Whitlam government in controversy in the mid-1970s.<sup>134</sup> The Whitlam government was replaced with the conservative Fraser government,<sup>135</sup> which was broadly sympathetic to the movement but had other priorities. This presented the bureaucracy with a significant opportunity to resist reform, which it exploited to the fullest through departmental committees and the Parliamentary process.<sup>136</sup> Despite this, the issue did not disappear entirely from the political agenda, primarily due to pressure from backbench members of the government,<sup>137</sup> and a Senate Committee which held consultations showing reforms were widely-supported in the press and by public opinion, even if not electorally decisive.<sup>138</sup> A law resembling McMillan's original draft was eventually passed in the final hours before the Fraser government was replaced by the progressive Hawke government in the early 1980s.<sup>139</sup>

### III. EXPLAINING THE HISTORY OF CONSUMER ADVOCACY

The consumer advocacy movement has had a curious relationship with freedom of information. On the one hand, movements that existed in many countries were typically favourable towards access rights. On the other hand, they only appear to have played a truly decisive role in the early period of the global diffusion of these laws. The countries in which they were most influential were generally among the first outside the Scandinavian countries to introduce laws, particularly, but by no means only, the English-speaking countries.<sup>140</sup> This last part of the article considers two aspects of this. First, why did advocates only begin to play a decisive role from the 1970s and why was their influence strongest in these particular countries? Second,

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134. See *Sir John Kerr; Overturned Government of Australia*, L.A. TIMES, Mar. 30, 1991, at A18.

135. *Malcolm Fraser*, NAT'L ARCHIVES OF AUSTRALIA, [http://primeministers.naa.gov.au/prime\\_ministers/fraser/](http://primeministers.naa.gov.au/prime_ministers/fraser/) (last visited Nov. 28, 2017).

136. See ROYAL COMM'N REPORT, *supra* note 126, at 119, 350.

137. See Riley, *supra* note 9, at 38.

138. *Id.* at 31-33.

139. See *Freedom of Information Act 1982* (Cth) 215 n.3 (Austl.) (amended 2017); *Prime Ministers of Australia: Malcolm Fraser*, NAT'L MUSEUM OF AUSTRALIA, [http://www.nma.gov.au/primeministers/malcolm\\_fraser](http://www.nma.gov.au/primeministers/malcolm_fraser) (last visited Oct. 13, 2017).

140. See *Access to Information Laws: Overview and Statutory Goals*, RIGHT2INFO, [http://www.right2info.org/access-to-information-laws/access-to-information-laws#\\_ftnref7](http://www.right2info.org/access-to-information-laws/access-to-information-laws#_ftnref7) (last updated Jan. 20, 2012, 1:30 PM).

why do they not appear to have been so decisive since the 1990s? The answers offered here will necessarily be tentative due to the qualitative nature of this study. Nevertheless, through structured historical analysis between and within cases, we can identify certain plausible possibilities.

A. *Why Did Decisive Mobilisation Arise When and Where It Did?*

Deliberate action among consumer advocates in favour of freedom of information arose when it did, and in the countries where it did, due to a combination of structural factors and contingent events. I have already examined the role of structural, and particularly, institutional, features in other work including things like electoral systems and relations between legislatures and executives<sup>141</sup> (so-called “political opportunity structures”<sup>142</sup>), and the institutional structure of the economy.<sup>143</sup> The following discussion seeks to complement this earlier work by focussing primarily on the role of individual agency, and more broadly, on historical processes of change. This article will only seek to show briefly that these factors were channelled and filtered by institutions.

Active mobilisation for freedom of information occurred among consumer advocates in the early 1970s, and not before, primarily as a result of the emergence of public interest advocacy within the movement itself in the previous decade.<sup>144</sup> This shift occurred first in the US, where the public interest advocacy movement emerged before spreading to the other countries discussed earlier. This movement consisted of lawyers working in a diverse range of settings such as: traditional law firms with *pro bono* programmes; private advocates and political lobbyists; freelance legal representatives whose clients were the urban poor; in-house lawyers for social movements; and consumer safety advocates (to name but a few).<sup>145</sup> Chief among these was Ralph Nader, who was quite explicit in his desire to bring legal and consumer activism together.<sup>146</sup> This was by no means uncontroversial; Nader was on the Board of the Consumer’s Union until 1975, but re-

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141. See McClean, *supra* note 113; *Why the French FOIA Failed*, *supra* note 27.

142. See generally Herbert Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 BRIT. J. POL. SCI. 57, 58 (1986).

143. See McClean, *supra* note 113.

144. See FUNG, *supra* note 8, at 6, 6 n.1.

145. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071-72 (1970).

146. See Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 L. & SOC’Y REV. 247, 252 (1976).

signed because it refused to adopt the more radical approach he proposed.<sup>147</sup>

This change manifested itself in the emergence of new concerns and tactics, and as institutional and generational change. The consumer information movement exists, in functional terms, to address a structural imbalance in the market economy. It is not necessarily in the interests of vendors or advertisers to provide sufficient information on products to enable consumers to make fully informed choices since they have an interest in restricting information that could reflect badly on their products. Before the 1960s, consumer advocacy tended to address this by comparing the efficiency and technical quality of the products that were available on the market.<sup>148</sup> The legitimacy of this kind of advocacy rested on the expertise of the lawyers, engineers, economists, and doctors conducting the analyses on behalf of consumer advocacy organisations, and on the fact these experts had no vested interest in the productive process (they were neither producers nor regulators). The new public interest advocates were quite self-consciously interested in mobilising public opinion around concerns such as consumer safety and the environmental impact of products, and in influencing which products were available for sale in the first place.<sup>149</sup> Their influence can be seen (amongst other things) in the increasing frequency of recommendations not to buy a particular product or range of products because of these kinds of problems.<sup>150</sup>

The fact that public interest advocates became such strong supporters of freedom of information was probably made easier by historical chance. By the late 1960s, when Nader rose to prominence, the United States had a *Freedom of Information Act*,<sup>151</sup> and as we have seen, his supporters were significant early users of it. The promise the Act held out in principle, and the shortcomings it displayed in practice, undoubtedly contributed to the way these actors gradually came

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147. Laurie Johnston, Notes on People, *Nader Quits Consumers Union*, N.Y. TIMES, Aug. 23, 1975, at 10.

148. See *Consumer Advocacy, INC.*, <https://www.inc.com/encyclopedia/consumer-advocacy.html> (last visited Nov. 29, 2017).

149. See UNSAFE AT ANY SPEED, *supra* 46, at vi-xi, 343.

150. See John TD Wood, *Consumer Protection: A Case of Successful Regulation*, in REGULATORY THEORY 633, 640-41 (Peter Drahos ed., 2017) (discussing that government regulation of products stemmed from public interest advocate reviews of products).

151. The Freedom of Information Act came into effect in 1967. See Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. § 552 (2016)); Christopher Jensen, *Even to Critics, Ralph Nader Revolutionized Cars*, INT'L N.Y. TIMES, Nov. 27, 2015, at 18, 2015 WLNR 35177786.

to see government control over the disclosure of information as a problem worthy of attention in its own right.

But we should not overstate the importance of this contingency; there is clearly a deep elective affinity between public interest advocacy and concern over government secrecy. It is likely that the movement would have confronted state control over information as an issue in its own right sooner or later, even without the model of the FOIA to work from. Public interest advocacy constitutes a very specific response to problems of market failure, such as spill-overs and abuse of monopoly positions. It seeks to address collective ills like environmental degradation, poor financial reporting and consumer safety, and other issues by mobilising consumer behaviour and public opinion through providing information (this contrasts with classic consumer advocacy, which seeks primarily to maximise individual utility).<sup>152</sup> This strategy entails a highly ambiguous relationship with the State. On the one hand, its emphasis on individual choice represents a reaction against a reliance on the bureaucratic regulation of economic life, which was the characteristic feature of earlier “New Deal” progressivism.<sup>153</sup> This manifested itself in Nader’s denunciations of “agency capture,” discussed earlier. On the other hand, public interest advocacy often relies on official files to demonstrate that a problem exists, and this requires a state with sufficient infrastructural capacity to collect the information in question. Public interest advocacy also needs a State that is capable of imposing regulations to solve these problems, and which is sufficiently responsive to public opinion to do so over the objections of powerful economic interests.<sup>154</sup>

The global spread of consumer movement engagement with freedom of information is also heavily influenced by contingent events

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152. See Comment, *supra* note 145, at 1070 n.3 (first citing H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961); then citing GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); then citing G. McCONNEL, *PRIVATE PROPERTY AND AMERICAN DEMOCRACY* (1966); and then citing William E. Connolly, *The Challenge to Pluralist Theory*, in *BIAS OF PLURALISM* 3 (William E. Connolly ed., 1969)).

153. See FUNG, *supra* note 8, at 1-2, 5 (first citing Ginger Zhe Jin & Leslie Phillip, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q. J. ECON. 409 (2003); then citing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993); and then citing Richard J. Zeckhauser & David V. P. Marks, *Signposting: The Selective Revelation of Product Information*, in *WISE CHOICES: GAMES, DECISIONS, AND NEGOTIATIONS* 22 (Richard J. Zeckhauser et al. eds., 1996)).

154. See FUNG, *supra* note 8, at 1-2, 5-6 (citing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993)).

flowing from the emergence of public interest-style advocacy.<sup>155</sup> Public interest movements outside the United States typically arose and began to advocate for freedom of information as a result of direct contact with Nader himself, and the adoption of his approach.<sup>156</sup> The importance of personal contacts is quite clear from the historical sources for Australia, the UK, and Canada.<sup>157</sup> The importance of personal contact is also noteworthy from a scholarly perspective because it stands in stark contrast to other studies of diffusion; the most important study of this aspect of freedom of information focuses on deep-seated structural factors like technological and economic change, fashion among policy elites, and network effects.<sup>158</sup> Diffusion of norms among civil society is not given great weight.

The fact that this kind of mobilisation did not spread more widely or prove more widely effective is probably also related to the limits on the diffusion of public interest advocacy. It might be tempting to assume that the English language was a factor here aiding diffusion of norms and practices among consumer advocates. If this were the case, we might expect that mobilisation would be slower and less decisive outside the English-speaking world, a hypothesis apparently confirmed by the experience of Germany.<sup>159</sup> But the case of France suggests that state structures are probably more likely the cause than language barriers.<sup>160</sup> In France, as already noted, the 1970s saw a considerable growth in consumer information organisations, and also a shift in tactics which was fairly similar to Nader's public interest advocacy (and, indeed, may have been inspired by him).<sup>161</sup> In the 1970s, French and Belgian consumer advocates shifted from simply providing information on products and began to organise local groups, recruit

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155. See, for example, Wood, *supra* note 150, at 639-40, for a discussion of the link and nearly simultaneous rise of the consumer movement and freedom of information in both the US and Australian.

156. See *id.* at 640-41.

157. See, e.g., PUB. INT. RES. CTR., *supra* note 83 (indicating that "PIRC [a public interest organisation based in the UK] was originally conceived of as an offshoot of the Public Citizen network of organisations created in the US by Ralph Nader.").

158. See Colin J. Bennett, *Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability*, 10 GOVERNANCE: INT'L J. POL'Y, ADMIN., & INST. 213 (1997); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149-50, 157 (1983).

159. See Christian Kleinschmidt, *Comparative Consumer Product Testing in Germany*, 84 BUS. HIST. REV. 105, 107-08 (2010) (citing Trumbull Gunnar, *National Varieties of Consumerism*, 47 JAHRBUCH FÜR WIRTSCHAFTSGESCHICHTE 77, 92 (2006)).

160. Kleinschmidt, *supra* note 159, at 106-07; see also Matthew Hilton, *Consumers and the State since the Second World War*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72, 74 (2007).

161. See Marcus-Steff, *supra* note 11, at 92.

activists, and hold “consumers’ strikes.”<sup>162</sup> These activities indirectly formed part of a general climate favourable to reform, but as I have shown elsewhere, the French reform process may have occurred at around this time but was almost entirely driven by the Government for its own purposes.<sup>163</sup> There was no serious attempt by consumer advocates to pressure the government to introduce a general right of access because the French political system provided extremely limited opportunities for advocates to directly pressure the government and almost no incentives for the government to respond to that pressure.<sup>164</sup> The experience of Japan is also consistent with this. The earliest mobilisation in favour of freedom of information appears to have arisen among public interest lawyers and activists in the late 1970s in response to scandals involving political corruption (e.g. the use of expense accounts to bribe) and environmental, health, and safety issues—especially regarding nuclear reactors and waste.<sup>165</sup> Ralph Nader toured Japan in 1989, advocating a product liability law and a Japanese FOIA.<sup>166</sup> Despite this, and despite the fact that draft disclosure laws were proposed in parliament on five occasions in the 1980s and early 1990s by opposition parties, the Japanese law was only passed in the early 2000s.<sup>167</sup> An operative factor in this delay appears to be that a national access law in Japan was never an electorally-significant issue in Japan,<sup>168</sup> although the similarities with the French experience suggest the insulation of the State from popular pressure may also have been a factor.

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162. See Giselle Nath, *Giving Consumers a Political Voice*, 132 *LOW COUNTRIES HIST. REV.* 70, 72, 75-76 (2017); see also Matthew Hilton, *The Death of a Consumer Society*, 18 *TRANSACTIONS ROYAL HIST. SOC.* 211, 217-20, 223-27, 231 (2008) (discussing the globalisation and radicalisation of Western European consumer movements).

163. See *Why the French FOIA Failed*, *supra* note 27, at 45-46 (citing Michel Aurillac, *Les Origines Parlementaires du Droit D'accès*, in *TRANSPARENCE ET SECRET* 53 (2003)).

164. See *Why the French FOIA Failed*, *supra* note 27, at 52 (citing Herbert Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 *BRITISH J. POL. SCI.* 57 (1986)).

165. See David Boling, *Access to Government-Held Information in Japan: Citizens' Right to Know Bows to the Bureaucracy*, 34 *STAN. J. INT'L L.*, 1, 7 (1998) (first citing EDWIN O. REISCHAUER, *THE JAPANESE* (1977); then citing Kawabata Tai, *Information on Nuclear-Plant Accident Hard to Get*, *JAPAN TIMES*, July 20, 1988, at 13; and then citing *Tokyo Fire Department Nixing Requests for Nuclear Fuel Shipment Information*, *ASAHI EVENING NEWS*, Apr. 29, 1992, at 4); see also Lawrence Repeta & David M. Schultz, *Japanese Government Information: New Rules for Access*, *NAT'L SECURITY ARCHIVE* (May 23, 2002), <http://nsarchive2.gwu.edu/nsa/foia/japanfoia.html>.

166. Boling, *supra* note 165, at 1-2 (citing 5 U.S.C. § 552 (West 2007) (amended 2016)).

167. See Boling, *supra* note 165, at 15 (citing David Boling, *Challenging the Rule of Angels*, *AM. CHAMBER COM. J. JAPAN*, May 1993, at 39, 41); see also Repeta & Schultz, *supra* note 165.

168. See Boling, *supra* note 165, at 19 (citing *Citizens' Movement Seeking FOIA in Japan* (Radio Japan broadcast Jan. 20, 1994)).

B. *Why Did Consumer Advocacy Subside As An Important Factor?*

The events discussed above all occurred relatively early in the diffusion of freedom of information around the world. Since then, the number of countries with access laws has increased dramatically.<sup>169</sup> In 1990, the number stood at only fourteen; in 2000, it had grown to forty-six; by 2010, around ninety countries had introduced an access law, and the number has continued to grow since.<sup>170</sup> Despite this dramatic growth and the role they played early on, consumer advocates have not played a particularly significant role since. They have been part of broad supportive coalitions in some cases, including Germany as noted earlier, but in most of these cases, the primary drivers of reform have been political insiders—elected politicians, international government organisations, and on some occasions, journalists, and constitutional reformers.

This apparent waning of influence is not because the consumer advocacy movement has abandoned the cause. Public interest lawyers remain a very important constituency for freedom of information in most of the countries discussed above (France being a notable exception). This is particularly true of the US, where Nader's groups such as Public Interest, and others, which arose at the same time like Common Cause, remain significant users.<sup>171</sup> They also form a strong lobby in support of the law itself.<sup>172</sup> Since the 1970s, they have continued to work for the extension of rights by supporting requesters to lobbying Congress and bringing lawsuits to achieve reforms through jurisprudence when legislation has proved impractical,<sup>173</sup> although not always so decisively as in 1974. Public interest law firms and other groups continue to play similar roles in the UK and Australia and, as already discussed, supported the introduction of laws elsewhere.

This apparent waning is due, at least in part, to the fact that freedom of information began to spread for different reasons in the 1990s and the conventional account of these reasons has tended to obscure the role played by consumer advocates in developing the models which were being diffused. Chief among these is the rapid interna-

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169. See RIGHT2INFO, *supra* note 140.

170. *Id.*

171. See U.S. PUB. INT. RES. GROUP, *supra* note 56; see also *About Us*, COMMON CAUSE, <http://www.commoncause.org/about/> (last visited Oct. 21, 2017).

172. See Kevin Bogardus, *The Top 10 Lobbying Victories of 2010*, THE HILL (Dec. 15, 2010, 12:51 AM), <http://thehill.com/business-a-lobbying/133691-the-top-10-lobbying-victories-of-2010>.

173. See U.S. PUB. INT. RES. GROUP, *supra* note 56; see also *About Us*, COMMON CAUSE, <http://www.commoncause.org/about/> (last visited Oct. 21, 2017).

tional uptake of so-called “targeted disclosure mechanisms” by governments themselves.<sup>174</sup> This is a relatively new label for mechanisms for regulating divisive social issues like financial markets, pollution control, and food and product safety through transparency. Under these mechanisms, the government does not directly enforce standards of behaviour through investigation and sanction.<sup>175</sup> Rather, it ensures that trustworthy, comparable information is available to the public (usually understood as “consumers”) about the quality of food, levels of pollution, the investments made by companies, or whatever the case may be.<sup>176</sup> Standards are enforced through market pressure.<sup>177</sup> The functional similarities with the uses that public interest advocates made of access laws should be clear.

The origin of these mechanisms is conventionally traced to the Union Carbide disaster at Bhopal in December 1984.<sup>178</sup> In response, the US introduced the *Emergency Planning and Community Right to Know Act of 1986*,<sup>179</sup> which mandated the publication of the volume of certain chemicals released by industries into the environment.<sup>180</sup> In so doing, it sought to shift responsibility away from government for setting acceptable levels of emissions in favour of allowing market pressure and negotiations with interest groups to achieve the same end.<sup>181</sup> The model established by this law diffused rapidly around the world, due in part to the influence of international organisations. The Organisation for Economic Co-operation and Development (“OECD”), for example, encouraged member nations to adopt so-called Toxic Release Inventory laws, also known as Pollutant Release and Transfer Registers, from the early 1990s.<sup>182</sup> In a separate but related process, the United National Economic Commission for Eu-

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174. See FUNG, *supra* note 8, at 1-2, 4.

175. See *id.* at 1-2, 6.

176. See *id.* at 6.

177. See *id.* at 2-4.

178. OFF. OF EMERGENCY MGMT., U.S. ENVTL. PROTECTION AGENCY, THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (Sept. 2012), <https://www.epa.gov/epcra/epcra-fact-sheet>.

179. Emergency Planning and Right-to-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 11001-11050 (1986)).

180. *Id.*; see also DAVID BANISAR, FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS 162 (2006), [http://www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf).

181. See ARCHON FUNG ET AL., FULL DISCLOSURE: THE POLITICS, PERILS AND PROMISE OF TRANSPARENCY 29 (2007) [hereinafter FULL DISCLOSURE]; Vivek Ramkumar & Elena Petkova, *Transparency and Environmental Governance*, in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 279, 280 (Ann Florini ed., 2007).

182. Ramkumar & Petkova, *supra* note 181, at 281.

rope's Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, also known as the Aarhus Convention,<sup>183</sup> entered into force in October 2001, and by the end of the decade, had forty signatories and twenty-seven parties.<sup>184</sup> The Convention mandates the collection and disclosure of certain sorts of environmental information, and grants certain enforceable rights to citizens and NGOs to participate in decision-making processes and justice mechanisms.<sup>185</sup>

At the same time, as governments began to take up targeted transparency mechanisms, international organisations also began to encourage the adoption of access laws as a general tool of good public governance.<sup>186</sup> By the early 2000s, international government organisations like the World Bank and the OECD were advocating open government in this way.<sup>187</sup> Alongside international civil society organisations like Article 19, Access Info Europe, and Amnesty International, they were playing a crucial role in the spread of freedom of information laws, particularly among newly-democratising nations.<sup>188</sup>

The role of public interest advocates in developing these models and in campaigning for freedom of information tends not to be recognised in contemporary scholarship on either targeted transparency mechanisms or freedom of information. This may be because this scholarship is influenced by the way the international policy community thinks about these reforms.

A good example of this is Archon Fung's thorough and insightful work on targeted transparency mechanisms.<sup>189</sup> Fung defines targeted transparency mechanisms in terms that cover exactly the same ground as the laws introduced by the Campaign for Freedom of Information in the UK as alternatives to a full Freedom of Information Act, and which are consistent with the uses to which Nader put in the US

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183. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Convention on Access to Information]; Ramkumar & Petkova, *supra* note 181, at 297.

184. Convention on Access to Information, *supra* note 183; Ramkumar & Petkova, *supra* note 181, at 297.

185. Convention on Access to Information, *supra* note 183; see Ramkumar & Petkova, *supra* note 181, at 297.

186. Public Affairs Division, *Public Sector Modernisation: Open Government*, OECD OBSERVER, Nov. 2005, at 3, <http://www.oecd.org/site/govgfg/39044786.pdf>.

187. *Id.*

188. See Alexandru Grigorescu, *International Organizations and Government Transparency: Linking the International and Domestic Realms*, 47 INT'L STUD. Q. 643, 649-50 (2003).

189. See FULL DISCLOSURE, *supra* note 181.

FOIA.<sup>190</sup> They are laws that have specific a policy purpose, which is achieved by enforcing disclosure of defined information via defined means by defined disclosers (who need not necessarily be government agencies), usually backed up by enforcement mechanisms.<sup>191</sup>

To be fair to Fung, his primary purpose is not to explain the origins of these laws, but to identify the factors that contribute to their success. Based on a comparison of the eighteen American policies that meet his definition, he concludes that they work best when applied to problems where a lack of information is a significant contributor and where there is consensus on how to measure the problem.<sup>192</sup> He also concludes that they work best where communicating this information is practical, where users have the will and capacity make relevant choices, where this choice will encourage those with the capacity to reduce risks or improve performance, and where variable results that flow from individual choice are acceptable.<sup>193</sup> All of this is, broadly, consistent with the theory underpinning *Emergency Planning and Community Right to Know Act*. It does, however, display a neoliberal emphasis on the primacy of individual choice in a quasi-market environment as a policy tool. As such, it tends to downplay the important role which intermediary organisations like public interest advocates have actually played by accessing and distributing information and harnessing the perception that they may be able to influence mass behaviour in order to influence the behaviour of governments and regulated organisations.

This tendency to overlook the influence of public interest advocacy is also a feature of the brief historical discussion Fung offers early in the book.<sup>194</sup> Targeted transparency mechanisms are, he argues, a second generation of transparency instruments (the first being classic right to know legislation).<sup>195</sup> They emerged, he says, as a response to pressure from unions and environmental movements about spill-overs such as pollution.<sup>196</sup> More generally, they are a result of the emergence of policy areas characterised by irreconcilable social divisions in which “conventional forms of government intervention . . . are some-

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190. See FULL DISCLOSURE, *supra* note 181, at 39. See generally Freedom of Information Act, 5 U.S.C. § 552 (West 2007) (amended 2016); CAMPAIGN FOR FREEDOM OF INFO., *supra* note 44 (all of these sources refer to transparency mechanisms as laws made with a specific policy purpose, which is accomplished through specific disclosures).

191. See FULL DISCLOSURE, *supra* note 181, at 39.

192. *Id.* at 174.

193. *Id.* at 174-75.

194. See *id.* at 24-25.

195. *Id.* at 25.

196. *Id.* at 29.

times ill suited to the kinds of risks and performance flaws that policy-makers now identify for action” such as food labelling and car safety.<sup>197</sup> In response, governments hand over to citizens the ability to choose for themselves.<sup>198</sup> Their spread is also a result of technological change, which provides the means to collect, assemble, process and distribute information far more quickly and conveniently than in the past.<sup>199</sup> And, finally, they constitute a response to scepticism about the ability of government to regulate, and a general decline in trust that government will regulate in the interests of the people, as a result of which government responds by giving citizens the ability to exert pressure on their own.<sup>200</sup> This explanation is consistent in some respects with the actual course of events in the US from the 1990s onwards, such as the environmental movement and the personal computing revolution.<sup>201</sup> It however obscures the role played by public interest advocacy over the preceding two decades in pioneering this use of access laws and subtly portrays the government as a much more active, and willing participant in the adoption of these laws than was actually the case.

It would be unfair to dwell much longer on a relatively minor aspect of a book which sets itself a very different task, but it is nevertheless worth noting because it is common to a great deal of contemporary scholarship and professional literature on this subject. This, too, tends to be primarily concerned with the analysis of the effectiveness of transparency as a policy tool. It also offers potted histories of the development of these laws, which are strongly influenced by the functions that the authors are most interested in and tends to look no further than recent events that conform to these instrumental expectations. This is particularly true of professional literature on freedom of information (as opposed to targeted transparency mechanisms), which tends to emphasise its role in contributing to democratic control of the administrative state, and hence to emphasise the role of groups with well-recognised roles in contemporary democratic theory. These groups include elected politicians, appointed bureaucrats, the voting public, and NGOs for whom transparency is a primary goal in its own right, rather than as instrumental goal.<sup>202</sup>

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197. *Id.* at 14.

198. *Id.*

199. *Id.* at 14-15.

200. *Id.* at 15.

201. *Id.* at 28-29.

202. See, e.g., Public Affairs Division, *supra* note 186. See Daniel Berliner, *The Political Origins of Transparency*, 76 J. POL. 479 (2014); Robert Gregory Michener, *The Surrender of Se-*

#### IV. CONCLUSION

Consumer advocates played an important role in the development and spread of freedom of information. These organisations were widespread in the industrialised democratic world of the mid and late twentieth century and helped to establish favourable conditions for the introduction of access laws by distributing information to the general public about commercial issues and by legitimising its availability. Once freedom of information emerged as a matter of public debate, these groups were typically among the supporters. From the late 1960s, some consumer advocacy movements shifted emphasis away from simply informing consumers and increasingly sought to influence regulators and producers. In these countries, the consumer advocacy movement was typically a much more active supporter of freedom of information and was often responsible for putting access laws on the legislative agenda and ensuring these laws were actually passed. The most prominent examples of this occurred in the English-speaking world, particularly in the US, the UK, and Australia, but there is also evidence of something similar in Canada, Japan, and to a lesser extent Germany.

This article has offered a tentative explanation for this historical alignment between public interest advocacy and freedom of information, which emphasises both structural and contingent factors. Structurally, public interest advocacy emerged from dissatisfaction with the capture of regulatory agencies by producers and with the contribution of government secrecy to this situation. This happened to occur earliest in the United States because the public interest advocacy movement emerged there first, and because the *Freedom of Information Act of 1966* provided a point around which this alignment could crystallise. It spread around the world largely due to personal contact between local public interest advocates and their American counterparts, particularly Ralph Nader. The article has not attempted to systematically assess why this mobilisation appears to have occurred most prominently in particular countries, but on the basis of a preliminary comparative analysis of the countries cited above, and by reference to other scholarship, has suggested favourable political opportunity structures and a conducive political economy may be relevant.

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crecy: Explaining the Emergence of Strong Access to Information Laws in Latin America (May 2010) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with University of Texas at Austin) for scholarly examples focusing on political factors.

The article has also considered the rather curious fact that these events are not widely acknowledged in contemporary scholarly and professional literature on transparency, despite the fact that public interest advocacy was a crucial contributor to both freedom of information and the theory underpinning contemporary targeted transparency mechanisms. It has suggested that this may be partly due to the fact that, from the 1990s, transparency became an accepted tool of public sector governance, and that as a result, these mechanisms were taken up by governments and international government organisations. As a result, although public interest advocates continue to use and support these laws, they have played a less significant role in their diffusion. It also appears that contemporary scholarship on this subject has typically been more interested in the functions and uses of these laws than in their origins and has tended to read contemporary (and somewhat neoliberal) assumptions about them back into history.

A study of the history of these laws serves as a useful corrective to this. Freedom of information is not merely the outcome of struggles to exert democratic control over the state, it is also the legacy of efforts to shift the balance between consumers and producers in the economy. The laws in many countries have been influenced by these struggles because the countries in which consumer advocates fought have served as models from which other governments and non-government organisations have drawn inspiration. This history also serves to draw attention to the crucial role played by intermediary organisations in the relationship between individuals, whether they be voters or consumers, and the large bureaucracies which shape many aspects of contemporary life.