

RALPH NADER, LONE CRUSADER? THE ROLE OF CONSUMER AND PUBLIC INTEREST ADVOCATES IN THE HISTORY OF FREEDOM OF INFORMATION[†]

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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 *F* ... *I* ... *A*

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(“FOIA”).¹ 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.² 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.³ 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 methods⁴ and process tracing.⁵

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-

1. Sam Archibald, *Environmental Freedom of Information Act 1955-1974*, 26 *POL. SCI. & POL.* 726, 730 (1993).

2. , , .

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

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' Research¹⁰ (1929) and Consumers' Union¹¹ (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.¹² 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 1957.¹³ By 1960, these organisations were numerous and widespread enough to give rise to the International Organization of Consumers Union ("IOUC").¹⁴ The IOUC, founded by groups from the US, UK, the Netherlands, Belgium, and Australia, followed a conference attended by seventeen organisations from fourteen countries.¹⁵ In some parts of Europe, government agencies also came to play an important role in product testing and consumer information—such as the *Verbraucherzentrale* in Germany.¹⁶

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.¹⁷ It can be seen in the UK, where, for example,

10. Lawrence B. Glickman, *Consumers' Research: A History of the Consumer Movement in America*, *Journal of American History*, 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. Joachin Marcus-Steff, *L'Union des consommateurs en France*, 18 REVUE FRANÇAISE DE SOCIOLOGIE, 85, 88 (1977), www.jstor.org/stable/3320870; A HISTORY OF THE CONSUMER MOVEMENT, 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. REBECCA J. PULJU, WOMEN AND MASS CONSUMER SOCIETY IN POSTWAR FRANCE 30-31 (2011).

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

14. A HISTORY OF THE CONSUMER MOVEMENT, 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; A HISTORY OF THE CONSUMER MOVEMENT, 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. ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 6-9.

Magazine had 700,000 subscribers by 1977.¹⁸ 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.¹⁹ In addition to this indirect role by stimulating demand and influencing norms, advocacy organisations occasionally exerted direct influence.²⁰ 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.²¹ 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.²² The decision by the *C . . 'A . .*

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

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.²⁸ 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*, 1983.²⁹ In other countries, their counterparts supported freedom of information by joining with other interest groups to campaign.³⁰ 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.³¹ 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.³² 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,³³ as well as supporting positive rights of access in later years.³⁴ 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.³⁵ This occurred in both Germany and Japan, where each country's Green party strongly advocated for reform in both areas in the 1990s and

26. *Id.* at 99.

27. Tom McClean, *Freedom of Information Act*, 7 S.W. J. INT'L MEDIA & ENT

early 2000s.³⁶ 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.³⁷ John Moss, a member of Congress who was instrumental to the passage of the original *Freedom of Information Act*, 1966,³⁸ went on to play an instrumental role in the passage of key consumer protection acts in subsequent years, including the *Consumer Product Safety Act*,³⁹ the *Motor Vehicle Information and Cost Savings Act*,⁴⁰ the *Toxic Substances Control Act*, 1984,⁴¹ the *Poison Prevention Packaging Act*, 1970⁴² and the *Toxic Substances Control Act*.⁴³

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.⁴⁴

A.

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

36. *A. P. v. A. E.*, ALLGEMEINE FLEISCHER ZEITUNG, Feb. 1, 2006, LexisNexis; Diethard Wiechmann, *A. E. v. K.*, LEBENSMITTEL ZEITUNG, Dec. 29, 2006, at 20; Information Clearinghouse Japan, note 31.

37. ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, 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 *C. v. J. E. M. v. O.*, JOHN E. MOSS FOUND. (Feb. 11, 2014), <http://www.johnmossfoundation.org/overview.htm>;

George Kennedy, *H. A. v. G. K. v. G. C. v. G. A. v. F. I. v. A. P.*, FOIA 30, JOHN E. MOSS FOUND. (1996), <http://www.johnmossfoundation.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. *J. v. J.*, 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 (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); *A. v. J.*, 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 *F* *I* *A* 1966.⁴⁵

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.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.⁴⁹ Particular targets for his attacks were part of what he called “lobbying infrastructure” in Washington, which included private advocacy and law firms.⁵⁰

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.⁵¹ 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.⁵² The structure of and rela-

45. . . . , David E. McCraw, *F* *F* *I* *A* *A* *L* *B* *N* *FOIA* , 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. Marti Mueller, *N* . . . *F* *A* *P* *C* , 166 *SCI.* 979, 979 (1969).

48. David Bollier, *N* , *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT* 383 (Stephen Brobeck et al. eds., 1997); Jerry L. Mashaw, *I* , *E* *A* : *A* *E* *M* , *G* *A* , 57 *L. & CONTEMP. PROBS.* 185, 193 (1994).

49. Bollier, 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, note 48.

52. J. Craig Jenkins & Abigail Halcli, *G* , *D* *I* *M* *P* , 1953-1990, *PHILANTHROPIC FOUNDATIONS: NEW SCHOLARSHIP, NEW POSSIBILITIES* 229, 232, 252 (Ellen Condliffe Lagemann ed., 1999);

Nader’s Raiders sought to apply.⁶¹ 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”).⁶² The attack alleged that the Commission had been captured by industry interests, and was no longer regulating them in the interests of the public.⁶³ It also alleged that the agency was actively protecting these arrangements through the systematic withholding of important information.⁶⁴ 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.⁶⁵ In this report, he argued the FOIA was being “undercut by a riptide of bureaucratic ingenuity,”⁶⁶ 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.⁶⁷ 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.⁶⁸ Nader and others also criticised the FOIA itself, alleging

⁶¹ See Ralph Nader, *Federal Trade Commission: A Report*, 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’ O

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.⁶⁹

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,⁷⁰ press coverage of the Vietnam War (and in particular the massacre at My Lai),⁷¹ and the legal battles over the Pentagon Papers.⁷² 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,⁷³ the bill was passed a second time with a veto-proof majority.⁷⁴

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

69. . . . at 2.

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

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

72. Harlow Uncer, *P. . . . N. . . . L. . . .*, *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 fil[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,

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.⁷⁵ It also came from Nader's Raiders, who lobbied members of Congress to ensure support.⁷⁶ Nader himself worked closely with Senator Edward Kennedy to overcome resistance from the bureaucracy once the amendments were being considered.⁷⁷ 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.⁷⁸ 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.⁷⁹ This opposition was eventually overcome by a second vote in the Congress.⁸⁰ Although Nader was not the only one involved in overcoming it,⁸¹ his work was specifically cited by one of

75. *O. H. E. E. N. J. O. N. A. L. O. F. I. N. E. N. A. I. O. N. A. L. L. A.*, 1972, PUB. CITIZEN (Jan. 1998), <https://www.citizen.org/our-work/litigation/obtaining-access-government-records-1972>.

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

77. *C. I. A. O. B. I.*, . . . note 58.

78. Dan Lopez et al., *B. 30 A. F. I. N. N.*, NAT'L SECURITY ARCHIVE (Nov. 23, 2004), <http://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/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/NSAEBB/NSAEBB142/050774%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/NSAEBB/NSAEBB142/052374%20CIA%20to%20ODonnell%20Memo.pdf>) (“The Central Intelligence Agency was particularly concerned with the . . . 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. Lopez, . . . note 78.

80. Archibald, . . . 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.⁸²

B. K ,

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

factor. The Public Concern at Work sought the introduction of a whistle-blower's protection act to complement a freedom of information act.⁹¹ To this end, the organisation worked jointly with the Campaign on drafting the *Public Interest Disclosure Bill*,⁹² which was passed in 1998.⁹³ This period spans the transition between the Conservative Major government and Blair's New Labour administration, which introduced the British FOIA in 2005.⁹⁴

The Campaign was founded in 1984, and primarily sought to work through the parliamentary system rather than through public advocacy.⁹⁵ 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.

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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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.¹⁰³ The Campaign, therefore, opted for piecemeal reform via private members' bills on specific issues.¹⁰⁴ It was met with some success, thanks in part to good luck. The Campaign cultivated widespread support among backbench Members of Parliament.¹⁰⁵ 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*¹⁰⁶ and the *Environment and Safety Information Act 1988*.¹⁰⁷ The *E*...

100. Maurice Frankel, *Freedom of Information: A History*, THE SECRETS FILE 74, 75-76, 83-94 (Des Wilson ed., 1984).

101. Maurice Frankel, *History of the Freedom of Information Act 1982*, THE SECRETS FILE, note 100, at 22.

102. Jim Chandler, *Freedom of Information: A History*, LOCAL GOVERNMENT AND ACCOUNTABILITY 106, 108 (Michael Hunt & Richard Chapman eds., 2010); 1993 *Freedom of Information Act*, CAMPAIGN FOR FREEDOM OF INFO. (Jan. 20, 1994), <https://www.foi.org.uk/1994/01/1993-freedom-of-information-awards/>.

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

105. 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); *Access to Medical Reports Act 1988*, 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.).

in the United States, and the various UK bodies discussed above.¹¹⁹ And, like them, its main substantive goal was the adoption of a freedom of information act.¹²⁰ The Committee also adopted similar campaign techniques, including publishing a short-lived journal.¹²¹ 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.¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵

119. Wood, note 118; *Nader, C. . . . P. . . . I*, RUPERT PUB. INT. MOVEMENT J., Nov. 1980–Feb. 1981, at 8 [hereinafter *Nader, C. . . . I*].

120. *FOIL, Nader, O. . . . J.*, RUPERT PUB. INT. MOVEMENT J., Mar. 1980, at 26 [hereinafter *FOIL, Nader, O. . . . J.*].

121. *Nader, C. . . . I*, RUPERT PUB. INT. MOVEMENT J.

122. *FOIL, Nader, O. . . . J.*, note 120 (discussing freedom of information legislation in Australia); John Nevill, *M. . . . F.*, 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); *A. . . . D.*

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.¹³⁴ The Whitlam government was replaced with the conservative Fraser government,¹³⁵ 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.¹³⁶ Despite this, the issue did not disappear entirely from the political agenda, primarily due to pressure from backbench members of the government,¹³⁷ and a Senate Committee which held consultations showing reforms were widely-supported in the press and by public opinion, even if not electorally decisive.¹³⁸ 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.¹³⁹

III. EXPLAINING THE HISTORY OF CONSUMER C

p8.2 in Tm2.54-M26t,

signed because it refused to adopt the more radical approach he proposed.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰

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*,¹⁵¹ 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

147. Laurie Johnston, Notes on People, *Nader v. Coca-Cola*, N.Y. TIMES, Aug. 23, 1975, at 10.

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

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

150. John TD Wood, *Consumer Protection: A 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. 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, *Environmental Consumerism*, 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).¹⁵² 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.¹⁵³ 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.¹⁵⁴

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

152. Comment, 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, *Consumer Policy and the BIAS OF PLURALISM* 3 (William E. Connolly ed., 1969)).

153. FUNG, note 8, at 1-2, 5 (first citing Ginger Zhe Jin & Leslie Phillip, *Environmental Policy and Economic Growth*, 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, *Wise Choices: Games, Decisions, and Negotiations* 22 (Richard J.

flowing from the emergence of public interest-style advocacy.¹⁵⁵ 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.¹⁵⁶ The importance of personal contacts is quite clear from the historical sources for Australia, the UK, and Canada.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ But the case of France suggests that state structures are probably more likely the cause than language barriers.¹⁶⁰ 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).¹⁶¹ In the 1970s, French and Belgian consumer advocates shifted from simply providing information on products and began to organise local groups, recruit

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. *Id.* at 640-41.

157. *Id.*, *supra*, 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. Colin J. Bennett, *Diffusion of Innovation: Evidence from Consumer Activism in Australia*, *Journal of Consumer Policy*, 2004, 28:1-2.

activists, and hold “consumers’ strikes.”¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ Ralph Nader toured Japan in 1989, advocating a product liability law and a Japanese FOIA.¹⁶⁶ 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.¹⁶⁷ An operative factor in this delay appears to be that a national access law in Japan was never an electorally-significant issue in Japan,¹⁶⁸ although the similarities with the French experience suggest the insulation of the State from popular pressure may also have been a factor.

162. Giselle Nath, *Giselle Nath, C. . . . P*, 132 *LOW COUNTRIES HIST. REV.* 70, 72, 75-76 (2017); Matthew Hilton, *D C*, 18 *TRANSACTIONS ROYAL HIST. SOC.* 211, 217-20, 223-27, 231 (2008) (discussing the globalisation and radicalisation of Western European consumer movements).

163. *F FOIA F* note 27, at 45-46 (citing Michel Aurillac, *L O P D D*, *TRANSPARENCE ET SECRET* 53 (2003)).

164. *F FOIA F* note 27, at 52 (citing Herbert Kitschelt, *P O P P A N M F D*, 16 *BRITISH J. POL. SCI.* 57 (1986)).

165. David Boling, *A G -H I J C*, *K B B*, 34 *STAN. J. INT’L L.*, 1, 7 (1998) (first citing EDWIN O. REISCHAUER, *THE JAPANESE* (1977); then citing Kawabata Tai, *I N -P A H G*, *JAPAN TIMES*, July 20, 1988, at 13; and then citing *F D N N F I*, *ASAHI EVENING NEWS*, Apr. 29, 1992, at 4); Lawrence Repeta & David M. Schultz, *J G I : N A*, *NAT’L SECURITY ARCHIVE* (May 23, 2002), <http://nsarchive2.gwu.edu/nsa/foia/japanfoia.html>.

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

167. Boling, note 165, at 15 (citing David Boling, *C A*, *AM. CHAMBER COM. J. JAPAN*, May 1993, at 39, 41); Repeta & Schultz, note 165.

168. Boling, note 165, at 19 (citing *C M*, *FOIA J* (Radio Japan broadcast Jan. 20, 1994)).

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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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ They also form a strong lobby in support of the law itself.¹⁷² 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,¹⁷³ 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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tional uptake of so-called “targeted disclosure mechanisms” by governments themselves.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ Standards are enforced through market pressure.¹⁷⁷ 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 1984.¹⁷⁸ In response, the US introduced the *Emergency Planning and Community Right-to-Know Act of 1986*,¹⁷⁹ which mandated the publication of the volume of certain chemicals released by industries into the environment.¹⁸⁰ 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.¹⁸¹ 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.¹⁸² In a separate but related process, the United National Economic Commission for Eu-

174. FUNG, note 8, at 1-2, 4.

175. . at 1-2, 6.

176. . at 6.

177. . 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>.

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,¹⁸³ entered into force in October 2001, and by the end of the decade, had forty signatories and twenty-seven parties.¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ By the early 2000s, international government organisations like the World Bank and the OECD were advocating open government in this way.¹⁸⁷

like Article 19, Access Info Europe, and Amnesty International were playing a crucial role in the spread of freedom of information laws, particularly among newly-democratising nations.

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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.¹⁸⁹ 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

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, ... note 181, at 297.

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

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

186. Public Affairs Division, *Partnership for Transparency: Open Government*, OECD OB-

SERVER, Nov. 2005, at

187. *J. ...*

188. Alexandru G. ...

INT’L STUD. Q. 643, 649-50 (2003).

ULL DISCLOSURE, ... note 181.

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 *F* . . . *I* . . . *A* . . . 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.

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.

