Fixing FOIA: Pushing Congress to Amend FOIA Section b(3) to Require Congress to Explicitly Indicate an Intent to Exempt Records from FOIA in New Legislation

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In 2008, the Associated Press made a request under the federal Freedom of Information Act (FOIA) for documents detailing $3.1 million spent on government credit cards in the 2007 budget year. The Associated Press discovered many questionable charges, including charges for products bought at high-end stores, like the Sharper Image, and thousands of dollars spent at Las Vegas casino hotels. Further investigation by the Associated Press revealed a report from the Government Accounting Office detailing questionable charges to government credit cards, including over $14,000 on internet dating services and over $70,000 in questionable high-end clothing purchases. Once these findings were widely published on the Associated Press wire, Congress and the Office of Management and Budge became involved, eventually instituting new

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3 Id.

agency rules to crack down on credit card misuse, including better training for employees that hold government credit cards and requiring those employees to provide better documentation of charges.\textsuperscript{5} The public would likely never have known about these charges, despite the Government Accounting Office report, if the AP had not made a FOIA request for these records.

FOIA has been called “a vital precaution that has served the people well in defending their right to know what their government is doing--or not doing”\textsuperscript{6} and has been the only avenue available in some cases to discover government violations of the constitutional and fundamental rights of the American people. FOIA has been used by journalists and other information-seeking citizens to discover that the federal government used human subjects to test hallucinogenic drugs during the Cold War,\textsuperscript{7} the federal government failed to inform the public of toxic lead content in the water of the nation’s capital,\textsuperscript{8} and funds earmarked to help small businesses recovering from the terrorist attacks of September 11\textsuperscript{th} in New York and Washington D.C. were paid by the federal government to companies in South Dakota, Utah, and Oregon.\textsuperscript{9} These are just a few of countless news stories that evidence the government oversight that FOIA grants journalists and


\textsuperscript{6} Senator Leahy’s Floor Statement on FOIA’s 35\textsuperscript{th} Anniversary, March 15, 2001, http://leahy.senate.gov/press/200103/010315a.html (last visiting, July 16, 2009);

\textsuperscript{7} CIA v. Sims, 471 U.S. 159 (1985)

\textsuperscript{8} Cohn, D’Vera, \textit{Investigating Washington D.C.’s Water Quality},

http://www.nieman.harvard.edu/reportsitem.aspx?id=101028

\textsuperscript{9} \textit{Many who got Sept. 11 loans did not need them; some loan recipients had no idea their funds came from terror-relief program}, RICHMOND TIMES DISPATCH, September 9, 2005 at A-1.
the public-at-large. In many instances, these news stories have spawned Congressional action to fix governmental missteps, indicating that FOIA may assist Congress in agency oversight as much as it assists journalists and the public.\(^\text{10}\) Without FOIA, these government missteps would not be discovered easily, and, therefore, would not be remedied as quickly or, perhaps, at all. Without FOIA, journalists would have a difficult time carrying out their vital role as the Fourth Estate\(^\text{11}\) of government – a fourth leg, of sorts, of the government that keeps watch over the other three for the benefit of the public.

The core provisions of today’s federal Freedom of Information Act were written into law in the mid-1970s\(^\text{12}\) and were enacted in response to two court cases that largely deferred to an agency’s claims that records needed to be withheld from public view based on a discretionary decision to do so by the head of an agency.\(^\text{13}\) The 1970s version of FOIA included more specific

\(^\text{10}\) Rinckey, supra n. 4.

\(^\text{11}\) Historians track the concept of the “Fourth Estate” to 1841 when Thomas Carlyle wrote in his book On Heros and Hero Worship: “[Parliamentarian Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. Thomas Carlyle, THE VICTORIAN WEB, http://www.victorianweb.org/authors/carlyle/heroes/hero5.html

\(^\text{12}\) The original statute was enacted in 1966, but the bulk of the statute that is still in effect today was enacted through amendments to the statute in 1974 and 1976. 5 U.S.C. § 552

\(^\text{13}\) In EPA v. Mink the executive classified documents as “top secret,” which the court determined allowed those documents to be withheld from public view. 410 U.S. 73 (1973). In Administrator, FAA v. Robinson, the Administrator of the FAA withheld documents because he decided that the commercial airline safety inspection reports were exempt from public view.
direction on when agencies could withhold records, eliminating any language that indicates the agency had unfettered discretion in making this determination.\footnote{5 U.S.C. § 552 (2000)} FOIA remained largely untouched by Congress for three decades.\footnote{There were some small amendments to the statutes in 1986 and 2002. \textit{Id.} The Electronic Freedom of Information Act was enacted in 1996, and added many provisions to the act regarding electronic records. \textit{Id.} However, the core provisions remain largely the same as they were written in the 1970s. \textit{Id.}} Of course, over time chinks in the armor of the law became apparent, so there have been some efforts over the years to make it a stronger law.\footnote{\textit{Id.}} However, there is one provision that has remained a problem both for agencies, records requestors and the courts over the past three decades of FOIA’s existence. Section b(3) of FOIA allows agencies to withhold records if there is some other federal statute that dictates that the records are closed.\footnote{5 U.S.C. § 552(b)(3)(2000)} Section b(3) is broadly written, allowing agencies to withhold records if the record is specifically identified or if there is some sort of “criteria” upon which the agency thinks Congress intended to close access to the records.\footnote{\textit{Id.}} It is this latter provision that has caused most of the problems with section b(3). An agency’s decision to withhold a record under a statute in which Congress was not clear or explicit -- either in the text of the statute or in the Congressional record -- that it’s intent was to close access to a particular type of record often becomes a because release of them would adversely affect the rights of airlines that objected to the release of the documents. 422 US 255, 259-259 (1975).
litigated issue that has continually put a burden on the court system.\textsuperscript{19} In the three decades since FOIA was enacted, 140 cases have involved a determination of whether a statute exempts a record through b(3).\textsuperscript{20} Of those 140 cases, over 80\% have found for the agency, indicating that the courts are far too quick to defer to an agency’s claim that a statute exempts a record from FOIA.\textsuperscript{21} This deference undermines Congress’ goal to create public oversight by enacting FOIA, but also undermines Congress’ ability to maintain oversight over the administrative state through the use of the media as a vigilant watchdog.\textsuperscript{22}

This article advocates a two-tiered strategy to deal with this problem. The most direct solution would be for Congress to pass one of the bills that come before it each year seeking to place a requirement in section b(3) that Congress must explicitly indicate it’s intent to exempt records from FOIA in any subsequently enacted legislation.\textsuperscript{23} However, since Congress has

\begin{footnotesize}
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\item \textsuperscript{19} What statutes specifically exempt agency records from disclosure, under 5 U.S.C.A. § 552(b)(3)(2000), 47 A.L.R. Fed. 439 (listing 146 cases that have involved section b(3) claims).
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} The beginnings of the modern-day FOIA statute began during the McCarthy anti-communist era when Congress became agitated that agencies would not hand over documents during the McCarthy investigations. Reuel E. Shiller, \textit{Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970}, 53 \textit{VAND. L. REV.} 139 (2000)
\item \textsuperscript{23} See e.g., Faster FOIA Act of 2005, S. 529, 109\textsuperscript{th} Congress (2005); Open Government Act of 2007, S. 849, 110\textsuperscript{th} Congress (2007); Open Government Act of 2007, S. 2488, 110\textsuperscript{th} Congress (2007); Open FOIA Act of 2008, S. 2746, 110\textsuperscript{th} Congress (2008); Open FOIA Act of 2009, S. 612, 11\textsuperscript{th} Congress (2009).
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failed to seize the opportunity to fix the b(3) problem with any of the five bills that have come before it thus far, this article advocates for the courts to gently nudge Congress into considering one of these reforms by closely scrutinizing any claim that Congress intended to exempt records from FOIA, especially when the court considers laws drafted after FOIA. This nudge not only makes practical sense in light of the enormous amount of needless litigation involving the b(3) provision, but is also allows the federal courts to take the role of protecting the fundamental and constitutional rights that are supported by FOIA and maintains the public oversight that assists Congress in overseeing the administrative state.

Part II of this article will detail the enormous burden b(3) cases have placed on the federal court system. Part III will demonstrate how an amendment to FOIA placing a duty on Congress to explicitly exempt documents from FOIA would eliminate the need for this type of wasteful litigation in the federal courts. To convince Congress to make such an amendment, the federal courts should begin to look for this sort of explicit intent in the cases that come before it. Part IV will demonstrate how looking for this intent also fits with theories of judicial review of rights that support important constitutional and fundamental rights. Part V discusses how FOIA supports Congressional oversight of the administrative state. Additionally, this section will highlight how the court’s deference to agency claims that statutes exempt records from FOIA without an express intent in the statute or the Congressional Record diminishes agency oversight by Congress as well as the public, which is antithetical to Congress’ intent in enacting FOIA. Finally, Part VI gives a brief synopsis of legislative efforts to reform FOIA so far and encourages continued efforts to fix the b(3) problem.
II. Cases Involving FOIA section b(3) Exemptions – an Unnecessary Burden on the Federal Courts

A survey of over 140 cases involving b(3) litigation demonstrates that statutes enacted prior to FOIA as well as those enacted subsequent to FOIA have all caused agencies and courts difficulty in understanding Congress’s intent regarding the openness of records.\(^{24}\) Congress’ desire not to implicitly repeal statutes already in existence at the time FOIA was enacted may have been a cautious and efficient decision for Congress, but it certainly was neither cautious nor efficient for the courts.\(^{25}\) Less than 10% of the FOIA cases have dealt with statutes enacted after FOIA.\(^{26}\) Although only 10% of cases in the last 30 years have involved statutes enacted after

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\(^{25}\) “When the House Committee on Government Operations focused on Exemption 3, it took note that there are ‘nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160.’. (Emphasis added)” Administrator, Federal Aviation Administration v. Robinson, 422 U.S. 255, 264 (1975)(citing H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966))

FOIA, that number is needless in light of the easy correction to the problem – an amendment to FOIA requiring Congress to explicitly indicate its intent to exempt a record from FOIA in any new legislation. This requirement would save needless and costly litigation, prevent delayed access to public records, provide stronger protection of those records that Congress does intend to keep protected from public view, and allow the public and Congress essential oversight of federal agencies.

The most frequent b(3) issue that the federal courts have struggled with are matters of national security that Congress has exempted from disclosure under the National Security Act or a similar statute. Most typically, the requestor seeks the records from the CIA, but there are some situations where the requestor sought the records from another agency, yet the records still fell within the parameters of a Congressional statute geared to protect matters of national security. The federal courts have interpreted whether b(3) covers an exemption based on a national security statute in, at least, 30 cases; the D.C. Circuit alone has had to determine over 15 cases on this topic.


29 Davis, supra n.23.
In CIA v. Sims in 1985, the Supreme Court was forced to take up the subject of whether the Director of the CIA could withhold the names of researchers who did intelligence work for the CIA in the 50s and 60s under the b(3) exemption of FOIA. For 14 years in the 50s and 60s the CIA conducted a project in which it funded research through various universities and other research centers that involved looking into chemicals and other techniques to counter brainwashing and other information gathering techniques the CIA was concerned about being used against Americans. Some of the research was ethically questionable. One experiment, in particular, involved secretly administering LSD and other dangerous drugs to participants, causing the death of at least two subjects. An attorney filed a request with the CIA for records related to the funding of this research, including what groups had been funded and the names of people who conducted the research. The CIA provided the names of the institutions, but refused to release the names of the people in charge of the research, citing section b(3) of FOIA. The National Security Act of 1947 indicates that the Director of the CIA should protect “intelligence sources and methods from unauthorized disclosure.” The CIA argued that this provision satisfied the b(3) standard of “particular types of matters” withheld by another

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31 Id. at 161-162.

32 Id. at n. 2.

33 Id. at 161-162 & n. 2.

34 Id. at 163.

35 Id. at 163-64.

36 61 Stat. 496

37 Id. at 164.
federal statute. After a lengthy discussion of Congress’ intent in drafting the National Security Act to aid intelligence gathering by making sure the sources used in that gathering can remain confidential, the Court decided that the National Security Act sufficiently identified the types of records to be exempt from FOIA to meet the b(3) standard, and it held that the broad authorization granted to the Director to protect intelligence sources was designed to protect any source “needed for its intelligence function.” The court determined that the research at question was “related to the Agency’s intelligence-gathering function” because the Director needed to be able to promise confidentiality to information gathering sources, like these research institution personnel, in order to elicit information from them. Additionally, the court found that the National Security Act directive for the Director was designed to allow persons handing over intelligence to the agency not to face retribution from persons affected by that intelligence.

At least one lower court has found that time can change the analysis of the CIA v. Sims standard. In Fitzgibbon v. CIA, the D.C. Court of appeals noted that the passage of time can make it difficult to determine if someone was promised or expected confidentiality in return for

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38 Id. at 163-64.

39 Id. at 173, n. 17 (citing App. to Pet. For Cert. in No. 83-1075, pp. 22a-23a)

40 Id. at 173-74. Medoff v. United States Cent. Intelligence Agency, 464 F. Supp. 158 (D.C.N.J. 1978), found similarly that records requested regarding funding for research conducted at Fairleigh Dickinson University did not need to be disclosed based on the CIA Director’s duty to protect “intelligence sources and methods from unauthorized disclosure.”

41 Id. at 177.

divulging information to the CIA and can minimize any fear of retribution against the individual who divulged intelligence information.  

Lower courts have found that the directive given to the Director of the CIA to protect “intelligence sources and methods from unauthorized disclosure” covers many types of records. The CIA’s hiring and firing regulations, copies of job vacancy announcements, historic intelligence gathering budget information, correspondence and policies regarding work conducted with the International Criminal Police Organization (INTERPOL), documentation of statements made by a CIA director of the House Armed Services Committee during Congressional consideration of rules related to the authority of the CIA, information in the CIA’s hands related to the publication of a book about Marxism, documents identifying private attorneys who had worked for the CIA and the fee agreements between the attorneys and the agency, a confirmation of the existence of any document related to intelligence research conducted on a University of California campus, documents related to the funding and use of student members of the United States National Student Association to conduct intelligence


47 National Commission on Law Enforcement and Social Justice v. CIA, 576 F.2d 1373 (9th Cir. 1978)  

48 *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978)  


gathering, records of a suspected double-agent requested by the agent himself, records regarding the CIA’s efforts to keep journalists from publishing information about secret intelligence operations, records involving investigations into churches, have all been found to be covered by this directive. One notable exception to these cases is *Weberman v. National Security Agency*, in which the District Court for the Southern District of New York found that the directive in the National Security Act did not allow the CIA to avoid admitting or denying the existence of a telegram sent by Jack Ruby’s brother from Cuba.

Other cases have dealt with the issue of similar statutes directed at protecting national security information from being released to the public, but in the context of different agencies. There are, at least, two cases involving the FBI in which courts have found the agency could rely on a portion of the Privacy Act that exempts records “compiled for the purpose of identifying individual criminal offenders and alleged offenders” from FOIA through the b(3) provision to deny FOIA requests for those records. The National Security Agency has also successfully defended denials of FOIA requests for records in that agency’s hands based on Public Law 86-

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56 Stimac v. FBI, 577 F. Supp. 923 (N.D. Ill. 1984); Painter v. FBI, 615 F.2d 689 (5th Cir. 1980).
36, which, through provision b(3), exempts any documents that describe a “function of the National Security Agency” from FOIA.\textsuperscript{57}

IRS records are another frequently denied record by way of the b(3) exception that commonly ends up in federal court. Generally, the facts underlying these suits involve the IRS, or other government agency holding tax related documents, withholding documents under 26 U.S.C. § 6103, which prohibits the IRS from disclosing tax “return information.”\textsuperscript{58} The statute does define this category a bit more by indicating that “return information” is “[a] taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deduction, exemptions . . . whether the taxpayer’s return was, is being, or will be examined or subject to other investigations.”\textsuperscript{59} Because of the broad language in this statute, courts almost uniformly uphold the IRS’s decision to withhold documents under this statute.\textsuperscript{60} Despite the ease with which


\textsuperscript{59} 26 U.S.C. § 6103 (2009)

\textsuperscript{60} Id. (allowing the IRS to withhold documents relating to tax litigation); see also Cooper v. IRS, 450 F. Supp. 752 (D.C. Cir. 1977); Radcliffe v. IRS, 536 F.Supp. 2d 423 (S.D.N.Y. 2008); Kanter v. IRS, 478 F. Supp. 552 (N.D. Ill. 1979); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979); Anheuser-Busch v. IRS, 493 F. Supp. 549 (D.C. Cir. 1980); Stauss v. IRS, 516 F. Supp. 1218 (D.C. Cir. 1981)(finding documents regarding the IRS’s investigation into groups that protect tax laws were properly withheld from public view); Conway v. U.S.IRS, 447 F. Supp.
1128 (D.C. Cir. 1978) (upholding the IRS’s decision to withhold internal documents related to revenue rulings involving issues about a foreign tax credit); King v. IRS, 688 F.2d 488 (7th Cir. 1982) (finding IRS correct in denying access to IRS comments on revenue rulings); Ryan v. Bureau of Alcohol, Tobacco and Firearms, 715 F.2d 644 (D.C. Cir. 1983) (finding that forms held by the Bureau of Alcohol, Tobacco and Firearms were exempt from public view because they contained information designed to provide liquor manufacturers tax breaks); Moody v. IRS, 682 F.2d 266 (D.C. Cir. 1982) (affirming the district court’s decision that a document concerning the IRS’s investigation into tax corruption in Texas was exempt under section b(3)); Heinsohn v. IRS, 553 F. Supp. 791 (E.D.D.C. 1982) (finding that documents relating to calculation of gross sales figures of a taxpayer were exempt from public disclosure); Breuhaus v. IRS, 609 F.2d 80 (2d Cir. 1979) (finding that IRS Commissioner’s opinion letter to House Ways and Means Committee regarding whether a tax-exempt organization needed to pay a termination tax was confidential under exemption b(3)); Belisle v. Commissioner of Internal Revenue, 462 F. Supp. 460 (D.C. Okl. 1978) (finding documents regarding a corporation’s tax exempt status was correctly withheld under b(3)); White v. IRS, 707 F.2d 897 (6th Cir. 1983) (finding that documents regarding IRS investigation into a taxpayer’s failure to pay taxes was confidential); Cliff v. IRS, 496 F. Supp. 568 (S.D.N.Y. 1980) (finding IRS was correct to deny access to an internal IRS memo regarding the effects of changes in IRS procedures on certain taxpayer liability); but cf. Fruehauf Corporation v. IRS, 566 F.2d 574 (6th Cir. 1977) (finding that internal IRS documents and letters to third parties regarding private letter rulings were not prohibited from disclosure under § 6103 and b(3)).
federal courts seem to find these documents fall within the ambit of 26 U.S.C. § 6103, the federal 
courts have had to deal with this issue on at least 18 occasions.\textsuperscript{61}

In one glaring example of the need for a Congressional duty to explicitly indicate in the 
text of a statute its desire to exempt records from FOIA, the Ninth Circuit struggled with how to 
construe a statute enacted after FOIA that appeared to the court to be written in response to it’s 
previous opinion interpreting FOIA.\textsuperscript{62} \textit{Long v. U.S.I.R.S.} involved a request for data tapes of an 
IRS survey designed to identify taxpayers who should be audited because they were likely to 
have a tax change.\textsuperscript{63} In a previous review of the Long case, the Ninth Circuit found that the 
tapes would not pose a risk of identifying taxpayers and were therefore not exempt from FOIA 
under 26 USC § 6103.\textsuperscript{64} In response to this decision, Congress enacted an amendment to the IRS 
code that directed the court not to construe any federal law to allow the IRS to release any 
standards used by the IRS to decide what returns should be audited.\textsuperscript{65} Despite the fact that the 
timing of this amendment\textsuperscript{66} indicates that Congress intended this amendment to be a response to 
the Ninth Circuit’s previous decision, Congress failed to explicitly indicate in the statute or in the

\textsuperscript{61} See supra n. 59.

\textsuperscript{62} Long v. U.S. IRS, 742 F.2d 1173 (9th Cir. 1984).

\textsuperscript{63} Id.

\textsuperscript{64} Long v. IRS, 596 F.2d 362, 367 (9th Cir. 1979).

\textsuperscript{65} Long, 742 F.2d at 1176; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 701(a), 95 

\textsuperscript{66} The first case was decided in 1979. Long, 596 F.2d at 367. Congress amended the Economic 
legislative history that this amendment was designed to allow 26 USC § 6103 to exempt documents from FOIA through the b(3) exception. This lack of explicit intent allowed the parties to further litigate the case, and the case made it back to the Ninth Circuit in this subsequent appeal. The Ninth Circuit did decide that the new amendment exempted the tapes from FOIA, but it took over five years for the court to finally make that decision. That decision would not have ended up in front of the federal courts if Congress had been clearer about it’s intent.

There are several other areas of the law where b(3) reviews have required frequent attention. The Patent Act indicates that “applications for patents shall be kept in confidence in the Patent Office,” which courts have found exempts abandoned patent applications, and records of Patent and Trademark Office decisions regarding changing patent filing dates have both been exempted from FOIA under this language in the Patent Act. The Immigration and Nationality Act indicates that “[t]he records of the Department of State and diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential.” At least three courts have found that

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68 Id.
69 Id.
70 Lee Pharmaceuticals v. Kreps, 577 F.2d 610 (9th Cir. 1978).
71 Irons and Sears v. Dann, 606 F.2d 1215 (D.C. Cir. 1979).
records related to the issuance or denials of visas are not public records pursuant to the Act and provision b(3) of FOIA.\textsuperscript{73}

Cases involving records related to the issuance of visas have also been a frequent problem for the federal courts. Section 222(f) of the Immigration and Nationality Act indicates that “records of the Department of State . . . pertaining to the issuance or refusals of visas or permits to enter the United States shall be confidential.”\textsuperscript{74} Federal courts have found that this language exempts request for records related to a visa applications\textsuperscript{75} and visa refusals.\textsuperscript{76} One federal court, however, has found that records related to visa revocations do not come within the ambit of section 222(f) based on the plain language of the statute, so records relating to visa revocations are not exempt from FOIA via section b(3).\textsuperscript{77}

There are a myriad of other laws that have spawned b3 cases. The federal courts have also had to decide if the following acts exempt records from FOIA through b(3): the Parole Act,


\textsuperscript{74} Immigration and Nationality Act 8 U.S.C. § 1202(f) (2009).

\textsuperscript{75} Medina-Hincapie v. State, 700 F.2d 737 (D.C. App. 1983).

\textsuperscript{76} Church of Scientology v. Department of State, 493 F.Supp 418 (D.D.C. 1980); De Laurentiis v. Haig, 686 F.2d 192 (3d Cir. 1982).

the Export Administration Act, the Investment Advisers Act, the Trade Secrets Act, the Civil Rights Act of 1964, the National Parks Omnibus Management Act, the Outer Continental Shelf Lands Act, the Privacy Act, the Postal Service Act, the Consumer

78 USDOJ v. Julian, 486 U.S. 1 (1988); Berry v. DOJ, 733 F. 2d 1343 (9th Cir. 1984); Crooker v. US Parole Commission, 760 F. 2d 1 (1985)

79 Times Publishing Company v. US Dept of Commerce, 236 F.3d 1286 (11th Cir. 2001);
American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978)

80 Aguirre v. SEC, 551 F.Supp.2d 33 (D.C. Cir. 2008)

81 St. Mary’s Hospital v. Califano, 462 F.Supp. 315 (S.D. Fla. 1978); Florida Medical Association, Inc. v. Depart of Health, Education & Welfare, 479 F. Supp. 1291 (M.D. Fla. 1979);


Products Safety Act,\textsuperscript{87} the Census Act,\textsuperscript{88} statutes relating to the Secretary of State’s power to spend money on emergencies related to foreign affairs,\textsuperscript{89} the Commodity Exchange Act,\textsuperscript{90} the Federal Trade Commission Act,\textsuperscript{91} the Tariff Act of 1930,\textsuperscript{92} the Transportation Recall Enhancement, Accountability, and Documentation Act,\textsuperscript{93} the Communications Act of 1934,\textsuperscript{94} the Atomic Energy Act,\textsuperscript{95} the Federal Aviation Act,\textsuperscript{96} and the Railroad Retirement Act.\textsuperscript{97} Although many of these laws, like the Tariff Act\textsuperscript{98} and the Communications Act,\textsuperscript{99} preceded FOIA by


\textsuperscript{88} Baldrige v. Shapiro, 455 U.S. 345 (1982)

\textsuperscript{89} Washington Post Company v. U.S. Dept. of State, 685 F.2d 698 (D.C. Cir. 1982)

\textsuperscript{90} Hunt v. Commodity Futures Trading Commission, 484 F. Supp. 47 (D.C. Cir. 1979)

\textsuperscript{91} Martin Marietta Corp. v. Federal Trade Commission, 475 F. Supp. 338 (D.C. Cir. 1979)


\textsuperscript{93} Public Citizens, Inc. v. Robber Manufacturers Association, 533 F.3d 810 (D.C. Cir. 2008)

\textsuperscript{94} Reston v. Federal Communications Commission, 492 F. Supp. 697 (D.C. Cir. 1980)


\textsuperscript{96} British Airports Authority v. Civil Aeronautics Board, 531 F.Supp. 408 (D.C. Cir. 1982)

\textsuperscript{97} Association of Retired Railroad Workers v. U.S. Railroad Retirement Board, 830 F.2d 331 (D.C. Cir. 1987).

\textsuperscript{98} Tariff Act of 1930, 46 Stat. 741

\textsuperscript{99} Communications Act of 1934, 48 Stat. 1046, 73\textsuperscript{rd} Congress.
several decades, there are some – like the Transportation Recall Enhancement, Accountability, and Documentation Act\textsuperscript{100} – that were enacted after FOIA. At the point these subsequently-enacted statutes were drafted, Congress, presumably, was aware of FOIA, but chose not to make clear its intent to exempt documents from FOIA, causing the federal courts to have to resolve the issue.\textsuperscript{101}

As is apparent from the sheer number of cases that have burdened the courts on b(3) issues, the b(3) section of FOIA is not a clear or efficient method to determine the public nature of a document for agencies, records seekers, or the court system. This burden necessitates a change. Although the bulk of the b(3) case law has come out in favor of the agency’s decision to withhold records, the courts’ leanings towards finding legislative intent, even when one is not explicitly mentioned in the statute or in the Congressional Record, may be counterproductive to making FOIA a more effective statute. If the courts gave closer scrutiny to the statute and the legislative history of the statute, Congress may feel the pressure to shore up this portion of the statute by adding in a duty for Congress to make its intent to exempt records from FOIA’s reach clear. This sort of duty is not foreign to United States jurisprudence and can be justified because of the unique nature of FOIA as a procedural mechanism that bolsters and protects many constitutional and fundamental rights.

\textsuperscript{100}The Transportation Recall Enhancement, Accountability, and Documentation Act was enacted in 2000 in response to testimony taking at Congressional hearings regarding deaths caused by defective Firestone tires on Fort Explorers. 49 U.S.C. §§ 30101-30170.

III. The Need for An Amendment to FOIA Requiring Congress to Express an Intent to Exempt Records from FOIA

As the body of legislation continues to grow, it is inevitable that statutes will overlap at cross purposes, much like the laws that agencies claim trigger a b(3) denial under FOIA. The “legislative chaos” that is the process of statute-making requires Congress to focus on the passage of individual bills in a manner that may not lend itself to understanding the reach of the text of a bill. It is inevitable, therefore, for Congress to write a statute that has the potential to conflict with another statute and possible that Congress may never contemplate such a conflict in drafting the legislation. Indeed, part of the reason for section b(3) of FOIA was Congress’ acknowledgement that there could have been many statutes on the books when FOIA was enacted that would inherently conflict with FOIA because those statutes closed access to records that would otherwise be open under the terms of FOIA. This rationale makes less sense in regards to subsequently enacted legislation. While it may have been difficult for the Congress to have sifted through the entire U.S. Code when FOIA was passed to look for potential conflicts

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103 “When the House Committee on Government Operations focused on Exemption 3, it took note that there are ‘nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160.’ H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). (Emphasis added.).” Administrator, Federal Aviation Administration v. Robertson 422 U.S. 255, 265, 95 S.Ct. 2140, 2147 (Dist. Colo. 1975)
between existing statutes and FOIA, it certainly would not be difficult to require Congress to
monitor, acknowledge, and indicate its intended solution for such a conflict in subsequently
drafted legislation. Even though Congressional staff may not be keen on adding an additional
duty to their lists of tasks involved in drafting new legislation, the unique status of FOIA as a
guarantor of many constitutional and fundamental rights deserves, at the least, for a
Congressional staffer to have the task of considering whether new legislation contains any
provisions closing access to government records. Indeed, this task would not be an onerous one.
The Congressional Recording Service already distributes a checklist to legislators for their
consideration in drafting new legislation.104 Adding one more check to the list of 24 items seems
cost effective in light of the amount of litigation such an addition would save.

A recent example of the need for just such a Congressional duty to place explicit intent to
exempt a type of record from FOIA in the text of a statute or in the Congressional Record
occurred during the late 90s and early 2000s when Congress enacted the Health Insurance
Portability and Accountability Act (HIPAA).105 In 1996 Congress enacted HIPAA, which
indicates that medical providers must keep medical records confidential.106 HIPAA directs the
Department of Health and Human Services to enact regulations to further effectuate HIPAA’s


105 Catherine J. Cameron, Jumping off the Merry-Go-Round: How the Federal Courts Will
Reconcile the Circular Deference Problem between HIPAA and FOIA, 58 CATH. U. L. REV. 333
(2009).

The Department did so, indicating that most any records that could be tracked to an individual were not be disclosed by a medical provider, but also indicated that if another federal statute warranted public access to those records, then those records should be released to the public. Of course, section b(3) of FOIA makes for a pattern of circular deference – FOIA could say a record is open unless it is closed under another federal statute and HIPAA could indicate that same records is closed unless it is open under another federal statute. During the notice and comment process of these regulations, questions were submitted about the interaction between HIPAA, the Department’s regulations and FOIA. The Department opined that such a conflict would be resolved in favor of FOIA controlling access to the record, but the Department could base that on nothing more than conjecture about Congress’s intent since there was no expressed intent made in the HIPAA statute or in any of the Congressional record regarding the statute. Congress spent months contemplating HIPAA and there is no evidence in the Congressional record that Congress ever contemplated this eventuality, even though the terms of the statute clearly indicate that a medical provider could be any of the many government agencies that provides medical services or houses medical records. If Congress had simply explained within the text of the statute or in the Congressional record that it intended to exclude medical records from FOIA if those records are requested from a government agency or had


109 See supra n. 104.

110 Id. at 82,597.

111 Id. at 82,482.
indicated that its intent was not to exclude these records from FOIA, it certainly would have saved much confusion and what will likely turn into litigation when a requester wants a medical record held by the government bad enough to mount a challenge in federal court.\textsuperscript{112}

The solution, of course, to the situation HIPAA created is for FOIA section b(3) to be amended to indicate that FOIA controls access to all government records unless a statute explicitly indicates in it’s text or in the Congressional Record that Congress intended in drafting the statute to exempt records from FOIA. This duty would cause Congress to have to review newly drafted legislation for potential conflicts with FOIA and indicate it’s explicit intent in regard to that conflict. Some access proponents may argue that requiring Congress to vet every statute for potential FOIA conflicts and then expressly indicate it’s intent to exempt records from FOIA may cause Congress to exempt more records than if it had not had this duty. Of course, the potential is also there that Congress may actually exempt less because having to explicitly exempt records may open Congress up to being unfriendly to public access. While these outcomes cannot be accurately predicted, what can be predicted is the virtual elimination of wasteful litigation regarding the correct interpretation of Congress’ intent. The certainty of this benefit should far outweigh any gaming strategy by access proponents or those who feel that access is unwarranted in particular situations.

\textbf{IV. Creating a New Theory of Judicial Review of b(3) cases}

As long as Congress refuses to place this duty on itself to expressly exempt records from FOIA, conflicts between FOIA and subsequently enacted statutes closing access to records are inevitable and the courts will continue to be bombarded with cases in which record requesters argue that agencies are overreaching when the agency relies on a vague indication of Congress’

\textsuperscript{112} \textit{See supra} n. 104.
intent to exempt a record from FOIA in a particular statute. Much scholarship has looked at the role of courts in legislative interpretation of conflicts between statutes. Some scholars argue that role should be a limited one – that allowing courts too much power to hypothesize on Congress’s intent in drafting legislation when none is expressed allows for judicial legislation.\footnote{Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 3, 14-23 (Amy Gutmann ed., 1997)} This sort of faux deference to Congressional intent has been roundly criticized as allowing the judiciary to put itself in the role of legislative drafter by substituting its own intent for that of Congress.\footnote{Id.}

There are those, though, that argue the exact role of judiciary in a tripartite system is to figure out how two statutes ought to be read together, even if that means having to guess at Congress’s intent if no expressed intent is apparent on the text of the statute or in the Congressional record.\footnote{Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harvard L. Rev. 892, 893 (1982).} In practice, the court certainly prefers to find intent when an explicit one is mentioned. Certainly, when a statute is at cross-purposes with a constitutional provision or some other fundamental right, courts are hesitant to read in a Congressional intent that will affect that right if the Congressional intent is not clearly stated within the statute or can be found in the Congressional record.\footnote{Supra n. 115} Perhaps the emergence of “clear statement” rules of statutory interpretation by the courts are the best evidence of the court’s desire to defer to Congressional intent in a statute or the
legislative history of a statute. Although at the extreme, “clear statement” rules require the court to find that Congress made it’s intent clear on the face of the statute, some of the more permissive versions of the rule allow the court to look to Congressional intent for support that Congress made a “clear statement” of its intent.117 “Clear statement” rules of statutory construction have been used, specifically, in situations where the court is trying to protect rights that are “weighty or constant values, be they constitutional . . . or otherwise.”118

Although some have argued that the First Amendment encompasses some protection for access to government records,119 the only access rights the Supreme Court has found in the first

119 Although the case of Branzburg v. Hayes, 408 U.S. 665 (1972) held that the First Amendment does not afford the press any special access rights beyond those of the general public, Justice Stewart noted in his dissent that “the right to publish is central to the First Amendment and basic to the existence of a constitutional democracy . . . A corollary to the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the press by which news is assembled and disseminated.” Id. at 727. For a summary of scholarship that has argued that there is a First Amendment right of access to government records see Fuchs, Meredith, Judging Secrets: The Role the Courts Should Play in Preventing Unnecessary Secrecy, 58 Administrative Law Review 131, n. 40 (2006).
amendment involve proceedings related to criminal trials. Unfortunately for record-seekers, the Court has refused to find that “the government is compelled [by the Constitution] to provide the media with information or access to it on demand.” Even if access to government records is not an explicit constitutional right, a look at the historical treatment of access to government records indicates that the bulk of law making bodies in this country have treated it as a right deserving of some elevated reverence because of the rights that it protects and supports.

Although the federal government did not draft a comprehensive legislative plan for access to government records until the 1940s with the enactment of Administrative Procedure Act, some

120 See Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980) (holding that the First Amendment granted the press a right of access to a criminal trial); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)(finding that the First Amendment allowed the press access rights to a trial involving a rape charge); Press Enterprise v. Superior Court of California, 464 U.S. 501 (1984) (finding that the First Amendment afforded the press access rights to a preliminary hearing before a criminal trial).

121 Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978)

122 Every state in the union has a freedom of information statute, indicating the importance of such a right to every state law making body. See REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (2006) http://www.rcfp.org/ogg/index.php.

123 Administrative Procedure Act of 1946, 60 Stat. 237. Section 3(c) of the act indicates that “save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.”
state statutory schemes governing access to state records were drafted in the late 1800s. \(^{124}\) Not that this timeline indicates that there was no belief in this country that citizens had a right to see the interworking of government prior to the late 1800s. Certainly, this belief flourished during the formation of our government as is evident from the writings of the founding fathers. \(^{125}\) The relative lateness of comprehensive legislation on access to government records is likely due to the fact that it was not until the 20\(^{th}\) century that government grew so big as to necessitate comprehensive legislation setting forth rules for each agency to follow when public access was requested for a records. \(^{126}\)

\(^{124}\) Wisconsin was the first state to enact an open records law in 1849. Wis. Rev. Stat. Ch. 10, §§ 29, 37, 137 (1849).

\(^{125}\) "The liberties of people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." Patrick Henry June 5, 1788; “A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both.... [A] people who mean to be their own governors must arm themselves with the power which knowledge gives.” Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 3 Letters and Other Writings of James Madison 276 (Philadelphia 1867); "Liberty cannot be preserved without a general knowledge among the people, who have a right…and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers." John Adams, A Dissertation on the Canon and Feudal Law (1765), http://johnadamsweb.com/adamsquotes.html

\(^{126}\) 111 Cong. Rec. 26821. The purpose of the original Freedom of Information Act of 1966 was read into the record as follows: “Today the very vastness of our Government and its myriad of
If access to government records is not in itself a fundamental or a constitutional right, it appears that it is, at least, essential to the protection of fundamental and constitutional rights. In the deliberations leading up the drafting FOIA in 1966, various Congressman indicated the need for comprehensive legislation to guarantee public access to government documents to ensure that constitutional and fundamental rights are not trampled on by the federal government. Indeed, the oft-quoted statement by James Madison – “A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both…. [A] people who mean to be their own governors must arm themselves with the power agencies makes it difficult for the electorate to obtain that ‘popular information’ of which Madison spoke. But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.”

127 112 Cong. Rec. 13007. U.S. Representative John Moss commented “our system of government is based on the participation of the governed, and as our population grows in numbers it is essential that it also grow in knowledge. Representative King noted “[t]he demands of a growing urban, industrial society has become greater both in volume and complexity [and]... it has given rise to confusion, misunderstanding and a widening gap between the principle and the practice of the popular right to know.” Additionally, the Republican Policy Committee Statement on Freedom of Information Legislation, 112 Cong.Rec. 13, 648 (1966) reads: “[t]he screen of secrecy which now exists [as] a barrier to reporters as representatives of the public, to citizens in pursuit of information vital to their welfare, and to Members of Congress as they seek to carry out their constitutional functions” will improve government and avert the “grave danger of losing the public's confidence.”
which knowledge gives” – seems to indicate that there was a belief at the formation of our country that access to government records supports the fundamental right to vote for an electorate. 128

This status as an essential method for protection of a myriad of constitutional and fundamental rights warrants the same careful analysis by courts when assessing a statute that conflicts with FOIA that a court would give a statute that potentially infringes on a constitutional or fundamental right. 129 Courts should be cautious in divining intent that is not expressed in the statute that the agency is claiming prohibits release of a document through provision b(3) just as the court would if assessing a conflict between a constitutional protected right and a statute that might infringe up that right. 130 Doing so undermines the need for the court to be an independent

128 See Letter from James Madison, supra n. 124

129 Although this article does not argue that access to government records is a fundamental right, there appears to be a good argument that it is a fundamental right that is protected by the Ninth Amendment. In Beyond Penumbras and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment, Jason Marks argues that the Ninth Amendment was drafted by James Madison to protect the “fundamental rights of personal autonomy.” Marks, Jason, Beyond Penumbras and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment, 5 Seton Hall Constitutional L.J. 435, 454 (1995). We know from Madison’s other writings, that he believed strongly in government oversight, perhaps strongly enough to have considered it a fundamental right that was protected by language in the Ninth Amendment that protects “rights . . . retained by the people.” See supra. n. 124

130 This article does not attempt to argue that access to government records is deserving of a strict scrutiny analysis, only that courts should take a careful review of any infringement on a
examiner and protector of these very important rights and places the court in the roll of a simple wordsmith, ready to rubber stamp an agency’s belief that a vaguely insinuated Congressional intent to exempt a record from FOIA is enough to take away an avenue of government oversight that might mean that the public can no longer effectively protect constitutional and fundamental rights.

At the least, FOIA is a “weighty or constant value” deserving of a “clear statement” rule. While the “clear statement” doctrine is used frequently by the courts in matters of clear constitutional infringement, it is also often used for those values that are not constitutional, but yet are core to effective government functioning. Likely the most famous of uses of the “clear statement” doctrine involves the Supreme Court’s consideration of state sovereign immunity based on the Eleventh Amendment of the Constitution. Absent an express intent stated by Congress in a statute to abrogate the United States government’s immunity from suit, the Court has refused to find such an abrogation. Although commentators disagree, perhaps the Court has taken the approach of requiring a “clear statement” of Congress’ intent to abrogate sovereign immunity because although sovereign immunity is not a constitutional right, it is a right long recognized by the Supreme Court and one that some have argued protects the constitutional right to access governmental records because the rights that access protects are rights deserving of strict scrutiny analysis.

131 See Singer, n. 117


133 The Supreme Court first recognized sovereign immunity in 1821. Singer, supra n. 117.
mandate of separation of powers, much like FOIA protects various constitutional mandates necessitating similar treatment.

Despite the various statutory construction frameworks supporting the need for a clear indication by Congress that it intends to exempt records from FOIA, the federal courts seem to have developed a “rubber stamp” mentality towards b(3) claims by an agency supporting the denial of access to a record. A review of the b(3) case law evidences that over 80% of cases reviewed by the federal courts find that the agency was correct in claiming b(3) exemptions, even without an express intent in the conflicting statute that indicates Congress intended to exempt records from FOIA. The “rubber stamp” mentality the court seems to have had over

\[134\] Harold Krent, Reconceptualizing Sovereign Immunity, 45 VAND. L. REV 1529, 1530 (1992)(“Much of sovereign immunity . . . derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule.”)

the last 30 year in looking through the b(3) case law is completely inapposite to the unique status FOIA holds in supporting fundamental and constitutional rights. Although the majority of the b(3) cases in the 1970s, 1980s and 1990s, dealt with a claim by an agency that a statute that preceded FOIA exempts records from FOIA, the more recent cases have begun to focus mostly on subsequently-enacted statutes that an agency claims exempt records from FOIA. The age of FOIA means that this trend will likely continue, and is unacceptable in light of the important rights that FOIA protects.

If potential infringements on fundamental and constitutional liberties are protected through the lens of a strict scrutiny review, a potential infringement on the mechanism that allows the public to know if the government is infringing on fundamental or constitutional liberties deserves an elevated scrutiny as well. That scrutiny should come in the shape of refusing to divine Congressional intent when none is expressed in the statute or in the Congressional Record. Simply guessing that Congress’s intent was to preclude information from being released is not a rigorous enough analysis for inhibiting such an important conduit for


136 Supra n. 25.
protection of constitutional and fundamental rights. That intent should be clear; in the best of worlds it would be explicitly expressed in the statute or in the Congressional records. Courts should be very hesitant to find an intent that is not explicitly expressed because of the potential harm that can come from squelching the only method for the protection of so many fundamental and constitutional rights.\footnote{Indeed, arguments have been made that the court should require the courts to narrowly tailor restraints on record access granted by FOIA. See Amanda Fitzsimmons, \textit{National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the Public Domain}, 4 I/S: A Journal of Law and Policy for the Information Society 479, 519-520 (2008) (arguing that courts should apply a presumption of access to cases involving agency claims that records are exempt from FOIA because release of the records will affect national security interests in order to narrowly tailor any restrictions to public access based on this claim); Raquel Aldana-Pindell, \textit{The 9/11 National Security Cases: Three Principals Guiding Judges’ Decision-Making}, 81 OREGON L. REV. 985, 1045, 365 (2002) (noting that some courts have required an agency’s claim that records need to be kept secret to protect a national security interest to be closely scrutinized to make sure that the claim is tailored narrowly enough to protect the strong public interest in knowing what the government is up to).}

Admittedly, there ensues a debate about the proper role of judicial review of legislative action in the US legal system, but even the most cynical of judicial critics can certainly see some bright light in judicial review based on the logic Richard H. Fallon, Jr. expresses in his latest article.\footnote{Richard H. Fallon, \textit{The Core of an Uneasy Case for Judicial Review}, 121 HARV. L. REV. 1693, 1695-1696 (2008).} In \textit{The Core of an Uneasy Case for Judicial Review}, Fallon argues that the strongest
justification for judicial review of legislative action lies in the idea that the judiciary is simply another set of eyes to review an action – no better and no worse than the legislature. But this extra set of eyes protects these essential rights from improper infringement and allows the system to rely on the presumption of protecting rights instead of infringing on them. Fallon analogizes the system to a criminal trial in which a jury of twelve all needs to vote “guilty” for a defendant to be convicted. If even one juror refuses to enter such a vote then the defendant walks free. This design attempts to place a presumption on innocence, just like allowing judicial review of legislative action, especially that which involves constitutional or fundamental rights, places a presumption on protection of those rights because if one party reviewing that legislation finds that it violates those rights, the legislation is no longer in effect.

Looking at the b(3) cases through this lens, it becomes even more apparent that the judiciary has not been upholding it’s duty to be another member at the jury table. Although Fallon’s article focused on cases involving constitutional and fundamental rights, FOIA’s unique position as a mechanism essential to protecting those rights ought to cause the court to act as

139 Fallon developed this view to refute the argument of Jeremy Waldron in The Core of the Case Against Judicial Review, which argued that the prevailing view that the judiciary is somehow better at protecting rights than the legislature is a form of elitism based on the notion that judges are better educated and come from a wealthier background than the average Congressman.


140 Id.

141 Id.

142 Id.

143 Id.
another member at the jury table in reviewing any attempt to infringe upon the ability to access documents that protect constitutional and fundamental rights. The majority of cases reviewed for this article did not involve an express intent by Congress to exempt a document from FOIA — if it had, the case likely would not have been litigated. However, less than 20% of the cases involve a finding that the record should be open. If the courts want to uphold their role as another jury member at the table, the review of b(3) cases when Congress has no explicitly expressed an intent to exempt a record from FOIA needs to be a heavy one, not simply a rubber-stamp of legislative action. Such a review would mean that the majority of cases in which Congress has not expressed an explicit intent should find that the record is not exempted from FOIA, especially in those cases that involve statutes enacted subsequent to FOIA. Only when Congress expresses this intent either in the statute itself or in the Congressional Record should the court system find that a denial of the important right of government oversight is appropriate.

Additionally, some theorists believe there is much to be gained from close judicial review of legislative action that might infringe on core democratic principles, especially when those actions could be cutting off a discrete minority of the population from the democratic process. A certain amount of political legitimacy is gained from the public awareness that another arm of government, one that is theoretically somewhat removed from political pressure, is reviewing the

144 Id.
145 See supra n. 134.
acts of the legislature, especially when those acts break down the correct balance and functioning of the democratic process for groups that might be underrepresented. Since a huge part of the proper functioning of a democracy is the collective public “buy in” to the idea that the government is legitimate and works in a democratically fair and sound fashion, this political legitimacy aids the functionality of a democratic society. To that end, government oversight is crucial to this public “buy in” and, therefore, essential to an effective and functional democracy. This need to protect the public oversight so essential to the democratic equation, makes it even more apparent that the court should find that access is limited through b(3) only if Congress has explicitly indicated its desire to do so. This heightened judicial review will assist in building political legitimacy by creating a sense that the judiciary is closely scrutinizing any potential infringement on the core democratic principal of the public being able to see what the government is up to.

**Part V: Requiring an explicit Congressional intent to exempt records from FOIA bolsters the public and Congress’ ability to oversee the Administrative State**

When Congress enacted FOIA, it did so in response to the ever-growing Administrative State. By the year of the last significant amendment to section b(3) – 1974 -- Congress had

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147 Ely, *supra* n. 145.

148 Ely, *supra* n. 145.

149 “[I]t is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.” 111 Cong. Rec. 26821 Oct. 13, 1965 (a portion of a Senate report written in response to the consideration of the FOIA bill).
delegated its authority to hundreds of departments and agencies in an effort to deal with the growth of the country and the need for more government.\textsuperscript{150} FOIA assists Congress in overseeing the day-to-day functions of federal agencies by allowing the public access to records of those agencies.\textsuperscript{151} When the courts fail to take an extremely close look at agency claims of FOIA exemptions for records, the courts fail to uphold Congress’ ability to make sure agencies are complying with Congress’ delegations of power appropriately.

The Administrative State traces its roots to the President Roosevelt’s New Deal legislation, which began creating executive branch agencies that assisted Congress in carrying out the work of getting government services to the people.\textsuperscript{152} The birth of FOIA tracked the birth of agencies. The first version of FOIA appeared in the Administrative Procedure Act of 1946, suggesting that Congress felt that public oversight was necessary for agencies.\textsuperscript{153} Notably, FOIA does not apply to Congress, so clearly Congress felt that agencies were different than Congress in the need for public oversight.\textsuperscript{154} It isn’t clear from the Congressional record what that difference is, but it is likely that Congress wanted public oversight to make sure agencies were working effectively and carrying out their Congressional mandate appropriately. If that was Congress’ intent, it certainly has come to fruition. Although Congress receives reports from

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\item[\textsuperscript{150}] Id.
\item[\textsuperscript{151}] Id. (noting that prior to the passage of FOIA “[i]nnumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities.”)
\item[\textsuperscript{152}] Cass R. Sunstein, \textit{Constitutionalism After the New Deal}, 101 HARV. L. REV. 421, 422 (1987)
\item[\textsuperscript{154}] 5 U.S.C. § 552 (2000)
\end{enumerate}
\end{flushleft}
agencies routinely that update Congress on agency progress, it often isn’t until the media or the public combs through the report and then writes a story on it that Congress claims to become aware of concerns at the agency level.155

The agency oversight afforded by FOIA is essential for Congress to maintain a watchful eye the day-to-day work of agencies. Therefore, exempting records from the oversight afforded by FOIA should not occur unless Congress explicitly expressed its intent to do so. If courts continue to allow agencies to withhold records based on statutes that express no clear intent by Congress to exempt records from FOIA, courts will be allowing agencies to usurp Congressional power and minimize the very public oversight that allows Congress to make sure that agencies are doing the work authorized by Congress.

Part VII: Legislative efforts

While care should be given by courts in analyzing the intersection of statutes and FOIA via the b(3) exemption, the true panacea to this problem lies in legislative reform to fix the b(3) problem. Over 140 cases in 35 years is a testament to the need for placing a duty on Congress to be explicit in drafting new legislation if the intent is for that legislation to exempt records from

155 Lee Hamilton, Effective Oversight Requires Effective Press, The Center for Congress at Indiana University, http://congress.indiana.edu/radio_commentaries/effective_oversight.requires_effective_press.php. Former Congressman Hamilton argues that press oversight is crucial when the Congressional majority and President are from the same political party because Congress “is prone to be passive in the oversight of [the President’s] administration” in these instances.
At least two Senators have already championed this cause. Notably, these Senators come from both sides of the aisle, indicating that the b(3) issue is not a particularly politicized debate.\(^{157}\)

The original version of FOIA was enacted in 1966, but the statute was heavily amended in 1974 and 1976 after it became clear that the law was not working as Congress had intended. By 1974, Congress received many reports of agency failure to comply with the spirit of the law by refusing to respond to record requests and charging exorbitant fees for copying and searching for records.\(^{158}\) Additionally, two cases had been decided that Congress found troubling.\(^{159}\) In *EPA v. Mink*,\(^{160}\) the Supreme Court found that Congress had failed to authorize courts to review agency claims that a document was classified for national security reasons. Additionally, in *Administrator, FAA v. Robertson*,\(^{161}\) the court found that a statute that allowed the Federal Aviation Administrator to discretionarily decide that records should be withheld from public

\(^{156}\) See supra n. 18.

\(^{157}\) Senator Patrick Leahy is Democratic senator from Vermont; Senator John Cornyn is a Republican senator from Texas.

\(^{158}\) The National Security Archive, *George Washington School of Law*,
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm

\(^{159}\) Veto Battle 30 Years Ago Set Freedom of Information Norms,
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm; Johnathan L. Entin,

*Psychiatry, Insanity, and the Death Penalty: A Note on Implementing Supreme Court Opinions*,

\(^{160}\) 410 U.S. 73 (1973).

\(^{161}\) 422 U.S. 255 (1975).
view because release of them would affect the interests of another entity was permitted under the b(3) provision as it was written at the time. In response to these issues, the court instituted two significant sets of amendments – one in 1974 and another in 1976 – that curtailed agency fees, allowed full court review of agency determinations, and amended section b(3) to indicate that only those statutes either specifically identify the records at issue or set forth specific criteria to identify the records that leave no agency discretion in the matter. ¹⁶²

FOIA endured a minor amendment in 1986 and one in 1996 that was designed to incorporate electronic records into the scope of the statute. In 2005 Senators Leahy and Cornyn began introducing legislation that sought to amend FOIA to make it function in a way that prevented some of the administrative quagmire that, effectively, prohibited access to records that were likely public.¹⁶³ Although these efforts were met with lukewarm interest by the Congress, there was a turnabout in 2007.¹⁶⁴ Both houses passed Senator Leahy and Cornyn’s Open Government Act of 2007 the second time it was introduced without much hesitation.¹⁶⁵ Cornyn and Leahy drafted a provision that would have made it more difficult for Congress to bury and exemption to FOIA inside a large, multi-volume bill so that access proponents would be on a

¹⁶² 5 U.S.C. § 552


¹⁶⁵ Pub. Law No. 110-175 (2007)
notice that such a provision was under consideration, but that provision was negotiated out of the bill before it reached the final vote in the Senate. 166 Leahy and Cornyn continue to try to pass bills to strengthen section b(3) of FOIA. Their latest effort seeks to amend FOIA to require a specific reference to section b(3) in the text of legislation if Congress intends to exempt records from FOIA through section b(3). 167 Legislation of this type would certainly fix the b(3) issue by requiring Congress to express it’s intent to exempt records from FOIA by specifically referencing section b(3) if it was to pass. Congress may not need to pass this strong of an amendment to solve the b(3) problem. Any legislation that would force Congress to explicitly express it’s intent to exempt records from FOIA – either in the text of the statute or in the Congressional Record – should be sufficient to prevent litigation over a conflict between a newly enacted statute and FOIA.

Conclusion

Section b(3) continues to frustrate the federal courts because of the needless litigation emanating from statutes that include language that could be seen as indicating Congressional intent to exclude records from FOIA’s reach, but that intent is not clear and unambiguous. Congress has begun to move in the correct direction by introducing legislation that seeks to amend section b(3) in a manner that will require Congress to reference section b(3) if it wants to exempt records from FOIA. The federal courts can certainly give an impetus to Congress to move legislation like this along by rethinking the way in which the courts have been reviewing


b(3) cases. Instead of rubber-stamping any agency claim that legislation exempts records from FOIA, the federal courts should take a close look at any such agency claim and the statute the claim is predicated on. If the statute or the Congressional Record of the enactment of the statute do not evidence an explicit Congressional intent to exempt records from FOIA, especially in newly enacted legislation, the courts should decline to uphold the agency’s reasoning for withholding the record. This type of heightened review is appropriate in light of FOIA’s unique status as a right that protect other important fundamental and constitutional rights. Requiring such a review of b(3) claims will ensure that FOIA’s critical purpose of allowing government oversight is not compromised. Additionally, this close review of b(3) claims has the added incentive of pushing Congress in the direction of eventually passing a bill that amends section b(3) in a manner that eliminates the b(3) issue all together.