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Bringing Full Disclosure Back: A Call for Dismantling FOIA

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A Call for Dismantling FOIA

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Before he was appointed to the Supreme Court, Antonin Scalia lambasted the federal Freedom of Information Act, calling it "the Taj Mahal of the Doctrine of Unanticipated Consequences" that was "a far cry from John Q. Public finding out how his government works." Justice Scalia was right, albeit for reasons wholly unrelated to his arguments at the time. He recognized that in the two decades since it had become law in 1966, FOIA had become a lumbering beast, a tool for corporate lawyers and a burden on the justice system that did little to serve its purpose as the "ultimate guarantee of responsible government." FOIA is now 50 years old, and despite several efforts to revise and update the law, it still has not delivered on its promise to assure transparency of federal government agencies. The purpose of FOIA was to enable the "fullest possible disclosure" of government records, and yet, half a century later, obfuscation and delay are the hallmarks of the law that was supposed to ensure the people’s right to know. In 2016, a House of Representatives oversight committee reviewing the FOIA issued a final report simply titled “FOIA is Broken.” Broken? Perhaps. A more accurate description might be petrified.

Among citizens and journalists trying to use FOIA to shed light on government activities, horror stories abound. It took more than four years for Sulome Anderson, the daughter of former hostage Terry Anderson, to get access to documents about his kidnapping, many heavily redacted, from 20 years earlier. Journalist Phil Eil, working on a book about a physician known as the “Pill Mill Doctor” who was convicted of illegally distributing pain medications in 2012, had after four years only received a fraction of the documents he requested under FOIA about evidence used in the highly-publicized federal trial, and most of those were

1 Antonin Scalia, The Freedom of Information Act Has No Clothes, 6 AEI J. ON GOVT & Soc’y 14, 15-16 (1986). Scalia was skeptical of FOIA in general, seeing it as overly burdensome in terms of both financial costs and interference with good governance, and saying it was “romantic notion” that the executive branch could be kept in check through “do-it-yourself oversight by the public and, its surrogate, the press.” Id. at 19.
2 Id. at 16.
4 U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, FOIA is BROKEN: A REPORT 39 (2016). (hereinafter FOIA is BROKEN)
6 Id.
 unusable because they had been so heavily redacted. The Transportation Safety Administration took seven years to respond to a FOIA request about misconduct by federal air marshals filed in 2008, covering up years of abuse. Army officials deliberately delayed access to information about concussions at West Point, requested by The New York Times, while trying to spin a more positive story to other media outlets, repeating a tactic the Army had successfully deployed regarding requests about injured veterans the previous year. And Jason Leopold, who one government agency dubbed the “FOIA Terrorist” for his requests as a journalist for Vice News, has had to go to court to force the Pentagon to disclose just the titles of reports in its database, and even then, the Department of Defense said it would only cooperate “as long as you promise to never file a FOIA request again.”

How did FOIA become a tool for preserving secrecy rather than transparency, and what can be done about it? In this article, the authors examine the mechanics of FOIA, which was drafted and enacted with good intentions but wound up doing little to advance the transparency failures that had arisen under the old Administrative Procedure Act (APA) it was supposed to replace. The APA, mocked by access advocates for predating access on an agency’s determination that it was in the public interest or otherwise could be denied for “good cause found,” was replaced by a statute that has grown equally ineffective over time, its requirements ossified by decades of litigation and layer upon layer of judicial interpretation rending the plain meaning of the statute meaningless.

Structural problems have plagued the law from the start, requiring frequent amendments and updates. Times have changed, and technology has transformed the way records are kept and managed, though FOIA has had problems keeping pace, rooted in the paper-first mindset of the era in which it was initially drafted. Of course paper records were the only option when FOIA was passed in 1966, and that technology, by necessity, kept the records in the hands of government until they were requested and copies had to be made. In this sense, a record was only open

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and available when an agency determined it to be so, and even then, only when it determined that following the requirements of FOIA was suitable in that situation, with little practical consequence for non-compliance. Additionally, what were initially intended to be narrow exemptions to FOIA have been judicially enlarged in some instances to the point of absurdity.

In response to continued public criticism about government transparency, Congress and the executive branch have made serious efforts, through legislation and policy directives, to correct some of the flaws of FOIA and to respond to the advance of computer record-keeping, such as the passage of E-FOIA in 1996, President Obama’s Open Government Directive in 2009, and even consideration of a new round of amendments in 2016. However, by resting on the flawed design of FOIA legislation drafted in a different era, these and other responses continue to fall short. Process-oriented reforms are laudatory but mask the real problem with FOIA – its content. The act has reached the point of no return, in need of systemic, top-to-bottom reform, rather than the piecemeal, process-oriented reforms that have typified legislative action on FOIA since the 1970s.

Records still largely begin their lives as closed and secret, with major effort required by citizens to gain access to them at the discretion of government agencies. Consider the pilot project headed up by the Office of Information Policy (OIP) entitled “Release to One, Release to All,” under which federal agencies would host the documents they released pursuant to FOIA requests on their websites so they would be available to anyone. This policy, while plausibly advancing transparency goals, starts from the flawed premise that government records are only actually available to the public upon request and release. That process, the original sin of FOIA that instantly undermines the presumption of openness intended by Congress when the law was passed in 1966, must be replaced with a digital counterpart that presumes openness as a starting point. Modern technology allows for more radical, proactive openness, where records are open instantly and available to the public that has paid for their creation, without the permission of government officials required.

The House oversight committee, in the conclusion of its “FOIA is Broken” report, said the law had become “unacceptably neutered,” and noted, “Structural reform is necessary to ensure the FOIA tool works as intended.” The purpose of this article is to consider what “structural reform” would look like if we were to

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17 FOIA IS BROKEN, supra note 4 at 39.
dismantle FOIA and start again, from scratch, with an understanding of how records are created and maintained in the digital age.

Background

*Full Disclosure: The Purpose of FOIA*

Fifty years ago, citizens faced many of the same hurdles they do today when trying to access federal agency records. Witnesses testifying before a House committee in 1965 said that the Administrative Procedure Act, which included a section requiring disclosure of agency records, had “been used more as an excuse for withholding than as a disclosure statute,” and the committee found that the APA “was being used as an excuse for secrecy.”\(^{18}\) In 1966, as Congress began considering the bill that became FOIA, it noted the weaknesses of the APA – particularly in allowing broad agency discretion to deny access based on the “public interest” or otherwise “required for good cause” – and clearly stated that the purpose of the new law would be “to eliminate such phrases” and “to establish a general philosophy of full agency disclosure.”\(^{19}\) President Lyndon B. Johnson, in a statement upon signing the bill, recognized that “freedom of information is so vital that only the national security, not the whim of public officials, should determine when it must be restricted.”\(^{20}\)

By 1974, with public trust in government waning on the heels of Watergate, it was clear that FOIA was not living up to its intended purpose. It had instead become, in practice, a “‘freedom from information’ law,” as a Senate committee noted, with an average delay of 33 days for agency responses to requests, excessive copying fees, and a “cumbersome and costly legal remedy” for those who have to go to court after having been denied access.\(^ {21}\) Rep. Bill Alexander from Arkansas recounted an effort by a public interest group seeking documents about pesticides from the Department of Agriculture, which were initially denied, then ordered by a court to be released, but even then, the department said it would “cost $91,000 and take a year and a half to get it together.”\(^ {22}\) The amendments, he said, were intended to “put an end to the ridiculous delays, excuses, and bureaucratic runarounds which have denied U.S. citizens the ‘right to know’ and made Americans a captive of their own Government.”\(^ {23}\) Congress tried to tighten up the exemptions and also tried to pass sanctions that included 60-day suspensions for federal agency employees who were found to deny access to records without a “reasonable basis in law,” President Gerald Ford, House members, and government employee unions opposed the severity of those sanctions, so the bill was watered down to make punishment only after both a court finding that the denial was done “arbitrarily or capriciously” and

\(^{20}\) Presidential Statement upon Signing S.1160 (July 4, 1966).
\(^{22}\) 120 Cong. Rec. H10001, 388 (Oct. 7, 1974).
\(^{23}\) Id.
after a disciplinary hearing was conducted against the employee.\textsuperscript{24} Even then, Congress had to override a presidential veto to pass the amendments to FOIA, with senators using passionate language in favor of government transparency and accountability. Sen. Walter Mondale, describing increased secrecy and federal agency cover-ups, saw the 1974 amendments as a reaffirmation of the government’s commitment to transparency, as was the hope of FOIA: “The American people are tired of the politics of secrecy. They are demanding a politics of honesty and openness. (The amendments) will be an important step in restoring the faith of a free people in their Government.”\textsuperscript{25}

Even then, agencies and courts continued to undermine the clear intent favoring transparency. In 1975 in \textit{Administrator, FAA v. Robertson}, the Supreme Court ignored this intent, instead finding “broad, flexible discretion” to agencies regarding application of exemptions, requiring a new round of clarification of the purpose of the law.\textsuperscript{26} Congress “reiterated its policy of full disclosure” in 1976, when it narrowed the scope of Exemption 3 in response to the ruling.\textsuperscript{27} The pattern, however, was established: congressional proclamation, followed by judicial retreat.

Despite these amendments to FOIA that continuously sought to expand public access and uphold the promise of full government agency transparency, delays and frustration persisted. A House committee examining the first 20 years of FOIA in 1986 found “inadequate resources, unnecessary bureaucratic complexity, political interference with the disclosure process, poor organization of agency records, and a lack of commitment by agencies to disclosure” as weaknesses in the act.\textsuperscript{28} These weaknesses were due, at least in part, to the ways in which records were created and managed by agencies. And if anything, they have worsened, exacerbated by the digital age.

\textit{The Emergence of Computer Record-Keeping}

When Congress began considering FOIA in the mid-1960s, with computing in its infancy, records were kept primarily on paper.\textsuperscript{29} While the federal government had been using computers as early as ENIAC by the Army in 1945 and UNIVAC for the Census in 1951, these computers were largely used for calculation and scientific problem-solving; by 1965, about two-thirds of the nearly 2,200 computers used by the federal government were in the Department of Defense, assigned to tasks such as “missile simulation, test(ing) data reduction, and war gaming,” while many of the others were employed by NASA to aid in calculations for space missions.\textsuperscript{30}

\textsuperscript{24} \textit{Id.} at 376-380.
\textsuperscript{25} 120 Cong. Rec. S19806, 472-473 (Nov. 21, 1974).
\textsuperscript{26} 422 U.S. 255, 267 (1975).
\textsuperscript{27} Halstuk & Chamberlin, \textit{supra} note 3 at 535.
By the early 1970s, computers were being used more frequently by the government in areas such as taxes, Social Security, criminal, and health records. A committee assembled by the U.S. Department of Health, Education & Welfare (HEW) responded to public concerns about the rise of computer record-keeping in a report in 1973 that called for establishment of “fair information practices,” citing a public opinion survey that showed “worries and anxieties about computers and personal privacy” in about a third of those interviewed and fear of a “‘Big Brother’ system” in which intelligence is gathered and citizens lose control of information about themselves. The committee was skeptical of “the so-called ‘Freedom of Information Act,’” calling it “an instrument for disclosing information rather than for balancing the conflicting interests that surround the public disclosure and use of personal records.” One recommendation of the committee was an amendment to FOIA that would require agencies to obtain consent from individuals before disclosing personally-identifiable information contained in government databases. While Congress did not specifically amend FOIA in this way, it did follow several of the committee’s recommendations in passing the Federal Privacy Act in 1974.

Federal agencies’ use of computers advanced significantly over the next decade, and by 1985, a committee studying government record-keeping estimated that there were “over 200,000 personal computers now in use at all levels of government.” However, the transition to electronic record-keeping was still in its infancy, and there was little consistency within the federal government on how records were created and stored. Most records were still kept as paper documents, and the culture of record-keeping was still rooted in paper:

Significantly, the habits developed by office personnel rely almost entirely on paper documentation. Records management has meant paper management...The detailed manuals on filing procedures, correspondence control, and records scheduling are primarily concerned with paper files.

By 1990, federal agencies had more than 48,000 large mainframe computers and more than a million personal computers in use, yet commentators noted the “low priority placed on public access in the design of government computer systems.” Concerns about security breaches and cost, as well as the wide variety of technology in use that made standardization nearly impossible, were also holding back public

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32 Id. at 35.

33 Id. at xxvii.


36 Id. at 26.

access to government records.\(^{38}\) It had become clear that FOIA, drafted in the era of paper records, would need to be updated to address the widespread growth of electronic record-keeping by federal agencies, while also harnessing the power of computers and the emerging Internet to serve the core purposes of FOIA. As a House Committee considering amendments to the law noted:

The FOIA must stay abreast of these developments in order to ensure continued public access to Government information. The FOIA must promote uniformity among agencies, reduce uncertainty among FOIA requestors, and avoid potential disagreements between the two.\(^{39}\)

Again, while considering these amendments to FOIA, Congress noted that “full disclosure of information to the public” is “critical to maintaining an open and free society.”\(^{40}\) The resulting legislation was the Electronic Freedom of Information Act of 1996, which required agencies to (1) formally extend FOIA to cover records in electronic formats; (2) create an electronic reading room where people can access “copies of all records, regardless of form or format,” which have been released pursuant to a request and are likely to become the subject of similar requests in the future; and (3) provide records “in any form or format requested by the person” to the extent that the records are “readily reproducible” in that format.\(^{41}\)

While the use of computers in federal agencies continued to expand, records continued to be kept in hodgepodge fashion, and FOIA compliance remained problematic. In 2005, a survey of federal agencies showed that while many agencies were making concerted efforts to move toward keeping and managing electronic records, “the majority of all organizations still designate paper as their official record-keeping format,” using a dual system that used both paper and digital records.\(^{42}\) Even the dual system, however, could not handle issues such as e-mail,\(^{43}\) a problem that had been anticipated for almost 15 years by this point.\(^{44}\) In a little less than a decade after E-FOIA was passed, the report found, “many organizations are still puzzled over how to deal with the management of electronic records,” with federal agencies placing low priority on such matters, and employees showing little understanding of how electronic record-keeping worked.\(^{45}\)

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\(^{40}\) *Id.* at 7.


\(^{43}\) *Id.* at 2.

\(^{44}\) *See* Bunker et al., *supra* note 37.

\(^{45}\) Stickland, *supra* note 42, at 3.
Today, the executive branch widely acknowledges the move toward effective computer record keeping, with the Obama administration calling for agencies to “commit immediately to the transition to a digital government” in 2012.\textsuperscript{46} The administration’s directive called for all permanent records to be managed in electronic format by 2019, and for all e-mail records to be managed in an electronic system with capabilities to “identify, retrieve, and retain” e-mail records.\textsuperscript{47} We are in an age where federal agency documents are almost entirely generated through some sort of electronic device – whether on a government or personal computer or on a smartphone – rather than on paper. Miriam Nisbet, the first director of the FOIA ombuds program in the Office of Government Information Services, noted in 2012, “With the FOIA as a backdrop, and fueled by technological development, the government has the ability now – more than ever – to make its records available to the governed (that is, the public) without waiting for a request to be made under the FOIA.”\textsuperscript{48} And yet, despite the tools available, and an almost complete transition to digital management of records, FOIA compliance is still so troublesome and riddled with abuse and delays as to require regular overhauls, including a new round of amendments required to fix the “broken” law as it neared its 50th anniversary. Why, after half a century, does FOIA continue to fall short of its framers’ intent of “full disclosure”? Besides the aforementioned structural issues and inadequate responses to technological change, the courts have further watered down FOIA through its interpretations of what were initially intended to be very narrow exemptions.

\textit{Privacy Exceptionalism and Exemption Expansion}

An agency must disclose any record that does not fall within one of the nine categories of information exempted from disclosure under the Act.\textsuperscript{49} The Act’s nine exemptions provide example after example of the practical stagnation of the law, as the courts have wrestled with ambiguous legislative language, limiting the law’s coverage in ways that debilitate its effectiveness. Generally, Congress intended the exemptions to protect against disclosure of information that would substantially harm national defense or foreign policy, individual privacy interests, business proprietary interests, and the efficient operation of governmental functions. Agencies have had the authority to construe the exemptions as discretionary rather than mandatory when no harm would result from disclosure of the requested information.\textsuperscript{50} If a requested document falls within

\textsuperscript{47} Id.
\textsuperscript{48} Miriam Nisbet, \textit{Openness: Are We There Yet (And How Will We Know)?}, presentation for the International Conference on Archives, Brisbane, Australia (2012), 1.
\textsuperscript{49} 5 U.S.C. § 552(b)(1)-(9).
\textsuperscript{50} Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).
one of the nine exemptions, the agency can release it anyway as an exercise of its discretionary powers. Moreover, "[t]hese exemptions are specifically made exclusive...and must be narrowly construed."\textsuperscript{51}

Would that they were. Instead, fifty years of litigation under the Act has resulted in several exemptions being eviscerated by judicial interpretations undermining earlier pronouncements of narrow construction. As Martin Halstuk, Benjamin Cramer and Michael Todd noted in a 2014 study, the Supreme Court had heard eight cases involving FOIA exemptions and privacy, and had sided with the government in every case but one, leading to what the authors called the doctrine of "privacy exceptionalism" for a law intended to promote transparency, rather than its opposite.\textsuperscript{52}

Consider Exemption 2, for example, which allows agencies to withhold documents “related solely to internal personnel rules and practices.” In one of the first substantive treatments of the Act, the Supreme Court in 1976 described the exemption as one designed “to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest.”\textsuperscript{53}

Later, courts identified a smaller subset of records covered by the exemption, records that might be exempt if its disclosure would risk circumvention of law or agency regulations. In order to fall into this category, the material will normally have to regulate internal agency conduct rather than public behavior.\textsuperscript{54}

From that rather concise reading, future courts have greatly expanded the exemption to cover records pertaining to law enforcement, national security and other records far from its original purview.\textsuperscript{55} Exemption 2’s tortured legislative history (featuring dueling House and Senate reports, with the Senate’s interpretation of the exemption much more crabbed than the House’s)\textsuperscript{56} fueled the diminution of the statute’s plain meaning in In \textit{Crooker v. Bureau of Alcohol, Tobacco & Firearms}, the United States Circuit Court for the District of Columbia held that a Bureau of Alcohol, Tobacco and Firearms (BATF) agent training manual was exempt from disclosure under exemption 2 despite its obvious interest to some members of the public.\textsuperscript{57} The court reasoned that the exemption permits the nondisclosure of information that relates predominantly to the internal workings of an agency that are not the subject of any substantial, valid public interest. Therefore, it concluded that Exemption 2 applies if the information requested meets a test of "predominant

\textsuperscript{53} 425 U.S. 352 (1976).
\textsuperscript{54} Church of Scientology v. Smith, 721 F.2d 828, 830-31 n.4 (D.C. Cir. 1983).
\textsuperscript{56} \textit{Id.} at 318-319.
\textsuperscript{57} 670 F.2d 1051 (D.C. Cir. 1981).
“internality” and its disclosure would pose a significant risk of circumvention of agency law.\textsuperscript{58}

What had been treated largely as an exemption for “housekeeping” records\textsuperscript{59} quickly became far more, as the Second Circuit created a judicial rationale for enlarging the scope of exemption 2 in \textit{Caplan v. Bureau of Alcohol, Tobacco \& Firearms}.\textsuperscript{60} The court withheld disclosure of a Bureau of Alcohol, Tobacco and Firearms manual dealing with raids and searches. The court reasoned that in situations in which disclosure would risk physical harm to law enforcement personnel, precedent did not foreclose adopting the House report’s more narrow interpretation of exemption 2, and concluded that a reading of both the House and Senate reports on the pertinent subsections (b)(2) and (a)(2)(C) provided evidence of an intent that the manual be withheld on the basis of exemption 2.\textsuperscript{61} Therefore, the court held that exemption 2 exempts from disclosure internal agency matters where disclosure might risk circumvention of agency law.\textsuperscript{62}

Only a couple of years later, the Ninth Circuit in \textit{Hardy v. Bureau of Alcohol, Tobacco \& Firearms} held that portions of the Bureau of Alcohol, Tobacco and Firearms manual dealing with raids and searches were exempt from disclosure because they were law enforcement materials, disclosure of which may risk circumvention of agency regulations.\textsuperscript{63} The court reviewed the other two approaches used by the circuits to exempt law enforcement materials and rejected the approach taken by other circuit courts as unfaithful to the structure of FOIA, which requires full disclosure except in the case of a specific exemption. The court asserted that earlier decisions did not foreclose reliance on the House report to use exemption 2 to withhold materials that could aid in the circumvention of the law.\textsuperscript{64}

Thus, when the D.C. Circuit attempted to make order of exemption 2 in \textit{Crooker}, the precedent was sufficiently divergent that its best efforts only made matters worse. As one commentator noted, “the extent to which \textit{Crooker} manipulated the wording, legislative history, and case law on exemption 2 is unique.”\textsuperscript{65} The result was almost preordained: the majority’s reliance on a narrow reading of the exemption emanating from the House report and never embodied in an amendment to the exemption, the intent found by the majority reflects no more than the wishes of some of the opponents of the act in the House at the time, and in no way reconciles the competing Senate report on the bill. Its result, driven by judicial expression of congressional intent, resulted in a watering down of the plain meaning of the statute. While the Supreme Court has ruled to narrow the

\textsuperscript{58} \textit{Id.} at 1074.
\textsuperscript{59} \textit{Cox v. United States Department of Justice}, 576 F.2d 1302 (8th Cir. 1978).
\textsuperscript{60} 587 F.2d 544 (2d Cir. 1978).
\textsuperscript{61} \textit{Id.} at 547.
\textsuperscript{62} \textit{Id.} at 548.
\textsuperscript{63} 631 F.2d 653 (9th Cir. 1980).
\textsuperscript{64} \textit{Id.} at 657.
\textsuperscript{65} See \textit{Carro, supra} note 55, at 340.
construction of exemptions in recent years,\textsuperscript{66} it is easy to remain skeptical that agencies will make a move toward transparency when there are so few incentives for compliance.

Conflicting legislative intent, muddled through years of often irreconcilable precedent and finally, an attempt at clarity that becomes anything but: the treatment of exemption 2 is a lens upon which one could similarly discuss exemption 4 (trade secrets), exemption 6 (personal privacy) and exemption 7 (law enforcement). Each of the major FOIA exemptions has been criticized as flawed in execution on much the same grounds. The legal framework has turned what was supposed to be a broad presumption in favor of full disclosure into a patchwork of judicially created exemptions layered on top of legislatively created exemptions, with three notorious ones identified by FOIA scholars Martin Halstuk and Bill Chamberlin\textsuperscript{67}: (1) minimal privacy concerns for non-intimate matters such as citizenship status and passport information contained in records are enough to trigger non-disclosure under Exemption 6, which was to have “broad, rather than a narrow meaning” to protect privacy\textsuperscript{68}; (2) allowing withholding records under Exemption 7(c) for materials that do not fall within the “central purpose” of FOIA, which the Court defined as ensuring that the government’s activities are open to public scrutiny, disregarding legislative history supporting the opposite of this\textsuperscript{69}; and (3) creating a new hurdle requiring requesters seeking records about potential government wrongdoing that may also include privacy interests under Exemption 7(c) to offer additional proof that the “public interest sought to be advanced is a significant one” and that release of the information would advance that interest.\textsuperscript{70} Such expansion of exemptions in the name of privacy over transparency has effectively undermined the purpose of FOIA as a disclosure statute. As Halstuk and Chamberlin noted:

Congress has repeatedly reiterated the statute’s strong presumption of government openness, and the Supreme Court has consistently recognized this principle for more than two decades after the FOIA’s enactment. The Court’s current privacy framework is the product of judicial overreaching grounded in historical revisionism that is clearly at odds with the bedrock

\textsuperscript{66} See Milner v. Dept. of Navy, 562 U.S. 562 (2011), in which the Court ruled that an agency’s use of Exemption 2 for “personnel and rules and practices” could not validly be used to exempt maps and explosives data records kept by a Naval base, despite decades of agency reliance on this exemption.

\textsuperscript{67} Halstuk & Chamberlin, supra note 3, at 542.

\textsuperscript{68} Department of State v. Washington Post Co., 456 U.S. 595 (1978)

\textsuperscript{69} Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 774 (1989), in which the Court found that convicted criminals have a privacy interest in their rap sheet maintained by the Federal Bureau of Investigation, a federal record compiled from state and local governments that is stored by a federal agency but does not “open agency action to the light of public scrutiny,” citing Department of Air Force v. Rose, 425 U.S. 352, 361 (1976).

\textsuperscript{70} National Archives and Records Administration v. Favish, 541 U.S. 157, 172 (2004).
democratic principles of accountability and transparent governance in an open society, as envisioned by FOIA's framers.\textsuperscript{71}

It’s no wonder that federal agencies feel emboldened to delay requests interminably and to deny with little fear of consequence. People seeking records in the face of hostile agencies only have recourse in federal courts, which seem to invent new reasons to deny access to records in what were intended to be narrow exemptions. Nevertheless, lawsuits under FOIA are increasing rapidly, reaching an all-time high of 498 suits filed in federal district courts in fiscal year 2015, according to tracking done by The FOIA Project, nearly double the number of lawsuits filed in fiscal year 2008.\textsuperscript{72}

Reclaiming FOIA cannot start with the courts, which seemingly treat the act as an unnecessary intrusion upon people’s privacy rather than a tool for ensuring government transparency. A new kind of law, one responsive to modern record-keeping technology and informed by half a century of failed efforts at transparency, is the only option.

**Radical Transparency: Putting Openness First**

Fifty years of experience have taught us that FOIA is in desperate need of an overhaul, one that goes beyond tinkering with exemptions and updating wording in the presumption of openness, if it is going to live up to its promise of providing meaningful and consistent transparency. This was understandable, to some extent, in the era of paper record-keeping. In 1966, it was not plausible to require each federal agency to make thousands of boxes of paper files open for browsing at any time for any reason, particularly when those records may include material protected by important privileges or privacy laws. Similarly, in 1996, when E-FOIA was enacted, record-keeping and public access technology were not advanced beyond requiring FOIA “reading rooms” for commonly requested documents.

Times have changed, and the law should change, too. The 2016 amendments to FOIA may be helpful, but they are incremental adjustments for a law that continues to fail and disappoint, requiring constant repair. The Electronic Frontiers Foundation noted after Congress passed the 2016 revisions that the bill is a move in the right direction, but “it falls short of fixing some of FOIA’s biggest problems, including agency delay and stonewalling.”\textsuperscript{73} Solving those problems requires a more thorough overhaul.

\textsuperscript{71} Halstuk & Chamberlin, *supra* note 3, at 564.


With Congress’ intent of providing the fullest possible disclosure of federal agency records as a starting point, we propose dismantling the current FOIA and replacing it with a law guided by the following three principles:

1. Government records should be open and accessible by the public from the moment of creation, using portals and automation to reduce barriers to access as much as possible.

2. Exceptions that would result in closure or redaction should be narrow, used sparingly, determined when a record is created, and transparently reported to the public. Consequences for abusing exemptions or otherwise violating the law should be severe and swift.

3. Incentives should be shifted so that it is harder to close a record than to make it available for public inspection and copying. Government inaction should never result in delay or denial of access.

First Principle: Thinking With Portals

As the federal government moves away from paper documents and toward full electronic record-keeping and management, imagine the following: A record is created by a federal agency employee, such as an email or a memo, or even a line entered into a database. The moment it is created, it automatically goes not just into the agency’s electronic record-keeping system (ERKS), but also into a central ERKS for all federal agencies, where it is backed up and stored, and where previously existing files are updated. A bot scans the file for individually-identifiable information that the government must keep private – for example, financial records, social security numbers, names of witnesses or victims in ongoing criminal investigations – and tags that document as either private as a whole or otherwise redacts the proper information. And then, the record is pushed to a central portal, freely accessible online to anyone to be searched and retrieved.

This technology, impossible half a century ago, is entirely plausible today. This is what government transparency might look like if we were to dismantle FOIA and start again with an eye on living up to the principles of “fullest possible disclosure.” But we would have to shift the way we think about the law that drives record-keeping and transparency to make this happen.

When paper records were the only option, they started in the control of the agency that created and maintained them. Opening them to public inspection required a legal mandate, and even then, the APA and the 1966 version of FOIA failed because they gave agencies too much discretion to deny, delay, or otherwise limit access. From the start, the federal FOIA did not include language specifically creating a presumption of openness of government records, though courts have consistently recognized that the purpose of the law was to create “the strong
presumption in favor of disclosure” by federal agencies.\textsuperscript{74} In President Obama’s Open Government Directive in 2009, he called for FOIA to “be administered with a clear presumption: In the face of doubt, openness prevails.”\textsuperscript{75} Congress, in its efforts to make the presumption of openness more meaningful in 2016,\textsuperscript{76} did not write in language to FOIA using the phrase “presumption of openness,” but rather equated it to the “foreseeable harm” standard, limiting agency actions on withholding materials under exemptions only to situations in which “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or that is otherwise prohibited by law.\textsuperscript{77}

Over time, it has become clear that this approach to the “presumption of openness” renders modern FOIA as toothless as the APA. Openness on a federal agency’s terms, only after it has determined whether some harm may be “reasonably foreseeable,” is not openness at all. Agencies still remain the gatekeeper of records. What is needed is mandated openness from the moment a record is created – something technologically impossible in 1966, but practical today, though the use of ERKS and online portals.

Federal agencies have shown the ability to maintain online portals in many ways, such as the FOIA reading rooms mandated by E-FOIA in 1996, and court records providers such as the Public Access to Courts Electronic Records (PACER).\textsuperscript{78} However, they have much more potential for proactive disclosures that have largely gone unfulfilled, even after President Obama’s Open Government Directive calling for more proactive, online disclosures. In 2015, the FOIA Advisory Committee found that E-FOIA compliance was problematic, and it suggested that despite Department of Justice Office of Information Policy, which provided guidance for federal agencies to follow to become more proactive in posting records, “there is no evidence that agencies are following it” and found only a “small increase in proactive posting government-wide.”\textsuperscript{79}

Where executive branch directives and committee recommendations have failed, legislative action can mandate and succeed. Congress can look to the states for help. In 2010, New Mexico passed a law mandating proactive online disclosure through creation of a state Sunshine Portal to serve as a “single internet web site that is free, user-friendly, searchable and accessible to the public...to host the state’s

\textsuperscript{75} Barack Obama, Memorandum for the Heads of Departments and Agencies, Subject: Freedom of Information Act (Jan. 21, 2009).
\textsuperscript{76} “The standard mandates that an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law. This standard is commonly referred to as the 'Foreseeable Harm' standard, or the 'Presumption of Openness.'” S. Rep. 114-4 7-8, (2015).
\textsuperscript{77} S.B. 337, 114th Cong. (2016).
\textsuperscript{78} John Schwartz, An Effort to Upgrade a Court Archive System to Free and Easy, N.Y. Times, Feb. 12, 2009, at A16.
financial information for the purpose of governmental transparency and accountability to taxpayers.”

The law mandated deadlines for creating the site and laid out materials that must be included on the site, such as operating budgets, state cash balances by account, revenue received broken down by source, state contracts of more than $20,000, appropriations for state building projects, and a list of employee positions and salaries, as well as a requirement that the site be updated “as frequently as possible but at least monthly.” After the site launched in 2011, the legislature amended the law to mandate that public schools post information to the Sunshine Portal as well. The law called for the site to be developed through cooperation by the state’s Information Technology, Finance, and Administration departments, though the site was built by a private contractor for about $180,000. The site has not been without its issues, including an adverse ruling by a state district judge in 2012 that required the state to remove most government employee names from the salary database, but it is an example that a law mandating proactive transparency can be created and maintained in a way that is meaningful to the public.

Additionally, making federal agency records available through automation and portals would help reduce copying and processing costs, which are not insignificant. OGIS estimated that in Fiscal Year 2014, agencies “processed 647,142 FOIA requests at a cost of $462 million dollars and recouped just $4.2 million dollars from FOIA fees, less than 1 percent of the reported cost.”

Congress has shown a willingness to think with portals already, as the 2016 amendments call for development of a central portal for filing FOIA requests. But imagine if that central portal included access to all federal agency documents instead. The central portal would be a key for proactive disclosure of federal agency records, which FOIA overhaul supporters in Congress view as the way to “improve

81 N.M. Stat. Ann. § 10-16D-3(D). The initial wording in the statute required updates to be posted to the portal “as new information is received,” though that was amended. See S.B. 195, 49th Leg. (N.M. 2010).
82 S.B. 327, 50th Leg. (N.M. 2011).
85 FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, supra note 79, at 10.
transparency of government operations and allow the public to better understand
government activities and decisions.”

Second Principle: Curb Exemption Creep Through Proactive Designation

Judicial expansion of exemptions, largely in the name of protecting national security
privacy, has also contributed to FOIA paralysis in federal agencies. Proactive
transparency would present a challenge to the current FOIA system of dealing with
privacy and security concerns, which is in essence a system where records start out
closed and are only released if and when a requester can establish a right of access,
as well as a sufficient reason for wanting the documents, and proof that there is
likely government wrongdoing to be exposed. While this system certainly protects
valid privacy and national security concerns, it also delays or denies access to far too
much information that should be easily accessible by the public.

An exemption system in a proactive, transparency-first FOIA would have to
be done differently. If a record starts out as open and accessible, then agency
employees creating records would have to designate them as falling under a valid
exemption at the start. Again, this would have been difficult if not impossible in the
age of paper records, but technology makes such a system feasible. As envisioned in
the previous section, the ERKS could allow a drop-down box of options to be
selected by the record creator including the actual legislative exemptions – not the
ones created by the judiciary – raising the employee’s concerns. Names or account
numbers involved that trigger privacy concerns could be redacted on the spot. If an
employee intends to use an exemption, he or she could then explain the need for
keeping that information out of the hands of citizens. To ensure that these
exemptions were not abused, the exemptions themselves could then be made
transparent, published on a daily log of exemptions on the transparency portal.

This may seem burdensome to the government employee, but as they say in
the tech industry, this is a feature, not a bug. Exemptions should be difficult and
rarely used. A proactive disclosure system, with exemptions made and explained at
the outset of record creation, would help address what the Senate noted in 2016 as
“a growing and troubling trend towards relying on these discretionary exemptions
to withhold large swaths of Government information, even though no harm would
result from disclosure.”

It’s worth remembering here that identity thieves and spies don’t use FOIA to
cause harm, even though these are often the enemies that privacy and security point
to as the reason for broader interpretation of FOIA exemptions. The information
most likely to require exempting – financial accounts, Social Security records, victim
and witness information in criminal investigations, identities of U.S. agents in
ongoing military operations, and attorney-client communications, for example –
should obviously be exempted and receive little concern from the public not being
able to access them. The rest should be public, and the burden should be on
government to explain why at the moment a record is created.

There would certainly be times when agency employees were unsure whether information should be redacted or exempted. In such situations, the employee could ask the Office of Government Information Services ombuds office for guidance, either as a quick answer via email or conversation, or through a more formal opinion. Guidance for this kind of system can be found in Texas, where the Public Information Act requires government bodies to ask for an opinion from the Attorney General’s office for information that “it wishes to withhold from public disclosure and that it considers to be within one of the exceptions” under the act.\textsuperscript{88} Decisions are to be made “promptly,” but no later than 45 business days after an opinion is sought.\textsuperscript{89} Under a proactive disclosure system, rather than waiting for a request, a government employee would seek an opinion when the issue arose, allowing a determination to be made without a requester having to wait for it.

One concern in a proactive disclosure system would be agency employees actively seeking to undermine or otherwise avoid it by using private methods of communication outside of the ERKS. This would not be a new problem; indeed, government officials appear to commonly try this tactic, including creation of a private server system in the State Department under Secretary Hillary Clinton,\textsuperscript{90} or conducting government business on a private email account on Yahoo by former Alaska Governor Sarah Palin.\textsuperscript{91} FOIA does not currently include criminal penalties within the text of the act, though the agency may be ordered to pay “reasonable attorney fees and litigation costs” to plaintiffs who successfully sue to force compliance.\textsuperscript{92} Employees may also face discipline for denying materials “arbitrarily or capriciously,”\textsuperscript{93} though such actions are exceedingly rare, or federal government employees may be prosecuted under the criminal code section regarding “willfully and unlawfully” concealing or destroying “any record...filed or deposited...in any public office.”\textsuperscript{94} A new FOIA built on principles of proactive transparency should build in criminal penalties for willful non-compliance with the law, similar to state laws that build in fines and jail time as a way of deterring efforts to undermine transparency goals.\textsuperscript{95} The OGIS should have the power to investigate and recommend sanctions for deliberate non-compliance, with referral to the Department of Justice possible for egregious cases.

\textsuperscript{88} \textsc{Texas Gov’t Code} § 552.301(a) (LexisNexis 2016).
\textsuperscript{89} \textsc{Texas Gov’t Code} § 552.306(a).
\textsuperscript{92} 5 U.S.C. § 552(a)(4)(E)
\textsuperscript{93} 5 U.S.C. § 552(a)(4)(F)
\textsuperscript{94} 18 U.S.C. § 2071.
\textsuperscript{95} See Daxton R. “Chip” Stewart, \textit{Let the Sunshine In, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws}, 15 COMM. L. & POL’Y 265, 292-298 (2010).
Third Principle: Shift Incentives to Favor Openness

Martin Luther King, Jr., once said that justice delayed is justice denied. Similarly, in when it comes to government transparency, often access delayed is access denied. The House of Representatives Committee on Oversight and Government Reform report on FOIA in 2016 said “The Biggest Barrier of All” under FOIA is “Delay, Delay, Delay.” While agency decisions are supposed to be made within 20 business days after a request is received, with an extension of up to 10 days for “unusual circumstances,” delays are frequently much longer, sometimes years, before agencies comply with FOIA requests.

Government inaction should not hinder the public’s right to know, and yet, when the government is non-responsive to requests, it is the right to know that suffers. The incentives built into the law favor secrecy, not transparency. It is not enough “to depend solely upon the voluntary disclosure of documents by those most likely to want to withhold them,” as Nisbet, the head of OGIS, once said. Currently, for the most part, a federal agency record is created in secret, it is managed in stored in secret, and only upon request might it become open – and only then if a government employee with little fear of punishment for non-compliance deems it appropriate and in his or her best interest to release after considering an array of legislatively and judicially created exemptions. The default is closure, and it takes a significant amount of work by a dogged citizen or journalist to force the government to disclose its records, and even then, it may take a time-consuming and expensive lawsuit.

If FOIA were based in proactive transparency, it would turn this model on its head by shifting the incentives toward openness, rather than secrecy. If it were harder to apply and explain exemptions at the outset, when records are created, then the incentive would be to take the path requiring less work by just letting the record go into the ERKS and be uploaded to the FOIA portal in the first place. Worries about under-protection of privacy may be able to be addressed through automated record-keeping bots designed to take care of some of the simpler tasks of identifying and redacting information. As the National Archives and Records Administration said in a report in 2014 on automated records, “touching each file and making a separate recordkeeping decision about each one” is likely to be overly burdensome for busy users, so “(a)utomated tools for managing electronic records could reduce the recordkeeping burden on end users and lead to more consistent, scalable results, and ultimately more accessible and usable agency information.”

Once again, modern technology unimaginable half a century ago allows new ways of thinking about record-keeping and government openness. Building new incentives into FOIA, where the norm is transparency, where secrecy is the more

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96 FOIA is Broken, supra note 4, at 34.
97 5 U.S.C. § 552(a)(6)
98 Nisbet, supra note 48, at 3.
difficult option, and where the record-keeping system largely automates exemptions and redaction, would enable citizens to learn about their government more effectively.

Conclusion

FOIA is irrevocably broken. It needs systemic reform, not the series of endless legislative amendments and administrative patches that have done little to actually change access law for the better in the past 50 years.

Redrafting FOIA in the digital age, for the digital age, is the only way to end the constant cycle of non-compliance, delay, frustration, and inadequate legislative revision that has plagued the law since its initial passage. Proactive disclosure through electronic and automated record-keeping and government-hosted portals offer a chance at a culture shift to serve the underlying purpose of FOIA of full agency disclosure. Codification of proactive transparency-first FOIA system would move beyond incremental fixes at the agency and administrative level, which are improvements but nevertheless would be subject to the whim of presidential administrations and directives, to keep the emphasis on the “presumption of openness.”

Citizens need a technology-first solution. Government employees seek technology to help them with their jobs as well, which as the director of the Office of Information Policy Melanie Pustay said in 2015, is “universally desired” by agencies because “any time you can replace a manual process with an electronic one, you can do things faster. It helps the processing time for individual requests, obviously, but it can also reduce staffing, which in turn can help in these fiscal times.”

Even critics of FOIA who see expanded transparency as potentially infringing on essential privacy norms see problems in a law that does not address technology adequately. Daniel Solove, the renowned privacy scholar, commented that in the U.S., the “information regulatory infrastructure is disconnected, often outdated, and inadequate to meet the challenges of the new technologies of the Information Age.” An overhaul using automated records management and portals would not be intended to ignore or minimize legitimate privacy concerns, or to overturn privacy protections mandated through the Privacy Act, the Family Educational Rights and Privacy Act, or other essential laws requiring the government to keep certain information about individuals from being distributed to the public. Rather, a FOIA favoring proactive transparency would build in protections for privacy interests as records are created, while preventing excessive and unnecessary exemption and redaction in the name of serving those interests.

100 See S. Rep. 114-4, supra note 76, at 3.
101 Anderson, supra note 5.
Recovering from half a century of being “Taj Mahal of Unintended Consequences” will take great public support, motivation by transparency and privacy advocates, legislative will, presidential support, and perhaps most importantly, technological design that embraces automation and public accessibility. The details and intricacies of building these portals, and getting the legislative language just right to balance the incentives and consequences, will be crucial. But these should not deter efforts to remake FOIA in a way that, at long last, would give citizens what they should expect from a transparent federal government.