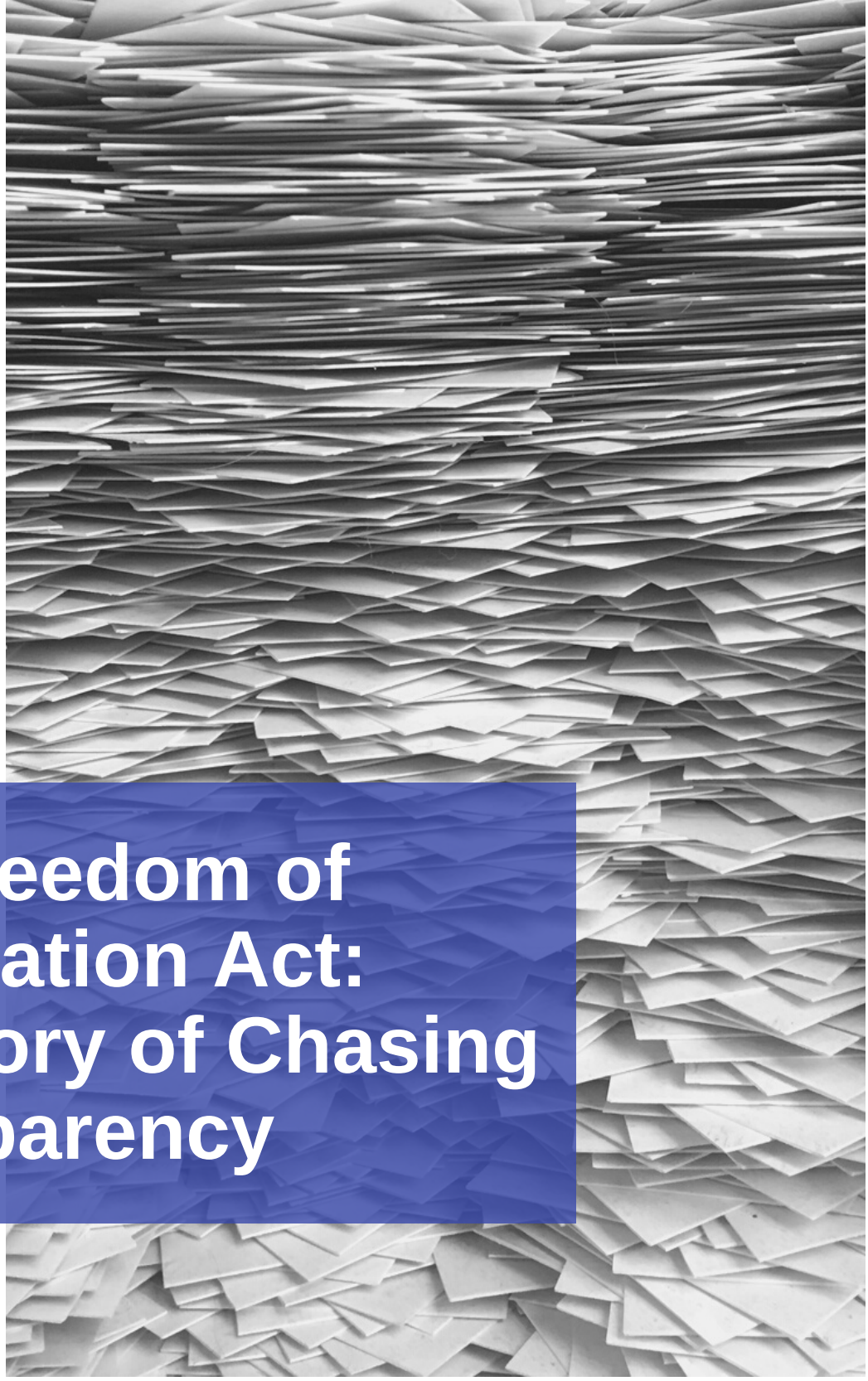
JULY 2023



The Freedom of Information Act: A History of Chasing Transparency

Gary Lawkowski, J.D.
Curtis M. Schube, J.D.

THE COUNCIL TO MODERNIZE GOVERNANCE

Freedom of Information Act
History and Modern Problems

Gary Lawkowski
Curtis M. Schube[1]

Table of Contents

[1] Gary Lawkowski is a counsel at the Dhillon Law Group, where has represented clients in matters concerning state and federal Freedom of Information Acts. He previously worked in the federal government, including serving as a Counsellor to the Secretary of the Interior and a Senior Policy Advisor to the White House Domestic Policy Council. He is a native of the Commonwealth of Virginia and earned both his J.D. and a B.A. with High Distinction from the University of Virginia.
Curtis Schube is the Executive Director for Council to Modernize Governance, a think tank committed to making the administration of government more efficient, representative and restrained. He is formerly a constitutional and administrative law attorney.

Freedom of Information Act White Paper
History and Modern Problems

"A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."[2]

I. Introduction

The three most important words in the U.S. Constitution are those at the beginning: "We the people." U.S. Const., preamble. With these three words, our nation's the founders set forth a relationship between the people of the United States and their government, where sovereignty rests with the people. In other words, the government takes its orders and directions from the people, not the other way around.

To exercise oversight and ultimately control over their government, the people must know what their government is doing. That is where the Freedom of Information Act (FOIA) comes in.

At its best, FOIA provides a mechanism to give the American people the information they need to make informed choices about how they want to be governed and to exercise oversight of the officials tasked with acting in their name. FOIA also helps make sure that the American people understand the rules they are subject to and are not subject to "secret" or hidden laws. At its worst, FOIA is viewed as a tool of special interests or advocacy groups to gain a competitive advantage or gum up the works of federal agencies and the courts.

In practice, FOIA has never fully lived up to the lofty ideals of its supporters. From the beginning, it has been plagued by concerns that agencies were dragging their feet in responding to requests or needlessly invoking exemptions to hide embarrassing information from the public. These concerns persist, particularly as processing delays and agency backlogs continue to increase.

As FOIA approaches 60 years old, it faces a number of challenges in addressing its two main goals: preventing the rise of "secret" law and facilitating citizen oversight.

With respect to "secret" law, FOIA has been a qualified success. There is far more information available to citizens about what rules and interpretations guide agency actions, so much so that in some ways the problem is that there is too much information for it to be practically useful. To the extent that agency laws and interpretations remain hidden from view, it is largely in narrow fields, such as national security procedures and legal interpretations that have the effect of guiding policy.

---

[2] U.S. Congress, House, *Clarifying and Protecting the Right of the Public to Information* at 33, 89th Cong., 2d Ses. Report No. 1497 May 9, 1966, 23. https://nsarchive2.gwu.edu/nsa/foialeghistory/H.%20Rep.%20No.%2089-1497%20(1966%20Source%20Book).pdf.

With respect to citizen oversight, success is less certain. Significant delays in processing requests are normal, with the average "simple" request often taking more than twice as long as the statute mandates. Agencies often treat a FOIA request as an afterthought and agency FOIA offices and technology are often poorly tailored to meet their statutory obligations. Statutes designed to increase transparency for all citizens have, ironically, stifled agencies in making proactive disclosures. And the identity and purpose of many requesters has continued to be transactional, with businesses and lawyers making up the two largest group of requesters, and requests seeking administrative records to support personalized adjudications making up a large volume of requests.

II. The History of FOIA

a. Access to Government Records Before FOIA

The Freedom of Information Act was passed in 1966. Before that, access to government records was addressed by the Administrative Procedure Act (APA).

As adopted, the "Public Information" portion of the APA required each agency to publish "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public," descriptions of an agency's "central and field organizations," and "statements of the general course and method by which [an agency's] functions are channeled and determined" in the Federal Register.[3] It also required agencies to "make available to public inspection all final opinions or orders in the adjudication of cases . . . and all rules."[4] Finally, it provided that "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."[5]

The APA public information provisions contained little in the way of enforcement. To the contrary, its primary enforcement mechanism was to preclude agencies from requiring citizens to conform with unpublished rules and opinions, stating "[n]o person shall in any manner be required to resort to organization or procedure not so published."[6]

There were, however, several large exceptions to the public information provisions. First, the statute itself exempted "any function of the United States requiring secrecy in the public interest" and "any matter relating solely to the internal management of the agency."[7] Second, the statute provided a general exception to the publication of opinions and orders and other public records where there was "good cause to be held confidential and not cited as precedents" or "held confidential for good cause," respectively.[8]

---

[3] *An ACT To improve the administration of justice by prescribing fair administrative procedure,* Public Law 60, U.S. Statutes at Large 237, § 3(a) (June 11, 1946).
[4] Ibid,(b).
[5] Ibid, (c).
[6] Ibid, (a).
[7] Ibid, § 3.
[8] Ibid, (b), (c).

Finally, there was one large limitation on the availability of public records—they were only available to "persons properly and directly concerned" with the matter.[9]

Notwithstanding its noble intent, "Section 3 of the [APA] . . . though titled 'Public Information' and clearly intended for that purpose, [was] used as an authority for withholding, rather than disclosing, information."[10]

By the mid-1950s, pressure began building for a general public records law. In 1953, Dr. Harold L. Cross, a lawyer working on behalf of the American Society of Newspaper Editors, published "the first comprehensive study of growing restrictions on the people's right to know the facts of government," a book called "The People's Right to Know."[11] Dr. Cross's book outlined three areas where "improper secrecy had been permitted to blossom," including section 3 of the APA,[12]and "became the bible of the [freedom of information] movement, the scholarly foundation for every major piece of federal legislation in the field, and a scrupulously researched but passionately written sourcebook for advocates of freedom of access at the local, state and national levels."[13]

Dr. Cross's cause was picked up by the eventual sponsor of the Freedom of Information Act, California Congressman John Moss. In 1955, Congressman Moss was appointed chairman of the Special Subcommittee on Government Information of the Government Operations Committee and tasked with "ascertain[ing] the trend in the availability of Government information and . . . scrutinize[ing] the information practices of executive agencies and officials in light of their propriety, fitness, and legality."[14] "Over the next decade, the Special Subcommittee . . . conducted extensive investigative hearings into all aspects of Government information activities,"[15]and "documented and denounced excessive government secrecy."[16]

Congressman Moss's efforts bore modest fruit in 1958, when "the House and Senate enacted, without a dissenting vote, the first statute devoted solely to freedom of information," a law that clarified that the general "housekeeping" statute authorizing federal agencies to regulate the business of the agency, set up filing systems, and keep records "d[id] not authorize withholding of information from the public or limiting the availability of records to the public."[17]

---

[9] Ibid, (c).
[10] U.S. House, *Clarifying and Protecting*, 25.
[11] Ibid, 23.
[12] Ibid.
[13] George Kennedy, Freedom of Information: How Americans Got Their Right to Know, *American Society of Newspaper Editors*, 1996, accessed June 13, 2023, http://www.johnemossfoundation.org/foi/kennedy.htm.
[14] U.S. Congress, U.S. House Committee on Government Operations, *Amending Section 552 of Title 5, United States Code, Known as the Freedom of Information Act*, 93rd Cong., 2d Ses. Report 93-876, Mar. 5, 1974, 123. https://nsarchive2.gwu.edu/nsa/foialeghistory/H.R.%20Rep.%20No.%2093-876%20(Mar.%205,%201974).pdf.
[15] *Ibid*.
[16] Thomas Blanton, Freedom of Information at 40: LBJ Refused Ceremony, Undercut Bill with Signing Statement, *The National Security Archive*, July 4, 2006. https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/index.htm.
[17] U.S. Congress, House Committee on Government Operations, *Administration of the Freedom of Information Act,* 92nd Cong. 2d Ses., Report 92-1419, Sept. 20, 1972, 9. https://nsarchive2.gwu.edu/nsa/foialeghistory/H.R.%20Rep.%20No.%2092-1419%20(Sept.%2020,%201972).pdf.

Nevertheless, even with this modest success, the federal government still lacked a general federal records law providing average Americans with access to government records. "[T]hrough 1965, the administration stalled Moss's [general public records] bill," with "[a]ll 27 federal agencies and departments that presented testimony oppos[ing] the bill" and the Department of Justice claiming the bill was unconstitutional.[18]

Notwithstanding opposition from the executive branch, by 1966, a general public records law gained steam. "Behind the scenes, the Justice Department prevailed on Moss to create a new House report on the bill with government-produced language that rolled back the Senate interpretation" and, by the time the bill passed Congress, only one agency continued to urge "disapproval."[19]

As a result, on July 4, 1966, President Johnson signed the Freedom of Information Act, stating "[t]his legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."[20]

b. The Freedom of Information Act

The Freedom of Information Act made a number of consequential changes. [21] The biggest concerned the general public's ability to access records. Gone was the requirement that a person be "properly and directly concerned" with information to request applicable records. In its place was a requirement that "every agency shall, upon request for identifiable records . . . make such records promptly available to any person."[22] As initially adopted, FOIA did not have a specific timeframe for the production of records. Instead, it directed agencies to produce them "promptly."[23]

To effectuate the general public's right to request records, FOIA included a judicial review and enforcement provision giving the United States District Court jurisdiction to "enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant."[24] It further assigned the burden to the agency to justify its actions and gave the court authority to "punish the responsible officers for contempt" in "the event of noncompliance."[25] Finally, it directed that FOIA proceedings "shall take precedence on

[18] Thomas Blanton, Freedom of Information at 40: LBJ Refused Ceremony, Undercut Bill with Signing Statement, *The National Security Archive,* July 4, 2006. https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/index.htm.
[19] Ibid.
[20] Lyndon B. Johnson, "Statement by the President Upon Signing the 'Freedom of Information Act'," July 4, 1966. https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-freedom-information-act#:~:text=I%20have%20always%20believed%20that,when%20it%20must%20be%20restricted.
[21] *An Act to Amend Section 3 of the Administrative Procedure Act*, Public Law 80, U.S. Statutes at Large 89-487 (Jul. 4, 1966) ("FOIA").
[22] Ibid, § (c).
[23] Ibid.
[24] Ibid.
[25] Ibid.

the docket over all other cases and shall be assigned for hearing and trial at the earliest practical date and expedited in every way."[26]

In addition to granting the general public the right to request records, FOIA also limited the government's ability to withhold records. It eliminated the APA's general exceptions for "any function of the United States requiring secrecy in the public interest" or "any matter relating solely to the internal management of an agency." It also eliminated the ability for agencies to withhold records for "good cause."

In place of these general exceptions, FOIA included nine specific exemptions for:

- Matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy";
- Matters "related solely to the internal personnel rules and practices of any agency";
- Matters specifically exempted from disclosure by statute";
- "Trade secrets and commercial or financial information obtained from any person and privileged or confidential";
- "[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency";
- "[P]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy";
- "[I]nvestigatory files compiled for law enforcement purposes except to the extent available by law to a private party";
- Matters that are "contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions"; and
- "[G]eological and geophysical information and data (including maps) concerning wells."[27]

c. The 1974 Amendments

By the early 1970s, it was apparent that "[p]assage of FOIA did not lead to a new era of open government."[28] Beginning in 1971, the Foreign Operations and Government Information Subcommittee of the House Government on Government Operations "began the first

[26] Ibid.
[27] Ibid, (e).
[28] Dan Lopez, Thomas Blanton, Meredith Fuchs, and Barbara Ellas, Veto Battle 30 Years Ago Set Freedom of Information Norms, *The National Security Archive,* Nov. 23, 2004. https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm.

comprehensive study of federal agencies' administration of [FOIA]," which was followed by fourteen days of public investigatory hearings in April 1972.[29]

In September 1972, the House Committee on Government Information produced a report of the administration of the Act, faulting "5 years of foot-dragging by the Federal bureaucracy" for hindering "efficient operation" of the act.[30] The Committee went on to detail six "major problem areas," many of which continue to resonate with frequent FOIA users today:

- "The bureaucratic delay in responding to an individual's request";
- "The abuse in fee schedules by some agencies for searching and copying documents or records";
- "The cumbersome and costly legal remedy under the act," which "makes litigation under the act less than feasible in many situations";
- "The lack of involvement in the decision-making process by public information officials when information is denied";
- "The relative lack of utilization of the act by the news media," driven in "significant" part by "[t]he delaying tactics of the Federal bureaucrats" serving "as a major deterrent to more widespread use of the act"; and
- "The lack of priority given by top-level administrators to the full implementation and proper enforcement" of the act.[31]

On the heels of this report, in early 1973, two representatives introduced bills to reform FOIA.[32] In 1974, reform bills were passed in both the House and Senate, which were reconciled into what became the 1974 amendments. The 1974 amendments to FOIA made a number of major changes to FOIA to give the statute more teeth. For example, the 1974 amendments:

- Made it easier for requesters to craft requests by changing the standard from "identifiable records" to "reasonably describing" the records sought, Pub. L. 93-502 (b)(1) (Nov. 21, 1974);
- Sought to correct the imposition of excessive fees by requiring agencies to "specify[] a uniform schedule of fees" whereby fees are "limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such

[29] U.S Congress, U. S. House Committee on Government Operations, *Amending Section 552 of Title 5, United States Code, Known as the Freedom of Information Act*, 93rd Cong. 2d Ses., *Report No. 93-876,* Mar. 5, 1974, 123. https://nsarchive2.gwu.edu/nsa/foialeghistory/H.R.%20Rep.%20No.%2093-876%20(Mar.%205,%201974).pdf.
[30] U.S. Congress, U.S. House, *Administration of the Freedom of Information Act,* 92nd Cong., 2d Ses., H. Rept. No. 92-1419, Sept. 20, 1972, 15. https://nsarchive2.gwu.edu/nsa/foialeghistory/H.R.%20Rep.%20No.%2092-1419%20(Sept.%2020,%201972).pdf.
[31] *Ibid*.
[32] Lopez, Blanton, Fuchs, and Ellas, *Veto Battle*.

search and duplication." *Id*. The amendments further provided for the waiver or reduction of fees "where the agency determines that waiver or reduction of the fees is in the public interest because furnishing the information can be considered as primarily benefitting the general public;"

- Sought to correct the overuse of exemptions by granting the District Court authority to "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions;" *Id*.

- Sought to correct inappropriate delay in responding to FOIA requests, including by:

    - Mandating that agencies determine within 10 days whether they will comply with the request unless there are "unusual circumstances," in which case agencies may take an additional 10 days to respond;

    - Mandating that agencies make a determination on an appeal within 20 days of receipt;

    - Provide that requesters have constructively exhausted their administrative remedies, allowing them to access relief in the district court, once the applicable deadlines for decisions have passed; and

    - Set a timeline for litigation, requiring the government to answer a complaint within 30 days unless the court directs otherwise "for good cause shown;"

- Allowed for the recovery of reasonable litigation costs and attorney's fees in any case where the requester "substantially prevailed."

- Sought to impose consequences on agency employees who did not comply with FOIA by directing the court to "issue[] a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding" and "the Civil Service Commission [to] promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding," which would be reported to the employee's employer. The amendments also reiterated the ability of the court to cite the responsible federal officials for contempt;

- Sought to tighten up the government's ability to claim an exemption for national security purposes by requiring that such records be "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order";

- Provided additional criteria to limit the use of exemptions for purported investigatory materials to only those that "would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, and in the

case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel";

- Sought to prevent the overly broad withholding of records through claims of exemption by requiring agencies to prove "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."[33]

President Ford initially vetoed the 1974 Amendments, citing three main areas of concern:

- The provisions relating to classified material could adversely affect military and intelligence secrets;

- The standard for disclosure of FBI and other investigatory law enforcement materials were insufficient to maintain proper confidentiality; and

- The "ten days afforded to an agency to determine whether to furnish a requested document and twenty days afforded for determinations on appeal are . . . simply unrealistic in some cases."[34]

Notwithstanding President Ford's concerns, Congress swiftly overrode the President's veto, enshrining the 1974 amendments into law.[35]

d. Modest Changes: The 1976 and 1986 Amendments

Over the next two decades, Congress made only modest changes to FOIA.

In 1976, Congress passed and the president signed the Government in the Sunshine Act.[36] The Government in the Sunshine Act included broad disclosure and transparency obligations for meetings by government agencies and placed limits on ex parte communications, however, its changes to FOIA were relatively modest. Specifically, the Government in the Sunshine Act amended exemption 3, dealing with materials specifically exempted from disclosure by statute, by requiring that such statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[37] This change was "prompted by a 1975

[33] *An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act*, Public Law 88, U.S. Statutes at Large 1561, (Nov. 21, 1974).
[34] Gerald R. Ford, "Message from the President of the United States Vetoing H.R. 1271, An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act," House Documents, Oct. 17, 1974. https://nsarchive2.gwu.edu/nsa/foialeghistory/House%20Document%20No.%2093-383%20Message%20from%20the%20President%20of%20the%20United%20States%20(Nov.%2018,%201974).pdf
[35] Lopez, Blanton, Fuchs, and Ellas, *Veto Battle 30*.
[36] *Government in the Sunshine Act*, Public Law 90, U.S. Statutes at Large 1241, (Sept. 13, 1976).
[37] Ibid, § 5(b).

decision of the Supreme Court [*Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975)], which broadly interpreted the types of information falling within the ambit of the third exemption of the FOIA."[38]

In 1986, Congress included the "Freedom of Information Reform Act of 1986" as part of the Anti-Drug Abuse Act of 1986.[39] The 1986 amendments to FOIA made several changes to the law enforcement exemption and tweaked the procedure for assessing fees and providing fee waivers.

The approach of the 1974 amendments to law enforcement records was one area of concern highlighted by President Ford in his veto message. By the late 1970s, the Senate Judiciary Subcommittee on Criminal Law reported "[i]t can safely be said that none [of the sponsors of FOIA] foresaw the host of difficulties the legislation would create for the law enforcement community, nor did they foresee the utilization that would be made of the act by organized crime and other criminal elements."[40] In support of the 1986 amendments, Senator Hatch cited a 1978 colloquy between Senator Nunn and "an admitted murdered and convicted felon" in which the felon stated that he used FOIA "to try to identify the informants that revealed information to the agencies" and subsequently murder them.[41]

In response to these and other concerns, the 1986 amendments first lowered the standard of proof for asserting the law enforcement exemption from "would" to "could reasonably expected to" interfere with enforcement proceedings, disclose the identity of a confidential source, or endanger the life or physical safety of any individual, and added a qualification for the disclosure of law enforcement techniques and procedures when disclosure "could reasonably be expected to risk circumvention of the law."[42]

Second, the 1986 amendments added three additional carve outs under the law enforcement exception for investigations involving violations of criminal law where the subject of the investigation is not aware of its pendency and the disclosure of records could reasonably be expected to interfere with enforcement proceedings, when the record is under an informant's name or personal identifier and the person's status as an informant has not been confirmed, and when a request involves FBI records concerning foreign intelligence, counterintelligence, or international terrorism and the existence of the records is classified.[43]

With respect to fees and fee waivers, the 1986 amendments clarified how fees apply and the availability of fee waivers. Under the 1974 amendments, fees could be charged to the "search and duplication" of records and could be waived or reduced "if the agency determines that waiver or reduction of fees is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

---

[38] U.S. Congress, Senate Committee on the Judiciary, *Electronic Freedom of Information Improvement Act of 1995*, 104th Cong., 2d Ses., Report No. 104-272, May 15, 1996, 7. https://nsarchive2.gwu.edu/nsa/foialeghistory/104_cong_reports_efoia_senate.pdf.
[39] *Anti-Drug Abuse Act of 1986*, Public Law 100, U.S. Statutes at Large 3207 (Oct. 27, 1986).
[40] Orrin Hatch, 132 Cong. Rec. S. 14038 (Sept. 27, 1986).
[41] Ibid.
[42] *Anti-Drug Abuse Act of 1986*, § 1802.
[43] Ibid, § 1802.

The 1986 amendments expanded the ability of agencies to assess fees by clarifying that fees apply to charges "for document search, duplication, *and review*" and defined "review" as "only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section."[44]

The 1986 amendments also added additional restrictions on when fees could be waived or reduced. To wit, the amendments limited fees assessed to just duplication costs "when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media." They further clarified that fees should be reduced or waiver "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." They also limited agencies' ability to request advanced payment of fees to only persons who previously failed to pay fees in a timely fashion or whose estimated fee would exceed $250. Finally, the amendments specified that judicial review of a fee waiver is to be determined de novo and limited to the record before the agency.

e. Building a Bridge to the 21st Century—The Electronic Freedom of Information Act Amendments of 1996

In 1996, Congress passed and the President signed "legislation … [to] bring[] FOIA into the information and electronic age"[45]—the Electronic Freedom of Information Act Amendments of 1996.

This legislation had two primary objectives.

First, in recognition of the increased role of electronically stored information and the early rise of the internet, the 1996 amendments clarified that FOIA includes electronically stored records and provided for increased access to records electronically.[46]

Second, the 1996 amendments made substantive changes to the timelines for agencies to respond to FOIA requests. The Senate Report in support of the 1996 Amendments noted that "the single most frequent complaint about the operations of the FOIA" was "agency delays in responding to FOIA requests," and cited prior reports attributing delays to "inadequate resources, unnecessary bureaucratic complexity, poor organization of agency records, and lack of interest in

[44] *An Act to Strengthen Federal Efforts to Encourage foreign cooperation in eradicating illicit drug crops,* Public Law 100, U.S. Statutes at Large. 3207, Oct. 27, 1986, 49. https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3207.pdf. (emphasis added).
[45] William J. Clinton, "Statement of the President," *The White House*, Oct. 2, 1996. https://nsarchive2.gwu.edu/nsa/foia/presidentstmt.pdf.
[46] *Electronic Freedom of Information Act Amendments of 1996*, Public Law 110, U.S. Statutes at Large 3048, §§ 3-5 (Oct. 2, 1996).

agency disclosure."[47] The House Report regarding the 1996 amendments similarly noted that agency delay constituted "the single most frequent complaint about the operation of the FOIA"[48] and observed "recent annual reports on the administration of the Act, covering 1992 operations, show an annual volume of almost 600,000 requests."[49]

Ironically, in its effort to address agency delay caused in part by bureaucratic complexity, Congress loosened the time period for agencies to respond to FOIA requests and created new bureaucratic options for processing FOIA requests. For example, the 1996 amendments extended the time period for agencies to respond to FOIA requests from 10 days to 20 days, created an option for agencies to utilize a "multitrack processing" system, provided for an extension of the agency response time in "unusual circumstances," directed the creation of a process for "expedited processing," called for additional communication between agencies and requesters, and mandated reporting to Congress.[50]

While on paper the 1996 amendments appeared to make substantive changes to the timeframe for agency responses, at least one commentor has noted "in practice this change had little effect."[51]

f. Post-9/11 Tweaks—The 2002 Amendments

In 2002, Congress made minor changes to FOIA to restrict the ability of foreign governments to access documents from the intelligence community through FOIA. The House Report supporting the 2002 amendments reported "CIA estimates that requests from foreign governments and foreign nationals comprise approximately 10 percent of the FOIA requests received annually based on the last three years," while such requests increased at a rate of one percent per year from FY 1999 through FY 2001.[52] To prevent the use of resources in processing these requests, the 2002 amendments, included in the 2003 Intelligence Authorization Act, prohibited agencies in the intelligence community from providing records in response to requests from foreign governments and representatives of foreign governments.[53]

---

[47] U.S. Congress, Senate Committee on the Judiciary, *Electronic Freedom of Information Act of 1996*, 104th Cong., 2d Ses., S. Rep. 104-272, May 15, 1996, 15-16.
https://nsarchive2.gwu.edu/nsa/foialeghistory/104_cong_reports_efoia_senate.pdf.
[48] U.S. Congress, House Committee on Government Reform and Oversight, *Electronic Freedom of Information Act Amendments of 1996,* 104th Cong., 2d Ses., H. Rep. 104-795, Sept. 17, 1996, 23.
https://nsarchive2.gwu.edu/nsa/foialeghistory/104_cong_reports_efoia.pdf.
[49] Ibid.
[50] *Electronic Freedom of Information Act Amendments of 1996*, Public Law 110, U.S. Statues at Large 3048, Pub L., §§ 7-8, 10 (Oct. 2, 1996).
[51] *History of FOIA*, Electronic Frontier Foundation. https://www.eff.org/issues/transparency/history-of-foia.
[52] U.S. Congress, Senate Permanent Subcommittee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2003,* 107th Cong., 2d Ses., *S. Rep. 107-592,* Jul. 18, 2002, 27.
https://nsarchive2.gwu.edu/nsa/foialeghistory/H.R.%20Rep.%20No.%20107-592%20(2002%20Amend%20Intel%20Requests).pdf.
[53] *Intelligence Authorization Act for Fiscal Year 2003*, Nov. 27, 2002, § 312.

g. The Open Government Act of 2007

In 2007, Congress found that while "'disclosure, not secrecy, is the dominant objective of the Act' . . . in practice, [FOIA] has not always lived up to the ideals of that Act."[54] In order to correct this, Congress adopted a number of changes, including:

- Seeking to protect new media by clarifying that the fee waiver provisions for representatives of the news media applies to people without specific institutional associations, including those "associated with less traditional media outlets or distribution methods, particularly those that rely on the internet to reach a broad audience;"[55]

- Restoring the "catalyst" theory to recover attorney's fees and costs in litigation. Under FOIA, prevailing parties could recover attorney's fees and costs in litigation since the 1974 amendments. Under applicable case law, a requester could show that they substantially prevailed either by obtaining an enforceable court order or by showing that their actions prompted a unilateral change in the agency's position, *i.e.*, that the lawsuit was the catalyst for a change in agency position. In 2001, the Supreme Court rejected the catalyst theory in a case concerning the Fair Housing Amendments Act and the Americans with Disabilities Act.[56] The OPEN Government Act effectively reversed this decision with respect to FOIA claims, permitting requesters to recover costs and fees when they obtained relief through "a voluntary or unilateral change in position by the agency, if the complaint's claim is not insubstantial."[57]

- Clarified that costs and fees would be paid from agency appropriations, not from the Claims and Judgment Fund of the United States;[58]

- Purported to enhance discipline and accountability by:

    - Mandating that the Attorney General report to the Office of the Special Counsel each time there is a finding that the agency acted arbitrarily and capriciously and report the number of such civil findings to Congress;[59]

    - Direct the Special Counsel to submit an annual report of the actions taking on such referrals;[60] and

---

[54] *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), quoted in *Openness Promotes Effectiveness in our National Government Act of 2007 ("OPEN Government Act of 2007)*, Public Law 121, U.S. Statutes at Large 2524, §§ 2(4)-(5) (Dec. 31, 2007).
[55] *OPEN Government Act,* § 3; U.S. Congress, House Committee on Oversight and Government Reform, *Freedom of Information Act Amendments of 2007*, 110th Cong., 1st Ses., H. Rep. 110-45, Mar. 12, 2007, 6. https://nsarchive2.gwu.edu/nsa/foialeghistory/2016-02-12/(7)%20Com.%20Oversight-Overview%20.pdf.
[56] *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001).
[57] *OPEN Government Act*, § 4(a).
[58] Ibid, § 4(b).
[59] Ibid, § 5.
[60] Ibid.

- Directed the Office of Personnel Management to prepare a report on changes in executive branch personnel practices that would enhance compliance.[61]

- Sought to improve the timeliness of responses to FOIA requests by:

  - Clarifying that the time limits under the Act begin on the day the request is received by the appropriate component, but, in any event, no later than 10 days after the request is received by the agency;[62]and

  - Prohibited agencies from assessing search fees when the agency fails to meet the time limits in the Act and there are not "unusual" or "exceptional" circumstances;[63]

- Clarified that FOIA applies to agency records held by private government contractors;[64] and

- Sought to improve information about the FOIA process, including by requiring agencies to make available a public liaison to help requesters,[65] providing for individual tracking numbers,[66] providing for increased reporting to Congress,[67] and creating an "Office of Government Information Services" in the National Archives and Records Administration to help mediate disputes between requesters and agencies.[68]

h. The 2009 and 2016 Amendments

In 2009, Congress adopted an amendment similar in purpose to the 1976 amendment, further clarifying that exemption 3 only applies going forward to statutes that specifically cite the exemption.[69]

The 2016 Amendments were more substantial. In its report explaining the 2016 amendments, the Senate Committee on the Judiciary cited a familiar litany of concerns with the operation of FOIA, noting "[i]n Fiscal Year 2013, the Federal Government received over 700,000 FOIA requests, an 8% increase from the previous fiscal year.[] As the number of requests grows, so does the backlog of agency responses," with "more than 95,000 responses to FOIA requests backlogged with a Federal agency."[70] It further observed "[i]n addition to the growing backlog,

---

[61] *OPEN Government Act*, § 11.
[62] Ibid, §6(a).
[63] Ibid, § 6(b).
[64] Ibid, § 9
[65] *OPEN Government Act*, § 6(b)(1)(B).
[66] Ibid, § 7.
[67] Ibid, § 8.
[68] Ibid, § 10.
[69] *Department of Homeland Security Appropriations Act of 2010*, Public Law 123, U.S. Statutes at Large 2142, § 564 (Oct. 28, 2009).
[70] U.S. Congress, Senate Committee on the Judiciary, *FOIA Improvement Act of 2015,* 114th Cong., 1st Ses., S. Rep. 114-4, Feb. 23, 2015. https://www.congress.gov/114/crpt/srpt4/CRPT-114srpt4.pdf.

there are concerns that some agencies are overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure."[71]

To address these and other concerns, the 2016 amendments made the following changes, among others:[72]

- Required agencies to make records available in electronic formats;
- Required agencies to post records that have been requested three or more times;
- Further limited the ability of agencies to charge fees when they miss the statutory deadline for providing a response by requiring agencies show "unusual circumstances" and that more than 5,000 pages are necessary to respond to the request;
- Limited agencies' ability to make discretionary withholdings by requiring agencies reasonably foresee that disclosure would harm an interest protected by FOIA. This change was prompted by a seesawing between presidential administrations. In 1993, Attorney General Reno issued a memorandum "instruct[ing] agencies to make discretionary disclosures . . . and to withhold records only if a reasonably foreseeable harm existed from that release."[73] In 2001, the Bush Administration reversed this policy and told agencies DOJ "would defend decisions to withhold information from requesters unless those decisions 'lack[ed] a sound legal basis.'"[74] In 2009, the Obama Administration reversed course again, returning to something similar to the Clinton administration policy and directing agencies "to deny a FOIA request only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions."[75]
- Placed a 25-year sunset provision on claims of deliberative process privilege;
- Required the Office of Government Information Services to offer mediation services; and
- Made changes to the role and responsibilities of agency Chief FOIA Officers.[76]

III. Modern Problems with FOIA

As the Freedom of Information Act approaches its 60th Anniversary, it is still an open question whether FOIA has lived up to its broad promise. FOIA was enacted with two primary goals: preventing the rise and application of "secret law" and enabling the American people to

[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Attorney General John Ashcroft, Attorney General, *Memorandum for Heads of All Federal Departments and Agencies, Subject: The Freedom of Information Act*, Justice.gov, Oct. 12, 2001. https://www.justice.gov/archive/oip/011012.htm, cited in *FOIA Improvement Act of 2015*, 3.
[75] Attorney General Eric Holder, *Memorandum for Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* Mar. 19, 2009, cited in *FOIA Improvement Act of 2015*, 3.
[76] *FOIA Improvement Act of 2016*, Public Law 130, U.S. Statutes at Large 539, (June 30, 2016).

effectively engage in citizen-led government oversight, generally through the intermediating influence of professional journalists.

A. Preventing Secret Law

FOIA, along with its cousin the Administrative Procedure Act, have been qualified successes in limiting the application of secret law. FOIA's affirmative disclosure requirements, including its requirements that agencies make public final agency opinions along with dissenting and concurring opinions, provides crucial insight into what government is doing and what standards it is applying. However, it is an imperfect mechanism. Three factors continue to give rise to concerns about secret law.

First, FOIA contains exemptions for certain law enforcement and national security related activities and decisions. Government agencies utilize these authorities to shield not only specific actions, but also the operative rules and standards in matters that can plausibly be alleged to relate to national security decisions.

Second, there is concern that government officials misuse exemption 5, which protects government deliberations and attorney-client communications, to effectively conceal final agency actions. In theory, the deliberative process privilege does not apply to final agency actions. In practice, it can be difficult for agencies to identify a record memorializing a "final" decision, particularly for more informal actions that arise in the course of agency discussions. Moreover, many agencies adopt broad interpretations of the attorney-client privilege that allows them to shield what are effectively final statements of agency policy when those statements are drafted by agency counsel or the Department of Justice. For example, Office of Legal Counsel opinions are a longstanding point of contention between the Department of Justice and transparency advocates, with DOJ arguing that they are not "final agency actions" unless they are adopted by the requesting agency, even if their guidance is practically the last word on the subject.

Third, the growth of the regulatory state has meant many idiosyncratic policies or interpretations are effectively secret, even if they are technically available to the "public." In 1966, the year FOIA was adopted, the Code of Federal Regulations contained 43,118 pages.[77] In 2021, it was 188,321 pages. Similarly, in 1966, there were 16,850 pages in the *Federal Register*. By 1974, it had nearly tripled to 45,422 pages. In 2022, it was around 80,000 pages. And these are just the rules and policy statements that merit inclusion in the Code of Regulations and *Federal Register*—agencies produce many more reams of additional decisions, manuals, and other guidance documents that available in agency reading rooms or on agency websites. While this information is technically "available," the quantity is such that it is simply impossible for any one person to master much of it. The result is that even where agency law is not technically secret, it may practically be inaccessible to ordinary Americans.

The environment today is a drastic improvement over what it could be. There are some notable exceptions, particularly in the national security space, but in general, agency rules, interpretations, and enforcement decisions are publicly available if you know where to look. The

[77] *Reg Stats*, George Washington University. https://regulatorystudies.columbian.gwu.edu/reg-stats

problem is knowing where to look, as well as addressing the holdouts, particularly around national security rules and agency legal interpretations.

Measured against the goal of preventing the rise of secret law, FOIA is a qualified success—much of the information is technically available but falls short of the practical goal of ensuring Americans have actual knowledge of the rules intended to govern their conduct.

B. Allowing Citizen Oversight

FOIA's track record on facilitating citizen oversight has been more checkered.

i. Agencies Do Not Prioritize FOIA

In adopting the Electronic Freedom of Information Act Amendment, Congress noted a "lack of interest in agency disclosure."[78] As recent testimony from the Director of the Office of Government Information Services makes clear, this criticism remains valid. In response to questions for the record submitted by Senator Patrick Leahy, Director Alina Semo stated "[w]e need to recognize that federal agencies believe that their primary mission is not to collect, process, and respond to FOIA and Privacy Act requests. . . . Against this backdrop . . . FOIA staffing typically comes last, sometimes as an afterthought, with whatever staffing is not otherwise diverted to the agency's primary mission."[79]

Moreover, the accountability mechanisms that Congress created to try to force agencies to prioritize FOIA requests are largely dead letters. In 1982, then-Professor Antonin Scalia expressed concern about the imposition of sanctions on individual federal employees for failing to abide by FOIA, stating "[i]t is . . . rare that a federal official *must* be subject to a disciplinary investigation—even for malicious baby snatching under color of law, much less mere negligence. But if he should happen to trifle with an [sic] FOIA request, stand back!."[80] He need not have worried; "sanctions for improper withholding are virtually never applied,"[81] with one study finding only one instance of a court invoking the sanctions provision between 1974 and 1996.[82]

In some ways, this state of affairs is understandable. After all, no one wants the Department of Defense to be unprepared to respond to an international crisis because it was too busy responding to a records request. But the net effect of deprioritizing FOIA and defanging any efforts at mandating accountability is that agencies continue to routinely fail to respond to a Congressional priority, in part because they know they can do so with no real consequences, particularly from the courts.

---

[78] *Electronic Freedom of Information Act of 1996*, 15-16.
[79] *Responses to Questions for the Record—Alina M. Semo, Director, Office of Government Information Services*, Office of Government Information Services.
https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%20-%20Semo%20-%202022-03-29.pdf.
[80] Antonin Scalia, The Freedom of Information Has No Clothes, AEI Journal on Government and Society, Mar-Apr. 1982, 17. https://www.cato.org/sites/cato.org/files/serials/files/regulation/1982/3/v6n2-3.pdf.
[81] David E. Pozen, "Freedom of Information Beyond the Freedom of Information Act," *University of Pennsylvania Law Review,* 165, no. 1097 (2017), 1099.
[82] Paul M. Winters, "*Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974*," *Georgetown Law Journal,* 84, no. 617 (1996), 618.

ii. FOIA Responses are Slow and Getting Slower

One of the biggest problems with FOIA today is that FOIA responses are slow and seem to be getting slower at all levels of the FOIA process. As the history detailed above illustrates, this is hardly a new concern; nearly every effort to amend FOIA notes concerns that agencies are taking too long and dragging their feet in responding to FOIA requests. Nevertheless, the problem does appear to be getting worse, at least relative to recent history.

In general, FOIA requests are supposed to be processed within 20 days. Agencies may take an additional 10 days for "unusual circumstances." The Department of Justice reports that in FY2022, agencies generally are not coming close to meeting their statutory obligations. The average processing time for "simple" requests was 40.8 days—more than twice the statutory maximum.[83] Moreover, Department of Justice data indicates that response times are steadily getting worse, with response times for simple requests up from a 10-year low of 20.51 days in FY2014. This hard data is supported by anecdotal reports that "[i]t is not unusual for FOIA requesters to be told that the search for records responsive to their FOIA will not even be initiated until more than a year after the request was submitted, and several agencies have been giving requesters estimated dates for the completion of their requests that are several years in the future."[84]

Perhaps unsurprisingly, as response times have lagged, the number of backlogged FOIA requests has increased by nearly 35% from FY2021 to FY2022.[85] This backlog is not evenly distributed. Five agencies—the Department of Homeland Security, the Department of Defense, the Department of State, the Department of Justice, and the Department of Health and Human Services—account for 80% of backlogged requests.[86] Four out of five of these agencies also receive the most FOIA requests.[87]

The consequences of these delays arise in litigation. There is a perception among requesters, that is supported by language from the Government Accountability Office, that agencies "prioritize work on responses in litigation."[88] A 2019 study found that the number of lawsuits challenging agency response to FOIA requests was "relatively small" and did "not

---

[83] *Summary of Annual FOIA Reports for Fiscal Year 2022,* Department of Justice*,* 12. https://www.justice.gov/oip/page/file/1581856/download.

[84] *The Increase in FOIA Lawsuits Isn't the Problem—It's Agencies Underfunding their Transparency Obligations*, *American Oversight*, Mar. 17, 2020. https://www.americanoversight.org/the-increase-in-foia-lawsuits-isnt-the-problem-its-agencies-underfunding-their-transparency-obligations.

[85] *Summary of Annual FOIA Reports for Fiscal Year 2022,* 9.

[86] Ibid, 10. Interestingly, despite emphasizing its role as the only agency "whose very 'mission is to provide public access to Federal government records in [its] custody and control,'" NARA has the sixth largest FOIA backlog in the federal government. *Responses to Questions for the Record—Alina M. Semo*.

[87] Ibid, 3, 5. The exceptions are the Department of State, which has the third largest backlog, and the Department of Veterans Affairs, which has the 16th largest backlog while of processing the fifth most requests.

[88] James R. McTigue, Jr., "*GAO-22-105845: Freedom of Information Act: Selected Agencies Adapted to COVID-19 Challenges but Actions Needed to Reduce Backlogs," Government Accountability Office*, Mar. 29, 2022, 10. https://www.gao.gov/assets/gao-22-105040.pdf.

materially change[]" between 2015 and 2019.[89] In contrast, "suits filed when agencies failed to respond to FOIA requesters have skyrocketed" from over 80 in 2015 to over 180 in 2019.[90] Even as the number of delay suits increased, requesters actually waited *longer* to file a complaint: "requesters actually waited an average of over 30 days longer before filing suit in 2019 than they had in 2015."[91]

Moreover, there has been a "dramatic rise in pending FOIA cases" due in part to cases taking longer to resolve.[92] Some commenters have suggested that the increase in time to resolve cases is due in part to the shifting nature of FOIA cases themselves, with a higher portion of cases stemming from the agency's failure to respond rather than challenges to the agency's substantive response.[93] Anecdotal evidence also suggests that agencies are pushing for slower processing schedules once cases arrive in litigation, with some agencies pushing to process 300 pages of responsive materials per month.

iii. Agency FOIA Offices are Not Well Suited to the Task at Hand

Agency FOIA offices are not well suited to the task at hand. FOIA only requires that requesters "reasonably describe" the records sought. This standard recognizes that requesters are often at a disadvantage—they often do not know which specific employees worked on a matter, how an agency classifies its own documents, or what terminology the agency may use to describe specific projects[94]—and places the burden on the agency to be reasonably familiar with its own work.

In many agencies, this is a legal fiction. In the words of the FOIA Searches Working Group of the Technology Committee of the Chief FOIA Officers Council, "there is a significant gap in the public's understanding of agencies' ability to search their electronic archives and databases."[95]

---

[89] FOIA Project Staff, "FOIA Suits Rise Because Agencies Don't Respond Even as Requesters Wait Longer to File Suit," *The FOIA Project*, Dec. 15, 2019. https://foiaproject.org/2019/12/15/foia-suits-rise-because-agencies-dont-respond-even-as-requesters-wait-longer-to-file-suit/.

[90] Ibid.

[91] Ibid.

[92] FOIA Project Staff, "FOIA Lawsuits are Taking Longer to Resolve," *The FOIA Project*, Jan. 23, 2020. https://foiaproject.org/2020/01/23/lawsuits-annual-2019/.

[93] "Why are court cases taking longer to resolve? Increasingly FOIA suits are being filed because agencies aren't responding to FOIA requests in the first place, even though requesters are waiting longer before heading to court." Ibid.

[94] "FOIA requesters are frequently in no position to know how an agency classifies its documents or what terminology the agency might have used – that is often why they are making the request in the first place." *Gun Owners of America v. Federal Bureau of Investigation*¸ Case No. 21-1601, 2022 WL 856388, at *6 (D.D.C. Mar. 23, 2022). U.S. Congress, Senate Committee on the Judiciary, 93d Cong., 2d Ses., Report No. 93-854, May 16, 1974, 10. https://nsarchive2.gwu.edu/nsa/foialeghistory/S.%20Rep.%20No.%2093-854%20(May%2016,%201974).pdf, quoted by *Owners of America v. Federal Bureau of Investigation*, *6. "As the Senate Report accompanying the bill enacting the reasonable description requirement admonished, '[a]gencies should . . . keep in mind . . . that their superior knowledge of the contents to their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records."

[95] "FOIA Searches: Key Challenges and Findings," *National Archives*, Sept. 29, 2021. https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council/tech-comm-foia-searches-challenges-09-29-2021.

Depending on how an agency structures its FOIA office, the people leading the search for responsive materials may have little more insight into agency operations than requesters.

Instead, FOIA offices often lean heavily on blind electronic searches. As the FOIA Searches Working Group notes, most federal agencies lack the technological capacity to "perform a 'Google-like' search of their IT systems and databases."[96] Instead, agency FOIA offices rely on keyword and Boolean searches that are dependent on requesters or agencies identifying search terms and combinations that will appear in responsive records. In addition, "[t]here are sometimes dozens of IT systems that need to be searched to find records" at a given agency,[97] which means that many agencies are unable to conduct a single agency-wide search for responsive records.[98]

The result is that the tail is wagging the dog on FOIA requests. Agencies frequently are trying to fit the square peg of FOIA requests that comply with the statute into the round hole of agency search processes, often by seeking a level of specificity and additional information from requesters that is not supported by the law. For example, some agencies, such as the Centers for Disease Control, have asked requesters to provide the specific email addresses to be searched before conducting a search for responsive records,[99] while others have asked for domain names for communications with outside parties.

The FOIA Searches Working Group claims "[d]ebunking this myth [that agencies can conduct Google-like searches] has been an important discussion topic for this group."[100] This reflects an attitude that gets the relationship between requesters and agencies backwards. Rather than developing technological solutions that are aimed at meeting statutory requirements, agencies push requesters to modify their requests to comport with the agency's search capabilities. This runs directly counter to the idea behind the 1974 amendments of making it easier for requesters to access records without knowing the specific title or document number of an agency record, and violates the basic precept that agencies are presumed to be reasonably familiar with their own operations.

The keyword-centric approach to searches also has practical consequences that exacerbate existing problems with FOIA. In many cases it is difficult to tailor keyword searches to find just the requested records, particularly if a requester or FOIA office does not know the specific nomenclature of the agency. In order to avoid allegations that a search is too narrow, agencies often use broader keywords that return a large volume of materials, much of which is not actually responsive to the request. Sifting through this large volume of "potentially responsive" material likely contributes to processing delays and agency backlogs.

---

[96] Ibid.
[97] Ibid.
[98] "At least some agencies continue to assert an inability to conduct agency-wide searches of electronic records." Anne Weismann, "The FOIA is Broken, But is it Beyond Repair?", *Citizens for Responsibility and Ethics in Washington*, June 30, 2020, accessed June 13, 2023, https://www.citizensforethics.org/reports-investigations/crew-investigations/the-foia-is-broken-but-is-it-beyond-repair/.
[99] Ibid.
[100] *FOIA Searches: Key Challenges and Findings*.

iv. Agencies Lack Appropriate Technology to Review Large Volumes of Potentially Responsive Materials

Technological problems do not end after a search has been conducted. Many agencies do not have e-discovery tools that can facilitate review of large volumes of potentially responsive records.[101] This is particularly problematic when the use of keyword searches intersects with email. A single search term will often identify the same email in each inbox that is searched. In private practice, law firms will often use e-discovery software that will "de-duplicate" responsive records, making it so that individuals do not have to review multiple copies of the same records. Many agencies lack access to such software, exponentially increasing the burden on the agency to review multiple copies of the same record, particularly when a single record can be hundreds of pages long.

v. Section 508 of the Rehabilitation Act is Being Used to Hamper Affirmative Disclosure

There is an unforeseen tension between affirmative disclosure and Section 508 of the Rehabilitation Act.

Section 508 of the Rehabilitation Act requires federal agencies to ensure that electronic information and data is accessible to members of the public with disabilities.[102] For example, "[i]n order to be Section 508-compliant, the text must be machine-readable and any charts, graphs, pictures, or tables in the document must be tagged and described in a way that enables the screen reader to accurately describe a document to a reader with visual impairments."[103] On its face, Section 508 is designed to enhance transparency, making it so that all Americans, regardless of disability, can access government information.

The problem is that Section 508 creates barriers to making government records public on agency websites. For example, several common file types, such as PDFs and TIFFs, "strip existing metadata and other features that make those records accessible and Section 508-compliant."[104] Making records Section 508 compliant is a potentially time-consuming process that often has to be done manually by agency staff.[105]

There is a potential "out" for agencies—Section 508 creates an exception when compliance would cause an "undue burden" on the agency. However, the Director of the Office of Government Information Services reported only "one agency who received support from their legal staff to invoke the 'undue burden' clause."[106]

---

[101] Semo, *Responses to Questions for the Record.*
[102] Electronic and Information Technology, 29 U.S.C. § 794d (2000).
[103] Semo, *Responses to Questions for the Record*.
[104] Ibid.
[105] "Currently, in order to make redacted records 508 compliant, agency personnel must *manually* prepare the records for posting after FOIA processing is complete." *Ibid.* (emphasis in the original).
[106] Ibid.

vi. The Pool of People Who Use FOIA is Different than the Ideals Invoked by its Noble Goal

From the beginning, the pool of people who utilize FOIA has been different from the ideal evoked by its noble goals. In 1982, Antonin Scalia criticized the application of FOIA in practice, noting that FOIA "w[as] promoted as a boon to the press, the public interest group, the little guy; [it] h[as] been used most frequently by corporate lawyers."[107] That remains effectively true today. A 2017 report found that 39% of FOIA requests are filed by businesses, while law firms file 16.7% of requests.[108] Notwithstanding concerns expressed some that nonprofit organizations disproportionately engage in FOIA litigation,[109] nonprofit organizations only comprise 7.5% of FOIA requesters.[110] "News media," which effectively led the charge for the creation of FOIA through American Society of Newspaper Editors, make up 7.6% of requesters.[111]

A significant driver of this phenomena is the use of FOIA for discovery in administrative adjudications, particularly in the immigration context.

Two agencies receive more FOIA requests than every other agency combined and comprise the majority of the backlog in processing FOIA requests: the Department of Homeland Security and the Department of Justice.[112] In FY2022, the Department of Homeland Security alone received 58% of all FOIA requests. "Most" requests received by DHS "involve immigration records and are scatted within multiple component entities of DHS," with the largest category being "Alien Files" that are used "(1) to apply for immigration benefits and (2) support an alien in a pending immigration proceeding, such as removal proceedings, release from detention, or bond hearings."[113] For the Department of Justice, "DOJ's Executive Office for Immigration Review (EOIR) receives a substantial volume of first-person FOIA requests in connection with immigration proceedings," including 48,000 to 60,000 first-person FOIA requests seeking records of proceedings (ROP) of non-citizens before Immigration Judges" in connection with removal proceedings.[114]

---

[107] Scalia, *The Freedom of Information Has No Clothes,* 16.
[108] Cory Schouten, "Who Files the Most FOIA Requests? It's Not Who You Think," *Columbia Journalism Review* Mar. 17, 2017, accessed June 13, 2023, https://www.cjr.org/analysis/foia-report-media-journalists-business-mapper.php; Max Galka, *Who Uses FOIA and Why*, FOIAMapper.com, accessed June 13, 2023, https://www.archives.gov/files/who-uses-foia-and-why.pdf.
[109] *American Center for Law and Justice v. U.S. Department of Homeland Security*, 573 F. Supp. 3d 78, 83 (D.D.C. 2021) "Nonprofit FOIA plaintiffs create much of that backlog" of FOIA cases pending before the D.C. District Court." Ibid.
[110] Schouten, *Who Files the Most FOIA Requests?*; Galka, *Who Uses FOIA and Why*. This analysis distinguishes nonprofit organizations from universities, which may also be organized as nonprofit entities.
[111] Schouten, *Who Files the Most FOIA Requests?*; Galka, *Who Uses FOIA and Why*.
[112] *Summary of Annual FOIA Reports for Fiscal Year 2022*.
[113] Alina M. Semo, "Report to the Archivist of the United States: Freedom of Information Act Federal Advisory Committee 2020-2022*" Committee Term Final Report and Recommendation,* June 9, 2022, 24-25. https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/foia-advisory-committee-report-recommendations.final_.draft_.6.8.2022.docx.pdf.
[114] Ibid, 22-23.

IV. Conclusion

Because, through the sixty-year history of FOIA, Congress has been unable to achieve the true objectives of the law, perhaps it is time to rethink the foundations of the statute. Some commonsense reform, which focuses on *both* transparency and reducing the burden upon the federal agencies, is warranted. Modernizing the law to account for modern technology and agency growth would be beneficial to all parties involved. Council to Modernize Governance's next policy paper will focus upon such commonsense solutions.