

“LONGSTANDING, SYSTEMIC WEAKNESSES”: HILLARY  
CLINTON’S EMAILS, FOIA’S DEFECTS AND AFFIRMATIVE  
DISCLOSURE

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Abstract

The Hillary Clinton email fiasco demonstrated alarming failures in the procedures of the Freedom of Information Act (FOIA); derelictions in archive integrity and adequacy of search that an internal report identified as “longstanding, systemic weaknesses” in the FOIA. These procedural gaps pose dire consequences for the future of the FOIA, where requesters query incomplete archives and agencies intentionally desert their search obligations. The abandonment of these duties necessitates that the federal government look toward new mechanisms for access to government records and adopt strong affirmative disclosure principles. There has been little scholarship on the twin failures of archive integrity and adequacy of search, but support for increased instances of affirmative disclosure is building. This Article progresses the argument by presenting the country’s enduring, unheralded commitment to these principles and makes recommendations on how to further adopt affirmative disclosure measures.

By exploring the repeated violations of records management laws and the judicial opinions on the application of these laws, this Article documents how the FOIA has been undermined for decades, including deliberate attempts by public officials, including Henry Kissinger and Oliver North, to destroy or remove from custody records subject to the FOIA. Adequacy of search has been a persistent problem in the present requester-release system, as data on judicial appeals attest. These elements form the backbone of the FOIA, and agencies abrogation of these duties requires new ideas in providing access to government information. This Article proposes growing the government commitment to an informed public—a commitment that dates back the creation of the Federal Register and the 1813 establishment of the Federal Depository Library System—by increasing categories of proactively disclosed records and information, enforcing statutory provisions on publication of records and data hierarchies, live registries of existing records and implementation of a stronger ombuds’ role. These measures would help remedy agency reluctance to the present requester-release system and move closer to the presumption of openness enshrined in the 1966 passage of the FOIA.

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#### INTRODUCTION

The email fiasco that plagued Hillary Clinton's 2016 presidential campaign originally came to light due to mishandled Freedom of Information Act (FOIA) requests and would ultimately uncover malfeasance in State Department FOIA procedures. The scandal would prove to have serious political implications, but it also exposed unsettling lapses in an agency's FOIA administration. An internal investigation into the practices was largely lost in the media circus of the 2016 presidential campaign, but resulting reports documented a deliberate circumvention of records management requirements and an intentional dereliction of search duties.<sup>1</sup> One of the report's concise conclusions determined that

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1. U.S. Dep't of State, Office of Inspector Gen., Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary 14 (Jan. 2016), <https://www.stateoig.gov/system/files/esp-16-01.pdf> [hereinafter Evaluation of FOIA Processes]; U.S. Dep't of State, Office of Inspector Gen., Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements 42 (May 2016), <https://www.stateoig.gov/system/files/esp-16-03.pdf> [hereinafter Evaluation of Email Records].

the department's records management and search practices demonstrated "longstanding, systemic weaknesses."<sup>2</sup>

These findings are deeply disturbing, as archive integrity and adequacy of search serve as the foundation of the FOIA system. Without secure, trustworthy records management and forthright search procedures, FOIA requests can become an exercise in futility. Requesters rely on faithful adherence to the law, yet invariably remain at a disadvantage due to the statute's requester-release arrangement and adversarial nature. Ari Schwartz, former senior director of the National Security Council, suggested the FOIA system is tilted in favor of the agency, declaring a "requester's paradox"<sup>3</sup> exists. Those querying agency archives rarely know definitively whether the sought record exists and as a result are forced to trust agencies to honestly and legally execute their statutory duties, despite ample evidence that they will act to the contrary.<sup>4</sup> Judicial recourse, particularly with regards to records of national security or law enforcement interests, has shown to be little respite, demonstrating a structural preference for agency secrecy.<sup>5</sup>

In January 2016, the State Department produced an internal investigation into the Clinton email incident.<sup>6</sup> The candid autopsy found that two separate FOIA requests—one from the Associated Press (AP) and one from Citizens for Responsibility and Ethics in Washington (CREW)—had set in motion a chain of events that would outlast the 2016 presidential election. In March 2010 and again in the summer of 2013,

2. Evaluation of Email Records, *supra* note 1 ("Longstanding, systemic weaknesses related to electronic records and communications have existed within the Office of the Secretary that go well beyond the tenure of any one Secretary of State.")

3. *Information Policy in the 21st Century: A Review of the Freedom of Information Act: Hearing Before the Subcomm. on Gov't Mgmt., Fin., and Accountability of the H. Comm. on Gov't Reform*, 109th Cong. 139–40 (2005) (statement of Ari Schwartz, Associate Director, Center for Democracy & Technology) (referring to "the 'requester's paradox' — 'how can I know to request a specific document, when I don't even know that the document exists?'").

4. See, e.g., STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 39 (Comm. Print 2016), <https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf> (cataloging the failures of the FOIA); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-365, FREEDOM OF INFORMATION ACT: AGENCIES ARE IMPLEMENTING REQUIREMENTS, BUT ADDITIONAL ACTIONS ARE NEEDED 47 (2018), <https://www.gao.gov/products/GAO-18-365> (concluding that only five of eighteen surveyed federal agencies fully implemented the changes required by the 2016 FOIA Improvement Act on time).

5. See, e.g., David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L. J. 628, 672 (2005) (emphasizing judicial deference to agency discretion when confronted with national security claims for nondisclosure); Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 479 (2006) (documenting the post-9/11 evolution of national security secrecy); Christina E. Wells, "National Security" Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1198 (2004).

6. Evaluation of FOIA Processes, *supra* note 1.

the AP submitted FOIA requests seeking records related to Clinton's correspondence with aides, her calendars and emails about the Osama bin Laden raid and NSA surveillance practices.<sup>7</sup> Neither of the requests yielded a response from the State Department.<sup>8</sup> A suspicious CREW submitted a December 2012 FOIA request for records "sufficient to show the number of email accounts of, or associated with, Secretary Hillary Rodham Clinton, and the extent to which those email accounts are identifiable as those of or associated with Secretary Clinton."<sup>9</sup> The report found that five months later, the Office of Information Programs and Services—the State Department bureau responsible for FOIA compliance—replied that there were no responsive records found.

It was a third request that would prompt the flood of media coverage and public interest. Judicial Watch filed a FOIA request very similar to that of CREW seeking information on any State Department staff member not using a state.gov email address in conducting official department business.<sup>10</sup> The State Department would again deny the existence of such accounts, and with no concrete evidence to compel disclosure, a District Court judge would find in favor of the government agency.<sup>11</sup> Judicial Watch then filed another request for the processing notes from the original CREW FOIA request and were again denied and again appealed in court to no avail.<sup>12</sup> The State Department continued to deny a private email address was being used, and the District Court of D.C. repeatedly affirmed these claims despite Clinton acknowledging two years prior in a July 2014 House Select Committee on Benghazi that she had been emailing with a private account.<sup>13</sup>

The internal investigation would document dozens of department staffers regularly exchanged emails with Secretary Clinton's personal email account, which she used for official business.<sup>14</sup> Secretary Clinton's then-chief of staff was informed of the CREW request, but the report concluded that it was unlikely anybody outside the FOIA office ever considered, participated in, or reviewed the FOIA request or response

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7. Steve Peoples, *AP Sues State Department, Seeking Access to Clinton Records*, ASSOCIATED PRESS (Mar. 11, 2015), <https://www.ap.org/ap-in-the-news/2015/ap-sues-state-department-seeking-access-to-clinton-records>.

8. Glenn Thrush & Gabriel Debenedetti, *Clinton: I Used Private Email Account for 'Convenience'*, POLITICO (last updated Mar. 10, 2015, 6:49 PM), <http://www.politico.com/story/2015/03/hillary-clinton-email-press-conference-115947>.

9. Evaluation of FOIA Processes, *supra* note 1.

10. *Judicial Watch, Inc. v. Dep't of State*, 177 F. Supp. 3d 450, 456 (D.D.C. 2016).

11. *Id.*

12. *Judicial Watch, Inc. v. U.S. Dep't of State*, 306 F. Supp. 3d 97, 104 (D.D.C. 2018).

13. Robert O'Harrow, Jr., *How Clinton's Email Scandal Took Root*, WASH. POST (Mar. 27, 2016), [https://www.washingtonpost.com/investigations/how-clintons-email-scandal-took-root/2016/03/27/ce301168-e162-11e5-846c-10191d1fc4ec\\_story.html?utm\\_term=.2076e0723647](https://www.washingtonpost.com/investigations/how-clintons-email-scandal-took-root/2016/03/27/ce301168-e162-11e5-846c-10191d1fc4ec_story.html?utm_term=.2076e0723647).

14. Evaluation of FOIA Processes, *supra* note 1, at 15.

thereafter. Alarming, the inspector general found blatant disregard for search procedures: “Furthermore, it does not appear that [the Office of the Secretary and Executive Secretariat] searched any email records, even though the request clearly encompassed emails.”<sup>15</sup> According to the inspector general’s report, this was not an uncommon chain of events. In one of the primary findings, the report observed that State Department offices had chronically failed to search email records,<sup>16</sup> despite State-specific FOIA guidelines from 2010 explicitly instructing FOIA personnel to do so.<sup>17</sup>

Not only did the internal investigation demonstrate clear negligence by Clinton knowingly evading her duty to abide by records management rules—all of her emails were transmitted via a private email account, she never set up a State Department account<sup>18</sup>—but the department repeatedly provided intentionally misleading FOIA responses. In the review of State Department practices, the inspector general also found that Clinton was not the first Secretary of State to use a private email address. Secretary Colin Powell also conducted government work with a personal email account, while Secretaries Madeleine Albright and Condoleezza Rice claimed to not have used email while serving in the role.<sup>19</sup> John Kerry is thought to be the first Secretary of State to rely on a government email account.<sup>20</sup>

As use of personal email accounts for government business became a subject of national interest, it became clear how common the practice was. A review of the FBI’s investigation into Clinton’s use of a private server showed the agency was guilty of breaking the same policy.<sup>21</sup> An inspector general’s report on FBI operations documented that use of

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15. *Id.*

16. *Id.* at 8–9 (“[Office of the Secretary and Executive Secretariat] rarely searched electronic email accounts prior to 2011 and still does not consistently search these accounts, even when relevant records are likely to be uncovered through such a search.” The offices did not search email accounts even when a request sought all “correspondence.”).

17. U.S. Dep’t of State, FOIA Guidance for State Department Employees 8 (2010) (“Unless otherwise noted in a given request, offices should conduct a search for records in any form, including paper records, email (including email in personal folders and attachments to email), and other electronic records on servers, on workstations, or in Department databases.”).

18. Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html>.

19. O’Harrow, *supra* note 13.

20. Lisa Rein, *Clinton Isn’t First Senior Government Leader to Use Personal E-Mail for Official Business*, WASH. POST (Mar. 3, 2015), [https://www.washingtonpost.com/politics/clintons-experience-not-unique/2015/03/03/cf59747a-c1e5-11e4-9ec2-b418f57a4a99\\_story.html?utm\\_term=.467518a2f7a3](https://www.washingtonpost.com/politics/clintons-experience-not-unique/2015/03/03/cf59747a-c1e5-11e4-9ec2-b418f57a4a99_story.html?utm_term=.467518a2f7a3).

21. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 424–28 (June 2018), <https://www.justice.gov/file/1071991/download>.

personal email accounts for government matters was a common practice among heads of the FBI, including former Director James Comey.<sup>22</sup> Despite campaigning on the impropriety of Clinton's use of a private server, news reports showed President Trump's closest aides also used private email accounts for government work, including Chief of Staff Reince Priebus, chief strategist Steve Bannon, Stephen Miller, Jared Kushner and Gary Cohn.<sup>23</sup> Similarly, the executive branch was rife with officials using secret email addresses during President Barack Obama's tenure.<sup>24</sup>

The prevalence of private email usage in government operations is nothing short of disastrous for the FOIA. Private email records are not *per se* public records and require an effort on the part of a public official to be deposited into government records repositories subject to the FOIA. Incomplete archives result in a failed access mechanism, returning "no responsive records" closures even when the public has knowledge of the records, as demonstrated with Hillary Clinton's emails. Efficacy of the requester-release system is predicated on stable, trustworthy archives of government records and good faith efforts in searching these archives. The FOIA is an adversarial system,<sup>25</sup> whereby requesters are at an inherent information disadvantage. The requester's paradox acknowledges the problematic nature of blindly requesting documents from recalcitrant agencies. Without archive integrity and adequacy of search, requesters are placed at an unassailable disadvantage, effectively allowing agencies to pick and choose which records to release.

This Article documents the perilous implications of what was learned in the Clinton email scandal and how assumptions of archive integrity and adequacy of search—the very backbone of the FOIA—are likely significantly less sound than previously believed. Part I explores the legislative history and theoretical underpinnings that highlight

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22. *Id.*

23. Matt Apuzzo & Maggie Haberman, *At Least 6 White House Advisers Used Private Email Accounts*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/politics/private-email-trump-kushner-bannon.html>.

24. See Julian Hattem, *Former EPA Chief under Fire for New Batch of 'Richard Windsor' Emails*, THE HILL (May 1, 2013, 6:08 PM), <http://thehill.com/regulation/energy-environment/297255-former-epa-chief-under-fire-for-new-batch-of-richard-windsor-emails> (reporting EPA Director Lisa Jackson used alias email accounts to communicate with non-government figures about government business); see also *Obama Appointees Using Secret Email Accounts*, CBS NEWS (June 4, 2013, 8:35 AM), <https://www.cbsnews.com/news/ap-obama-appointees-using-secret-email-accounts/> (documenting non-public email addresses being used in the departments of Labor, the Interior and Health and Human Services, including by Secretary of Health and Human Services Kathleen Sebelius).

25. See Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 636 (1975) (acknowledging the general adversarial relationship between the press and government secrecy, and observing the press cannot be guaranteed transparency via the FOIA due to the government's own self-interest).

uncertainty in federal agencies' ability and interest in executing these requisite duties in good faith. Part II examines the statutory provisions and judicial interpretations of archive integrity and adequacy of search, demonstrating the unsteady foundation of federal records management law and court opinion ambivalent to breaches in archive integrity. Part III recommends a move toward an access regime rooted in affirmative disclosure, which would implement expectations that would make the processes of archiving and searching more transparent to the public. The federal government has long been invested in the principles of affirmative disclosure.<sup>26</sup> The manuscript calls on catalyzing the insights and outrage spurred by the Clinton emails fiasco to move public access closer to the grand ambitions of those that originally agitated for, and won, passage of the FOIA.

## I. BACKGROUND

The FOIA exists as an amendment to the 1946 Administrative Procedure Act (APA),<sup>27</sup> a law intended to “bring uniformity and order out of the chaos” of President Franklin Roosevelt’s New Deal expansion of the federal government.<sup>28</sup> There was a great deal of enthusiasm surrounding passage of the APA. The president of the American Bar Association described it as possibly the most consequential administrative statute since the Judiciary Act of 1789.<sup>29</sup> The law was wide-ranging in its subject matter but explicitly sought to address a lack of access to government information.<sup>30</sup> Despite its efforts, the APA had

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26. “Affirmative disclosure” and “proactive disclosure” are often used interchangeably. Both represent information released without a request, but affirmative disclosure generally describes information required to be posted, while proactive disclosure is thought to refer to posting information without a legal obligation. For the purposes of this manuscript, affirmative disclosure is the preferred term and denotes a legal duty to release information without a request. See U.S. DEP’T OF JUSTICE, *Proactive Disclosures*, in DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 9, 9–12, 18–19 (2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf>; Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009), <https://www.ims.gov/sites/default/files/presidentmemorandum620.pdf>.

27. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946); Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 339–40 (1986).

28. Arthur T. Vanderbilt, *Foreword* to N.Y.U., *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES*, at v (George Warren ed., 1947).

29. See *The Federal “Administrative Procedure Act” Becomes Law*, 32 A.B.A. J. 377, 377 (1946) (statement of ABA President Willis Smith) (“The Administrative Procedure Act will be not only a means of promoting the administration of justice, but it will promote better public relations between the people and their government. For our day it is in many ways as important as the Judiciary Act of 1789 was in the founding of the Federal Government.”).

30. COMM. ON ADMIN. PROCEDURE, *ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES*, S. DOC. NO. 77-8, at 25–26 (1941) (“An important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its

“not yet succeeded in coping with the problems created by the growth of the agencies.”<sup>31</sup> In relatively short order, the APA garnered criticism.<sup>32</sup> By 1953, Harold Cross, a media lawyer and principle architect of the FOIA, identified the APA as deeply flawed, claiming “[c]omplaints of arbitrary, capricious, and oppressive action and usurpation of power by the host of administrative agencies were numerous.”<sup>33</sup> The language of the APA was deferential to agency secrecy, only requiring disclosure of government records “to persons properly and directly concerned.”<sup>34</sup> Agencies could withhold disclosure if “secrecy [was] in the public interest,”<sup>35</sup> if the sought records pertained “solely to the internal management of an agency,”<sup>36</sup> or nondisclosure was “otherwise required by statute.”<sup>37</sup> Agencies were also granted broad nondisclosure authority under a provision allowing information to “[be] held confidential for good cause found.”<sup>38</sup> Cross cited was a letter from the Library of Congress observing the law to have effectively granted agencies the ability “to assert the power to withhold practically all the information they do not see fit to disclose.”<sup>39</sup> The Records Act, referred to throughout this article as The Housekeeping Act,<sup>40</sup> passed in 1789, included a provision granting department heads sweeping power in determining “the custody, use and preservation of the records, papers and property appertaining to it.”<sup>41</sup> Prior to the 1935 Federal Register Act<sup>42</sup> and the APA, the Housekeeping Act was the prevailing standard in both archiving and access to agency records. Notably, the Housekeeping Act provided agencies with absolute control of any records of the agency’s creation or in the agency’s possession, from origination to disposal, and ceded no rights of access or inspection to any individual outside of the

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substance and procedure. . . . A primary legislative need, therefore, is a definite recognition, first, of the various kinds or forms of information which ought to be available and, second, of the authority and duty of agencies to issue such information.”).

31. Robert O. Blanchard, *The Moss Committee and a Federal Public Records Law (1955–1965)*, at 32 (1966) (unpublished Ph.D. dissertation, Syracuse University) (on file with Syracuse University Libraries).

32. See, e.g., Charles S. Rhyne, *The Administrative Procedure Act: Five-Year Review Finds Protections Eroded*, 37 A.B.A. J. 641, 641 (1951).

33. HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 223 (1953).

34. Administrative Procedure Act, Pub. L. No. 79-404, § 3(c), 60 Stat. 237, 238 (1946).

35. *Id.* § 3.

36. *Id.*

37. *Id.* § 3(c).

38. *Id.*

39. CROSS, *supra* note 33, at 228.

40. Records Act, ch. 14, 1 Stat. 68 (1789) (current version at 5 U.S.C. § 301 (2018)).

41. John J. Mitchell, *Government Secrecy in Theory and Practice: “Rules and Regulations” as an Autonomous Screen*, 58 COLUM. L. REV. 199, 199 (1958).

42. Federal Register Act, ch. 417, 49 Stat. 500 (1935).

agency. Cross suggested that with the Housekeeping Act in effect the only hopes for transparency were “official grace” and “non-legal considerations.”<sup>43</sup> The forces behind the FOIA, namely Rep. John Moss and, in this case, Sen. Thomas Hennings Jr., made the Housekeeping Act the first target of legislative activity. Congress sought to suture the Housekeeping Act loophole with the amendment of one sentence in 1958.<sup>44</sup>

#### A. Registering Agency Recalcitrance

The FOIA was thought to be a vast improvement over the APA and Housekeeping Act. Much of the FOIA’s allure was in its comparatively well-defined requester-release system. The law explicitly affords non-governmental parties a right to government records and provides remedies for aggrieved requesters. All individuals, citizen or not, are given the right to request inspection or copy of any existing executive department or agency record.<sup>45</sup> Significantly, FOIA empowered individuals by providing two avenues of recourse for dissatisfied requesters; one via internal administrative appeal<sup>46</sup> and another through federal court appeal.<sup>47</sup>

An important element of the FOIA is the “presumption of openness,” a principle assuming records are *prima facie* publicly available. This flipped the burden of proof, requiring agencies to demonstrate the necessity of nondisclosure. According to the statute, agency records can only be withheld when qualifying for one of nine exemptions.<sup>48</sup> Congress has been adamant that the FOIA is guided by the “presumption of openness” principle.<sup>49</sup> Federal courts have frequently recognized the

43. CROSS, *supra* note 33, at 218 (“In the present state of the law the people and their organs of information must trust primarily to official grace as affected by reason, courtesy, the impact of public opinion, and other non-legal considerations and, in the longer view, to remedial legislation by Congress. As of now, in the matter of right to inspect such records, the public and the press have but changed their kings.”).

44. Pub. L. No. 85-619, 72 Stat. 547 (1958) (“This section does not authorize withholding information from the public or limiting the availability of records to the public.”).

45. 5 U.S.C. § 552(a)(3)(A) (2018).

46. *Id.* § 552(a)(6)(A)(i)(III)(aa).

47. *Id.* § 552(a)(4)(B).

48. *Id.* § 552(b).

49. S. REP. NO. 89-813, at 3 (1965) (“[I]t is the purpose of the present bill to eliminate [APA language], to establish a general philosophy of full agency disclosure.”); S. REP. NO. 93-854, at 157–58 (1974) (“The [FOIA] . . . sets out the affirmative obligation of each agency of the federal government to make information available to the public. . . . Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate . . . the information should be withheld.”); H. REP. NO. 104-795, at 6 (1996) (“The FOIA establishes a

ideal.<sup>50</sup> President Barack Obama very publicly expressed his support for the notion,<sup>51</sup> and Congress codified the tenet in the 2016 FOIA amendments.<sup>52</sup>

After enactment of the FOIA, faith in the federal government was shaken by the events of the Pentagon Papers and Watergate. The FOIA was shown to be largely ineffective in *EPA v. Mink*,<sup>53</sup> and future Supreme Court Justice Antonin Scalia penned an article calling the FOIA “a relatively toothless beast.”<sup>54</sup> Congress looked to strengthen the FOIA, amending the statute in 1974 and in the process created the structure of the contemporary FOIA. To counteract agency reticence, the amendments included the possibility of punishment for individuals and agencies found to not be in compliance with the statute. Federal courts were given the authority to issue contempt citations to responsible FOIA personnel.<sup>55</sup> If the court determines agency personnel “acted arbitrarily or capriciously with respect to withholding,” they can order an investigation into the agency’s processing of the request and decide whether further disciplinary action is called for.<sup>56</sup> To further encourage use of the law, the court has the ability to assess the requester’s attorney fees and litigation costs to the government.<sup>57</sup> During the debates prior to the 1974 amendments, Sen. Bill Alexander recounted two failed FOIA requests of his own before declaring the new punitive measures would “put an end to the ridiculous delays, excuses, and bureaucratic runarounds

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presumptive right for the public to obtain identifiable, existing records of Federal departments and agencies.”); H. REP. NO. 110-45, at 2 (2007) (“This bill will restore the presumption of disclosure.”).

50. See *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976); *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 493–94 (1994).

51. Memorandum of January 21, 2009—Freedom of Information Act, 74 Fed. Reg. 4,683, 4,683 (Jan. 26, 2009) (“The [FOIA] should be administered with a clear presumption: in the face of doubt, openness prevails. . . . All agencies should adopt a presumption in favor of disclosure . . . . The presumption of disclosure should be applied to all decisions involving FOIA.”).

52. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016) (codified at 5 U.S.C. § 552(a)(8)(A)) (showing the “presumption of openness” provision is considered synonymous with the “foreseeable harm” standard: “An agency shall withhold information under this section only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b).”).

53. 410 U.S. 73 (1973) (holding a U.S. congresswoman could not acquire information on nuclear tests near her home state of Hawaii due to technicalities).

54. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 REG. 14, 15 (1982).

55. 5 U.S.C. § 552(a)(4)(G) (2018).

56. *Id.* § 552(a)(4)(F)(i).

57. *Id.* § 552(a)(4)(E)(i).

which have denied U.S. citizens their ‘right to know’ and made Americans a captive of their own Government.”<sup>58</sup>

Despite more than a decade of legislative consideration and the construction of a rhetorically robust statute, Congress remained highly cognizant of potential difficulties in forcing reluctant agencies into the transparency program. The law was in large part an act of partisanship. Early FOIA advocacy was seen as a Democratic project advanced by a Democratic Congress and contrary to the interests of Republican President Dwight Eisenhower.<sup>59</sup> Upon arrival of Democratic administrations, John Kennedy followed by Lyndon Johnson, Republicans, led by Illinois Rep. Donald Rumsfeld, began lining up support for the new law and ultimately voted in favor of passage while President Johnson was in the White House.<sup>60</sup> The considerable gestation period and political nature of the FOIA produced the original modern access to government information law, but it was also a law of factional opportunism and expediency.

Both in the build-up and early implementation of the law, resistance was found to be wide-spread and intransigent. Rumsfeld observed strong opposition during the hearings on the FOIA bill: “Every witness who testified for the executive branch was against it.”<sup>61</sup> Sam Archibald, staff director of the Special Subcommittee on Government information, a group singularly responsible for the FOIA, recalled the earliest efforts of the subcommittee found agency officials had “a less-than-friendly attitude toward open disclosure.”<sup>62</sup> Rep. Moss’s subcommittee conducted an enormous survey of agency information practices that guided their drafting efforts, and it surfaced “government’s negative attitude toward the people’s right to know about their government.”<sup>63</sup> Moss himself was well aware of the impending difficulty in enforcing execution of the transparency statute, and in an unusually frank conversation with Assistant Attorney General Norbert Schlei, Moss explained the law

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58. 120 CONG. REC. S10,001-09 (daily ed., Oct. 7, 1974) (statement of Sen. Alexander), reprinted in HOUSE COMM. ON GOVERNMENT OPERATIONS & SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT & AMENDMENTS OF 1974 SOURCE BOOK, at 388 (Joint Comm. Print 1975).

59. MICHAEL R. LEMOV, PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS 50 (2011) (depicting the Eisenhower White House’s battle between the press and the Democratic Congress’s effort to pass freedom of information laws).

60. *Id.* at 63 (“Republican support for a freedom-of-information bill, fueled by Rumsfeld and then Majority Leader Gerald Ford, was new. It was something that had been decidedly absent during the Eisenhower administration.”).

61. Robert O. Blanchard, The Moss Committee and a Federal Public Records Law, 1955–1965, 115 (1966) (unpublished Ph.D. dissertation, Syracuse University).

62. Samuel J. Archibald, *The Freedom of Information Act Revisited*, 39 PUB. ADMIN. REV. 311, 313 (1979).

63. *Id.* at 314.

needed to be strong and explicit due to the natural reluctance of the executive branch in relinquishing control of information.<sup>64</sup>

In the customary guidance for the new law, Attorney General Ramsey Clark emphasized the law's complexity, room for interpretation and possible reticence from agencies. He observed that FOIA's success would be subject to agencies' will: "Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government."<sup>65</sup> He stressed "records management; in seeking the adoption of better methods of search, retrieval, and copying; and in . . . documentary classification" would be vital to the successful realization of the law.<sup>66</sup> According to Clark, President Johnson identified "a change in Government policy and attitude" toward access to records as a key concern in signing the FOIA into law.<sup>67</sup>

After enactment, the agency reticence became apparent. In 1972, the Congressional Research Service published a study of the first four years of FOIA administration. Rep. William Moorhead announced the findings before the legislature, concluding, "[I]ts shortcomings are due more to resistance on the part of the huge bureaucracy than to compromises which are inherent in the legislative process which created the law."<sup>68</sup> One agency was said to "keep no records and apparently have no interest in implementing the law."<sup>69</sup> Another observer suggested agencies were not merely indifferent to the FOIA but hostile.<sup>70</sup> In the lead-up to the 1974 FOIA amendments, the Senate Judiciary Committee called "execution of this law by 'those who direct and administer our agencies of government' . . . substantially less than 'faithful.'"<sup>71</sup>

The FOIA lacked popularity from parties other than agencies subject to the new law. Harold Relyea, a FOIA scholar at the Congressional Research Service, claimed those in command never placed any internal

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64. GEORGE KENNEDY, *ADVOCATES OF OPENNESS: THE FREEDOM OF INFORMATION MOVEMENT 124-25* (1978) (stating "[m]any times information is controlled rigidly at very low echelons in government, and the only way we can change that is to impose some requirement under the law. . . . We cannot just continue to drift and rely on the good faith of people or the good judgment of people who, inherently when they are in a safe spot in government, do not want to start any controversy, and the easiest thing in the world is to sit on that information.").

65. Memorandum from Attorney Gen. Ramsey Clark for the Exec. Dep'ts & Agencies on the Pub. Info. Section of the Admin. Procedure Act (June 1967), <https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act>.

66. *Id.*

67. *Id.*

68. 92 CONG. REC. H9,949 (daily ed., Mar. 23, 1972) (statement of Rep. Moorhead).

69. *Id.* at 9,950.

70. Harold C. Relyea, *The Freedom of Information Act a Decade Later*, 39 PUB. ADMIN. REV. 310, 311 (1979).

71. SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *FREEDOM OF INFORMATION ACT SOURCE BOOK*, at 1 (Comm. Print 1974).

emphasis on FOIA implementation. He said agencies “failed to perceive any sense of priority or leadership on the part of the administration in meeting their responsibilities for executing the Act.”<sup>72</sup> Archibald suggested the news media’s desire for a new access to information law was overblown as well. There was a small coterie of especially vocal press organizations, namely the American Society of Newspaper Editors and Sigma Delta Chi, but most news outlets and veteran journalists had established the necessary connections, and a law threatened their exclusive access.<sup>73</sup>

In cataloging access statutes from across the country and assessing the national landscape regarding access to government information, Harold Cross suggested the general reluctance of government to disburse records and information to largely be vestiges of more autocratic, more secretive governments, suggesting the executive branch’s reticence was as much an act of inertia as anything.<sup>74</sup> Governments, dating back to monarchies, had never been forced to share information at the behest of constituencies and were uncomfortable ceding such power.

Cross emphasized the necessity of mandamus in compelling noncompliant public bodies to release appropriate records. He underscored examples of states where the right of inspection was theoretically absolute but fell well short in practice.<sup>75</sup> He also highlighted examples of state courts refusing to enforce access to records.<sup>76</sup> In delineating what is a public record, Cross surveyed existing state statutes, concluding there was rarely a mention, and certainly no consensus, what was to be kept, filed and retained. He suggested it would be the responsibility of courts to make such determinations and that these

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72. Relyea, *supra* note 70, at 310.

73. Samuel J. Archibald, *The Early Years of the Freedom of Information Act—1955 to 1974*, 26 PS: POL. SCI. & POL. 726, 728 (1993) (“[M]ost of the media managers early in the 1950s were little interested in the problem of government secrecy, and even those interested were shy about pushing legislation to overcome excessive secrecy . . . Many Washington correspondents were little interested in opening up government information. After all, they had their sources, and a law breaking loose government records might open their sources to competitors. And important members of Congress were even less interested in the public’s right to know. Congressional leaders and ranking committee members usually got the information they wanted from the executive branch. They had a lot of control over the purse strings and the policies of government; they were told what was going on.”).

74. CROSS, *supra* note 33, at 6 (“Quite largely, and to degrees which vary among the states, it is what it is today because of what it was on many yesterdays. It is in a condition of cultural lag—the captive of common law rules adopted when the courts, as part of the regalia of government, were concerned with the prerogatives of the king, his ministers and minions, rather than with the small affairs of his subjects; when there were few contacts between government and subject and still fewer which required or were susceptible of written records; when ritualistic adherence to legalism was an end in itself.”).

75. *Id.* at 7.

76. *Id.* at 8.

determinations consistently deferred to government secrecy.<sup>77</sup> Cross's 1953 study of the U.S. access to records landscape left him highly attuned to how power abuses and undermines strong statutes. He insisted on stable records custodianship, assuming all modern record-keeping included salaried custodial officers.<sup>78</sup> Cross called for the people's right to know to be recorded in detail and not to assume good faith.<sup>79</sup>

Scholars, including Cross, and Congress documented an acute awareness of the difficulties in implementing new government transparency measures, and, in particular, the improbability of imposing what were radical new access requirements on unwilling federal agencies. The movement that spawned the FOIA was founded in response to government reticence to releasing records and information. Yet, the government failed to address crucial elements of the requester release system they put in place. Much time was spent determining the number and nature of the exemptions, the appeals process and the administration of fees, but to date Congress has failed to adequately define "search," nor address archive expectations. As a result, the archive integrity and adequacy of search remain unsteady elements of the law.

#### B. *Failures of the FOIA & a Future of Affirmative Disclosure*

There has been a significant amount of research exploring the history, use and implementation of the FOIA; a great deal of it exemplary and illustrative. By and large, this scholarship has been critical in nature, finding fault in the execution of the law, disappointment in the judicial interpretations and prescriptive in conclusion. Much of the preceding scholarship has highlighted glaring issues and presaged legislative change. Generally, FOIA scholarship has also been relatively constrained to a narrow band of denial and delay issues and limited to remedying how agencies fail specific statutory provisions but rarely consider broader structural failures that have left the mechanism sclerotic and unreliable.

A disproportionate amount of the research has explored the use of statutory exemptions and common rationales for denials. Despite it accounting for less than one percent of all exemption claims in recent years, significant scholarly attention has been given to Exemption 1<sup>80</sup> and

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77. *Id.* at 39 ("[The laws'] stark brevity leaves wide scope for judicial construction.").

78. *Id.* at 6.

79. *Id.* at 42 ("The overall statutory picture indicates a need in many jurisdictions for definition for inspection purposes that is based on the right of the people to know what their public servants have actually done whether or not some particular statute requires the keeping, preservation, filing or what not of a written record of what they have done.").

80. See, e.g., Susan N. Mart & Tom Ginsburg, *[Dis-]Informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725 (2014); Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession or Publication of National*

the themes of national security and terror in nondisclosure.<sup>81</sup> Law enforcement and its corollary nondisclosure provision, Exemption 7, have garnered a tremendous amount of interest.<sup>82</sup> A considerable amount of scholarship has considered the exemptions for commercial information<sup>83</sup> and intra-agency communications.<sup>84</sup> Exemption 3, the malleable provision excluding a wide and varying range of records, has also garnered significant scholarly attention.<sup>85</sup> The conflict between privacy and government transparency and the myriad ways privacy has evolved as a nondisclosure justification has been an enduring point of interest among FOIA scholars.<sup>86</sup> Other persistent subjects have included

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*Security Information*, 13 COMM. L. & POL'Y 447 (2008); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

81. See, e.g., Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006); Lotte E. Feinberg, *FOIA, Federal Information Policy, and Information Availability in a Post-9/11 World*, 21 GOV. INFO. Q. 439 (2004).

82. See, e.g., Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(C) in Context*, 120 YALE L.J. 379 (2010); Richard A. Kaba, *Threshold Requirements for the FBI Under Exemption 7 of the Freedom of Information Act*, 86 MICHIGAN L. REV. 620 (1987); Orin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1 (1983); Larry P. Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U. L. REV. 37 (1975).

83. See, e.g., Samuel L. Zimmerman, *Understanding Confidentiality: Program Effectiveness and the Freedom of Information Act Exemption 4*, 53 WM. & MARY L. REV. 1087 (2011); Patrick Lightfoot, *Waiving Goodbye to Nondisclosure Under FOIA's Exemption 4: The Scope and Applicability of the Waiver Doctrine*, 61 CATH. U. L. REV. 807 (2011); Kathleen V. Radez, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 COLUM. BUS. L. REV. 632 (2010); Charles N. Davis, *A Dangerous Precedent: The Influence of Critical Mass III on Exemption 4 of the Federal Freedom of Information Act*, 5 COMM. L. & POL'Y 182 (2000); Russell B. Stevenson, *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207 (1982).

84. See, e.g., Amanda M. Swain, *Trentadue v. Integrity Committee: An Attempt to Reign in the Expansion of the Freedom of Information Act's 5th Exemption*, 61 OKLA. L. REV. 371 (2008); Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769 (2005).

85. See, e.g., Benjamin W. Cramer, *Old Love for New Snoops: How Exemption 3 of the Freedom of Information Act Enables an Irrebuttable Presumption of Surveillance Secrecy*, 23 COMM. L. & POL'Y 91 (2018); Cordell A. Johnston, *Greentree v. United States Customs Services: A Misinterpretation of the Relationship between FOIA Exemption 3 and the Privacy Act*, 63 B.U. L. REV. 507 (1983).

86. See, e.g., Martin E. Halstuk, Benjamin W. Cramer & Michael D. Todd, *Tipping the Scales: How the U.S. Supreme Court Eviscerated Freedom of Information in Favor of Privacy*, in TRANSPARENCY 2.0 16 (Charles N. Davis & David Cuillier eds., 3d ed., 2014); Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511 (2006); Charles N. Davis, *Electronic Access to Information and the Privacy Paradox*, 21 SOC. SCI. COMPUTER REV. 15 (2003); Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights versus FOIA Disclosure Policy: The "Uses and Effects"*

costs and resources of the FOIA,<sup>87</sup> judicial deference to secrecy,<sup>88</sup> problematic agencies like the CIA,<sup>89</sup> the advent of off-statute nondisclosure rationales,<sup>90</sup> the general impact of amendments<sup>91</sup> and a broad collection of general critiques and historical appraisals.<sup>92</sup>

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*Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 12 (2003); Matthew D. Bunker & Charles N. Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464 (1998); Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41 (1994).

87. See, e.g., Stephanie Alvarez-Jones, "Too Big to FOIA": How Agencies Avoid Compliance with the Freedom of Information Act, 39 CARDOZO L. REV. 1055 (2017); A.J. Wagner, *Essential or Extravagant: Considering FOIA Budgets, Costs and Fees*, 34 GOV. INFO. Q. 388 (2017); Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325 (1993).

88. See, e.g., Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MARYLAND L. REV. 1060 (2014); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013).

89. See, e.g., Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; Or, Perhaps Both,"* 44 DUKE L.J. 1183 (1995); Brent Filbert, *Freedom of Information Act: CIA v. Sims – The CIA Is Given Broad Powers to Withhold the Identities of Intelligence Sources*, 54 UMKC L. REV. 332 (1986); Gregory G. Brooker, *FOIA Exemption 3 and the CIA: An Approach to End the Confusion and Controversy*, 68 MINN. L. REV. 1231 (1983).

90. See, e.g., Michael D. Becker, *Piercing Glomar: Using the Freedom of Information Act and the Official Acknowledgement Doctrine to Keep Government Secrecy in Check*, 64 ADMIN. L. REV. 673 (2012); Nathan F. Wessler, "[We] Can Neither Confirm nor Deny the Existence or Nonexistence of Records Responsive to Your Request": *Reforming the Glomar Response Under FOIA*, 85 N.Y.U. L. REV. 1381 (2010); Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845 (2006); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005); Danae J. Atchison, *Reining in the Glomar Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219 (1993).

91. See, e.g., Martin E. Halstuk, *Speed Bumps on the Information Superhighway: A Study of Federal Agency Compliance with the Electronic Freedom of Information Act of 1996*, 5 COMM. L. & POL'Y, 423 (2000); Lotte E. Feinberg, *Managing the Freedom of Information Act and Federal Information Policy: The Reagan Years*, 6 GOV. INFO. Q. 345 (1989); Lotte E. Feinberg, *Managing the Freedom of Information Act and Federal Information Policy*, 46 PUB. ADMIN. REV. 615 (1986).

92. See, e.g., MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975* (2015); Dave E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010); Shannon E. Martin & Gerry Lanosga, *Historical and Legal Underpinnings of Access to Public Documents*, 102 L. LIBR. J. 613 (2010); Kiyul Uhm, *The Founders and the Revolutionary Underpinning of the Concept of the Right to Know*, 85 JOURNALISM & MASS COMM. Q. 393 (2008); ALASDAIR S. ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006); Kiyul Uhm, *The Cold War Communication Crisis: The Right to Know Movement*, 82 JOURNALISM & MASS COMM. Q. 131 (2005); HERBERT N. FORESTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* (1999); Charles J. Wichmann III, *Ridding FOIA of Those Unanticipated Consequences: Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213 (1997); Paul H. Gates & Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, 13 AM. JOURNALISM 38

These are worthy and important avenues of FOIA research, but the mismanaged Clinton requests document blight at the root of the FOIA system. Much of the existing scholarship, however, has assumed the stability of archives and good faith in agency searches. In an effort to understand the depths of the rot, this study will explore records management and search procedures in the FOIA and survey potential paths forward for improving on the existing accountability paradigm.

In Parts II and III, this Article will review the systemic failures that appeared in the Clinton email fiasco, archive integrity and adequacy of search. These are lightly researched areas. With regard to archive integrity, this is largely due to the presuppositions of the statute, which relies on faithful accordance with independent record-keeping laws. There is considerable jurisprudence on adequacy of search, as it has vexed requesters since enactment, but there has been little in the way of statutory movement or scholarly comment.

Part III will focus on affirmative disclosure, a topic of a great interest to contemporary government transparency scholars. For FOIA researchers, the endemic shortcomings of the mechanism have led many to call for a transformation of the FOIA to a more affirmative disclosure-oriented system. Such a suggestion is practicable as the FOIA comprises three sections but is most well-known for the requester-release element.<sup>93</sup> The two other sections are affirmative disclosure requirements, one dictating basic agency information and new administrative rules to be published in the Federal Register.<sup>94</sup> The second affirmative disclosure part necessitates digital publication of a range of records not distributed in the Federal Register, including court rulings on agency rules, policy interpretation adopted by the agency, a general index of agency records on-hand and, notably, any records that have been released to a requester in the past.<sup>95</sup> The last provision requires agencies to post to their website all records previously released in response to a FOIA request.

David Pozen is amongst the scholars pushing for more proactive transparency. He has questioned the FOIA experiment and the undying commitment to it, cataloging its many flaws.<sup>96</sup> He suggests FOIA only

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(1996); Phillip J. Cooper, *The Supreme Court, the First Amendment, and Freedom of Information*, PUB. ADMIN. REV. 622 (1986); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649 (1984); Lillian R. Bevier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1 (1976); Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L.L. REV. 1 (1970).

93. 5 U.S.C. § 552(a)(3)(A) (2018).

94. *Id.* § 552(a)(1).

95. *Id.* § 552(a)(2).

96. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099 (2017) (observing the law is “shot through with exemptions . . . has

truly works for those well-versed in the intricacies of the law and dedicated to tirelessly battling agencies; in short, large institutions with legal teams, not typical citizens. Pozen proposes moving past the American infatuation with requester release and turning toward affirmative disclosure: “To make good on the promise of FOIA over the next fifty years of the Act’s life . . . we will need to devote greater attention and resources to a range of information-forcing mechanisms.”<sup>97</sup> Margaret Kwoka has produced significant research exploring the primary users of the FOIA.<sup>98</sup> Her results echoed Pozen’s claims of institutional dominance of FOIA use, finding the preponderance of requests serve business interests.<sup>99</sup> The FOIA has become a mechanism for transferring government wealth to private enterprise. Instead of serving individuals and the press, as originally intended, the FOIA has become a form of corporate subsidy with private firms exploiting the law through methodical FOIA programs operated by large legal teams.<sup>100</sup> Kwoka, too, has pointed toward affirmative disclosure in an effort to return the FOIA to its democratic objectives and as a method aligned with the digital future.<sup>101</sup> Affirmative disclosure, as a predominately technical response to the FOIA’s problems, is especially well suited to counteract the formulaic, sometimes algorithmic, information-seeking efforts of businesses.<sup>102</sup> Effectively, agencies could reduce personnel and recapture FOIA by applying simple machine learning in response to the growing tide of machine-generated business requests.

Daxton Stewart and Charles Davis have claimed the FOIA is “petrified” and has been unable to address the failures of the APA.<sup>103</sup> They claimed the requester release system that pits requester against agency is the “original sin” of the FOIA and have also called for

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never been funded at a level that would allow agencies to respond promptly to most requests. . . . [and that] courts affirm agency denial decisions at extraordinary rates. Attorneys’ fees and other litigation costs remain difficult to recover . . . and sanctions for improper withholding are virtually never applied.”).

97. *Id.* at 1102.

98. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1361 (2016).

99. *Id.* at 1414 (explaining that FOIA primarily serves business interests along the lines of “researching competitors’ business ventures about which an agency happens to have information, uncovering regulatory risks to better advise investors, or simply using FOIA to find out what others are learning about you . . .”).

100. *Id.* at 1415.

101. *Id.* at 1429 (“Especially in light of technological advances, affirmative disclosure holds the key to unlock true government transparency.”).

102. *Id.* at 1430 (“Although affirmative disclosure initiatives have not fulfilled their promise thus far, commercial requesting provides an area ripe for targeted affirmative disclosure because . . . commercial requesting, by and large, is a formulaic enterprise.”).

103. Daxton R. “Chip” Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL’Y 515, 516–17 (2016).

affirmative disclosure as the obvious path forward.<sup>104</sup> The FOIA is seen as a product of a paper record-keeping era and will forever remain constrained by the law's initial conception of access to physical documents. A primary issue in delivering on FOIA objectives was the government's variegated approach to adopting computer systems and digitizing information. There was little in the way of standardized record-keeping in the 1980s.<sup>105</sup> Many agencies independently developed methods for digital archiving and search, and agencies were slow to move on from paper records. In the 1990s, computer use in the government grew exponentially, but access to digital records was hardly a concern in the development of government computer systems.<sup>106</sup> Stewart and Davis advocate the dismantling of the FOIA and enactment of a new law based on three principles: open and accessible documents from the moment of creation; narrowly construed exemptions, used sparingly and transparently reported; and records should be harder to conceal than release.<sup>107</sup> While the second and third suggestions are ostensibly active in the current FOIA, redrafting FOIA in the digital age, for the digital age, is of primacy in conquering the many failures of the FOIA.<sup>108</sup> Access to government records necessitates a change of culture and function, including electronic and automated record-keeping: "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.'"<sup>109</sup> Others have called on Congress to move past FOIA's paper-based format and the accordant requester's paradox in favor of increased affirmative disclosure.<sup>110</sup>

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104. *Id.* at 518.

105. *Id.* at 522.

106. *Id.*

107. *Id.* at 529 ("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.").

108. *Id.* at 536.

109. *Id.*

110. See, e.g., Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 597 (2009) ("[Affirmative disclosure] is undeniably a step beyond the current statute, for it does not require an actual request to trigger dissemination. But it is still keyed to the question of what citizens might ask for rather than what citizens might find useful. Because requestors generally, and by definition, do not know what the agency has, the requestor-based system will always be incomplete."); David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86

Beth Simone Noveck has suggested turning away from the adversarial nature of requester release, rallying behind another popular government transparency initiative, typically referred to as either Open Data or Open Government.<sup>111</sup> Her proposal emphasizes purpose over feel-good rhetoric: “[O]pen data substitutes a utilitarian rationale for transparency in place of a justification based on moral obligation. In other words, open data is rooted in a theory about government effectiveness whereas FOIA is grounded in a theory of governmental legitimacy.”<sup>112</sup>

In Part III, this Article will more closely examine the United States’ lasting commitment to affirmative disclosure and recent experiments in expanding the principles. Recent government inroads and a growing body of scholarship advocating for more affirmative disclosure attest to it being the future of government access. Pozen suggested tinkering with the mechanics of the FOIA to be regressive, “Given FOIA’s many limitations and drawbacks, a forward-looking legislative approach must do more than refine the Act’s request-driven strategy: it must look beyond the FOIA strategy altogether.”<sup>113</sup> The most scalable and plausible approach to be replacing the FOIA is a comprehensive affirmative disclosure regime.<sup>114</sup>

## II. ARCHIVE INTEGRITY

The FOIA presumes the integrity of agency archives. Without well-maintained archives, there is no stability in the FOIA system. Despite this necessity, there is no corresponding link between federal records laws and the FOIA. FOIA rests atop archive and records management laws but makes no specific mention of it, nor are records laws responsive to the FOIA. This disconnect has presented issues when requests for known records return “no responsive records” closures. Appealing records custody and maintenance has resulted in courts considering whether the public has an interest or right to compel custody. Judicial opinion is mixed on the matter, but the statutory language provides agencies with a near absolute authority in dictating which records are retained and which records are disposed of.

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TEX. L. REV. 1787, 1836 (2008) (calling on Congress to pass a law “requiring the government to open up other categories of information to ready public access. And it will have to grapple with the broader question, which already looms on the horizon, of how to replace FOIA once paper records are a thing of the past.”).

111. Beth S. Noveck, *Is Open Data the Death of FOIA?*, 126 YALE L.J.F. 273, 274 (2016).

112. *Id.* at 284.

113. Pozen, *supra* note 96, at 1101.

114. *Id.* at 1151.

### A. *Records Management Law*

The federal government is required by law to handle and preserve records in a deliberate and orderly fashion. The Constitution makes two references to record keeping, calling on Congress to keep and publish an account of events<sup>115</sup> and vote totals.<sup>116</sup> The framers were likely less interested in contemporaneous accountability mechanisms, like FOIA or the Government in the Sunshine Act,<sup>117</sup> but were committed to keeping an accurate account of affairs.<sup>118</sup>

Our present understanding of records management is primarily defined by the 1943 Records Disposal Act<sup>119</sup> and the Federal Records Act of 1950 (FRA).<sup>120</sup> The FRA was a product of the Commission on Organization of the Executive Branch of the Government. The resulting report listed three general recommendations, all focused on providing a more defined structure for the federal government's records management practices.<sup>121</sup> As it stands today, the U.S. Code contains seven sections dedicated solely to records management for federal agencies.<sup>122</sup> This slim chapter of U.S. law exists as the backbone of the FOIA, providing the statutory requirements for the handling of agency records; how such information is classified, transferred, archived or destroyed. The law assigns responsibility to the heads of all federal agencies for establishing responsible records management procedures, including "adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency."<sup>123</sup> Agency heads are given wide-ranging authority in determining the internal policies for records management but are responsible for creating, maintaining and

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115. U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

116. *Id.* § 7 ("If [the President] approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . . . But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.").

117. 5 U.S.C. § 552b (2018).

118. ANNE W. BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS 165 (1994) ("The collection of information was a primary concern of the founding fathers and one for which they were prepared to pay a modest amount of money.").

119. Records Disposal Act of 1943, ch. 192, 57 Stat. 380.

120. Federal Records Act of 1950, ch. 849, 64 Stat. 578.

121. COMM. ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, 81ST CONG., RECORDS MANAGEMENT IN THE UNITED STATES GOVERNMENT: A REPORT WITH RECOMMENDATIONS 6 (Comm. Print 1949).

122. 44 U.S.C. §§ 3101–3107 (2016).

123. *Id.* § 3101.

documenting the current business of the agency.<sup>124</sup> There is little firm supervision over agency records practices, but agencies are to work with the National Archives and Records Administration (NARA) in coordinating historical custody and solutions when records go missing.<sup>125</sup> Notably, the law makes explicit reference to the safeguarding of agency records, prohibiting alienation or destruction of records and includes penalties and procedures for lapses in records management.

Seven years prior to the FRA, Congress passed the Records Disposal Act.<sup>126</sup> The federal government had long been concerned with records maintenance and orderly destruction of unnecessary records. Physical storage required significant and growing resources, and the threat of fire was ever present. Before providing agencies with authority for record maintenance, the legislature detailed how and when records were to be disposed.<sup>127</sup> The law outlined specific procedures for reporting proposed schedules of unneeded records, followed by a waiting period and ultimately a determination on disposal from the head of NARA.<sup>128</sup> The agency is only able to destroy or remove from custody records that lack preservation value and “do not appear to have sufficient administrative, legal, research, or other value.”<sup>129</sup> The law provides a clear expectation for chain of custody and guards against arbitrary destruction of records.

Congress has continued to refine records management and disposal law,<sup>130</sup> but the foundation for our current records management expectations were laid out in the 1940s and 1950s. The 2014 amendments to the Presidential Records Act and FRA were a response to a 2011 memorandum from President Obama that brought attention to failures in records management and called for improved performance. The president’s hope for better records management was not only efficiencies and cost savings but “increasing open Government and appropriate public access to Government records.”<sup>131</sup> President Obama highlighted the importance of archive integrity, suggesting “proper records management is the backbone of open Government.”<sup>132</sup>

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124. *Id.* § 3102.

125. *Id.* § 3102(3).

126. 44 U.S.C. § 3106 (2016).

127. *Id.* §§ 3301–3314.

128. *Id.* § 3303.

129. *Id.*

130. *See, e.g.*, Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2727; Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812; Paperwork Reduction Act Amendment of 1995, Pub. L. No. 104-13, 109 Stat. 163; Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003.

131. Memorandum of November 28, 2011—Managing Government Records, 76 Fed. Reg. 75,423, 75,424 (Dec. 1, 2011).

132. *Id.* at 75,423.

At present, agency requirements ensuring archive integrity are vague and NARA's oversight is minimal. Records management laws and rules are inconsistently enforced. Agency practices vary considerably, and few are being held to account for failures.<sup>133</sup> Any value the FOIA has relies on archive integrity. The gaps in the record-keeping law and inconsistent supervision suggest the FOIA is likely far less effective than the generally pessimistic position of journalists and scholars. Whether public officials are willfully disposing of embarrassing or incriminating records or agencies prove understaffed or incompetent in ensuring archive integrity, the errors undermine the FOIA. Due to the requester's paradox, such activities are hard to know and are rarely acknowledged publicly.

### B. *Archive Integrity & the FOIA*

Two cases stand out as illustrative in documenting the court's position on the confluence of information repositories and access to government information. In *Kissinger v. Reporters Committee*, the Supreme Court found Nixon's former Secretary of State to have flagrantly violated records management laws, only to determine there was no enforcement

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133. See, e.g., Russ Kick, *FBI Wants to Destroy 9,000+ RICO Files*, ALTGOV 2 (June 2, 2018), <https://altgov2.org/fbi-destroying-rico-files/> (noting that the FBI is in the process of destroying more than seventy percent of their RICO records and has no intention of scanning the documents); Patrice McDermott, *Government Reorganization Still in the Dark to Both Congress and the Public*, GOV'T INFO. WATCH (May 31, 2018), <https://govinfowatch.net/2018/05/31/government-reorganization-still-in-the-dark-to-both-congress-and-the-public/> (documenting the OMB's failure to maintain or release requisite records regarding major reorganization efforts at the Department of the Interior); Eric Katz, *White House Produces No Evidence It Considered Public Input on Reorganizing Government*, GOV'T EXEC. (May 2, 2018), <https://m.govexec.com/management/2018/05/after-lawsuit-white-house-produces-no-evidence-it-considered-public-input-reorganizing-government/147927/> (stating that the OMB claims to have no records on public comment after previously stating there were more than 100,000 submissions); Joe Davidson, *ATF's Problem of 'Lost, Stolen, Or Missing' Guns Has Gotten Better, But It's Still a Problem*, WASH. POST (Apr. 9, 2018), [https://www.washingtonpost.com/news/powerpost/wp/2018/04/09/afts-problem-of-lost-stolen-or-missing-guns-has-gotten-better-but-its-still-a-worry/?noredirect=on&utm\\_term=.0e6a5c9f63e0](https://www.washingtonpost.com/news/powerpost/wp/2018/04/09/afts-problem-of-lost-stolen-or-missing-guns-has-gotten-better-but-its-still-a-worry/?noredirect=on&utm_term=.0e6a5c9f63e0) (discussing a Justice Department report that documented not only the ATF's failure to track stolen guns in the agency's custody but also "significant deficiencies related to tracking and inventory of ammunition" and general records maintenance); *Judicial Watch Sues IRS for Records on Destroyed Hard Drives of Lois Lerner, Other IRS Officials*, JUD. WATCH (Feb. 27, 2015), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-sues-irs-records-destroyed-hard-drives-lois-lerner-irs-officials/> (asserting that the IRS coordinated the intentional destruction of hard drives containing incriminating information); Timothy Cama, *EPA Tells Court It May Have Lost Text Messages*, THE HILL (Oct. 8, 2014, 2:42 PM), <http://thehill.com/policy/energy-environment/220162-epa-may-have-lost-text-messages> (reporting that the EPA submitted a District Court filing admitting to "the potential loss" of contested records at the center of a court case); *Lost to History: Missing War Records Complicate Benefit Claims by Iraq, Afghanistan Veterans*, PROPUBLICA (Nov. 9, 2012, 3:45 PM), <https://www.propublica.org/article/lost-to-history-missing-war-records-complicate-benefit-claims-by-veterans> (cataloging systemic failures by the Army in destroying or misplacing records on field reports, security concerns and leadership issues).

mechanism or punishment suited to the crime.<sup>134</sup> With a series of cases culminating in *Armstrong v. Executive Office of the President*,<sup>135</sup> three consecutive presidents unsuccessfully attempted to remove Iran-contra emails from archives subject to FOIA.

The Supreme Court's opinion in *Kissinger*, in particular, explicated the relationship between the FOIA and records management, highlighting the role of the FRA and the responsibility of executive agencies in maintaining archive integrity. In the 1970s, Henry Kissinger served a variety of roles in the Nixon and Ford administrations. As National Security Adviser and Secretary of State, Kissinger developed a habit of having his phone calls monitored by an assistant and transcribed for posterity.<sup>136</sup> Five days prior to Jimmy Carter defeating Gerald Ford in the 1976 presidential election, Kissinger had his telephone transcriptions removed from his office in the State Department. After recognizing the breach of federal records laws, their return was ordered by NARA. Most of the documents would ultimately be relocated to the Library of Congress before the U.S. Archivist requested the return of the phone transcripts to the State Department on not one but two occasions. Kissinger refused, and the records remained with the Library of Congress, an entity not subject to the FOIA.

The Supreme Court case centered on three separate FOIA requests seeking records from Kissinger's phone transcriptions.<sup>137</sup> All three requests were denied by the State Department with two of them rejected under the same premises: a) the telephone transcripts were not agency records (they were personal), and b) the telephone transcripts were no longer in the custody of the federal government.<sup>138</sup> However, a federal court ruled the phone records transcribed while he was Secretary of State (though not when he was the National Security Adviser or Special Assistant to the President) were indeed "agency records" subject to FOIA query. The court determined Kissinger had wrongfully removed the

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134. 445 U.S. 136, 150–51 (1980).

135. 1 F.3d 1274 (D.C. Cir. 1993).

136. 445 U.S. at 140.

137. *Id.* at 143–44. The first request was from *New York Times* columnist William Safire and sought Department of State records for Kissinger's telephone records that mentioned Safire by name or "leaks." *Id.* at 143. The request was denied because Kissinger was serving as National Security Adviser, not in the State Department, during the specified period. *Id.* The second request was from the Military Audit Project seeking the telephone transcripts, but the Department of State determined a) they were not agency records, and b) they no longer held the records as they had been removed from the department's custody. *Id.* The third request, brought by journalism organizations, was very similar to the Military Audit Project's request and was denied under the same explanations. *Id.* at 143–44.

138. *Id.*

records and ordered the transcripts (still in the custody of the Library of Congress) searched for responsive records.<sup>139</sup>

The plaintiffs had successfully contended that whether Federal Records and Records Disposal Acts provided a private right of action in recovering the telephone transcripts was irrelevant; the FOIA established such a remedy. The Supreme Court disagreed, deciding that the FOIA statute offered no such ability, with Justice William Rehnquist declaring federal courts were limited to enjoining agencies only when agency records were improperly withheld and not otherwise.<sup>140</sup> Since Kissinger had removed the records from State Department possession—wrongfully or not—it was impossible for the records to be improperly “withheld.”<sup>141</sup> Justice Rehnquist’s opinion flatly stated, “The [FOIA] does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.”<sup>142</sup>

In an opinion containing both partial concurrence and partial dissent, Justice William Brennan called the Court’s stance on improper withholding a “crabbed interpretation.”<sup>143</sup> Justice Brennan observed, “[T]he Records Acts and FOIA fail to mesh: The former scheme is evidently directed toward fostering administrative interests, while the latter is definitely designed to serve the needs of the general public.”<sup>144</sup> While the majority opinion failed to address the intentional circumvention of the FOIA, Justice Brennan addressed it:

If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency’s powers to move documents beyond the reach of the FOIA requester. . . . I would think it is also plainly unacceptable for an agency to devise a records routing system aimed at frustrating FOIA requests in general by moving documents outside agency custody with unseemly haste. . . . If the purpose of FOIA is to provide public access to the records incorporated into Government decisionmaking, then agencies may well have a concomitant responsibility to retain possession of, or control over, those records.<sup>145</sup>

Justice John Paul Stevens also wrote an opinion that was part-concurrence, part-dissent, challenging the acceptance of wrongfully

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139. *Id.* at 145.

140. *Id.* at 150.

141. *Id.*

142. *Id.* at 152.

143. *Id.* at 158.

144. *Id.* at 159.

145. *Id.* (Brennan, J., concurring in part and dissenting in part) (citations omitted).

removed records and suggesting the opinion incentivized the illegal removal of records.<sup>146</sup>

Well after the Supreme Court's decision, Kissinger's phone transcripts were still in dispute. In 2001, the National Security Archive, a non-profit focused on foreign policy and open government, sent a complaint to the State Department and the National Archives suggesting that Kissinger's phone transcripts were improperly removed, subject to the FOIA and in violation of federal records law.<sup>147</sup> After the Bush administration convinced Kissinger to return the records to the State Department and National Archives, the National Security Archive submitted a FOIA request for the newly returned phone transcripts. Three years later, the State Department delivered more than 3,500 responsive documents but withheld a substantial number of records as well. Over the next eleven years, the National Security Archive would appeal denials and redactions. Curiously, more than thirty years after their creation, some of the records were withheld under Exemption 5 as "pre-decisional."<sup>148</sup> The National Security Archive would ultimately win the release of more than 1,000 additional documents.<sup>149</sup>

The National Security Archive played a role in another case of missing agency records. Tom Blanton, head of the organization, pursued incriminating emails from the Iran-contra scandal, while a succession of U.S. presidents claimed the right to destroy the records. The National Security Archive would submit a FOIA request and ultimately win the release of the emails, despite, in Blanton's narrative, the Reagan White House's coordinated efforts to avoid embarrassment and hide potentially criminal behavior.<sup>150</sup>

By the mid-1980s, email was pervasive within the federal government and a trail of emails existed documenting the unscrupulous chain of Iran-contra events. Oliver North and another national security adviser attempted to undo the trail by erasing thousands of emails, but a career public servant and ranking military colonel forwent the traditional bi-weekly deletion of backup tapes and instead put this particular two-week

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146. *Id.* at 161 (Stevens, J., concurring in part and dissenting in part) ("I cannot agree that this conclusion is compelled by the plain language of the statute; moreover, it seems to me wholly inconsistent with the congressional purpose underlying the Freedom of Information Act. The decision today exempts documents that have been wrongfully removed from the agency's files from any scrutiny whatsoever under FOIA. It thus creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests.").

147. *Archive Sues State Department Over Kissinger Telcons*, NAT'L SEC. ARCHIVE (Mar. 4, 2015), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB503/>.

148. *Id.*

149. *Id.*

150. TOM BLANTON, WHITE HOUSE E-MAIL: THE TOP SECRET COMPUTER MESSAGES THE REAGAN/BUSH WHITE HOUSE TRIED TO DESTROY 7 (1995).

segment of White House communications aside, preserving the record despite North and company's intentions.<sup>151</sup>

North's correspondence would play an important role in the report by the Tower Commission (the federal investigation of Iran-contra), but as President George H.W. Bush prepared to begin his presidential term, the emails had not been released to the public. Like *Kissinger*, the presidential transition was to coincide with a new record-keeping era, and the backup tapes of the emails were scheduled to be destroyed (with the approval of NARA). The National Security Archive sought a last-minute injunction against the destruction and filed a FOIA request to establish legal grounds for the maneuver.

The effort to save the emails (and have them released under a FOIA request) culminated in *Armstrong v. Bush*,<sup>152</sup> where the D.C. District Court considered the same central question from *Kissinger*—whether citizens can compel government to retain records—under different circumstances.<sup>153</sup> Whereas in *Kissinger* the court decided the FOIA offered no remedy when agencies desire to remove or destroy records from an archive,<sup>154</sup> in *Armstrong*, the court sought to determine whether the Presidential Records Act,<sup>155</sup> or other records management statutes, could force agencies to preserve records.<sup>156</sup> Judge Charles Richey found in favor of the plaintiff, deciding the APA “empowers a private plaintiff to seek judicial review of presidential performance under [the Presidential Records and Federal Records acts].”<sup>157</sup>

The court found the APA obligation to retain records to be nondiscretionary. On appeal, the D.C. Circuit also found in favor of *Armstrong* and the National Security Archive.<sup>158</sup> Though the FRA was determined to provide private citizens an ability to force agencies to abide by their own recordkeeping guidelines, the APA allows individuals the right to sue the U.S. Archivist or an agency head for a failing “to take enforcement action to prevent an agency official from destroying records in contravention of the agency’s recordkeeping guidelines or to recover records unlawfully removed from an agency.”<sup>159</sup> A pivotal outcome, public officials do hold a duty or responsibility for maintaining archive integrity and are explicitly required to protect against unlawful destruction or removal.

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151. *Id.* at 4–5.

152. 721 F. Supp. 343 (D.D.C. 1989), *aff’d in part, rev’d in part*, 924 F.2d 282 (D.C. Cir. 1991).

153. *Id.* at 344.

154. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 139 (1980).

155. 44 U.S.C. §§ 2201–2207 (2016).

156. *Armstrong*, 721 F. Supp. at 344.

157. *Id.* at 348.

158. *Armstrong v. Bush*, 924 F.2d 282, 297 (D.C. Cir. 1991).

159. *Id.*

Despite the Appeals Court decision, President George H.W. Bush's staff rounded up the existing tapes containing the emails and, on the eve of President Bill Clinton's inauguration, the White House ordered NARA to collect and remove all tapes from the grounds.<sup>160</sup> According to Blanton, in the waning hours of his presidency, Bush had come to an agreement with the U.S. Archivist that would have ceded custody of all tapes of presidential emails to Bush.<sup>161</sup> However, the tapes were not destroyed, and President Clinton's administration continued to defend Reagan and Bush's right to destroy the White House emails in the courts, while also battling for the agreement between Bush and the archivist in another case.<sup>162</sup>

In *Armstrong v. Executive Office of the President*,<sup>163</sup> the Circuit Court reversed the D.C. District Court's finding of civil contempt for the U.S. Archivist and several federal agencies for allowing the last-minute transfer of the tapes, while also affirming the existing records management guidelines were in violation of the FRA.<sup>164</sup> After a firm rebuke for the handling of the tapes by the district court, the D.C. Circuit remanded the crux of the case—whether records would be released—and called on the agencies to align their records management guidelines with the FRA.<sup>165</sup>

In the end, Armstrong, Blanton and the National Security Archives would win the release of the emails, but the case would produce no standing for requiring agencies to hold or retrieve records.<sup>166</sup> Federal courts have decided there is a duty to maintain records when they may contain incriminating evidence or lead to litigation. This applies to both private companies<sup>167</sup> and the federal government.<sup>168</sup> In this scenario, government is expected to voluntarily “suspend its routine document retention/destruction policy.”<sup>169</sup>

*Armstrong v. Bush* was cited frequently in a 2016 case involving Hillary Clinton's email scandal,<sup>170</sup> but the D.C. District Court effectively

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160. BLANTON, *supra* note 150, at 9–10.

161. *Id.* at 10 (explaining that the same archivist, Don W. Wilson, granted President Reagan the ability to destroy the original tapes [which was halted and ultimately overridden by the courts] and would resign shortly after Bush left office to take over leadership of the George Bush Presidential Library).

162. *Id.* at 10–11.

163. 1 F.3d 1274 (D.C. Cir. 1993).

164. *Id.* at 1296.

165. *Id.* at 1296–97.

166. *Id.*

167. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

168. See *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998).

169. 220 F.R.D. at 218.

170. *Judicial Watch, Inc. v. Kerry*, 156 F. Supp. 3d 69 (D.D.C. 2016).

reversed the decision,<sup>171</sup> recognizing an individual's right to compel action "is limited to those circumstances in which an agency head and Archivist have taken minimal or no action to remedy the removal or destruction of federal records."<sup>172</sup>

At present, there is no conclusive right, ability or expectation for a private citizen to any records retention or archive integrity. Agencies abide by their internal records management practices in accordance with the general guidance of the FRA and other light-touch laws. Agencies are expected to coordinate disposal with the NARA, but everyday maintenance of archives is well beyond the scope of any NARA responsibility, as demonstrated in the State Department failures with Secretary Clinton.

### III. ADEQUACY OF SEARCH

Search procedures have been an obstinate FOIA concern. The information asymmetry at the heart of the requester release system is particularly acute in the search process. The original agency aversion to releasing records and the increasingly adversarial nature of the law have only amplified the issue. Defining an adequate search has proved especially elusive, as agencies often retain huge physical repositories of records and determining appropriate search parameters can be more of an art than a science. The two parties have decidedly different perspectives and different conceptions of a successful search. A requester is ends-oriented. A successful search means finding and producing the sought information. Agencies are more process-oriented. They are focused on following logical guidelines in an effort to locate the information, not singularly focused on finding a needle in a haystack. The task has proved to be a moving target as well. The FOIA was enacted in a paper-centric era, and the shift to digital records has necessitated a new paradigm for search.

#### A. *Statutory Definition*

With regards to the agency search procedure, the FOIA statute has relatively little to say, defining search as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."<sup>173</sup> The court has further refined adequate search with the current precedent outlining expectations

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171. *Id.* at 75–76 ("Straightforward as this may appear, the Court does not agree. . . . The mere fact that federal records were removed from the State Department in contravention of the FRA, therefore, does not automatically entitle a private litigant to a court order requiring the agency to involve the Attorney General in legal action to recover the documents.").

172. *Id.* at 76.

173. 5 U.S.C. § 552(a)(3)(D) (2018).

as “reasonably calculated to uncover all relevant documents.”<sup>174</sup> Determining a reasonable search is not predicated on the results, but, as the D.C. Circuit outlined, “[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.”<sup>175</sup>

The statutory provisions defining search and search expectations were not adopted until the 1996 Electronic Freedom of Information Act.<sup>176</sup> The House report for the law, under a section titled “The Effect of Electronic Records,” suggested the digitization of records necessitated formalized search protocols.<sup>177</sup> The report also discussed the motives behind “reasonable” as the standard for satisfactory search, noting a less diligent search would also use up agency computers, before concluding that electronic searches and paper-based searches should be roughly equal with regards to expenditure of agency resources.<sup>178</sup> In floor discussion of the bill, Rep. Randy Tate marveled at the potential range and ease of access to government records.<sup>179</sup> Rep. Tate’s enthusiasm was shared by many in Congress as they intended to move a large amount of the government’s paper records online and the democratic possibilities of this transfer were seen as tremendous.

The Senate produced a report for a similar FOIA bill<sup>180</sup> that would ultimately be consolidated with the House’s bill. They also considered what constituted a “reasonable effort,” concluding that no matter the new robust possibilities agencies should guard against disruption of the agency’s core functions.<sup>181</sup> The Senate considered guidelines for the appropriate amount of time to satisfy an adequate search but produced nothing beyond the general search parameters in the statute.

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174. *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

175. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

176. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, 3050.

177. H.R. REP. NO. 104-795, at 11 (1996).

178. *Id.* at 22.

179. 142 CONG. REC. H10,450 (daily ed. Sept. 17, 1996) (statement of Rep. Tate) (“My neighbors will be able to turn on their computers—click onto the internet—and download information made accessible by the [bill]. . . . The use of the latest technology by Government agencies will harness the benefits of computer technology and deliver to everyone increased Government accessibility.”).

180. S. 1090, 104th Cong. (1996).

181. S. REP. NO. 104-272, at 15 (1996) (“What constitutes a ‘reasonable effort’ shall vary with the circumstances under which the records are held. We recognize that both agency computer program development resources and agency computer system operation resources are highly valuable and finite. Both of these categories of agency resources shall be impinged upon by the level of new search activity required under the amendments. Agencies should search for and retrieve data according to new specifications where such retrieval activity does not disrupt agency functions.”).

Outside the 1996 FOIA amendment and its legislative discussion, there is little in way of defining agency responsibility regarding “reasonable search.” The Senate report from the 1974 FOIA amendment foresaw the digital evolution, suggesting digital search and databases “would include services functionally analogous to searches for records that are maintained in conventional forms.”<sup>182</sup> But the affordances of digital records have not produced significantly different request outcomes, as rates of denials and appeals remain relatively consistent over time.

### B. *Judicial Interpretation*

Federal courts, on the other hand, have been frequently tasked with defining “reasonable search” and determining “adequacy of search.” Challenging the adequacy of search is the product of the requester’s paradox. When a request returns a “no records” response, a natural response is to appeal. The FOIA Project, an offshoot of Syracuse University’s Transactional Records Access Clearinghouse, has annotated 4,373 federal FOIA cases from 1996 to present and sorted them by issue.<sup>183</sup> They identified more than 171 issues in the FOIA cases, ranging from segregation to individual exemptions. “Adequacy of search” was the third most common issue in complaints (behind “failure to respond within statutory time limit” and “litigation – attorney’s fees”) and the most common issue by a large margin in court opinions. “Adequacy of search” was identified as an issue in 624 complaints and 550 federal opinions.

One of the most influential and commonly cited FOIA cases, *Vaughn v. Rosen*,<sup>184</sup> was the result of the D.C. Circuit ruminating on FOIA search processes and the adversarial nature of the requester release system. The case centered on a law professor who had filed a FOIA request with the Civil Service Commission for personnel evaluation reports. The responsive records were withheld under Exemptions 2, 5 and 6. Vaughn appealed, contesting both the exemption claims and the legitimacy of the search.

Writing for the D.C. Circuit, Judge Malcolm Wilkey underscored the court’s preference for transparency, claiming an “overwhelming emphasis upon disclosure.”<sup>185</sup> Judge Wilkey identified the unbalanced nature of a FOIA dispute:

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182. S. REP. NO. 93-854, at 12 (1974).

183. The FOIA Project, Transactional Records Access Clearinghouse, Syracuse University (Mar. 23, 2018), [http://foiaproject.org/case\\_search/](http://foiaproject.org/case_search/).

184. 484 F.2d 820, 823–24 (D.C. Cir. 1973).

185. *Id.* at 823.

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . . The best [an] appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information. . . . This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible.<sup>186</sup>

Judge Wilkey proceeded to establish the practice of the Vaughn index, whereby courts perform an in camera audit of a sample of the exempted records.<sup>187</sup> A Vaughn index requires the agency to produce an affidavit detailing each exempted passage along with the accordant exemption claim.<sup>188</sup>

In a case involving a Vaughn index, the Church of Scientology sought NSA records on the church, the religion broadly and Scientology founder L. Ron Hubbard.<sup>189</sup> The NSA responded claiming it had no files on either the church or Hubbard.<sup>190</sup> In the course of concurrent FOIA requests with the CIA and Department of State, the church learned of at least 16 documents concerning Scientology held by the NSA.<sup>191</sup> The NSA then found the records and withheld them under Exemption 1 and 3 claims.<sup>192</sup>

The church sued and sought further information on the NSA's search procedure.<sup>193</sup> The D.C. Circuit agreed to hear the case partially in an effort to further probe the search procedures and the adequacy of the agency's search.<sup>194</sup> The church argued that claims of a thorough search were demonstrably false, presenting evidence of prolonged correspondence between the two parties. In each, the church had offered additional information to aid the search and was each time told all locations that could be reasonably expected to contain the records had

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186. *Id.* at 823–25.

187. *Id.* at 826–27.

188. *Id.*

189. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 825 (D.C. Cir. 1979).

190. *Id.*

191. *Id.*

192. *Id.* at 825–26.

193. *Id.* at 826.

194. *Id.* at 831 (“In our view, the Boardman affidavit was far too conclusory to support the summary judgment awarded NSA. . . . Not only does the Boardman statement fail to indicate even in the slightest *how* agency functions might be unveiled, but it also lacks so much as guarded specificity as to the ‘certain functions and activities’ that might be revealed.”).

been searched.<sup>195</sup> Then, the sixteen records were found. Through other FOIA requests, the church learned the NSA had meddled in other searches and “that sixteen documents encompassed by appellant’s request had been provided to CIA by NSA and that NSA had advised against their release.”<sup>196</sup> Judge Spottswood W. Robinson questioned an intelligence service that was unable to adequately search its own archives.<sup>197</sup> The opinion proceeded to underscore the deleterious nature of such duplicitous behavior.<sup>198</sup> Judge Robinson observed that tolerance of such unmotivated search risked undermining the entirety of the FOIA project and was tantamount to conceding secrecy to the agencies.<sup>199</sup>

Federal courts have continued to weigh in on adequacy of search, but the inherent imbalance of the requester release system means a satisfactory search procedure is unlikely for requesters. In more than forty years of jurisprudence, courts have demonstrated ambivalence in determining whether the ultimate goal was the product or a good faith effort.<sup>200</sup> Recent cases, including *Mobley*, seem to trend toward accepting

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195. *Id.* at 834.

196. *Id.*

197. *Id.* at 835 (“On a broader scale, since NSA’s prime mission is to acquire and disseminate information to the intelligence community, it seems odd that it is without some mechanism enabling location of materials of the type appellant asked for, particularly with identifying details as extensive as those furnished.”).

198. *Id.* at 836–37 (“To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act. Few if any requesters will be better informed than appellant on the particulars of data that may have been obtained clandestinely by a governmental intelligence agency.”).

199. *Id.* at 837 (“If the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired materials, the majestic goals of the Act will soon pass beyond reach. And if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.”).

200. *See, e.g., Mobley v. CIA*, 806 F.3d 568, 581–82 (D.C. Cir. 2015) (stating that short of proof that a sworn statement was disingenuous, the court will presume good faith in the agency’s account of search procedure. Despite the FBI failing to search the Baltimore Field Office after a Baltimore newspaper cited an FBI source stating the Baltimore office was working on the *Mobley* case, the court found the agency’s search satisfactory. “Further, a request for an agency to search a particular record system—without more—does not invariably constitute a ‘lead’ that an agency must pursue.”); *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 67–68 (D.C. Cir. 1990) (noting that the State Department “only searched the record system ‘most likely’ to contain the requested information . . . . There is no requirement that an agency search every record system.”); *Meeropol v. Meese*, 790 F.2d 942, 952–53 (D.C. Cir. 1986) (“[A] search is not unreasonable simply because it fails to produce all relevant material.”); *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981) (“Agency affidavits enjoy a presumption of good faith, which will withstand purely speculative claims about the existence and discoverability of other documents.”); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978); *Exxon Corp. v. FTC*, 384 F. Supp. 755, 760 (D.D.C. 1974) (considering the adversarial nature of FOIA search, before determining, “[Exxon’s] discovery is aimed not at ascertaining whether identified records have been produced, but whether there exist

agency account of faithful search procedures.<sup>201</sup>

Two relatively recent cases demonstrate the constant tension between agencies and requesters. In a consolidated case, *National Security Counselors v. CIA*,<sup>202</sup> the appellant challenged the adequacy of the search after a “no records” response.<sup>203</sup> While awaiting the hearing, another State Department agency (one other than the agency that provided the “no records” response) replied with the requested material.<sup>204</sup> The initial agency had collectively forgotten it had referred the request.<sup>205</sup> Rather than gracefully acknowledging the error, the initial agency suggested it had performed an adequate search, declaring that were it to do it over again, it would not have referred the request.<sup>206</sup> The District Court then ordered the agency to search all offices for the sought records (which turned up more responsive information).<sup>207</sup>

Another recent case has suggested that federal departments and agencies may intentionally utilize antiquated search techniques in an effort to staunch record requests. The appellant therein, prolific requester Ryan Shapiro, filed an appeal claiming the FBI has systematically and strategically processed FOIA requests using a knowingly outdated 21-year-old software program to return “no records” responses to requesters.<sup>208</sup> The Department of Justice has confirmed the FBI’s practice of using only one of the three search functions – the most general – as fulfilling FOIA requirements.<sup>209</sup> Shapiro called the use of the narrowest search function of the aged program “failure by design.”<sup>210</sup> A former FBI chief technology officer stated the Automated Case Support (“ACS”) system was “based on old technology” and lacks contemporary programming and search functionality.<sup>211</sup> The FBI continues to use ACS despite the 2012 roll-out of the \$425 million digital management system

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additional records that might be specifically identified by Exxon. It would be unreasonable to read the intent of Congress expressed in the Freedom of Information [Act] to require such discovery.”).

201. Mobley, 806 F.3d at 381.

202. 960 F. Supp. 2d 101 (D.D.C. 2013).

203. *Id.* at 119.

204. *Id.* at 122.

205. *Id.*

206. *Id.* at 154.

207. *Id.*

208. *See, e.g.*, Shapiro v. U.S. Dep’t of Justice, 153 F. Supp. 3d 253 (D.D.C. 2016); Will Potter, *Meet the Punk Rocker Who Can Liberate Your FBI File*, MOTHER JONES (Nov. 13, 2013, 11:00 AM), <http://www.motherjones.com/politics/2013/11/foia-ryan-shapiro-fbi-files-lawsuit>.

209. Sam Thielman, *Justice Department “Uses Aged Computer System to Frustrate FOIA Requests,”* THE GUARDIAN (July 16, 2016, 8:00 AM), <http://www.theguardian.com/politics/2016/jul/16/justice-department-freedom-of-information-computer-system>.

210. *Id.*

211. *Id.*

Sentinel.<sup>212</sup> The Justice Department has said search of both Sentinel and ACS “would be needlessly duplicative.”<sup>213</sup>

Adequacy of search presents the proverbial Gordian knot whereby the parties’ divergent interests seem unlikely to be resolved under the present FOIA system. Inherently adversarial, requesters seek nothing short of their requested records, while agencies are protective of time and resources. The animosity and unsatisfactory ends are intrinsic to the requester-release mechanism. Slicing through the tangle of interests calls for a new approach, one not steeped in decades of hostility and further complicated by ambivalent and contradictory interpretations.

#### IV. AFFIRMATIVE DISCLOSURE

The longstanding, systemic weaknesses of critical FOIA components call for new directions in ensuring the public’s right to know. In failing to secure the integrity of agency archives and an inability to generate civic or judicial faith in adequate search procedures, the requester-release mechanism serves as a useful but flawed tool in executive transparency. It falls well short of the legislative commitment. Fortunately, there are myriad complementary disclosure efforts already in place that could be intentionally grown to help realize more effective transparency.

While the FOIA was not passed until 1966, there has been an enduring interest in federal transparency, and it was primarily achieved through records maintenance laws. The Constitution contains a provision requiring publication of congressional proceedings.<sup>214</sup> Beyond the constitutional proviso, the framers espoused support for a public right to know, though their motivations and intent are not entirely clear.<sup>215</sup> The Housekeeping Act of 1789 outlined delegation of authority, specifically providing each department head autonomy in determining “the custody, use, and preservation of [the] records, papers, and property [appertaining to the department].”<sup>216</sup> While deficient for modern purposes, the law was novel in acknowledging responsibility, access and distribution of agency

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212. See John Foley, *FBI’s Sentinel Project: 5 Lessons Learned*, INFO. WEEK (Aug. 2, 2012, 5:58 PM), <http://www.informationweek.com/applications/fbis-sentinel-project-5-lessons-learned/d/d-id/1105637>; Thielman, *supra* note 209.

213. Thielman, *supra* note 209.

214. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).

215. See, e.g., DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981); DAVID M. O’BRIEN, *THE PUBLIC’S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* (1981); Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know*, 7 COMM. L. AND POL’Y 51 (2002).

216. 5 U.S.C. § 301 (2018).

records. Final dominion resided with the agency, resulting in one scholar observing that though its laudable objective was to increase accountability, “Nevertheless, secrecy and claims of privilege have been the result[.]”<sup>217</sup>

Prior to Harold Cross and John Moss sewing up the Housekeeping Act, passage of the APA and the FOIA’s arrival was the Federal Register Act of 1935.<sup>218</sup> It was established as a method for publicizing government records, requiring all documents having “general applicability and legal effect” to be submitted to the Office of the Federal Register.<sup>219</sup> These materials were then to be published in the newly created Federal Register, an official daily journal of government activity. To this day, it exists as the primary source of government activity, publishing proposed and final agency rules and regulations, notices of meetings and adjudicatory proceedings, and certain presidential documents, including executive orders, proclamations and administrative orders.<sup>220</sup>

Shannon Martin has identified the age-old practice of government-issued public notices as an under-recognized mechanism for government transparency and, in particular, affirmative disclosure.<sup>221</sup> Martin defined public notice as the tradition of posting and circulating notices in community newspapers as a method for getting information about government work out to the electorate.<sup>222</sup> She claimed the tradition of posting and circulating notices in community newspapers to be central to representative democracies around the world.<sup>223</sup> In the earliest iterations, it was a method of control, not transparency, but has evolved over time. Governments have been affirmatively disseminating a wide range of missives as far back as British monarchies,<sup>224</sup> and until advent of the Internet, public notice was a common statutory requirement obligating local governments to publish specific categories of information—from announcement of a new law or civic procedure to advertisement of an impending auction or foreclosure to security warnings—in a local newspaper. With the arrival of broadcast, notice sometimes took the form of audio or video, but the objective remained. The atomization of media has diluted the purpose of public notice. With no central or universally shared medium, many governments have taken to posting public notices to a specified area of a government website. While the future form of public notice remains unclear, Martin remains confident of its purpose,

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217. Mitchell, *supra* note 41, at 200.

218. Federal Register Act, ch. 417, 49 Stat. 500 (1935).

219. 44 U.S.C. § 1505(a) (2012).

220. *Id.*

221. SHANNON R. MARTIN, SOCIAL MEDIA AND PARTICIPATORY DEMOCRACY: PUBLIC NOTICE AND THE WORLD WIDE WEB 17 (2014).

222. *Id.*

223. *Id.*

224. MAURICE RICKARDS, THE PUBLIC NOTICE 54 (1973).

“The value of public notice as a means of effective self-governance cannot be overstated. . . . [T]he very earliest of representative democracies employed public notice to chronicle government work with an eye toward encouraging community participation in government decision making.”<sup>225</sup> It exists as an early, distinctive brand of affirmative disclosure, once again demonstrating how deeply engrained and elemental affirmative disclosure practices are to contemporary societies.

While representing different eras, the impetus of these laws was similar. They represent concerted government efforts at disseminating records. The democratic pursuit of these programs was developing an informed public: one able and willing to participate in discourse and responsibly wield their franchise. The founders famously spoke to these goals,<sup>226</sup> and the commitment to building a knowledgeable demos is legible in the inchoate access laws. Yet, two examples best demonstrate the depth of the legislature’s foresight and commitment to these principles. The Federal Depository Library Program and its digital evolution mark an unmistakable, if unsung, fidelity to providing easily accessible information on government activity. The 1996 amendments to the FOIA stand as a remarkable, if largely unrealized, vision in progressing access to government information.

#### A. *Federal Depository Library*

In 1813, a congressional joint resolution established the precursor to the Federal Depository Library Program (FDLP), requiring select government documents be made available in designated libraries throughout the United States.<sup>227</sup> With this, Congress tasked the Secretary of State with dissemination of congressional documents, including Senate and House journals, to specified state libraries, universities and historical societies.<sup>228</sup> Another congressional joint resolution would establish the

225. MARTIN, *supra* note 221, at 117.

226. See, e.g., Letter from James Madison to W. T. Barry (Aug. 4, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON: 1819–1836, 103 (Gaillard Hunt ed., 1910) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”); Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 11 THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd ed., 1955) (“The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro’ the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right . . .”).

227. FED. DEPOSITORY LIBRARY PROGRAM, DESIGNATION HANDBOOK FOR FEDERAL DEPOSITORY LIBRARIES 7 (2008), <https://permanent.access.gpo.gov/lps100554/designation-handbook.pdf>.

228. *A Brief History of the FDLP*, FED. DEPOSITORY LIBR. PROGRAM (Jan. 26, 2018), <https://www.fdlp.gov/about-fdlp/mission-history/a-brief-history-of-the-fdlp>.

Government Publishing Office (then the Government Printing Office; GPO) in 1860,<sup>229</sup> and in 1895 Congress passed the Printing Act,<sup>230</sup> which altered the responsibilities of the GPO and created the FDLP. The law centralized government printing, which had previously been hired out to private printing firms, and provided a detailed outline of documents to be published and how each was to be distributed.<sup>231</sup> For the more consequential records, like newly passed statutes, “distribution to State and Territorial libraries and to the designated depositories” was called for.<sup>232</sup> The new law was meticulous in defining GPO resources and their acquisition, but granted the new bureau great latitude in determining the policies of government information. A first responsibility, though, was distributing eleven congressional documents to the 420 newly designated depository libraries.<sup>233</sup> In 1962, Congress established the present-day iteration of the FDLP, also formally recognizing its name.<sup>234</sup> Another law was passed in 1993, effectively moving the depository library system online.<sup>235</sup> The new law required the digitization and online availability of the Congressional Record and the Federal Register, among other records, and functioned as a digital repository for important government information.<sup>236</sup>

As it exists today, the FDLP<sup>237</sup> consists of 1141 depository libraries in the United States and its territories. Each library is required to hold a “basic collection” of “vital sources of information that support the public’s right to know about the workings and essential activities of the Federal Government.”<sup>238</sup> The basic collection includes census

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229. S.J. Res. 25, 36th Cong. (1860).

230. Act Providing for the Public Printing and Binding and the Distribution of Public Documents, ch. 23, 28 Stat. 601 (1895).

231. *Id.* at 613 (“Of the Report of the Bureau of Animal Industry, thirty thousand copies, of which seven thousand shall be for the Senate, fourteen thousand for the House, and nine thousand for distribution by the Agricultural Department.”).

232. *Id.* at 615.

233. *A Brief History of the FDLP*, *supra* note 228.

234. Depository Library Act of 1962, Pub. L. No. 87-579, 76 Stat. 352.

235. Government Printing Office Electronic Information Access Enhancement Act of 1993, Pub. L. No. 103-40, 107 Stat. 112.

236. *Id.*

237. 44 U.S.C. §§ 1901–1916 (2012).

238. *FDLP Basic Collection*, FED. DEPOSITORY LIBR. PROGRAM (last updated Sept. 14, 2018), <https://www.fdlp.gov/requirements-guidance/collections-and-databases/1442-basic-collection> (stating that the twenty-one resources are: American FactFinder, Assistance Listings, Ben’s Guide to the U.S. Government, Budget of the United States Government, Catalog of U.S. Government Publications, Code of Federal Regulations, Compilation of Presidential Documents, Congressional Record, Constitution of the United States of America: Analysis and Interpretation, Economic Indicators, Economic Report of the President to the Congress, Federal Register, Govinfo, Occupational Outlook Handbook, Official Congressional Directory, Public Papers of the Presidents of the United States, Social Security Handbook, United States Code, United States Government Manual, United States Reports, and United States Statutes at Large).

information, a current federal budget, the Federal Register, an up-to-date United States Code, a Social Security guide and an occupational outlook guide, among many others. There are optional secondary sources and expectations regarding regional libraries providing local information.<sup>239</sup> Many of the texts and records are no longer held as print copies and are only available online. The collections are unique to each library and evolve often and the medium or format of the information has changed as well. But the premise remains the same; to keep the common citizen apprised and current of government activity.

The FDLP stands as an unalloyed commitment to affirmative disclosure. During the 19th century, the federal government, at no little expense or effort, ensured citizens had access to information. It required a coordinated effort of printing and delivery across undeveloped terrain and demonstrates the federal insistence in the program. The libraries live on, though their stature is diminished, but they exist as a testament to an early and enduring U.S. belief in access.

### B. *Affirmative Disclosure & FOIA*

Since enactment, the FOIA has included two unheralded clauses necessitating proactive disclosure, and the 1996 EFOIA amendments<sup>240</sup> made a concerted effort to embrace the possibilities of digital records. The advent of computer use began in earnest in the 1980s, but government adoption and practices varied considerably. In the 1990s, computer use in the government grew exponentially, but access to digital records was hardly a concern in the development of government computer systems.<sup>241</sup> The EFOIA amendments were a formal recognition of the digital revolution and the possibilities of the Internet. They instituted important changes in the FOIA, including officially folding all digital records into the domain of the FOIA and allowing requesters to dictate the format of the delivered record.<sup>242</sup> Electronic Reading Rooms were also established as part of the amendments, requiring all federal agencies to make an online space for the affirmative disclosure of four types of agency records and information, including a requirement for agencies to post online any record released as part of any other request.<sup>243</sup>

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239. *Depository Collection and Development*, FED. DEPOSITORY LIBR. PROGRAM (last updated Aug. 16, 2018), <https://www.fdlp.gov/requirements-guidance/guidance/14-depository-collection-and-development#basic-collection>.

240. Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

241. Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin & Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 559-60 (1993).

242. 5 U.S.C. § 552(a)(3)(B) (2016).

243. *Id.* § 552(a)(2)(D) (requiring online publication of “all records, regardless of form or format that have been released to any person [who made a specific request therefore] and that

These efforts were meant to modernize the FOIA and dramatically increase the amount of information disclosed by agencies. They represent a sea change in government disposition, marking a new initiative in disseminating more information to the public. Significantly, it required no request from citizens and was a headlong embrace of digital affordances. The general outlook was sanguine. It was thought the amendments would decrease the cost of FOIA administration while ushering in a new digital era of government transparency.

It is hard to overstate the enthusiasm surrounding the EFOIA amendments. Contemporaneous scholars believed the EFOIA amendments would have a seismic impact on public access to government records. Michael Tankersley suggested it marked a move away from the requester release system to a more transparency-friendly affirmative disclosure regime.<sup>244</sup> He was unabashed in his excitement, noting that despite a lack of fanfare the efforts signaled “a revolutionary shift.”<sup>245</sup> If Congress provided adequate resources and could ensure agency support of the new affirmative disclosure policies, Tankersley believed the very meaning of public access would change.<sup>246</sup> James O’Reilly shared the belief that the EFOIA amendments would represent a paradigmatic change in government transparency.<sup>247</sup> However, he warned of the threat of too much availability and was concerned about access to private information. The amendments presented the possibility of changing the FOIA law’s purpose “from a window for oversight of the actions of government into a library of resources about others.”<sup>248</sup> O’Reilly believed the 1996 alterations presented the possibility of having

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because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”).

244. Michael E. Tankersley, *How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age*, 50 ADMIN. L. REV. 421, 422–23 (1998) (“The 1996 Amendments shift the emphasis away from [the] ‘request-and-wait’ model. The new paradigm requires agencies to anticipate requests and make broad categories of records immediately available to the public at agency records depositories and, using telecommunications technology, at requesters’ home computers. . . . The new model for public access requires that agencies be more forthcoming in making records immediately accessible to the public, and that requesters be more sophisticated in locating records and fashioning requests.”).

245. *Id.* at 423.

246. *Id.* at 458 (“The success of these Amendments will depend on whether agencies embrace or resist this new paradigm . . . . In order for these Amendments to be implemented, the government must make a broader commitment to devoting resources to providing information to the public than it has in the past. . . . For both agencies and requesters, Congress’s decision to emphasize the use of new technologies and shift FOIA away from the traditional ‘request-and-wait’ procedures will change the meaning of public access under FOIA.”).

247. James T. O’Reilly, *Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy?*, 50 ADMIN. L. REV. 371, 374 (1998) (“This will create a very different landscape of FOIA utilization in the coming years.”).

248. *Id.* at 376.

gone too far in embracing digital affordances and opening up the government.

Despite the grand ambitions of the EFOIA, after more than twenty years of the alterations, little has changed in the prevailing FOIA routines, and the sea change predicted by Tankersley and O'Reilly has failed to materialize. In analyzing FOIA annual report data, the general administration of the FOIA remains largely unchanged. Backlogs fluctuate, exemptions grow and shrink in popularity and the reporting requirements have expanded, yet the data documents very similar trends. Anecdotal reports demonstrate continued consternation from requesters.<sup>249</sup> An audit of the EFOIA's implementation mirrored amendments failure to affect change.<sup>250</sup> A 2007 study of 149 federal agencies found about one in five agencies were fully compliant with the explicit requirements of the 1996 amendments.<sup>251</sup> Only six percent had the required FOIA guidance to help requesters,<sup>252</sup> and about one-third provided the requisite records indices.<sup>253</sup> The open government survey concluded "that not only did the agencies ignore Congress, but lack of interest in FOIA programs is so high that many agencies have failed even to keep their FOIA Web sites on par with their general agency Web sites. Congress's best intentions have not had the desired impact."<sup>254</sup>

One unrealized and overlooked provision of the EFOIA amendments required agencies to present indices of agency records and an aid for locating records.<sup>255</sup> The premise behind the indices and aids was to help dissolve some of the mystery of the requester-release system, what Schwartz called the requester's paradox. A map of records repositories is

249. See, e.g., Dave Maass, Aaron Mackey & Camille Fischer, *The Foilies 2018*, ELEC. FRONTIER FOUND. (Mar. 11, 2018), <https://www.eff.org/deeplinks/2018/03/foilies-2018>; *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016, 8:01 AM), <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front>; Angus Loten, *FBI Blocking FOIA Requests with Aging IT, Lawsuit Alleges*, WALL ST. J. (July 22, 2016, 5:14 PM), <https://blogs.wsj.com/cio/2016/07/22/fbi-blocking-foia-requests-with-aging-it-lawsuit-alleges/>; Tom Blanton, *America Classifies Way Too Much Information—And We Are All Less Safe for It*, WASH. POST (July 31, 2015), [https://www.washingtonpost.com/opinions/the-united-states-is-not-safer-when-its-citizens-are-left-in-the-dark/2015/07/31/641b53fa-36e2-11e5-b673-1df005a0fb28\\_story.html?utm\\_term=.4badfec5f1f3](https://www.washingtonpost.com/opinions/the-united-states-is-not-safer-when-its-citizens-are-left-in-the-dark/2015/07/31/641b53fa-36e2-11e5-b673-1df005a0fb28_story.html?utm_term=.4badfec5f1f3); *Federal Agencies Stiff-Arm FOIA Requests*, USA TODAY (Mar. 15, 2015, 8:06 PM), <https://www.usatoday.com/story/opinion/2015/03/15/sunshine-week-foia-government-transparency-editorials-debates/24823085/>.

250. See, e.g., Kwoka, *supra* note 98, at 1430 ("The success of the E-FOIA provisions... has been generally regarded as extremely limited because of agencies' implementation failures.").

251. NAT'L SEC. ARCHIVE, FILE NOT FOUND: 10 YEARS AFTER E-FOIA, MOST FEDERAL AGENCIES ARE DELINQUENT 7 (2007), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB216/index.htm>.

252. *Id.* at 15.

253. *Id.* at 13.

254. *Id.* at 1.

255. 5 U.S.C. § 552(g) (2016).

subtly radical, chipping away at the wall separating the public and the government and presenting a half-measure in affirmative disclosure. Knowledge of agency records hierarchies cedes a small amount of control to individuals, giving citizens an opportunity to better craft requests and a better chance at appeal. It does not allow the public into the walled garden of government information, but – in theory – providing a glimpse of what records exist. The indices exist only hypothetically though, as the National Security Archive documented. Agencies have largely disregarded the requirement, and no enforcement mechanism has ever materialized.

The Obama administration famously added to the proactive disclosure efforts introducing its own transparency initiative, commonly called Open Government, early in the president's first term.<sup>256</sup> President Obama's original memorandum declared, "The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public."<sup>257</sup> Attorney General Eric Holder followed up with a memorandum of his own, in which he announced that "agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs."<sup>258</sup>

A new transparency plan was initiated with the 2009 Open Government Directive, which highlighted three principles: transparency, participation and collaboration.<sup>259</sup> The document emphasized proactive disclosure, requiring a range of digital protocols including creating dedicated webpages for easy access to agency records and information and the online publication of "at least three high-value data sets."<sup>260</sup> Generally, the Open Government effort focused on ensuring more data is easily accessible to the public and in doing so pushing more of the records out to the public without public entreaty. "As one observer has written, the basic thrust of EFOIA was to shift from a system in which requesters endure lengthy delays while waiting for paper copies of records 'to a model in which agencies anticipate requests and act to make records (and

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256. Memorandum of January 21, 2009—Freedom of Information Act, 74 Fed. Reg. 4,683, 4,683 (Jan. 26, 2009).

257. *Id.*

258. Attorney General's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879, 51,881 (Oct. 8, 2009).

259. Memorandum from Peter R. Orzag, Director of the Office of Management and Budget, for the Heads of Executive Departments and Agencies Concerning the Open Government Directive 1 (Dec. 8, 2009) (on file with the Treasury Dep't).

260. *Id.* at 2, 7–8 (defining high-value data as "information that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operation; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation.").

information on how to find additional records) available over online systems.”<sup>261</sup> The results of the new policies were checkered,<sup>262</sup> but a clear step in advancing proactive disclosure policies.<sup>263</sup>

The Office of Information Policy (OIP), a Justice Department bureau responsible for FOIA oversight, has further explored expanding existing requester release. They have proposed increasing proactive disclosure efforts as an extension of the FOIA and under the authority as established with FOIA’s original passage. In July 2015, the OIP commenced a six-month pilot study formally testing broadened proactive disclosure practices with seven executive agencies and offices.<sup>264</sup> One of the primary policies examined was “release to one is release to all,” where a single request for a record results in that record being posted to the agency’s website for all to access.<sup>265</sup> Assessment called the proactive disclosure policies a success with a number of the agencies voluntarily continuing the practices once the study ended, including the Environmental Protection Agency, the National Archives and Records Administration and multiple divisions of the Defense Department.<sup>266</sup> One of the biggest challenges to proactive disclosure was compliance with Section 508 of the Rehabilitation Act that requires material posted to the Internet to be accessible to those with disabilities.<sup>267</sup> The OIP ultimately found there to be an inherent value in making records available to all and that proactive disclosure policies would likely reduce traditional FOIA workload,<sup>268</sup> concluding that demand for increased proactive disclosure and use of available information will likely grow as policies become more engrained and popular.

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261. Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 577, 588 (2009) (citing Michael Tankersley, *Opening Drawers: A Requester’s Guide to the Electronic Freedom of Information Act Amendments*, LEGAL TIMES, May 19, 1997, at 29).

262. See Russell L. Weaver, *President Obama’s Open Government Initiative*, 1 INT’L J. OPEN GOV’TS 1, 2 (2014); Beth S. Noveck, *Rights-Based and Tech-Driven: Open Data, Freedom of Information, and the Future of Government Transparency*, 19 YALE HUM. RTS. & DEV. L.J. 1, 5–6 (2017); Matthew Crain, *The Limits of Transparency: Data Brokers and Commodification*, 20 NEW MEDIA & SOC’Y 88, 89 (2016).

263. Patrice McDermott, *Building Open Government*, 27 GOV’T INFO. Q. 401, 402 (2010) (noting “high value” datasets amounted to more than 100,000 by March 2010, though their value was a “mixed bag.”).

264. *Proactive Disclosure Pilot Launches*, DEP’T OF JUSTICE (July 10, 2015), <https://www.justice.gov/archives/opa/blog/proactive-disclosure-pilot-launches>.

265. U.S. DEP’T OF JUSTICE, PROACTIVE DISCLOSURE PILOT ASSESSMENT 3 (2016).

266. *Id.* at 16–17.

267. *Id.* at 4.

268. *Id.* at 19 (“If even one requester can find what he or she is looking for by reviewing the records already processed for the release to someone else, that would be one less FOIA request that needs to be made and one less FOIA request that an agency need receive.”).

Most notable among recent government efforts regarding proactive disclosure is the recent amendment to the FOIA.<sup>269</sup> The 114th Congress further refined the proactive disclosure section of the statute,<sup>270</sup> as well as the FRA.<sup>271</sup> The FOIA Improvement Act of 2016 formally endorsed affirmative disclosure through an amendment to the FRA that requires agencies to have “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.”<sup>272</sup>

In March 2018, the Department of Justice announced the launch of a first iteration of a centralized portal for federal FOIA requests.<sup>273</sup> The portal was built with the cooperation of the Office of Management and Budget, as directed by the 2016 FOIA amendment.<sup>274</sup> All agencies subject to the FOIA have their request procedures and documents housed at the federal portal. The effort represents clear steps in bringing order to an often chaotic, decentralized requester release system but still fails to address systemic issues inherent in the FOIA.

### C. *International Efforts*

An intermediary step in developing a more transparent government is building a public-facing records management system. A first step in this process would be creating and publishing a register of all records and record metadata. In 1989, Canada took a very modest step in that direction by establishing the Coordination of Access to Information Requests System (CAIRS) as an internal tracking protocol for the country’s federal Access to Information Act (ATIA).<sup>275</sup> CAIRS acted as a central register of Canadian ATIA requests. The CAIRS system itself became a frequent subject of ATIA requests with users mining it for statistical studies of transparency and in an effort to refine future requests.<sup>276</sup> Nearly all ATIA activity became available after a database was built of the resulting CAIRS info, allowing individuals to peruse the wording of requests, dates, departments and unique identifiers.<sup>277</sup> Despite claims that the Canadian government was working on publishing an

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269. FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538.

270. 5 U.S.C. § 552(a)(2)(D)(ii)(II) (2016) (encoding the “rule of three,” where agencies are obligated to post online any records that have been requested three or more times).

271. 44 U.S.C. § 3102 (2016).

272. *Id.*

273. *Department of Justice Announces Launch of National FOIA Portal*, U.S. DEP’T OF JUSTICE (Mar. 8, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-launch-national-foia-portal>.

274. FOIA Improvement Act of 2016 § 2.

275. Access to Information Act, R.S.C. 1985, c. A-1.

276. *Tories Kill Access to Information Database*, CBC NEWS (May 2, 2008, 9:23 PM), <http://www.cbc.ca/news/canada/tories-kill-access-to-information-database-1.705430>.

277. *Id.*

ATIA register on its own and make general improvements on the law, critics have suggested the government is not interested in providing access to a register like CAIRS or enacting substantive change in the statute.<sup>278</sup> Alasdair Roberts expressed enthusiasm with the prospect of proactive disclosure of the metadata on all federal records: “Even rudimentary information about the volume and subject of newly generated documents might reveal secrets about agency priorities.”<sup>279</sup> A one-time request under the Canadian ATIA to a single agency returned enough metadata to determine the “emerging priorities” of the small government unit.<sup>280</sup> Roberts observed that not only do government objectives come to light, but it also expedites the requesting process by allowing individuals to choose from the menu of available records by its unique identifier and simultaneously cutting back on fishing expeditions.<sup>281</sup> CAIRS was shuttered in 2008 after the government determined it to be excessively costly and problematic.<sup>282</sup> A spokesman for the Treasury Board, the government division responsible for ATIA oversight, explained the register was intended to be an internal tool, and its accidental public nature caused a range of issues for government and individuals alike.<sup>283</sup> Even if it was unintentional, the CAIRS system represents an early effort in public-facing records management. More interesting though was the civic interest in the mechanism, collectively bootstrapping a nearly comprehensive look at Canada access to records management.

Open government policies have gained global traction as well with a number of initiatives established, many aimed at the broader goal of freeing data. The International Open Data Charter is one such effort that has found broad support. The charter’s stated objective is to “embed a culture and practice of openness in governments in ways that are resilient to change through opening up data.”<sup>284</sup> The first principle of the charter explicitly calls for “open by default,” whereby all government

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278. Nina Corfu, *Overhaul of Canada’s Access to Information Act Taking Too Long*, *Critic Says*, CBC NEWS (Apr. 6, 2017, 8:00 AM), <http://www.cbc.ca/news/canada/nova-scotia/access-to-information-act-changes-overhaul-promised-liberals-federal-government-1.4056886>; Gil Shochat, *The Dark Country*, THE WALRUS (Jan. 12, 2010, 4:21 PM), <https://thewalrus.ca/the-dark-country/>.

279. ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* 220–21 (2006).

280. *Id.* at 221.

281. *Id.* at 222.

282. Brodie Fenlon, *Harper Defends Database Shutdown*, GLOBE & MAIL (May 5, 2008), <https://www.theglobeandmail.com/news/national/harper-defends-database-shutdown/article18449934/> (noting CAIRS “was deemed expensive, it was deemed to slow down the access to information, and that’s why this government got rid of it.”).

283. *Id.*

284. *Who We Are*, OPEN DATA CHARTER, <https://opendatacharter.net/who-we-are/> (last visited Nov. 14, 2018).

information is presumed available to the public and, according to the third principle, is maintained in a central portal that necessitates clear justifications for any information not released.<sup>285</sup> Among the more granular of the suggested practices is “consistent information lifecycle management” to “ensure historical copies of datasets are preserved, archived, and kept accessible as long as they retain value.”<sup>286</sup> The International Open Data Charter was signed by all G8 leaders in June 2013.<sup>287</sup> As of 2015, 70 countries had agreed to the principles.<sup>288</sup> A 2015 progress review awarded high marks to the United Kingdom, Canada and the United States, as well as special commendation to Canada for proactively publishing hundreds of thousands of previously unshared datasets.<sup>289</sup> The report also produced recommendations, citing issues that have plagued government transparency initiatives for decades. Technical barriers were found to have been a burden, namely metadata issues and licensing issues, but the primary impediments in realizing the Open Data Charter principles were determined to be a lack of political will and public awareness of the efforts.<sup>290</sup>

The International Modern Media Initiative (IMMI) was initially a radical Icelandic effort to adopt a raft of the world’s most progressive speech and transparency laws and was unanimously passed as a resolution by the Icelandic parliament in 2010.<sup>291</sup> After a dramatic financial crash, followed by a WikiLeaks revelation of banking and financial malfeasance, the country rebooted the nation’s leadership and demanded more accountability.<sup>292</sup> Most provocatively, the project contained a passel of anonymity, whistleblower, source and intermediary protections that would have provided legal shelter for WikiLeaks-type organizations.<sup>293</sup> The heart of the proposal though was transparency-oriented, looking to engraft in the country’s freedom of information law a strong affirmative disclosure mechanism that would require a central registry of documents held by government bodies.<sup>294</sup> Any non-posted

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285. *Principles*, OPEN DATA CHARTER, <https://opendatacharter.net/principles/> (last visited Nov. 14, 2018).

286. *Id.*

287. DANIEL CASTRO & TRAVIS KORTE, OPEN DATA IN THE G8: A REVIEW OF PROGRESS ON THE OPEN DATA CHARTER 3 (2015) (noting the G8 countries in 2013 included Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States).

288. *Who We Are*, *supra* note 284.

289. CASTRO & KORTE, *supra* note 287, at 4–6.

290. *Id.* at 32.

291. *IMMI Resolution: Iceland to Become International Transparency Haven*, INT’L MODERN MEDIA INST., <https://en.immi.is/immi-resolution/> (last visited Nov. 14, 2018).

292. Bruce Sterling, *The Icelandic Modern Media Initiative*, WIRED (Feb. 17, 2010, 9:44 AM), <https://www.wired.com/2010/02/the-icelandic-modern-media-initiative/>.

293. *IMMI Resolution*, *supra* note 291.

294. *Id.*

document was to remain on the public registry with the reason for nondisclosure and an estimated time of publication. Exemptions were to be severely limited and hold expiration dates, and privacy was secondary to the public interest. The registry was to have been live and contained not only a ledger of existing documents but the documents themselves. The proposed system was to have been overseen by an information minister independent of the judiciary with binding execution and sanction power. After the initial popularity and Western interest, the effort was rebranded as the International Modern Media Initiative but lost political purchase as Iceland struggled to regain financial stability, reseating the political party complicit in the cratering of the economy.<sup>295</sup>

#### D. Adopting Affirmative Disclosure

Implementing affirmative disclosure as a method for increased government transparency offers a continuum of possibilities. At present, a range of affirmative disclosure mechanisms exist, including provisions in the FOIA, the FDLP and public notice. One possible path forward is merely enhancing these existing instances. This would be a continuation of the federal government's current efforts in slowly adopting affirmative disclosure principles. On the other end of the spectrum is a dramatic change in government transparency, in-line with Iceland's proposal, where digital records—the preponderance of government information—are public on creation. This capitalizes on the affordances of electronic records and would truly institute a presumption of openness.

A major consideration in the future of government transparency is the existence and authority of an ombudsperson. Federal judges have acknowledged the limits of courts resolving access disputes.<sup>296</sup> Introduction of an independent oversight role has been suggested as a method for mitigating the adversarial nature of access to government information.<sup>297</sup> An ombudsperson would be especially important in an affirmative disclosure system, as the lack of requests makes the program especially reliant on internal compliance. In freedom of information laws, there is considerable variation in the ombuds role, but it generally represents a non-judicial authority with, *de minimis*, a responsibility to

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295. *Iceland Vote: Centre-Right Opposition Wins Election*, BBC NEWS (Apr. 28, 2013), <http://www.bbc.com/news/world-europe-22320282> (noting that Sigmundur David Gunnlaugsson would move into the prime minister's chair only to depart in the Panama Papers scandal).

296. See *Vaughn v. Rosen*, 484 F.2d 820, 823–25 (D.C. Cir. 1973).

297. See Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 848 (1975) (“The fear of government oppression, raised by the use of management and quality control techniques to the exclusion or minimization of adversary decisionmaking, can be neutralized if the people's watchdog were to become a viable concept. In this way, the ombuds[person] signals the start of a new tradition: expedited public decisionmaking under the supervision of institutionalized external overseers of the system.”).

resolve disputes between requesters and public bodies. Daxton Stewart suggests, traditionally, ombuds have no formal enforcement authority and instead rely on voluntary compliance with recommendations.<sup>298</sup> This has evolved though, and some have been given substantial power.

Ombudspersons have a long history in U.S. transparency measures, and Mark Fenster has suggested the modern concept originated in the United States in the 1960s, citing Hawaii's creation of the role.<sup>299</sup> In 2007, the federal government created the Office of Government Information Services as an office of NARA to offer "a non-exclusive alternative to litigation."<sup>300</sup> OGIS effectively operates as a FOIA ombuds office, primarily acting as a channel for communication between requesters and agencies but also making recommendations to Congress and the president. Congress deemed the work of OGIS "largely successful"<sup>301</sup> and, in a sign of confidence, expanded OGIS authority with the 2016 FOIA amendments. Nonetheless, OGIS remains largely impotent in enforcing FOIA. It holds no ability to investigate agency action or compel disclosure. Its primary weapon is the issuance of advisory opinions. Fenster has observed its impact to have been modest.<sup>302</sup> Stewart's survey of three state ombuds positions found flexible and impartial roles to be more effective and that an appropriate goal is not merely serving as an alternative to litigation but creating a culture of knowledge and trust among all parties.<sup>303</sup> Significantly, favoritism—"citizen aide" is a common title—fails to resolve, and often enflames, the culture of conflict.<sup>304</sup>

There has been considerable experimentation with the ombudsperson position in access to government information.<sup>305</sup> Some have imbued an individual with the authority of the position, while others have established an oversight panel or committee.<sup>306</sup> Defining the procedural processes of the committee—whether they can conduct investigations or merely resolve disputes—and deciding who, if anybody, they are to report to are major considerations in establishing the effectiveness of the role. Most important, though, is determining the formal authority of the

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298. Daxton R. Stewart, *Evaluating Public Access Ombuds Programs: An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising under Open Government Laws*, 2012 J. DISP. RESOL. 437, 439 (2012).

299. Mark Fenster, *The Informational Ombudsman: Fixing Open Government by Institutional Design*, 2 INT'L J. OPEN GOV'TS 275, 279 (2015).

300. OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, 2529.

301. S. REP. NO. 114-4, at 3 (2015).

302. Fenster, *supra* note 299, at 294.

303. Stewart, *supra* note 298, at 501-02.

304. *Id.* at 502.

305. See HARRY HAMMITT, *MEDIATION WITHOUT LITIGATION* 2 (2007).

306. See, e.g., CONN. GEN. STAT. § 1-205 (2015) (showing Connecticut's Freedom of Information Commission comprises nine commissioners).

ombudsperson. To realize an effective position capable of enforcing the law, the individual or committee needs investigatory authority, subpoena power, substantial enforcement abilities and the ability to impose penalties or punishments. The ombuds role also requires political insulation and a charter defining its position in enforcing the statute. It is a difficult office to commission, but given the latitude to independently provide routine monitoring, randomized review and investigate complaints is essential to any access program, but especially so to affirmative disclosure.

### 1. Conservative Approach to Increasing Affirmative Disclosure

A conservative path forward in executing affirmative disclosure can be realized expanding upon the on-going affirmative disclosure methods. Two simple, easily attainable changes would produce significant improvements in government transparency: (1) identifying more records categories subject to affirmative disclosure, and (2) enforcing existing public index requirements.

Both the FDLP and the FOIA have expanded the categories of information required to be published. The EFOIA establishment of electronic reading rooms, Obama's directive calling on the release of high-quality datasets and 2016's codification of release-for-one-release-for-all all signal the government's slow embrace of affirmative disclosure.<sup>307</sup> These efforts can be accelerated by identifying more categories of information to be disclosed regularly.

The OGIS provided instructive guidelines for conceptualizing what these categories could be. In a 2018 report, OGIS produced a report of recommendations for fostering successful affirmative disclosure practices.<sup>308</sup> The report proposed adopting an affirmative disclosure policy for three sets of information, records that: (1) memorialize agency actions, (2) provide original government-collected data and/or (3) are frequently requested.<sup>309</sup> OGIS pointed to the abundance of affirmatively disclosed information produced by agencies like the Bureau of Labor Statistics and the National Weather Service, observing that when agencies view dissemination as part of their mission they successfully established the necessary procedures.<sup>310</sup> Citizens and journalists alike rely on quarterly labor reports and the daily release of climate data, and the agencies consistently, successfully meet these affirmative disclosure

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307. See 5 U.S.C. § 552(a)(2)(D) (2016).

308. PROPOSED RECOMMENDATION FOR PROACTIVE DISCLOSURE CRITERIA, PROACTIVE DISCLOSURE SUBCOMM. (2018), <https://www.archives.gov/files/proactive-disclosure-subcommittee-criteria-recommendation-passed.pdf>.

309. *Id.* at 4–5.

310. *Id.* at 2–3.

expectations. Increased affirmative disclosure begets a more robust, routine and responsive affirmative disclosure regime.

Other laws have been passed that reengineer agency responsibilities to include affirmative disclosure policies. The DATA Act of 2014 requires the Department of the Treasury and the Office of Management and Budget to post government spending figures on a dedicated government website.<sup>311</sup> The National Environmental Policy Act included responsibilities for federal agencies to prepare and release environmental assessments and impact statements for any major federally funded project.<sup>312</sup> Federal laws oblige agencies to affirmatively disclose information on a diverse array of subjects, including federal emergency plans,<sup>313</sup> drinking water,<sup>314</sup> insecticides,<sup>315</sup> clean air standards<sup>316</sup> and toxic substances.<sup>317</sup> Herz defined categories for the types of information already expected to be affirmatively released: (1) information about the agency and its activities; (2) information about how to interact with the agency; (3) information about the entities regulated by the agency; and (4) information about the world.<sup>318</sup> These laws represent a small sample of the many agencies that affirmatively disclose information, but demonstrate how pervasive the practice is.

Two simple methods for determining more information ripe for affirmative disclosure include performing an exhaustive search of commonly requested categories of information and an open public comment period. For instance, individuals frequently request the tax records of non-profit organizations. These requests are generally granted pro forma, as they rarely involve non-disclosable information. By developing a public interface, these annual records could exist both in government repositories and online. At present, private companies request and post this information at a cost to the user. Margaret Kwoka has demonstrated these information brokers to be an especially heavy burden on FOIA resources.<sup>319</sup> By recognizing the categories of records exploited by these types of companies and developing the necessary interface, agencies would rid themselves of a considerable number of

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311. DATA Act, Pub. L. No. 113–101, 128 Stat. 1146, 1148 (2014).

312. 42 U.S.C. § 4332 (2015).

313. 42 U.S.C. § 11044(a) (2015).

314. 42 U.S.C. §§ 300g–1(b)(1)(B)(i)(1), 300j–4(g)(5) (2015).

315. 7 U.S.C. § 136i–1(a)(1), (b) (2015).

316. 42 U.S.C. § 7414(a)(1)(A), (c) (2015).

317. 15 U.S.C. § 2607(b)(7) (2015).

318. Herz, *supra* note 110, at 579–81 (noting that another example of the third category includes the Occupational Safety and Health Administration’s comprehensive online posting of work safety inspection; instances of the fourth category would be the release of car safety testing and the EPA’s posting of environmental testing).

319. Kwoka, *supra* note 98, at 1425–26.

requests, while also better serving the public interest.<sup>320</sup> Another method for determining appropriate categories of affirmative disclosure could be revealed through analysis of existing FOIA logs.<sup>321</sup> Agencies could produce the frequently sought records in advance of requests, preempting the FOIA process, conserving resources and providing additional access.<sup>322</sup> Agencies could also hold semi-regular public comment periods or allow individuals to make requests for reoccurring record releases. This would present the possibility of continuously expanding records categories and keep affirmative disclosure flexible and responsive to public interest.

A second element for quickly and easily adopting affirmative disclosure is the enforcement of existing record indices provisions.<sup>323</sup> Providing the public with an understanding of agency records expedites the request process and reaffirms the appeals process. The release of organizational information structures is the first step in ceding control of more information, and maps of record repositories are a small leap from the more aggressive and transparency-forward registries of records. The process of developing and publishing hierarchies of information and aids to assist the public is relatively simple. Again, these requirements exist in the present FOIA statute, and insisting they be produced should be without controversy.

The two steps to conservatively increasing affirmative disclosure require little in the way of statutory change but would represent a dramatic reconceptualization of access to government information. Government agencies already affirmatively disseminate vast quantities of data. Much of the information is so ubiquitous as to be hardly noticeable. The public assumes this information is public, and the agencies see it as part of their charter. Perhaps the largest failure of the FOIA has been its evolution as a galling obligation to be conducted in addition to agencies' real work.<sup>324</sup> If every agency conducted itself with access and transparency at the forefront of their operations, the public's relationship with the government could change rapidly. It could be as simple as opening the door to more categories of affirmative disclosure and a commitment to publishing records indices.

## 2. Radical Approach to Increasing Affirmative Disclosure

The more radical recommendation for increased affirmative disclosure proposes more intensity in applying the principles of the

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320. *Id.* at 1432.

321. *Id.* at 1436.

322. *Id.* at 1434.

323. *Id.* at 1434–35.

324. *See* S. REP. NO. 104–272, at 15 (1996) (observing search should be thorough but not interrupt an agency's primary functions).

conservative approach, not new tools. The proposition relies on the presumption of openness, operationalizing it by making records publicly available upon creation and posting these records to a live register. The registers would hold a row for every created record, and the row would include metadata on the record. The row would host the record unless it was flagged for review. If review determined it to be not disclosable, the row would state the exemption and an expiration date for the exemption. Determinations about which records are subject to registry posting are open for debate but exploring previous request logs and allowing public petitions seem like practical starting points. Creating public-facing records that appear online once saved to the computer is theoretically frightening but technically possible. It is a radical hypothesis, but proposes sapping agency control of their own records, as each iteration of the information process provides potential opportunities for agency intervention and secrecy. Much of FOIA's failure resides in a lack of agency will to carry out their duties. By removing custody of their information as early as possible, the process becomes more difficult to undermine.

Agency emails would make an ideal, if bold, foray into implementing more affirmative disclosure. In addition to the very public failures in processing the requests for Hillary Clinton's emails, requests for agency emails make up a sizeable portion of total requests, and a 2018 study found that two in five agencies said they were unable or not required to search for requests seeking specific emails.<sup>325</sup> Twenty-six percent of the agencies claimed the request for emails was either too broad or would impose an undue burden on the agency.<sup>326</sup> Converting the internal, but presumably open, email accounts of government personnel to publicly available, searchable record repositories would lift much of this burden while making government communication more transparent instantly.<sup>327</sup>

Agency emails already exist in registries and creating a second public-facing iteration of each individual's inbox would take minimal technical development. The format would allow for easy withholding, when necessary, by retaining the row position in a typical inbox and merely redacting the necessary information (sender, subject and/or date), listing the corresponding exemption and providing a date of expected release. With regards to segregability, the body of an email could be redacted in the same fashion of current FOIA requests, by blacking out the withheld portions.

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325. Lauren Harper, Nate Jones & Tom Blanton, *Agencies Struggling to Respond to FOIA Requests for Email*, NAT'L SEC. ARCHIVE (Mar. 8, 2018), <https://nsarchive.gwu.edu/news-foia-audit/foia/2018-03-08/agencies-struggling-respond-foia-requests-email>.

326. *Id.*

327. See Kwoka, *supra* note 98, at 1431, 1434.

The registries of live records may appear to be an unlikely application yet represent a reality if Congress's rhetoric and the presumption of openness are to be believed. Access to government information is in a deplorable position, constrained by a law from a paper-record era that's received a crabbed interpretation from federal courts. The law pits requesters against agencies despite an incredible disadvantage in information and resources. Live registries and default publication remove responsibility from agencies that have undermined the function of the FOIA at every turn. Hillary Clinton's email fiasco represents just another cynical turn in the executive branch's overt disregard for the law and the public's right to know. Putting agency personnel's emails online would be a line in the sand demonstrating, for the first time, the government is sincere in its presumption of openness.

#### CONCLUSION

To be sure, affirmative disclosure is not a panacea.<sup>328</sup> It would not cure all of the ills of the FOIA. It may represent an early front in a transparency war that may compel Congress to pass explicit laws requiring public bodies avoid covert or encrypted messaging programs and record memorial actions akin to provisions in federal open public meeting laws necessitating agency business be conducted in a public setting.<sup>329</sup> But affirmative disclosure represents a significant step forward in delivering on the people's right to know. It runs the risk of reconstituting some of the problems of the pre-FOIA transparency mechanisms, assuming good faith from agencies in fulfilling the affirmative disclosure of the records, whether they be select categories or the entirety of their archives. It places a lot of responsibility with agencies that have demonstrated an incredible reluctance to release records. The proposed recommendations would also leave many of the issues plaguing the FOIA in place. The use of registers and flagging of non-disclosable information allows agencies considerable authority in determining excluded records, which would not be dissimilar from the existing exemptions system. A strong, independent ombudsperson could alleviate many of these concerns, but as addressed above, such an appointment presents a range of issues.

Just as passage of the FOIA marked a revolutionary change in the conception of the public's relationship with government records and

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328. See, e.g., Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, 70 PUB. ADMIN. REV. 925, 929 (2010) (examining India's exemplary freedom of information statute, including expansive proactive disclosure provisions and finding that implementation substantially underperformed with regard to statutory expectations, in particular, proactive disclosure: "Unfortunately, many public authorities have neglected the RTIA's proactive disclosure requirements.").

329. 5 U.S.C. § 552b(b) (2018).

information, adopting further affirmative disclosure will require a similar recalibration. The first step in doing so is recognizing the United States' enduring commitment to affirmative disclosure and the quiet ubiquity of these principles. Affirmative disclosure is enshrined in the Constitution and is ingrained in daily lives in ways rarely considered. The second step is galvanizing the righteous refrain of the public's right to know. Specific sets of federal agency records remain sequestered only through public acquiescence and indifference. Passage of the FOIA marked an important success in access but has become shot through with loopholes, many of which have been recognized by federal courts. The blatant disregard of essential FOIA procedures by the State Department in the Clinton email fiasco presents two overlooked but crippling failures of the FOIA. Further implementation of affirmative disclosure provides the architecture for building off of the FOIA's foundation. It is easily amendable, as affirmative disclosure elements already exist in the statute; technically achievable and symbiotic in both shrinking agency resource needs and increasing public access to government records.

Adopting strong affirmative disclosure measures, like those outlined above, and following through on implementation and oversight, confronts the "longstanding, systemic weaknesses" and would mark the advent of a new paradigm in government transparency. The ultimate objective—a presumption of openness—remains unchanged, but modernizing the architecture and refreshing public faith could manifest government finally delivering on the objective adopted more than fifty years ago.

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