



PANDERING, PRIORITY OR POLITICAL WEAPON: PRESIDENCIES, POLITICAL PARTIES THE FREEDOM OF INFORMATION ACT

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Politics have a profound influence on the design and administration of nearly all government laws and policies. And the executive branch, a highly political institution, is given significant latitude in shaping the primary mechanism for accessing government information, the Freedom of Information Act. This article explores the political nature of the FOIA by examining legislative history, party messaging, presidential actions and a quantitative analysis of FOIA use and implementation from 1975 until the present. The outcomes are both predictable — Presidents Ronald Reagan and Donald Trump having poor records — and surprising — President George W. Bush producing a relatively transparent record. The study's findings suggest the failures of FOIA are likely less a consequence of presidencies and political parties than an indiscriminate symptom of contemporary U.S. governance.

In the United States, there are common narratives regarding presidencies and political parties. Federally, Republicans are generally considered to be less compliant with and sometimes hostile toward government transparency mechanisms, like the Freedom of Information Act,¹ and less likely to produce policy changes that favor public access to government information.² Democrats and Democratic presidencies are thought to lead governments more liberal in producing records and information and more likely to release guidance or memoranda in favor of public access to government information.³ Democratic rhetoric and efforts frequently accord with these perceptions. However, an examination of FOIA use and implementation data document that these tropes are not entirely accurate.

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¹5 U.S.C. § 552 (2018).

²See discussion accompanying *infra* notes 6-8, 71-86.

³See discussion accompanying *infra* notes 51, 68, 87-99.

In an effort to explore the history of FOIA use and implementation, this article analyzes FOIA annual reports from their 1975 advent until the present. These reports document basic usage and compliance figures. Over the course of eight administrations, the FOIA data present a flawed, and increasingly so, access mechanism, where in recent years requesters are more likely to receive a denial or no records at all than the information requested. And while there are clear fluctuations among administrations, Democrats and Republicans do fare similarly, suggesting the poor FOIA performance is not necessarily rooted in party politics and instead is an indiscriminate symptom of contemporary U.S. governance.

Scholars have conducted similar studies using FOIA annual reports over shorter periods of time.⁴ This article extends previous quantitative analysis of FOIA use and implementation by exploring presidential and political impact on the FOIA, not across recent presidencies but all presidencies since FOIA annual reports were required by the watershed 1974 amendments.⁵ The study examines the pervasive belief that presidential administrations and political parties exert a strong and distinct influence on implementation of the FOIA. Prominent FOIA scholars James O Reilly and Patrice McDermott have observed the differing tendencies between parties. O Reilly called the FOIA efforts of the administrations of Bill Clinton and Barack Obama countervailing forces favoring disclosure, whereas Republican administrations and their Justice Departments were focused on actively suppressing transparency and empowering agencies to withhold information.⁶ In examining public positions of presidents since Reagan, McDermott found Republican administrations were generally less inclined to support as robust a FOIA as their Democratic counterparts.⁷ Famed First Amendment lawyer Floyd Abrams has suggested Republicans and Republican presidencies have historically been less

⁴See, 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: DIGITAL DATA AND PRIVACY IN A WIRED WORLD* 16 (Charles N. Davis & David Cuillier eds., 2014); Minjeong Kim, *Numbers Tell Part of the Story: A Comparison of FOIA Implementation Under the Clinton and Bush Administrations*, 12 *COMM. L. & POLY* 313 (2007); Ben Wasike, *FOI in Transition: A Comparative Analysis of the Freedom of Information Act Performance Between the Obama and Trump Administrations*, 37 *GOV'T INFO. Q.* 1 (2020); Ben Wasike, *FOIA in the Age of "Open.Gov": An Analysis of the Performance of the Freedom of Information Act Under the Obama and Bush Administrations*, 33 *GOV'T INFO. Q.* 417 (2016).

⁵Privacy Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

⁶1 JAMES T. O REILLY, *FEDERAL INFORMATION DISCLOSURE* § 3.4, 40 (2018).

⁷Patrice McDermott, *Building Open Government*, 27 *GOV'T INFO. Q.* 401, 412-13 (2010).

supportive and are less likely to prioritize transparency and the FOIA.⁸ Legal counsel for *The New York Times* suggested both political parties share an interest in government transparency but perhaps for different reasons. Democrats are seen to have a “tradition for openness,” while he thought Republican support for transparency was rooted in skepticism.⁹ Research has shown that right-leaning and left-leaning members of the voting public have different priorities when considering government transparency, and this can be seen as a distillation of the general party positions with liberal-identifying individuals more supportive of transparency as a method of ensuring good governance¹⁰ and more inclined to support press access to government information.¹¹

The article explores the political nature of the FOIA and the influence of presidential administrations in five parts. First, an outline of the FOIA, its role in a democracy and theories of institutional secrecy are provided. Second, a review of the legislative history reveals the deep partisan roots of the FOIA and how it has been wielded as a political weapon, created and commonly amended by Congress only when the political winds were favorable to congressional majorities. Third, the article analyzes political party platforms in an effort to demonstrate the official positions of the Democratic and Republican parties and how their views on transparency and the FOIA evolved over time. Fourth, a thorough examination is provided of each presidential administration's FOIA actions. The section focuses on presidential rhetoric, national security executive orders and attorney general interpretive guidance. Last is a quantitative analysis of cabinet-level FOIA annual reports from 1975 to 2018. This examination of the party and presidential influence is important as the FOIA is frequently identified as the primary mechanism for realizing government transparency

⁸John Wicklein, *Foiled FOIA*, AM. JOURNALISM REV. 38 (April 1996) (In observing the ensuing Bill Clinton presidency: “When a Republican administration comes in, says Floyd Abrams, ‘they don't talk about the Bill of Rights.... But here's a Democratic president who has taught constitutional law and has grown up in an atmosphere where openness in government is taken very seriously.’”).

⁹Jameel Jaffer, *Open Government Transparency Under Bush, Obama, and Trump*, COLUM. JOURNALISM REV. May 23, 2017, available at <https://www.cjr.org/analysis/government-transparency-trump-obama-bush.php>.

¹⁰See Suzanne J. Piotrowski & Gregg G. Van Ryzin, *Citizen Attitudes Toward Transparency in Local Government*, 37 AM. REV. OF PUB. ADMIN. 306 (2007).

¹¹See David Cuillier, *Access Attitudes: A Social Learning Approach to Examining Community Engagement and Support for Press Access to Government Records*, 85 JOURNALISM & MASS COMM. Q. 549 (2008).

by politicians,¹² judges,¹³ scholars¹⁴ and journalists.¹⁵ Understanding the effect, of lack thereof, of the executive office on the function of the FOIA provides substantive new insights into the nature of political influence on the FOIA, challenging existing notions of the preeminent federal transparency law in the United States.

A DEMOCRATIC IMPERATIVE AND AN ESSENTIAL TOOL FOR JOURNALISTS

President Lyndon Johnson signed the FOIA into law on the Fourth of July 1966. It is the modern instantiation of government transparency, one of the first of its kind in the world, and the template for freedom of information laws in all fifty states and in more than 120

¹²See, e.g., S. REP. NO. 114-4, at 2 (2016) (calling the FOIA “the nation’s premier transparency law”); 153 CONG. REC. S10986 (daily ed. Aug. 3, 2007) (statement of Sen. Leahy: “Open government and transparent decision-making are bedrock American values. For more than four decades, FOIA has translated those great values into practice by guaranteeing access to government information.”); H.R. REP. NO. 104-795, at 6 (1996) (identifying FOIA as establishing the federal government’s commitment to a policy of openness).

¹³See, e.g., *NARA v. Favish*, 541 U.S. 157, 172 (2004) (The FOIA and its purpose “should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.”); *NLRB v. Robbins*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”); *Dept of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (The Supreme Court found a “crystal clear . . . congressional objective” in passing the FOIA. It was “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”).

¹⁴See, e.g., SUZANNE J. PIOTROWSKI, *GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 1* (2008) (“[T]he Freedom of Information Act is vitally important to the federal government generally and federal administration specifically. . . . The ability to access government documents is essential finding out what the government is doing.”); Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MD. L. REV. 1060, 1061 (2013) (“FOIA represents one of the strongest government accountability measures Congress has ever adopted.”); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 635 (2005) (“The Act has become both a powerful tool for inducing disclosure and a powerful symbol of America’s commitment to governmental transparency.”).

¹⁵See, e.g., Paul McMasters, *FOIA: It’s Always There*, *QUILL*, October 1996, available at <https://www.spj.org/foiabout.asp> (“A law that has served as a model for nations around the world trying to make government more accessible and accountable to their citizens. A law that set out to make manifest the Jeffersonian principle of an informed citizenry.”); Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, *N.Y. TIMES*, July 21, 2018, available at <https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html>. (In discussing filing public records requests, “But to journalists, they are essential tools.”); John Dyer, *Fifty Years of FOIA*, *NIEMAN REPORTS*, Winter 2016, available at <https://niemanreports.org/articles/fifty-years-of-foia/> (“It remains one of the most powerful and fundamental tools of American journalism.”).

countries.¹⁶ Though signed into law relatively recently, the FOIA and its broad goals are rooted in the Framers' vision, and its statutory realization rose from a movement devoted to counteracting the engrained secrecy practices of war-time governance.¹⁷ Originally designed during an era of hard copies, the FOIA was recalibrated in 1996 to include digital information and has since seen its popularity grow rapidly.¹⁸

The law grants anybody, U.S. citizen or otherwise, the right to access the records of the federal government. The office subject to the request, limited to executive branch departments and agencies,¹⁹ is required to produce any responsive records, deny the request or close the request under an "other authority."²⁰ Other authorities include not possessing responsive records, among a range of other administrative closures (for example, the request being withdrawn or the requester refusing to pay the imposed fee). If the request is denied, the office must provide a statutory justification,²¹ of which there are nine exemptions.²² If not satisfied, the requester can file an administrative appeal with the office,²³ and, failing that, can sue the office in a federal district court (and the court has jurisdiction to enjoin the agency from withholding).²⁴ Departments and agencies have twenty

¹⁶See *Right to Information: A Tool for People Power*, TRANSPARENCY INT., Sept. 26, 2019, https://www.transparency.org/news/feature/right_to_information_people_power.

¹⁷Kiyul Uhm, *The Founders and the Revolutionary Underpinning of the Concept of the Right to Know*, 85 JOURNALISM & MASS COMM. Q. 393 (2008); Kiyul Uhm, *The Cold War Communication Crisis: The Right to Know Movement*, 82 JOURNALISM & MASS COMM. Q. 131 (2005).

¹⁸Electronic Freedom of Information Act, Pub. L. No. 104-231, 110 Stat. 3048 (1996). See also Martin E. Halstuk & Bill F. Chamberlin, *Open Government in the Digital Age: The Legislative History of How Congress Established a Right of Public Access to Electronic Information Held by Federal Agencies*, 78 JOURNALISM & MASS COMM. Q. 45 (2001).

¹⁹5 U.S.C. § 552(f)(1) (2018) ("[A]gency as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), of any independent regulatory agency.").

²⁰5 U.S.C. § 552(a)(6) (2018).

²¹5 U.S.C. § 552(a)(8)(A) (2018) ("An agency shall — withhold information under this section only if — the agency reasonably foresees that disclosure would hard an interest protected by an exemption described in subsection (b).").

²²5 U.S.C. § 552(b) (2018).

²³5 U.S.C. § 552(a)(6)(A)(i)(III) (2018) ("[I]n the case of an adverse determination — the right of such person to appeal to the head of the agency.").

²⁴5 U.S.C. § 552(a)(4)(B) (2018) ("On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.").

business days to respond to a request²⁵ (though this is routinely disregarded) and have the right to charge the requester reasonable fees,²⁶ which can be waived if the request is determined to be in the public interest.²⁷

The FOIA exists as the U.S. citizens best method for realizing government transparency, and the Supreme Court of the United States has called it a democratic imperative, alternatively describing it as “vital”²⁸ and “a structural necessity,”²⁹ and warned that the FOIA was “not to be dismissed as a convenient formalism.”³⁰ Courts and legislators commonly champion it as the foundation of an informed public without which electorates would be unable to intelligently participate in political discourse or ably cast votes. Jeannine Rely showed that international freedom of information laws are found most often in countries with strong news media climates.³¹ And these laws are seen as central to the journalism profession. FOIA is a “cornerstone of openness,” according to a former Society of Professional Journalists president.³² Investigative reporters use it to conduct deep dives on government and government-adjacent entities, routinely citing FOIA and state public records laws in their reporting. *The New York Times* explained its use of FOIA, and called public records laws “essential,” noting such laws play an important role in not only their investigative work but also their day-to-day reporting.³³ A Nieman Report retrospective succinctly described FOIA as “one of the most powerful and fundamental tools of American journalism.”³⁴

²⁵5 U.S.C. § 552(a)(6)(A)(i) (2018) (Each agency shall “determine within 20 days (excepting Saturdays and Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such a request of” its determination.).

²⁶5 U.S.C. § 552(a)(3)(A) (2018).

²⁷5 U.S.C. § 552(a)(4)(A)(iii) (2018) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester.”).

²⁸*NLRB v. Robbins*, 437 U.S. 214, 242 (1978).

²⁹*NARA v. Favish*, 541 U.S. 157, 172 (2004).

³⁰*Id.*

³¹Jeannine E. Rely, *Freedom of Information and Global Diffusion: Testing Roger s Model*, 89 JOURNALISM & MASS COMM. Q. 431 (2012).

³²*McMasters*, *supra* note 15.

³³Lucas, *supra* note 15.

³⁴Dyer, *supra* note 15.

THE ROOTS AND RESIDUAL PULL OF GOVERNMENT SECRECY

Despite clear ideological support for the FOIA and various social factions recognizing its importance, the federal government has failed to fully deliver on its commitment to transparency.³⁵ Much of this can be attributed to the nature and structure of modern social power. Government secrecy is both a remnant of preceding forms of autocratic government and a consequence of the prevailing hierarchical, meritocratic organization of contemporary democracy. Prior to the advent of democratically elected leaders, governments held absolute dominion over information. Sissela Bok suggested early government secrecy was rooted in the term *arcana imperii*, or “secrets of rule” (or even “mysteries of state”), itself an extension of *arcana ecclesiae*, the ancient code of silence among religions.³⁶ Calling it an “esoteric rationale,” Bok said governments, essentially, keep secrets because governments have always kept secrets; just as creed, and the resulting ritual, have frequently been shrouded in mystery to protect the faithful from sacred knowledge and motives.³⁷ The connection becomes more apparent when considering that most monarchies and early forms of rule established their authority through divine right. Another piece of the esoteric rationale origin points to governmental actions that while requisite to the strength of the state may be morally objectionable to its citizens, thus demanding rulers make repugnant choices in order to secure the perpetuation and safety of the nation. This tacit acknowledgement by the citizenry to the unappealing decisions made on their behalf has evolved into a willful obliviousness that is ripe for

³⁵See, e.g., David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099-1100 (2016) (“[T]he FOIA model has proven deficient in significant respects. . . . [O]ne might find that FOIA ultimately serves to legitimate the lion’s share of government secrecy while delegitimizing and debilitating government itself.”); COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, FOIA IS BROKEN: A REPORT 39 (2016), <https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf> (Committee Chair Jason Chaffetz: “You live in La-La Land. That’s the problem. You live in a fantasy land, because [the FOIA] ain’t working.”); *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA, July 21, 2016, <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front>.

³⁶SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 173 (1989).

³⁷*Id.* at 39-40 (“Keepers of secrets can experience the powerful, the forbidden, and the sacred with the same awareness that outsiders have of such secrets as both endangered by and dangerous for those who come too near or expose them. This experience underlies what I shall call the esoteric rationale for protecting what is held sacred and the secrets that partake of it. . . . It serves an indispensable function in protecting these, but it can also deflect moral inquiry through the incentives it offers people to remain in a childish relationship to secrecy and power.”).

exploitation and abuses of government secrecy. Bok wrote, “To the extent that rulers become convinced of their rightful freedom from oversight and from ordinary moral constraints, they grow predictably more corrupt and exploitative.”³⁸

Max Weber has described government secrecy as a natural byproduct of hierarchies and power relationships. He observed that every bureaucrat seeks to enhance the value of information and the status of those holding it by keeping the knowledge to themselves.³⁹ Limiting the circulation of information provides the appearance of superior intellect for those in power. When guarded closely, secrets become a currency, to be exchanged when doing so returns another resource or advantage. Maneuvers are made in an effort to control adversaries, scale the hierarchy or sustain power. Weber suggested that an executive or political party in power prefers other offices of government be at an information disadvantage, because “bureaucracy naturally welcomes a poorly informed and hence a powerless parliament — at least in so far as ignorance somehow agrees with the bureaucracy’s interests.”⁴⁰ This advantage is used not only to shield a government from its own public and assembly but also in defending against outside competition, be it economic, military or any other source of threat. Bureaucracy shelters itself from hostility, both internally and externally, further securing itself by apportioning information when beneficial in sustaining the appearance of power and control, and not otherwise. Weber introduced the concept of the “official secret” as the deliberate invention of the bureaucracy, calling it fanatically defended by those in power.⁴¹ The official secret is alluring and potent — Edward Snowden, upon gaining access to an array of classified National Security Agency documents, called covert NSA knowledge “a very intoxicating thing”⁴² — and insularity not only multiples the

³⁸*Id.* at 173.

³⁹MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 233 (H.H. Gerth & C.W. Mills eds., 1946) (“Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. . . everywhere that the power interests of the domination structure toward the outside are at stake, whether it is an economic competitor of a private enterprise, or a foreign potentially hostile polity, we find secrecy.”).

⁴⁰*Id.* at 233-34.

⁴¹*Id.* at 233 (“The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the ‘official secret’ is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond [protecting a narrow band of government interests].”).

⁴²Andrew Rice, *Edward Snowden’s Strangely Free Life — As a Robot*, N.Y. MAG., June 26, 2016, available at <http://nymag.com/intelligencer/2016/06/edward-snowden-life-as-a-robot.html?utm=bottom>.

value of information but also shields leadership from criticism by allowing for the correction of errors without public acknowledgment. These principles apply at the highest levels of governance but also tend to cascade into lower levels of bureaucracy for the same reasons they appeal above.

Government secrecy is the residue of ancient knowledge and largely bygone power structures and in many ways is the antithesis of the democratic ideal, yet secrecy practices continue to serve contemporary purposes for obvious and easily observable reasons. It is in a politician's and government personnel's individual interests to provide as little transparency as is publicly acceptable. And, as a result, government transparency mechanisms deliver small gains but cannot produce the paradigm shift promised by the FOIA. At its essence, government secrecy is not about presidential predilection or party politics. It is about something rawer. It is about information control in service of power, about perpetuating existing power structures.

THE POLITICS OF LEGISLATION

Historically, the FOIA is a deeply political law. The right-to-know movement — spurred primarily by professional journalism organizations — joined the Democratic Party in pushing legislation through Congress, but the original bill and all following amendments are the product of political opposition and opportunism. As legislation, FOIA was largely a Democratic project and the product of the Subcommittee on Government Information chaired by Rep. John Moss, a Democrat from northern California. The common FOIA narrative finds Moss as a first-term congressional member, serving on the lowly House Post Office and Civil Service Commission, curious about the recent discharge of 2,800 federal employees for so-called “security reasons.”⁴³ When the Civil Service Commission refused to turn over any documents, he realized he had no recourse at the time due to the executive and legislative branches being controlled by Republicans.⁴⁴ Moss was initially indignant and ultimately galvanized.⁴⁵

⁴³MICHAEL R. LEMOV, *PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 44-49 (2011).

⁴⁴See BRUCE LADD, *CRISIS IN CREDIBILITY* 189-90 (1968) (“The [Civil Service Commission] flatly refused to supply the information requested. With the Republicans in control of both the executive branch and the Congress, there was no one to whom Moss could appeal for assistance.”).

⁴⁵See MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY 1945-1975* 45-46 (2015).

The Subcommittee on Government Information — comprised of Moss; Rep. Dante Fascell, a Florida Democrat; and Clare Hoffman, a Michigan Republican⁴⁶ — was formed in 1955 by Rep. William Dawson, an Illinois Democrat and chair of the Government Operations Committee. The subcommittee was charged with investigating suppression of information and abuse of secrecy policies.⁴⁷ Robert Blanchard, one of the first FOIA scholars, said these concerns were stirred by the news media but also motivated by the growing sophistication of government secrecy practices, President Dwight D. Eisenhower's creation of the Office of Strategic Information and, likely most consequentially, the newly elected 84th Congress, of which both chambers were controlled by the Democratic Party.⁴⁸ The Moss Committee, as it became known, was especially active, holding 200 hearings and investigations, producing seventeen volumes of hearing transcripts and fourteen volumes of reports during its twelve years.⁴⁹ Its modus operandi was finding abuses of government secrecy, hauling the offending officials in for hearings and then, through close coordination with the press, widely publicizing the details of the infractions. This was especially effective, as the journalism organizations and the Democrats on the committee formed an unusually close bond.⁵⁰

Hoffman, the lone Republican on the committee, acted as a counterweight to Moss's zeal. His allegiance vacillated depending upon whom was in the White House. According to Moss's biographer, Michael Lemov: "Hoffman had aggressively but ineffectually tilted against executive secrecy throughout the [Democratic] Truman administration. He became a more grudging supporter of the freedom-of-

⁴⁶The trio served on the subcommittee from creation until 1962, when it was expanded to eight members. Of the three, only Moss carried on until passage of the law.

⁴⁷See Robert O. Blanchard, *Present at the Creation: The Media and the Moss Committee*, 49 JOURNALISM Q. 271 (1972).

⁴⁸See *id.* at 272.

⁴⁹See Donald Rumsfeld, *FoI Cleanup Hitters With Good Followthrough*, BULL. OF THE AM. SOC'Y OF NEWSPAPER EDITORS, February 1968, at 9, reprinted in 114 CONG. REC. 3773, 3775 (1968).

⁵⁰See Michael R. Lemov & Nate Jones, *John Moss and the Roots of the Freedom of Information Act: Worldwide Implications*, 24 SW. J. INTL. L. 1, 44-45 (2018) ("Journalists and journalism associations were delighted to work with Moss. Sometimes the Moss Committee staff wrote the press organizations' freedom-of-information annual reports — which were in turn widely reproduced in the press in terms laudatory of the Moss Committee. The Moss Committee was a 'unique political hybrid, an unusual locus of cooperation between Congress and the press. The committee's investigations were organized in consultation with key leaders in the press, and Moss's staff was dominated by former newspaper reporters, including chief of staff Sam Archibald, a former Sacramento Bee reporter.").

information cause with Republican Dwight Eisenhower in the White House.”⁵¹ With Eisenhower in office, Hoffman redirected the committee to consider the powers of executive office, and, in a 1956 hearing, argued the president, per the Constitution, was not obliged to justify his actions to the public or Congress, and this included submitting the executive branch to new transparency measures.⁵² Hoffman also complained that the press was given better treatment than he was as the minority member, noting on multiple occasions newspapers ran stories on subcommittee reports that he had yet to see.⁵³

Legislation only gained Republican support when a Democrat was in the White House, and it was seen as advantageous to the party.⁵⁴ President Lyndon Johnson had deflated Democratic enthusiasm for freedom of information legislation, and there is evidence of moves made to kill the legislation and committee. Lemov recounted quiet efforts to defund the Moss Committee.⁵⁵ Curiously, once the Senate had passed the FOIA bill, Democratic Speaker John McCormack sent the bill, not to the committee that spent years on it, but to the Judiciary Committee. If not for the inexplicable benevolence of Judiciary Committee Chair Emanuel Celler and his decision to turn jurisdiction over to the Moss Committee, the bill was fated to languish and die in committee.⁵⁶ It was also known that President Johnson was no fan of the legislation.⁵⁷ He had remained largely quiet and ambivalent when pressed on the subject but was known to detest the transparency effort and had orchestrated Democratic leadership to smother

⁵¹*Id.* at 40.

⁵²Availability of Information from Federal Departments and Agencies, H.R. REP. NO. 84-2947, at 96-99 (1956) (Hoffman stated, “[T]he right of the citizen, of the Congress, to be advised of the information possessed by the executive departments is subject to several limitations as is the right to a free press, to free speech, to freedom of petition, and every other right guaranteed by the Constitution. There must be a reason for the exercise of the right . . . [it] is limited by the fact that the Constitution grants to the President certain authority, imposed upon him certain duties. Acting in performance of those duties within the scope of the authority granted, he is under no obligation to explain or justify his acts, either to individuals or to the Congress.”).

⁵³See Robert O. Blanchard, *A Watchdog in Decline*, COLUM. JOURNALISM REV., Summer 1966, at 17.

⁵⁴See Samuel J. Archibald, *The Early Years of the Freedom of Information Act – 1955-1974*, 26 PS: POL. SCI. & POL. 726 (1993).

⁵⁵LEMOV, *supra* note 43, at 60.

⁵⁶See Archibald, *supra* note 54, at 729.

⁵⁷See Samuel J. Archibald, *The Freedom of Information Act Revisited*, 39 PUBLIC ADMIN. REV. 311, 312 (1979) (“Moss politely tempered Johnsonian language in recounting the comments relayed to him by McCormack and Albert: ‘What is Moss trying to do, screw me? they said Johnson had asked his House Democratic party leaders. ‘I thought he was one of our boys, but the Justice Department tells me his goddamn bill will screw the Johnson administration.’”).

any freedom of information bills.⁵⁸ But Rep. Donald Rumsfeld, a second-term Illinois Republican, fomented political pressure and catalyzed party support from Minority Leader Gerald Ford and Rep. Robert Griffin, of Michigan.⁵⁹ As the 1966 election approached, Rumsfeld ratcheted up the pressure, sharpening freedom of information as a political issue, and Moss successfully advised the White House to come to peace with the FOIA bill as it had become “a political necessity.”⁶⁰ The Johnson Administration had no interest in publicly opposing freedom of information and began exploring methods of sculpting favorable legislation or having the Justice Department draw up a diluted bill.⁶¹ Rumsfeld’s campaign was successful, and the bill would make it through the Senate before returning to its birthplace in the House for a vote. Despite more than a decade of life as contentious legislation, the bill passed unanimously in the House, 307-0. The vote tally, however, marked not a body fervent in its support, but a legislature frightful of appearing opposed to transparency. After voicing strident concern for five years, Republicans were happy to vote in favor of the FOIA. With President Johnson in office, it was politically expedient. Despite passage by Congress, there was concern that the bill would be pocket vetoed. But on July 4, 1966, President Johnson begrudgingly signed it from his Texas ranch after a talk with aide Bill Moyers.⁶² Sam Lebovic suggested the capitulation was actually a compromise, where Moss still intent on pushing his legislation across the finish line accepted a White House stipulation that allowed the Justice Department to write the House report on the bill, forever fixing the FOIA’s legislative history in the executive’s favor.⁶³

Not long after the FOIA was passed, critics began assailing the new law. Rumsfeld produced a measured celebration of his committee’s success in the organ of the ASNE, before exhorting the press “to push the Government agencies as hard as possible” and chastising news media

⁵⁸See LADD, *supra* note 44, 205-06 (In a 1965 meeting of Democratic leaders, President Johnson told House Speaker McCormack, Majority Leader Carl Albert, and Majority Whip Hale Boggs that Moss needed to be “brought in line.”).

⁵⁹See *id.* at 208-09.

⁶⁰*Id.* at 209-10.

⁶¹See Sam Lebovic, *How Administrative Opposition Shaped the Freedom of Information Act*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* 13, 13-14 (David E. Pozen & Michael Schudson eds., 2018).

⁶²See Mark Fenster, *FOIA as an Administrative Law*, in *TROUBLING TRANSPARENCY*, *supra* note 61, at 57 (Fenster quoted Moyers recounting President Johnson’s reticence: He “had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality.”).

⁶³Lebovic, *supra* note 61, at 14.

for failing to fully realize the power of the law.⁶⁴ Sam Archibald, chief of staff for the Moss Committee, also castigated the press for failing to advance the law and hold agencies accountable.⁶⁵ In a *Columbia Journalism Review* article at the time of the FOIA passage, Blanchard suggested the root of the failures was political, observing the Moss Committee's output waned dramatically once President John Kennedy took office.⁶⁶ Blanchard said it was not simply party politics but careerism as well, as Moss had begun to rise in the ranks of party leadership and was reticent to rankle his seniors.⁶⁷ Blanchard's article was sharply rebuked in the following issue, including a response from Moss, who concurred that the committee's activities had changed; the Kennedy and Johnson administrations had been receptive to their efforts and more transparent, in contrast to the obstreperous Eisenhower administration.⁶⁸

Since passage, the legislative process behind the FOIA has remained motivated by partisan politics. Of the five major FOIA amendments, four were passed by a majority Congress in political opposition to the president. The fifth was a split, one chamber aligned with the president and the other not. Three of the five amendments were signed into law under Republican administrations, though the 1974 amendments were passed in spite of President Gerald Ford's veto, and President Reagan's signature was in support of amendments deleterious to access. The 1986 War on Drugs-fueled amendments were passed by a Republican Senate and Democratic House. The 1996 EFOIA amendments were signed by President Clinton and passed by a wholly Republican Congress. President George W. Bush signed modest FOIA amendments in 2007 with a Democratic Congress.⁶⁹ President Obama's 2016 amendments were also signed with both chambers in Republican majority.

⁶⁴Rumsfeld, *supra* note 49, at 9-10.

⁶⁵Samuel J. Archibald, *Whose FoI Law?*, BULL. OF THE AM. SOC'Y OF NEWSPAPER EDITORS, December 1969, at 10.

⁶⁶Blanchard, *supra* note 53, at 18.

⁶⁷*Id.* at 20. ("Another variable affecting the Moss Committee in the early 1960s was the career of John E. Moss. While chairman of his subcommittee, Moss rose swiftly into the House leadership to the position of deputy Whip. He is now within eventual striking distance of the House Speakership. One does not, as a party leader, unduly, unnecessarily, or willingly embarrass or challenge party leadership when it is in the White House.")

⁶⁸John Moss, *The Moss Committee*, COLUM. JOURNALISM REV., Fall 1966, at 57 ("The difference in handling the problems in the 1960s as compared to the era of the Eisenhower Administration is that the Subcommittee has had the close cooperation of and responsiveness from the top level officials of the Kennedy-Johnson Administration. Thus, it has been possible in most instances to get the information problems solved before they become a public issue.")

⁶⁹Senators Bernie Sanders and Angus King caucused with the Democrats, giving the Democratic Party a slight advantage in the Senate.

PARTY PLATFORMS AND FREEDOM OF INFORMATION

The deeply political nature of the FOIA is not uncommon. Daniel Berliner has documented similar phenomena around the world and has suggested that strong freedom of information laws are often a product of highly competitive democracies.⁷⁰ Broadly, robust transparency measures diminish the value of corruption (by increasing the likelihood of exposure), and a formidable opposition party also increases the ruling party's interest in establishing significant freedom of information mechanisms. When there is a credible chance of a political transition, ruling parties demonstrate support for transparency laws in the interest of constraining the opposition where they to gain control. In the absence of substantial opposition, ruling parties have diminished motivation for inviting transparency measures. Opposition parties are, of course, highly motivated to enact access mechanisms, as the trajectory of the FOIA exhibits. This power dynamic and the vacillating nature of federal politics has resulted in regular amendment to the FOIA. However, one political party has celebrated and more conspicuously supported a stronger FOIA, while gaining the allegiance of transparency advocates and the language of the right to know community and journalism organizations.

Democratic Party Platforms

The Democratic Party is the party of the Freedom of Information Act, and its party platforms, dating back to 1936, so reflect. The platforms grow exponentially over time, adding numerous planks and considerable detail, but even in the earlier iterations, the party stated a goal of protecting and advancing the First Amendment as a method for protecting freedoms and civil liberties.⁷¹ The freedom of information movement's roots are in the international community, spurred by Western interests in ensuring their messaging reached non-aligned countries.⁷² Right-to-know advocates and the journalism community termed it "free flow of information," and the Democratic Party adopted this language beginning in 1944, calling for "the freer flow among them of ideas" as promoting liberated, happier people the world

⁷⁰Daniel Berliner, *The Political Origins of Transparency*, 76 J. OF POL. 479 (2014).

⁷¹See DEMOCRATIC NAT'L CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1936 (1936), available at <https://www.presidency.ucsb.edu/documents/1936-democratic-party-platform>.

⁷²See, e.g., Zechariah Chafee, *Legal Problems of Freedom of Information in the United Nations*, 14 LAW & CONTEMP. PROBS. 545 (1949); John B. Whitton, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT'L L. 73 (1949).

over.⁷³ In 1946, the United Nations Committee on Human Rights recognized freedom of information as a necessary corollary to the fundamental right of expression, and in the 1948 Democratic Party platform, the party explicitly mentioned the UNCHR, stating, “We believe the primary step toward the achievement of world-wide freedom is access by all people to the facts and the truth.”⁷⁴ Before media rights organizations in the United States began advocating for new access, the Democratic Party platforms from 1936 to 1950 all acknowledged the importance of the free press and free movement of information as a method for informing citizens.

Freedom of information took a new domestic turn in the 1950s. Harold Cross, at the behest of the American Society of Newspaper Editors, published the path-breaking book *The People's Right to Know* in 1953, and in 1955 Rep. John Moss inaugurated the Subcommittee on Government Information. The Democratic Party platform of 1956 reflected the changing tide, using the language common to the contemporary FOIA discourse. Whereas previous freedom of information planks supported the general international movement, the 1956 platform was the first to include a plank identifiably tied to the U.S. right to know efforts and to explicitly seek a new transparency law. It was also politically hostile, calling out the Eisenhower Administration. Under the “Freedom of Information” plank, the party formally recognized a domestic failure in access to government information and specifically identified the few valid justifications for secrecy.⁷⁵ In 1960, the platform grew considerably in length but continued to include a plank for “Freedom of Information” that carried forward the message of 1956 but with more intensity: “We reject the Republican contention that the workings of Government are the special private preserve of the Executive. The massive wall of secrecy erected between the Executive branch and the Congress as well as the

⁷³DEMOCRATIC NAT'L CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1944 (1944), available at <https://www.presidency.ucsb.edu/documents/1944-democratic-party-platform>.

⁷⁴DEMOCRATIC NAT'L CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1948 (1948), available at <https://www.presidency.ucsb.edu/documents/1948-democratic-party-platform>.

⁷⁵DEMOCRATIC NAT'L CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1956 (1956), available at <https://www.presidency.ucsb.edu/documents/1956-democratic-party-platform> (“During recent years there has developed a practice on the part of Federal agencies to delay and withhold information which is needed by Congress and the general public to make important decisions affecting their lives and destinies. We believe this trend toward secrecy in Government should be reversed and that the Federal Government should return to its basic tradition of exchanging and promoting the freest flow of information possible in those unclassified areas where secrets involving weapons development and bona fide national security are not involved. We condemn the Eisenhower Administration for the excesses practiced in this vital area, and pledge the Democratic Party to reverse this tendency, substituting a rule of law for that of broad claims of executive privilege.”).

citizen must be torn down.”⁷⁶ By 1964, with a Democrat in the White House, advocacy for freedom of information was under a plank simply headed “The Government” and was given less space. Though the language was rather close to the opening words of Cross’s book, the plank was less vigorous than prior calls for access to government information.⁷⁷

After the FOIA was signed into law, the 1968 Democratic Party platform only addressed the concept of transparency and full public information in passing. This changed in 1972. The Democratic Party platform was published approximately a year after the Pentagon Papers were the subject of a series of articles in *The New York Times* and less than a month after the break-in at the Watergate. There were many mentions of the necessity of access to information, full disclosure and transparency, much of it explicitly directed at the Nixon administration. Notably, the platform called for limits on classification, establishment of an open meetings law and the bolstering of the FOIA.⁷⁸ The landmark 1974 amendments were passed, and the 1976 platform continued to emphasize openness, filling the document with calls for transparency and accountability.⁷⁹ By 1980 and 1984, the Democratic Party was accepting (or granting itself) the mantle of the

⁷⁶DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1960 (1960), available at <https://www.presidency.ucsb.edu/documents/1960-democratic-party-platform>.

⁷⁷DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1964 (1964), available at <https://www.presidency.ucsb.edu/documents/1964-democratic-party-platform> (“We, the people, are the government. . . . The government’s business is the people’s business. Information about public affairs must continue to be freely available to the Congress and to the public.”).

⁷⁸DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1972 (1972), available at <https://www.presidency.ucsb.edu/documents/1972-democratic-party-platform> (“Immediately strengthen the Federal Freedom of Information Act. Congress should improve its oversight of Executive secrecy by requiring federal agencies to report annually on every refusal to grant information requested under the Act. Citizens should have full recourse to the courts to deal with violation or circumvention of the Act. It should be amended to allow courts to review the reasonableness of a claim of executive privilege.”).

⁷⁹DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1976 (1976), available at <https://www.presidency.ucsb.edu/documents/1976-democratic-party-platform> (Under “The Right to Responsive Government”: “[G]overnment decision-making must be opened up to citizen advocacy and participation. . . . The Democratic Party is committed to openness throughout government: at regulatory commissions, advisory committee meetings and at hearings. Public calendars of scheduled meeting between regulators and the regulated, and freedom of information policies, should be designed to facilitate rather than frustrate citizen access to documents and information. Under “The Right to Integrity in Government”: “The Democratic Party is pledged to the concept of full public disclosure by major public officials and urges appropriate legislation to effectuate this policy.” Under “The Right to Fair Dealing by Government”: “Freedom of information requirements must be interpreted in keeping with the right of the individual to be free from anonymous accusation or slander. Each citizen has the right to know and to review any information directly concerning him or her held by the government.”).

party of openness: “The Democratic Party takes pride in its long and outstanding record of leadership in opening up the processes of government to genuine participation by the people.”⁸⁰ During the Reagan presidency, the Democratic platform directly criticized his new classification system and promised to correct the president’s revisions to FOIA-related policies.⁸¹ Again, Democrats trumpeted their accomplishments as the transparency party: “We Democrats are not afraid to govern in public and let the American people know and understand the basis for our decisions.”⁸²

Access to government information and government transparency fade into the background beginning the late 1980s. There was no direct mention of the FOIA and only passing discussion of accountability in tangential topics like deficit spending and access to quality education. As President Bill Clinton took office, there was significantly less conversation in the platforms on access to government information as a stated goal. Over the next twenty years, there was a good deal of discussion of ethical politicians and in making elections more transparent. There was a refrain among these platforms, calling for accountability in public education. There was also growing concern for civilian ability to access the source of information and remain informed *via* the burgeoning internet. These platforms frequently referenced the importance of democratic values as something to be instilled as a part of foreign diplomacy, and in 2000, there was a direct call for increased transparency and accountability among the world banking organizations.⁸³

However, the 2008 Democratic Party platform returned to the resolute support of the 60s and 70s platforms. Under the plank “Open, Accountable, and Ethical Government” was a renewed commitment to access to government information and transparency. The 2008 platform embraced the Internet and digital achievements in advancing new methods for developing transparency.⁸⁴ This language would

⁸⁰DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1980 (1980), available at <https://www.presidency.ucsb.edu/documents/1980-democratic-party-platform>.

⁸¹DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 1984 (1984), available at <https://www.presidency.ucsb.edu/documents/1984-democratic-party-platform>.

⁸²*Id.*

⁸³DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 2000 (2000), available at <https://www.presidency.ucsb.edu/documents/2000-democratic-party-platform>.

⁸⁴DEMOCRATIC NATL CONVENTION, DEMOCRATIC PARTY PLATFORM OF 2008 (2008), available at <https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform> (“We will use technology to make government more transparent, accountable, and inclusive. Rather than obstruct people’s use of the Freedom of Information Act, we will require that agencies conduct significant business in public and release all relevant information unless an agency reasonably foresees harm to a protected interest.”).

prove to be nearly identical to the material President Obama used in his Open Government Directive.⁸⁵ The 2012 platform — on multiple occasions — refers to President Obama’s first term as “the most open, efficient, and accountable government in history,”⁸⁶ celebrating the Open Government Initiative and providing some general language about the importance of transparent governance. And in 2016, with President Obama on his way out of office, there was again little emphasis on transparency, only ancillary mentions as necessary in criminal investigations and prosecutions and a desire to bring more transparency to election finances.

Over time, the Democratic Party platform reflected the rise of the international freedom of information movement and championed the early advocacy that would produce the FOIA. The platforms pushed for the vital 1974 amendments and aggressively critiqued President Reagan’s efforts to diminish access to government information. Then it became less and less of a priority, noticeably shying away from the subject when a Democrat was in office, until the 2008 platform, which was boldly in favor of FOIA and new digitally focused methods of transparency. And while the Democratic Party platform traced the popular path of the FOIA movement, there was an undeniable flavor of political opportunism in its journey. Whether in critiquing Reagan’s actions against access to information or celebrating President Obama’s idealistic digital turn, it would seem the party’s messaging was more focused on political point-scoring than popularizing a democratic good.

Republican Party Platforms

The Republican Party was the first of the two parties to advocate for free flow of information as a First Amendment right. Like the Democrats, the Republicans were initially motivated by international diplomacy. The 1932 Republican Party platform called for free speech and press as “fundamental principles upon which our form of government rests.”⁸⁷ The Republicans continued to identify free speech and press as necessary democratic tenets and found the radio to be especially important both domestically and abroad. In 1944, under the plank “Free Press and Radio,” the platform said free press and radio

⁸⁵See discussion accompanying *infra* notes 151-53.

⁸⁶DEMOCRATIC NAT’L CONVENTION, DEMOCRATIC PARTY PLATFORM OF 2012 (2012), available at <https://www.presidency.ucsb.edu/documents/2012-democratic-party-platform>.

⁸⁷REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1932 (1932), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1932>.

would help ensure “full and complete information” for American citizens. “There must be no censorship except to the extent required by war necessity.”⁸⁸ While Democrats began adopting media-rights-fomented freedom of information language, the Republican Party ceased mentioning it in its platform. By 1952, a primary concern of the Republican Party was Democrats denying access to files and information on the Communist scourge plaguing the U.S. government.⁸⁹ And as the Democratic Party was refining the language of what would be the FOIA, the Republican Party platform was looking “to bring about a progressive elimination of the barriers that interfere with the free flow of news, information and ideas.”⁹⁰ By 1976, freedom of information was couched under a “Right to Privacy” plank, suggesting there is a problem with over-classification, while also expressing concern about law enforcement not violating the privacy of law-abiding citizens.⁹¹ This was an early iteration of the argument that animated the 1986 FOIA amendments. The platform also called for the Soviet Union to adopt multinational agreements that required free interchange of information and an independent press. In 1980, the Republican Party platform called for reining in the FOIA, suggesting government transparency undermines federal ability to properly conduct background checks and sought to curtail “costly and capricious” requests to intelligence agencies.⁹² These concerns would surface shortly after President Reagan took office and directly manifest in the 1986 FOIA amendments. Free flow of ideas and information was prescribed for communist countries in 1984, as “America is helping to build the infrastructure of democracy and demonstrating the strength of our belief in the democratic example.”⁹³ This while Sen. Orin Hatch was pushing through the FOIA amendments that made access to law enforcement and intelligence agencies significantly more difficult. This was echoed again in the 1988 platform under more hyperbolic terms, calling “oppression of people through control of information ... one of

⁸⁸REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1944 (1944), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1944>.

⁸⁹REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1952 (1952), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1952>.

⁹⁰REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1956 (1956), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1956>.

⁹¹REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1976 (1976), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1976>.

⁹²REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980 (1980), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980>.

⁹³REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1984 (1984), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1984>.

the darkest pillars of totalitarianism.”⁹⁴ Simultaneously, the platform rejected “legislative measures that impinge on the President’s constitutional prerogatives,” referring here to executive privilege. Decision-making was to be strengthened by further limiting access to classified information, a classification program that had recently been expanded by President Reagan. They also included a desire to make leaks of classified information a felony. The Republican Party platforms of the 1980s are duplicitous proposals, calling for increased transparency and free flow of information within enemy borders, but a narrowing of access provisions at home, where the president required broad powers, and law enforcement and intelligence agency records must be further secured. There was little general freedom of information or FOIA talk in the 1990s, and in 2004, the Republican Party platform vaguely gestured toward free flow of information as an element of open markets and open societies.⁹⁵ This transparency, though, was directed at undermining Fidel Castro’s Cuban government and opening up China.⁹⁶ The most recent Republican Party platforms call for more sunlight in the United Nations,⁹⁷ tighter restrictions on intelligence information⁹⁸ and transparency in the scientific community, especially among the Environmental Protection and Food and Drug Administration.⁹⁹

There is no ambiguity about which political party’s platforms more frequently and vigorously advocated access to information. Democratic messaging is clearly aligned with the right to know movement’s messaging, the movement that would ultimately manifest the FOIA. The Republican Party platforms wield freedom of information when politically expedient, much like the Democratic Party. But outside of efforts to injure sitting Democratic presidents, references to freedom of

⁹⁴REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1988 (1988), available at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1988>.

⁹⁵REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2004 (2004), available at <https://www.presidency.ucsb.edu/documents/2004-republican-party-platform>.

⁹⁶*Id.* (Free flow of information as part of “public diplomacy efforts to disseminate information abroad about Castro”; China is “to become more open with information.”).

⁹⁷REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2008 (2008), available at <https://www.presidency.ucsb.edu/documents/2008-republican-party-platform>.

⁹⁸REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2012 (2012), available at <https://www.presidency.ucsb.edu/documents/2012-republican-party-platform> (Leaks had “imperiled intelligence assets vital to American security” and limited intelligence agencies’ abilities to “ensure that our nation’s most sensitive information and activities are protected appropriately.”).

⁹⁹REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2016 (2016), available at <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform>.

information are narrow and in service of other priorities, like maintaining free marketplaces or aimed at international diplomatic goals. The bulk of FOIA discussion takes place in the decade leading up to the 1986 amendments with the Republican Party making its case for limiting law enforcement and intelligence transparency. In total, there is a significantly lighter volume of freedom of information language in Republican Party platforms, and mentions all but disappear after the 1980s. When examining party platforms, there is unequivocal evidence that the Democratic Party places greater weight on messaging about government transparency and the FOIA.

EXECUTIVE INFLUENCE

The presidency has both a direct and indirect role in FOIA administration. The statute contains a provision granting the president, *via* executive order, the power to determine the breadth of the national security exemption.¹⁰⁰ Each new executive order expunges all preceding national security classification instructions unless noting otherwise. While subject to judicial review, there is no immediate legislative oversight, and the exemption provides the executive with the ability to shape the classification system with a unilateral, and personally amendable, mandate. It is a privilege “executive officials have historically wielded... expansively, withholding information only remotely pertaining to national security.”¹⁰¹

More broadly, the president sets an influential tenor for government transparency and FOIA compliance.¹⁰² The president’s leadership choice for the Department of Justice is also significant, as the attorney general commonly produces a FOIA memorandum outlining the

¹⁰⁰5 U.S.C. § 552(b)(1) (2018) (The national security exemption excludes records and information “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order”).

¹⁰¹Christine E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1199 (2004).

¹⁰²See, e.g., James T. Hamilton, *FOIA and Investigative Reporting: Who’s Asking What, Where, and When — and Why It Matters*, in TROUBLING TRANSPARENCY, *supra* note 61, at 116 (noting that agency officials look “toward the White House for signals” in making decisions about what information must be released under FOIA); O’REILLY, *supra* note 6, at § 3.4, 34 (2018) (“The Executive Branch’s legal advice, its controlling interpretations of complex statutes, and its litigation defenses come from one source, the Department of Justice. In assessing the development of the Freedom of Information Act, some of the praise and some of the blame for federal agency performance must be given to the DOJ and its leadership.”).

administration's interpretation of the law.¹⁰³ Each attorney general's memo varies, but typically one provides a sweeping review of the law, ranging from guidance on narrow technical provisions to litigation advice to establishing a higher standard for nondisclosure.

All administrations since the law was passed have made statements publicly supporting government transparency, and many have openly championed FOIA. Despite privately expressed reticence, President Johnson, as the individual responsible for signing the bill into law, expressed enthusiasm in his signing statement, calling government transparency necessary, and FOIA and its underlying principles essential, cherished and closely guarded.¹⁰⁴ Perhaps more influential was the original legal interpretation of the law. Attorney General Ramsey Clark produced detailed guidance for the new law. The House and Senate had submitted competing reports as iterations of the bill percolated for over a decade, and Clark's inaugural interpretation signaled a clear preference for the House's more restrictive legislative history (as stipulated in President's Johnson's compromise).¹⁰⁵ Despite Clark's expansive reading of exemptions, he evinced vigorous support for the new law, expressing hope that the FOIA would refresh core democratic values.¹⁰⁶

President Richard Nixon Republican, 1969-1974)

President Richard Nixon was largely silent on government transparency over his five-year tenure. He issued a remarkable executive order on national security, however, in which he identified the FOIA as a primary tenet in ensuring the public remains informed of federal affairs.¹⁰⁷ The executive order overhauled the federal classification system, narrowing classification definitions, reducing the number of individuals with classification authority and simplifying declassification procedures. The executive order is remarkable for its unequivocal support "of an open and democratic society."¹⁰⁸ While the veracity of

¹⁰³See, e.g., Kim, *supra* note 4, at 314-15 ("Presidents and attorneys general influence the way the law is applied through FOIA policy memoranda" (citing a former Department of Justice attorney in observing the attorney general as one of the two most influential factors in FOIA administration)); McDermott, *supra* note 7, at 412.

¹⁰⁴Statement by President Lyndon Johnson Upon Signing Pub. L. No. 89-487, July 4, 1966.

¹⁰⁵H.R. REP. NO. 89-1497 (1966).

¹⁰⁶Memorandum from Attorney General Ramsey Clark on the Public Information Section of the Administrative Procedure Act 37 (June 1967), available at <https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act>.

¹⁰⁷Exec. Order No. 11,652, 37 Fed. Reg. 5209 (Mar. 8, 1972).

¹⁰⁸*Id.*

the language may be debated given his unceremonious abdication of office two years later, he claimed to be motivated by failures of the old system that allowed bureaucrats to conceal mistakes and prevent embarrassment. When deprived of their rightful knowledge of government activity “people soon become ignorant of their own affairs, distrustful of those who manage them, and — eventually — incapable of determining their own destinies.”¹⁰⁹ Despite his hostility toward the press, President Nixon was consistent in his rhetoric supporting access to government information. He answered an ASNE questionnaire during his unsuccessful 1960 presidential campaign. In his responses, he claimed to have a strong conviction regarding the importance of freedom of information, calling on presidential administrations to “be subjected to intense scrutiny under the spotlight of public opinion.”¹¹⁰

President Gerald Ford Republican, 1974-1977)

President Gerald Ford was not an especially supportive executive. He vetoed the 1974 FOIA amendments. The amendments brought substantial change to the first iteration of the law that had proved to be shot through with loopholes. First, President Ford criticized the legislation for providing access to federal personnel files.¹¹¹ Then, he expressed concern with the substance of the amendments, finding them unworkable and fretting that the more requester-friendly nature of the amendments would be excessively costly and onerous to agencies.¹¹² His veto outlined his concerns with the FOIA amendments, suggesting they compromised military and diplomatic efforts, made vulnerable the FBI and law enforcement records, and found the twenty-day deadline to be unrealistic.¹¹³ Attorney General Edward Levi was also concerned with the amendments because, he wrote, they “pose legal and administrative problems of great complexity.”¹¹⁴ In his

¹⁰⁹*Id.*

¹¹⁰*Candidates State Their Views*, BULL. OF THE AM. SOC Y OF NEWSPAPER EDITORS, June 1960, at 1, 1 (He continued: “Only when people know the facts are they able to comment critically and constructively on policy. Because of this ... I would lean toward more disclosure than less.”).

¹¹¹Statement by President Gerald Ford on Privacy Legislation, Oct. 9, 1974, <https://www.presidency.ucsb.edu/documents/statement-privacy-legislation>.

¹¹²H.R. REP. NO. 93-876, 15-24 (1974).

¹¹³Veto by President Gerald Ford of Freedom of Information Act Amendments, Oct. 17, 1974, available at <https://www.presidency.ucsb.edu/documents/veto-freedom-information-act-amendments>.

¹¹⁴Memorandum from Attorney General Edward Levi for The Executive Departments and Agencies Concerning the Amendments to the Freedom of Information Act (February 1975), available at <https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia>.

signing statement for the 1976 Government in the Sunshine Act — itself a major achievement in government transparency — President Ford was more sanguine in discussing federal transparency.¹¹⁵ He wrote that the public had a right to know that exceeded being told of outcomes, and this right extended into understanding “why and by what process” these decisions were made.¹¹⁶

President Jimmy Carter Democrat, 1977-1981)

President Jimmy Carter espoused clear support for FOIA in his single term. He made mention of the importance of the FOIA in his 1978 State of the Union Address, highlighting the necessity of transparency and the steps his administration had taken in ensuring “the letter of the [FOIA] was observed.”¹¹⁷ His attorney general, Griffin Bell, called on federal departments and agencies to consider the public interest when making nondisclosure determinations and suggested releasing records “even if there is some arguable legal basis for the withholding.”¹¹⁸ Attorney General Bell’s guidance document was the first to explicitly signal to agencies the Department of Justice’s interest, or lack thereof in this case, in helping support legal defense for FOIA denials. Since attorneys general have commonly addressed their interest in FOIA litigation in their guidance. President Carter’s national security executive order was also unambiguously in favor of increased transparency.¹¹⁹ The executive order would replace the classification system implemented by President Nixon, and it tightened classification standards, further limited those with classification powers, and encouraged personnel to assign the less restrictive classification when uncertain. President Carter also prioritized declassifying records, emphasizing public interest over a routine secrecy practices. He

¹¹⁵Pub. L. No. 94-409, 90 Stat. 1247 (1976).

¹¹⁶Remarks by President Gerald Ford Upon Signing Pub. L. No. 94-409, Sept. 13, 1976, available at <https://www.fordlibrarymuseum.gov/LIBRARY/document/0122/1253027.pdf> (He continued: “Today many citizens feel that their government is too remote, that it is not responsive to their needs. This legislation should go a long way in reaffirming that government exists for the people, not apart from the people.”).

¹¹⁷State of the Union Address by President Jimmy Carter (Jan. 19, 1978), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=30867&st=freedom+of+information&st1=> (“One of our primary goals is to make certain that the government’s ethical standards are high, and that they are fully observed. And we must ensure that our government is open and responsive to the American people ... we took steps to make certain that the letter of the Freedom of Information Act was observed.”).

¹¹⁸Memorandum from Attorney General Griffin B. Bell to the Heads of All Federal Departments and Agencies (May 5, 1977), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-bell-ltr-foia.pdf>.

¹¹⁹Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (July 3, 1978).

remained a supporter of the FOIA after his term in office, writing a 2006 opinion piece in the *Washington Post* advocating for less government secrecy, observing, “We cannot take freedom of information for granted. Our democracy depends on it.”¹²⁰

President Ronald Reagan Republican, 1981-1989)

Perhaps no president has affected the FOIA more than Ronald Reagan. Most notably, he was a driving force behind the watershed 1986 FOIA amendments,¹²¹ which greatly enhanced law enforcement’s ability to limit the flow of information.¹²² Upon taking office, President Reagan’s first attorney general, William French Smith, struck the prevailing Justice Department’s position encouraging openness, instead declaring the Justice Department’s new policy “to defend all suits challenging an agency’s decision to deny a request,” effectively announcing his department’s support for all refusals to share information.¹²³ In 1982, President Reagan issued an executive order on national security that created three new categories of classification not subject to the FOIA, and authorized derivative classification. He became the first president to sound the alarm on nefarious computer users, recognizing the mosaic theory.¹²⁴

After passage of the 1986 amendments, President Reagan’s signing statement was clear that the primary motivation of the law was strengthening the hand of law enforcement by enforcing less transparency.¹²⁵ Attorney General Edwin Meese provided interpretation of the new provisions of the law, guidance that affirmed the impetus, while suggesting the 1986 amendments were actually a course correction of the “many weaknesses” introduced by the 1974 amendments which were spurred by public skepticism after Watergate and the Pentagon

¹²⁰Jimmy Carter, *We Need Fewer Secrets*, WASH. POST, July 3, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/02/AR2006070200674.html> (“We cannot take freedom of information for granted. Our democracy depends on it.”).

¹²¹Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 99 Stat. 3207 (1986).

¹²²See A. Jay Wagner, *A Secret Police: The Lasting Impact of the 1986 FOIA Amendments*, 23 COMM. L. & POLY 387 (2018).

¹²³Memorandum from Attorney General William French Smith on FOIA Policy Guidance (Jan. 1, 1981), <https://www.justice.gov/oip/blog/foia-update-policy-guidance-attorney-generals-memo-foia>.

¹²⁴Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (Apr. 2, 1982).

¹²⁵Statement by President Ronald Reagan Upon Signing Pub. L. No. 99-570, Oct. 27, 1986, available at <https://www.presidency.ucsb.edu/documents/statement-signing-the-anti-drug-abuse-act-1986>.

Papers.¹²⁶ Meese said the FOIA had become excessively burdensome and undermined law enforcement's ability to conduct its work.¹²⁷ Meese's guidance and Sen. Orrin Hatch, the amendments sponsor, warned of sophisticated requesters exploiting the law to criminal ends, frequently citing dubious statistics provided by federal law enforcement.¹²⁸ Hatch wrote that the 1974 amendments had gone too far with government transparency.¹²⁹ In a hearing just before the amendments passage, Hatch echoed Meese, suggesting the amendments would sew up some "massive loopholes," acknowledging that "drugs and organized crime constitutes a special problem under the FOIA."¹³⁰ Scholar Lotte Feinberg wrote that the Reagan presidency, while subject to the same reluctance as all presidencies, was the most successful at redirecting the law to meet his aims.¹³¹ Feinberg wrote that the Reagan administration used all available tools to deflect transparency efforts, listing regulation, guidelines, executive orders and management of bureaucratic rewards as legal mechanisms successfully deployed by the Reagan administration.¹³² Despite a multifaceted effort to rein in access to records, President Reagan not only professed support for transparency but actually established Freedom of Information Day. In a memorandum observing the new holiday, President Reagan harkened to the Founders and their intent to construct a strong, transparent government. He singled out the FOIA as the realization of the government's interest in an open government and an informed public.¹³³

¹²⁶Memorandum from Attorney General Edwin Meese on the 1986 Law Enforcement Amendments to the Freedom of Information Act (Dec. 1987), available at <https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act>.

¹²⁷*Id.* ("Indeed, they are essential to the effective functioning of all federal law enforcement activities and should be applied comprehensively toward that end.")

¹²⁸Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1 (1983).

¹²⁹*Id.* at 13 ("The end product of these problems is an unfortunate overemphasis upon disclosure at the expense of confidentiality necessary to law enforcement investigations and informants. In fact, (b)(7) provides a reminder that disclosure may endanger the life of an informant or a suspected informant whose identity may be revealed by piecing together released FBI documents.")

¹³⁰132 CONG. REC. S13965-02 (daily ed. Sept. 27, 1986) (statement of Sen. Orrin Hatch).

¹³¹Lotte E. Feinberg, *Managing the Freedom of Information Act and Federal Information Policy*, 46 PUB. ADMIN. REV. 615, 618 (1986) ("No president has yet eagerly embraced the FOIA, but the Reagan administration... has been the most successful in reinterpreting legislative intent.")

¹³²*Id.*

¹³³Proclamation No. 5620, 52 Fed. Reg. 8443 (March 18, 1987) ("We choose this day to celebrate our freedom of access to information about government because Madison, throughout his life, never ceased to mention the freedoms that help us learn everything we need to know about matters relating to our liberties and all public concerns.")

President George H.W. Bush Republican, 1989-1993)

After eight years of significant efforts set on limiting access to government information, Reagan's vice president would have little to do with or say about FOIA. The administration of President George H. W. Bush would proceed under the newly established FOIA status quo, overseeing no amendments to the law and rarely making public comments on the subject. His attorney general produced no interpretive guidance. He was only the second president since President Harry Truman (the other being President Johnson) to not release a national security executive order. In comments to Republican politicians and appointees, President Bush supported expanding the reach of FOIA to include Congress (though nothing of substance ever materialized).¹³⁴

President Bill Clinton Democrat, 1993-2001)

After the tranquil years of the Bush administration, the election of Democrat Bill Clinton launched a new era of FOIA implementation. President Clinton unabashedly and frequently proclaimed his support for transparent governance and the FOIA.¹³⁵ Attorney General Janet Reno produced 1993 FOIA guidance that expressed strong support for the law, most notably reinstating the harm, or presumption of openness, standard, and repudiated nearly all of Attorney General Meese's

¹³⁴Remarks by George H.W. Bush to Republican Members of Congress and Presidential Appointees (Mar. 20, 1992), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=20745> (Bush suggests expansion of the FOIA "We should apply to Congress the same laws, from employment practices to civil rights to the Freedom of Information Act, which it imposes on everyone else.").

¹³⁵See, e.g., Memorandum from President Bill Clinton for the Heads of Departments and Agencies (Oct. 4, 1993), available at <https://www.justice.gov/oip/blog/foia-update-president-clintons-foia-memorandum> (calling the FOIA "of great importance to the American public," playing "a unique role in strengthening our democratic form of government," encouraging agencies to go beyond the mere letter of the law, "to enhance public access through the use of electronic information systems."); *Messaging on Returning Without Approval to the House of Representatives Intelligence Authorization Legislation for Fiscal Year 2001*, in 3 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON, 2000-2001 2466-67 (2002) (In opposing H.R. 4392, a bill aimed at criminalizing leakers, President Clinton produced a statement effusive in its support for transparency, citing the Pentagon Papers and Madison: "As President, therefore, it is my obligation to protect not only our Government's vital information from improper disclosure, but also to protect the rights of citizens to receive the information necessary for democracy to work. . . . The legislation does not achieve the proper balance. . . . [T]his criminal provision would, in my view, create an undue chilling effect.").

guidance. Attorney General Reno's memorandum called for "maximum responsible disclosure," announcing the Department of Justice would "no longer defend an agency's withholding of information merely because there is a 'substantial legal basis.'"¹³⁶ Instead, "we will apply a presumption of disclosure," and it established the harm standard whereby denial would have to be justified by "specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure."¹³⁷

President Clinton would also issue a national security executive order in direct contradiction to the standards set by the Reagan administration. It removed many of the Reagan-established classification categories and issued instructions urging agencies to be more transparent.¹³⁸ The amendments in the Electronic Freedom of Information Act of 1996¹³⁹ were potent changes to the law, seeking to modernize FOIA and integrate new digital practices, and President Clinton's statement reflected this excitement, calling the FOIA crucial and trumpeting his administration's "many initiatives to bring more government information to the public."¹⁴⁰ There was great enthusiasm for the new FOIA amendments with scholars believing a new transparency paradigm was being realized.¹⁴¹

On the whole, the Clinton administration's approach to transparency and FOIA were a clear reproach to the Reagan administration's efforts to scale back government transparency and limit FOIA. President Clinton and Attorney General Reno frequently made reference to the Reagan-era changes, explicitly noting that they were doing away with such standards in favor of a more transparent and accountable government.

¹³⁶Memorandum from Attorney General Janet Reno to the Heads of Departments and Agencies (Oct. 4, 1993), available at <https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>.

¹³⁷*Id.*

¹³⁸Exec. Order No. 12958, 60 Fed. Reg. 19823 (Apr. 17, 1995).

¹³⁹Pub. L. 104-231, 110 Stat. 3049 (1996).

¹⁴⁰Statement by President Bill Clinton Upon Signing Pub. L. No. 104-231, Oct. 2, 1996, available at <https://www.presidency.ucsb.edu/documents/statement-signing-the-electronic-freedom-information-act-amendments-1996>

¹⁴¹*See, e.g.,* 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."); 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) ("These provisions fundamentally alter the relationship between FOIA users and agencies, and the role of FOIA in federal information policy. . . . The changes . . . represent a revolutionary shift.").

President George W. Bush Republican, 2001-2009)

President Bush was no champion of government transparency or FOIA prior to the terrorist attacks of September 11, 2001, but after the tragedy his administration dissembled mechanisms of transparency. Attorney General John Ashcroft produced a 2001 memorandum outlining the Bush administration's new FOIA interpretation. The document identified fundamental governmental values that included "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."¹⁴² Ashcroft encouraged agencies "to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA."¹⁴³ In many ways Ashcroft's memo was an abrupt reversal of Reno's memo released eight years earlier. Ashcroft announced the Justice Department's willingness to defend nondisclosure decisions, pledging his department's support for any exemption demonstrating "a sound legal basis." The memo was read as an abdication of the harm standard instituted by Attorney General Reno, and the standard was a return to the threshold established in 1981 by President Reagan's first attorney general, William French Smith. The Ashcroft FOIA guidance was panned by news media and transparency advocates, with Dan Metcalfe, co-director of the Office of Information Policy, a FOIA oversight office, archly describing the memo as "certainly a shift in tone."¹⁴⁴ In a highly unusual step, President Bush's chief of staff distributed a memo warning the executive branch against sharing security information and asking agencies subject to FOIA to supply details on how they were protecting such information.¹⁴⁵ The memo explicitly identified Exemption 2 as a proper method for denying requests seeking critical infrastructure information. In his time in office, President George W. Bush rarely commented publicly on the FOIA but did so once before the convention of the American Society of Newspaper Editors and again in a signing statement on federal budgeting trans-

¹⁴²Memorandum from John Ashcroft, Attorney General, to Heads of all Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

¹⁴³*Id.*

¹⁴⁴Rebecca Daugherty, *Ashcroft's FOI Act Memo Prompts Concerns*, NEWS MEDIA & THE L., Winter 2002, available at <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2002/ashcrofts-foi-act-memo-prom/>.

¹⁴⁵Memorandum from Chief of Staff Andrew Card to Heads of Executive Departments and Agencies (Mar. 19, 2002), available at <https://www.justice.gov/archive/oip/foiapost/2002foiapost10.htm>.

parency.¹⁴⁶ In 2007, FOIA amendments were passed, and President Bush released a one-paragraph signing statement on New Year's Eve that professed no support for the FOIA or transparency and merely outlined the amendments.¹⁴⁷

Though President Bush signed minor amendments and produced occasional support for the FOIA, there was prevailing belief that his administration had done great harm to government transparency and the FOIA. In summarizing the collected actions of the second Bush presidency, Jane Kirtley wrote, "The Bush administration's contempt for the public's right to know amounts to an organized assault on freedom of information that is unprecedented since the enactment of the Freedom of Information Act forty years ago."¹⁴⁸ There is a strong general consensus that the administration of President George W. Bush, post 9/11, made a concerted, coordinated effort to limit records through the FOIA.¹⁴⁹

President Barack Obama Democrat, 2009-2017)

In stark contrast, on the first day of Barack Obama's presidency, his administration, to great fanfare, issued a memorandum in which the president declared that, under his watch, the United States would experience "an unprecedented level of openness in Government."¹⁵⁰ Months later, Attorney General Eric Holder issued another memorandum specifically addressing the FOIA, declaring, "[E]very agency and department should know that this administration stands on the side

¹⁴⁶Remarks by George W. Bush at the American Society of Newspaper Editors Convention (Apr. 14, 2005), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=73669&st=freedom+of+information&st1=> ("Look, the presumption ought to be that the citizens ought to know as much as possible about the Government decisionmaking. . . . I believe in open government. I've always believed in open government."); Remarks by President George W. Bush upon signing Pub. L. No. 109-282, Sept. 26, 2006, <https://www.presidency.ucsb.edu/documents/remarks-signing-the-federal-funding-accountability-and-transparency-act-2006> ("We believe that the more transparency there is in the system, the better the system functions on behalf of the American people.").

¹⁴⁷Statement by President George W. Bush Upon Signing Pub. L. No. 110-175, Dec. 31, 2007.

¹⁴⁸Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POLY 479, 479 (2006).

¹⁴⁹See, e.g., SANDRA BRAMAN, CHANGE OF STATE: INFORMATION, POLICY, AND POWER 206-07 (2006) (noting a "dramatic diminution of information available").

¹⁵⁰Memorandum from President Barack Obama for Heads of Executive Departments and Agencies on Transparency and Open Government (Jan. 21, 2009), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>.

not of those who seek to withhold information, but those who seek to make it known.”¹⁵¹ Holder’s new FOIA guidance asked federal departments and agencies to always side with disclosure, suggesting increased discretionary releases and more partial releases when possible. The new guidance also repealed Attorney General Ashcroft’s position, reinstating the foreseeable harm standard. Holder called for a new day in compliance, requesting FOIA officers and agency personnel work together in ensuring prompt and efficient FOIA processes and requesting “a spirit of cooperation” between agencies and FOIA requesters, a relationship often fraught with hostility. Holder also called on agencies to issue fewer full denials in favor of closely redacting and releasing non-exemptible information. In 2009, the director of the Office of Management and Budget released a government directive that emphasized support of the FOIA and required executive departments and agencies to increase instances of proactive disclosure, abide by uniform data standards and “create and institutionalize a culture of open government.”¹⁵² Notably, the Obama Administration sought to grow access to government information through FOIA and new initiatives. Under President Obama, the government instituted other technology-forward transparency efforts, including elevating the role of federal chief information officer and inaugurating the data.gov website; both efforts to increase proactive disclosure.

The 2016 FOIA amendments¹⁵³ represented meaningful if modest change on the law’s fiftieth anniversary, closing loopholes, installing sunset provisions and codifying the foreseeable harm standard that had vacillated between Republican and Democratic presidencies. President Obama did not produce a signing statement but addressed the amendments in collected remarks, calling the FOIA “one of the key ways in which citizens are able to find out what exactly is going on in government.”¹⁵⁴ Coming in the last months of his presidency, President Obama sounded a conciliatory note in his brief remarks, acknowledging dissatisfaction with the FOIA under his administration, before concluding with, “Hopefully, this is going to help.”¹⁵⁵

¹⁵¹Memorandum from Attorney General Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

¹⁵²Memorandum from Director of the Office of Management and Budget Peter Orszag for Heads of Executive Departments and Agencies (Dec. 8, 2009), available at <https://obamawhitehouse.archives.gov/open/documents/open-government-directive>.

¹⁵³FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

¹⁵⁴Remarks by President Barack Obama Upon Signing Pub. L. No. 114-185, June 30, 2016, available at <https://www.presidency.ucsb.edu/documents/remarks-signing-the-foia-improvement-act-2016-and-the-puerto-rico-oversight-management-and>.

¹⁵⁵*Id.*

However, an earlier iteration of the bill was reported to have been killed by the White House.¹⁵⁶ Similar bills had passed both Republican chambers of Congress, but were held up, according to Department of Justice emails, in deference to some of the strong disclosure language in the legislation and a provision punishing FOIA personnel for noncompliance.

The Obama Administration broadcast its FOIA advocacy early in the president's first term, and this message was an integral part of his presidential campaign. He attempted to reverse the damages done by his predecessor, and the press celebrated his arrival as an ally of the FOIA.¹⁵⁷ And despite the enthusiasm and efforts, the Obama Administration failed to deliver the promised change. The administration's transparency and FOIA record have produced a less than sanguine view of his efforts.¹⁵⁸ But public opinion seems to grant at least a moderately favorable opinion of his administration's efforts. Steve Aftergood, long-time transparency advocate, concluded that while the Obama presidency may not have met its ambitious objectives, "[I]t is far from obvious that any other Administration has a stronger claim than Obama's to being named 'most transparent.'"¹⁵⁹

President Donald Trump 2017-present

President Donald Trump has proved to be a clear contradiction to President Obama with regards to the FOIA. By and large, President Trump has been publicly indifferent to the FOIA and spoken little on

¹⁵⁶Trevor Timm, *Obama Claimed to Want Transparency. His Actions Suggest the Opposite*, THE GUARDIAN, Mar. 9, 2016, <https://www.theguardian.com/commentisfree/2016/mar/09/obama-transparency-foia-bipartisan-reform-stopped>.

¹⁵⁷See Clint Hendler, *What We Didn't Know Has Hurt Us*, COLUMBIA JOURNALISM REV., January/February 2009, available at https://archives.cjr.org/feature/what_we_didnt_know_has_hurt_us.php "[M]uch of the damage done to the Freedom of Information Act under Bush could be undone with the stroke of a pen, and Obama, in the campaign and the transition, has suggested he'll do just that.... There are signs that Obama could be an ally. He hit most of the right notes during his campaign, and his transition Web site suggests that there will be an executive order to roll back Bush's changes to the Presidential Records Act. It also promises greater disclosure of the sort of public-private communications that Cheney fought so hard to keep secret.").

¹⁵⁸See, e.g., Jaffer, *supra* note 9; Maureen Sullivan, *Obama Promised Transparency. But His Administration Is One of the Most Secretive*, WASH. POST, May 24, 2016, available at https://www.washingtonpost.com/lifestyle/style/obama-promised-transparency-but-his-administration-is-one-of-the-most-secretive/2016/05/24/5a46caba-21c1-11e6-9e7f-57890b612299_story.html.

¹⁵⁹Steve Aftergood, *Was Obama Administration the Most Transparent or the Least?*, FED'N OF AM. SCI., Nov. 20, 2017, available at <https://fas.org/blogs/secrecy/2017/11/obama-transparency/>.

the subject of government transparency. He has tweeted many times on operating a very transparent administration, though these were frequently in relation to the special counsel's investigation. On Aug. 18, 2018, he tweeted "Most transparent in history" as part of a longer tweet touting his cooperation with Special Counsel Robert Mueller.¹⁶⁰ Four days later, President Trump told a pool of reporters, "There has never been, ever before, an administration that's been so open and transparent."¹⁶¹ This was also in reference to the Mueller administration, citing the numerous documents his team had provided the special counsel.

Evidence suggests this bluster is not accurate. The director of the Office of Information Policy, in testimony before a congressional committee, acknowledged instances of proactive disclosure were down significantly and agencies across government had removed scientific and medical pages from their Web sites.¹⁶² The hearing was held primarily due to concerns about the Department of the Interior announcing new FOIA rules. While a Trump-nominated attorney general has yet to publish the customary FOIA guidance, federal agencies, including the Department of Interior, have produced rules that would allow the Interior to reject requests deemed "unreasonably burdensome," impose monthly limits on requests by an individual and introduce review of FOIA requests by political appointees.¹⁶³ Months after the Interior's new rules, the Environmental Protection Agency also announced new FOIA regulations that included political review, among other controversial new policies.¹⁶⁴

In one of the few explicit references to the FOIA, Attorney General Bill Barr criticized the law as harassment before a Federalist Society crowd.¹⁶⁵ He claimed neither Congress nor courts were willing to subject themselves to such scrutiny. He suggested the executive branch is

¹⁶⁰Louis Jacobson, *Is Donald Trump the Most Transparent President Ever? No.*, POLITIFACT, June 4, 2019, <https://www.politifact.com/truth-o-meter/statements/2019/jun/04/donald-trump/trump-administration-most-transparent-ever-no/>.

¹⁶¹*Id.*

¹⁶²FOIA: *Examining Transparency Under the Trump Administration: Hearing Before the H. Comm. on Oversight Reform*, 116th Cong. (2019) (statement of Melanie Pustay, director of the Office of Information Policy).

¹⁶³See Michael Biesecker, *Lawmakers Push Back Against Interior's Proposed FOIA Changes*, ASSOCIATED PRESS, Mar. 5, 2019, available at <https://apnews.com/ec0f979e85ce4deba6f8304bb9b92040>.

¹⁶⁴Gregory Wallace & Ellie Kaufman, *EPA Changes Transparency Rules*, CNN, June 26, 2019, available at <https://www.cnn.com/2019/06/26/politics/epa-foia-rule/index.html>.

¹⁶⁵Remarks by Attorney General Bill Barr to the Federalist Society (Nov. 15, 2019), available at <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture>.

unable to perform collaborative decision-making under such constraints: “That process cannot function properly if it is public, nor is it productive to have our government devoting enormous resources to squabbling about what becomes public and when, rather than doing the work of the people.”¹⁶⁶

A FOIA oversight organization has documented a dramatic increase in the number of FOIA lawsuits in federal courts, with the number of cases pending more than doubling during Trump’s time in office.¹⁶⁷ The project also found federal FOIA cases are taking significantly longer to resolve.¹⁶⁸ Under President Trump, the United States has also pulled out of the international Open Government Partnership and efforts at modernizing the national security information policy have stalled.¹⁶⁹ Credible reporting has documented the president commonly ripping documents to shreds,¹⁷⁰ disregarding protocol when calling international leaders (and halting the practice of disseminating public summaries of such calls),¹⁷¹ regularly overclassifying call records,¹⁷² ceasing the practice of publishing White House visitor logs,¹⁷³ and requesting staff not produce records of meetings.¹⁷⁴ All are either a violation of the Presidential Records Act¹⁷⁵ or the FOIA, or they represent a break from accepted norms and practices. There is a strong consensus among journalists and scholars that the Trump presidency will

¹⁶⁶*Id.*

¹⁶⁷*FOIA Lawsuits Are Taking Longer to Resolve*, THE FOIA PROJECT, Jan. 23, 2020, <http://foiaproject.org/2020/01/23/lawsuits-annual-2019/> (The number of FOIA cases in federal courts was 702 at the end of calendar year 2016. At the end of 2019, the number was 1448).

¹⁶⁸*Id.* (“In addition, cases that have been pending for two or more years are nearly two-and-a-half times greater, rising from 138 at the end of FY 2016 to 330 at the end of FY 2019.”).

¹⁶⁹See Camille Fassett, *The Freedom of Information Act Is Getting Worse Under the Trump Administration*, FREEDOM OF THE PRESS FOUND., Mar. 14, 2019, <https://freedom.press/news/freedom-information-act-getting-worse-under-trump-administration/>.

¹⁷⁰See Annie Karni, *Meet the Guys Who Tape Trump’s Papers Back Together*, POLITICO, June 10, 2018, <https://www.politico.com/story/2018/06/10/trump-papers-filing-system-635164>.

¹⁷¹See Kaitlan Collins, *White House Stops Announcing Calls with Foreign Leaders*, CNN, July 25, 2018, available at <https://www.cnn.com/2018/07/24/politics/foreign-leaders-call-white-house/index.html>.

¹⁷²See Michael Crowley, *Whistle-Blower Shines Light on Super-Secret N.S.C. Computer System*, N.Y. TIMES, Sept. 26, 2019, available at <https://www.nytimes.com/2019/09/26/us/politics/whistleblower-nsc-computer-system.html>.

¹⁷³See Julie H. Davis, *White House to Keep Its Visitor Logs Secret*, N.Y. TIMES, Apr. 14, 2017, available at <https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html>.

¹⁷⁴See Robert S. Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, DEPT OF JUSTICE 117 (March 2019).

¹⁷⁵44 U.S.C. § 2201 (2018).

have a deleterious impact on government transparency.¹⁷⁶ Early returns have transparency advocates predicting record-setting non-compliance and litigation.¹⁷⁷

Thus far, the Trump administration has largely disregarded the FOIA, along with most archival and transparency laws and practices. Under his watch, federal departments and agencies have attempted audacious circumventions of the law through agency rulemaking (and in doing so the EPA failed to abide by rulemaking process¹⁷⁸). And in one of the very few references to the law, President Trump's attorney general produced likely the most hostile public comment regarding the FOIA by an executive officeholder, suggesting the FOIA was burdensome, expensive and an encroachment on the president's privacy.

Differing Political Approaches

Republican and Democratic presidential administrations have demonstrated different approaches to the FOIA throughout its history. An evaluation of executive orders, memoranda and rhetoric, shows Republican presidents less frequently comment on government transparency and the FOIA. Democratic presidents (and presidential candidates) were much more likely to publicly avow support for government transparency and a stronger FOIA. It was often a part of campaign strategy, and Democrats made public comments in favor of the FOIA much more frequently. Presidents Clinton and Obama made FOIA improvement a notable policy issue. Republican presidents were less likely to produce public messaging on government transparency or the FOIA. Republican messaging often warned of the dangers of too much transparency, and support for the FOIA was typically vague. President Reagan was the only Republican to make FOIA

¹⁷⁶See Hamilton, *supra* note 102, at 126 (“[T]he early signs in the Trump administration point to less information being released.”); David Cuillier, *Forecasting Freedom of Information: Why It Faces Problems — and How Experts Say They Could Be Solved*, JOHN S. AND JAMES L. KNIGHT FOUND. 4, March 2017, <https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/232/original/FOI-final-unlink.pdf> (“Overwhelmingly, experts predict that access will get worse: Nearly 9 out of 10 predicted that access to government information will worsen because of the new presidential administration.”).

¹⁷⁷See Fassett, *supra* note 169.

¹⁷⁸See, e.g., Meg Cunningham, *EPA Rule Lets Political Officials Block FOIA Document Requests*, ROLL CALL, June. 26, 2019, <https://www.rollcall.com/2019/06/26/epa-rule-lets-political-officials-block-foia-document-requests/> (The EPA announced the final rule, published in the Federal Register, without a mandatory public comment period.).

amendments a major initiative, and his efforts were directed toward limiting access to law enforcement and intelligence records.

The national security executive orders also strike a different tone. Presidents of both parties drew broad parameters around the national security interests of country. Republican administrations (with the exception of Nixon's) were more likely to raise concerns about the growing threat to national security and the necessity of protecting critical infrastructure. Republican presidencies also tended to grow the number of classification categories and expand classification authority to more offices and personnel. While the national security executive orders of Democrats were more likely to draw back classification systems.

The influential FOIA guidance from the Department of Justice also showed differing positions. Attorneys general under Democratic presidents encouraged the release of more information, often implementing the foreseeable harm standard — “disclosure would harm an interest protected by exemption” — while attorneys general nominated by Republican presidents would commit to supporting any nondisclosure decisions with a sound legal basis. The vacillating foreseeable harm standard was the most conspicuous difference between Republican and Democratic FOIA guidance, but there is an unequivocal message in support of increased transparency in Democratic memoranda, encouraging departments and agencies to err on the side of transparency. Republican attorneys general, on the other hand, often identified necessary categories of confidentiality and directed departments and agencies to use specific exemptions or methods in denying requests.

The Democratic and Republican political parties and Republican and Democratic presidential administrations strike undeniably different postures with regard to the FOIA. The study seeks to determine how these public profiles and legal maneuvers affect the use and implementation of the FOIA. The article seeks to answer two simple questions in considering the impact of these presidencies and their political parties:

RQ1: Does a comparison of Republican and Democratic presidential administrations show differences in FOIA use and administration?

RQ2: How does FOIA use and administration differ among individual presidential administrations?

METHODS

This article examines FOIA use and implementation by aggregating and analyzing FOIA annual reports. Each federal department and agency subject to the FOIA is required by statute to produce an

annual report. The annual reports, introduced by the 1974 FOIA amendments,¹⁷⁹ present a quantitative snapshot of each department's year with FOIA. The requirements of the reports have varied over time but have consistently included figures on denials, exemption claims, administrative closures, appeal outcomes, fees collected and annual costs. Cabinet-level departments were the chosen sample because they are the primary administrators of the FOIA, receiving the bulk of requests in any given year. As a result, they are the intended targets of legislative amendments and executive guidance. Also, smaller agencies are more prone to structural change, closure and merger, leaving longitudinal analysis more difficult. Focusing on the relatively steady cabinet-level departments allowed for a more consistent database.

A dataset was compiled using the annual reports of the fifteen cabinet-level departments, from 1975 until 2018. There are fifteen cabinet-level departments. It was comprised by extracting and combining annual report data as needed to build a consistent longitudinal dataset. For instance, the Department of Health, Education and Welfare split into the Department of Education and the Department of Health and Human Services in 1979. For the years 1975 to 1979, HEW reports for the appropriate subsidiary Education and Health departments were examined and presented in as standalone departments. The Department of Homeland Security was created in 2002, becoming the fifteenth cabinet-level department, and filed its first FOIA annual report in 2003. The Department of Justice hosts annual reports from 1998 until present. All other annual reports were collected through FOIA requests and trips to the Senate archives in Washington, D.C. In total, 94% (595/632) of the department years are accounted for. For the decade of 1998 to 2007, the Department of Veterans Affairs included Privacy Act information in its annual reports, inflating the figures. These years have been removed from the dataset.

Others have examined similar annual reports datasets. Minjeong Kim explored FOIA annual report data from twenty-five federal agencies over eight years in contrasting the final three years of the Clinton presidency and the first five years of President George W. Bush's tenure.¹⁸⁰ Ben Wasike has done so twice, once collecting the fifteen cabinet-level departments and five additional agencies in a comparison of President George W. Bush's tenure versus the first four years of the Obama administration;¹⁸¹ and a second time where he collected FOIA

¹⁷⁹Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564; §§ (d)(1)-(7) (1974).

¹⁸⁰Kim, *supra* note 4.

¹⁸¹Wasike, *FOIA in the Age of "Open.Gov.," supra* note 4.

data for the entirety of the executive branch in comparing six years of the Obama administration against the first year of the Trump presidency.¹⁸²

This study focused solely on cabinet-level departments, the primary administrators of the FOIA. Given the time frame of the study, the dataset is comprised of these larger, more durable departments, providing a more stable sample over time. Previous studies, like those of Kim and Wasike, have used annual reports from 1998 and after, reports required by the 1996 EFOIA amendments to be published on the department's website and by the Department of Justice.¹⁸³ This article encompasses a larger timeframe, having collected data from the annual reporting requirement's advent with the 1974 amendment. The study represents the most comprehensive review of FOIA annual reports to date.

FINDINGS

The compiled annual report dataset was analyzed for political differences among basic categories like requests processed, initial disposition, exemptions (with a special interest in the national security and law enforcement exemptions due to their disputed nature), appeals, costs and fees. The analysis produced little that consistently differentiated FOIA administrations by presidential political party, though there were a number of notable observations.

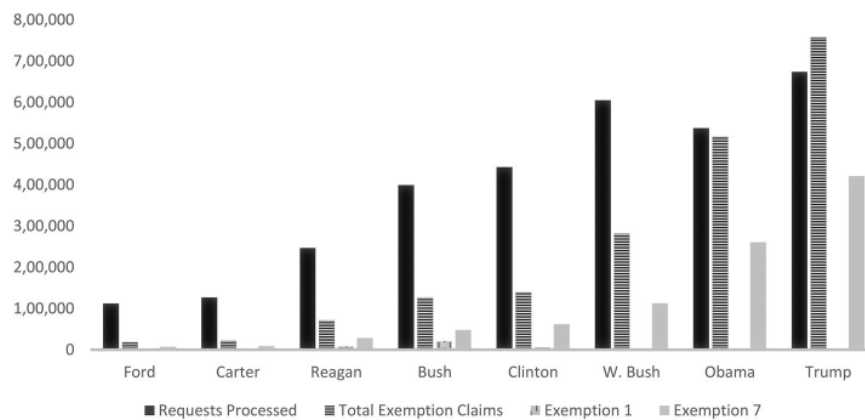
Requests Processed

As shown in [Figure 1](#), the FOIA has gained in popularity over time, and the number of requests received and processed by federal departments has risen fairly consistently. Federal departments under President Ford processed nearly 112,000 annually, compared to the 674,000 annually processed by federal departments under President Trump, a more than five-fold increase in the number of requests processed per annum. On the whole, departments under Republican presidencies process fewer requests by a less than 3% margin annually. However, more recently Republican presidencies have received and processed significantly more requests than their Democratic counterparts. And on an administration-over-administration comparison,

¹⁸²Wasike, *FOI in Transition*, *supra* note 4.

¹⁸³Pub. L. 104-231, 110 Stat. 3049-3054; §§ (e)(1)-(2) (1996).

Figure 1 *Annual requests processed and exemptions claims by federal departments under past eight presidencies.*



processed requests surge when a Republican president follows a Democrat.

From Ford to Trump, there is an annual 11% average increase in the number of requests processed by departments under each administration. The Reagan Administration experienced a 95% increase compared to the Carter Administration. When George W. Bush succeeded Bill Clinton, there was a 37% increase in annual requests processed by federal departments. From Bush to Obama, the number of requests decreased by 11%. In the first two years of the Trump presidency, requests have increased 25% annually relative to Obama's tenure.

Initial Disposition

All requests produce one of three results: a denial, a grant or a closure under an "other authority." [Table 1](#) displays the results by presidential administration and documents federal departments under Republican presidencies produced a more transparent record. Over the period of analysis, Republicans produced a record of 7 percentage points more in full grants and 5 percentage points fewer in total denials. Federal departments under President George W. Bush provided the most transparent outcomes by a fairly large margin, issuing both the highest percentage of full grants and lowest percentage of denials of the eight presidencies. The Clinton Administration was second, providing full grants in just under half of the outcomes. Federal departments under President Reagan produced the least transparent outcomes with 87% results as either a denial or a closure under other authorities. In the first two years of the Trump presidency, federal

Table 1

President	Full Grant	Total Denials	Other Authorities
Ford (R)	30.24%	43.21%	26.55%
Carter (D)	22.77	43.74	33.49
Reagan (R)	12.81	46.20	40.99
Bush (R)	38.66	25.83	35.50
Clinton (D)	49.94	17.92	32.14
W. Bush (R)	57.99	16.91	25.11
Obama (D)	28.42	39.90	31.68
Trump (R)	21.84	46.32	31.85
Democrat	37.04	31.04	31.92
Republican	45.21	25.87	28.92
Total	41.21	28.04	30.39

Initial Disposition.

Note: Initial dispositions or closures of FOIA requests by federal department under past eight presidencies. The total denials category includes both partial and full denials.

departments have been less than forthcoming with records, with the FOIA process resulting in full grants just 22% of the time, second only to President Reagan.

The early years of FOIA annual reports document high denial rates under presidents Ford, Carter and Reagan, with Reagan holding the second highest total denial percentage of all eight presidents. The percentage of denials begins sinking under the first Bush presidency, only to climb precipitously once President Obama is in the White House. Under President Trump, departments have produced a denial in nearly half of all outcomes, the highest denial rate of the eight presidencies. The lowest denial rates were posted by consecutive administrations, first George W. Bush, then Clinton. Full grants on requests show considerably more variance, ranging from a low of 13% during President Reagan's tenure to a high under President George W. Bush's 58%.

FOIA requests are also often administratively closed under other authorities. For instance, the request is closed as "No Records" if the department has no records that match the sought information; or a request is closed due to fee concerns if the requester refused to pay the fee (or stopped responding after a fee was issued). Over the forty-four years, 30% of all processed requests were closed due to administrative reasons, and Republicans were 3% less likely than Democrats to close a request due to administrative reasons. As the FOIA process is predicated on the initial request, it is likely that a strong correlation exists between requests processed and all other FOIA variables. This is the

case for other authority closures. There is a significant positive relationship between requests processed and closures under other authorities, $r(42) = .90, p = .001$.

Exemptions

When issuing a denial, agencies must provide a rationale, which is termed an “Exemption.” Exploring the exemption claims helps understand both the type of information requested and the government justification for nondisclosure. Relative total requests processed, total exemption claims do not demonstrate as strong of a correlation as many other FOIA variables, like initial disposition or annual costs. However, there is still a significant positive relationship between requests processed and total exemption claims, $r(42) = .72, p = .001$. [Figure 1](#) shows exemption claims have increased significantly over time. Federal departments under President Clinton provided more exemption claims than during the combined years of the Reagan and Bush presidencies. Federal departments under President George W. Bush more than doubled the number of exemption claims produced under the Clinton administration. During the Obama presidency, the total number of exemption claims rose another 84%. Thus far, total exemption claims have jumped another 46% annually under President Trump.

Exemption 1, the national security provision, makes up a decreasing percentage of exemption claims, but it bears noting that Republicans have claimed Exemption 1 nearly three-times as often as a Democrats. Under President George H. W. Bush, federal departments provided more than 82,000 Exemption 1 claims, more than one-third more than the administration with the second most, the Reagan Administration, and President Bush did so in a one-term presidency. More than 16% of the exemption claims by the first Bush Administration were Exemption 1 claims. More recently, that percentage has been dramatically lower. The percentage of Exemption 1 claims to all exemption claims under President Obama was 0.6%, and under President Trump it has been 0.3%.

Federal departments under Democratic administrations have been more than 4% more likely to issue Exemption 7 claims, which provides nondisclosure for law enforcement. Exemption 7 claims have increased sharply since the 1986 FOIA amendments. The correlation between requests processed and Exemption 7 claims is lower than that of total exemptions, and among the lowest of those analyzed. However, the correlation between total requests processed and Exemption 7 claims still demonstrates a significant positive relationship, $r(42) = .65, p = .001$. On an annual basis, Exemption 7 claims by federal departments during the Reagan Administration increased more than 228%. It rises

another 68% annually under President Bush. Use of Exemptions 7 rises modestly under President Clinton before jumping another 81% under President George W. Bush. After the second Bush presidency, Exemption 7 claims explode, increasing 132% annually during the Obama administration, followed by another 61% during the Trump administration. During the Ford and Carter presidencies, Exemption 7 was invoked on 6-7% of all requests processed. While Obama was in office, that figure was 49%, and the figure stands at 62% during President Trump's tenure. Much of the Exemption 7 growth can be attributed to Exemption 7(C), personal privacy of law enforcement records, and Exemption 7(E), protecting information that would disclose investigative techniques and procedures. While remaining a relatively small portion of total Exemption 7 claims, federal departments under President Trump have issued a staggeringly large number of Exemption 7(B) claims, guarding against pretrial publicity. During President Trump's two years in office, federal departments have already tripled the number issued during President Obama's eight years, or more than five-times as many as issued during President George W. Bush's eight years.

Most other exemptions remain relatively similar across presidencies and political parties. Exemption 6, the personal privacy provision, is invoked 34% more often annually under Democratic presidents. Federal departments under Democratic administrations also invoked Exemption 3, the provision that allows nondisclosure under other statutes, 24% more often annually than under Republican administrations.

Appeals

As shown in [Table 2](#), federal departments under Democratic administrations processed more appeals than their Republican counterparts. Over the life of the study, the correlation between the two, total requests processed and appeals processed, is lower than many other variables in the study. However, there is still a significant positive relationship between requests processed and appeals processed, $r(42) = .73$, $p = .001$. Federal departments under Democratic presidents processed 22% more appeals on an annual basis. The ratio for requests processed to appeals processed was 64:1 for Republicans and 52:1 for Democrats. Federal departments under President Carter scored the worst, processing an appeal for every twenty-nine requests processed. Republican administrations scored slightly better in outcomes of appeals as well, as Democratic administrations were nearly 4% more likely to affirm the original decision upon appeal, while

Table 2

President	Processed/Year	Requests:Appeals	Processed/Affirmed	Processed/Reversed
Ford (R)	1,850	40.33	40.94%	27.03%
Carter (D)	4,293	29.47	32.18	24.47
Reagan (R)	4,991	49.45	31.82	34.12
Bush (R)	7,109	56.16	22.77	25.55
Clinton(D)	7,687	57.63	20.70	25.09
W.Bush(R)	7,459	82.71	16.09	36.35
Obama (D)	10,213	52.58	34.39	39.21
Trump (R)	12,351	54.54	36.26	39.47
Democrat	8,019	52.04	28.90	32.22
Republican	6,548	63.53	25.34	33.99
Total	7,216	57.53	27.14	33.10

Appeals.

Note: Affirmed includes dispositions labeled “affirmed on appeal” and “partially affirmed and partially reversed/remanded on appeal.” Reversed includes “completely reversed on appeal.”

Democratic administrations were also nearly 2% less likely to reverse the original disposition on appeal.

Costs, Fees and Staffing

The amount of money federal departments have spent on FOIA processes has grown over time, largely in line with the growth of requests submitted and processed. There is a significant and strong positive relationship between requests processed and total annual costs, $r(42) = .81$, $p < .001$. However, as shown in [Table 3](#), there are notable differences in costs accrued by party and individual presidencies. Over the forty-four years of data, federal departments have spent \$7.35 billion on FOIA systems. The average cost per request processed is \$401. Federal departments under Democratic presidencies have spent \$474 per request, while the same departments under Republican administrations have averaged \$340 per request. On a total cost basis, with Democrats in office, federal departments spend \$180 million more, or 40% more, annually. While George W. Bush was president, federal departments incurred nearly double the annual costs of the Clinton presidency. Under President Obama, annual costs were \$366 million across the fifteen departments; a 58% increase from the previous administration. With Trump in the White House, annual costs have continued to rise. In 2017 and 2018, federal departments have incurred costs of \$441 million annually, a 20% increase. Under President Trump, federal departments

Table 3

Party	Total Cost	Cost/Year	Litigation Cost/Year	Fees Collected/Year	Staff/Year
Democrat	\$3,954	\$198	\$19	\$3.0	3,624
Republican	3,396	142	16	2.9	3,505

Costs, Fee and Staffing.

Note: All figures are in millions. Litigation costs and staffing data only include annual reports data from 1998 and after.

have spent the largest percentage of annual costs on litigation, at 8.1%. Under President Obama, that figure was 6.5%, and despite President George W. Bush's Department of Justice announcing its commitment to defending more FOIA cases, litigation only accounted for 5.0% of annual costs over the eight years, lower than the preceding administration.

A considerable portion of FOIA costs can be attributed to FOIA personnel, yet there is no significant statistical relationship between the number of requests processed and the number of FOIA personnel. Staffing has only been documented since 1998, and over that period, the number of FOIA personnel has been relatively stable across administrations. The fifteen federal departments committed 4,127 full- and part-time staff to FOIA operations under President Clinton, the highest figure of the four presidencies. Departments under President Trump, with 3,938 annual FOIA personnel, had the second largest FOIA staff in annual report accounting, followed by President Obama, 3,435 annually, and President George W. Bush, 3,397.

Since 1975, federal departments have collected nearly \$10 million in fees, or 0.13% of all costs incurred. On an annual basis, the parties accumulate a nearly identical amount of money in fees. On a per request basis, under Democratic leadership, departments collected \$7.07 per processed request, while that figure was \$6.97 under Republicans.

DISCUSSION

Research Question 1 relates to whether political parties produce different FOIA outcomes. Republican and Democratic administrations produce relatively similar implementation data, though there are notable differences among narrower categories. There are also distinct trends that seem to transcend parties and individual presidencies. The findings demonstrate that Republican administrations face heightened scrutiny. Whether warranted, FOIA requests surge in recent years when a Republican is in the White House. The data do not allow for characterization of the requests by subject, making it difficult to isolate environmental factors (that is, events

outside of the executive's control) and the actions of the administration, but requests received and processed grow at a fairly linear rate. The exceptions or disruptions are clear spikes in requests processed when a Republican presidency succeeded a Democratic presidency, and the only decline in requests processed by federal departments occurred under President Obama. Again, the annual reports provide no method for determining whether the requests were motivated by particular events or actions, but, for instance, 9/11 does not produce a notable increase in requests received or processed in either 2001 or 2002. Analysis suggests that in recent years, invited or not, Republican administrations face more acute inquiry into the operations of the executive branch by way of significantly more FOIA requests.

Sorting FOIA use and implementation data by individual presidential administrations produced more stark contrasts. As to Research Question 2, there does seem to be an impact by individual presidencies, though that influence does not appear to necessarily accord with the administration's legal and rhetorical positions. However, the two presidencies with likely the most negative public records with regards to the FOIA produced the worst outcomes. Federal departments under presidents Reagan and Trump issued the most denials and the fewest full grants. Their public dispositions on FOIA were very different. President Reagan demonstrated a disdain for the mechanism by calibrating all available legal dials to slow the flow of records to the public. During President Reagan's tenure, two attorneys general released guidance with interpretations narrowing public access, he issued a regressive national security executive order and he helped orchestrate FOIA amendments that constrained access to government information. President Trump, on the other hand, has remained aloof to the law, blithely disregarding the FOIA and transparency norms, while eschewing customary guidance and executive orders. Federal departments, however, have taken steps to undermine the law, issuing bold new rules that prioritize department secrecy. Through dichotomous approaches to FOIA, the two presidents produced the poorest FOIA outcomes by a reasonably large margin.

Federal departments under President George W. Bush performed the best, with requests ending in full grants 58% of the time and denials only 17%.¹⁸⁴ This is notable because the Bush Administration was

¹⁸⁴Due to the Department of Veterans Affairs including Privacy Act data in their FOIA annual reports from 1998 to 2007, these data were removed from analysis. Adding these figures back in bolstered results across most categories. When including the data in the analysis of George W. Bush, the number of requests processed increases 255%, jumping from 4,841,084 to 17,212,720, and the initial disposition outcomes improve dramatically (86% full grant, 5% total denials, 9% other authorities).

strongly castigated by scholars and the press as hostile to transparency efforts. And President Bush released a national security executive order that classified significantly more information, while his attorney general produced FOIA guidance strongly in favor of tighter control of federal records. However, even in the post-9/11 environment of intensified security and safety, federal departments produced information at a higher rate than under any other administration.

Administrative appeals can act as a rough guide of requester satisfaction, and again federal departments under Republican presidents fared better. Federal departments under Democrats, while processing 18% fewer initial requests over the life of the study have processed 2% more appeals. Under President George W. Bush, federal departments processed one appeal for every eighty-three requests, a ratio significantly better than other administrations. The outcomes of the appeals were relatively similar by political party with both completely reversing the challenged request decision approximately one-third of the time. The percentage of reversals per appeals processed has trended up in recent years with the highest reversal rates occurring under presidents Trump, Obama and George W. Bush.

A former Justice Department attorney said the primary impact of an administration on FOIA implementation was in the attorney general nomination and budget priorities.¹⁸⁵ Federal departments under Democrats spend significantly more, but did not produce better outcomes. Republicans spend a slightly larger percentage of annual costs on litigation, but Democrats collect more in fees, often seen as a legal deterrent to requesters.

Despite the varying shades of the individual presidencies, Republican administrations produce better initial outcomes for requesters. Democratic presidents frequently espouse their support for the FOIA. Their political campaigns often include a commitment to transparent governance. The realization of the law was the work of Democratic members of Congress and signed into law by a Democratic president. Support for government transparency and the FOIA, in many ways, is part of the Democratic Party's identity. Yet, analysis of outcomes over forty-four years and eight presidencies demonstrates Republicans outperform Democrats. By a considerable margin, they deny fewer requests and issue more full grants. This is significant, as these initial outcomes likely provide the clearest view of whether the law is functioning or not, whether it is providing citizens with information on the individuals and activities of their government. These

¹⁸⁵See Kim, *supra* note 4, at 315 n.4.

descriptive outcomes lack nuance and fail to capture a wide range of variables, but they likely represent the best barometer of FOIA use and implementation currently available.

These results document a failure to achieve the covenant ostensibly established when FOIA was signed into law, nor does it meet the aspirational rhetoric that has followed. In observing its contemporary status, Mark Fenster called the law “more a symbolic commitment to the free flow of government information than an effective means to regulate secrecy.”¹⁸⁶ It has not ended state secrecy — and Fenster contends it may be worse — the public remains no more politically informed or engaged since passage. Fenster considered whether the project itself is impossible due to the structure of the U.S. government. The Framers designed a system of checks and balances where power is dispersed. The vertical and horizontal scope of the federal system, along with the general vastness, naturally grows pockets of authority and oversight. While an intentional design feature, Fenster wrote, “It produces an unarchivable, ever-expanding body of information that lacks a singular and coherent meaning and that is continually kept secret and leaked in a manner that the bureaucracy cannot itself control. No legal authority, of whatever type, can perfectly manage this mess.”¹⁸⁷ Lillian BeVier anticipated the mess and the untenable politicization of the FOIA.¹⁸⁸ She concluded there was no constitutional right and that the courts were patently ill-suited to determine the parameters of such a contentious and far-reaching law.¹⁸⁹ It would be put upon the legislature to solve the issue, a body too compromised by varied interests and wholly consumed by political competition to satisfactorily determine such a complex and divisive matter.¹⁹⁰ And the inadequate present is the product of resolving “questions of public access to government information by turning to the political marketplace.”¹⁹¹

¹⁸⁶Fenster, *supra* note 62, at 52.

¹⁸⁷*Id.* at 65-66.

¹⁸⁸Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980).

¹⁸⁹*Id.* at 509-10.

¹⁹⁰*Id.* at 512-13 (“Rather, resolution will emerge from a dependably unruly struggle characterized by appeals to administrative convenience, by deference to the claims of competing special interest groups, by subjection to the intellectual forces of institutional checks and balances, and ultimately by the tendency to accommodate political realities.”).

¹⁹¹*Id.* at 514.

CONCLUSION

The title of the article — “Pandering, Priority or Political Weapon” — considers whether the FOIA is an insincere legal mechanism meant to appease, the democratic imperative so often discussed, or a tool used to harm political opposition. The study concludes elements of all three are observable, but the legislative history and requests processed by party data suggest the FOIA has been and always will be a political weapon. When out of power, governors have few legal methods as effective in exacting a pound of political flesh. That a blind transparency mechanism would be used by political opposition seems unavoidable and to some degree healthy. The degree of politicization, especially in legislation and requests submissions, however, is notable. The results, while limited by an inability to isolate FOIA from broader socio-political events, suggest government transparency and the FOIA are likely popular rhetorical strategies that rarely come to fruition in office. Politicians will pander, but rarely is the FOIA truly made a priority. The Obama Administration is likely the best example of campaign and early-term enthusiasm dying when confronted with the glaring reality of governing. His presidency started with zealous, and apparently sincere, FOIA advocacy but concluded with a checkered FOIA record and some modest FOIA amendments passed by a Republican Congress. President Obama, hoping the codification of the harm standard and some sunset provisions helped, was a long way from revolutionizing transparency through embracing technology. What started with the thunderous ambition of a hurricane passed as a storm that did not substantially, or at all positively, influence use and implementation figures, much less reset the prevailing transparency climate. Transparency makes change more difficult. It slows process. It creates scrutiny. It derails plans. It is unlikely to ever make government functions more popular, instead only opening operations to criticism. For those in power, it is much easier to allow the muddied machinery of FOIA to sputter along than it is to supercharge the efforts of political opponents and detractors. In the bitterly partisan era, governing is hard enough. Even the most ideological politician seems likely to succumb to the verities of running a fractured nation.

The findings demonstrate variegated results, not wholly predictable by coarse variables like political party or public perception. And this could indicate that at the heart of the FOIA is a successful transparency mechanism insulated from politics. It is noteworthy, however flawed the figures, that there seems to be only a somewhat weak correlation between public rhetoric, interpretive guidance and classification standards. The implementation of FOIA is more granular than

generally conceived. The unit of measurement in FOIA is quite small, and each request is highly differentiated, and request administration is personal; meaning FOIA operates on a level divorced from federal machinations and grandstanding. The vast majority of FOIA staffs are not political appointees and remain removed from party politics. They function on the bureaucratic level of Weber, completing day-to-day activities, guarding more local interests than presidential objectives.

It must also be noted that the study has severe limitations, as the nature of FOIA administration is entirely contingent on the events of the day, and, thus, there is little consistency in how these presidencies are evaluated. There are too many exogenous factors to make too confident of claims. There are, of course, many transparency mechanisms, and this article only focuses on the biggest and most obvious of them. There is no accounting for the myriad smaller transparency initiatives outside the purview of the FOIA that a presidential administration may support or undermine.¹⁹² These less conspicuous efforts can accumulate and promote substantial change and may represent a more accurate depiction of administrations' beliefs and intentions. The smaller scale, non-FOIA changes may also be all that is politically available to a president for any number of reasons. While the author believes most administrations' position on the FOIA and transparency generally are accurately portrayed in the article, the concept of government transparency is manifold, and the article avoids empirical claims on such a broad subject.

Presidents do affect some change — and this is evident in the findings — but the failures of the FOIA are bipartisan. All presidents produce disappointing results. Those that campaign on government transparency or fervently support the FOIA produce a record similar to those who demonstrate no support. Because when push comes to shove, there is no immediate benefit to increased transparency. However, there is an advantage in refusing to disclose incriminating or embarrassing information. And while the FOIA marks a notable step in shared governance, it will remain primarily a symbolic victory until the public demands executive agencies and departments meet the language of the statute and the rhetoric of politicians. It is too

¹⁹²See, e.g., Edward-Isaac Dovere, *Extreme Secrecy Eroding Support of Obama's Trade Pact*, POLITICO, May 4, 2015, <https://www.politico.com/story/2015/05/secrery-eroding-support-for-trade-pact-critics-say-117581> (observing the Obama administration's unwillingness to publicize information around the Trans Pacific Partnership); Steven R. Weisman, *The President and the Press*, N.Y. TIMES, Oct. 14, 1984, available at <https://www.nytimes.com/1984/10/14/magazine/the-president-and-the-press.html> (detailing President Reagan's internal policies that dramatically restricted officials from speaking to the press).

easy to revert to secrecy, and as Bok showed, control of information is as old as authority itself.

More broadly, there are likely limits to the contemporary FOIA regime. The law can change around edges — fewer full denials, more appeals success, different exemption mix — but the contemporary U.S. government is only going to produce so much information, no matter how enthusiastic the party or president. At present, the FOIA represents a kind of democratic tokenism, more the “convenient formalism” warned of by Justice Anthony Kennedy than the democratic *sine qua non* of politicians rhetoric. Since 2009, in aggregate, nearly three-quarters of requests end in a denial or an administrative closure. The future success of the FOIA likely lies in a renewed commitment, both broad and deep, to meaningful government transparency. The data suggest real change requires more than rhetoric or small technical alterations. The draw of power is too strong, and the justifications for secrecy too ingrained.