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NORTH CAROLINA LAW REVIEW

Volume 90
Number 5 *Social Networks and the Law*

Article 12

6-1-2012

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THE SOCIAL LAYER OF FREEDOM OF INFORMATION LAW*

DAVID S. LEVINE**

It is now received wisdom that a properly functioning democracy requires transparency and accountability—information shared with the public that allows the public to know what its government is doing. It is equally uncontroversial to say that social media allow for an unprecedented amount of informal but structured dissemination and analysis of information. Despite these two basic points, U.S. freedom of information law has failed to harness the power of these new social media networks and, more importantly, formats in a way that amplifies public knowledge of government information. This harsh reality impedes a modern transparent democracy.

The focus of this Article is a general lack of appreciation, from both a theoretical and practical perspective, for the public's need and desire for optimally formatted, socially ready information. This defect is unfortunately found in the Freedom of Information Act ("FOIA"), the major U.S. sunshine law that suffers from a related but greater statutory deficiency. FOIA requires that an agency provide a "record" in "any form or format requested by the person if the record is readily reproducible by that agency in that form or format." Thus, FOIA allows agencies to produce information in less-than-optimal formats, resulting in

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significantly impeded flow of information to and from government.

Social media are a prism through which this governmental disclosure problem can be addressed. However, a solution suggesting that government merely employ social media tools, like posting information directly to Facebook and Twitter, misses the point. Rather, when thinking about this freedom of information problem and the broader issue of how we can spur a truly modern democracy, it is more useful and productive—and indeed more theoretically sound—to focus on encouraging the government to utilize social media formats like spreadsheets and structured, machine-readable databases.

This Article argues that, from a theoretical perspective, governments should reorient their thinking about social media to focus on its indirect value as an information-formatting construct rather than as purely a direct tool for distributing information. Once social media's impact on freedom of information is properly understood, it follows that governments should provide information in structured and useful formats that are socially optimized to best meet the public's analytical needs so that the social layer of government information can flourish. From a practical perspective and to meet this theoretical imperative, this Article proposes a modest amendment to FOIA so as to spur and support the public's development and exploitation of the social layer of government information.

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INTRODUCTION

Governments face a crisis in the dissemination of public information fueled by the existence of powerful information intermediaries like the Internet and its social media portals such as Facebook and Twitter. The crisis derives from public expectations for optimal informational formatting; the crisis is government's ability and willingness to meet those demands. The antecedents of this crisis are literally borne in the United States' ongoing devotion to transparency and accountability. By the end of the eighteenth century, Jeremy Bentham had already eloquently described the theory behind and values and benefits inherent in a government that is open to public inspection. While noting that maintaining secrets may have some short-term benefits, Bentham succinctly stated that in "an assembly elected by the people, and renewed from time to time, publicity is absolutely necessary to enable the electors to act from knowledge."¹ He explained,

To conceal from the public the conduct of its representatives, is to add inconsistency to prevarication: it is to tell the constituents, "You are to elect or reject such or such of your deputies without knowing why—you are forbidden the use of reason—you are to be guided in the exercise of your greatest powers only by hazard or caprice."²

In 2012, the public's high expectations regarding the time it takes to receive such information and the format of the information received has engendered a modern crisis of implied and/or presumed concealment by government of information not likely foreseen by Bentham but well within his stated range of concern, beginning with inconsistency and arguably breaching prevarication. First, the public increasingly expects that all information, particularly regarding high-profile or controversial issues, will be shared in "real time."³ In other words, delays in sharing information, whether they be for infrastructural reasons, like low bandwidth in an Internet connection or human resource scarcity reasons requiring more time for

1. JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS (1837), *reprinted in* 2 THE WORKS OF JEREMY BENTHAM 299, 310–12 (John Bowring ed., Russell & Russell 1962); *see also* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 171, 174–75 (1982) (discussing Bentham's contributions to this area).

2. *See* BENTHAM, *supra* note 1, at 312.

3. *See* Am. Univ. Wash. Coll. of Law, *ACTA To Meet Sept 23: Locking out Civil Society?*, PROGRAM ON INFO. JUST. & INTELL. PROP., <http://www.wcl.american.edu/pijip/go/blog-post/acta-to-meet-sept-23-locking-out-civil-society> (last visited Apr. 8, 2012) (discussing Anti-Counterfeiting Trade Agreement ("ACTA") negotiations in real time).

information to be gathered, are increasingly not well received.⁴ Indeed, the public's collective patience in receiving information is becoming almost laughably limited. For example, as it currently stands, waiting two seconds for a webpage to load in a browser is considered a slow and antiquated standard; rather, the acceptable standard should be a function of milliseconds.⁵ However, the public's patience can also be justifiably strained and the government viewed as engaging in prevarication when the government engages in deliberate foot-dragging that prevents information from being disseminated when it is most useful, as in the case of *Bloomberg News's* Freedom of Information Act ("FOIA") litigation with the Federal Reserve.⁶ Social media tools, with the immediate satisfaction of an informational posting followed by endorsement and/or dissemination by readers in the form of Facebook's "Like,"⁷ Google+'s "+1,"⁸ or Twitter's "Retweet,"⁹ cleverly address this desire for increased speed in information dissemination and feedback.

Simultaneously, the past ten to fifteen years have witnessed an explosion in the number of information intermediaries, which now includes the public itself. Consumers of information, be they reporters or the general public, have constant access to the massive Internet library through handheld, laptop, and desktop computers. Thus, the public has an increasing expectation, fueled largely by the explosion of social media sites and the public's experience with them, for information to be received in optimal formats with good metadata¹⁰ and source information, searchable indices, and standardized structures.¹¹

4. See, e.g., Bianca Bosker, *Facebook DOWN: Users Report Problems with Facebook.com*, HUFFINGTON POST (Sept. 23, 2010, 4:12 PM), http://www.huffingtonpost.com/2010/09/23/facebook-down-users-repor_1_n_736935.html (showing an outage on Facebook merits an entire news article featuring updates on the status of the outage).

5. Steve Lohr, *For Impatient Web Users, an Eye Blink Is Just Too Long To Wait*, N.Y. TIMES (Feb. 29, 2012), http://www.nytimes.com/2012/03/01/technology/impatient-web-users-flee-slow-loading-sites.html?_r=1&hp.

6. See *infra* Part II.B.2.

7. *Like Button*, FACEBOOK, <https://developers.facebook.com/docs/reference/plugins/like> (last visited Apr. 9, 2012).

8. *Recommend on Search, Share on Google+*, GOOGLE, <http://www.google.com/+1/button> (last visited Apr. 25, 2012).

9. *FAQs About Retweets (RT)*, TWITTER, <http://support.twitter.com/articles/77606> (last visited Apr. 3, 2012).

10. See *infra* note 63 (defining metadata).

11. See U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 21 (2009) [hereinafter DOJ GUIDE], available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf.

These changes require a theoretical reexamination of the information foundational assumptions inherent in FOIA. When information is presented usefully, the public can immediately become an information intermediary itself by analyzing and exploiting such information through groundbreaking informational technologies, exemplified by freely accessible social ideation tools like Ahhha,¹² Google Docs,¹³ and Socrata.¹⁴ As information intermediaries, the public can then look for patterns, correlations, and smoking guns in the information received and share those results with others. However, presented suboptimally, the same information and data requires the public to initially decipher what has been produced and then optimize the data on its own before analysis of the information can commence in earnest, much less be shared with others. Therefore, it is no longer socially or technologically acceptable to put information in merely a good or decent format, as suggested by a failure of legislative drafting found in the Legislative Branch Appropriations Act of 2010 (“LBAA”),¹⁵ discussed below; rather, the expectation is that it should be presented in an optimal format. The battle engaged over several years by *Bloomberg News* to get useful information about the recent trillion-dollar bank bailout lending windows from the Federal Reserve and the production of a suboptimal PDF document by the Department of Justice (“DOJ”), which required optimization by the public at large, in response to a freedom of information request regarding data retention by telecommunications companies exemplify this issue.¹⁶

Unfortunately, governments are currently not well positioned to address these public expectations for two primary reasons. First, there is government inertia: the government has poor information technology capabilities and institutional reticence to engage new technologies and prefers to take the path of least resistance whenever politically possible.¹⁷ For purposes of this Article, the LBAA exemplifies the downside to government inertia and antiquated language in statutes focused on information formats. The LBAA has resulted in the Senate’s production of a marginally “searchable,” although facially “itemized,” 12 megabyte PDF document, as allowed by the statute, rather than an easy-to-use, optimally searchable and

12. AHHHA, www.ahhha.com (last visited Apr. 25, 2012).

13. GOOGLE DOCS, docs.google.com (last visited Apr. 25, 2012).

14. SOCRATA, www.socrata.com (last visited Apr. 25, 2012).

15. Legislative Branch Appropriations Act, Pub. L. No. 111-68, 123 Stat. 2023 (2010).

16. See *infra* Part II.B.

17. See *infra* Part II.A.

itemized database.¹⁸ Indeed, government inertia is further underscored by the government's overwhelming use of social media, if it uses social media at all, as a tool to conduct one-way distribution of information.¹⁹ Second, even for relatively simple questions that require minimal effort to achieve compliance, the government is weighed down by a cumbersome and increasingly antiquated information dissemination process that is the focus of this Article—the Freedom of Information Act.²⁰

Simply put, information is often trapped inside government in a suboptimal format. The government can, and in a perfect world should, produce layers of information that answer the “who, what, when, where, and why” FOIA questions. However, modern technology has created the possibility of a market for an additional analytical social layer of government information where an engaged public becomes an information intermediary and derives its own answers to these questions by synthesizing the government's information. When doing so, the public, be they individuals, public interest groups, or other public groups, delves into more complex questions like “how” in search of the aforementioned patterns, correlations, and smoking guns. The desire to conduct detailed analysis of government-produced information and data through social media and ideation constructs amplifies the need for optimal formats of the data received by the public, as such formats are required to vigorously analyze data.

Thus, in the current age, with the proliferation of social media and ideation sites and applications, the public has good reason to expect the government to be able to produce socially ready information in a format that allows the public to develop the social layer of government information easily as an information intermediary and without technological impediments created by the government itself. Lack of resources is no longer a credible argument, or at least it is increasingly not perceived as credible, which may be just as important. Technology and low cost public access to it has

18. See *infra* notes 96–101 and accompanying text. While the LBAA could and should be amended along the lines of the proposed amendment to FOIA, that is not the focus of this Article. FOIA's deficiencies are a great concern because of its broad impact on a wide variety of information, not just information about congressional expenditures.

19. As a colleague recently pointed out after having visited a state motor vehicle registration office and noticing signs imploring the public to “follow” it on Facebook and Twitter, “This is getting out of hand. Why would I want or need to follow the motor vehicles department on Twitter?”

20. See *infra* Part I.B.

made the social layer integral to the proper operation of the freedom of information system, as impeding the social layer is increasingly viewed as prevarication that obstructs the free flow of government information. This Article focuses on the desire and ability of the public to create a governmental information social layer, built upon FOIA-produced information, and the problems that this desire and capability creates for governments. Like the Internet's Open Systems Interconnect Seven Layer Network Model ("OSI Model"), discussed below, each of which is integral to the proper functioning of the Internet,²¹ the social layer is now integral to the proper and optimal functioning of the freedom of information system.

This Article analyzes how the government might overcome these problems and attempt to meet these public expectations by fully embracing social media formats. To help understand these issues and problems, this Article proposes a theoretical analogy to the OSI Model that envisions the Internet as operating by way of seven essential "layers" of interaction in order to allow a user to access information through an electronic device connected to it like a laptop or smartphone.²² By analogy, this Article proposes theorizing government information and the freedom of information system as supporting a new and integral "social layer." Particularly in the context of social media and ideation, theorizing information produced by government by way of a FOIA request through an analogy to the OSI Model can help make sense of how these issues and problems conflict with the public's expectations with regard to information

21. See ERIC A. HALL, INTERNET CORE PROTOCOLS: THE DEFINITIVE GUIDE 7 (2000) ("Each layer within the OSI . . . Model has a very specific function, and each layer depends on the other layers in order for the entire model to function properly.").

22. The OSI Model, as explained by the System Administration, Networking, and Security Institute,

describes seven layers of interaction for an information system communicating over a network, presenting a stack of layers representing major function areas that are generally required or useful for data communication between nodes in a distributed environment [i.e., computers connected to the Internet]. Starting from a high-level application perspective, data is sent down the stack layer by layer, each layer adding information around the originally presented data until that original data plus its layers of added content are represented at the bottommost layer as a physical medium such as bursts of colored light or voltage across a wire in order for that data to physically travel from one point to the other in the real world.

dissemination, as well as impede a properly functioning FOIA and, more broadly, deliberative democracy.

To address this problem, there needs to be a fundamental shift in how the government views information after the advent of social media. The government's dominant focus on using social media directly through Facebook pages and Twitter feeds misses the bigger and more important picture. This Article proposes that to foster a social layer of government information the government does not need to directly use tools like Facebook, Twitter, or Google Docs;²³ rather, it merely needs to offer information in socially ready formats like spreadsheets and machine-readable databases. Therefore, the government can begin to get a modern handle on Bentham's foundational concern about inconsistency and prevarication in democratic governmental operations, address the institutional impediments, and meet the public's expectations for a real-time social layer by embracing social media informational values and optimal formats, as opposed to just the tools themselves, combined with modest changes in FOIA.

This Article is written to help get the government to that point from both a theoretical and practical perspective. Part I offers background on FOIA, social media, and the high watermark for current governmental transparency efforts—Data.gov. Part II discusses the broad problems and issues identified through three examples and focuses on how these issues are amplified but unsolved through a dissection of certain provisions of FOIA. Part III contextualizes the analogy to network layers theory, which lays the groundwork for Part IV, the proposed solution. As FOIA requests often involve the most politically sensitive and contentious information held by government, this Article proposes in Part IV that FOIA be amended to encourage the government to use optimal information formats in its storage and dissemination of information and produce information under FOIA accordingly.

23. This Article is not suggesting that the government should not use such tools directly—just that such activity does not adequately address the concerns raised by this Article. Also, lest this proposal be viewed as of short-term interest, if, for example, Facebook falls from its current perch as the leading social media tool or even in the highly unlikely event that social media take a precipitous fall in popularity, the analysis and proposal herein would apply to any tools that are developed in the future.

I. BACKGROUND: SOCIAL MEDIA, FOIA, AND DATA.GOV

Government, like any business, must rethink its operations in light of social media and figure out how to adapt to contemporary society.²⁴ Just as media companies have reexamined their business models in light of social media, as purveyors of information, the government must consider not just *where* information is found, but *how* it is created and *what* its components are. The purpose of this Article is to encourage the use of social media constructs, like real-time dissemination of information as well as optimal formatting, by embracing technology in freedom of information laws and the public's conceptions of open government and society. This Part furthers this goal by examining the social media principles that the government can learn from in adapting its conception of information and the existing information structures under which the government currently operates to the legitimate expectations of the public.

A. *What Are Social Media's Principles?*

In order to assess the problem of inadequate formatting, it is important to initially define the principles of "social media." Social media, first generation technology companies and applications, like Facebook, Twitter, and Google+, and second generation ideation sites, like Ahhha, Socrata, and Google Docs, form a core of this commercial space. These businesses are built around sharing and widely disseminating information provided by others.²⁵

The first generation social media business model is built around networking: sharing information as much as members are willing (or occasionally unwilling).²⁶ Consider the following principles found in these core social networking companies' own descriptions of what they do:

24. See Alexander Jackson, *How To Use Social Media To Grow Your Company*, BALTIMORE BUS. J. BACK TO WORK BLOG (Mar. 9, 2012, 11:47 AM), <http://www.bizjournals.com/baltimore/blog/2012/01/how-to-use-social-media-to-grow-your.html> ("If you haven't at least thought about how you can use social media to grow your company — you're late.").

25. See, e.g., Mark Zuckerberg, *Our Commitment to the Facebook Community*, FACEBOOK BLOG (Nov. 29, 2011, 9:39 AM), <https://blog.facebook.com/blog.php?post=10150378701937131> (stating that Facebook was created based on "the idea that people want to share and connect with people in their lives").

26. See, e.g., *id.* (noting that users of Facebook have privacy concerns about the information they share or choose not to share).

Facebook: “[G]iv[ing] people the *power to share* and make the world more open and connected.”²⁷

Twitter: “Twitter is a *real-time information* network that connects you to the latest information about what you find interesting. Simply find the public streams you find most compelling and follow the conversations.”²⁸

Google+: “Real-life sharing, rethought *for the web*.”²⁹

Thus, simply put, at the core of social networking is the “power to share” “real-time information” “for the web.”

Second generation social ideation, which has emerged since 2010, has been defined as enabling “individuals to stake their claim on a unique idea, tap into the wisdom of the crowd to combine concepts and feedback, and share in its potentially future success monetarily.”³⁰ Consider a stated purpose of each of these sites:

Socrata: “Fulfill your data transparency mandate comprehensively and cost-effectively. Make your *public data easy to find, easy to understand and easy to use*.”³¹

Google Docs: “Share and *collaborate in real time*.”³²

Ahhha: “Bring *ideas to market*, How to change lives through crowd sourcing, Lending a helping hand through Social Ideation [and] Social Collaboration”³³

27. *About*, FACEBOOK, <https://www.facebook.com/facebook?sk=info> (last visited Apr. 9, 2012) (emphasis added).

28. *About*, TWITTER, <https://twitter.com/about> (last visited Apr. 17, 2012) (emphasis added).

29. *Introducing the Google+ Project: Real-Life Sharing, Rethought for the Web*, GOOGLE OFFICIAL BLOG (June 28, 2011, 1:45 PM), <http://googleblog.blogspot.com/2011/06/introducing-google-project-real-life.html#!1/2011/06/introducing-google-project-real-life.html> (emphasis added).

30. Courtney Boyd Myers, *AHHHA Launches Today To Corner the “Social Ideation” Market*, TNW (Mar. 28, 2011), <http://thenextweb.com/apps/2011/03/28/ahhha-launches-today-to-corner-the-social-ideation-market/>.

31. *Customer Spotlight*, SOCRATA, <http://web.archive.org/web/20110728030259/http://www.socrata.com/> (July 28, 2011) (emphasis added) (retrieved from the internet archive, Wayback Machine).

32. *Google Docs Tour*, GOOGLE DOCS, <http://www.google.com/google-d-s/tour2.html> (last visited Apr. 9, 2012) (emphasis added).

33. Leeza Kuznetsova, *Lend a Hand (That’s Why You’ve Got Two)*, AHHHA (July 23, 2011), <http://blog.ahhha.com/tag/social-collaboration/> (emphasis added) (quoting the blog’s “tags” on the post).

Thus, social ideation contains a more fine-grained set of social media principles, involving making public data “easy to use, easy to find and easy to understand” in order to allow collaboration “in real time” for bringing “ideas to market.”

Combining the principles of social networking and ideation creates a general definition of social media. In sum, the principles of sharing information in real time on the web operate at the core of social media; a more advanced definition gets at the core of government’s present substandard theoretical approach and performance, namely social ideation’s goal of “making public data easy to find, easy to understand and easy to use” while maintaining real-time collaboration so as to bring “ideas to market.” The government’s goal under FOIA should be to serve the ideals of a transparent and accountable deliberative democracy,³⁴ and that is the focus of this Article. In 2012 and beyond, that goal cannot be met without embracing modern information formats.

B. *The FOIA System*

FOIA, enacted in 1966 as a result of increased interest in allowing investigative journalism,³⁵ is designed to force disclosure and “permit access to official information long shielded unnecessarily from public view”³⁶ by permitting any citizen or business to request information from the federal government by making a FOIA request.³⁷ As one scholar has explained, “Few aspects of government-citizen relations are more central to the responsible operation of a representative democracy than the citizen’s ability to monitor governmental operations. Critical in this regard is the existence of a general individual right of access to government-held information.”³⁸

FOIA can be the avenue for journalists and private citizens alike to discover exactly what the government is doing. In the wake of

34. For detailed discussion of deliberative democracy, see David S. Levine, *The People’s Trade Secrets?*, 18 MICH. TELECOMM. & TECH. L. REV. 61, 102–05 (2011), available at <http://www.mttlr.org/voleighteen/levine.pdf>.

35. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966); Christopher J. Lewis, Comment, *When Is a Trade Secret Not So Secret? The Deficiencies of 40 C.F.R. Part 2, Subpart B*, 30 ENVTL. L. 143, 153 (2000).

36. *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded by statute on other grounds*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *as recognized in* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *see also* *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360–62 (1976) (reviewing the history of FOIA).

37. This introductory material is excerpted from Levine, *supra* note 34, at 78–79.

38. Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 971 (1975).

FOIA, the Vietnam War, and a few other significant events of the 1960's, "[m]ajor media . . . began accepting 'a duty to report beyond the superficial handouts from those with social and political power.'"³⁹ Thus, any impediment to the operation of FOIA can have devastating effects on the ability of citizens to accurately analyze and critique the activities of government. Absent FOIA, much vital information can remain trapped inside government and away from public view. The existence of FOIA means that the public has a system to request information from the government that has not already been proactively produced.⁴⁰

Unfortunately, this ideal is not fully realized because FOIA currently has major impediments built into the law. Particularly for information deemed politically sensitive and of high public interest, FOIA is broken, dated, and can impede use of social media by governments. While FOIA's purpose "is to let people know how their government works,"⁴¹ in practice that does not always happen. As illustrated in the below examples, the problem is that for the most sensitive and substantively useful information, FOIA is not adequately or expeditiously showing people how government works.

The issue partially lies in several structural problems in the law, as alluded to in the scenarios discussed in Part II. Among them are:

General transparency: The government does not distinguish between types of information and its format in creating information that might be subject to a FOIA request, and

39. Carl Sessions Stepp, *Is Investigative Reporting Here to Stay?*, AM. JOURNALISM REV., Dec. 2005/Jan. 2006, at 67, 67 (reviewing JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM (2005)) (quoting JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 66 (2005)). The immediate impact of FOIA was recently revealed in a declassified document involving a discussion between Henry Kissinger and some foreign diplomats in 1975. He stated, "Before the Freedom of Information Act, I used to say at meetings, 'The illegal we do immediately; the unconstitutional takes a little longer.' [laughter] But since the Freedom of Information Act, I'm afraid to say things like that." Nate Jones, *Sunshine Week Document Friday! Kissinger Says, "The Illegal We Do Immediately; The Unconstitutional Takes a Little Longer. But Since the FOIA, I'm Afraid to Say Things Like That."*, UNREDACTED (Mar. 15, 2012), <http://nsarchive.wordpress.com/2012/03/15/document-friday-kissinger-says-the-illegal-we-do-immediately-the-unconstitutional-takes-a-little-longer-but-since-the-foia-im-afraid-to-say-things-like-that/>.

40. Notably, the Obama Administration responded to more FOIA requests in 2011 than ever before and cited exceptions to disclosure less often. See *Government Can't Keep Up with Information Requests*, CBSNEWS.COM (Mar. 12, 2012, 4:19 AM), http://www.cbsnews.com/8301-501704_162-57395168/government-cant-keep-up-with-information-requests/.

41. *Attorney General Gives Openness Speech*, U.S. DEP'T OF JUSTICE (1996), http://www.justice.gov/oip/foia_updates/Vol_XVII_3/page3.htm.

FOIA does not require that a particular format be used.⁴² This is generally understandable because government does not naturally create and store information based upon what a FOIA request might look like. FOIA is a blunt instrument.

Storage: Government storage systems are poor. There is a lot of data to hand over, and much of it is not stored well or does not exist in document form.⁴³

Labor: FOIA's conception of the labor associated with meeting a FOIA request has been ossified since the 1960's when FOIA was adopted—a time when data took much time to collect and process and, even if it existed, may not have been found by a human searcher. Modern time/cost of conversion (assuming it's needed) is much lower.⁴⁴

The statutory language of FOIA is problematic in conceptualizing a social information layer. FOIA calls for production of a “record,” regardless of whether the format is electronic or not.⁴⁵ But key to this problem regarding formats is 5 U.S.C. § 552(a)(3)(B):

In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is *readily reproducible* by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.⁴⁶

This troublesome language defining “readily reproducible” creates significant problems that are the focus of this Article. The increasing multitude of information format options has outpaced this statutory language. Requestors may ask for a specific format in order to meet a specific goal.⁴⁷ For example, a tax attorney requesting tax records for

42. See 5 U.S.C. § 552(a) (2006 & Supp. IV 2010).

43. See *infra* Part II.B.

44. It is beyond the scope of this Article to thoroughly assess and propose solutions to these problems; however, the solutions proposed herein would partially and indirectly address these issues.

45. 5 U.S.C. § 552(f)(2) (Supp. IV 2010); see also LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2006: COVERING THE FREEDOM OF INFORMATION ACT, THE PRIVACY ACT, THE GOVERNMENT IN THE SUNSHINE ACT, AND THE FEDERAL ADVISORY COMMITTEE ACT 17 (Harry A. Hammitt et al. eds., 23d ed. 2007) [hereinafter LITIGATION] (defining “record” under the 1996 Amendments to FOIA).

46. 5 U.S.C. § 552 (a)(3)(B) (2006) (emphasis added).

47. Importantly, FOIA does not require a requestor to explain why he seeks information. See U.S. Dep't of Justice, *How Do I Make a FOIA Request?*, FOIA.GOV, <http://www.foia.gov/how-to.html> (last visited April 25, 2012).

purposes of an audit may not particularly care about the format of the documents so long as they are readable and certainly would not want them posted online. On the other hand, a requestor seeking information about negotiations surrounding an international trade negotiation being done in secret, like the Anti-Counterfeiting Trade Agreement (“ACTA”)⁴⁸ or, as in the case of *Bloomberg News*, discussed more fully below, how the Federal Reserve makes \$1.2 trillion in loans, would likely want data produced in a robust format and would like to see that information easily reproducible online. This statute’s language does not instruct as to what, if any, responsibilities an agency would have with regard to meeting these differing goals and objectives of public disclosure.

Put simply, given the growing number of document and information formats, an agency’s exact responsibilities and duties in responding to a format request is unclear. Although it is clear that FOIA does not require an agency to *create* a record in order to respond to a FOIA request,⁴⁹ this subsection has been interpreted to mean that “[r]equestors may request records in any form or format in which the agency maintains those records” and that “[a]gencies must make a reasonable effort to comply with requests to furnish records in other formats.”⁵⁰

Although the United States Supreme Court has not addressed this issue, lower federal courts have generally interpreted this language initially to mean that the agency must have the technical capability to create and keep a record in the requested format; no deference is given to the characteristics of the requestor or the policies of the agencies.⁵¹ Deference, however, is given to “agency explanations of the feasibility of providing records in the requested format.”⁵² Most importantly, reproducibility employs a “standard of reasonableness that is benchmarked against the agency’s ‘normal business as usual approach’ with respect to reproducing data in the

48. David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 AM. U. INT’L L. REV. 811, 823–27 (2011).

49. Although beyond the narrow scope of this Article, this Article proposes that future research should consider whether, under very limited circumstances, an agency *should* be required to create a record. See *infra* note 174.

50. LITIGATION, *supra* note 45, app. A at 484.

51. *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088–89 (D.C. Cir. 2006); *TPS, Inc. v. U.S. Dep’t of Def.*, 330 F.3d 1191, 1195–97 (9th Cir. 2003); see *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (construing “readily reproducible” as the ability to duplicate).

52. LITIGATION, *supra* note 45, at 38 (citing *TPS*, 330 F.3d at 1197).

ordinary course of the agency's business."⁵³ Thus, the government's professed ability, or lack thereof, to produce the information in the requested format is given great weight by the courts.

Even though the demand for information via social media outlets is a recent phenomenon, formatting issues are not new to FOIA. Indeed, the DOJ considered the issues of formatting and the technical capabilities of government in 1990, well before the explosion of social media and the variety of document and data formats usable by the public at large.⁵⁴ Nonetheless, even then, the DOJ acknowledged both the need for robust formatting and the government's difficulties in meeting certain format requests:

Indeed, in the case of "electronic" media, a record's format and ultimate compatibility with a particular data-processing system can entirely govern its essential "readability" and, thus, its basic utility. Where a record does not exist in a format of preferred compatibility, it can be a costly and time-consuming enterprise to convert it into that preferred format for viable use. As federal agencies have become increasingly automated in their practices of records maintenance, to the point of maintaining records in varying database formats even within individual agencies and agency components, this issue of required form of disclosure has become a matter of increasing concern to both FOIA requesters and agencies alike.⁵⁵

While the formatting issues are much more pronounced today than in 1990, it is still somewhat surprising that despite the intervening twenty-two years, these concerns remain largely unaddressed in the law. While President Obama's Presidential Memorandum for the Heads of Executive Departments and Agencies concerning the Freedom of Information Act instructs agencies that disclosures should be made in a "spirit of cooperation,"⁵⁶ that spirit is not fully codified in and is sometimes undermined by FOIA.⁵⁷ Therein lies the problem in FOIA: even twenty-two years later, given most federal agencies' "business as usual" approach, a request for an

53. *TPS*, 330 F.3d at 1197.

54. The year 1990 is also before the FOIA amendments, which amplified electronic data as a record. See *Congress Enacts FOIA Amendments*, U.S. DEP'T OF JUSTICE (1996), http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page1.htm.

55. *Department of Justice Report on "Electronic Record" FOIA Issues, Part II*, U.S. DEP'T OF JUSTICE (1990), http://www.justice.gov/oip/foia_updates/Vol_XI_3/page3.htm.

56. Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009) [hereinafter Presidential Memorandum on FOIA].

57. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 313 (2010).

optimally, or even reasonably, formatted document or dataset may be far from the agency's "business as usual," as seen in the below examples.⁵⁸ Indeed, as recently as 2008, a federal court held that "[b]ecause [the Securities and Exchange Commission ("SEC")] has not developed a system to provide public online access, the records requested are not readily reproducible in that format."⁵⁹

Thus, there is an increasing distance between the law and the public's reasonable expectations in a social media-infused world. In this age, a law that allows a court to hold that providing online access to a public document is beyond the duties and expectations of a federal agency reflects a standard that is woefully behind the reasonable technological capabilities of anyone who owns a computer, much less a highly sophisticated agency like the SEC. With the seemingly increasing lag time between public and governmental adoption and use of robust social media formats, and the need and demand for real-time information, FOIA has become too deferential to the government and not adequately responsive to the reasonable needs of the public in a democracy.⁶⁰

However, a decision from the Southern District of New York in 2011 confronted these issues and offered a framework for addressing the problems discussed in Part II. In *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*,⁶¹ Judge Shira Scheindlin, who has authored highly influential opinions on e-discovery obligations under the Federal Rules of Civil Procedure ("FRCP"),⁶² held that the government must produce the

58. See *LaRoche v. SEC*, 289 F. App'x 231, 231 (9th Cir. 2008) (affirming summary judgment for the agency because records sought were not "readily reproducible" in searchable electronic format requested by plaintiff).

59. *Jackson v. U.S. Dep't of Labor*, No. 2:06 CV 02157, 2008 WL 539925, at *4 (E.D. Cal. Feb. 25, 2008) (magistrate's recommendation), *adopted*, 2008 WL 4463897, at *1 (E.D. Cal. Oct. 2, 2008).

60. That deference threatens the public's interest in transparency and accountability, as well as the best interests and even self-interests, of the government itself, as discussed *infra* in Part IV.

61. No. 10 Civ. 3488 (SAS) (S.D.N.Y. Feb. 7, 2011) (on file with the North Carolina Law Review), *withdrawn by order*, No. 10-03488 (S.D.N.Y. June 17, 2011) (on file with the North Carolina Law Review), *stay granted* by 10 Civ. 3488 (SAS), 2011 U.S. Dist. LEXIS 140852 (S.D.N.Y. Dec. 7, 2011). While the decision no longer has formal precedential value and was withdrawn for reasons involving the facts of the dispute between the parties, its reasoning (based upon the facts as presented in the opinion) remains persuasive and groundbreaking.

62. See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461-98 (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311-24 (S.D.N.Y. 2003).

metadata⁶³ associated with some documents produced in response to a FOIA request.⁶⁴ Noting the limited caselaw interpreting this subsection,⁶⁵ the court, for the first time, analogized the government's responsibilities in responding to a FOIA request to the discovery obligations of parties in civil litigation.⁶⁶ With regard to the format of the document production, and after noting that a requesting party may request a form of production and the responding party may object to it, Judge Scheindlin noted that FRCP 34 requires that

if the requesting party has not specified a form of production, the responding party must state the form that it intends to use. The responding party may select the form in which the material "is ordinarily maintained," or in a "reasonably usable form." The Advisory Committee Note to Rule 34 states that the responding party's "option to produce [electronically stored information (ESI)] in a reasonably usable form does not mean that [it] is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently."⁶⁷

In holding that the Immigration and Customs Enforcement Agency ("ICE") must produce the metadata for some of the produced documents and that it is therefore "readily reproducible" under FOIA,⁶⁸ Judge Scheindlin again noted the deferential standard of FOIA:

FOIA is silent with respect to form of production, requiring only that the record be provided in "any form or format requested by the person if the record is readily reproducible by the agency in that form or format." There is no doubt in my mind that this language refers only to technical ability or, at most, reasonable accessibility. Defendants do not argue that they are *unable* to produce the records in the requested form — namely native format for spreadsheets and single file format for

63. Merriam-Webster defines metadata as "data that provides information about other data." *Metadata*, MERRIAM-WEBSTER, <http://mw1.merriam-webster.com/dictionary/metadata> (last visited Apr. 25, 2012).

64. *Nat'l Day Laborer*, slip op. at 17–18.

65. *Id.* at 7.

66. *Id.* at 8–9.

67. *Id.* at 8–9 (alterations in original) (citations omitted) (quoting FED. R. CIV. P. 34).

68. *Id.* at 18.

text records — but that reviewing all of the metadata would greatly increase the burden of search and production.⁶⁹

Because ICE did not argue that it could not produce the records in the requested format, as might be the case in the above examples, it is unclear how the court would have ruled if the government had made more of its “business as usual” approach before the court. However, Judge Scheindlin indirectly suggested a standard for how that issue might have been resolved: “metadata *maintained* by the agency *as a part of an electronic record* is *presumptively* producible under FOIA, unless the agency demonstrates that such metadata is not ‘readily reproducible.’ ”⁷⁰ Thus, ultimately, the court seemingly would have resolved that issue based upon the “technical ability” of the government “or, at most, reasonable accessibility” for the public.⁷¹ While “reasonable accessibility” is a better standard than “technical capability” to compel optimal formatting from the government so as to create a social layer of government information, neither standard puts the necessary responsibility squarely on the government to make the effort to update its technological capabilities and comfort with technology, or meet the reasonable expectations of today’s public. Thus, FOIA needs to be amended to require the government to produce information in socially usable and ready formats, as discussed in Part IV.

C. *The Good News: Data.gov*

Given the principles associated with social media companies, it makes sense to ask whether the government is even capable of meeting these ambitious goals even if FOIA were re-theorized and amended to address the formatting problem. Fortunately, this question can begin to be answered on a legitimately positive note. In the last twenty years, the federal government has begun to increase its use of technology to store and disseminate information to the public.⁷² Most recently and successfully, the website Data.gov was launched in May 2009 to “[i]ncrease public access to machine readable datasets generated by the executive branch of the federal

69. *Id.* at 15.

70. *Id.* at 18.

71. *Id.* at 15.

72. See Irina V. Popova-Nowak, *What Is Transparency?*, in A GUIDE TO OWNING TRANSPARENCY: HOW FEDERAL AGENCIES CAN IMPLEMENT AND BENEFIT FROM TRANSPARENCY 10, 10–12 (Wayne Moses Burke & Maxine Teller eds., 2011), available at <http://openforumfoundation.org/wp-content/uploads/2011/10/A-Guide-to-Owning-Transparency.pdf>.

government.”⁷³ According to the Government Accountability Office (“GAO”), Data.gov has “made progress” toward its goals, including “increasing the number of datasets that are available and improving the discovery and technical capabilities of the site.”⁷⁴

Significantly, given the problems associated with FOIA, Data.gov shows that the government is capable of improving its technological service to the public while addressing real-time and format issues—under the right conditions. With regard to real-time production of information, the GAO noted that the goal of providing “a vehicle to rapidly disseminate new data . . . and to improve access to and usability of currently available data” was being met by reducing the “[t]ime required to process datasets for publication” from “about 5 days to about 2 days in fiscal year 2010,” while still allowing users to “suggest datasets.”⁷⁵ Moreover, and most importantly for purposes of the present analysis, Data.gov has done a laudable job “[p]rovid[ing] data at the lowest analytical unit so that users can make their own analyses of the agency-provided information” by providing raw data in formats that “enable[] users to make their own analyses.”⁷⁶ Thus, it is possible to conceive of a government website, or more broadly the government itself, providing real-time and optimally formatted information.⁷⁷

73. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-775, ELECTRONIC GOVERNMENT: PERFORMANCE MEASURES FOR PROJECTS AIMED AT PROMOTING INNOVATION AND TRANSPARENCY CAN BE IMPROVED app. at 53 (2011), available at <http://www.gao.gov/assets/330/323755.pdf>.

74. *Id.* app. at 78.

75. *Id.* app. at 83.

76. *Id.* app. at 75. Attesting to the need for optimal formatting, Data.gov has been successful in what is also known as the “bulk access” process. As the Sunlight Foundation has explained,

This process makes accessing online information simpler, faster and easier. And really, all the cool kids in government are doing it these days. Literally hundreds of thousands of data sets are available on Data.gov, the House of Representatives has a spiffy new transparency portal and even the good 'ol Government Printing Office has gotten into the act. Bulk access means that the public gets reliable information right when they need it -- immediately.

Nicole Aro, *Tell Congress To Open Up*, SUNLIGHT FOUND. (Mar. 12, 2012, 1:28 PM), <http://sunlightfoundation.com/blog/2012/03/12/tell-congress-to-open-up/>. Another way to think about “bulk access” is “making . . . information directly available to the public as a downloadable database, instead of item-by-item.” Melanie Buck, *Sunlight Foundation: Put THOMAS on the Fast Track*, GOVLOOP (Feb. 9, 2012, 7:35 PM), <http://www.govloop.com/profiles/blogs/sunlight-foundation-put-thomas-on-the-fast-track>.

77. However, Data.gov is far from perfect. See Melanie Buck, *The Case of the Missing DOT Data*, SUNLIGHT FOUND. (Oct. 18, 2011, 10:53 AM), <http://sunlightfoundation.com/blog/2011/10/18/the-case-of-the-missing-dot-data>.

As explained by Professor Lisa Blomgren Bingham, “[c]urrent experiments like [Data.gov] make it possible for citizens to use technology to organize and analyze machine-readable data sets; this is far beyond any disclosure required under FOIA.”⁷⁸ This reality begs a question: if the government can meet these goals in the context of information posted on Data.gov, why is it more difficult to do in the context of FOIA? Several reasons, illustrated in the examples below, explain the differences and the potential solutions.

First and very importantly, the difference is conceptual. Data.gov focuses on datasets “collected or developed by federal agencies.”⁷⁹ Indeed, in its Data Policy Statements, under the heading “public information,” Data.gov delineates the parameters of the data that might be posted:

All datasets accessed through Data.gov are confined to public information and *must not* contain National Security information as defined by statute and/or Executive Order, or other information/data that is protected by other statute, practice, or legal precedent. The supplying Department/Agency is required to maintain currency with public disclosure requirements.⁸⁰

The implication of this statement, particularly with the vague reference to practices and legal precedent, appears to be that FOIA-produced information is not *required* to be posted on the Data.gov site.⁸¹ Moreover, even if not explicitly prohibited, the possibility that data might be mistakenly posted on Data.gov that should properly be treated as exempt from disclosure under FOIA⁸² (or would be found

78. Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 344.

79. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, app. at 16.

80. *Data Policy*, DATA.GOV, <http://www.data.gov/datapolicy> (last visited Apr. 25, 2012).

81. The government has posted reports about FOIA requests on government websites, but the government has not posted FOIA-produced information itself. *See Raw Data*, DATA.GOV, <http://explore.data.gov/catalog/raw/?q=FOIA&sortBy=relevance> (last visited May 7, 2012) (searching Data.gov for “FOIA” results in a list of FOIA logs but not the FOIA-produced information itself).

82. *See* 5 U.S.C. § 552(b) (2006 & Supp. IV 2010). There are a variety of exemptions from disclosure under FOIA, ranging from national security to the deliberative process privilege. *See id.* It is important to note that this Article and proposal for amendment to FOIA would not change the applicability of those exemptions. Thus, for example, the government would still have the opportunity to claim that a document regarding lawmaking is exempt from disclosure under the deliberative process privilege. Concerns about the use (and misuse) of certain exemptions can be found in David Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 150–57 (2011); Levine, *supra* note 34, at 75–84; Levine, *supra* note 48, at 829–35.

to be exempt in litigation) is a major disincentive to taking a chance on posting even marginally questionable information.

Significantly, there is no indication that Data.gov was created with FOIA information in mind, and the site does not appear to include any FOIA-produced information.⁸³ Indeed, it has not been possible to find *any* evidence of the federal government posting FOIA-requested information on any government website, in any format, other than under certain circumstances as mandated by 5 U.S.C. § 552(a)(2), which the DOJ classifies as the “proactive disclosures” portion of FOIA.⁸⁴ Other than that notable statutory exception, which will be discussed below, the government has not yet taken this bold step with regard to FOIA information generally, even though nothing in Data.gov’s policies should explicitly preclude posting such information there.⁸⁵ This reality is in line with how federal agencies tend to view e-government—as “a way to make information available, provide forms and electronic filing, create an electronic face for government, and distribute the viewpoints of government agencies.”⁸⁶ In other words, governments still tend to conceptualize electronic distribution of information non-socially, lessening their perceived need to optimize data.⁸⁷

Moreover, there is the issue of money: Data.gov operates under a funded mandate derived from the Electronic Government Act of 2002 (“E-Gov Act”)⁸⁸ that requires the government to use “the

83. For example, to test this reality, this author searched for “ACTA” and “Anti Counterfeiting Trade Agreement” with Data.gov’s search function and had no hits. See Data.Gov Search Results for “ACTA,” DATA.GOV, <http://search.usa.gov/search?query=acta&affiliate=datagov&x=0&y=0> (yielding no results when searching for the term “ACTA”) (last visited Apr. 25, 2012); Data.Gov Search Results for “Anti Counterfeiting Trade Agreement,” DATA.GOV, <http://search.usa.gov/search?query=anti+counterfeiting+trade+agreement&affiliate=datagov&x=0&y=0> (yielding no results when searching for the term “Anti Counterfeiting Trade Agreement”) (last visited Apr. 9, 2012). However, this author is aware of FOIA-requested documents produced by the United States Trade Representative. See Levine, *supra* note 48, at 813–14.

84. See DOJ GUIDE, *supra* note 11, at 9–22; *infra* note 90.

85. Note that this Article is not proposing to go that far with FOIA—yet. Possible legal impediments are discussed *infra* in Part IV.

86. Paul T. Jaeger & John Carlo Bertot, *Transparency and Technological Change: Ensuring Equal and Sustained Public Access to Government Information*, 27 GOV’T INFO. Q. 371, 373 (2010) (citation omitted).

87. Indeed, as one report pointed out, government agencies have lagged behind the private sector in “development and application” of technologies that track and assess “consumer uses of digital resources,” Tom Moritz, *Constraints on Transparency*, in A GUIDE TO OWNING TRANSPARENCY: HOW FEDERAL AGENCIES CAN IMPLEMENT AND BENEFIT FROM TRANSPARENCY, *supra* note 72, at 28, 37, thus exacerbating the problem.

88. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899.

Internet and other information technologies to improve government services for citizens, internal government operations, and opportunities for citizen participation in government.”⁸⁹ While social media formatting may not be expensive to do, there is nonetheless no such similar funding or, perhaps more importantly, technological statutory mandate specifically for FOIA.⁹⁰ Additionally, from a technological perspective, a *requirement* to utilize social media would be neither overly drastic nor unrealistic since many federal agencies have already experimented with social media. However, most federal agencies are reluctant to use social media due to lack of technological experience.⁹¹ Thus, institutional reticence plays a big role in the lack of institutionalized production of optimally formatted data.

89. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, app. at 10. In the current fiscal crisis, funding under the E-Gov Act has been seriously threatened. As of this writing, the appropriation of \$34 million in FY 2009 and FY 2010 will be severely cut. See Daniel Schuman, *Electronic Government Fund Would Grow Slightly Under President's Plan*, SUNLIGHT FOUND. (Feb. 14, 2012, 12:53 PM), <http://sunlightfoundation.com/blog/taxonomy/term/save-the-data/>. The E-Gov Act's funding was cut to \$12.4 million for FY 2012, but under President Obama's budget for FY 2013, the E-Gov Act's funding would increase to \$16.665 million. *Id.* The budget concerns are all the more reason for the government to find the least expensive method to disseminate information, namely, social media sites and constructs. If used directly, a social media/ideation site can host information without government funding. Even if used indirectly, as encouraged in this Article, by producing information as a Google Doc or in a Tweet-like sentence, the public will more easily be able to manipulate and disseminate information via these tools and constructs.

90. President Obama's January 2011 regulatory compliance memorandum calls for federal agencies to make public information "accessible, downloadable, and searchable." Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825, 3825 (Jan. 21, 2011). This is good as far as it goes, but a higher standard is needed: the public information must be also *useable* and *optimal*, mandates not directly reflected in any statute, federal regulation, or case. The DOJ makes this point quite well. It notes in its 2009 FOIA Guide that "all proactively disclosed records should, to the extent practicable, be posted online on agency websites." DOJ GUIDE, *supra* note 11, at 10. However, its citations for this modest proposition notably lack any reference to a statute, federal regulation, or case. Rather, its citations are to Presidential memoranda, DOJ reference materials, and DOJ newsletters. *Id.* at 10 n.9. Thus, a Presidential memorandum has evidently not created the needed pressure on government and, at any rate, as demonstrated by a recent apparent rollback from the Obama administration on FOIA and electronic transparency, can be too easily modified or rescinded. See John Wonderlich, *Obama's DOJ Seeks to Weaken the FOIA*, SUNLIGHT FOUND. (Oct. 28, 2011, 5:36 PM), <http://sunlightfoundation.com/blog/2011/10/28/obamas-doj-seeks-to-weaken-the-foia> (posting a list of proposed changes to agency rules on how to respond to FOIA requests that "undermine FOIA," and noting that "[t]his is utterly contradictory to the President's and Attorney General's public transparency rhetoric. Presidential rhetoric does not get FOIA requests filled, though.>").

91. CHARLEY BARTH, DIR. OF RECORDS OFFICE, DEP'T OF THE NAVY, SOCIAL MEDIA: A FEDERAL CASE STUDY 13 (2011), available at <http://www.archives.gov/records-mgmt/training/raco/2011/raco11-barth.pdf> (explaining that the Federal Records Council

Finally, the basic incentive structure in government, despite FOIA, is to keep information from the public, and the current state of FOIA makes that arguably too easy to achieve.⁹² Especially when dealing with information that may be politically or substantively explosive, or just unflattering, there are cultural issues that undermine the desire for government to be thoroughly open and user-friendly. As explained by Robert Gellman,

The reasons agencies, government officials, and legislators want to control the information in their domain are many and varied. Information may be a source of power that can be best exploited in an environment of secrecy. Information may be closely held in order to avoid embarrassment, to evade oversight, to establish a function and create jobs at an agency, to develop a constituency of users, or to develop a source of revenue. While not every agency, bureaucrat, or politician will find a motive to control every government information product or service, the temptations are there.⁹³

FOIA, by definition, involves the production of public information that has not actually been made available to the public, which, as will be seen below, is often also the most politically and time-sensitive information held by the government.⁹⁴ Data.gov has not yet delved

("FRC") was established in 2002 to provide record management guidance to federal agencies, NARA, and Archivist of the United States).

92. It is beyond the scope of this Article to discuss all of the flaws in FOIA, but for a thorough examination, see Levine, *supra* note 82, at 150–57, and Levine, *supra* note 48, at 823–27.

93. Robert M. Gellman, *Twin Evils: Government, Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1046 (1995) (citation omitted).

94. The U.S. Department of Homeland Security is a particularly egregious example of the procedure in practice. See Ted Bridis, *Playing Politics with Records Requests*, MSNBC.COM (July 21, 2010), http://www.msnbc.msn.com/id/38350993/ns/politics-more_politics/#.TqxcC3I0iSo. The Department of Homeland Security was "political[ly] vetting" certain FOIA requests:

Anything that related to an Obama policy priority was pegged for this review. So was anything that touched on a "controversial or sensitive subject" that could attract media attention or that dealt with meetings involving prominent business and elected leaders. Anything requested by lawmakers, journalists, activist groups or watchdog organizations had to go to the political appointees. This included all of [Associated Press's] information requests, even a routine one for records that had already been sought by other news organizations.

Id. This is particularly notable given that this policy existed under President Obama, who has trumpeted open government as a hallmark of his administration. See Presidential Memorandum on FOIA, *supra* note 56, at 4683; Levine, *supra* note 48, at 815–16. A recent hearing held by the Technology Subcommittee of the House Oversight and Government

into the dissemination of FOIA-produced information, although there is no technological impediment to it doing so. The impediment, if any, is institutional.

Nonetheless, Data.gov remains the bright spot in an otherwise lackluster sky of transparency fueled by technology. Moreover, it reflects the federal government's boldest step at attempting to mimic the best qualities of social media: real-time dissemination of optimally formatted data and information. By harnessing the informational potential of social media, Data.gov reflects the possibility of a positive move from a pull system of information dissemination, where the public needs to ask for the information in an optimal format, to a push system where the government has the incentive to deliver the information in real time and optimally to the public at large. Most significantly for FOIA, Data.gov indicates that the government can maintain information in useful formats and distribute such information optimally, while moving beyond merely posting information on Facebook or Twitter. What is primarily lacking is the conceptual and statutory incentive.

The challenge for FOIA, however, is that the data and information subject to a FOIA request are, by definition, often the most politically sensitive and/or controversial; otherwise, this information would not need to be requested and/or litigated once a denial of the request was issued. Thus, FOIA puts the government's resolve to the test: assuming technological capability and statutory support, is it willing to offer such information both real-time and optimally formatted for the public's use? Data.gov, operating outside of FOIA, reflects a willingness to meet that standard when the information is otherwise publicly available by physically going to a federal agency and/or writing a letter. As the method to ask for information and data about how telecommunications companies share customer data with the DOJ and controversial multi-trillion dollar federal bank bailout programs, FOIA presents a trickier set of issues. Thus, the questions become: why do the problems discussed below occur, and how can we create the conditions so that government might emulate (even against its perceived self-interest) the best of Data.gov in its FOIA system?

Reform Committee suggests that while progress has been made in federal agency openness, "the government must continue to take advantage of improved technology in order to eliminate barriers to information." Cassandra LaRussa, *House Examines the Role of Technology in Transparency*, SUNLIGHT FOUND. (Mar. 26, 2012, 2:16 PM), <http://sunlightfoundation.com/blog/2012/03/26/house-examines-the-role-of-technology-in-transparency/>.

II. THE BAD NEWS: PROBLEMS

With the above background, the problems identified in the below examples can be analyzed. One fact is clear: being merely “proactive” is not enough. The public rightly expects more from the government, but the government remains stuck in antiquated ways of thinking about information sharing. The following three scenarios demonstrate the social media shortcomings of the FOIA system and the government’s thinking about social media constructs in the context of public information more broadly. Specifically, these scenarios illustrate the problems associated with public expectations of speed, through real-time production of information, and optimal formatting, as well as the problems of governmental inertia and the FOIA system itself discussed earlier.⁹⁵ The scenarios indicate that the issue of information formatting is paramount in the development of a modern information flow system to and from government.

A. *Governmental Inertia*

While not an example derived from FOIA, a stark example of the problems of broad governmental inertia and information formatting is reflected in the implementation of the groundbreaking LBAA, exemplifying the fact that as a result of poor information technology, the government is incentivized to take the path of least resistance wherever possible. A recent amendment to the LBAA requires that the Senate release its expenditure reports in electronic format.⁹⁶ For the first time, there was the possibility of the release of digital structured data, which allows for the manipulation and search of information based upon set criteria, by and about Senatorial expenditures⁹⁷—a potentially explosive topic.⁹⁸ But the LBAA fails to

95. *See supra* Part I.A–B.

96. 2 U.S.C. § 104a(1), (6)(2) (Supp. IV 2010).

97. *See id.* § 104a(6)(1)–(3).

(6) Beginning with the report covering the first full semiannual period of the 112th Congress, the Secretary of the Senate—

(1) shall publicly post on-line on the website of the Senate each report in a searchable, itemized format as required under this section;

(2) shall issue each report required under this section in electronic form; and

(3) may issue each report required under this section in other forms at the discretion of the Secretary of the Senate.

require the release of data in an optimal format; rather, the bulky and difficult-to-manipulate PDF is permissible.⁹⁹ The LBAA appears to allow the Senate to use this difficult-to-manipulate format because PDFs meet the minimal statutory criteria of being “searchable” and “itemized,” and even then only arguably when they are saved from word processing documents to PDF in a way that recognizes the text.¹⁰⁰ Thus, while a major step forward in government transparency, the LBAA does not go far enough to force the release of truly useful structured data from the government and allow meaningful exploitation of social media websites that thrive on simple and effective access to information.

The distinction between optimal formatting, as proposed in this Article, and the bare minimum required in the LBAA for “searchable” and “itemized” documents is reflected in the concerns expressed by the Sunlight Foundation upon release of the information. It is no surprise that when the Senate finally released its data as a PDF document in late November 2011, transparency advocates and analysts were rightly disappointed:

We had expected that the very lengthy wait would have meant that the Senate would have released the information in a database, and not only in a huge (12 MB) searchable PDF. For the public -- or members of the Senate -- to be able to evaluate the contents of the report, they're going to have to scrape all of the data from the PDF and put it into a database. It took considerable effort and expense for [the Sunlight Foundation] to scrape the House expenditure reports. A preliminary technology assessment by one of my colleagues indicates that it's going [be] hard, if not harder, to do the same for the Senate's report. . . . In this era of tight budgets, Senators should demand that the Senate's statement of disbursements be

98. See, e.g., Daniel Schuman, *Senate Finally Publishes Its Spending Online, but Could Do Much Better*, SUNLIGHT FOUND. (Nov. 30, 2011, 12:27 PM), <http://sunlightfoundation.com/blog/2011/11/30/senate-finally-publishes-its-spending-online-but-could-do-much-better/> (noting the scandal in the United Kingdom where members of Parliament were using public money to repair their own homes).

99. Clay Johnson, *Adobe Is Bad for Open Government*, SUNLIGHT LABS (Oct. 28, 2009, 12:57 PM), <http://sunlightlabs.com/blog/2009/adobe-bad-open-government/>; John Wonderlich, *Senate Expenses To Be PDF'd*, SUNLIGHT FOUND. (Apr. 19, 2011, 5:07 PM), <http://sunlightfoundation.com/blog/2011/04/19/senate-expenses-to-be-pdfd> (“You can expect us to continue to try to get this released as a proper dataset -- more often than semi-annual, and perhaps most importantly, as structured data.”).

100. See Wonderlich, *supra* note 99.

complete, accurate, timely, and in an easy-to-use online database.¹⁰¹

“Searchable” and “itemized,” as used in the LBAA, reflects language applicable to a static document like printing a PDF document on paper. It is searchable in a basic sense and is itemized in a similarly basic way. Therefore, it seems uncontroversial to say that the LBAA fails to address the fundamental needs of the public to have data that is not only “searchable” and “itemized” but, as social ideation site Socrata describes its product, “easy to find, easy to understand and easy to use.”¹⁰² Thus, what the LBAA should have required was production of, as the Sunlight Foundation suggests, an easy-to-use “online database” that would automatically encompass a technologically current iteration of what is meant by “searchable” and “itemized.”¹⁰³ The experience of the LBAA forms part of the basis of the FOIA proposal made in this Article, as FOIA has similarly deficient formatting requirements fixed in an era before the advent of social media and its spotlight on formatting.

Importantly, an often overlooked formatting problem is the impact of poor formatting on government itself. In the case of the LBAA, the damage caused by use of suboptimal formats is not only to the public’s ability to assess government activities but also to the Senate’s own ability to analyze its expenditures. As the Sunlight Foundation points out, this is problematic not just from a transparency and accountability perspective but from the perspective of government’s own self-interest in efficient operations and policing its expenditures.¹⁰⁴ To the extent that a governmental entity—be it the Senate, a federal agency, or a state or local governmental unit—has difficulty accessing and assessing information at its fingertips because of formatting issues, everyone should be alarmed. The likelihood of poorly theorized, drafted, and/or enacted policies, rules, and laws would logically increase greatly if policymakers are unable to find and/or analyze information at its disposal because of suboptimal formatting, like the electronic paper known as the PDF.¹⁰⁵ Thus, this example demonstrates that the government’s reticence in

101. Schuman, *supra* note 98.

102. *See id.*; *supra* note 31 and accompanying text.

103. *See* Schuman, *supra* note 98.

104. *See id.*

105. To be clear, there are virtues to the PDF, like increased document integrity and security as compared to a standard word processing format like Word, but it remains a difficult-to-manipulate format and, therefore, is suboptimal from a transparency and accountability standpoint.

storing and/or producing information in optimal formats can have the consequence of impeding (a) all scrutiny and analysis from inside and outside government, potentially favorable or unfavorable, as well as (b) proper analysis of its own (or another governmental entity's) operations. This latter issue also exists within FOIA, as discussed below.

From a statutory construction standpoint, this scenario suggests that the words “searchable” and “itemized” do not go far enough to force the government to store, create, and/or produce usable data, especially in an environment where ease of compliance is paramount. Federal agency and congressional staffers facing budget cuts and stretched staff will naturally look for the path that meets the minimum required for compliance under the statute, as, for example, a PDF document appears to meet the LBAA's minimal standard.¹⁰⁶ However, a PDF is not a usable database, and a useable database needs to be the standard for all future production of information by government. As the Sunlight Foundation pointed out with regard to another deficient expenditure report production from Congress, “[t]he online publication isn't perfect, however, as the document is published in PDF. That's where Sunlight comes in. Our technology gurus have yet again reshaped the information into a usable database.”¹⁰⁷

In this era, however, one does not need to be a “technology guru” to create a usable database—for example, since May 2011, Data.gov has been driven by the aforementioned social ideation site Socrata.¹⁰⁸ Moreover, “[t]he vast majority of government information is now born digital,”¹⁰⁹ making the conversion process from PDF to a usable database all the easier. In sum, the path of least resistance is increasingly becoming synonymous with the production of a usable database without having to resort to “technological gurus” at a

106. PDF documents have certain benefits, like security, that may be lacking in other formats, *see supra* note 105, but it is not apparent that governments are producing documents in PDF format because of security. The primary motivation seems to be ease of compliance under the statutory standard, be it the LBAA or FOIA. *See cholcombe, Improve Website UX: Dump the PDFs*, DESIGN FOR USE (Oct. 14, 2010), <http://designforuse.net/?p=625> (“The reason government agencies rely so heavily on PDFs is simple: the PDF already exists for internal business use, so why not put it online?”).

107. Daniel Schuman, *Following the Money: New House Expenditure Reports Available Online*, SUNLIGHT FOUND. (Mar. 4, 2010, 8:30 AM), <http://sunlightfoundation.com/blog/2010/03/04/following-the-money-new-house-expenditure-reports-available-online>.

108. *Data.gov*, SOCRATA, <http://www.socrata.com/customer-spotlight/data-gov> (“Socrata-powered next generation platform was launched May 27, 2011.”) (last visited Apr. 25, 2012).

109. Jaeger & Bertot, *supra* note 86, at 372.

dedicated private entity. If information or data is born digital, at a minimum it should be released to the public in a usable format. And if it was not born digital, then the public should reconsider whether the government should have the obligation to make it digitally useful for its own and the public's sake. Indeed, there is no technological difference between the information posted on Data.gov in searchable databases and the PDF produced under the LBAA. The only difference is non-technological, namely, the statutory mandate and/or incentive to create optimally formatted data. Thus, the LBAA reflects a standard that highlights governmental inertia and antiquated thinking about technology; those behaviors are mimicked, more alarmingly, in the following FOIA examples.

B. Formatting and Speed

Invariably, it appears that if the federal government produces its most politically sensitive and potentially explosive information, it is produced in suboptimal formats and/or at an often glacial pace.¹¹⁰ This was not as big of an issue when there were one or few format options and limited information produced by government, but, as the formatting possibilities have expanded¹¹¹ and government has been overrun by data,¹¹² so too have expectations for using optimal formats, and quickly. The examples below illustrate the problems associated with government production of information in suboptimal formats.

1. The DOJ and Telecommunications Company Data Retention Information

Reflecting how a formatting downgrade can lead to somewhat absurd results, this problem arose in September 2011 involving the production, via a FOIA request, of a document held by the DOJ that showed how long telecommunications companies retain customer data.¹¹³ Attesting to its political sensitivity, this issue has been a

110. A complete survey of the timeliness issues in FOIA is beyond the scope of this Article; however, they are well-documented. *See, e.g., FOIA Access to Records Still Slow*, POST & COURIER (Charleston, S.C.), July 4, 2011, at 5A, available at <http://www.postandcourier.com/article/20110704/PC1602/307049972>.

111. *List of File Formats*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_file_formats (last visited Apr. 9, 2012) (listing various file formats).

112. *See, e.g., Phil Kuntz, Fed Data from 29,000 Pages Show Banks' Bailout: Methodology*, BLOOMBERG (Aug. 22, 2011, 8:39 AM), <http://www.bloomberg.com/news/2011-08-21/fed-data-from-29-000-pages-show-banks-borrowings-methodology.html>.

113. *See Mike Masnick, DOJ Document Shows How Long Telcos Hold onto Your Data*, TECHDIRT (Sept. 30, 2011, 5:20 AM), <http://www.techdirt.com/blog/wireless>

primary concern of privacy and criminal law advocates who have raised red flags about the DOJ gaining unwarranted and/or warrantless access to this very personal data.¹¹⁴ As a result of a FOIA request made by the ACLU to the DOJ, the DOJ produced a “pretty weak” PDF scan of a DOJ document entitled “Retention Periods of Major Cellular Service Providers.”¹¹⁵ This “pretty weak” scan was indeed pretty weak: because of how a PDF replicates shading in a document, three of the six columns of data as reproduced online were often illegible.¹¹⁶

Despite the government’s ability to produce spreadsheets,¹¹⁷ it required a public and media effort to make this information usable. An individual and *Wired*, a major technology news agency, separately converted the PDF into “friendlier formats”: a Google Docs spreadsheet and an infographic, respectively.¹¹⁸ Absent this conversion, the public only had a “pretty weak scan” that was largely unusable and difficult to parse.¹¹⁹ Importantly, this conversion allowed the reporter and commenters that followed the article to assess the data and comment on it—the essence of social media principles.¹²⁰ But reliance on the public to make government truly transparent, accountable, and social seems both unnecessary and arguably punitive, especially since such reliance assumes that the public has the time, interest in, and responsibility for doing that work. While one document may be comparatively easy to convert, when the public is confronted with hundreds or thousands of pages, as

/articles/20110929/13165516137/doj-document-shows-how-long-telcos-hold-onto-your-data.shtml (analyzing customer retention data from various telecommunications companies). As noted *supra* at notes 35–40 and accompanying text, FOIA is often the means by which the public can gain access to politically sensitive or explosive information.

114. See Masnick, *supra* note 113 (“With the Justice Department believing that it can get all sorts of data from telcos without any oversight or without a warrant, it seems rather important to know what kind of info your mobile operator is keeping -- and for how long.”).

115. *Id.* Indicating the absurdity of what is to follow, the article parenthetically stated that “Wired [a major technology news agency] also notes that the document could already be found online if you knew the title.” *Id.* Therefore, a FOIA request was required to access the document unless a web surfer either (a) somehow serendipitously knew the name of the document, or (b) stumbled upon it. Thus, aside from the hiding-in-plain-sight aspect of this scenario, the lack of interest or unwillingness to make the information more easily usable is troubling.

116. See *id.* (posting an image of the mostly illegible PDF the DOJ produced).

117. See *infra* Part II.B.2.

118. Masnick, *supra* note 113.

119. See *id.*

120. See *supra* Part I.A.

discussed in the following example, the public's burden can become onerous and perhaps impossible to overcome.¹²¹

Moreover, the current system calls for the public to make an initial assessment of the import of a document without it necessarily being easily usable. For example, the DOJ document at issue happened to be provocatively titled (at least to those who follow data privacy issues), thus compelling the public to reformat it. But if this document had been innocuously titled, the information had been obscured within the PDF scan such that it was misread as less informative, or the information was buried in a larger document-dump production, it is conceivable that no one would have done the work necessary to discover or assess the importance of the document and its data. Similar scenarios that impede transparency on information already deemed public can be easily avoided by the government releasing the data in usable formats, as it does on Data.gov. In that way, not only would the presented information be searchable and usable, but it would allow for follow-up questions to the government like a request for the underlying data that allowed for the creation of the usable document, akin to Data.gov's social media allowance for suggestions from the public requesting additional datasets.¹²²

This scenario likely arose due to a mixture of the aforementioned governmental inertia, lack of a FOIA statutory mandate, and political disincentives. A formatting statutory mandate helps address these problems, as well as the issues of real-time dissemination, as discussed below. Given the ease with which this data can be converted, it should be incumbent upon the government to make this data usable from the beginning, as it did (partially) in the following example.

2. The Federal Reserve and Bank Bailouts

An even more egregious and serious example of this problem occurred within the context of the ongoing litigation involving *Bloomberg News* and the Federal Reserve.¹²³ In sum, in November of 2008, Bloomberg L.P. ("Bloomberg") filed a complaint in the United States District Court for the Southern District of New York against the Board of Governors of the Federal Reserve System (the

121. See *infra* Part II.B.2. (providing an example of when *Bloomberg News* spent five months converting 894 PDFs from the Federal Reserve into a usable form).

122. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, app. at 82.

123. For detailed treatment of the background on this issue, see Levine, *supra* note 48, at 818-21.

“Fed”).¹²⁴ The case involved a FOIA request made by Bloomberg to the Fed in May 2008 asking the Fed to “disclose the recipients of more than \$2 trillion of emergency loans from U.S. taxpayers and the assets the central bank is accepting as collateral.”¹²⁵ After months of not receiving a substantive response to the request, Bloomberg alleged the following in its complaint:

The government documents that Bloomberg seeks are central to understanding and assessing the government’s response to the most cataclysmic financial crisis in America since the Great Depression. The effect of that crisis on the American public has been and will continue to be devastating. Hundreds of corporations are announcing layoffs in response to the crisis, and the economy was the top issue for many Americans in the recent elections.¹²⁶

In March 2011, after several years of litigation and over the Fed’s strenuous objections, the United States Supreme Court denied certiorari on the Second Circuit Court of Appeals’ decision requiring the Fed to release the information.¹²⁷ *Bloomberg News* trumpeted the release of “secret loan documents under court order” and quoted one former Fed attorney as calling this “an enormous breakthrough in the public interest.”¹²⁸ Significantly for purposes of this Article, later that month, Bloomberg got its information in the form of “two CD-ROMs, each containing an identical set of 894 PDF files, from Fed attorney Yvonne Mizusawa at about 9:45 a.m. in the lobby of the

124. Complaint for Declaratory and Injunctive Relief at 1, 13, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2008) (No. 08-CV-9595).

125. Mark Pittman, *Fed Refuses To Disclose Recipients of \$2 Trillion*, BLOOMBERG (Dec. 12, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGvwtDayiiM>; see *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 145–46 (2d Cir. 2010), cert. denied, 131 S. Ct. 1674 (2011); Complaint for Declaratory and Injunctive Relief, *supra* note 124, at 5–6; see also *Contents of the Administrative Tracking/Processing File for Each FOIA Request and FOIA Appeal Received at the Federal Reserve Board from Bloomberg News Service During Calendar Years 2007 and 2008*, at 1, 2–133 GOVERNMENTATTIC.ORG, www.governmentattic.org/2docs/FedReserve_BloombergFOIA_2007-2008U.pdf (cataloguing every FOIA request sent from Bloomberg to the Fed) (last updated Apr. 8, 2009).

126. Complaint for Declaratory and Injunctive Relief, *supra* note 124, at 1.

127. Clearing House Ass’n, L.L.C. v. *Bloomberg, L.P.*, 131 S. Ct. 1674 (2011) (denying certiorari).

128. Craig Torres, *Fed Releases Discount-Window Loan Records During Crisis Under Court Order*, BLOOMBERG (Mar. 31, 2011), <http://www.bloomberg.com/news/2011-03-31/federal-reserve-releases-discount-window-loan-records-under-court-order.html>.

Martin Building in Washington.”¹²⁹ In August 2011, *Bloomberg News* combined this data with other data released as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹³⁰ to publish an exhaustive analysis, entitled “The Fed’s Secret Liquidity Lifelines,”¹³¹ ranking companies by “how much they borrowed from the U.S. Federal Reserve during the financial crisis”¹³² in a usable database.¹³³ That database was constructed by extraction “from 29,000 pages of documents and 18 Fed-prepared Microsoft Excel spreadsheets listing more than 21,000 transactions.”¹³⁴ The first of many comments after *Bloomberg News*’s article sums up the social media implications of *Bloomberg News*’s work: “Bloomberg is to be congratulated for digging into this and providing an interactive database to help understand the magnitude of what the Fed has been doing, in secret. Frankly the data is chilling.”¹³⁵

In December 2011, *Bloomberg News* “released spreadsheets showing daily borrowing totals for 407 banks and companies that tapped Federal Reserve emergency programs during the 2007 to 2009 financial crisis.”¹³⁶ Because of the poor formatting of the originally produced information, *Bloomberg News* properly trumpeted that “[i]t’s the first time such data have been publicly available in this form.”¹³⁷ *Bloomberg News* also included a “by the numbers” analysis of the key findings from their exhaustive study of the data.¹³⁸ Significantly, *Bloomberg News* did what the Fed would not (or could

129. *Id.*

130. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

131. Bradley Keoun et al., *The Fed’s Secret Liquidity Lifelines*, BLOOMBERG, <http://www.bloomberg.com/data-visualization/federal-reserve-emergency-lending/#/overview/?sort=nomPeakValue&group=none&view=peak&position=0&comparelist=&search=> (last visited Mar. 14, 2012).

132. Kuntz, *supra* note 112.

133. *See id.*

134. *Id.* The eighteen databases were produced as a result of Dodd-Frank, not FOIA, further underscoring the problems associated with FOIA’s limited technological requirements. *See* Bradley Keoun & Phil Kuntz, *Wall Street Aristocracy Got \$1.2 Trillion in Secret Loans*, BLOOMBERG (Aug. 22, 2011), <http://www.bloomberg.com/news/2011-08-21/wall-street-aristocracy-got-1-2-trillion-in-fed-s-secret-loans.html> (“In December [2010], in response to the Dodd-Frank Act, the Fed released 18 databases detailing its temporary emergency-lending programs.”).

135. Dclark1125, to Keoun et al., *supra* note 131.

136. Phil Kuntz & Bob Ivry, *Fed Once-Secret Loan Crisis Data Compiled by Bloomberg Released to the Public*, BLOOMBERG (Dec. 23, 2011), <http://www.bloomberg.com/news/2011-12-23/fed-s-once-secret-data-compiled-by-bloomberg-released-to-public.html>.

137. *Id.*

138. *Id.*

not) not: release all of the data to the public in a socially useable format.

Putting aside the questionable reasons for the Fed's refusal to initially produce the information,¹³⁹ the formatting issues reveal the scale of the potential problem. Even considering the volume of the production, it seems extremely outmoded, albeit convenient for the Fed, to produce 894 PDFs by placing them on a CD-ROM disc and physically handing them to a human being. It took *Bloomberg News*, even with its massive resources, several months to convert that data into a usable form.

Presumably, had the Fed done this work itself, it would have led to quicker dissemination of the information to an eager public expecting real-time information. Moreover, as reflected in the discussion of the LBAA, if the Fed had actually maintained the data in an optimal form, it would have been better able to assess its options in addressing the most significant economic crisis that the world has faced since the Great Depression of the 1920s and 1930s (when such robust data analysis tools were not even technologically possible). At a minimum, it would seem that the Fed would have been better positioned to reformat the documents into an accurate spreadsheet, as it apparently did for some of the non-FOIA requested information. For example, the Fed should have been able to do the conversion more quickly than the public, given its institutional familiarity with the underlying data, its structure, and its presentation. As actually handled, the process included a five-month gap between production of the information and its dissemination in usable form to the public, a delay that is in no way socially acceptable¹⁴⁰ given the well-known ways to render such information useful—as evidenced by the government's own (partial) non-FOIA related production of spreadsheets. Especially given the magnitude of the public policy issues involved in the FOIA request and the massive resources presumably assigned to handling this matter, including filing a writ of

139. For detailed discussion of the reasons behind the litigation and critique of the Fed's position, see Levine, *supra* note 48, at 818–21.

140. In addition, this situation was socially unacceptable because it needlessly delayed empirical analysis of the information and data that could have led to more timely public policy and law reform proposals. See Keoun & Kuntz, *supra* note 134. Indeed, once the information was released in an optimal format, policy goals and proposals were suggested. Responding to the publication in an optimal format of the datasets, one commentator noted that “[t]he sheer size of the Fed loans bolsters the case for minimum liquidity requirements that global regulators last year agreed to impose on banks for the first time,” while another noted that regulators are “not going to go far enough to prevent this from happening again.” *Id.*

certiorari to the Supreme Court, it would seem reasonable to expect a similarly serious commitment from the Fed when the time came to actually make the information public.

Again, and moreover, it would seem that such proactive measures would be in the Fed's own self-interest as regulator of the national economy because such measures would allow for greater internal analysis and discussion, even if such measures increase the possibility of more robust criticism of the Fed's operations upon release to the public. While the possibility that the Fed would think in such terms may sound naïve to some, the role of FOIA is not to fuel a cynical view of government but to act as a bulwark against such views and institutionalize a more ideal set of values.¹⁴¹ FOIA, properly structured, is our last and best statutory bastion to promote a truly transparent and accountable democracy and republic.

III. CONCEIVING THE SOCIAL LAYER

As demonstrated above, society needs to move away from a focus on the government's "ability" to meet a formatting request and instead concentrate on what is the optimal format for the usability of the requested information. To conceptualize both the problem and proposed solution found in Part IV, and as discussed in the Introduction, it is useful to theorize FOIA as part of the social layer of government information—moving from general transparency to targeting transparency toward what the public values most—analogue to the OSI Model.¹⁴² By analogy, there are several core layers of information provided by freedom of information laws, i.e., when/where is something happening, who is involved in the discussion, what is being discussed, and how/why is a certain conclusion reached. Social networking sites like Facebook and Twitter, newer social ideation sites like Ahhha and Socrata, and, more importantly, their related information formats can be viewed as part of an additional and related "social layer" of government information. In this layer, now integral to a proper functioning freedom of information system as shown in Part II, data can be disseminated, manipulated, and analyzed in structured and usable ways to networks of interested persons, allowing for the creation of additional information beyond the core layers, thereby increasing the

141. See Presidential Memorandum on Transparency and Open Government for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) [hereinafter Presidential Memorandum on Transparency].

142. See *supra* Introduction.

public's understanding of government operations. The public's ability to look for patterns, correlations, and smoking guns, both positive and negative, would be thereby fundamentally enhanced by recognizing the existence of the social layer of government information.

There are real theoretical and practical benefits to thinking of FOIA this way. Most significantly, properly deployed, supported, and maintained, the social layer of government information could represent the most robust transparency and accountability yet seen in human history. To illustrate the potential power of the social layer of government information, imagine a scenario where a requestor found a government receptive to producing information in optimal formats because the government itself internally employed optimal data formats. Further envision the government producing information in an optimal format so that the data analysis engaged by *Bloomberg News* or *Wired* could commence in a matter of minutes, rather than weeks or months, without any resources expended by the public other than access to a computer and brainpower. Finally, add that all of that information is available for immediate access online in a searchable, categorized, and/or machine-readable form, as might exist when posted on a website or in a social media space to those who might value it most. Only then, we can begin to conceive a more robust and responsive deliberative democracy where the public can both analyze information and offer meaningful input to its policymakers.¹⁴³ Transparency and accountability allowing for the government to benefit from meaningful and useful public input should be the focus in 2012 and beyond.¹⁴⁴

Moreover, the very conception of a social layer could help overcome the government's reticence toward increased public scrutiny and second-guessing. Identifying a social layer of FOIA may help the government to embrace intermediaries like social websites created by public interest groups, where many consumers may initially access government-produced information. Since the public often uses information initially collected by government but rarely

143. Of course, campaign finance would also need to be addressed for a true deliberative democracy to exist. See generally LAWRENCE LESSIG, *REPUBLIC, LOST* (2011) (analyzing the "disease" and corruption in campaign finance and discussing various solutions).

144. This is a focus of this author's current research in an article titled *Bring In the Nerds: Secrecy, National Security and the Creation of Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. (forthcoming May 2012).

accesses it directly through government platforms,¹⁴⁵ governments must broadly acknowledge that intermediaries like social media and ideation sites, as well as other public sites that mimic social media sites, exist, accept that such sites may praise or criticize government, and embrace these sites. Acknowledging both these formats and intermediaries might create a positive feedback loop that allows government to not only become more comfortable with social media formats and ideas but allow the government to improve its own data storage and analysis capabilities.¹⁴⁶

FOIA represents the current system used to access the government's metaphysical source code,¹⁴⁷ or data of and about government and its activities. The existence of new data formats and their potential to achieve the robust transparency and accountability that is at the center of a social layer of government information, drives a wedge in FOIA and is hampered by FOIA's antiquated approach to what is technologically reasonable. It is a wedge that cannot be ignored, and theorizing a social layer of FOIA would force the government to confront it.

Therefore, particularly for information that has a strong and/or broad public interest, like in the examples discussed in Part II, the government should have an affirmative responsibility to make that data and information technologically accessible in the social layer of government information. Remarkably, then-Attorney General Janet Reno suggested thinking about prioritization of data in terms of "tiers" or "tracks" in the context of timeliness of responses to FOIA requests, back in 1996:

The bulk of the requests come from individuals seeking information that the government is merely storing—information about a business competitor, or a celebrity or historic figure, or simply to satisfy curiosity. Since the purpose of FOIA is to show how government works, surely we might give some consideration to creating different tiers, or tracks, to

145. Although Data.gov and its related websites, if continually funded and improved, may mitigate that trend over the long term.

146. While beyond the scope of this Article, this idea reflects conceptions of open society found generally in ARCHON FUNG ET AL., *ASH INST. FOR DEMOCRATIC GOVERNANCE & INNOVATION, JOHN F. KENNEDY SCH. OF GOV'T, HARVARD UNIV., THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES EFFECTIVE?* (Dec. 2004), available at <http://www.innovations.harvard.edu/cache/documents/67/6784.pdf>.

147. Thanks to James Grimmelman for coining this term in a discussion at the Internet Law Work-in-Progress Conference at Santa Clara Law in March 2011.

give priority to requests that have a broad, public purpose rather than a purely private one.¹⁴⁸

Similarly, both government and the public need to think of information in terms of “layers” and thereby more forcefully encourage government to embrace current information formats despite budgetary concerns and institutional reticence if U.S. democracy is to be truly transparent and accountable. While not a panacea, conceiving a vital social layer for the most sensitive and controversial information that the government holds, which is often only released after a FOIA request, represents a viable, initial step. It would also elevate the role of the public as an instrument of government transparency and accountability that could help move the United States toward a more robust democracy less prone to cynicism, defeatism, and apathy.

IV. THE SOLUTION

Based on the above theoretical shift, the most simple and direct way to attack this problem is by amending § 552(a)(3)(B) to remove the phrase “readily reproducible” and encompass the notions of optimal, socially ready formatting. Thus, this subsection should be amended to read as follows:

In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if **IT IS TECHNOLOGICALLY FEASIBLE TO PROVIDE** the record ~~is readily reproducible by the agency~~ in that form or format **WITHOUT UNDUE OR EXTREME BURDEN OR EXPENSE**. Each agency shall make **CONCENTRATED reasonable** efforts to maintain its records in **OPTIMALLY USABLE** forms or formats that are reproducible for purposes of this section.

This amended language has several benefits. First, it maintains the responsibility on the part of the requestor to specify format(s), so as not to require the government to produce every record optimally. However, it is designed to move FOIA away from a standard that places a premium on the agency’s “business as usual” and toward a standard that embraces current general technological feasibility, whatever it may be. “Feasible” is defined as “capable of being done,

148. *Attorney General Gives Openness Speech*, *supra* note 41.

executed, or effected.”¹⁴⁹ Ideally, placing the onus on the requestor to request an optimal format will require optimization of only that data and information that is most in need of that formatting at the production stage, as in the case of Bloomberg’s Fed data, and/or for which the public would be poorly positioned to perform the optimization, as in the case of the DOJ document. To the extent that a requestor opts out of and/or is ignorant of an optimal format, the sentence that follows strongly encourages governments to maintain their records in optimally usable forms or formats and should increase the number of optimally usable responses, without limiting the government to one such optimal form or format.¹⁵⁰

Moreover, adding language about “burdens” and “expense” into this subsection acts as a curb against excessive requests—requests designed solely to impede government operations and/or annoy, and whose public benefits, despite the general spirit of FOIA are significantly outweighed by these practical considerations. Of course, this balancing will shift over time as creating optimally useful information becomes both easier and less time consuming but regardless will reflect the state of technology at the relevant time. It is an important check against abuse of the FOIA process.

Finally and significantly, the proposed language increases the pressure on government to embrace easily accessible social media formats and fora, as “concentrate” is defined as “to focus one’s powers, efforts, or attention <concentrate on a problem>,”¹⁵¹ whereas “reasonable” is defined as “not extreme or excessive,” “moderate, fair,” or “inexpensive.”¹⁵² The original FOIA language has proven that “reasonable” efforts have not compelled the government to adequately embrace robust formats and social media constructs.¹⁵³ Moreover, the LBAA showed that “searchable” and “itemized” are not specific enough for modern technological capabilities in information storage and display.¹⁵⁴ In contrast, the use of “optimal”—

149. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 831 (1993).

150. Implicit in this proposal is the idea that the public may be harmed if the data or information is never put in an optimally usable format. Thus, this proposal has the added benefit of improving the functionality of FOIA’s “electronic reading rooms,” discussed *infra* at notes 160–64 and accompanying text.

151. *Concentrate*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/concentrate> (last visited Apr. 9, 2012).

152. *Reasonable*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/reasonable> (last visited Apr. 9, 2012).

153. *See supra* Part II.B.

154. *See supra* Part II.A.

defined as “most desirable or satisfactory”¹⁵⁵—and changing the “forms and formats” phrase to the plural should give the government some flexibility and help prevent vexatious litigation over whether the government chose the one perfect form or format. “Optimal” is a broad enough word to encompass the social optimization theorized and discussed in this Article, crystallized in the product of usable data. Thus, the proposal has the added bonus of encouraging a significant enhancement of government’s technological prowess and ability to locate, digest, and analyze information that would hopefully lead to better substantive policy analysis and creation, as well as enforcement.

Thus, this language is designed to embrace a policy choice so as to advance FOIA’s “spirit of cooperation,”¹⁵⁶ the President’s directive that government information be rapidly disclosed “in forms that the public can readily find and use,”¹⁵⁷ and to encourage federal agencies and the Executive Branch to “harness new technologies to put information about their operations and decisions online and readily available to the public,”¹⁵⁸ as suggested in the aforementioned Presidential and DOJ FOIA memoranda.¹⁵⁹ The existing statutory language does not adequately incorporate those charges; the amended language gives these directives the statutory mandate that is required to help move the government toward supporting a social layer of government information while giving the government some protection from excessively burdensome, vexatious or onerous requests. Ultimately, technology’s rapid advance and the public’s collective desire for a transparent and accountable democratic government calls for this updated language.

An additional corollary benefit to this proposal is that it could increase the potential robustness of FOIA’s “electronic reading rooms.” FOIA, in 5 U.S.C. § 552(a)(2), establishes what have come to be known as “reading rooms” by requiring that

[e]ach agency, in accordance with published rules, shall make available for public inspection and copying—

155. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 149, at 1584.

156. Presidential Memorandum on FOIA, *supra* note 56, at 4683.

157. Presidential Memorandum on Transparency, *supra* note 141, at 4685.

158. *Id.*

159. See Presidential Memorandum on FOIA, *supra* note 56, at 4683; Presidential Memorandum on Transparency, *supra* note 141, at 4685; DOJ GUIDE, *supra* note 11, at 9–10, 14 n.25, 17–18; *supra* note 90.

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D).¹⁶⁰

The DOJ has referred to this section as requiring “proactive disclosures”: “where agencies make their records publicly available without waiting for specific requests from the public,” which is “an integral part” of FOIA.¹⁶¹ Indeed, “the President has directed agencies to ‘take affirmative steps to make information public’ without waiting for specific requests, and, to ‘use modern technology to inform citizens about what is known and done by their Government.’”¹⁶² Moreover, “proactively disclosed records should, to the extent practicable, be posted online on agency websites.”¹⁶³ The website where such information can be found has come to be known as the agency’s “electronic Reading Room[].”¹⁶⁴

This section is particularly noteworthy as an explicit reference to moving from a pull to a push system of information disclosure. However, in practice, the electronic reading rooms have suffered from the same deficiencies seen in FOIA generally. For example, the

160. 5 U.S.C. § 552(a)(2) (2006).

161. DOJ GUIDE, *supra* note 11, at 9.

162. *Id.* (citing Presidential Memorandum for FOIA, *supra* note 56).

163. *Id.* at 10.

164. *Id.* at 20–21. Indeed, some proposals for FOIA reform seem to build on the existence of electronic reading rooms. For example, one group of transparency experts propose that “agencies should publish, on their Web sites, any information that they, or a court, determine does not fall within a FOIA exemption.” Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 936 (2009).

electronic reading room for the U.S. Trade Representative has no ACTA documents posted, even though there is high public interest in the information,¹⁶⁵ thus seemingly requiring that documents be posted under subsection (D)'s frequently requested records provision.¹⁶⁶ The Fed's electronic reading room contains no documents or data requested by *Bloomberg News*.¹⁶⁷ The Naval Sea Systems Command electronic reading room includes a list of frequently requested records with no hyperlinks, listings that reflect antiquated views of information formats, like "Certificates of Approval – (files on CD-273 pages of scanned images)" and a bizarre listing that says "Ship Availability Database (SAV)- (Word summary to explain what this is and how to request from NAVSEA FOIA Office- no longer available online since it is a database)."¹⁶⁸ Other frequently requested records listings, like that of the Office of the Secretary of Defense and Joint Staff, are simply empty.¹⁶⁹

Although, like Data.gov, the electronic reading rooms demonstrate that agencies have the technical capability to post information online, FOIA's electronic reading room concept, while laudable, has not been implemented in a robust way. Nor has it been deployed in a way that meets the principles of social media,

165. For example, ACTA has recently been the subject of protests throughout Europe. Ben Rooney, *Thousands Protest Against ACTA*, WALL ST. J. TECH BLOG (Feb. 13, 2012, 1:18 PM), <http://blogs.wsj.com/tech-europe/2012/02/13/thousands-protest-against-acta/>.

166. See *Frequently Requested Records*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/reading-room/freedom-information-act-foia/electronic-reading-room/frequently-requested-reco> (last visited Apr. 25, 2012). This is not surprising given the U.S. Trade Representative's position on maintaining excessive secrecy throughout the ACTA negotiations. See Levine, *supra* note 48, at 823–27. In contrast, the FBI has posted the late Apple Computer founder Steven Paul Jobs' FBI file in its electronic reading room. See *FBI Records: The Vault, Recently Added*, FED. BUREAU OF INVESTIGATION, <http://vault.fbi.gov/recently-added> (last visited Apr. 25, 2012). A pop-up box on the FBI's Reading Room webpage that loads when you first visit it attests to the formatting problems discussed in this Article: "The image quality contained within this site is subject to the condition of the original documents and original scanning efforts." See *FBI Records: The Vault*, FED. BUREAU OF INVESTIGATION, <http://vault.fbi.gov> (last visited Apr. 11, 2012). Again, in the twenty-first century, FOIA should not allow the FBI to blame a document's poor usability on "image quality" when there exist ample ways to optimize the data, using tools like Google Docs or spreadsheets.

167. See *FOIA Reading Rooms*, FED. RESERVE BD., <http://www.federalreserve.gov/foia/readingrooms.htm> (last updated Mar. 20, 2012).

168. *FOIA Reading Room*, NAVAL SEA SYS. COMMAND, <http://www.navsea.navy.mil/foia/readingroom.aspx> (last visited Apr. 25, 2012).

169. See 5 U.S.C. § 552 (a)(2)(D) *Records*, SEC'Y OF DEF. & JOINT STAFF, http://www.dod.gov/pubs/foi/D_Records.html (last visited Apr. 25, 2012). It is, of course, possible that there are no records that meet this standard, but the general state of federal government agency reading room websites makes that possibility questionable.

particularly a social method for easy manipulation of the data and information. Through the aforementioned amendment requiring the government to make concentrated efforts to maintain its records in optimally usable formats, perhaps federal agencies will be better positioned to truly engage the public on a more social level through the laudable electronic reading room. At a minimum, it should cause agencies' FOIA personnel to reconsider their ability to be truly "proactive."

Of course, this proposal has some downsides that need to be addressed. One objection could be that this proposal will slow government down and/or make it more difficult for the government to respond to and comply with a FOIA request and that businesses like *Bloomberg News* have the capability and motivation to optimize data. In essence, a PDF document is an easy way to properly respond to a request, requiring minimal technical capability and preventing easy manipulation of the information therein, when done properly, thereby preserving the integrity of the document. Moreover, why should the government help *Bloomberg News* indirectly monetize government data by optimizing the data and thereby allowing *Bloomberg News* to more easily drive traffic to its website?

However, the proliferation of readily accessible and easy-to-use applications, like Google Docs and Socrata, and the ease with which documents can be reformatted into usable databases makes the labor and financial burdens on government less of a concern, and presumably these burdens will only decrease as a concern over time. Indeed, Data.gov processes datasets for posting in two to five days.¹⁷⁰ Moreover, the very purpose of FOIA is to let people know how the government works. Thus, expecting the government to produce public information and data in a modern information format would fall squarely within the mandate imposed by the statute and encourage useful input from the public, a handsome return on the investment.¹⁷¹ Nonetheless, it is a fair point that, especially in the short-term and while the United States faces an extreme financial crisis, government would be under some financial pressure when faced with the prospect of remediating their technological storage and production capabilities. However, the aforementioned benefits should make the marginal short-term labor and cost increases worth the time

170. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, app. at 83.

171. Additionally, if this theory holds, even if the government was inundated with input, it would likely be received in socially useful and optimal formats that are easier to digest and analyze than paper, email, or other older formats.

and expense, and should eventually pay for themselves by decreasing the time and labor allocated to responding to the requests.

Additionally, another reality and criticism is that there would certainly be litigation over all of the proposed new language, like the standard for “undue burden” and what is “optimally usable.” However, this condition is true of most new statutory language, and it may be offset by a decrease in litigation over what is “readily reproducible” or what is a proper form of production as currently envisioned in the statute.¹⁷² Moreover, as Judge Scheindlin noted, there is ample precedent for understanding how a FOIA request should be handled by analogy to the FRCP:

Regardless of whether FOIA requests are subject to the same rules governing discovery requests, Rule 34 surely should inform highly experienced litigators as to what is expected of them when making a document production in the twenty-first century. . . . [B]ecause the fundamental goal underlying both [FOIA and FRCP] is the same — *i.e.*, to facilitate the exchange of information in an expeditious and just manner — common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules in the course of FOIA litigation.¹⁷³

Especially if Judge Scheindlin’s position gains traction, the FRCP can help guide both the government and requestors as to their proper duties under FOIA, thereby decreasing litigation and making many issues that might arise in a dispute more easily adjudicated with reference to ample FRCP case law precedents. Additionally, as the technological capabilities of government increase, there may be less opportunity to argue about burdens and expenses and/or courts will be less sympathetic to such arguments. Nonetheless, one can expect a short-term increase in litigation based on the proposed amendments.

Despite these shortcomings, this proposed statutory language should help facilitate a social layer where it is needed most. This language is designed to incorporate what is primarily required for a robust and efficient social layer of FOIA—real-time production of optimally and socially formatted and structured information to an eager public—in order for the public to assess the good as well as bad

172. DOJ GUIDE, *supra* note 11, at 14.

173. Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, No. 10 Civ. 3488 (SAS), slip op. at 16 & n.33 (S.D.N.Y. Feb. 7, 2011) (on file with the North Carolina Law Review), *withdrawn by order*, No. 10-03488 (S.D.N.Y. June 17, 2011) (on file with the North Carolina Law Review), *stay granted* by 10 Civ. 3488 (SAS), 2011 U.S. Dist. LEXIS 140852 (S.D.N.Y. Dec. 7, 2011).

in government and the government to assess its own data and information. In that way, the public can force government to become more comfortable with social media formats and fora, rather than social media companies and websites per se. This dynamic would be a benefit to the government and public alike. There is a classic tradeoff reflected here between ease of governmental compliance versus what is most beneficial to the public. This language reflects a desire to see that balance moved away from heavy deference to the government's current technological capabilities and narrowly conceived interests and toward effecting the robust, technologically friendly, transparent, and accountable government that society should expect, and deserves, in 2012 and beyond. The government is past due in adopting modern data analysis and storage formats that would greatly enhance its ability to assess and create policy and law, and to foster information flows not only from government but, significantly in the social era, to government.¹⁷⁴ It is time to encourage the growth of the social layer of government information through the proposed theoretical construct of a social layer of information combined with an amendment to FOIA.

CONCLUSION

In July 2011, the White House tweeted¹⁷⁵ the following to the public: "Fiscal policy is important, but can be dry sometimes. Here's something more fun: [link]."¹⁷⁶ The link was to the now-famous Internet meme of singer Rick Astley's video for the song *Never Gonna Give You Up*.¹⁷⁷ Yes, the White House "Rickroll'd"¹⁷⁸ the public.

174. Even more ambitious reform proposals—like changing the FOIA definition of a "record" to require the production of new records, like a Tweet, in response to a FOIA request, or requiring that all FOIA information be posted on Data.gov, subject to statutory limitations for privacy and other exemptions—are reserved for future research and consideration. Additionally, reconfiguring FOIA by focusing more on the value of public input is the focus of current and future research. *See generally* Levine, *supra* note 144 (introducing this theoretical shift).

175. "Twitter updates, often called Tweets, are 140 characters or fewer, and share interesting information with the world." *How To Post a Tweet*, TWITTER, <http://support.twitter.com/articles/15367-how-to-post-a-twitter-update-or-tweet> (last visited Apr. 11, 2012).

176. Brenna Ehrlich, *Call the White House Boring on Twitter, Get Rickrolled*, MASHABLE (July 27, 2011), <http://mashable.com/2011/07/27/white-house-rick-roll/>.

177. *See id.*

178. *Wired* describes a "Rickroll" as a "click-and-switch meme [that] sends innocent Web users not to the promised link but to a YouTube video of the well-coiffed crooner

Given the White House's comfort with using social media to send a 140-character-maximum joke message to anyone on Twitter regarding a topic as monumental and serious as fiscal policy, it seems anachronistic that the federal government is allowed to ignore social media constructs in one of their most sacred obligations: informing the public of their activities through FOIA. Particularly in a time where confidence in government is at historic lows and cynicism at historic highs, the public should ask and require more from the government when it comes to the use of technology that improves its understanding of governmental activities and its ability to offer meaningful input to government. As Judge Scheindlin pointed out in *National Day Laborers*, the government itself should not tolerate its own substandard technology and transparency:

Whether or not metadata has been specifically requested — which it should be — production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading of the [electronically stored information]. That is why the Government's previous production — namely, static images stripped of all metadata and lumped together without any indication of where a record begins and ends — was not an acceptable form of production. *The Government would not tolerate such a production when it is a receiving party, and it should not be permitted to make such a production when it is a producing party.*¹⁷⁹

Similarly, the public should no longer tolerate a FOIA that deters the development of its social layer. Thus, it is time for the public to similarly demand that government make a concerted technological commitment in FOIA, rather than impeding the development of an integral social layer of government information. If the government fully embraces new technologies and formats without institutional reservations, forcing it to grapple with its own data and information in robust and powerful ways, and thereby become more accessible and accountable to the public, perhaps the greatness of the U.S. federal government will begin to be restored. The proposed conception and

[Rick Astley] from the 1980s." Scott Brown & Steven Leckart, *Wired's Guide to Hoaxes: How To Give — and Take — a Joke*, WIRE (Aug. 24, 2009), http://www.wired.com/culture/culturreviews/magazine/17-09/mf_hoax?currentPage=2.

179. Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, No. 10 Civ. 3488 (SAS), slip op. at 24 (S.D.N.Y. Feb. 7, 2011) (on file with the North Carolina Law Review), *withdrawn by order*, No. 10-03488 (S.D.N.Y. June 17, 2011) (on file with the North Carolina Law Review), *stay granted by* 10 Civ. 3488 (SAS), 2011 U.S. Dist. LEXIS 140852 (S.D.N.Y. Dec. 7, 2011).

theorization of a social layer of FOIA and resulting amendment to FOIA would be a significant step toward this restoration.

