

5-2017

# The Freedom of Information Act Reimagined: Lawmaking, Transparency, and National Security In Twenty-First-Century America

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**THE FREEDOM OF INFORMATION ACT REIMAGINED:  
LAWMAKING, TRANSPARENCY, AND NATIONAL SECURITY  
IN TWENTY-FIRST-CENTURY AMERICA**

An Honors Thesis  
Presented To

The Faculty of the Department of Politics  
Bates College

In partial fulfillment of the requirements of the  
Degree of Bachelor of Arts

by  
Matthew F. Phillips

Lewiston, Maine  
March 24, 2017

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## ACKNOWLEDGMENTS

Although my name is the only one that appears on the cover of this thesis, there are several others that deserve recognition as well, as none of my work would have been possible without them. First and foremost is my thesis advisor, Professor Stephen Engel. I am grateful for his thoughtful and detailed feedback on my writing, his insightful suggestions on new ideas to explore, his incredible efficiency in reviewing my work and responding to emails, and his endless patience whenever I missed deadlines or submitted drafts that needed work. He spent way too many hours helping me with this project, and although he always told me that it was just a part of his job, the reality is that he never failed to go above and beyond what was expected of him. His dedication to his work is inspiring, and it pushed me to be a better student and writer. I cannot imagine having a better advisor.

I am also thankful for the help of the professors within the Bates Politics Department, and Professors John Baughman, Senem Aslan, and Cody Eldredge in particular, for their feedback and suggestions throughout my work on this project. Thank you to Christine Murray for her help with my archival research, and to all the other librarians who helped answer my endless questions over the past seven months. I am also grateful for the support of the Bates Honors Program Committee, and for the willingness of Professors Baughman, Jan Hovden, and Marc Eisner to serve on the panel for my defense.

Finally, thank you to my family and friends for reassuring me whenever things got tough over the past two semesters. I am grateful that I had people around me to remind me to take care of myself and occasionally have some fun, even in my most stressful moments.

## **ABSTRACT**

When it was originally passed in the United States in 1966, the Freedom of Information Act (FOIA) was the broadest and most comprehensive freedom of information law in the world. Based on the idea that the American people have a right to know about the inner workings of their government, FOIA allowed anyone in the country to request and obtain access to a wide variety of records held by federal agencies. Over the past half century, the law has been used by journalists and other concerned citizens to expose countless instances of waste, fraud, and mismanagement in government. However, half a century after it was originally created, FOIA no longer seems to be working as intended, as evidence suggests that the government is releasing less information to the public than ever before. This project examines FOIA's development over the past 50 years, with a particular focus on three recent updates to the law that initially seemed to fix its problems but ultimately appear to have been ineffective. Why is a law that once worked so well to increase transparency no longer doing so? And what are the consequences of a more secretive government? Three explanations for the law's recent shortcomings are discussed and analyzed.

## INTRODUCTION

On April 27, 2004, CBS News aired an explosive story on its newsmagazine program *60 Minutes II*.<sup>1</sup> The organization was the first to share images confirming reports of a series of human rights abuses that had recently occurred at an American detention camp in Abu Ghraib, Iraq.<sup>2</sup> The images depicted American soldiers assaulting and humiliating Iraqi prisoners on multiple occasions.<sup>3</sup> One picture showed a captive with wires on his hands, who was instructed to stand on a box and was told that he would be electrocuted if he fell off. Another depicted the bloodied corpse of a man who had apparently been beaten to death, and others showed naked captives forced to simulate sex with each other. Even more disturbing was the fact that the American soldiers in the pictures were smiling, laughing, and giving the camera a thumbs-up.<sup>4</sup>

The images from Abu Ghraib—12 of them in all—had been leaked to CBS News following a recent Army investigation into the prison, which had resulted in the suspension of 17 American soldiers.<sup>5</sup> The American people were outraged following this revelation; in a poll conducted a month after the *60 Minutes* report aired, three-fourths of Americans said that the mistreatment of Iraqi detainees was unjustified under any circumstances.<sup>6</sup> President George W. Bush's approval ranking sank to its lowest point thus far in his presidency, and support for the war in Iraq plummeted.<sup>7</sup> At the time, however, it was still unclear exactly how widespread these

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<sup>1</sup> Rebecca Leung. "Abuse of Iraqi POWs by GIs Probed." *CBS News*, April 27, 2004, <http://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Thom Shanker. "THE STRUGGLE FOR IRAQ: THE MILITARY; 6 G.I.'s in Iraq Are Charged With Abuse Of Prisoners." *The New York Times*, March 21, 2004, <http://www.nytimes.com/2004/03/21/world/struggle-for-iraq-military-6-gi-s-iraq-are-charged-with-abuse-prisoners.html>.

<sup>6</sup> Wayne Drash. "Abu Ghraib photos were 'big shock,' undermined U.S. ideals." *CNN*, May 20, 2009, <http://edition.cnn.com/2009/WORLD/meast/05/18/detainee.abuse.lookback/index.html?iref=nextin>.

<sup>7</sup> Ibid.

human rights abuses really were; were these isolated incidents confined to the walls of Abu Ghraib, or were similar abuses happening at American prisons throughout Iraq, or even the rest of the world? Americans wanted answers, but the U.S. government was unwilling to provide them, arguing that doing so would threaten the national security.<sup>8</sup>

The American Civil Liberties Union (ACLU), however, was unwilling to accept this answer. On June 2 of that year, the organization sued the Department of Defense for more information about the events at Abu Ghraib and any similar instances of abuse at other U.S. detention facilities.<sup>9</sup> The ACLU had formally requested that the department release this information six months earlier through a freedom of information law, and now it claimed that the government had broken the law by refusing to do so.<sup>10</sup> “The government’s ongoing refusal to release these records is absolutely unacceptable,” an attorney for the ACLU said in a statement. Under the law, “[t]he public has a right to know what the government’s policies were, why these abuses were allowed to take place, and who was ultimately responsible.”<sup>11</sup>

The lawsuit that began on that day would not end for nearly 13 years. On January 18, 2017, U.S. District Judge Alvin Hallerstein sided with the ACLU and ordered the Defense Department to release thousands of photographs from Abu Ghraib that it had previously been trying to hide.<sup>12</sup> The images revealed hundreds of additional instances of abuse, torture, murder, and rape that had occurred at the prison in the early 2000s,<sup>13</sup> demonstrating that the cruelty was

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<sup>8</sup> Seymour M. Hersh. “Torture at Abu Ghraib,” *The New Yorker*, May 10, 2004, <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

<sup>9</sup> New York Civil Liberties Union, “U.S. Illegally Withheld Records on Abuses at Abu Ghraib and Elsewhere, ACLU Charges,” press release, June 2, 2004, <https://www.nyclu.org/en/press-releases/us-illegally-withheld-records-abuses-abu-ghraib-and-elsewhere-aclu-charges>.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Reuters. “U.S. must release Abu Ghraib photos, judge says.” *RawStory*, January 18, 2017, <http://www.rawstory.com/2017/01/us-must-release-abu-ghraib-photos-judge-says/>.

<sup>13</sup> Ibid.



far more widespread than many Americans had imagined. The executive branch had argued that these images could endanger American soldiers if made public, but Hallerstein ultimately ordered their release on the grounds that the government had not presented him with enough evidence to justify these concerns.<sup>14</sup> It appeared that the disclosure of this information might embarrass the federal government, but it would not put American citizens at risk.

The law that ultimately forced the Department of Defense to release these images is known as the Freedom of Information Act (FOIA). The law captures the notion that American citizens have a fundamental right to know about how their tax dollars are being spent.<sup>15</sup> It aims to increase government transparency by requiring that executive branch agencies release specific information about their operations to the public in virtually all instances when citizens request that they do so. Although some categories of information are exempted from disclosure through the law,<sup>16</sup> most of the information that citizens request is eligible to be released, placing a spotlight on countless government activities that might otherwise be covered in darkness.

FOIA was passed by a unanimous Congress and signed into law by President Lyndon Johnson in 1966, and over the past half-century it has been used to uncover government negligence, deception, fraud, and mismanagement on innumerable occasions. In just the past two years, for example, the law has been used to reveal that air traffic controllers working for the Federal Aviation Administration are dangerously overworked;<sup>17</sup> that the National Security Agency has continued to surveil Americans' emails, despite earlier promises that it would stop;<sup>18</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> S. 1160. 89<sup>th</sup> Cong., 2<sup>nd</sup> sess., *Congressional Record* 112: 13642.

<sup>16</sup> Tina Zappile. "Freedom of Information Act." (2014). 8.

<sup>17</sup> Claire Groden. "Secret study says air traffic controllers are dangerously overworked." *Fortune*, August 11, 2015, <http://fortune.com/2015/08/11/air-traffic-controllers-study/>.

<sup>18</sup> Charlie Savage. "File Says N.S.A. Found Way to Replace Email Program." *The New York Times*, November 19, 2015, <https://www.nytimes.com/2015/11/20/us/politics/records-show-email-analysis-continued-after-nsa-program-ended.html>.

that the Department of Defense recently wasted an estimated \$500 million contracting for the construction of military drones;<sup>19</sup> and that employees for the Drug Enforcement Administration were regularly allowed to keep their jobs after serious misconduct, including dealing drugs themselves.<sup>20</sup> By filing FOIA requests for this information, journalists and other watchdog groups have forced federal agencies to uncover information about their operations that they almost undoubtedly would have kept secret otherwise. And although not all FOIA inquiries result in eye-opening discoveries like these, the massive effect the law has had at increasing government transparency and accountability over the past 50 years is nevertheless undeniable.

Despite FOIA's many successes, however, there is a growing consensus that the law is no longer working to increase government transparency as effectively as it once did. It is not uncommon for requesters to wait months if not years to obtain information that the law mandates agencies disclose within weeks, and many requesters claim that an increasing proportion of their FOIA inquiries are being either totally denied or only partially fulfilled. Some evidence supports these claims that FOIA performance is worsening. In 2016, for example, the Obama administration cited national security concerns and other considerations to deny a record number of FOIA requests.<sup>21</sup> When these denials were challenged in court, the decisions were overturned at the highest rate in six years, meaning that the government had been wrong to withhold the requested information in the first place.<sup>22</sup> It appears that federal agencies are doing whatever they

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<sup>19</sup> Sharon Weinberger. "The Pentagon's Half-Billion-Dollar Drone Boondoggle." *The Intercept*, August 12, 2015, <https://theintercept.com/2015/08/12/pentagons-half-billion-dollar-drone-boondoggle/>.

<sup>20</sup> Brad Heath and Meghan Hoyer. "DEA agents kept jobs despite serious misconduct" *USA Today*, September 27, 2015, <http://www.usatoday.com/story/news/2015/09/27/few-dea-agents-fired-misconduct/72805622/>.

<sup>21</sup> Ted Bridis. "Obama's final year: US spent \$36 million in records lawsuits" *The Associated Press*, March 14, 2017, [https://www.apnews.com/0b27c4d4b23b436d805328694e58c605/Obama%27s-final-year:-US-spent-\\$36-million-in-records-lawsuits](https://www.apnews.com/0b27c4d4b23b436d805328694e58c605/Obama%27s-final-year:-US-spent-$36-million-in-records-lawsuits).

<sup>22</sup> *Ibid.*

can to resist disclosing information through the FOIA—even if that means breaking the law in the process.

These statistics represent a continuation of what seems to be a notable downward trend in FOIA performance government-wide throughout the past couple of decades, making it more challenging for journalists and other interested citizens to hold their government accountable. For reasons that I explain in the next chapter, it is difficult to compile more robust statistics to empirically prove that this is the case, yet those who have used the law most frequently in recent years say that it is undeniable that FOIA performance has indeed worsened. According to the former president of the Society for Professional Journalists, for example, federal agencies “are getting more sophisticated in denying, delaying, and derailing requests, using FOIA as a tool of secrecy, not openness.”<sup>23</sup> A reporter for *Newsweek* similarly said recently that “[w]hat we are now witnessing in terms of obstructionism and obfuscation [of FOIA] is truly unprecedented.”<sup>24</sup> The director of the Pew Research Center’s Project for Excellence in journalism agreed, noting that “[m]ore of American life now occurs in shadow. And we cannot know what we do not know.”<sup>25</sup>

It appears that the aforementioned examples of FOIA successes are now largely aberrations rather than the norm, as the government seems to be releasing less information than ever before. The ACLU’s struggle to obtain information about the human rights abuses at Abu Ghraib serves as a prime example to illustrate this point, as the Department of Defense only released the requested images after being ordered to do so by a federal judge—and in a lawsuit

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<sup>23</sup> Erin C. Carroll, "Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press," *Utah Law Review* 2016, no. 2 (2016). 214.

<sup>24</sup> U.S. Congress. House. Committee on Oversight and Government Reform, *Ensuring Transparency Through the Freedom of Information Act (FOIA): Hearing before the Committee on Oversight and Government Reform*. 114th Cong., 1st sess., June 2, 2015.

<sup>25</sup> Carroll, 206.

that lasted more than a decade nonetheless. By the time this information became public, the American people had largely lost interest in the story, as the country's war in Iraq had ended six years earlier. A lot had changed, and the country had moved on.

How would Americans have reacted to the new Abu Ghraib images if they had been released back in 2004? Would the Army have changed its policies governing the treatment of detainees? Could that have saved lives? Would the 2004 presidential election have turned out differently? We will never know the answers to these questions, but it is safe to conclude that a government shrouded in secrecy sometimes has its consequences, and there now seems to be a growing consensus that FOIA needs to be modified to prevent them. It is clear that the law, which was the broadest and most expansive of its kind when passed in the 1960s,<sup>26</sup> is no longer living up to its full potential. Paradoxically, FOIA has actually received three major revisions over the past two decades, all of which were supposedly designed to remedy some of its most commonly cited problems; the Electronic Freedom of Information Act Amendments of 1996, the OPEN Government Act of 2007, and the FOIA Improvement Act of 2016 all included measures to improve FOIA performance by increasing agency compliance with the law, expanding the amount of information that requesters could obtain through it, and streamlining the request and disclosure processes so that agencies could release information more quickly.<sup>27</sup> For reasons that are unclear, however, these efforts do not appear to have had much of an effect at accomplishing

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<sup>26</sup> Zappile, 5.

<sup>27</sup> *Electronic Freedom of Information Act Amendments of 1996*, Public Law 104-231. U.S. Statutes at Large 110 (1996): 3048-3054.;

*Openness Promotes Effectiveness in Our National Government Act of 2007*, Public Law 110-175. U.S. Statutes at Large 121 (2007): 2524-2531.;

*FOIA Improvement Act of 2016*, Public Law 114-185. U.S. Statutes at Large 130 (2016): 538.

this goal. How is it possible that such major and promising updates to FOIA have been so ineffective at solving its biggest problems? I attempt to answer that question in this project.

Existing scholarship on FOIA suggests that recent amendments to the law may have been admirable efforts to improve it, but that the changing ways in which requesters have used the law over the past two decades have nevertheless contributed to its declining performance. One theory, for example, contends that an ever-increasing annual volume of FOIA requests has overwhelmed agencies, which have not had the financial nor staff resources to process these requests in a timely manner. Consequently, agencies have taken longer to release information through the law and may be inclined to deny an increasing proportion of FOIA requests, even when doing so is illegal. This theory suggests that recent amendments designed to strengthen FOIA have actually done the opposite by increasing agency responsibilities under the law without providing the agencies with any additional resources to fulfill these responsibilities; a requirement that agencies write regular reports detailing their FOIA activities, for example, could have the inadvertent effect of increasing agency backlogs by taking resources away from processing requests, even if the requirement was designed to decrease backlogs by increasing oversight of agency activities.

A second theory suggests that a recent increase in FOIA denials is the result of a corresponding increase in requests for sensitive national security information that is exempted from disclosure through the law. The text of FOIA contains a list of nine categories of information that are exempted from disclosure, and information related to the national security often fits within one or more of these categories.<sup>28</sup> Although many of these exemptions have

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<sup>28</sup> Tina Zappile. "Freedom of Information Act," (2014).

been a part of the law since it was originally passed,<sup>29</sup> it is possible that agencies have invoked them to deny requests more frequently in recent years because of an increased public demand for national security information. This would seem to make sense in the ongoing aftermath of the terrorist attacks on September 11, 2001, which brought national security to the forefront of the American consciousness; even though Americans may have wanted to know more about their country's security at the time, there was also presumably a heightened risk associated with disclosing this information, leading to an increase in FOIA denials. FOIA backlogs may also have increased during this period as agency officials spent longer determining whether requested information was safe to release to the public. And while amendments to the law attempted to alleviate problems in other ways, they largely avoided the national security issue, which may have rendered them ineffective.

Both of these theories posit that a changing demand for information from federal agencies is largely responsible for the apparent decline in FOIA performance over the past two decades. The first suggests that the volume of FOIA requests has increased so rapidly that federal agencies have been unable to keep up with demand, and the second suggests that a heightened volume of requests related to national security issues specifically has allowed agencies to legally deny more requests by invoking exemptions written into the law. As I explain in subsequent chapters, there is evidence to support each of these theories. My focus throughout this project, however, is on testing and supporting a third hypothesis that has not yet been studied by other scholars. I argue that recent declines in FOIA performance could also be the effects of a supply-side problem, namely that legislators have designed recent updates to the law itself to be

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<sup>29</sup> Lyndon B. Johnson, "Statement by the President Upon Signing the "Freedom of Information Act"," (The American Presidency Project: Gerhard Peters and John T. Woolley, 1966).

ineffective by deferring policymaking responsibility to unelected judges and government officials.

My theory is based largely on the work of political scientist George Lovell, who writes about a series of early-twentieth-century labor statutes in his 2003 book *Legislative Deferrals*. These laws initially represented major victories for the increasingly powerful labor movement in the United States, but they were subsequently reversed by federal judges. In a departure from traditional legal thinking, Lovell suggests that lawmakers intentionally designed the statutes to achieve this anti-labor outcome by writing their legislation in a way that would invite judicial invalidation. By predicting that the courts would strike down their pro-labor statutes, the author argues that legislators would receive an electoral benefit of passing legislation sought by their constituents, but that they were also essentially able to achieve anti-labor laws while altogether avoiding the political backlash that would normally result from doing so, as the brunt of criticism from angry constituents was directed at unelected judges instead. This is a process that Lovell calls a legislative deferral.

In this project, I apply this concept of a legislative deferral to the dynamics of FOIA and explore whether members of Congress may have intentionally designed recent amendments to the law to worsen FOIA performance, despite their public proclamations that the amendments were intended to do the opposite; although there are many benefits to increasing government transparency, doing so also has the potential to undermine other interests that legislators may have, such as safeguarding the national security or protecting the executive branch from additional public scrutiny. It would therefore make sense for legislators to pass laws that appear to increase government transparency, thereby allowing them to satisfy their constituents and preserve their chances at reelection, while actually aiming to achieve the opposite effect. I

suggest that members of Congress have written their FOIA amendments to legislatively defer important policy decisions to judges and/or bureaucrats in federal agencies, who they anticipate will interpret the amendments in a way that ultimately results in the release of fewer records.

My argument is complex and multifaceted, as is the current state of FOIA operations throughout the federal government. However, I explain both in greater detail throughout the remainder of this thesis. I start in chapter 1 by outlining FOIA's history over the past 50 years and its development from a law that was once groundbreaking to one that now lags behind dozens of others throughout the rest of the world. I also share additional information about current FOIA performance and why journalists and other requesters claim that it is no longer working as intended, along with information about why compiling statistics to prove that this is the case is often challenging.

In chapter 2, I summarize existing explanations for FOIA's problems and discuss additional scholarship that forms the basis of my own theory, which I test throughout the project. I start by describing in greater detail the theories that explain recent declines in FOIA performance as a result of either a lack of funding or an increase in demand for sensitive national security information. Then, to elaborate on my own, original hypothesis, I provide a lengthier summary of George Lovell's legislative deferral hypothesis and discuss how his scholarship connects to my own. I subsequently outline a modified version of Lovell's model that I use in later chapters to determine whether legislative deferrals occurred with recent FOIA amendments.

The following three chapters are case studies in which I test my hypothesis on the three most recent amendments to the law. In chapter 3, I examine 1996's Electronic Freedom of Information Act, which was passed around the same time that complaints about the law initially appeared to intensify. Specifically, I look at a provision within the amendment that newly



required federal agencies to expedite the processing of some inquiries made by journalists and other representatives of the news media. This provision was supposedly designed to help journalists, in their work on behalf of the American people, obtain requested records more quickly, but I ultimately conclude that it was actually designed to do the opposite. I argue that lawmakers deferred to federal agencies by writing this provision in a way that seemed to be beneficial but in reality was not.

In chapter 4, I use the OPEN Government Act of 2007 as another case study with which I test my legislative deferral hypothesis. After explaining how FOIA policy changed in the United States following 9/11, I outline the development of the OPEN Government Act legislation. Because I do not find any evidence to suggest that members of Congress intentionally left ambiguous statutes in their bill, I conclude that a legislative deferral did not occur in this instance. I then discuss a few explanations for why this may be the case.

Chapter 5 is my final case study, in which I use the deliberations surrounding the FOIA Improvement Act of 2016 to test my theory. I start by discussing the development of FOIA policy throughout the presidency of Barack Obama, and I explain that, despite his promises to make his administration the most transparent in American history, it does not appear that this occurred. I then examine the development of a provision within the FOIA Improvement Act that codified an Obama policy encouraging agencies to adopt a “presumption of openness” when processing FOIA requests. Although it appears that this measure would improve FOIA performance, there is evidence to suggest otherwise, which allows me to conclude that a legislative deferral occurred in this instance. This provides further support for my hypothesis that members of Congress have designed FOIA amendments to fail to accomplish their stated goals.

Finally, in the project's conclusion, I summarize and discuss the implications of my findings. I explain that my hypothesis is supported in two of my three case studies, which allows me to conclude that my argument has merit but may not be the only explanation for why FOIA does not appear to be functioning properly. I then discuss the implications of my research, with a particular focus on how FOIA policy may change now that President Donald Trump is in office.

## 50 YEARS OF FOIA

When the Freedom of Information Act was initially signed into law in 1966, it was the first information law of its kind in the world,<sup>1</sup> giving American citizens more access to information about their government than ever before. However, it no longer seems as revolutionary fifty years later; a recent comparison of the strength of similar laws in more than 100 countries found that the U.S. version of FOIA ranked 45<sup>th</sup>, meaning that it is now weaker than dozens of laws that it once inspired.<sup>2</sup> Federal agencies seem to be withholding more information from the American public than at any point since FOIA was created, and the information they do release often takes years to be sent to those who requested it. As I explained in the previous chapter, in this project I attempt to find out why this is the case.

This chapter is dedicated to setting the stage for my analysis. I outline FOIA's history and explain how it has evolved over the past half-century before turning to an extended discussion of contemporary problems with the law. I provide some empirical evidence to support the notion that the law is no longer working as intended and then explain that recent amendments to FOIA supposedly designed to facilitate the release of information appear to have failed to do so. Although a lack of sufficient data makes it difficult to empirically prove that this is the case, I subsequently contend that the stated experiences of journalists and others who use the law on a regular basis provide enough evidence to support the claim that these amendments have at the very least been ineffective.

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<sup>1</sup> Tina Zappile. "Freedom of Information Act." (2014). 5.

<sup>2</sup> Erin C. Carroll, "Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press," *Utah Law Review* 2016, no. 2 (2016). 215.

## FOIA's History and Development

The Freedom of Information Act was signed into law on July 4, 1966 by President Lyndon Johnson. It allowed any person in the country, regardless of his citizenship status, to request and obtain previously unpublished records on any topic from the federal government, without explanation or justification.<sup>3</sup> By doing so, it promised to make the government more transparent and give the American people the information they needed to fully participate in their democracy.

It had taken more than a decade of deliberations in Congress for FOIA to finally make it to the White House. In 1955, Representative John E. Moss (D-CA) became the chair of a new House Special Subcommittee on Government Information, which became known as the Moss Subcommittee.<sup>4</sup> Moss had recently witnessed government secrecy firsthand by serving on a House committee investigating the federal Civil Service and Post Office,<sup>5</sup> and, following public disapproval with the secretive and problematic tactics of the FBI during the McCarthy era, he was able to capitalize on a widespread mistrust of government to convince his peers that the creation of a new subcommittee would be worthwhile.<sup>6</sup> In its first formal report, the subcommittee expressed the need for new legislation to make the government more transparent. It warned that “a paper curtain has descended over the Federal Government...an attitude which says that we, the officials, not you, the people, will determine how much you are to be told about your own Government.”<sup>7</sup> A new law was needed to change the status quo in Washington.

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<sup>3</sup> Wendy Ginsberg, "The Freedom of Information Act (Foia): Background, Legislation, and Policy Issues," (Congressional Research Service, 2014). 1.

<sup>4</sup> Ginsberg, 3.

<sup>5</sup> Sam Archibald, "The Early Years of the Freedom of Information Act. 1955 to 1974," *PS: Political Science and Politics* 26, no. 4 (1993). 726.

<sup>6</sup> Zappile, 2.

<sup>7</sup> Archibald, 726.

Despite its best efforts, the Moss Subcommittee was not able to garner enough support for such a law until 1966. On June 20 of that year, the bill would unanimously pass in the House of Representatives by a vote of 308-0.<sup>8</sup> Representative Moss had been in the hospital recovering from illness, but he was able to escape to the House floor to speak on behalf on his prized legislation,<sup>9</sup> which he had been working on in some capacity for nearly his entire time in Congress.<sup>10</sup> “[A]s our population grows in numbers,” he said in his opening remarks, “it is essential that it also grow in knowledge and understanding. We must remove every barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.”<sup>11</sup> Moss believed that public access to government information was an essential component of a healthy democracy, and that American citizens could only participate in their democracy responsibly and fully if they had an accurate understanding of how their government operated.

Several other representatives who spoke on behalf of FOIA made similar arguments about the law’s importance. “[O]ur democratic society,” Rep. Donald Rumsfeld (R-IL) said, “is based upon the participation of the public who must have full access to the facts of Government to select intelligently their representatives to serve in Congress and in the White House. This legislation provides the machinery for access to government information necessary for an informed, intelligent electorate.”<sup>12</sup> Rep. Joe Skubitz (R-KS) echoed these comments, saying that democracy “can only operate effectively when the people have the knowledge upon which to

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<sup>8</sup> S. 1160. 89<sup>th</sup> Cong., 2<sup>nd</sup> sess., *Congressional Record* 112: 13661.

<sup>9</sup> *Ibid.*, 13652.

<sup>10</sup> *Ibid.*, 13651.

<sup>11</sup> *Ibid.*, 13641.

<sup>12</sup> *Ibid.*, 13653.

base an intelligent vote.”<sup>13</sup> And Rep. Bob Dole (R-KS) concluded that “[l]ogically, there is little room for secrecy in a democracy.”<sup>14</sup>

Many representatives also argued that the American people had a constitutional right to know about the activities of their government. “Inherent in the right of free speech and of free press is the right to know,” Rep. Moss said.<sup>15</sup> Similarly, Rep. Cornelius Gallagher (D-NJ) said that FOIA would “give...meaning to the freedom of speech amendment.”<sup>16</sup> Gallagher suggested that passing FOIA was more important than ever before because the U.S. government was becoming “larger and more complex,” leading to an increase in secrecy that threatened American freedoms and made the government harder to control.<sup>17</sup> Rep. Garner Shriver (R-KS) agreed, saying that “the check [on government power] of public awareness must be sharpened” in response to an increasingly powerful federal government.<sup>18</sup> Rep. David King (D-UT) also mentioned this idea in his remarks, saying that a “mushrooming bureaucracy” was presenting a threat to the “cherished liberties and fundamental rights” of the nation’s citizens.<sup>19</sup> “[T]he freedoms that we daily exercise,” he said, “were not easily obtained nor are they easily retained. Inroads and encroachments—be they overt or covert, be they internal or external—must be effectively guarded against. For freedoms once diminished are not readily revitalized; freedoms once lost are recovered with difficulty.”<sup>20</sup> He saw FOIA as a way to protect these freedoms.

Rep. King also used examples from American history to make his case for FOIA. He explained that the American colonies had often “demonstrated a formidable hostility toward

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<sup>13</sup> Ibid., 13653.

<sup>14</sup> Ibid., 13655.

<sup>15</sup> Ibid., 13642.

<sup>16</sup> Ibid., 13659.

<sup>17</sup> Ibid., 13659.

<sup>18</sup> Ibid., 13652.

<sup>19</sup> Ibid., 13645.

<sup>20</sup> Ibid., 13643.

those who earnestly believed that the rank-and-file citizenry was entitled to a full accounting by its governing bodies.”<sup>21</sup> At the time, he said, “[t]he power that knowledge provides was fully understood; by some it was feared.”<sup>22</sup> King explained that the country’s founding fathers were aware of this power and knew that it could be used to keep government officials accountable in the new nation. He shared a quote by James Madison that emphasized this point:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.<sup>23</sup>

Nearly 150 years after Madison had written this, American citizens and their representatives were still fearful of government secrecy, especially as they continued to combat the spread of communist ideology in the Cold War. “It is necessary that free people be well informed,” Rep. Jack Edwards (R-AL) said, “and we need only to look behind the Iron Curtain to see the unhappy consequences of the other alternative.”<sup>24</sup>

There was thus consensus among representatives that increasing access to information was consistent with American values and was necessary to preserve the strength of the country’s democracy, particularly as the federal bureaucracy continued to grow and the communist threat intensified. At the time, the only freedom of information law in the U.S. was a portion of the 1946 Administrative Procedure Act (APA), which members of the Moss Subcommittee claimed had developed into a tool of secrecy for government officials, who were taking advantage of its overly vague statutes to withhold information from the public.<sup>25</sup> As a result, Rep. King concluded that

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<sup>21</sup> Ibid., 13644.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., 13659, 13646.

<sup>24</sup> Ibid., 13657.

<sup>25</sup> Ibid.

...the overall intent of the Congress, as embodied in the...[APA], has not been realized and the specific safeguards erected to guarantee the right of public access to the information stores of Government appear woefully inadequate to perform the assigned tasks. The time is ripe for a careful and thoughtful reappraisal of the issues inherent in the right to know concept; the time is at hand for a renewal of our dedication to a principle that is at the cornerstone of our democratic society.<sup>26</sup>

Other representatives agreed. Rep. Edward Gurney (R-FL) pointed out that even members of Congress were unable to use the APA to access “such routine information as lists of...the employees” of nonsecurity departments and agencies, putting their ability to govern effectively in jeopardy.<sup>27</sup> Rep. Shriver said that Americans were “fight[ing] daily battles just to find out how the ordinary business of their government [was] being conducted.”<sup>28</sup> FOIA had the potential to change that.

In addition to closing loopholes that allowed government officials to withhold unnecessary amounts of information, FOIA went a step further than the APA by removing a requirement that requesters justify their need for information.<sup>29</sup> “[T]his legislation,” said Rep. Melvin Laird (R-WI), “marks a historic breakthrough for freedom of information in that it puts the burden of proof on officials of the bureaus and agencies of the executive branch who seek to withhold information from the press and public, rather than on the inquiring individual who is trying to get essential information as a citizen and taxpayer.”<sup>30</sup> Representative Edwards said that this measure “should have been approved and signed into law long ago as a means of giving the American citizen a greater measure of protection against the natural tendencies of the bureaucracy to prevent information from circulating freely.”<sup>31</sup>

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<sup>26</sup> Ibid., 13643.

<sup>27</sup> Ibid., 13659.

<sup>28</sup> Ibid., 13652.

<sup>29</sup> Ginsberg, 3.

<sup>30</sup> S. 1160, 13647.

<sup>31</sup> Ibid., 13657.



And now, after more than a decade of work by the Moss Subcommittee, FOIA was finally going to become a reality. “During these 10 years,” Rep. Florence Dwyer (R-NJ) said, “we have conducted detailed studies, held lengthy and repeated hearings, and compiled hundreds of cases of the improper withholding of information by Government agencies. Congress is ready,” she concluded, “. . .to reject administration claims that it alone has the right to decide what the public can know.”<sup>32</sup> Although Democratic representative John Moss had advocated most strongly for the bill, it had fervent supporters on both sides of the aisle; the Republican Policy Committee, for example, issued a statement urging “prompt enactment” of the bill to help eliminate the “screen of secrecy which now exists...[as] a barrier” to transparency.<sup>33</sup> It seemed that everyone could agree on FOIA’s importance, and the bill was indeed subsequently passed by a unanimous House.<sup>34</sup> It had already been passed by a voice vote in the Senate,<sup>35</sup> and it was thus sent to President Johnson’s desk for a signature.

President Johnson signed the legislation about two weeks later, but he was markedly less enthusiastic about FOIA becoming law than the senators and representatives who had advocated for it. According to his press secretary at the time, Johnson “had to be dragged kicking and screaming to the signing ceremony” because he “hated the very idea of the Freedom of Information Act...hated the thought of journalists rummaging in government closets...[and] hated them challenging the official view of reality.”<sup>36</sup> As a result, he signed the law with little fanfare on his Texas ranch,<sup>37</sup> and only after the Justice Department persuaded him to do so.<sup>38</sup>

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<sup>32</sup> Ibid., 13660.

<sup>33</sup> Ibid., 13648.

<sup>34</sup> Ibid., 13661.

<sup>35</sup> 111 Cong. Rec. 26820.

<sup>36</sup> Carroll, 208.

<sup>37</sup> Lyndon B. Johnson, "Statement by the President Upon Signing the "Freedom of Information Act"," (The American Presidency Project: Gerhard Peters and John T. Woolley, 1966).

<sup>38</sup> Tom Blanton and Lauren Harper. “FOIA@50.” *The National Security Archive*, July 1, 2016, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB554-FOIA@50/>.

Still, he feigned approval of the law in his signing statement. “I signed this measure with a deep sense of pride,” he wrote, “that the United States is an open society in which the people's right to know is cherished and guarded.”<sup>39</sup> He also said that “[n]o one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”<sup>40</sup> Johnson would continue, though, to explain that a variety of records would fall outside this category and be exempt from disclosure because they contained sensitive national security information, for instance, that could be harmful in the wrong hands.<sup>41</sup> (For a complete list of information exempted from the law today, see Table 1.1 on the next page).

In subsequent years, Johnson and the agencies he supervised would try their best to resist FOIA wherever possible. All 27 federal agencies and departments that had testified about the legislation during the deliberation process had opposed it,<sup>42</sup> and, once it became law, agencies were frequently able to bend the rules because there were no mechanisms within it to force agency compliance.<sup>43</sup> Additionally, there was no time frame within which agencies had to respond to FOIA requests or release records, so it took an average of 33 days to respond to requests and several additional months for requesters to actually obtain materials,<sup>44</sup> which was certainly not what the initial drafters of the bill had envisioned. And because there was no penalty for federal employees who broke the law by failing to release information at all,<sup>45</sup> some people never received the records they requested, even when they had a legal right to do so. However, even with this resistance, FOIA was still successful in changing national policy, and it set a new precedent for freedom of information in both the United States and the rest of the

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<sup>39</sup> 111 Cong. Rec. 26820.

<sup>40</sup> Ibid.

<sup>41</sup> Johnson.

<sup>42</sup> Blanton and Harper.

<sup>43</sup> Johnson.

<sup>44</sup> Archibald, 730.

<sup>45</sup> Ibid.

world.<sup>46</sup> At the time, only Sweden and Finland had any laws similar to FOIA, and neither country’s law was as broad.<sup>47</sup> John Moss’s vision of a transparent U.S. government was becoming a reality.

**Table 1.1: FOIA Exemptions**<sup>48</sup>

<b>Exemption</b>	<b>Definition</b>
<b>Exemption 1</b>	Protects classified national defense or foreign policy information, based on criteria established by Executive orders [Note: Executive Orders are issued to specify each President’s National Security Policy; the current one in effect is Executive Order 13,526 dated 12/29/2009, as President Donald Trump has not yet issued an Order detailing his own policy.]
<b>Exemption 2</b>	Protects internal personnel rules and practices of an agency based on two categories: (a) trivial or “low 2” information (b) more substantial or “high 2” information
<b>Exemption 3</b>	Protects information prohibited from disclosure by another federal statute, whether prohibited without exception or provided criteria for which to decide
<b>Exemption 4</b>	Protects trade secrets and confidential commercial or financial information
<b>Exemption 5</b>	Protects agency memorandums or letters which would not be available outside court proceedings
<b>Exemption 6</b>	Protects information in personnel, medical, and similar files if it “would constitute a clearly unwarranted invasion of personal privacy”
<b>Exemption 7</b>	Protects law enforcement records if they could (A) interfere with enforcement proceedings (B) deprive a person of a right to a fair trial or adjudication (C) constitute an unwarranted invasion of personal privacy (D) disclose the identity of a confidential source (including those involved in national security intelligence investigations) (E) disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions, including if disclosure could lead to circumvention of the law (F) endanger the life or physical safety of any individual
<b>Exemption 8</b>	Protects agencies responsible for regulating or supervising financial institutions and the information they gather about those institutions
<b>Exemption 9</b>	Geological and geophysical information, including maps and wells

<sup>46</sup> Zappile, 2.

<sup>47</sup> Carroll, 207.

<sup>48</sup> Adapted from Zappile, 2.

## *Early Developments*

Although the purpose of FOIA to increase access to government information remains the same as it was 50 years ago, the law has evolved through a variety of amendments, executive orders, and court rulings.<sup>49</sup> These changes reflect attempts by lawmakers and judges to balance demands for transparency and accountability with concerns about protecting state secrets and other sensitive information.<sup>50</sup> The first change to FOIA occurred in 1974, in response to concerns about government secrecy following the Watergate scandal.<sup>51</sup> Congress overrode a veto by President Gerald Ford to pass the Privacy Act Amendments, which significantly strengthened the law. The revisions specified within the amendments essentially transformed FOIA into the law that the Moss Subcommittee had initially envisioned by placing new requirements on agencies to ensure that they released information in a timely manner.<sup>52</sup> Agencies were newly required to respond to FOIA requests within ten working days, with the opportunity to receive a ten-day extension in “unusual circumstances.”<sup>53</sup> Additionally, the law prohibited agencies from charging requesters exorbitant fees for the processing of records and information, and the scope of records exempted from disclosure became more limited.<sup>54</sup> Thus, government information became considerably more accessible, promising to make the government itself more transparent. In his veto message, President Ford called the legislation “unconstitutional,” “unworkable,” and “unrealistic” and expressed his concern that it would place an exorbitant administrative burden

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<sup>49</sup> Ibid., 1.

<sup>50</sup> Ibid.

<sup>51</sup> Carroll, 208.

<sup>52</sup> Zappile., 7.

<sup>53</sup> Carroll, 208.

<sup>54</sup> Zappile, 7.

on federal agencies.<sup>55</sup> By overriding this veto, though, Congress signaled that it disagreed, perhaps in part because it received substantial pressure from the newspaper industry to do so.<sup>56</sup>

Two years later, in 1976, Congress passed the Government in the Sunshine Act to clarify further the terms and exemptions of the law.<sup>57</sup> That same year, a concept that became known as glomarization was established by two rulings in the DC District Court over FOIA decisions.<sup>58</sup> Glomarization essentially gave federal agencies the ability to deny the disclosure of records for nearly any reason, regardless of whether or not the requested records were related to an existing exemption in the law.<sup>59</sup> It was first used after the sinking of the *Glomar Explorer* submarine in 1968. When the incident was reported by the press, several journalists submitted FOIA requests to the CIA asking that it release all its records related to the incident, but these requests were denied on the grounds that the requested information supposedly did not exist. Two journalists, who suspected that the agency was illegally trying to hide the documents, appealed these denials, but the Court ultimately decided to uphold them. The Court stated that the CIA had a right to deny the existence of the documents because it had a “compelling reason” to do so.<sup>60</sup> These decisions set a precedent for future court cases related to FOIA decisions, as glomarization was often used to keep requesters in the dark about the existence of similarly sensitive materials. Any information related to national security, a person’s personal privacy, or confidential government informants allowed agencies to successfully invoke this tool for nearly a decade.<sup>61</sup> However, the Department of Justice, which administers FOIA, eventually limited its application through

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<sup>55</sup> Carroll, 209.

<sup>56</sup> Ibid.

<sup>57</sup> Electronic Frontier Foundation. "History of FOIA." *Electronic Frontier Foundation*, <https://www EFF.org/issues/transparency/history-of-foia>.

<sup>58</sup> Zappile, 7.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

subsequent updates to the department's regulations that required agencies to invoke a specific exemption written into the law when making denials.<sup>62</sup>

In 1982, President Ronald Reagan issued an executive order that further facilitated the withholding of sensitive records.<sup>63</sup> These measures became more permanent in 1986 with the passage of the Freedom of Information Reform Act.<sup>64</sup> The act introduced exclusions into FOIA to protect information in cases when glomarization was insufficient, which had become especially important to lawmakers after the DOJ's recent policy changes that had limited glomarization's utility. Agencies no longer had to argue that they had compelling reasons to deny the existence of particular records if the records fell within one of three exclusion categories now written into the law (for a complete list of exclusions, see Table 1.2).<sup>65</sup> As long as agencies consulted with the Department of Justice's Office of Information and Privacy (OIP; now known as the Office of Information Policy) beforehand, courts were instructed to automatically deny FOIA appeals without indicating whether an exclusion had even been invoked, thereby keeping the existence of the requested records a secret.<sup>66</sup> Because the OIP was also a federal agency, it was now possible to keep sensitive information entirely within the executive branch, as judges did not have the power to overrule agency decisions. As a result, federal agencies had more power than ever before to administer FOIA as they saw fit.

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<sup>62</sup> Ibid.

<sup>63</sup> Electronic Frontier Foundation.

<sup>64</sup> Zapille, 7.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., 7-8.

**Table 1.2: FOIA Exclusions** <sup>67</sup>

Exclusion	Definition
<b>(c)(1) Exclusion</b>	Allows an agency to deny the existence of records related to an ongoing investigation if the subject of that investigation is not yet aware of ongoing government actions, therefore, recognizing the existence of the records would likely cause harm by impeding the investigation (this extends protections provided by Exemption 7(A))
<b>(c)(2) Exclusion</b>	Allows federal agencies to deny the existence of records that pertain to confidential informants in criminal proceedings, applicable prior to an informant being officially recognized as a source (this extends protections provided by Exemptions 7(B) 7(C))
<b>(c)(3) Exclusion</b>	Allows the Federal Bureau of Investigation (FBI) to protect records considered classified for purposes of intelligence, counterintelligence, or being related to international terrorism

The first twenty years of FOIA’s existence were thus characterized by efforts of competing coalitions to strike a fair balance between increasing government transparency and protecting national security interests. Members of the executive branch consistently opposed efforts to make the law stronger and actively advocated for measures that would make it weaker. Members of Congress, on the other hand, tended to support efforts to strengthen FOIA, perhaps because the law did not increase oversight of their own activities. Disagreements between Democrats John Moss and Lyndon Johnson over the law’s expansiveness help demonstrate that government transparency was not a strictly partisan issue, and FOIA thus had supporters and opponents on both sides of the political aisle. The same pressures from these competing factions would continue to influence FOIA’s development over the next 30 years. However, in what appeared to be major victories for transparency advocates, the three most significant updates to the law within this timeframe would all appear to share a common goal of facilitating the release of information rather than restricting it. Next, I briefly summarize each of these updates before turning to a discussion about how and why they appear to have ultimately failed at accomplishing this important goal, putting the ideal of a transparent government in jeopardy.

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<sup>67</sup> Reprinted from Zappile, 8.

*The Electronic Freedom of Information Act of 1996*

In 1996, FOIA's reach was expanded considerably when President Bill Clinton signed the Electronic Freedom of Information Act (E-FOIA).<sup>68</sup> The main purpose of the act was to make government information more accessible through FOIA requests.<sup>69</sup> It did so by requiring agencies to make all of their records available electronically and by making digital records, such as emails, subject to disclosure through the law.<sup>70</sup> This not only provided requesters with the opportunity to access a wider variety of government information but also facilitated the process of doing so. There was also a provision that provided for expedited processing of certain FOIA requests that were deemed to be of particular interest to the public, which meant that some records would be released more quickly as well.<sup>71</sup> However, in anticipation of an increase in requests as a result of these changes, the time requirement for agencies to respond to general requests was doubled from ten to 20 days, so it would often take longer for requesters to receive information.<sup>72</sup> Additionally, Congress did not provide agencies with any extra funding to help them process these requests, so backlogs would eventually start accumulating.<sup>73</sup>

In addition to efforts to expand the law's reach, E-FOIA also included measures designed to facilitate oversight of agency compliance with the law. Agencies were newly required to track and report data about their FOIA activities, including information about their requests, appeals,

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<sup>68</sup> Carroll, 209.

<sup>69</sup> Zappile, 8.

<sup>70</sup> Ibid.

<sup>71</sup> U.S. Congress. House. Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, *H.R. 1281, War Crimes Disclosure Act, Health Information Privacy Protection Act, and S. 1090, Electronic Freedom of Information Improvement Act of 1995: Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight*. 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 14, 1996. 104.

<sup>72</sup> Ibid.

<sup>73</sup> Meredith Fuchs and Kristin Adair, "On the Sidelines of the Information Revolution: How the Freedom of Information Act Amendments of 1996 Failed to Transform Public Access," *Administrative and Regulatory Law News* 33, no. 1 (2007). 12.



backlogs, and response times.<sup>74</sup> The law also gave the attorney general the ability to monitor agency reporting and submit reports summarizing his or her findings to both Congress and the Justice Department, providing them with additional information about agency activities.<sup>75</sup> These measures appeared to signal that agencies would no longer be able to get away with blatantly ignoring the law like they sometimes had before. As a result, FOIA seemed closer than ever to being implemented in the way that John Moss and his contemporaries had initially intended.

### *OPEN Government Act of 2007*

The next major change to FOIA came in 2007, when the OPEN Government Act was signed into law by President George W. Bush. However, it was preceded by a few more minor changes in the early 2000s, which were made in response to the September 11, 2001 terrorist attacks on U.S. soil.<sup>76</sup> President Bush issued an executive order in November of that year that further limited public access to the records of former presidents,<sup>77</sup> and two months later he signed a bill known as the Intelligence Authorization Act that limited the ability of foreign governments to access U.S. government information.<sup>78</sup> However, this had little effect on making the law more restrictive for American citizens.

Another of Bush's measures, though, did have this effect; Bush instructed Attorney General John Ashcroft to issue a memorandum to all federal agencies encouraging them to carefully consider national security interests when determining whether to release information

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<sup>74</sup> Zappile, 8.

<sup>75</sup> Ibid.

<sup>76</sup> Electronic Frontier Foundation.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

though FOIA.<sup>79</sup> This meant that many records that previously would have been disclosed through the law no longer were, creating an obvious barrier to transparency. In response to criticism about this measure, President Bush would later sign an executive order designed to improve procedural aspects of FOIA such as the time it took agencies to process requests,<sup>80</sup> but it was clear to many that a more substantial update to the law was still necessary. This update eventually came in the form of the OPEN Government Act.

Also known as the Openness Promotes Effectiveness in our National Government Act (hence the acronym OPEN), the law furthered E-FOIA's mission to increase agency oversight by establishing the Office of Government Information Services (OGIS), which now serves as the FOIA ombudsman.<sup>81</sup> The OGIS was tasked with reviewing agencies' FOIA policies, overseeing their compliance with the law, and recommending policy changes to both Congress and the President.<sup>82</sup> The act also required agencies to provide tracking information about the status of FOIA requests and forced agencies to waive request processing fees if they failed to respond within the required 20-day timeframe.<sup>83</sup> All of these measures seemed to be designed to incentivize agencies to process requests—and get information into the hands of the American people—more quickly.

The act also expanded FOIA's definition of the "news media" to include websites and bloggers.<sup>84</sup> The law had long exempted members of the news media from paying request

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<sup>79</sup> John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act," ed. Department of Justice (2001).

<sup>80</sup> Executive Order 13392 of December 14, 2005, Improving Agency Disclosure of Information, Code of Federal Regulations, title 3 (2006): 216-220, <https://www.gpo.gov/fdsys/pkg/CFR-2006-title3-vol1/pdf/CFR-2006-title3-vol1-eo13392.pdf>.

<sup>81</sup> Carroll, 210.

<sup>82</sup> Hodes, Scott A. "FOIA Facts: The Impact of the Open Government Act of 2007." *LLRX*, January 18, 2008, <https://www.llrx.com/2008/01/foia-facts-the-impact-of-the-open-government-act-of-2007/>.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

processing fees because of their role in disseminating important information to the public,<sup>85</sup> and the expansion of this category served to encourage journalists from nontraditional news outlets to make more FOIA requests. However, it is important to recognize that, just like with E-FOIA a decade earlier, Congress did not accompany this and other efforts to increase the accessibility of government records with a corresponding increase in funding to agencies to support their added responsibilities. Even the OGIS, the federal agency that emerged from the act, did not receive any funding on which to operate.<sup>86</sup> As I will explain in greater detail in the next chapter, this unfunded mandate is a main reason why some scholars believe that the OPEN Government Act, despite its best intentions, has ultimately proven to be unsuccessful. Nevertheless, the act as a whole still seemed to represent a clear effort by Congress to make FOIA stronger.

### *FOIA Improvement Act of 2016*

On his first day in office in January 2009, President Barack Obama issued a memorandum on FOIA reform to the heads of the executive branch agencies charged with implementing the law. In it, he reiterated his campaign promise to make his administration the most transparent in American history and ordered agencies to “adopt a presumption in favor of disclosure” when responding to FOIA requests.<sup>87</sup> “In the face of doubt, openness prevails,” he wrote.<sup>88</sup> “The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or

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<sup>85</sup> U.S. Department of State. "Fees, Requester Categories, & Fee Waivers." U.S. Department of State, <https://foia.state.gov/Request/Fees.aspx>.

<sup>86</sup> Hodes.

<sup>87</sup> Barack Obama, “Memorandum for The Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act,” ed. The White House Office of the Press Secretary (2009). 1.

<sup>88</sup> Ibid.

because of speculative or abstract fears.”<sup>89</sup> Obama also instructed Attorney General Eric Holder to develop new federal guidelines for FOIA implementation, which Holder published two months later.<sup>90</sup> Although these early efforts to increase transparency seemed promising, many critics now suggest that they did not actually have much of an effect at improving FOIA processing.<sup>91</sup>

Despite his critics, though, President Obama undoubtedly deserves credit for signing another update to FOIA into law in June 2016. Passed just nine months prior to the publication of this thesis, the FOIA Improvement Act of 2016 is still so recent that there does not appear to be any scholarly literature on it yet nor any data about its effectiveness. However, its efforts to make FOIA stronger appear to be of the same magnitude as those of E-FOIA and the OPEN Government Act that preceded it, making it another major amendment to the law. The act codified the presumption of openness that Obama initially instructed agencies to adopt in his 2009 policy memo,<sup>92</sup> giving additional weight to this requirement and making it harder for future presidents to reverse. It instructed agencies to withhold information from requesters only when they “reasonably foresee” that “disclosure would harm an interest protected by an exemption” written into the law or “disclosure is prohibited by law.”<sup>93</sup>

In addition, the law placed further limits on agencies’ ability to assess fees for the processing of requests, encouraged collaboration between agencies to strengthen FOIA

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<sup>89</sup> Ibid.

<sup>90</sup> U.S. Department of Justice, Department of Justice Guide to the Freedom of Information Act: President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia-memorandum.pdf>.

<sup>91</sup> Russell Paul La Valle, “Obama’s legacy will be one of secrecy and hostility toward the press,” *The Hill*, December, 19, 2016, <http://thehill.com/blogs/pundits-blog/the-administration/311026-obamas-legacy-will-be-one-of-secrecy-and-hostility>.

<sup>92</sup> *FOIA Improvement Act of 2016*, Public Law 114-185. U.S. Statutes at Large 130 (2016): 538.

<sup>93</sup> U.S. Office of Information Policy. "OIP Summary of the FOIA Improvement Act of 2016." *The U.S. Department of Justice*, <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

administration, and required agencies to submit more comprehensive annual reports summarizing their FOIA activities.<sup>94</sup> It also limited the use of some FOIA exemptions, expanded the role of the OGIS as a FOIA ombudsman, and required agencies to post more of their records online in an easily-accessible format.<sup>95</sup> All of these changes appear to have been made in response to criticism by FOIA requesters, who were increasingly complaining that the law no longer seemed to be serving its purpose of making the U.S. government more transparent.

It is likely that the FOIA Improvement Act's effectiveness will not be measurable for at least another few years. However, despite all the seemingly beneficial provisions within it, the act seems unlikely to reverse a trend that appears to have started a couple of decades ago in which efforts to improve FOIA performance have seemingly had the opposite effect of worsening it; as I explain moving forward, all of Congress's aforementioned efforts to close loopholes, increase agency oversight, and make FOIA more expansive counterintuitively seem to have resulted in a law that allows federal agencies to withhold more information from the American people than ever before, and the FOIA Improvement Act does not appear to be any different. In the next section, I discuss the current problems with FOIA in greater detail. Then, in this chapter's conclusion, I outline my plan for testing theories that could explain why these problems exist in the first place.

## **Contemporary Challenges**

In September 2012, Bloomberg News published an article on its website detailing the results of a study it had completed on FOIA. Three months earlier, the organization had submitted FOIA requests for information about the travel costs of top government officials at 57

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<sup>94</sup> Ibid.

<sup>95</sup> *FOIA Improvement Act of 2016*.

different federal agencies, and only eight responded to these requests within the 20-day window required by the law.<sup>96</sup> Of the 20 cabinet-level agencies to which the organization submitted requests, just one—the Small Business Administration—responded on time. By the time Bloomberg published its article, it had only received about half of the records it requested.<sup>97</sup> An official from the State Department contacted the organization saying that one request would not be processed for nearly a year.<sup>98</sup> It was clear that FOIA was not supposed to be working this way.

By publishing the results of its inquiries, Bloomberg helped to expose an alarming level of opaqueness in American governance; its experience with FOIA is far from unusual, as agencies regularly ignore, delay, or outright deny FOIA requests, even when they have no legal basis for doing so. According to the Associated Press, the Obama Administration set a new record in 2014 for censoring or denying FOIA requests and took longer to release records that were not denied.<sup>99</sup> Perhaps more alarming is the fact that nearly a third of FOIA denials were reversed when appealed by requesters, signaling that agencies regularly failed to enforce the law appropriately in the first place.<sup>100</sup> This means that the American people now know less about the inner workings of their government than they have in the past, limiting their ability to understand how their tax dollars are being spent and their power to subsequently use this information to hold government officials accountable. As Tom Rosenstiel, the former director of the Pew Research

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<sup>96</sup> Jim Snyder and Danielle Ivory, "Obama Cabinet Flunks Disclosure Test with 19 in 20 Ignoring Law." Bloomberg News, September 29, 2012, <http://www.newsmax.com/Newsfront/Obama-Cabinet-disclosure-test/2012/09/29/id/458086/>.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ted Bridis. "Obama Administration Sets New Record for Withholding FOIA Requests." *The Associated Press*, March 18, 2015, <http://www.pbs.org/newshour/rundown/obama-administration-sets-new-record-withholding-foia-requests/>.

<sup>100</sup> Ibid.

Center's Project for Excellence in Journalism, recently said, "[m]ore of American life now occurs in shadow. And we cannot know what we do not know."<sup>101</sup>

In an attempt to understand why FOIA performance has worsened, a nonprofit known as the Center for Effective Government recently published a review of the 15 federal agencies that received the most FOIA requests in FY2012. According to the report, these agencies, including the Department of State, the Department of Homeland Security, and the Department of Defense, collectively received more than 90% of all FOIA requests that year, and only eight received passing grades on the organization's scorecard.<sup>102</sup> In other words, seven agencies failed to meet the Center's basic requirements for effectively implementing the law. The organization evaluated the agencies across three categories, (1) the processing times and eventual outcomes of the requests they received, (2) the effectiveness of their disclosure rules designed to increase transparency, and (3) the user-friendliness of their websites to facilitate the process of making requests.<sup>103</sup> In each category, at least one agency received an "A" grade, signaling that the organization's grading criteria were not too strict, but no agency received above a "B" overall, indicating that they all had room for improvement.<sup>104</sup> The Department of Homeland Security, which receives by far the most FOIA requests each year, received the second-lowest grade in the review, meaning that Americans had exceptional difficulty accessing some of the records they wanted most.<sup>105</sup>

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<sup>101</sup> Erin C. Carroll, "Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press," *Utah Law Review* 2016, no. 2 (2016). 206.

<sup>102</sup> Gavin Baker and Sean Moulton, "Making the Grade: Access to Information Scorecard 2014 Shows Key Agencies Still Struggling to Effectively Implement the Freedom of Information Act," (Center for Effective Government, 2014). 1.

<sup>103</sup> *Ibid.*, 5.

<sup>104</sup> *Ibid.*, 7.

<sup>105</sup> *Ibid.*

As I mentioned at the beginning of this chapter, even though FOIA was the most comprehensive information law in the world in 1966,<sup>106</sup> that is no longer the case; a recent study found that FOIA is now weaker than comparable laws it once inspired in more than 40 other countries,<sup>107</sup> and another study conducted around the same time resulted in similar findings.<sup>108</sup> Although it is challenging to find empirical data that supports this notion, as I explain in the following section, the experiences of journalists and others who use the law on a regular basis provide enough evidence to suggest that the law is indeed weaker than ever before. David Cullier, a former president of the Society for Professional Journalists, recently said that federal agencies “are getting more sophisticated in denying, delaying, and derailing requests, using FOIA as a tool of secrecy, not openness.”<sup>109</sup> And in 2015 Leah Goodman, an investigative reporter for *Newsweek*, mentioned that “never before have we seen so many government agencies that have turned themselves into veritable black boxes—where information flows in and nothing comes out.”<sup>110</sup> She concluded by saying that “[w]hat we are now witnessing in terms of obstructionism and obfuscation is truly unprecedented.”<sup>111</sup>

Countless others agree. Sharyl Attkisson, a journalist best known for her work with CBS News, recently described FOIA as “largely a pointless, useless shadow of its intended self.”<sup>112</sup> Mary Beth Hutchens, the communications director of a nonprofit known as Cause of Action that advocates for government accountability, said that “[t]he utility of FOIA as an oversight tool to

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<sup>106</sup> Carroll, 207.

<sup>107</sup> *Ibid.*, 215.

<sup>108</sup> U.S. Congress. Senate. Committee on the Judiciary, *We The People: Fulfilling the Promise of Open Government Five Years After the OPEN Government Act: Hearing before the Committee on the Judiciary*. 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 13, 2013. 82.

<sup>109</sup> Carroll, 214.

<sup>110</sup> U.S. Congress. House. Committee on Oversight and Government Reform, *Ensuring Transparency Through the Freedom of Information Act (FOIA): Hearing before the Committee on Oversight and Government Reform*. 114<sup>th</sup> Cong., 1<sup>st</sup> sess., June 2, 2015.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*



track the federal government’s activities is on the brink of being undermined.”<sup>113</sup> And a 26-year-old freelance journalist recently wrote a letter to the House Committee on Oversight and Government Reform describing his first experience with FOIA, in which he wrote that “I often describe the handling of my FOIA request as the single most disillusioning experience of my life.”<sup>114</sup> There is no doubt that the law is broken.

### **Empirical Limitations**

This project is dedicated to exploring why three major updates to FOIA over the past two decades—the Electronic Freedom of Information Act Amendments of 1996, the OPEN Government Act of 2007, and the FOIA Improvement Act of 2016—do not appear to have accomplished their goal of making the law stronger and seem to have actually made it weaker. Empirically verifying that this is the case would require finding evidence that (1) the proportion of FOIA requests that are denied and (2) the average FOIA request processing time have both increased following the passage of each amendment to the law. However, although recent studies and the testimonies of the journalists who use the law most provide ample support for the notion that FOIA performance throughout the executive branch is weak, proving that performance has worsened with each iteration of the law is more challenging, primarily because accurate and comprehensive empirical data on the matter is unavailable.

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<sup>113</sup> U.S. Congress. House. Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the Committee on Oversight and Government Reform, *FOIA in the 21<sup>st</sup> Century: Using Technology to Improve Transparency in Government: Hearing before the Subcommittee on Technology, Information Policy, Intergovernmental Relations, and Procurement Reform of the Committee on Oversight and Government Reform*. 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 21, 2012. 61.

<sup>114</sup> U.S. Congress. House. Committee on Oversight and Government Reform. *FOIA is Broken: A Report*. 114<sup>th</sup> Cong., 1<sup>st</sup> sess., 2016. ii.

As I explained earlier in this chapter, each of the three recent amendments to the law increased the number and diversity of statistics that federal agencies were required to include in their annual FOIA reports. 1996's E-FOIA was the first amendment to the law that made these reports mandatory, and it required that agencies include statistics about the number of requests they received and processed from the previous year; the number of requests pending at the end of the year; the median number of days it took them to process different types of requests; and explanations for their decisions not to disclose certain requested information, among other statistics.<sup>115</sup> Because agencies were not required to report this data prior to E-FOIA, few of them did so, and compiling government-wide statistics about FOIA performance prior to 1996 is therefore impossible. Additionally, even after E-FOIA was passed, it does not appear that there was any federal agency that took the time to combine the data in each individual agency's report into meaningful government-wide statistics until more than a decade later, when the Office of Information and Privacy released a report summarizing all agency activity in FY2006.<sup>116</sup> Consequently, measuring E-FOIA's effects is difficult because no baseline is available.

Although some nonprofit organizations attempted to pick up the slack and compile government-wide FOIA reports on their own, they were limited by the information available to them. For example, as Meredith Fuchs, the general counsel of the National Security Archive, explained in a 2007 hearing before the Senate Committee on the Judiciary, the requirement that agencies report the median processing time of their FOIA requests was "essentially meaningless" because the number "conceal[ed] long backlogs and [did] not accurately reflect the true state of

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<sup>115</sup> U.S. Government Accountability Office. "Freedom of Information Act: Processing Trends Show Importance of Improvement Plans." Report. <http://www.gao.gov/assets/260/258549.pdf>. 14.

<sup>116</sup> U.S. Department of Justice. "Summary of Annual FOIA Reports for Fiscal Year 2006." *U.S. Department of Justice*, <https://www.justice.gov/oip/blog/foia-post-2007-summary-annual-foia-reports-fiscal-year-2006>.

FOIA operations at an agency.”<sup>117</sup> Additionally, Fuchs explained, “it is difficult to derive other statistics, including trends across agencies, from median data because these numbers cannot be aggregated.”<sup>118</sup> Even the federal government admitted that this was a problem. In a 2007 report on FOIA performance in 2005, for example, the Government Accountability Office (GAO) said that “with only medians it is not statistically possible to combine results from different agencies to develop broader generalizations, such as a governmentwide statistic based on all agency reports, statistics from sets of comparable agencies, or an agencywide statistic based on separate reports from all components of the agency.”<sup>119</sup> The GAO recommended that agencies report arithmetic means as well so that these statistics could be compiled,<sup>120</sup> and members of Congress subsequently made this a requirement when they passed the OPEN Government Act of 2007.<sup>121</sup>

Even though more comprehensive data about FOIA performance post-2007 is now available, there is reason to question the reliability of this data, as some agencies have used dubious tactics when compiling information for their FOIA reports. For example, at the same 2007 hearing in which she criticized the requirement that agencies report median statistics, the National Security Archive’s Meredith Fuchs suggested that the Department of the Treasury in particular was reducing its FOIA backlogs in questionable ways. “Starting in August 2006,” she said, “we began to get letters from the Treasury asking if we continued to be interested in our FOIA requests. The letters warned ‘if we do not receive a reply...within 14 business days...we will close our files regarding this matter.’”<sup>122</sup> A recent executive order signed by President

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<sup>117</sup> U.S. Congress. Senate. Committee on the Judiciary, *Open Government: Reinvigorating the Freedom of Information Act: Hearing before the Committee on the Judiciary*. 110<sup>th</sup> Cong., 1<sup>st</sup> sess., March 14, 2007. 31.

<sup>118</sup> *Ibid.*

<sup>119</sup> U.S. Government Accountability Office, 31.

<sup>120</sup> *Ibid.*, 19.

<sup>121</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*, Public Law 110-175. U.S. Statutes at Large 121 (2007): 2524-2531.

<sup>122</sup> U.S. Congress, Senate, Committee, *Implementing FOIA*, 8.

George W. Bush had required agencies to develop plans for improving their FOIA performance, and one of the goals the Treasury Department had laid out in its plan was to reduce its FOIA backlog by ten percent by the start of 2007.<sup>123</sup> According to Fuchs, it appeared that the agency was attempting to do so by finding ways to avoid processing certain requests altogether instead of taking the traditional route of devoting additional resources to processing backlogged requests more quickly; assuming that the department sent similar time-sensitive letters to many or all of those who had outstanding requests with the agency, it is likely that the department was able to reduce its backlog simply by removing the requests of those who failed to respond within the required timeframe from its queue.

The Department of the Treasury would eventually announce that it had far surpassed its goal for 2006, reducing its FOIA backlog by an astonishing 40%—significantly more than its initial 10% goal.<sup>124</sup> Encouraged by this progress, the agency seemingly took its efforts to a new level; Fuchs explained that her organization had received several letters within the past year that indicated that many of its FOIA requests that had been submitted in the mid-1990s had somehow been destroyed.<sup>125</sup> The agency asked the National Security Archive to send in new copies of the requests.<sup>126</sup> Although the nonprofit was able to do so and the agency’s backlog therefore did not change, it is easy to imagine that the same strategy of “accidentally” destroying requests could have been successful with others who were less organized and were unable to produce the required documents. And while this technically would have reduced the department’s backlog, it would not have done so through any additional processing of FOIA requests; in other words, it

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<sup>123</sup> Ibid.

<sup>124</sup> U.S. Department of the Treasury. "Freedom of Information Act: Annual Report to the Attorney General for Fiscal Year 2007" U.S. Department of the Treasury. 20.

<sup>125</sup> U.S. Congress, Senate, Committee, *Implementing FOIA*, 27.

<sup>126</sup> Ibid.

would have allowed the department to meet its FOIA performance goals without actually improving performance and increasing the amount of information released to the public.

There is some evidence that other agencies have used similar questionable tactics to manipulate their FOIA statistics. At a 2011 hearing before the House Committee on Oversight and Government Reform, for example, Angela Canterbury, the director of the Public Policy Project on Open Government Oversight, mentioned part of a recent report by the Associated Press, which revealed that the Department of Homeland Security (DHS) had cut its FOIA backlog by 40 percent, “in part by referring thousands of cases to the State Department.”<sup>127</sup> Canterbury described this as a “shell game” and noted that the State Department’s own backlog doubled as a result.<sup>128</sup> DHS’s numbers may have improved, but the overall disclosure of information remained unchanged.

Given these two examples, it is certainly conceivable that the practice of manipulating FOIA data is an even more widespread issue, especially when agencies have incentive to disobey the law to protect their own activities from external scrutiny. Members of the House Committee on Oversight and Government Reform recognized this in a 2016 report, in which they noted the irony in the fact that “[t]he agency making the decision to withhold information is also the agency with the most at stake if embarrassing or controversial information is released.”<sup>129</sup> Additionally, FOIA still lacks substantive penalties for agencies who fail to comply with the law, so there are few reasons why agencies would choose to refrain from bending the rules in this way. As a result, while the data that agencies report should not, in most cases, be totally

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<sup>127</sup> U.S. Congress. House. Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-Sourcing Government Oversight: Hearing before the Committee on Oversight and Government Reform*. 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 17, 2011.

<sup>128</sup> *Ibid.*

<sup>129</sup> *FOIA is Broken*, 9.

discounted, one should view it with a healthy skepticism and understand that it may not be telling the entire story.

A final consideration when analyzing FOIA data is that the most recent amendments to the law do not represent the only changes to FOIA policy within the same timeframe; Presidents Clinton, Bush, and Obama, for example, all issued executive orders or other memorandums during their tenures that instructed the federal agencies under their control to implement FOIA in particular ways. These efforts have inevitably had an impact on FOIA performance as well. When looking at FOIA statistics for the past decade, for instance, it is impossible to know for sure whether an increase in backlogs and denials is the result of measures included within the OPEN Government Act of 2007, a 2005 executive order issued by President Bush, a 2009 memorandum issued by President Obama, a combination of all three, or some other factor that is more difficult to detect.

To summarize, there is evidence to suggest that the FOIA data agencies report as required by the law may be too incomplete and/or unreliable to empirically prove that a certain amendment has had a particular effect on FOIA performance. The information necessary to compile government-wide FOIA statistics has not been available for long enough to be able to compare agency backlogs, for example, both before and after 1996's Electronic Freedom of Information Act and 2007's OPEN Government Act, making it impossible to conclude with certainty whether they have weakened or strengthened the law. However, as explained in the previous section, the limited reliable data about FOIA performance that is available suggests that the law is currently not working as intended, so it is safe to assume that recent amendments to it have not totally accomplished their stated goal of facilitating the release of information. In addition, the testimonies of journalists and transparency advocates such as Tom Rosenstiel, who

claimed with certainty that “more of American life now occurs in shadow,”<sup>130</sup> provide further support for this notion.

## **Conclusion**

In this chapter, I have summarized the history of the Freedom of Information Act and its development throughout the past half century. I explained that although the law was initially the most comprehensive freedom of information law in the world, it now lags behind those in a few dozen other countries. Although reliable empirical data is unavailable to support the notion that FOIA is truly weaker than ever before, the testimonies of journalists and others who use the law regularly allow me to conclude that this is indeed the case, setting the stage for the rest of this project. In the following chapters, I examine why recent amendments designed to strengthen FOIA do not appear to have accomplished this goal. I start by discussing two existing scholarly theories that attempt to explain why this is the case before outlining a third theory that I have developed myself. I then outline my plan for testing these theories in the rest of the project.

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<sup>130</sup> Carroll, 206.

## **EXPLAINING DECLINES IN FOIA PERFORMANCE**

Evidence presented in the last chapter indicates recent amendments to the Freedom of Information Act have not accomplished their stated goals of improving FOIA performance. In this chapter, I present three theories that could help to explain this outcome. I start by outlining two theories prevalent in existing scholarship that posit that an increased volume and an evolving composition of FOIA requests have caused federal agencies to handle the requests differently. The first suggests that the number of requests that each agency receives on an annual basis has increased so rapidly that agencies have been unable to process all of them on time, creating growing backlogs. According to this theory, this process that has been exacerbated by recent FOIA amendments, which have increased agencies' responsibilities related to the law without a corresponding increase in funding to support them, leaving FOIA officials overwhelmed. The second theory suggests that, particularly following 9/11, an increased proportion of FOIA requests have recently been related to sensitive national security issues that are exempted from disclosure through the law, which would explain why FOIA denials have been rising. Both of these theories relate to a changing demand in FOIA requests, and although there is evidence to support each of them, neither addresses the supply side of the equation; is it possible that changes to FOIA itself are the cause of the law's many problems?

I examine this possibility throughout my project by testing a third hypothesis that has not yet been the subject of FOIA scholarship. I suggest that recent amendments to the law have ultimately made it weaker and worsened performance, even though the legislators who passed the amendments have claimed that they were actually designed to do the opposite; legislators may be incentivized to pass laws that appear to improve FOIA but fail to actually do so, I argue,



in an attempt to demonstrate responsiveness to their constituents' calls for increased government transparency while simultaneously serving some of the legislators' other political interests. These interests could include protecting the national security or sheltering the executive branch from undue scrutiny, for example, both of which would be accomplished by limiting the disclosure of information. As I explain, this theory is largely based on political scientist George Lovell's 2003 book *Legislative Deferrals*. Toward the end of this chapter, I outline this theory in greater detail by discussing how legislators might go about designing laws in this way. I then provide preliminary evidence to support the theory in relation to FOIA before concluding with a summary of the chapter as a whole and a brief outline of the rest of this project.

### **Existing Explanations**

Existing scholarship on the Freedom of Information Act points to two general theories that attempt to explain why it has become ineffective. Both suggest that the recent increase in FOIA denials is the result of an increased or evolving demand for government information. The first theory proposes that because recent efforts to make the law more expansive have not been accompanied by additional funding to support agencies in their added responsibilities, agencies have had no choice but to deny, delay, or ignore requests that would otherwise result in the release of records. The second proposes that, in the wake of the September 11<sup>th</sup> terrorist attacks, the percentage of FOIA requests related to sensitive national security issues has increased, so more FOIA requests overall are being denied through agencies' invocations of exemptions written into the law. In this section, I summarize these theories in greater detail before turning to a discussion about why my project instead focuses on a third hypothesis, which I outline in the following section.

### *Lack of Resources*

One theory contends that the failure of recent FOIA amendments to improve performance results from a rapidly increasing volume of requests that agencies have not had the financial nor staff resources to keep up with. According to Department of Justice, the government-wide volume of FOIA requests to federal agencies has skyrocketed in recent years, rising from 557,000 requests in FY2009 to 788,000 in FY2016.<sup>1</sup> That is an increase of about 41%. During roughly the same period, the number of full-time federal employees tasked with processing FOIA requests rose from about 3,700 to 4,200, or an increase of just 15%.<sup>2</sup> This means that the volume of FOIA requests has risen markedly faster over the past decade than the federal workforce charged with implementing the law, forcing agencies to accomplish more with comparatively smaller staffs. Because of these staffing constraints, it is perhaps understandable that backlogs at agencies might start to accumulate, or that FOIA officials might be more inclined to deny requests for information that is legally disclosable just to keep up with their overwhelming workload.

Some scholars suggest that budget and staffing constraints at agencies have been exacerbated by recent amendments to FOIA, which have increased agencies' responsibilities under the law but have not provided agencies with corresponding increases in funding to fulfill these responsibilities. The Electronic Freedom of Information Act, the OPEN Government Act, and the FOIA Improvement Act all included substantial provisions to increase the accessibility of government records by expanding FOIA's reach and ensuring that agency activities were monitored appropriately. However, none of the laws increased funding to agencies to help them

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<sup>1</sup> U.S. Department of Justice, "Summary of Annual FOIA Reports for Fiscal Year 2015," *U.S. Department of Justice*, [https://www.justice.gov/oip/reports/fy\\_2015\\_annual\\_foia\\_report\\_summary/download](https://www.justice.gov/oip/reports/fy_2015_annual_foia_report_summary/download).

<sup>2</sup> U.S. Department of Justice, "Summary of Annual FOIA Reports for Fiscal Year 2008," *U.S. Department of Justice*, <https://www.justice.gov/oip/blog/foia-post-2009-summary-annual-foia-reports-fiscal-year-2008>.

accommodate a subsequent increase in FOIA requests and the additional demands on their time because of these changes.<sup>3</sup> In an article about the aftermath of E-FOIA, for example, Meredith Fuchs and Kristin Adair wrote that it “is not enough to say that federal agencies are not complying with the law,” but rather “their failures, nearly across the board, to implement E-FOIA suggest several more systemic problems,” including chronic underfunding.<sup>4</sup> Indeed, the fact that Congress needed to update FOIA so significantly later that year with the passage of the OPEN Government Act serves as ample evidence that E-FOIA was not working effectively. Why Congress decided to refrain from solving this problem by increasing agency funding in either of its subsequent updates to the law is another question.

It is therefore possible that recent declines in FOIA performance are largely the result of factors outside the control of the government officials who implement the law and, to a certain extent, the legislators who have passed recent amendments designed to improve it; although legislatively increasing funding to agencies for implementing their FOIA responsibilities would have helped to alleviate this problem, it is unclear whether doing so was a realistic possibility for members of Congress at the time the amendments were passed. It is also possible that the recent increase in FOIA requests may be the result of efforts by Congress to streamline the requesting process through new requirements that agencies accept requests electronically, for example. In this case, although the amendments doing so may have played a role in exacerbating funding constraints, there does not appear to be evidence that the legislators who designed them intended

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<sup>3</sup> *Electronic Freedom of Information Act Amendments of 1996*, Public Law 104-231. U.S. Statutes at Large 110 (1996): 3048-3054.;

*Openness Promotes Effectiveness in Our National Government Act of 2007*, Public Law 110-175. U.S. Statutes at Large 121 (2007): 2524-2531.;

*FOIA Improvement Act of 2016*, Public Law 114-185. U.S. Statutes at Large 130 (2016): 538.

<sup>4</sup> *Ibid.*, 14.

that this outcome occur. Nevertheless, it appears that the amendments have contributed to resource limitations in some way, potentially worsening FOIA performance.

### *National Security Concerns*

Other scholars contend that FOIA performance has worsened simply because the composition of FOIA requests has changed over the past two decades, allowing agencies to legally invoke exemptions or exclusions written into the law more regularly in valid efforts to protect sensitive information. As mentioned in the last chapter, FOIA's development over the past 50 years has been characterized by efforts from competing groups in Congress to strike a balance between respecting the public's right to know about the inner workings of its government and protecting information that could potentially be harmful if it were publicly disclosed. Consequently, there are several exemptions and exclusions written into the law that allow agencies to legally deny the release of records.<sup>5</sup> Although many would argue that these tools are also used to withhold certain information illegally, and that these illegal invocations are more responsible for the massive increase in FOIA denials, it is still possible that the increase is at least partly a result of legal decisions made because of increases in particular types of requests.

When invoked, exemptions and exclusions differ in the amount of information that FOIA requesters receive when their requests are denied. When agencies invoke exclusions to deny requests, they claim that the requested records simply do not exist; when they invoke exemptions, they acknowledge that the records exist but refuse to release them anyway to prevent the public from learning about sensitive government information. The exclusions written into the law are related to protecting the process of intelligence gathering, as demonstrated in

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<sup>5</sup> Tina Zappile. "Freedom of Information Act." (2014). 8.

Table 1.2 in the last chapter (page 25). Although a broader array of interests is protected by FOIA exemptions, as Table 1.1 demonstrates (page 21), the exemptions used most frequently by some of the agencies that receive the most requests are also related to intelligence gathering or other issues connected to national security.<sup>6</sup> If more FOIA requests government-wide have recently been related to these issues, then it is possible that this accounts for part of the seeming increase in recent FOIA denials.

Some data supports this notion. The idea behind FOIA's exclusions and exemptions is closely related to something known as the state secrets privilege, which is used by executive branch agencies to prevent the disclosure of sensitive information in court. The privilege was first used in *United States v. Reynolds* (1953), in which the widows of three engineers killed on a military bomber sued the government for several key documents related to the incident.<sup>7</sup> The engineers were civilians who provided technical assistance as secret equipment was being tested on the flight, and their widows sought access to the official accident report to understand what happened.<sup>8</sup> Attorneys for the federal government argued that providing this information would threaten the national security, and the Supreme Court accepted this position, even though by doing so it set a precedent that weakened the judiciary's constitutional power to check executive actions.<sup>9</sup> In his majority opinion, Chief Justice Fred Vinson suggested that information about the equipment being tested was both dangerous to disclose and irrelevant to the case at hand:

there [is] a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission...[and there] is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon

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<sup>6</sup> Ibid., 5.

<sup>7</sup> Louis Fisher, "The State Secrets Privilege: From Bush II to Obama," *Presidential Studies Quarterly* 46, no. 1 (2016): 177.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

military secrets.<sup>10</sup>

The requested information was eventually declassified a half-century later, and it became clear then that the requested records did not actually contain any state secrets, but rather evidence of government negligence that had caused the bomber to crash.<sup>11</sup> Vinson and the other justices had been wrong, but they did not know this at the time because they did not read the requested records themselves.<sup>12</sup>

The *Reynolds* case set a precedent for future court cases related to national security, giving executive branch agencies the ability to determine on their own whether certain information should be used as evidence in court. However, considering the immense power that this gave the agencies, they still used the state secrets privilege relatively infrequently for about a half-century.<sup>13</sup> That changed, though, following the September 11, 2001 terrorist attacks. In the years since, the use of the privilege has expanded dramatically.<sup>14</sup> Scholar Daniel Cassman suggests that one possible explanation for this “is that lawsuits challenging counterterrorism policies—such as detention, detainee treatment, and surveillance—created entirely new areas of litigation that consistently touch on sensitive security matters.”<sup>15</sup> However, he also notes that the distribution of rulings in state secrets court cases since 9/11 is the same as it was beforehand;<sup>16</sup> in other words, the percentage of cases in which courts accept the state secrets privilege as a reason to withhold information has remained the same following 9/11, even though the overall number of cases in which the privilege is accepted has increased as a result of the government’s

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<sup>10</sup> U.S. Supreme Court, "United States V. Reynolds, 345 U.S. 1 (1953)," (Justia).

<sup>11</sup> Fisher, 177.

<sup>12</sup> Ibid.

<sup>13</sup> Daniel R. Cassman, "Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine," *Stanford Law Review* 67, no. 5 (2015). 1173.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., 1191.

<sup>16</sup> Ibid., 1192.

increased invocation of it. While Cassman contends that this data indicates that the state secrets privilege has continued to be used appropriately following 9/11, other scholars argue that it instead reflects continued overuse.<sup>17</sup> Either way, the fact that the privilege has an effect of limiting government transparency is undeniable.

A similar argument can be made about FOIA exemptions and exclusions. It is possible that agencies are using these measures in the same manner that they did prior to 9/11, but that the number of FOIA requests denied on these grounds has increased because the number of requests related to sensitive national security issues has also increased. Agencies would therefore be following the law appropriately by invoking the exemptions and exclusions specifically written into it to withhold information. It is also possible that these national security concerns have contributed to the recent increase in FOIA backlogs, as determining whether to disclose potentially sensitive military information, for example, likely takes longer than making determinations about information that is more obviously disclosable. There are also instances when agencies decide to partially fulfill requests by releasing records that they heavily redact beforehand, which can be a time-consuming procedure that contributes to the processing of fewer records overall. This would suggest that FOIA is actually working as intended while agency officials carefully process sensitive requests, despite the cries of transparency advocates who claim that the law is broken.

### *Discussion*

To summarize, existing scholarship seems to suggest that there are two overarching theories that attempt to explain why FOIA seems to have become so ineffective. The first theory

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<sup>17</sup> Ibid., 1194.

states that a lack of funding has forced executive branch agencies to ignore or deny more FOIA requests as the volume of requests has increased and amendments to the law have placed additional FOIA-related demands (such as increased oversight and reporting requirements) on agencies. The second theory states that an increase in FOIA requests related to sensitive national security issues has resulted in more denials through the invocation of exemptions and exclusions written into the law. Although there is evidence to support both of these theories, each fails to address some important questions that should at least be considered when trying to understand recent FOIA performance.

Perhaps the biggest question relates to Congress's role in passing amendments to FOIA over the past 20 years: if a lack of funding or an increase in national security requests are really responsible for the law's current ineffectiveness, then why has Congress refrained from addressing these problems in each of its recent updates? One answer might be related to political scientist Eric Schickler's concept of "disjointed pluralism," in which tensions between competing coalitions in Congress with different interests result in fragmented final product that accomplishes only some of each coalition's respective goals.<sup>18</sup> It is possible that pressures to keep costs down and protect national security interests have been so strong that they have entirely prevented Congress from taking measures to make FOIA more effective. However, if this is the case, then it raises another important question: if fixing the law's biggest problems in these ways has proven to be politically infeasible, then why has Congress bothered to update the laws at all? Existing theories do not address the congressional motivations that could provide additional insight into why Congress, with all the other demands on its time, would choose to repeatedly amend FOIA without actually addressing the law's major problems. Although it is

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<sup>18</sup> Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton: Princeton University Press, 2001). 4.



possible that legislators are simply determined to improve the law however they can, it is also possible that they might have different intentions in passing amendments than they lead the public to believe—an idea I explore in greater detail in the next section.

### **A Different Approach**

Existing scholarship on FOIA identifies problems with the law that have intensified over the past two decades, either because of an overall increase in FOIA requests that has overwhelmed agencies or because of an increase in requests for information related to national security issues that are exempted from disclosure. Both are related in part to the public's increased demand for information. However, the supply side of the equation has not yet been examined in sufficient detail. Is it possible that members of Congress have made the problem worse through their recent amendments to FOIA, and that they are enabling federal agencies to continue abusing the law? What if the recent amendments to FOIA have failed not because of congressional incompetence but instead because that is exactly what they were intended to do? What really goes into the process of passing a law, and what motivations do lawmakers have that they might want to hide from their constituents?

I attempt to answer those questions in this section by outlining a new hypothesis that has not yet been analyzed by others in the FOIA scholarship. I suggest that members of Congress may be motivated to intentionally pass amendments to FOIA that appear to improve performance but fail to do so. Such action could satisfy public demands for greater transparency while also protecting other interests that might be threatened by a more robust law; as I explain, some scholars argue that concerns about reelection are the primary motivators for legislators when making policy decisions, so appeasing their constituents is therefore a top priority. However, I

suggest that there are other interests that legislators may also need to consider when passing transparency laws—such as protecting the national security or limiting oversight of the executive branch—that may not always be politically popular. By passing laws that seem to accomplish one politically advantageous goal but that actually accomplish something else, legislators can ensure that all of their interests are being addressed, and I argue that this is exactly what has happened with FOIA.

This theory is based largely on the work of George Lovell, who outlines a process through which legislators may pass laws in this way in his book *Legislative Deferrals*. In the next subsection, I elaborate on Lovell’s scholarship. Then, in the following subsection, I explain the connections between his work and my own before outlining my plan to test this theory in the rest of my project.

### *Defining a Legislative Deferral*

In *Legislative Deferrals*, Lovell examines four federal labor statutes passed in the United States between 1898 and 1935: the Erdman Act (1898), the Clayton Act (1914), the Norris-LaGuardia Act (1932), and the Wagner Act (1935). He explains that each of these laws initially appeared to represent a major victory for the increasingly powerful labor movement in the country.<sup>19</sup> However, important provisions within the Erdman, Clayton, and Wagner Acts were all subsequently overturned by the courts in what seemed to be clear reversals of the intentions the legislators who passed the laws, limiting the political power of the labor movement they were supposedly designed to appease.<sup>20</sup> Naturally, this angered pro-labor voters, who Lovell explains

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<sup>19</sup> George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge, UK; New York: Cambridge University Press, 2003).

<sup>20</sup> *Ibid.*, 3.

expressed their frustration by criticizing the judges who made the controversial rulings.<sup>21</sup> He argues, however, that the judges themselves should not have received all the blame for these decisions; instead, he suggests that members of Congress may have intentionally designed the laws so that the courts would be compelled to make these rulings,<sup>22</sup> thereby placing judges at fault for the laws' shortcomings. Legislators made "deliberate efforts to deceive the workers whose interests were allegedly being served by the statutes,"<sup>23</sup> he writes, as they attempted to "establish their responsiveness by passing nonresponsive statutes."<sup>24</sup> Throughout his book, he attempts to prove that this is the case.

Before I explain Lovell's argument in detail, however, it is important to understand why members of Congress make the choices that they do. There is a vast literature on this topic, and although providing a comprehensive account of the arguments and theories within it is beyond the scope of this project, there seems to be a consensus among scholars that one motivation in particular is often at the forefront of legislators' minds: reelection. Lawmakers know that they will likely find themselves unemployed within a few years if they do not appease their constituents, and political scientist R. Douglas Arnold consequently suggests that there is nothing more important to them than doing so and winning reelection. "This means," he writes, "that legislators will do nothing to advance their other goals if such activities threaten their principal goal...[Only when] reelection is not at risk...[are they] free to pursue other goals, including enacting their own visions of good public policy or achieving influence within Congress."<sup>25</sup>

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<sup>21</sup> Ibid., 49.

<sup>22</sup> Ibid., 12.

<sup>23</sup> Ibid., 254.

<sup>24</sup> Ibid., 259.

<sup>25</sup> R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990). 5.

David Mayhew and others similarly suggest that reelection is a main motivating factor for lawmakers.<sup>26</sup>

With reelection in mind, legislators in the early twentieth century knew that passing labor laws would be risky. Labor organizations in the country were growing in size and influence, yet there was also a substantial portion of the American electorate that was not necessarily sympathetic to these organizations' pro-labor demands.<sup>27</sup> This made it impossible for legislators to enact labor policy that would satisfy everyone. Consequently, Lovell argues that members of Congress devised a way to avoid making controversial policy decisions altogether. "Caught between powerful constituencies with incompatible demands," he writes, "legislators preferred to avoid the political costs of making clear decisions...[and] thus decided that their political interests were best served by passing statutes that appeared to make decisive choices but that covertly empowered the courts" instead.<sup>28</sup> He describes the process of doing so as a legislative deferral.<sup>29</sup>

Developing the concept of a legislative deferral required Lovell to rethink one of the most widespread assumptions in political science. He argues that most scholarship on the relationship between Congress and the Court assumes that the two branches are fundamentally at odds with each other competing for power, when the reality is more complex.<sup>30</sup> He names this traditional framework for understanding and evaluating judicial power the "legislative baseline framework:"

I call [this] framework the *legislative baseline framework* because its core assumption is that outcomes established by elected legislators form a democratic baseline against which to evaluate decisions made by less directly accountable judges. The legislative baseline framework leads scholars to evaluate the impact and legitimacy of judicial decisions by

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<sup>26</sup> David R. Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 2004).

<sup>27</sup> Lovell, 24.

<sup>28</sup> *Ibid.*, 3.

<sup>29</sup> *Ibid.*, xviii.

<sup>30</sup> James Magee, "Book Review: Politics, Judicial Review and the Separation of Powers," *Journal of Legislative Studies* 13, no. 2 (2007). 324.

comparing the position established by judges to a baseline position established earlier by legislators.<sup>31</sup>

In other words, Lovell argues that judicial rulings have always been evaluated in comparison to the supposed legislative intent of Congress when passing the laws under review. However, he contends that it is easy to overlook the true significance of court decisions when viewing them from this perspective. “[T]he framework is important because it influences scholars’ ideas about which questions are interesting, which cases are important, and what evidence can be ignored,” he writes.<sup>32</sup> Consequently, it appears to Lovell that many scholars have asked the wrong questions and have fundamentally misinterpreted the labor laws that he studies. He is able to draw new conclusions about their significance by disregarding the legislative baseline framework and fundamentally reimagining the relationship between Congress and the Court to be far less adversarial than many scholars might assume.

By suggesting that members of Congress might actually have different goals when developing policy than they say they do, Lovell exposes a darker side of lawmaking, where the words of members of Congress cannot always be taken at face value. As a result, it is difficult for judges to ascertain the true intentions of legislators when laws are challenged in court,<sup>33</sup> creating the possibility that decisions typically seen as judicial reversals may not actually be reversals at all; instead, judges may make decisions to invalidate statutes that lawmakers never would have enacted in the first place if they had not been concerned about reelection. Rather than checking congressional power, then, these judicial decisions actually work to reinforce it; Congress and the Court work together in this scenario rather than against each other.<sup>34</sup> Lovell argues that

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<sup>31</sup> Lovell, 4.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid., xviii.

<sup>34</sup> Ibid., 9.

lawmakers elicit this outcome through legislative deferrals, which are carefully constructed provisions within their bills designed to provoke judicial interpretation.<sup>35</sup>

Specifically, Lovell explains that a legislative deferral occurs when lawmakers write their legislation to include provisions that are purposefully ambiguous and will undoubtedly require judges to make key decisions about their implementation.<sup>36</sup> Doing so allows legislators to “establish their responsiveness [to constituents] by passing nonresponsive statutes,” he writes, that do not accomplish any of the goals that they are supposedly intended to but nevertheless increase the legislators’ chances at reelection.<sup>37</sup> “For example,” he suggests that “many legislators might vote for a popular campaign finance reform law that threatens their chances at being reelected, but end up quite happy when judges predictably strike down the law on constitutional grounds” following a deferral.<sup>38</sup> Lovell explains that “saying and doing things that disguise deferrals as clear, responsive, and responsible policy choices” inevitably makes the move politically worthwhile for lawmakers while also allowing them to pursue other interests that may not be as politically popular.<sup>39</sup>

Scholar Mark Graber writes that Lovell’s work is now part of a broader trend of scholarship in political science that proposes that “[j]udicial review is established and maintained by elected officials.”<sup>40</sup> In the case of the labor statutes that Lovell examines, Graber argues that the eventual anti-labor decisions in the courts were nearly inevitable, not only because of legislative deferrals but also because the “Taft, Harding, and Coolidge administrations [in power at the time] fought to staff the federal judiciary with political actors prone to construe...[this]

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<sup>35</sup> Ibid., 41.

<sup>36</sup> Ibid., 41.

<sup>37</sup> Ibid., 259.;

Ibid., 9.

<sup>38</sup> Ibid., 28.

<sup>39</sup> Ibid., 11.

<sup>40</sup> Mark A. Graber, "Constructing Judicial Review," *Annual Review of Political Science* 8, no. 1 (2005). 427.

language against labor.”<sup>41</sup> This supports Lovell’s contention that “all the participants in the legislative process expected judges to be hostile to the interests of labor organizations and expected judges to make rulings reflecting their ideology.”<sup>42</sup> Although members of Congress inevitably risked sacrificing some of their policy goals by deferring decision-making to the courts, they were able to predict with a great deal of certainty how the judges would rule based on their ideological leanings, making rulings favorable to their interests a safe bet.

Lovell develops three criteria to determine whether members of Congress have legislatively deferred to the courts. If there is evidence to suggest that lawmakers (1) were aware of ambiguities within a bill, (2) predicted that courts would later address these ambiguities, and (3) specifically rejected alternative proposals to clarify the ambiguities during the course of deliberations, then Lovell suggests that a legislative deferral has occurred.<sup>43</sup> He uses transcripts of House and Senate floor debates found in the *Congressional Record* to determine whether each of these conditions are met.<sup>44</sup> In his analysis of the Erdman Act of 1898, for instance, the author demonstrates both that members of Congress were aware that their legislation would be interpreted by the courts and that they had the foresight to use specific yet seemingly ambiguous statutory language to influence these interpretations; he notes that Representative William Sulzer (D-NY), for example, told the House that a proposed version of the Erdman Act was inadequate because “[w]e can not tell just now how the courts will construe some of the provisions of the bill, and until that is done no one can tell whether this bill will be in the interest of the workers or not.”<sup>45</sup> When several similar statements are compiled, it becomes possible to make a convincing

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<sup>41</sup> Ibid., 435.

<sup>42</sup> Lovell, 32.

<sup>43</sup> Lovell, 41.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., 68.

argument that a legislative deferral has indeed occurred.

Lovell's concept of a legislative deferral can be used to analyze any piece of legislation, regardless of whether it relates to the labor laws he examines in his book. In the next subsection, I explain how I plan to use this concept as the basis for my analysis of FOIA.

### *Applying Legislative Deferrals to FOIA*

It has been more than a century since some of the laws that Lovell studies were passed, but it is safe to assume that reelection is still the principal consideration for members of Congress when passing legislation; nearly all political decisions can therefore be viewed as efforts by legislators to satisfy the most pressing demands of their constituents, who evaluate the performance of their representatives every time they head to the polls. With this in mind, it is possible to apply the concept of a legislative deferral to other controversial issues when evaluating contemporary policymaking, and I argue that doing so is particularly relevant when examining recent updates to FOIA.

Efforts to increase government transparency are actually remarkably uncontroversial among the American public. Recent polling data reveals that approximately 80% of Americans consider government transparency and accountability to be an important priority,<sup>46</sup> and just 5% currently believe that their government is effectively sharing information with them.<sup>47</sup> These statistics suggest that passing measures designed to increase government transparency, such as amendments to improve FOIA performance, are likely to be politically advantageous for lawmakers, appeasing many constituents and angering few. However, legislators may have other

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<sup>46</sup> Cary Coglianese, "The Transparency President? The Obama Administration and Open Government," *Governance* 22, no. 4 (2009): 535.

<sup>47</sup> John B. Horrigan and Lee Raine. "Americans' Views on Open Government Data," *Pew Research Center*. April 21, 2015. <http://www.pewinternet.org/2015/04/21/open-government-data/>



interests to consider before passing these laws, as there are some potential downsides associated with doing so. Particularly post-9/11, for example, members of Congress may be wary to implement measures that could inadvertently result in the disclosure of sensitive information. Additionally, those from the same party as the president, for fear of political backlash, may be reluctant to enact legislation that would increase public oversight and scrutiny of executive agencies. A legislative deferral, then, is an ideal way to reconcile public demand for increased transparency and private concerns about doing so; by writing ambiguous statutes designed to induce certain judicial interpretations, lawmakers can increase their chances of reelection while simultaneously ensuring that they do not abandon their other policy goals.

There are some indications that legislative deferrals have indeed been used in FOIA legislation in the past. In the last chapter, I described how the concept of glomarization emerged in courts following amendments to FOIA made in 1974 and 1976. The 1974 revision of the law made it easier for requesters to access information by placing time limits on the release of records and limiting the scope of records that could be exempted from disclosure through the law. The amendments made two years later, in 1976, further clarified the exemptions, preventing agencies from making broad interpretations and withholding records unnecessarily. Both of these revisions seemed to facilitate the release of information. However, the subsequent development of glomarization as a tool to withhold information essentially served to reverse each of these efforts; by allowing agencies to deny the existence of records when they claimed that there were “compelling reasons” to do so, judges overruled the new requirements limiting the use of exemptions. According to the traditional legislative baseline framework, this would seem to be a clear reversal of the legislators’ intentions when passing the amendments, but Lovell’s work provides reason to believe otherwise.

It is possible that the emergence of glomarization was the result of legislative deferrals to the courts. Even though the use of glomarization was limited by the DOJ in subsequent updates to its regulations, it can be argued that its initial emergence as a tool to withhold information set a precedent for the introduction of exclusions into the law in 1982, which effectively codified the glomarization principle. This would introduce the prospect that legislators intentionally designed their 1974 and 1976 amendments to FOIA to be reversed by the courts as part of a long-term strategy to limit the disclosure of records. Proving that this was indeed the case would require reading transcripts of deliberations surrounding the updates to the law and searching for evidence of a deferral. As I explain, however, in this project I focus instead on analyzing more recent updates to the law to provide insight into why FOIA performance has worsened over the past 20 years.

Mark Graber suggests that the concept of a legislative deferral can also be applied to other government actors, including administrative agencies.<sup>48</sup> This idea is not unprecedented in political science, as Howard Gilman has also argued that legislators can further their aims by using courts and federal agencies in similar ways.<sup>49</sup> In relation to the FOIA amendments, it is possible that lawmakers could make their statutes purposefully ambiguous so that the government officials charged with carrying out the laws must interpret them and thereby endure any public criticism that results. Many of the recent complaints about FOIA relate to the failure of federal agencies to implement the law appropriately, often by missing information disclosure deadlines or improperly invoking exemptions to withhold information, so, if members of Congress have indeed intended to defer to agencies through their legislation, it appears that their

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<sup>48</sup> Graber, 447.

<sup>49</sup> Howard Gilman. 2002. "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891." *American Political Science Review* 96 (3): 511-24.

strategy is working. Graber also notes that “[w]hen elected officials cannot foist political responsibility elsewhere, they often refrain from taking any action” at all.<sup>50</sup> The fact that legislators have taken action and delegated FOIA policymaking to agencies, then, suggests that they had a clear reason to do so and were aware of the many political benefits that it would have.

In this project, I test the hypothesis that members of Congress have deferred to courts or executive agencies to avoid the political consequences of refraining from passing legislation to improve FOIA; I suggest that they may be incentivized to do so to increase their chances at reelection while simultaneously protecting other interests that could be compromised by increased government transparency. To test this hypothesis, I apply a modified version Lovell’s legislative deferral model to the three most updates to the law: the Electronic Freedom of Information Act of 1996, the OPEN Government Act of 2007, and the FOIA Improvement Act of 2016. Each of these laws was supposedly designed to improve FOIA performance but appears to have done the opposite, making them ideal case studies with which to test my theory.

Modifying Lovell’s model is necessary because the lawmaking process has changed dramatically since the labor laws he studies were passed in the early 1900s. Although the goal of reelection as a primary motivator for lawmakers likely remains unchanged, the ways in which they pass legislation to accomplish this goal look very different now than they did a century ago. Barbara Sinclair writes about these changes in her book *Unorthodox Lawmaking*. “In the contemporary Congress,” she writes, “the textbook diagram describes the legislative process for fewer and fewer of the major bills...Before 1970 one could speak of a standard legislative process that most major legislation followed,” but this is no longer the case.<sup>51</sup> Instead, Sinclair

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<sup>50</sup> Graber.

<sup>51</sup> Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (Washington, DC: CQ Press, 2000). 4,7.

argues that many substantive changes to legislation often occur behind the scenes, after a bill has been reported from committee but before members of the broader House or Senate debate it on the floor.<sup>52</sup> More than a third of major legislation is now subject to these backdoor adjustments,<sup>53</sup> making the legislative process as a whole far less transparent as it has been in the past. A recent report from a think tank known as the CATO Institute helps to demonstrate just how opaque the lawmaking process now is: the organization recently awarded Congress a grade of “D-” when evaluating the accessibility of its meeting records.<sup>54</sup> “There is a lot of work to do before transcripts and other records can be called transparent,” the organization concluded.<sup>55</sup>

The lack of transparency in the lawmaking process makes it more challenging to prove that a legislative deferral has occurred, as doing so requires finding evidence that lawmakers (1) were aware of ambiguities in a bill, (2) were aware that courts or federal agencies would be required to interpret these ambiguities, and (3) specifically rejected alternative proposals to clarify the ambiguities and limit these interpretations; with more lawmaking now occurring behind closed doors, this evidence is simply harder to find. As a result, in this project I apply a modified version of Lovell’s model to the FOIA amendments I study. Although the first two criteria in my model remain the same, I adjust the third criterion to reflect the fact that finding evidence to fulfill the original one—that legislators specifically rejected proposals by others to clarify the law—is likely to be nearly impossible given the lack of information available. Instead, I argue that a legislative deferral has occurred when it is clear that members of Congress are aware of ambiguities yet choose to keep them in a bill anyway, even when they know that doing

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<sup>52</sup> Ibid., 17.

<sup>53</sup> Ibid.

<sup>54</sup> U.S. Congress. House. Committee on Oversight and Government Reform, Addressing Transparency in the Federal Bureaucracy: Moving Toward a More Open Government: Hearing before the Committee on Oversight and Government Reform. 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 13, 2013. 58.

<sup>55</sup> Ibid.

so will elicit judicial or agency interpretation and could potentially weaken FOIA performance.<sup>56</sup> I believe that doing so is more realistic given contemporary constraints but will not weaken my conviction that legislative deferrals have occurred.

## **Conclusion**

In this chapter, I have summarized three theories that explain why recent amendments supposedly designed to improve FOIA performance may have had the opposite effect. Existing scholarship on this issue centers around an increased or evolving demand for government records requested through FOIA; one theory suggests that updates to the law have placed additional FOIA-related responsibilities on federal agencies without providing them with sufficient funds to fulfill them. This has an effect of worsening long backlogs already caused by an increasing volume of FOIA requests, potentially forcing agencies to deny more requests because they simply do not have the resources to process them. The other theory suggests that, following the 9/11 terrorist attacks, a greater proportion of FOIA requests are related to sensitive national security issues and are thus denied through the invocation of legal exemptions written into the law. Recent amendments may not have had their desired effect, then, because they have not sufficiently addressed the largest problem holding the law back. There is evidence to support both of these theories, but my project focuses instead on a third theory that addresses my research question from a different perspective.

My hypothesis examines recent declines in FOIA performance as primarily a supply-side

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<sup>56</sup> In his book, Lovell writes that “instead of trying to classify legislative proposals on some objective scale of ambiguity, I use reported judicial rulings that were made in connection with each of my case statutes to identify provisions that contained ambiguities that led to judicial decisions” (40). Because I am also examining whether deferrals to federal agencies occurred in this project, I am not able to use judicial rulings in the same way to prove that an ambiguity exists. Consequently, I conclude that a statute is ambiguous simply when someone notifies members of Congress that it this is indeed the case.

issue rather than a demand-side one; instead of looking at changes to the ways in which requesters use the law as a cause of its problems, I look at changes to the law itself. I suggest that recent amendments to FOIA have failed to improve performance because members of Congress have intended for them to do just that, regardless of what they have publicly proclaimed. I argue that legislators, motivated by reelection goals, have deliberately incorporated ambiguous language into statutes specifically so that these efforts would be “reversed” by courts and federal agencies. This process is known as a legislative deferral and is based on George Lovell’s book of the same name. Even though legislatively deferring policymaking in this way has the potential to worsen FOIA, it represents a victory for legislators because it allows them to protect their own interests and simultaneously increase their chances at reelection. This helps to explain why they have taken the time to pass them at all. The result, though, is of course a more opaque U.S. government, keeping American citizens in the dark about how their tax dollars are being spent.

In the next chapter, I test this theory by taking a close look at the Electronic Freedom of Information Act (E-FOIA), which was passed in 1996 and is perhaps the most significant update to FOIA in its history. By making electronic records subject to disclosure through the law, E-FOIA overwhelmingly expanded FOIA’s reach so that American citizens could theoretically access more government information than ever before. However, despite this seemingly unquestionable effort to strengthen the law, it soon became clear that it had actually made FOIA even weaker than it was before. I examine whether this counterintuitive result could have been expected by applying my adapted legislative deferral model to the law. Afterward, in chapters 4 and 5, I apply the same model to the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016 to further test my hypothesis.

## THE ELECTRONIC FREEDOM OF INFORMATION ACT OF 1996

On October 2, 1996, President Bill Clinton signed the Electronic Freedom of Information Act Amendments of 1996 into law. The amendments represented the first major update to FOIA in its 30-year history and promised to expand the law's reach so that the American public could request and obtain more government records than ever before. In his signing statement, President Clinton said that the amendments would serve to "reforge...an important link between the United States Government and the American people" by bringing FOIA "into the information and electronic age."<sup>1</sup> Also known as the Electronic Freedom of Information Act, or E-FOIA, the new law was noteworthy in that it made digital records such as emails subject to disclosure through FOIA requests, and it also required that federal agencies make their records available electronically so that they could be accessed more easily.<sup>2</sup> Previously, federal agencies had responded to technological innovations and the rise of the digital era in diverse and confusing ways, oftentimes charging exorbitant fees for releasing electronic records or refusing to release them altogether.<sup>3</sup> E-FOIA was designed to create an overarching policy regarding such practices so that agencies would be consistent and fair in their handling of FOIA requests.

Parts of E-FOIA also modified other aspects of the original law that had rendered it increasingly ineffective over time. For example, in response to concerns that increasing volumes of requests were inhibiting agencies' ability to respond in a time-efficient manner, the legally-

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<sup>1</sup> Bill Clinton, "Statement by the President on H.R. 3802, October 2, 1996," ed. The White House Office of the Press Secretary (The National Security Archive: The National Security Archive, 1996).

<sup>2</sup> Tina Zappile, "Freedom of Information Act," (2014). 8.

<sup>3</sup> U.S. Congress. House. Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, *H.R. 1281, War Crimes Disclosure Act, Health Information Privacy Protection Act, and S. 1090, Electronic Freedom of Information Improvement Act of 1995: Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight*. 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 14, 1996. 104.

required 10-day timeframe for response was doubled to 20 days.<sup>4</sup> This change was made in an effort to boost morale within agencies and give citizens confidence that government officials were following the law as intended.<sup>5</sup> Additionally, to increase agency compliance with the law, E-FOIA placed new requirements on federal agencies to track and report data about their FOIA activities.<sup>6</sup> Agencies were required to publish information about their FOIA requests, backlogs, appeals, and response times, and the country's attorney general was given the power to monitor this data and present his findings to both Congress and the Justice Department.<sup>7</sup> Finally, a requirement to allow the expedited processing of certain FOIA requests<sup>8</sup>—a provision that had already been a part of many agencies' individual FOIA regulations but was not yet mandatory—was implemented in what appeared to be an effort to further strengthen the law.<sup>9</sup>

By 1998, two years after E-FOIA had been enacted, these measures were not accomplishing the goals that members of Congress and the president had claimed they would. In a hearing about the law's effectiveness on June 9 of that year, Representative Stephen Horn, the Chairman of the House Subcommittee on Government Management, Information and Technology, said “preliminary indications suggest that agency compliance [with the law] has been spotty at best.”<sup>10</sup> Horn had served in the same role when the subcommittee had initially drafted E-FOIA and advocated for its passage, so his admission that it had partly failed was particularly significant. Still, others who testified at the hearing were more blunt, alleging that

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<sup>4</sup> Zappile, 8.

<sup>5</sup> U.S. Congress. House, Committee on Government Reform and Oversight, *Electronic Freedom of Information Amendments of 1996: Report (to Accompany H.R. 3802)*, 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., 1996. H. Rep. 104-794.

<sup>6</sup> Zappile, 8.

<sup>7</sup> *Ibid.*

<sup>8</sup> U.S. Congress, House, Subcommittee, *H.R. 1281*, 104.

<sup>9</sup> *Electronic Freedom of Information Act Amendments of 1996*, Public Law 104-231. U.S. Statutes at Large 110 (1996): 3048-3054.

<sup>10</sup> U.S. Congress. House. Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, *Implementation of the Electronic Freedom of Information Amendments of 1996: Is Access to Government Information Improving?* 105<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 9, 1998.



the law had been “virtually ignored” and that agencies were blatantly disobeying it by refusing to release electronic records.<sup>11</sup> In an analysis of the law about a decade later, scholars Kristin Adair and Meredith Fuchs wrote that it “is not enough to say that federal agencies are not complying with the law,” but rather “their failures, nearly across the board, to implement E-FOIA suggest several more systemic problems.”<sup>12</sup> They noted that the law had been marginalized, underfunded, and, in some instances, totally ignored by federal agencies and that it consequently had “not brought about the revolution in openness and transparency that it could have.”<sup>13</sup> Instead, by refusing to follow the law as was supposedly intended, agencies were choosing to illegally restrict the release of records to the public, ensuring that the U.S. government remained as opaque as ever.

In a rare showing of bipartisanship during the Clinton presidency, E-FOIA had been passed unanimously by both the House of Representatives and the Senate, with members from each house of Congress praising the act for taking an important step toward making the American government more open than ever before.<sup>14</sup> In retrospect, it seems strange that a measure that received such universal acclaim and support in Congress would ultimately appear so ineffective at solving the problems that plagued FOIA, raising questions about exactly how things went wrong. How is it possible that hundreds of legislators could all overlook certain aspects of the proposed legislation that would cause problems in the future? Why did members of the House Subcommittee on Government Management, Information and Technology in

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<sup>11</sup> Ibid.

<sup>12</sup> Meredith Fuchs and Kristin Adair, "On the Sidelines of the Information Revolution: How the Freedom of Information Act Amendments of 1996 Failed to Transform Public Access," *Administrative and Regulatory Law News* 33, no. 1 (2007). 14.

<sup>13</sup> Ibid.

<sup>14</sup> *Electronic Freedom of Information Act Amendments*. H.R. 3802. 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., Congressional Record 142, pt. 129: S10893.;

*Electronic Freedom of Information Act Amendments of 1996*. H.R. 3802. 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., Congressional Record 142, pt. 128: H10447.

particular lack the expertise and knowledge to recognize that their efforts would eventually fail? Or what if, despite their unanimous approval of E-FOIA, members of Congress actually *did* anticipate the law's eventual failures but decided to pass the amendments anyway? What if they actually wanted the amendments to fail?

I address these questions in this chapter by testing my hypothesis that members of Congress intentionally used their legislation to defer to federal agencies and courts to make FOIA decisions for them. As mentioned in the last chapter, this idea is based on political scientist George Lovell's concept of a legislative deferral. In this chapter, I use E-FOIA as a case study to which I apply a slightly modified version of Lovell's model in an attempt to explain the amendment's failures. By finding evidence that meets my criteria for determining whether a legislative deferral has occurred, I am able to test and ultimately support this hypothesis.

I start with a brief legislative history of E-FOIA before explaining Lovell's model and my own in greater detail. Then, after exploring the similarities and differences between the labor laws in his project and the Freedom of Information Act that I study, I analyze a specific provision within E-FOIA designed to facilitate the expedited processing of certain FOIA requests. By examining how members of Congress responded to accusations that this provision's language was overly ambiguous, I am able to test my legislative deferral hypothesis and ultimately conclude that, based on the available evidence, a legislative deferral did occur in this instance. Finally, at the end of this chapter I discuss the implications of my findings on the project as a whole.

## Legislative History of E-FOIA

The original Freedom of Information Act took more than a decade to pass in Congress, and E-FOIA was no different, as numerous bills were introduced and reintroduced on the House and Senate floors to address the original law's increasing ineffectiveness at making the U.S. government more transparent. Efforts to amend FOIA to incorporate digital records began in 1985, 11 years before E-FOIA was passed, when the House Subcommittee on Government Information, Justice, and Agriculture held a series of hearings to investigate the electronic collection and dissemination of information by federal agencies.<sup>15</sup> Witnesses from freedom of information groups and corporations alike testified about the importance of having laws that were reflective of technological developments that were changing the ways in which the American government operated. Following these hearings, the broader Committee on Government Information released a report that provided a series of recommendations for new and updated policies to address these concerns.<sup>16</sup> One section of the report was titled "Public Access to Public Records" and detailed strategies for releasing electronic information to the public through FOIA.<sup>17</sup> A similar and lengthier hearing was held nearly four years later, in 1989, signaling that the proposed policies were becoming ever more important as technology continued to progress.<sup>18</sup>

The first attempt to implement these policies in relation to FOIA specifically occurred on November 7, 1991, when Senator Patrick Leahy (D-VT) introduced bill S. 1940, titled the

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<sup>15</sup> U.S. Congress. House. Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies*. 99th Cong., 1<sup>st</sup> sess., April 29, June 26, and October 18, 1985.

<sup>16</sup> U.S. Congress. House, Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview: Report*, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., 1986. H. Rep. 99-560.

<sup>17</sup> *Ibid.*

<sup>18</sup> ProQuest Congressional, "Legislative History of the Electronic Freedom of Information Act Amendments of 1996," ProQuest LLC.

“Electronic Freedom of Information Improvement Act of 1991” on the Senate floor.<sup>19</sup> Co-sponsored by Senator George Brown (R-CO), the bill included provisions that would require federal agencies to release any electronic records that were the subject of FOIA requests. This bill was very similar to the 1996 bill that would ultimately be passed into law, but it also included some provisions that likely would have made the law notably stronger, including one that penalized agencies for failing to respond to FOIA requests in a timely manner:

The court may assess against the United States all out-of-pocket expenses incurred by the requester, and reasonable attorney fees incurred in the administrative process, in any case in which the agency has failed to comply with the [10-day] time limit...Any agency not in compliance with the time limit...shall demonstrate to a court that the delay is warranted under the circumstances. It shall be within the discretion of the court to award the requester an amount not to exceed \$75 for each day that the agency's response to his request exceeded the time limits.<sup>20</sup>

No similar provision was included in the version of E-FOIA that ultimately became law in 1996. As mentioned previously, the most widespread criticism of the law was that agencies were almost universally failing to comply with the new twenty-day response window, and a clear penalty for long delays might have prevented such delays from occurring. However, the Senate never had the chance to vote on the bill with this provision in the 102<sup>nd</sup> Congress, so it was shelved until a later date.<sup>21</sup>

Senators Leahy and Brown reintroduced the Electronic Freedom of Information Improvement Act in the Senate on November 23, 1993. Although this version of the legislation still included the provisions penalizing agencies for failing to comply with the law, these provisions were eventually removed by January 1 of the following year, when a new version of the bill was released.<sup>22</sup> In the time period between the release of the two bills, there were no

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<sup>19</sup> *Electronic Freedom of Information Act of 1991*, S. 1940, 102<sup>nd</sup> Cong.

<sup>20</sup> *Ibid.*

<sup>21</sup> GovTrack, "S. 1940 (102nd): Electronic Freedom of Information Improvement Act of 1991," Civic Impulse, LLC.

<sup>22</sup> *Electronic Freedom of Information Act of 1994*, S. 1782, 103<sup>rd</sup> Cong.

public hearings related to the proposed legislation, so it is unclear exactly why these changes were made. However, they had an effect of weakening the other provisions of the proposed legislation by making them harder to enforce.

On April 11, 1994, Senator John Kerry (D-MA) cosponsored the bill.<sup>23</sup> On August 11 of that year, the Committee on the Judiciary unanimously decided to report a revised version of the bill to the full chamber, and on August 25 the bill was passed by a voice vote in the Senate.<sup>24</sup> A few weeks later, on September 12, the bill was referred to the Committee on Government Operations in the House of Representatives, but the House never had a chance to vote on it before the end of the congressional term, so it was once again died until a later date.<sup>25</sup>

Senators Leahy, Brown, and Kerry tried again in 1995. This time, the bill succeeded. It was introduced in the Senate on July 28 of that year and reported by the Senate Judiciary Committee on May 15 of the following year.<sup>26</sup> The bill was introduced in the House on July 12, 1996, and both chambers of Congress ultimately passed it on September 17 and 18.<sup>27</sup> It was passed by a unanimous voice vote in the Senate and by a vote of 402-0 in the House,<sup>28</sup> demonstrating just how popular the legislation was. Two weeks later, on October 2, President Clinton signed the Electronic Freedom of Information Act Amendments of 1996 into law. In his signing statement, he recognized Senator Leahy for his tireless efforts to pass E-FOIA over the past half-decade and expressed confidence that the law would make the U.S. government more transparent.<sup>29</sup>

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<sup>23</sup> U.S. Congress. Senate, Committee on the Judiciary, *Electronic Freedom of Information Improvement Act of 1994: Report*, 103<sup>rd</sup> Cong., 2<sup>nd</sup> sess., 1994. S. Rep. 103-365.

<sup>24</sup> GovTrack, "S. 1782 (103rd): Electronic Freedom of Information Improvement Act of 1994," Civic Impulse, LLC.

<sup>25</sup> Ibid.

<sup>26</sup> ProQuest Congressional.

<sup>27</sup> Ibid.

<sup>28</sup> GovTrack, "H.R. 3802 (104th): Electronic Freedom of Information Act Amendments of 1996," Civic Impulse, LLC.

<sup>29</sup> Clinton.

**Table 3.1: Legislative History of E-FOIA**

<b>Date</b>	<b>Bill Number</b>	<b>Title</b>	<b>Event</b>
11/7/91	102 S. 1940	Electronic Freedom of Information Improvement Act of 1991	Introduced in Senate
11/23/93	103 S. 1782	Electronic Freedom of Information Improvement Act of 1993	Introduced in Senate
8/22/94		Electronic Freedom of Information Improvement Act of 1994	Reported in Senate
8/25/94			Passed in Senate
9/12/94			Referred in House
7/28/95			104 S. 1090
5/15/96	Reported in Senate		
9/17/96	Electronic Freedom of Information Improvement Act of 1996	Passed in Senate	
7/12/96	104 H.R. 3802	Electronic Freedom of Information Amendments of 1996	Introduced in House
9/17/96		Electronic Freedom of Information Act Amendments of 1996	Reported in House Passed in House
9/18/96			Received in Senate Passed in Senate
10/2/96			Signed into law by President

Although it took several years for E-FOIA to become law, it appears that this was the case not because it was particularly controversial but rather because it was a relatively low priority for members of Congress at the time; with issues such as taxation and social security, for example, that more directly affected the daily lives of their constituents, it was more politically advantageous for legislators to focus on issues other than government transparency, even though

efforts to increase transparency would inevitably be popular.<sup>30</sup> As I explain in the next section, that E-FOIA was relatively free of controversy before being passed and received such widespread support actually makes it harder to support the notion of a legislative deferral, as it makes it more challenging to suggest that legislators had legitimate motivations to defer FOIA decision-making to courts and agencies in efforts to weaken the law.

### **Applying Lovell’s Legislative Deferral Model to E-FOIA**

In the remainder of this chapter, I apply a modified version of George Lovell’s legislative deferral model to E-FOIA to determine whether members of Congress intentionally left certain provisions in the amendment vague in an attempt to avoid the political controversy that might accompany its implementation. Through his analysis of a series of labor laws passed in the late nineteenth and early twentieth centuries, Lovell makes a convincing argument that on several occasions lawmakers identified specific ambiguities in their legislation but ultimately decided to refrain from clarifying these ambiguities, precisely, he claims, so that they could pass laws that appeared to be pro-labor but would ultimately be “reversed” by the courts.<sup>31</sup> By deliberately using ambiguous language in their provisions, Lovell argues that members of Congress intentionally enabled unelected judges to make controversial policy decisions for them, thus deferring any ensuing criticism to the judges and preserving their chances at reelection.<sup>32</sup> As I mentioned earlier, in this chapter I test whether this concept of a legislative deferral can be

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<sup>30</sup> David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge: Cambridge University Press, 1999).

<sup>31</sup> George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge, UK; New York: Cambridge University Press, 2003). 9.

<sup>32</sup> *Ibid.*

applied to an issue such as government transparency, in which implementation is delegated to other unelected governing officials, including executive branch bureaucrats.

As discussed in the last chapter, there is some evidence to suggest that past amendments to FOIA have involved legislative deferrals to the courts, but my analysis of E-FOIA specifically will examine whether legislative deferrals to administrative agencies have occurred as well. Mark Graber first suggested that this type of deferral was possible in an article published about a decade ago,<sup>33</sup> but thus far it does not appear that any scholars have tested this theory. Luckily, the same method that Lovell uses to support his notion of legislative deferrals to the courts can be applied to administrative agencies with few modifications, allowing me to make this type of analysis relatively easily.

Lovell concludes that a legislative deferral has occurred when he finds evidence in the *Congressional Record* to suggest that legislators were “not doing all they could to limit the power of judges to interfere with the advertised goal[s] of...statute[s].”<sup>34</sup> He makes this determination when three conditions are all met:

1. “legislators were aware of and drew attention to the precise ambiguities and interpretive questions that judges would later decide;
2. legislators specifically associated those ambiguities with a future role for the courts; and,
3. legislators specifically rejected alternative legislative proposals that were offered to clarify the language and limit the discretion of the courts.”<sup>35</sup>

As I explained in chapter 2, because more lawmaking now occurs behind closed doors than it did a century ago when the labor laws that Lovell studies were passed, using these criteria to prove that a legislative deferral occurred in contemporary lawmaking is more challenging if not impossible. Consequently, it is therefore necessary to modify the third criterion when applying

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<sup>33</sup> Mark A. Graber, "Constructing Judicial Review," *Annual Review of Political Science* 8, no. 1 (2005). 447.

<sup>34</sup> Lovell, 41.

<sup>35</sup> Ibid.



Lovell's model to my own analysis. In this project, then, I will conclude that a legislative deferral has occurred if there is evidence to suggest that lawmakers (1) recognized ambiguities in E-FOIA, (2) predicted that courts or agencies would eventually be forced to interpret these ambiguities, and (3) kept the ambiguities in the bill anyway. Even if there is no evidence that lawmakers rejected alternative proposals, the decision to keep ambiguities in the bill should serve as sufficient proof that they wanted those ambiguities to be there, even though doing so would undoubtedly result in weakening the law. If this is the case, I will be able to support my hypothesis and conclude that legislators intentionally designed their bill to be ineffective at accomplishing the publicly stated goal of increasing government transparency.

Before I examine the available evidence in greater detail, however, it is important to consider the differences between the labor laws that Lovell studies and the freedom of information laws that are the subject of my own analysis. During the time period in which the laws that Lovell uses as case studies were passed, labor organizations were becoming more powerful forces in American politics, and labor legislation was the subject of great controversy as the Supreme Court increasingly supported a doctrine of freedom of contract.<sup>36</sup> Because of this, there was great incentive for members of Congress to defer to the courts; it allowed them to reap the political rewards of passing legislation that appeared to be pro-labor while simultaneously staying true to their values with the knowledge that the new policies would not be in effect for long. The fact that E-FOIA passed through Congress with unanimous votes in both the House and Senate signals that it was different from the labor laws of the early 20<sup>th</sup> century, specifically because the legislation was almost entirely free of controversy. Although national security

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<sup>36</sup> Lovell, 42-43.; William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994). 227-230.

considerations have certainly affected FOIA legislation in the post-9/11 United States, there appear to have been fewer reasons for members of Congress to make deferrals before that because there were fewer compelling interests that could overrule the goal of increasing government transparency. Because of this, proving that a legislative deferral occurred with E-FOIA requires that I find evidence to unequivocally support this notion and explain the motivation behind it, which I am able to do in the next section.

### **Expedited Processing and Legislative Deferrals in E-FOIA**

On June 13 and 14, 1996, the House Subcommittee on Government Management, Information, and Technology held hearings to discuss proposed E-FOIA legislation. Members of media organizations and others with great familiarity with the law were invited to testify before the subcommittee about their experiences with FOIA and their opinions about proposed changes to it. Among those in attendance were Jane Kirtley, the Executive Director of the Reporters Committee for the Freedom of the Press, and Robert Gellman, an attorney and privacy information policy consultant, who both expressed concern in their testimonies that one of E-FOIA's provisions in particular was not written clearly enough to ensure that federal agencies implemented it appropriately. For the rest of this chapter, I will use the deliberations over this provision to test my hypothesis about a legislative deferral as the cause of E-FOIA's ineffectiveness.

The provision of concern related to the expedited processing of FOIA requests, which required agencies to process certain requests more quickly than others if they met a set of criteria outlined in the law. Expedited processing provisions had already existed in many agencies' FOIA regulations since the beginning of the Clinton administration, as they were a part of the

Department of Justice's guidelines for FOIA implementation, but supporters of E-FOIA nevertheless wanted to incorporate these provisions into the proposed legislation so that they could not be easily reversed by future administrations.<sup>37</sup> According to the legislation, agencies were expected to determine within ten days of receiving a FOIA request whether that request qualified to receive expedited processing.<sup>38</sup> This determination would be made if it was decided that there was a "compelling need" to do so,<sup>39</sup> which would occur when a failure to release records in a particularly timely manner would (1) threaten a person's safety, (2) result in the loss of a person's due process rights, or (3) affect public opinion about "actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage."<sup>40</sup> In their testimonies, Kirtley and Gellman shared their concerns about the third category, and the phrase "widespread, contemporaneous media coverage" in particular.

Kirtley noted that she and the journalists she represented were worried that this phrase was too vague to guarantee that agencies would always accept legitimate requests for expedited processing. "We do have some concerns," she said, "that the current bill may not completely serve the need for expedited access."<sup>41</sup> She expressed her hope that the eventual legislation would be "clearly understood to direct agencies to expedite processing whenever records are requested that would enlighten the public on matters where public concern is strong, and not just those areas that are already the subject of fervent media attention."<sup>42</sup> In other words, Kirtley

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<sup>37</sup> U.S. Congress, House, Subcommittee, *H.R. 1281*, 104.

<sup>38</sup> *Electronic Freedom of Information Act Amendments of 1996*, H.R. 3802, 104<sup>th</sup> Cong. January 1.

<sup>39</sup> *Ibid.*

<sup>40</sup> U.S. Congress. Senate, Committee on the Judiciary, *Electronic Freedom of Information Improvement Act of 1995: Report*, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., 1995. S. Rep. 104-272.

<sup>41</sup> U.S. Congress. House. Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, *Federal Information Policy Oversight: Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight*. 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 13, 1996. 120.

<sup>42</sup> *Ibid.*

believed that agencies should expedite the processing and release of *any* records of great interest to the American public, regardless of whether or not they were related to a story that had already received widespread media attention. Although Kirtley did not propose specific language to replace the phrase “widespread, contemporaneous media coverage” to strengthen the provision in this way, her warning that the current language would not be “clearly understood” nevertheless sent a strong signal to the subcommittee that it was inadequate and would need to change.

This identification of vague language is a key indicator of the potential for a purposeful legislative deferral; without proof that legislators are aware that an ambiguous statute exists, it is impossible to conclude that they intentionally kept the ambiguity in the bill to avoid controversy that might result from clarifying it. Similarly, it is not possible to conclude that legislators anticipated that courts or agencies would interpret statutes without proof of their recognition that the statutes might need interpretation. By pointing out to the subcommittee that the phrase “widespread, contemporaneous media coverage” was too vague, Kirtley informed legislators about a flaw in their bill, forcing them to choose between fixing this flaw and ignoring it through a deferral.

Robert Gellman placed additional pressure on legislators to change this provision when he testified before the subcommittee the following day. Gellman was critical of the same ambiguous language, although for different reasons. “This language raises so many questions that it is hard to know where to begin,” he said.<sup>43</sup> Gellman was concerned that the phrase was too broad to be effective, suggesting that “it is hard to imagine a legitimate request that would not satisfy this test” and that it would thus impose an overwhelming administrative burden on agencies that would slow down the entire FOIA process.<sup>44</sup> He provided a variety of examples to

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<sup>43</sup> U.S. Congress, House, Subcommittee, *H.R. 1281*, 76.

<sup>44</sup> *Ibid.*

illustrate his point about the ambiguous language and the challenges involved in having bureaucrats interpret it:

If a news story attracts extensive local coverage in Charleston, West Virginia, will that qualify as substantial media coverage or does the coverage have to be statewide or national to qualify?...[Or imagine that] The Associated Press runs a story about travel by a government official, and the identical story appears in 100 newspapers nationwide. Is that enough to qualify? What if the story runs in only 50 papers or 10 or 2? Does it matter if the story ran on the front page or elsewhere? Do we want bureaucrats making these evaluations of the media?<sup>45</sup>

While Kirtley worried that the ambiguous provision would allow agencies to limit usage of the proposed expedited processing provision, Gellman was instead afraid that the ambiguity would encourage too much usage because so many requests would presumably qualify. He concluded that the processing of these requests would inevitably result in widespread agency backlogs that would have an effect of slowing the process down “for nearly all requesters” and limit the release of information as a result.<sup>46</sup>

Interestingly, Gellman also predicted that the ambiguous language would “increase the amount of [FOIA] litigation.”<sup>47</sup> By doing so, he signaled to the subcommittee that its legislation, when passed into law, would be interpreted not only by the administrative agencies to which Congress was delegating but also by judges deciding FOIA appeal cases. Although it is likely that members of the subcommittee already knew this, it is important to recognize that they were clearly reminded of this during the hearing, signifying that they were undoubtedly aware of the consequences of failing to clarify the confusing provisions in their bill.

Later in his testimony, Gellman suggested that it was even possible to predict how specifically the courts would interpret the phrase he was concerned about. When another witness

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<sup>45</sup> Ibid., 77.

<sup>46</sup> Ibid., 78.

<sup>47</sup> Ibid.

suggested that “the courts have been integral in interpreting...[FOIA in the past] and ensuring the congressional intent for public access rights has been fulfilled the way Congress intended it, rather than the way some of the agencies might have wanted to do it,”<sup>48</sup> Gellman was quick to disagree. He suggested that the courts had instead interpreted FOIA less strictly than Congress had perhaps intended, often favoring federal agencies over the requesters who were challenging their decisions, which inevitably had an effect of making FOIA weaker and reducing government transparency. In particular, he said “it is very hard to get relief in court” when requesters “come to court and say agencies are not complying with time limits.”<sup>49</sup> Because the expedited processing provision under discussion would require agencies to process some requests faster than others, it was inherently related to time limits, and as a result Gellman predicted that the courts would use the ambiguity in the provision to similarly go against congressional intent. This would mean upholding agency denials of expedited processing requests and thus making people wait longer to access important government records.

So Gellman’s criticism of the ambiguous language regarding the expedited processing of requests was twofold: he worried (1) that it would allow too many requests to qualify for expedited processing, which he feared would create an administrative burden that would ironically slow down the release of records, and (2) that it would increase FOIA litigation that had historically seemed to go against congressional intent, giving agencies additional power and precedent to disobey the law. Although his prediction that courts would uphold expedited processing denials would theoretically have an effect of clarifying the “widespread, contemporaneous media coverage” standard and thus limit the future use of the provision, it would not help alleviate any administrative burden resulting from the provision because the same

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<sup>48</sup> Ibid., 104.

<sup>49</sup> Ibid.

number of requests would still have to be processed; requests that were not granted expedited processing would still often result in the release of records, just more slowly, so there would be no disincentive for requesters to ask for expedited processing anyway and thus continue to clog the system. Because of this concern, Gellman was as opposed to the idea of expedited processing in general as he was to the specific language of the corresponding provision that he criticized at the hearing. He reflected this opinion when asked how he would change the provision if it were to be included at all: “If you are going to do it,” he said, “I would suggest basically that you dump most of the language in the bill and put in a one line provision that says agencies can do it if they want, and let it go at that. That will minimize quibbling over what the statutory standards mean.”<sup>50</sup>

To summarize, both Jane Kirtley and Robert Gellman expressed concern in their testimonies that the phrase “widespread, contemporaneous media coverage” was too vague to serve as a condition that would warrant expedited processing of FOIA requests. As a representative of the news industry, Kirtley worried that this language could be interpreted to allow agencies to deny expedited processing requests for records that were clearly in the public interest but not necessarily the recipients of “fervent media attention.”<sup>51</sup> Somewhat contrarily, Gellman was afraid that it could be interpreted to warrant expedited processing for nearly any request, which would create an administrative burden for agencies and ultimately slow down the entire FOIA process. Although the reasoning underlying their respective concerns about the vague provision differed, they both seemed to agree that it ultimately would have an effect of weakening the law in one way or another by making it more challenging for requesters to access government records.

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<sup>50</sup> Ibid., 105.

<sup>51</sup> U.S. Congress, House, Subcommittee, *Federal Information Policy*, 120.

Additionally, both Kirtley and Gellman provided suggestions for ways that legislators might go about clarifying or changing the ambiguous provision to make it stronger. Kirtley proposed that the provision be modified to somehow include records that would “enlighten the public on matters where public concern is strong,”<sup>52</sup> and Gellman suggested that it basically be eliminated to give agencies the discretion to set their own expedited processing guidelines,<sup>53</sup> which would ensure that they would not be unnecessarily burdened by a far-reaching and, in some cases, unrealistic federal policy. Although others who testified before the subcommittee defended the expedited processing provision in general like Kirtley did, none of them defended nor criticized the “widespread, contemporaneous media coverage” language in particular; this meant that Gellman and Kirtley were the only ones who mentioned the language and that the feedback the subcommittee received about it was thus exclusively negative. This fact becomes particularly significant when analyzing how the subcommittee eventually decided to respond to this criticism.

About a month following the hearings in which Kirtley and Gellman testified before the Subcommittee on Government Management, Information, and Technology, Representative Randy Tate (R-WA) introduced a revised version of the bill on the House floor. This bill included new guidelines for expedited processing that would effectively become a part of the actual law three months later. According to these guidelines, it would be determined that there was a “compelling need” to expedite the release of records when (1) “a failure to obtain requested records on an expedited basis...could reasonably be expected to pose an imminent threat to the life or physical safety of an individual,” or (2) “with respect to a request made by a

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<sup>52</sup> Ibid.

<sup>53</sup> U.S. Congress, House, Subcommittee, *H.R. 1281*, 105.



person engaged in disseminating information, [there is a] compelling urgency to the public.”<sup>54</sup>

The second condition in the original legislation, which was related to protecting a person’s due process rights, was essentially folded into the first condition protecting a person’s physical safety, and, more importantly, the condition related to “widespread, contemporaneous media coverage” was changed to instead require “compelling urgency.” By the time E-FOIA became law a few months later, the wording of this condition had been changed again, although subtly. The final statute required there to be “urgency to inform the public concerning actual or alleged Federal Government activity” if a member of the news media were to receive expedited processing.<sup>55</sup>

For my project, concluding that a legislative deferral has taken place requires finding evidence that legislators have (1) drawn attention to specific ambiguities in a bill, (2) expressed recognition that courts or agencies will later be forced to interpret these ambiguities, and (3) chosen to keep the ambiguities in the bill anyway, thereby refusing to limit the discretion of courts and agencies. Based on the transcripts from their testimonies, it is clear that Jane Kirtley and Robert Gellman both (1) made the subcommittee aware of an ambiguous provision in the bill and (2) openly predicted that both federal agencies and courts would have to interpret this provision. They even went so far as to provide suggestions for clarifying the ambiguous language, which the legislators on the subcommittee chose not to adopt. Instead, as I explain, it appears that the legislators modified the controversial provision to include language that seems to be no less ambiguous than the original language, giving courts and agencies the discretion to interpret the law on their own, even if that meant that FOIA might become weaker as a result.

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<sup>54</sup> *Electronic Freedom of Information Act Amendments of 1996*, H.R. 3802, 104<sup>th</sup> Cong. July 12.

<sup>55</sup> *Electronic Freedom of Information Act Amendments of 1996*, Public Law 104-231. U.S. Statutes at Large 110 (1996): 3048-3054.

This failure to clarify the provision fulfills my the third criterion for a purposeful legislative deferral, thereby allowing me to conclude that one occurred with this part of the legislation.

By modifying the “widespread, contemporaneous media coverage” language after Kirtley and Gellman publicly articulated their concerns about it, it appears that lawmakers were attempting to demonstrate that they were being responsive to criticism of their legislation, even if they had no intention of modifying it in a way that would actually make it stronger. Thus, the final language that the subcommittee settled on instead, requiring that there be “urgency to inform the public,” is indeed different from the original but does not appear to alleviate either witness’s specific concerns or even make the provision any less ambiguous; the need to demonstrate “urgency” to access information seems to be just as unclear as the need to demonstrate that requested records are related to a “widespread” media story. Consequently, Kirtley’s fears that agencies could unnecessarily reject expedited processing requests still seem reasonable, as do Gellman’s fears that agencies would contrarily be forced to interpret the statute too broadly, thus slowing them down with an overwhelming number of expedited processing requests. So although the subcommittee responded to a perceived weakness in its bill by modifying the weak language under discussion, its modifications do not seem to have had any real effect on making the bill stronger and improving FOIA performance.

The question that arises, then, is why the subcommittee decided to modify the language the way it did; with specific proposals to make the bill stronger, why go with an alternative one that does not appear to accomplish this goal? Because the process of deliberation for the subcommittee was closed to the public and no transcripts of it are available, we will likely never know exactly how the final language was chosen, and any answer to this question is consequently bound to be at least partly speculative. However, all available evidence points to

the idea that members of Congress actually did not want to accomplish the goal of making the bill stronger at all, choosing instead to legislatively defer to the courts and federal agencies on the issue to avoid the potential consequences of making a politically unpopular decision about it. By demonstrating responsiveness to concerns made in a public setting, lawmakers were able to display an apparent desire to make FOIA stronger while changing the E-FOIA legislation in a way that would, unbeknownst to their constituents, fail to actually do so. This allowed them to create policy that was reflective of some of their other interests, such as a desire to protect the national security, while simultaneously satisfying their primary interest of preserving their chances at reelection.

## **Conclusion**

As I explained in this chapter, the Electronic Freedom of Information Act was passed by a unanimous Congress and signed into law by an enthusiastic President Clinton in 1996. Within just a few years, though, it became evident that the law was not working in the way that it was supposedly intended to, causing FOIA performance to decline in a number of areas rather than improve. By examining the transcripts of a series of Congressional hearings and the texts of House and Senate committee reports, I was able to find evidence to support the idea that lawmakers legislatively deferred to courts and federal agencies to make certain FOIA-related decisions for them, presumably in an attempt to avoid political controversy. In particular, legislators changed a provision requiring “widespread, contemporaneous media coverage” to qualify for the expedited processing of FOIA requests to instead require “urgency.” This appears to have been an attempt to appease critics Jane Kirtley and Robert Gellman, who had different opinions on how to clarify the provision, without actually addressing the substance of their

concerns, that the legislation was too ambiguous. The result was an equally ambiguous statute that was likely to cause the exact problems that Kirtley and Gellman predicted, but that would transfer the resulting public frustration to courts and agencies instead of the legislators themselves.

Even though the expedited processing provision in the final version of E-FOIA may have made the law weaker, it is important to remember that it was certainly not the most criticized aspect of the law following its implementation. Instead, there was widespread agreement that E-FOIA failed because there were no penalties for agencies who refused to adopt its requirements altogether. Unfortunately, because transcripts of deliberations over E-FOIA are largely unavailable, it is impossible to determine whether a legislative deferral occurred when a provision including these penalties in an early version of the bill was removed. However, recognition of this flaw in the amendment was so prevalent that it would undoubtedly arise the next time Congress attempted to make another major revision to FOIA. That would happen about a decade later, in 2007, with the OPEN Government Act. This time penalties for agencies that failed to comply with the law would indeed be part of the final legislation. Does this mean that members of Congress had a change of heart and suddenly wanted FOIA performance to improve? In the next chapter, I attempt to find out.

## THE OPEN GOVERNMENT ACT OF 2007

After the Electronic Freedom of Information Act was passed in 1996, another major update to FOIA would not come for more than a decade. President George W. Bush eventually signed the Openness Promotes Effectiveness in our National Government Act of 2007 on December 31 of that year. Often called the OPEN Government Act for short, the law seemed to address many of the problems that transparency advocates claimed were resulting in the release of fewer agency records than ever before and making the U.S. government more opaque as a result. It added penalties to agencies that failed to fulfill their FOIA responsibilities;<sup>1</sup> established a new agency known as the Office of Government Information Services (OGIS) to serve as a FOIA ombudsman and oversee compliance with the law, recommend policy changes, and assist the public with making requests;<sup>2</sup> increased agency reporting requirements to help identify successes and failures both at the agency level and government-wide;<sup>3</sup> and broadened the definition of “representative of the news media” to include journalists from online publications and other bloggers, thus allowing more requesters to submit FOIA inquiries for free.<sup>4</sup>

Each of these changes was designed to help U.S. citizens access more information held by their government, and they certainly seemed to be promising steps in the right direction at the time. However, there is evidence to suggest that they ultimately failed to solve FOIA’s problems completely and, in some cases, actually made the problems worse. Five years later, in 2012, the nonprofit the National Security Archive published a study that revealed that more than half of

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<sup>1</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*, Public Law 110-175. U.S. Statutes at Large 121 (2007): 2524-2531.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

federal agencies had still not fully complied with the law.<sup>5</sup> In a congressional hearing around the same time, Kevin Goldberg, a representative for the Sunshine in Government Initiative and the American Society of News Editors, noted that “most of the original goals of the OPEN Government Act—and FOIA itself—simply haven’t been realized.”<sup>6</sup> FOIA backlogs were continuing to increase,<sup>7</sup> and dissatisfaction with the law seemed to be higher than ever.

At the conclusion of this chapter, I analyze where things went wrong and why. However, I begin by outlining a series of developments in American politics and to FOIA policy in the years leading up to the OPEN Government Act’s passage to provide additional context for how and why the law formed in the way it did. As I explain, the inauguration of President Bush in early 2001 and the terrorist attacks on American soil later that year transformed the political climate into one in which government transparency was no longer a top priority and instead was often viewed as a threat to the country’s national security. This catalyzed changes to FOIA policy that resulted in the release of fewer records. I then provide a brief legislative history of the OPEN Government Act before using George Lovell’s legislative deferral model to examine whether members of Congress intentionally designed the law to be ineffective. As I demonstrate, all available evidence suggests that no legislative deferral occurred. However, there is evidence to support the notion that both an increased demand for sensitive national security information and a lack of resources to process these requests, two ideas outlined in chapter 2, did contribute to the law’s ineffectiveness.

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<sup>5</sup> U.S. Congress. Senate. Committee on the Judiciary, *We The People: Fulfilling the Promise of Open Government Five Years After the OPEN Government Act: Hearing before the Committee on the Judiciary*. 113th Cong., 1st sess., March 13, 2013. 3.

<sup>6</sup> *Ibid.*, 60.

<sup>7</sup> U.S. Congress. Senate. Committee on the Judiciary. *FOIA Improvement Act of 2015: Report together with Additional Views (to Accompany S. 337)*. 114th Cong., 1<sup>st</sup> sess., 2015. S. Rep. 114–4. 3.

## FOIA Policy in Post-9/11 America

Following the terrorist attacks in the United States on September 11, 2001, FOIA policy in the country changed dramatically. Protecting the country's national security interests proved to be of a higher priority than government transparency for the Bush administration, so it took measures to scale back FOIA and other similar laws. On October 12, just a month after 9/11, Attorney General John Ashcroft issued a memorandum to all agencies within the executive branch that detailed the administration's new policy for handling FOIA requests. Although the memo began by affirming the administration's commitment to "full compliance" with FOIA as it was written, Ashcroft also wrote that the administration was "equally committed to protecting other fundamental values that are held by our society," including "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."<sup>8</sup> As a result, he ordered agencies to consider these values when making decisions about FOIA disclosures:

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information... When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.<sup>9</sup>

This new policy went into effect immediately, and in doing so it overturned an earlier policy memorandum that had been issued in 1993 by Attorney General Janet Reno, which had

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<sup>8</sup> John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act," ed. Department of Justice (2001).

<sup>9</sup> Ibid.

encouraged a “presumption of disclosure” when handling FOIA requests.<sup>10</sup> Instead, according to Anthony Romero, the Executive Director of the American Civil Liberties Union, agencies were now expected to “resist disclosure wherever legally possible” to protect the country’s national security interests.<sup>11</sup> Should any legal challenges arise as a result of this policy, the Department of Justice was prepared to intervene on the agencies’ behalf, giving them no reason to resist Ashcroft’s orders.

In 2003, the Government Accountability Office (GAO) released a report suggesting that the administration’s new policy was having its desired effect of limiting the disclosure of potentially sensitive records. According to the report, about one in three of the FOIA officers that the agency interviewed reported that they were less likely than before to release records to the public, with the majority referencing Ashcroft’s memo as the main motivating factor.<sup>12</sup> Additionally, Ari Schwartz, the Associate Director of a nonprofit called the Center for Democracy and Technology, testified in a 2005 House hearing that many FOIA officers admitted to him that “they have specifically denied requests that they would have accepted in the past.”<sup>13</sup> And at another hearing in 2007, Melanie Ann Pustay, the Acting Director of the DOJ’s Office of Information and Privacy, commented that this was far from unusual given the new national security concerns following 9/11:

Certainly all of us in the FOIA community looked at information in a new light after 9/11, and there certainly have been situations where agencies had to start, for the first time, thinking about the impact of disclosure on a potential terrorist, and we would be

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<sup>10</sup> U.S. Congress. House. Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform, *The State of the FOIA: Assessing Agency Efforts to Meet FOIA Requirements: Hearing before the Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform*. 110<sup>th</sup> Cong., 1<sup>st</sup> sess., February 14, 2007. 103.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> U.S. Congress. House. Subcommittee on Government Management, Finance, and Accountability of the Committee on Government Reform, *Information Policy in the 21<sup>st</sup> Century: A Review of the Freedom of Information Act: Hearing before the Subcommittee on Government Management, Finance, and Accountability of the Committee on Government Reform*. 109<sup>th</sup> Cong., 1<sup>st</sup> sess., May 11, 2005. 161-162.



irresponsible if we didn't think that way... The law enforcement exemptions have been used in a new way because of new threats, new consequences from disclosure that were simply unforeseen before 9/11.<sup>14</sup>

Because FOIA requires that government officials determine which information should be released to the public based on a set of relatively vague guidelines, it is understandable that these officials might become more conservative with disclosures following an event as devastating as 9/11, and especially when ordered to do so by the sitting attorney general. However, many transparency advocates later accused the Bush administration of going too far in encouraging this type of behavior, limiting FOIA's utility as a tool to promote open government.<sup>15</sup>

Many of the criticisms of the Bush administration's FOIA policies related not only to the content of the Ashcroft memo but also to its practice of creating new ways to classify documents to prevent their disclosure to the public. According to Meredith Fuchs of the nonprofit the National Security Archive, "these new secrecy stamps...tell government bureaucracies 'don't risk it'...[and] 'find a reason to withhold.'"<sup>16</sup> Some congressmen agreed. Representative Henry Waxman (D-CA), for example, said in a 2005 hearing that the "new pseudo-classifications," including "Sensitive but Unclassified" and "For Official Use Only" had "no statutory or regulatory basis, yet they are being used to keep important information from the public."<sup>17</sup> Waxman likened this practice to a "wholesale assault on open government,"<sup>18</sup> one that necessitated the congressional action that would ultimately come in part in the form of the OPEN Government Act.

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<sup>14</sup> U.S. Congress, House, Subcommittee, *The State of the FOIA*, 76.

<sup>15</sup> Clint Hendler. "What We Don't Know Has Hurt Us." *Columbia Journalism Review*, January 2009, [http://archives.cjr.org/feature/what we didnt know has hurt us.php](http://archives.cjr.org/feature/what_we_didnt_know_has_hurt_us.php).

<sup>16</sup> U.S. Congress. Senate. Subcommittee on Terrorism, Technology, and Homeland Security of the Committee on the Judiciary, *Openness in Government and Freedom of Information: Examining the Open Government Act of 2005: Hearing before the Subcommittee on Terrorism, Technology, and Homeland Security of the Committee on the Judiciary*. 109<sup>th</sup> Cong., 1<sup>st</sup> sess., March 15, 2005. 46.

<sup>17</sup> U.S. Congress, House, Subcommittee, *Implementing FOIA*, 27.

<sup>18</sup> *Ibid.*, 26.

Even information that was not particularly sensitive was withheld from the public during this time. According to Thomas Kean, the Chair of 9/11 Commission created to investigate the terrorist attacks, three quarters of the classified information he saw during the course of the investigation should not have been so classified and withheld.<sup>19</sup> At a hearing a few years later, Senator Patrick Leahy (D-VT) noted that “billions of dollars of taxpayers’ money is spent every year to classify things that sometimes have been on Government websites for months before they are classified.”<sup>20</sup> It was clear that the Bush administration’s policy of withholding information whenever possible was leading to mistakes. “I am deeply concerned,” Representative Lacy Clay (D-MO) said, “that this administration appears to be shielding information that ought to be accessible to the public.”<sup>21</sup> Other members of Congress felt the same way.<sup>22</sup>

There was even debate about whether withholding sensitive information would have the desired effect of protecting American citizens. At a hearing about an early version of the OPEN Government Act in 2005, the National Security Archive’s Meredith Fuchs shared an interesting quote from Eleanor Hill, the staff director of the joint House-Senate Intelligence Committee investigation into 9/11. Hill had said that, prior to the attacks, “the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort, an alert and committed American public.”<sup>23</sup> By this same logic, as Fuchs explained in her testimony, President Bush’s efforts to protect the country by making FOIA more restrictive may have actually put American citizens in greater danger.<sup>24</sup> There are “things that the public needs to know and that the government needs

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<sup>19</sup> U.S. Congress, Senate, Subcommittee, *Openness in Government*, 16.

<sup>20</sup> U.S. Congress, Senate, Committee on the Judiciary, *Open Government: Reinvigorating the Freedom of Information Act: Hearing before the Committee on the Judiciary*. 110<sup>th</sup> Cong., 1<sup>st</sup> sess., March 14, 2007. 2.

<sup>21</sup> U.S. Congress, House, Subcommittee, *The State of the FOIA*, 2.

<sup>22</sup> U.S. Congress, Senate, Subcommittee, *Open Government*, 19.

<sup>23</sup> U.S. Congress, Senate, Subcommittee, *Openness in Government*, 17.

<sup>24</sup> *Ibid.*, 17-18.

to acknowledge so that instead of hiding these secrets,” Fuchs said, “we can confront the problems and fix them.”<sup>25</sup>

There is no way to prove whether a stronger FOIA would indeed make America safer, but the discussion surrounding this idea does underscore how controversial FOIA policy had become in post-9/11 America. With the Ashcroft memo and its new classification practices, the Bush administration took notable steps toward withholding information from the public, much to the frustration of those in the country who placed a higher priority on having an open and transparent government. There was disagreement not only about how much information should be withheld but also about whether withholding information was beneficial to the country at all. These differences in opinion would persist throughout the decade and were perhaps strongest during the time that the OPEN Government Act was being debated in Congress. Consequently, the legislation was significantly more controversial than the Electronic Freedom of Information Act that preceded it. Perhaps as a result of this controversy, the final law largely avoided the question of which records were eligible for disclosure, instead making a variety of procedural changes designed to increase agency compliance with FOIA as it was already written. However, as many transparency advocates would later affirm at hearings before the House and Senate subcommittees charged with writing the legislation, these were still welcome and necessary improvements.

### **FOIA Performance Hits New Lows**

Even before 9/11 and the Ashcroft memo, it was obvious that another major update to FOIA was necessary. Despite what appeared to be efforts by members of Congress to improve

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<sup>25</sup> Ibid., 17.

FOIA with 1996's Electronic Freedom of Information Act, it seemed that less information was being released to American citizens than ever before. As mentioned in the previous chapter, in a 1998 hearing dedicated to assessing E-FOIA's success, the Chairman of the House Subcommittee on Government Management, Information, and Technology, Stephen Horn (R-CA), admitted that "preliminary indications suggest that agency compliance [with the law] has been spotty at best."<sup>26</sup> By 2007, the year the OPEN Government Act was passed, it was possible to develop a more complete understanding of E-FOIA's shortcomings; some scholars suggested that it had been ignored, marginalized, and underfunded by the majority of federal agencies,<sup>27</sup> and there was data to support their claims: only 21% of federal agencies were fulfilling the basic requirements of the law, according to the National Security Archive.<sup>28</sup> It was clear that something needed to be done.

Deliberations over the OPEN Government Act had actually started two years earlier, in 2005, when there was already widespread agreement that FOIA needed to be amended. In response to these deliberations in both the House and Senate, President Bush issued an executive order on December 14 of that year titled "Improving Agency Disclosure of Information" that included a variety of measures designed to make FOIA stronger, including the creation of a new Chief FOIA Officer at each federal agency.<sup>29</sup> The Chief FOIA Officer was tasked with monitoring FOIA compliance throughout the agency and recommending changes when

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<sup>26</sup> U.S. Congress. House. Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, *Implementation of the Electronic Freedom of Information Amendments of 1996: Is Access to Government Information Improving?* 105<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 9, 1998.

<sup>27</sup> Ibid.

<sup>28</sup> The National Security Archive. "File Not Found: Agencies Violate Law on Online Information." *The National Security Archive*, March 12, 2007, <http://nsarchive.gwu.edu/NSAE/NSAE216/>.

<sup>29</sup> Executive Order 13392 of December 14, 2005, Improving Agency Disclosure of Information, Code of Federal Regulations, title 3 (2006): 216-220, <https://www.gpo.gov/fdsys/pkg/CFR-2006-title3-vol1/pdf/CFR-2006-title3-vol1-eo13392.pdf>

appropriate.<sup>30</sup> The executive order also required that each agency submit a report within six months with information about how to improve its FOIA practices, along with reports in each of the following two years detailing its successes and failures at making these improvements.<sup>31</sup>

Members of Congress who had been advocating for improvements to FOIA were generally receptive to President Bush's efforts, although there seemed to be a consensus that further legislation was still necessary. "This Executive order is certainly a step in the right direction," Representative Henry Waxman (D-CA) said. "If implemented properly, it could address some of the problems faced by FOIA requesters, but even if fully implemented, the Executive order will not address all of FOIA's problems."<sup>32</sup> Senator Patrick Leahy (D-VT) agreed: "I see it as a constructive first step, but not the comprehensive reform we [are considering]."<sup>33</sup> And Representative Brad Sherman (D-CA) pointed out that "[w]hile the Executive order was helpful, it failed to deal with a number of problems including the fact that under FOIA, the exemptions are too broad; the delays are too numerous; [and] there is a complete lack of penalties for agencies that violate FOIA."<sup>34</sup> As a result, these legislators continued their efforts to pass a new FOIA amendment.

Although President Bush's executive order served to make FOIA stronger by facilitating agency compliance with the law, it is important to recognize that it was not a complete reversal of his administration's earlier policy of encouraging agencies to withhold particularly sensitive information. Melanie Ann Pustay of the Office of Information and Privacy helped to explain this

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> U.S. Congress, House, Subcommittee, *Implementing FOIA*, 3.

<sup>33</sup> Ibid., 6.

<sup>34</sup> Ibid., 28.

distinction at a 2007 hearing before the House Subcommittee on Information Policy, Census, and National Archives:

The Executive order is addressed completely to the processes by which FOIA is administered, and it is designed to help agencies set up systems where requestors can learn about their requests more readily, have their requests processed more quickly. It doesn't address in any way the substance of what is released or withheld.<sup>35</sup>

Whereas the Ashcroft memo and the Bush administration's crackdown on the classification of certain documents sparked a series of debates about the substance of information eligible for disclosure through FOIA, the 2005 executive order was instead dedicated to improving the efficiency of the disclosure of those records that were eligible. It did not change Bush's controversial policy on discouraging the release of potentially sensitive information, but it did at least partly satisfy some of his critics by addressing some of FOIA's many problems. It was indeed a positive and much-needed step forward, especially considering that a preponderance of evidence was beginning to accumulate to support the notion that the law was becoming less effective than ever before.

Prior to Bush's executive order, an audit of 35 federal agencies had revealed that some FOIA request backlogs went back as far as 16 years.<sup>36</sup> In 2005, the number of backlogged requests at all federal agencies combined increased by 25 percent from the year before because of the "new challenges concerning the protection of National Security Information...[and] limited agency resources," according to Representative Edolphus Towns (D-NY).<sup>37</sup> And according to Linda Koontz of the Government Accountability Office, the rate of backlog increase accelerated in 2005 for the fourth consecutive year.<sup>38</sup> Things only seemed to be getting

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<sup>35</sup> U.S. Congress, House, Subcommittee, *The State of the FOIA*, 73.

<sup>36</sup> U.S. Congress, House, Subcommittee, *Information Policy in the 21<sup>st</sup> Century*, 133.

<sup>37</sup> U.S. Congress, House, Subcommittee, *Implementing FOIA*, 3-4.

<sup>38</sup> *Ibid.*, 46.

worse by 2006, when a nonprofit known as OpenTheGovernment.org released a midyear report on agency implementation of President Bush's executive order, which by then had been in effect for more than six months. The report found that 17 federal agencies were not doing anything at all to address the requirements of the order, and many others developed plans to do so that were rated as either poor or merely adequate.<sup>39</sup>

Although lawmakers were working on the OPEN Government Act throughout this entire period, the legislation did not receive significant attention until early 2007, nine months before a modified version would be signed into law. This is when scrutiny over FOIA really started, and it revealed a law that appeared to be failing by almost every measurement. In February of that year, a watchdog group known as the Coalition of Journalists for Open Government released a report detailing the results of a comprehensive study it completed on FOIA. Titled "The Waiting Game: FOIA Performance Hits New Lows,"<sup>40</sup> the report opened by stating that "overall FOIA performance remains at the lowest point since agency reporting began in 1998, despite President Bush's executive order last December directing agencies to become more service oriented and reform legislation introduced in the Congress."<sup>41</sup> It then outlined the law's many shortcomings, concluding that agency backlogs were worsening,<sup>42</sup> people were waiting longer for information,<sup>43</sup> agencies were denying FOIA requests more frequently,<sup>44</sup> people whose requests were denied got relief on appeal less often,<sup>45</sup> and costs to administer FOIA were continuing to rise,<sup>46</sup> despite the fact that agency FOIA staffs were smaller than in 1998.<sup>47</sup> The nonprofit

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<sup>39</sup> Ibid., 28.

<sup>40</sup> U.S. Congress, House, Subcommittee, *The State of the FOIA*, 150.

<sup>41</sup> Ibid., 151.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., 152.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 152, 160.

<sup>47</sup> Ibid., 152.

supported these findings with a plethora of empirical data that made their conclusions undeniable. It also debunked the claims of potential skeptics by proving that the complexity and volume of requests played no role in contributing to these disturbing statistics; according to the report, agencies had actually processed fewer requests in 2005 than eight years earlier,<sup>48</sup> and a smaller proportion of these requests were considered to be particularly complex, which could have had an effect of slowing down the disclosure process.<sup>49</sup> Yet the costs of administering FOIA had still risen 55% since 1998,<sup>50</sup> a clear sign that the program was being mismanaged and needed reform.

A month later, in March 2007, the Government Accountability Office released a similar report about FOIA, and although it seemed to suggest that the law was more effective than the Coalition of Journalists for Open Government claimed it was, it still outlined several areas where FOIA performance was lacking. Titled “Processing Trends Show Importance of Improvement Plans,” the report concluded that “the number of pending requests carried over from year to year has been steadily increasing,”<sup>51</sup> rising 43% from 2002 to 2006.<sup>52</sup> The GAO noted repeatedly, however, that it did not have enough data to develop meaningful statistics about government-wide FOIA performance in a number of other areas because the law only required agencies to report median statistics that could not be combined:

Our ability to make further generalizations about FOIA processing times is limited by the fact that, as required by the act, agencies report median processing times only and not, for example, arithmetic means (the usual meaning of “average” in everyday language) ...Thus, although using medians provides representative numbers that are not skewed by a few outliers, they cannot be summed...As a result, with only medians it is not statistically possible to combine results from different agencies to develop broader generalizations,

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<sup>48</sup> Ibid., 160.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., 176.

<sup>51</sup> U.S. Government Accountability Office. “Freedom of Information Act: Processing Trends Show Importance of Improvement Plans.” Report. <http://www.gao.gov/assets/260/258549.pdf> (accessed February 2, 2017). 19.

<sup>52</sup> U.S. Congress. Senate, Committee on the Judiciary, *Open Government Act of 2007: Report Together with Additional Views (to Accompany S. 849)*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., 2007. S. Rep. 110-59. 3.



such as a governmentwide statistic based on all agency reports, statistics from sets of comparable agencies, or an agencywide statistic based on separate reports from all components of the agency.<sup>53</sup>

The report concluded with a recommendation that future FOIA legislation require that agencies disclose averages (arithmetic means) and ranges in their annual FOIA reports.<sup>54</sup> However, despite the fact this data was currently unavailable, all other indications seemed to suggest that it was time for FOIA to be updated for the first time in more than a decade. The only question was what measures that revision would include, and a series of congressional hearings and debates in subsequent months would prove that disagreements about FOIA's future were plentiful.

### **Legislative History of the OPEN Government Act**

Despite the fact that fewer government records were being released to the public, there were still FOIA success stories during the time that helped to expose a variety of troubling government activities. In February 2007, for example, *USA Today* reported that there were 122 levees in the country that were “so poorly maintained that they could fail in a major flood.”<sup>55</sup> According to the newspaper, “The Army Corps of Engineers, which built many of the levees, refused to name the affected communities” until *USA Today* and the Associated Press submitted a FOIA request.<sup>56</sup> A couple of years earlier, the *Marine Corps Times* had used FOIA to report that “nearly 10,000 Marines were issued body armor that flunked government safety tests and had potentially life-threatening flaws.”<sup>57</sup> And, perhaps most prominently, FOIA helped to expose

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<sup>53</sup> U.S. Government Accountability Office, 31.

<sup>54</sup> *Ibid.*, 44.

<sup>55</sup> U.S. Congress, House, Subcommittee, *The State of the FOIA*, 86.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

a series of disturbing human rights violations at the U.S.-controlled Abu Ghraib prison in Iraq in 2004.<sup>58</sup> These examples of FOIA successes helped to remind both legislators and the American public of the law's importance, even as the country continued to reconsider its information policies following the 9/11 terrorist attacks. Anthony Romero of the American Civil Liberties Union, for instance, used the Abu Ghraib example when making a passionate plea for strengthening FOIA at a 2007 hearing before the House Subcommittee on Information Policy, Census, and National Archives:

The photographs from Abu Ghraib alone should be enough to convince this Congress that our body politic is not well. More pictures are being improperly withheld by our government as we speak. Do they show that the abuse pre-dated Abu Ghraib, or perhaps that it continued after the events that we know about? The CIA has refused to say whether it is continuing to use abusive interrogation techniques, making a mockery of the concept of a government that answers to the people. Congress needs to restore and even improve democracy's x-ray, so that the American people can correctly diagnose the problems, and make informed decisions about how to improve their government. A robust Freedom of Information Act will not make us weak; it will demonstrate for all to see the unconquerable strength of a free nation dedicated to the supremacy of the rule of law.<sup>59</sup>

Others who testified in hearings related to the OPEN Government Act were also quick to remind legislators of the law's importance. Meredith Fuchs of the National Security Archive, for example, provided lawmakers with a list of nearly 100 recent news stories that had been made possible by FOIA at a 2007 hearing.<sup>60</sup> These efforts did not go unnoticed, and they gave additional weight to the claims of legislators like Representative Lamar Smith (R-TX) and Senator John Cornyn (R-TX), who in 2005 started to demand that FOIA be amended.

Representative Smith introduced the OPEN Government Act of 2005 on the House floor on February 16, 2005, the same day that Senator Cornyn introduced a nearly identical bill on the

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<sup>58</sup> Ibid., 107.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., 127-145.

Senate floor.<sup>61</sup> Both pieces of legislation were referred to committees, and each of the respective committees held a hearing shortly thereafter to develop an understanding of FOIA's shortfalls and how the OPEN Government Act might address them.<sup>62</sup> The Senate version of the bill was eventually reported on September 21 of the following year but never became law.<sup>63</sup> A similar bill, known as the Restore Open Government Act of 2005, was introduced on the House floor by Representative Henry Waxman (D-CA) in May 2005, but this legislation was no more successful.<sup>64</sup> It was not until 2007 that efforts to reform FOIA would begin to gain momentum. On March 5 of that year, Representative Lacy Clay (D-MO) introduced a new bill on the House floor.<sup>65</sup> A week later, a similar bill was introduced in the Senate by Senators Leahy (D-VT) and Cornyn.<sup>66</sup> These bills would both be subsequently modified but were ultimately passed nine months later. The OPEN Government Act of 2007 became law upon President Bush's signature on December 31, 2007.

Throughout this entire process, there were substantive debates in Congress about certain aspects of the legislation. Many Democrats, for example, wanted to include a provision that would repeal 2001's Ashcroft memo, which had encouraged agencies to withhold information from the public whenever possible.<sup>67</sup> Although this provision was indeed a part of early versions of the legislation, it was eventually removed from the final bill to win the votes of Republicans

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<sup>61</sup> *Openness Promotes Effectiveness in Our National Government Act of 2005*, H.R. 867, 109<sup>th</sup> Cong.; *Openness Promotes Effectiveness in Our National Government Act of 2005*, S. 394, 109<sup>th</sup> Cong. February 16.

<sup>62</sup> U.S. Congress, House, Subcommittee, *Information Policy in the 21<sup>st</sup> Century*.; U.S. Congress, Senate, Subcommittee, *Openness in Government*.

<sup>63</sup> *Openness Promotes Effectiveness in Our National Government Act of 2005*, S. 394, 109<sup>th</sup> Cong. September 21.

<sup>64</sup> *Restore Open Government Act of 2005*, H.R. 2331, 109<sup>th</sup> Cong.

<sup>65</sup> H.R. 1309, 110<sup>th</sup> Cong.

<sup>66</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*, S. 849, 110<sup>th</sup> Cong. March 13.

<sup>67</sup> John Ashcroft. "Memorandum for Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act," ed. Department of Justice (2001).

like Senator Thomas Davis of Virginia.<sup>68</sup> “As I’ve stated since we began work on this legislation,” he said on the Senate floor, “improving procedural aspects of FOIA should be our [main] goal,”<sup>69</sup> and others agreed with him; the final version of the OPEN Government Act would be almost entirely procedural, as it was overwhelmingly focused on improving access to records that everyone agreed could safely be released to the public, not on providing additional legal guidelines to help government officials determine what those records were.<sup>70</sup>

There were two other provisions within the legislation that were also the subject of scrutiny and passionate debate. The first expanded the definition of “representative of the news media” as it was used by agencies when determining whether certain requesters would qualify to be exempted from paying certain fees related to their FOIA requests. The second provision was perhaps the most controversial part of the entire bill, as it penalized agencies that failed to fulfill their FOIA responsibilities by requiring that they pay for the attorney fees of requesters that successfully appealed their FOIA denials. Although lawmakers disagreed about these issues, they were ultimately able to compromise by developing common understandings of particular language within the legislation that would influence how courts interpreted it. Because members of Congress anticipated that the courts would be interpreting their legislation and ultimately modified some of its contents as a result, the debates over both of these issues serve as ideal examples to which I can apply to George Lovell’s legislative deferral model and test my hypothesis. However, as I conclude in the next section, although FOIA’s problems would persist following the OPEN Government Act’s passage, there does not appear to be enough evidence to

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<sup>68</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*. S. 2488. 110<sup>th</sup> Cong., 1st sess., Congressional Record 153, pt. 192: 15701-15704.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*, Public Law 110-175.

support my legislative deferral theory and thus the idea that legislators wanted the law to be ineffective.

### **Senator Kyl Takes The Floor**

In this project, I examine whether members of Congress have specifically designed recent FOIA amendments to fail to achieve their stated goals, and whether they have done so covertly to satisfy their constituents' demands for transparency and thereby preserve their chances at reelection. I assess whether the FOIA updates qualify as what scholar George Lovell describes as a legislative deferral, in which members of Congress specifically write certain controversial provisions in a way that appears ambiguous so that courts and federal agencies must interpret them and bear the brunt of any criticism from the public that may arise as a result. This would seem to make sense with FOIA, as laws designed to increase government transparency are likely to be popular in the United States but must simultaneously be weighed against the need to protect sensitive information from getting into the wrong hands, particularly post-9/11. If, however, a legislative deferral is not evident, then any difficulties experienced within the current FOIA regime can likely be attributed instead to one of the other theories I outlined in chapter 2, which relate to a changing composition and volume of FOIA requests. These theories explain FOIA's failures as a product of demand (i.e. the requests themselves) rather than supply (i.e. legislative intent to change how the requests are processed).

Evidence of a legislative deferral consists of legislators (1) being aware of ambiguities within a bill, (2) recognizing that courts or federal agencies will be forced to interpret these ambiguities if they are not clarified, and (3) choosing to refrain from clarifying the ambiguities anyway. I am only able to conclude that a legislative deferral has occurred—and that lawmakers

therefore anticipated that their amendment would be ineffective—if all three of these criteria are met. As I explained in the previous chapter, it appears that a legislative deferral did indeed take place with 1996’s Electronic Freedom of Information Act, which could help explain why it became obvious in subsequent years that it had failed to solve FOIA’s many problems, and in some cases even exacerbated them. However, in this chapter I conclude that legislative deferrals did not occur with any portion of the OPEN Government Act, specifically because of an amendment that was introduced on the Senate floor—and later approved by a unanimous Congress—by Senator Jon Kyl (R-AZ), who was determined to make sure that everyone knew exactly what Congress’s intentions were when passing the law.

### *Defining “Representative of the News Media”*

As discussed in the previous chapter, one of the most important portions of the Electronic Freedom of Information Act was a statute that allowed journalists and others “engaged in disseminating information” to receive expedited processing of their FOIA requests if government officials determined that there was “urgency to inform the public concerning actual or alleged Federal Government activity.”<sup>71</sup> The ambiguity within this language and legislators’ refusal to clarify it was what allowed me to conclude that a legislative deferral occurred with the law. As I explain in this section, lawmakers would debate a similar provision a decade later as the OPEN Government Act made its way through Congress, giving them another chance to decide whether and how to clarify language that would affect journalists and their interactions with the law.

FOIA had long exempted “representative[s] of the news media” from paying processing and search fees related to their FOIA requests because lawmakers believed that these

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<sup>71</sup> *Electronic Freedom of Information Act Amendments of 1996*, Public Law 104-231. U.S. Statutes at Large 110 (1996): 3048-3054.

representatives played an important role in disseminating information to the American public.<sup>72</sup> By making it cheaper for journalists to submit FOIA requests, it was thought that they would be able to serve as more effective government watchdogs.<sup>73</sup> The first version of the OPEN Government Act, introduced on the House floor on February 16, 2005, sought to expand the traditional definition of “representative of the news media” so that journalists from online publications and other bloggers would be newly eligible to receive fee waivers:

In making a determination of a representative of the news media...an agency may not deny that status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester. Prior publication history shall include books, magazine and newspaper articles, newsletters, television and radio broadcasts, and Internet publications. If the requestor has no prior publication history or current affiliation, the agency shall consider the requestor's stated intent at the time the request is made to distribute information to a reasonably broad audience.<sup>74</sup>

This addition to the legislation was designed to increase access to FOIA to a much wider variety of people, and although there was general agreement that journalists from online publications should indeed qualify for fee exemptions, there was debate about whether the requirement that agencies consider “the requestor’s stated intent...to distribute information to a reasonably broad audience” was specific enough to allow the tool to be used effectively. In an addendum to a report published by Senate Committee on the Judiciary on April 30, 2007, for example, Richard Hertling, the acting assistant attorney general, criticized nearly every aspect of the proposed OPEN Government Act, including this phrase, which was still present in the most recent version of the legislation. “Because it can be assumed that virtually all requesters claiming to be

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<sup>72</sup> U.S. Congress. House. Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, *H.R. 1281, War Crimes Disclosure Act, Health Information Privacy Protection Act, and S. 1090, Electronic Freedom of Information Improvement Act of 1995: Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight*. 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 14, 1996. 104.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Openness Promotes Effectiveness in Our National Government Act of 2005*, H.R. 867, 109<sup>th</sup> Cong.

representatives of the news media will readily state that it is their ‘intent’ to distribute the records to a broad audience,” he wrote, “this expansion of the definition... would render the concept of ‘representative of the news media’ virtually meaningless.”<sup>75</sup> He went on to suggest that this expansion of the phrase in this way “would have severe fiscal and other practical consequences for the Executive branch,” creating an “increased taxpayer burden” and stretching agency resources to an extent that would ultimately slow down the FOIA disclosure process for everyone.<sup>76</sup>

Senator Jon Kyl (R-AZ) also submitted an addendum that was included in the Senate report, and although he did not mention this provision at the time, it soon became clear that he, too, found the “stated intent” phrase to be problematic. About six months later, on August 3, Kyl proposed an amendment to the OPEN Government Act on the Senate floor that, in part, modified the legislation’s definition of “representative of the news media.” This amendment would eventually be approved by a unanimous Congress and become a part of the law later that year. In it, Kyl removed the “stated intent” phrase and instead expanded the section as a whole to clearly lay out which types of journalists would qualify for fee waivers. For example, he wrote in one part that a “freelance journalist shall be regarded working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity,” which could include a “publication contract” or a “past publication record” that was likely to make publication in the entity more probable.<sup>77</sup> “The compromise language included in my amendment,” Kyl said on the Senate floor, “clarifies the definition of media requester in a way that protects internet publications and freelance journalists but that still preserves commonsense

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<sup>75</sup> U.S. Congress. Senate, Committee on the Judiciary. 20.

<sup>76</sup> Ibid.

<sup>77</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*, S. 849, 110<sup>th</sup> Cong. March 13.



limits on who can claim to be a journalist.”<sup>78</sup> The requirement that requesters now “demonstrate a solid basis for expecting publication” was one such limit on that claim, and it would have an effect of reducing the financial toll that expanding the definition of “representative of the news media” would have on agencies.

To support my hypothesis that legislative deferrals occurred with FOIA amendments, it is necessary to find evidence that members of Congress are aware of ambiguities within a bill and choose to keep the ambiguities in it, even when they recognize that federal agencies will consequently be forced to interpret these ambiguities. The portion of the original OPEN Government Act legislation requiring that there be a “stated intent” to disseminate information to “a reasonably broad audience” was perhaps ambiguous in that it did not lay out specifically what stating one’s intent would look like, or what would constitute a sufficiently broad audience. However, Senator Kyl’s insistence on clarifying this language by expanding the broader definition of “representative of the news media” proves that a legislative deferral did not occur with this portion of the legislation. In fact, Kyl went out of his way to explain on the Senate floor exactly what he intended the revised definition to mean, specifically so that the courts would have enough information to make appropriate decisions in the FOIA appeal cases that would inevitably arise as a result. Although this disproves that a legislative deferral occurred, taking a closer look at how Kyl clarified the language is still valuable, as it serves as an example of what clear lawmaking looks like; juxtaposing this example with the legislative deferral in the Electronic Freedom of Information Act further emphasizes why lawmakers’ refusal to clarify E-FOIA’s language is so troubling.

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<sup>78</sup> *Open Government Act of 2007*. S. 849. 110th Cong., 1st sess., *Congressional Record* 153, pt. 127: 10986-10991.

Senator Kyl clarified his definition of “representative of the news media” in part by referencing prior court cases in which the same definition had arisen. “[W]e have incorporated into the amendment the definition of media requester that was announced by the DC Circuit in *National Security Archive v. U.S. Department of Defense*,” he said, explaining that the definition used in the case seemed to be largely consistent with the one proposed by Representative Lamar Smith (R-TX) and others who had written the OPEN Government Act.<sup>79</sup> He also acknowledged that, with the exception of including bloggers and other online journalists within the definition to expand it, “this definition of the term ‘news media’ as used in FOIA has been in effect for 17 years...[and] I do not think that anyone can reasonably fear that codifying it will turn the world upside down.”<sup>80</sup> In other words, Kyl was being clear that it was Congress’s intent that the same definition that had always been used would continue to be used, with one relatively minor exception to make it more expansive. He concluded by explaining that the reason why he was taking the time and effort to be so explicit about this definition was so that the courts would know exactly how to interpret the law. “By incorporating a judicially crafted definition of news media,” he said, “I believe that my amendment spares the courts the indignity of being compelled to parse conflicting Senate floor statements in order to divine the meaning of that term.”<sup>81</sup> The fact that Kyl anticipated that courts would eventually get involved and clarified the language for this specific purpose demonstrates that a legislative deferral certainly did not occur in this instance; rather, it appears that Kyl was genuine in his desire to improve FOIA and believed that modifying this section was a part of that process.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

*“Substantiality” and Attorney’s Fee Recovery*

Senator Kyl also used his amendment to clarify a second portion of the OPEN Government Act. This was perhaps the most controversial part of the entire bill, as it penalized agencies for failing to fulfil their FOIA responsibilities by requiring that they pay for the attorney’s fees of requesters who appealed their FOIA denials. Although it was used infrequently, this was technically already a part of the law, which stated that “[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA] case...in which the complainant has *substantially prevailed* [my emphasis].”<sup>82</sup> When Senator Kyl presented his amendment on the Senate floor on August 3, 2007, the proposed OPEN Government Act legislation included a section that would expand this statute by clarifying the definition of the term “substantially prevailed” so that more people would qualify to have agencies pay for their legal fees. It read:

For purposes of this section, a complainant has substantially prevailed if the complainant has obtained relief through either—

- (I) a judicial order, an administrative action, or an enforceable written agreement or consent decree; or
- (II) a voluntary or unilateral change in position by the opposing party, where the complainant’s claim or defense was not frivolous.<sup>83</sup>

Section (II) was particularly controversial because it served to legislatively overrule a 2001 Supreme Court case known as *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*. In the case, the Buckhannon Board and Care Home, an assisted living facility, sued the state of West Virginia for ordering that it close following a failed inspection by the state fire marshal’s office.<sup>84</sup> The home failed its inspection

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<sup>82</sup> *Freedom of Information Act*. U.S. Code 7 (2006), §§ 1 et seq.

<sup>83</sup> *Openness Promotes Effectiveness in Our National Government Act of 2007*, S. 849, 110<sup>th</sup> Cong. March 13.

<sup>84</sup> *Buckhannon Board & Care Home, Inc., et al. v. West Virginia Department of Health and Human Resources et al.*, 532 U.S. 598 (2001).

because it did not meet the state's "self-preservation" requirement, which required that residents be capable of escaping the building in case of an emergency.<sup>85</sup> Buckhannon argued that failing on these grounds was a violation of both the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA).<sup>86</sup>

Before the case was decided, though, the West Virginia state legislature passed two bills that eliminated the "self-preservation" requirement from the law, allowing the case to be dismissed as moot by the local District Court. Buckhannon, however, then requested that the state pay for its attorney's fees by referencing part of the FHAA, which stated that "the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee and costs."<sup>87</sup> The assisted living facility argued that it was the "prevailing party" in the dispute under something known as the "catalyst theory," which suggests that a plaintiff is a "prevailing party" if a defendant voluntarily changes its conduct in response to a lawsuit.<sup>88</sup> Because the state of West Virginia had modified its law in response to its conflict with Buckhannon, the home thought that it qualified as a "prevailing party," but the courts demonstrated that they disagreed; the District Court denied its motion, and both the Court of Appeals of the Fourth Circuit and the Supreme Court upheld the decision.

The proposed amendment to FOIA, which required federal agencies to pay the attorney's fees of requesters following a "voluntary or unilateral change in position" by the agencies, would, if enacted, serve to legislatively overrule the *Buckhannon* decision; it was effectively an embrace of the catalyst theory that the courts had already rejected. Although there were many people who were in favor of this measure because it would incentivize agencies to follow FOIA

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

appropriately, others worried that it would impose a significant financial burden on agencies that would ultimately be counterproductive.<sup>89</sup>

Although Senator Kyl was part of the latter group, the amendment he introduced on the Senate floor did not attempt to eliminate the attorney's fee provision, but rather modify it to make it slightly more restrictive. "In the spirit of compromise," he said, "and out of deference to [bill sponsor] Senator Cornyn's arguments and persistence, I have agreed to incorporate language into my amendment that does not fully address my concerns about this part of the bill and that is very generous to FOIA requesters."<sup>90</sup> He proposed changing the requirement that agencies pay for the attorney's fees of requesters as long as the requesters' claims are "not frivolous" to instead require that they do so whenever the requesters' claims are "not insubstantial."<sup>91</sup> Although this was a seemingly minor change to the legislation, Senator Kyl was insistent that it be made, specifically so that the courts would have a better understanding of congressional intent and would accordingly refrain from ordering agencies to pay the legal fees of undeserving requesters.<sup>92</sup>

In his remarks, Kyl explained that using the concept of substantiality in the provision would give the courts additional guidance when interpreting it. "Substantiality is a test that is employed in the Federal courts," he said, "to determine whether a federal claim is adequate to justify retaining jurisdiction over supplemental or other State law claims."<sup>93</sup> He continued by explaining that courts typically interpreted substantiality in a very specific way based on the Supreme Court's decision in 1933's *Levering & Garrigues Co. v. Morrin*.<sup>94</sup> In the case,

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<sup>89</sup> U.S. Congress. Senate, Committee on the Judiciary. 20.

<sup>90</sup> *Open Government Act of 2007*. S. 849. 110th Cong., 1st sess., *Congressional Record* 153, pt. 127: 10986-10991.

<sup>91</sup> Openness Promotes Effectiveness in Our National Government Act of 2007, S. 849, 110<sup>th</sup> Cong. August 3.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

according to Kyl, Justice George Sutherland concluded that a claim is “plainly unsubstantial either because [it is] obviously without merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.”<sup>95</sup> Kyl explained that using this judicially-defined concept with FOIA would be appropriate because “the ‘insubstantiality’ of a claim is a quality ‘which is apparent at the outset’” and “is a standard that courts should be able to apply without further factual inquiry into the nature of a complaint.”<sup>96</sup> This would allow courts to decide whether to order agencies to reimburse requesters for their attorney’s fees without wasting time or money in “a second major litigation.”<sup>97</sup>

Throughout his five-minute discussion of the concept of substantiality, Senator Kyl referenced a total of 11 different court cases in which the concept had been discussed, specifically because he anticipated that the courts would inevitably have to interpret the term in the OPEN Government Act as well.<sup>98</sup> “I hope that these comments on my understanding of the law in this area are of assistance to courts and litigants who will now be forced to adapt to the application of the substantiality test to FOIA fee shifting,” he said.<sup>99</sup> He concluded by encouraging courts and litigants to look at two cases in particular for “some recent and very thorough examples of how a substantiality analysis is actually conducted.”<sup>100</sup>

As he did by clarifying the “representative of the news media” standard, Senator Kyl went out of his way here as well to ensure that the language in the attorney’s fee recovery

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

provision of the OPEN Government Act was as unambiguous as possible. By proposing an amendment that incorporated the concept of substantiality in the provision regarding attorney's fee recovery, he was able to guarantee that the courts would interpret the provision in the way that he and, by extent, Congress intended. This eliminated the risk that the courts might award attorney's fees to requesters whose FOIA appeals lacked merit, which was enough to convince Kyl to support a measure that he otherwise would have opposed. Because he went to such great lengths to clarify language that he worried the courts might find to be ambiguous, it is clear that a legislative deferral certainly did not occur with this portion of the OPEN Government Act; once Kyl's amendment was adopted and the act as a whole was passed into law, there was nothing ambiguous at all about the substantiality requirement.

## **Conclusion**

In researching this chapter, I examined the transcripts of five congressional hearings regarding the OPEN Government Act and several debates on the House and Senate floors. I read reports produced by the House Committee on Oversight and Government Reform, the Senate Committee on the Judiciary, the Government Accountability Office, and nonprofit organizations such as the Coalition of Journalists for Open Government and the National Security Archive. These sources have allowed me to conclude that, at least based on the available evidence, a legislative deferral did not occur with the OPEN Government Act. As such, there must be another explanation for the law's ultimate failure to increase the amount of information released to the American public.

One possibility relates to the Bush administration's crackdown on FOIA following 9/11; as I explained, there is evidence to suggest that the Ashcroft memo and the administration's

increased classification of sensitive documents had an effect of reducing FOIA disclosures.<sup>101</sup> This would seem to support the theory I outlined in chapter 2 that suggests that national security concerns, and specifically an increased volume of FOIA requests for national security information, are a key cause of the recent increase in FOIA denials. There is also evidence that supports the theory that a lack of funding was a contributing factor; some agencies, for example, had such limited financial resources that they were unable to afford scanners and photocopiers with which to process their FOIA requests.<sup>102</sup> It seems only natural that these problems would be exacerbated by a law that increased agencies' FOIA responsibilities so dramatically without providing them with additional resources to do so.

It is impossible, however, to determine whether these potential explanations have any merit without examining them in greater detail, which is beyond the scope of this project. All I am able to conclude for now is that no portion of the OPEN Government Act appears to be purposely ambiguous, so the notion that legislators wanted it to fail is unlikely. Nevertheless, I chose to include discussions of two provisions within the law in particular, which involved the law's definition of "representative of the news media" in relation to FOIA fee exemptions and the determination of eligibility for attorney's fee recovery in FOIA appeal cases, because they both serve as examples of what good lawmaking looks like; Senator Jon Kyl's insistence on clarifying the definitions of certain terms and phrases on the Senate floor, where he knew his comments would be transcribed and published, sent a clear message to the courts that he knew would eventually be interpreting the legislation. He wanted them to know what Congress's intent was in passing the OPEN Government Act so that they could enforce it appropriately. This could not have been more different from the legislative deferral that occurred with the Electronic

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<sup>101</sup> U.S. Congress, House, Subcommittee, *The State of the FOIA*, 103.

<sup>102</sup> U.S. Congress, House, Subcommittee, *Implementing FOIA*, 168-169.



Freedom of Information Act a decade earlier; when compared to the selected provisions in the OPEN Government Act, the statute I examined in the previous chapter is so ambiguous that the conclusion that legislators wanted it to be that way is almost undeniable. Senator Kyl's amendments should therefore be seen as examples of clarity against which all other legislation should be compared.

In the conclusion of this project, I outline some theories that could account for why there is clear evidence of a legislative deferral occurring prior to 9/11 but not afterward; one would assume that legislators would have greater incentive to limit improvements to FOIA (and thus limit FOIA disclosures) following such a terrifying event in American history, but the fact that they did not do so through a legislative deferral suggests otherwise. It is possible that members of Congress felt that the Bush administration had already gone too far in limiting FOIA disclosures in the years immediately following the terrorist attacks, and that, by the time deliberations surrounding the OPEN Government Act began to intensify six years later, they were finally ready to pull back on some of the restrictions. Another possibility relates to the fact that the OPEN Government Act, unlike E-FOIA, dealt almost entirely with procedural aspects of the law rather than substantive ones about the types of information that could be disclosed; making these improvements would, at least theoretically, not threaten the national security to a greater extent, giving legislators no reason to resist them. Again, I explore these theories in greater detail in the project's conclusion.

However, it is important to reiterate that, given the fact that much of the lawmaking process now happens behind closed doors, it is impossible to conclude definitively that a legislative deferral did not occur at all. There is also the possibility that many other members of Congress initially attempted to write a legislative deferral into the OPEN Government Act but

were forced to change course when Senator Kyl publicly introduced his amendment on the Senate floor; after all, it is conceivable that their constituents might have noticed the legislators' opposition to Kyl's improvements, which could have threatened their chances at reelection. We will never know whether Kyl's amendment would have still been successful if it had been proposed in a private setting, but we do know that, even with the amendment, the OPEN Government Act would fail to fix FOIA for good. This set the stage for 2016's FOIA Improvement Act, which is the subject of the next chapter.

## THE FOIA IMPROVEMENT ACT OF 2016

Almost immediately after the OPEN Government Act was passed in 2007, it became clear to lawmakers and FOIA requesters alike that the law was not going to remedy all of the problems that it was supposedly designed to address. While early evidence suggested that the amendment did help to reduce FOIA backlogs at some agencies<sup>1</sup> and the newly established Office of Government Information Services (OGIS) successfully helped to reduce the amount of FOIA-related litigation,<sup>2</sup> there was almost universal consensus among FOIA experts that more needed to be done.

At a hearing before the House Committee on Oversight and Government Reform in early 2013, members of Congress invited journalists and other transparency advocates to testify about how the FOIA process had changed in the half-decade since the amendment had been implemented. Many witnesses shared the results of a recent audit conducted by the National Security Archive, which found that fewer than half of federal agencies had even attempted to implement the law.<sup>3</sup> “The last five years have been disappointing on many fronts, and the promise of the OPEN Government Act has not fully been realized,” Anne Weismann of Citizens for Responsibility and Ethics in Washington said in her written testimony.<sup>4</sup> “The fault, however, lies not with the legislation, which pinpointed many of the problem areas in FOIA processing, but with agencies that have successfully resisted complying with the meaning and intent of the

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<sup>1</sup> U.S. Congress. House. Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-Sourcing Government Oversight: Hearing before the Committee on Oversight and Government Reform*. 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 17, 2011.

<sup>2</sup> U.S. Congress. Senate. Committee on the Judiciary, *We The People: Fulfilling the Promise of Open Government Five Years After the OPEN Government Act: Hearing before the Committee on the Judiciary*. 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 13, 2013. 62.

<sup>3</sup> *Ibid.*, 2.

<sup>4</sup> *Ibid.*, 134.

Act.”<sup>5</sup> Kevin Goldberg, who spoke on behalf of the Sunshine in Government Initiative, agreed that agency implementation was weak but instead suggested that the legislation itself was indeed at fault. “The major enforcement element from the OPEN Government Act...simply has not been successful,” he said. “The requirement that agencies respond to requests within 20 days or lose the right to collect certain fees has been riddled with exceptions and, frankly, wasn’t that strong to begin with.”<sup>6</sup> Legislators would have to try to force agency compliance again in another amendment to the law.

Passed by a unanimous House and Senate and subsequently signed into law by President Barack Obama on June 30, 2016, the FOIA Improvement Act would eventually address this issue and others that arose following the 2007 law. The newest amendment to FOIA required that agencies post more of their records online in an easily-accessible format; expanded the role of the OGIS as a FOIA ombudsman; limited the use of some FOIA exemptions that transparency advocates claimed were overly broad; established a program mandating that the Chief FOIA Officers at each agency work together to develop recommendations to increase agency compliance with the law; required that agencies submit more comprehensive annual FOIA reports; and, perhaps most importantly, codified a portion of an executive order that had been signed by President Obama on his first day in office, which required agencies to adopt a “presumption of openness” when processing their FOIA requests.<sup>7</sup>

This project studying the Freedom of Information Act was completed in March 2017, just nine months after the FOIA Improvement Act’s implementation. Consequently, developing an understanding of the law’s effectiveness is not yet possible by the thesis deadline, as agencies

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid., 67.

<sup>7</sup> *FOIA Improvement Act of 2016*, Public Law 114-185. U.S. Statutes at Large 130 (2016): 538.

have likely only recently begun to update their FOIA regulations and practices to comply with the amendment. Preliminary data about the law's effectiveness will likely not be available until at least March 2018, when transparency advocates will travel to Capitol Hill to testify before House and Senate committees as part of Sunshine Week, an annual event that celebrates FOIA and access to public information. Until then, however, it is possible to make some predictions about whether the amendment will succeed at improving FOIA performance, and I do that in this chapter.

I start by discussing FOIA's development throughout President Obama's tenure in office, which culminated with his signing of the FOIA Improvement Act seven months before he left the White House. As I explain, although this amendment will likely become the most long-lasting change to FOIA that Obama made during this time, he also took other steps to strengthen the law earlier in his presidency, beginning on his first day in office. These efforts were eventually overshadowed, however, by reports that the Obama administration was failing to implement FOIA appropriately, both by refusing to comply with the OPEN Government Act and by politicizing the disclosure process. I explain these developments in detail for two reasons. First, Obama's public efforts to improve FOIA and his administration's private actions to seemingly undermine it were each important catalysts for the development of legislation that would become the FOIA Improvement Act; as I explain, the final law included provisions that were written in response to both the Obama administration's FOIA successes and its failures, so my explanations of each provide important context for my subsequent analysis. And second, because President Obama just recently left office, FOIA performance today is largely the result of the policies and practices he helped implement. Explaining them in detail is therefore relevant to understanding one of the reasons why the law is currently so ineffective.

After discussing this context, I test George Lovell’s legislative deferral model on the FOIA Improvement Act to see whether it is possible that members of Congress intentionally designed the law to be ineffective. Specifically, I examine a provision within the amendment that codified an earlier effort by President Obama to encourage a “presumption of openness” in the processing of FOIA requests; this provision required that agencies prove that the disclosure of information would cause a “foreseeable harm” to a government interest before the agencies could invoke an exemption to withhold it. As I explain, I ultimately conclude that a legislative deferral did indeed occur through this provision, as legislators failed to address publicly stated concerns that this “foreseeable harm” requirement would ultimately slow down the entire FOIA process and thus increase backlogs. I also explain that, in addition to the legislative deferral contained within it, the amendment as a whole appears to be regressive in that it fails to address some of the most commonly cited problems with the law, giving credence to other theories in FOIA scholarship that claim that a lack of funding and national security concerns might also explain the law’s shortcomings over the past two decades.

### **FOIA in the Obama Era**

It was not long after President Bush signed the OPEN Government Act of 2007 into law that a new person assumed the role of Commander in Chief. President Barack Obama was inaugurated on January 20, 2009 following a successful election campaign in which he had repeatedly promised to make his administration the most transparent in American history.<sup>8</sup> Advocates for government transparency certainly hoped that his administration would be less secretive than the Bush administration, which had doubled down on protecting potentially

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<sup>8</sup> Obama for America, "Obama Pledges Most Transparent and Accountable Administration in History," press release, August 15, 2007, <http://www.presidency.ucsb.edu/ws/?pid=93244>.

sensitive information following 9/11. However, by the time Obama left office eight years later, his legacy on transparency issues generally and FOIA specifically would be decidedly mixed, as notable improvements in access to information were coupled with equally palpable setbacks. Many of Obama's critics now claim that the President's early and promising efforts to increase transparency were largely ineffective or even regressive,<sup>9</sup> although his supporters naturally disagree.

There seemed to be general approval, however, when these early efforts were first implemented. For example, on his first full day in office, President Obama issued a memorandum to the heads of all federal agencies in which he wrote that “[t]he Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”<sup>10</sup> He justified this policy by explaining that government officials worked for the American people, who had a right to access as much information as possible:

The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies...should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.<sup>11</sup>

This presumption of disclosure was a reversal of the Bush administration's efforts to limit disclosure, which had come most notably in the form of Attorney General John Ashcroft's infamous 2001 policy memo that encouraged the release of records “only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be

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<sup>9</sup> Russell Paul La Valle, “Obama's legacy will be one of secrecy and hostility toward the press,” *The Hill*, December, 19, 2016, <http://thehill.com/blogs/pundits-blog/the-administration/311026-obamas-legacy-will-be-one-of-secrecy-and-hostility>.

<sup>10</sup> Barack Obama, “Memorandum for The Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act,” ed. The White House Office of the Press Secretary (2009). 1.

<sup>11</sup> *Ibid.*

implicated” by doing so.<sup>12</sup> In his own memo, President Obama directed Attorney General Eric Holder to issue new FOIA guidelines to federal agencies that “reaffirm[ed] the commitment to accountability and transparency.”<sup>13</sup> Holder officially rescinded Ashcroft’s policy about two months later.<sup>14</sup>

Obama also issued another memorandum in which he reaffirmed his commitment to openness in other areas of government,<sup>15</sup> along with an executive order that increased public access to the records of former presidents.<sup>16</sup> Approval of these measures was widespread. “This is the earliest and most emphatic call for open government from any president in history,” Tom Blanton, the director of the National Security Archive, said in a press release at the time. “President Obama has reversed two of the most dramatic secrecy moves of the Bush initiatives, one that told agencies to withhold whatever they could under FOIA and the other that gave presidential heirs and vice presidents the power to withhold presidential records indefinitely.”<sup>17</sup> Daniel Metcalfe, the executive director of the Collaboration on Government Secrecy, agreed; “I think it is fair to say that [the] action[s] by President Obama [were] not only unprecedented,” he

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<sup>12</sup> John Ashcroft, “Memorandum for Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act,” ed. Department of Justice (2001).

<sup>13</sup> Barack Obama, “Memorandum for The Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act.”

<sup>14</sup> U.S. Department of Justice, Department of Justice Guide to the Freedom of Information Act: President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia-memorandum.pdf>. (accessed February 20, 2017)

<sup>15</sup> Barack Obama, “Memorandum for The Heads of All Federal Departments and Agencies; Subject: Transparency and Open Government,” ed. The White House Office of the Press Secretary (2009).

<sup>16</sup> Executive Order 13489 of January 21, 2009, Presidential Records, *Federal Register*, volume 74 (2009): 4667-4671, <https://www.federalregister.gov/documents/2009/01/26/E9-1712/presidential-records>

<sup>17</sup> The National Security Archive. “President Obama embraces openness on day one, as urged by the National Security Archive and a coalition of more than 60 organizations,” *The National Security Archive*, January 21, 2009, <http://nsarchive.gwu.edu/news/20090121/>.



later said, “but...[went] much further than any other President has gone...in fostering transparency internationally.”<sup>18</sup>

It soon became clear, however, that the president’s efforts would not entirely solve FOIA’s problems. In March 2010, a year into Obama’s first term, the National Security Archive released its annual Knight Open Government Survey, which found that just 13 of 90 federal agencies that the organization studied had updated their FOIA policies to comply with the president’s orders.<sup>19</sup> In response, the White House issued a new memorandum asking agencies to update their FOIA regulations and “assess whether you are devoting adequate resources to responding to FOIA requests.”<sup>20</sup> Perhaps as a result, the same survey found that an additional 36 agencies had updated their policies by March of the following year—a significant improvement, but still less than half of all agencies whose FOIA activities were examined for the review.<sup>21</sup>

Nevertheless, early indications suggested that FOIA was improving by some measures. In FY2011, for example, the Obama administration processed more FOIA requests than in any year since 2005, and its use of exemptions to deny requests dropped dramatically.<sup>22</sup> Part of this drop was the result of the Supreme Court’s ruling in *Milner v. Department of the Navy* that year, which overturned three decades of FOIA precedent by restricting agencies’ use of an exemption written into the law.<sup>23</sup> This exemption, known as exemption 2, had commonly been interpreted to

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<sup>18</sup> U.S. Congress, House, Committee, *The Freedom of Information Act*.

<sup>19</sup> U.S. Congress, Senate, Committee on the Judiciary, *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age: Hearing before the Committee on the Judiciary*. 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 15, 2011. 99.

<sup>20</sup> Rahm Emanuel and Bob Bauer, “Memorandum for Agency and Department Heads; Subject: Freedom of Information Act,” ed. The White House Office of the Press Secretary (2010).

<sup>21</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Ensuring*.

<sup>22</sup> U.S. Congress, House, Committee on Oversight and Government Reform, *Addressing Transparency in the Federal Bureaucracy: Moving Toward a More Open Government: Hearing before the Committee on Oversight and Government Reform*. 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 13, 2013. 27.

<sup>23</sup> U.S. Congress, Senate, Committee on the Judiciary, *The Freedom of Information Act: Safeguarding Critical Infrastructure Information and the Public’s Right to Know: Hearing before the Committee on the Judiciary*. 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 13, 2012. 8.

allow agencies to withhold information when, in the words of one FOIA expert, its “disclosure...could reasonably be expected to enable someone to circumvent the law,” but the Court found this interpretation to be invalid. As a result, the use of exemption 2 fell by an astounding 63 percent, according to Sean Moulton of the nonprofit OMB Watch.<sup>24</sup> He was careful to note, however, that “the decrease also appears to be the result of a deliberate policy change by the Obama administration.”<sup>25</sup> It appeared that Obama’s recommendations were having a beneficial effect.

However, FOIA performance in this area did not seem to be as encouraging the following year. When testifying before the Senate Committee on the Judiciary in March 2013, Moulton said that the use of two other exemptions had risen “23 percent and 25 percent, respectively, in 2012 to their highest usage levels since 2002, when the use of both exemptions experienced extreme spikes likely related to greater information withholding in the aftermath of the 9/11 terrorist attacks.”<sup>26</sup> Agencies were now responding to the *Milner* decision by increasing their invocation of other exemptions to withhold information that presumably would have been withheld through exemption 2 in the past. There was even evidence that some representatives from the Justice Department were encouraging this behavior in an attempt to “protect the sensitive information left exposed” following the decision.<sup>27</sup> Perhaps as a result, a report from the Associated Press later found that the total number of exemptions invoked for national security reasons had recently reached its highest level since Obama had taken office four years

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<sup>24</sup> U.S. Congress. House. Subcommittee on Technology, Information Policy, Intergovernmental Regulations and Procurement Reform of the Committee on Oversight and Government Reform, *FOIA in the 21<sup>st</sup> Century: Using Technology to Improve Transparency in Government*: Hearing before the Subcommittee on Technology, Information Policy, Intergovernmental Regulations and Procurement Reform of the Committee on Oversight and Government Reform. 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 21, 2012. 49.

<sup>25</sup> *Ibid.*

<sup>26</sup> U.S. Congress, Senate, Committee, *We The People*. 53.

<sup>27</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Safeguarding*. 41.

earlier.<sup>28</sup> And FOIA performance continued to suffer in other areas as well: just three of 11 cabinet-level agencies that had sizable FOIA backlogs, for instance, succeeded in meeting their backlog reduction goals the same year.<sup>29</sup>

Also in 2012, though not directly related to FOIA, the Obama administration had opened an “unprecedented number of investigations and excessive prosecutions of leaks,” according to a report by the Center for Effective Government (formerly OMB Watch).<sup>30</sup> One particularly disturbing finding within the report was that the administration had used the Espionage Act to bring six cases against government or military employees for leaks, compared to just three such cases total since the law’s enactment nearly a century earlier, in 1917.<sup>31</sup> It was starting to become clear that, despite President Obama’s early promises to govern with an unprecedented level of transparency, this was not entirely shaping up to be the case. Throughout a series of FOIA hearings during this time, journalists and other transparency advocates repeatedly expressed their frustration with the Obama administration’s implementation of the law, noting that FOIA performance seemed to be worse than ever before. An attorney who had used the law for thirty years, for example, said that the Obama administration “is the worst on FOIA issues. The worst. It has gotten to a point where I am stunned. I am really stunned.”<sup>32</sup>

There seemed to be two major areas of dissatisfaction with FOIA as President Obama entered his second term. The first was that many federal agencies were continuing to resist complying with the OPEN Government Act of 2007 and with the Obama administration’s policy memorandums on FOIA implementation. The Department of Justice specifically received by far

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<sup>28</sup> U.S. Congress, House, Committee, *Addressing Transparency*. 107.

<sup>29</sup> *Ibid.*, 100.

<sup>30</sup> *Ibid.*, 19.

<sup>31</sup> *Ibid.*

<sup>32</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Safeguarding*. 3.

the most criticism for its egregious violations of the law, which were especially problematic because it is the agency tasked with monitoring FOIA compliance government-wide. The second area of dissatisfaction was with what appeared to be a clear politicization of FOIA processing at several federal agencies. At hearings before House and Senate committees charged with overseeing FOIA, many conservatives suggested that their FOIA requests were being denied specifically because of their political affiliation. Additionally, there was also evidence that senior Obama administration officials were endorsing these practices, casting further doubt on its claims that it was trying to be as transparent as possible. Because these two areas of dissatisfaction played an important role in the development of a political climate that, a few years later, would ultimately allow the FOIA Improvement Act to be passed, I will discuss each of them before turning to a lengthier analysis of the 2016 amendment as it made its way through Congress.

#### *DOJ Resistance to FOIA Reforms*

As mentioned previously, there seemed to be widespread agreement by the middle of Obama's presidency that more needed to be done to live up to the promises he made at the beginning of his first term. At a hearing in 2012, for example, Senator Chuck Grassley (R-IA) said that "there is a disturbing contradiction between President Obama's grand pronouncements and the actions of his political appointees. The Obama administration does not understand," he continued, "that open government and transparency must be about more than just pleasant sounding words and memos."<sup>33</sup> A year later, Angela Canterbury, the Director of Public Policy for the nonpartisan Project on Government Oversight, said that despite some limited progress

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<sup>33</sup> Ibid., 5.

under Obama, agencies were still regularly disobeying various aspects of the law.<sup>34</sup> And the Center for Effective Government noted in a report that “across-the-board improvements [in FOIA performance] have been rare,” in part “due to inconsistent enforcement” of the law by federal agencies.<sup>35</sup>

One would not have come to the same conclusion, however, by listening to representatives from the Department of Justice (DOJ) talk about FOIA. At several House and Senate hearings during this time, for example, Melanie Ann Pustay, the director of the DOJ’s Office of Information Policy (OIP), was invited to testify about recent changes to the law. The OIP is the agency responsible for overseeing government-wide FOIA compliance, so legislators likely expected Pustay to provide a valuable insider’s perspective on how recent developments had affected FOIA processing. However, she quickly appeared to lose much of her credibility by seeming to misrepresent information about the government’s actual FOIA performance. “It is clear to [the DOJ] that agencies are continuing to make significant, tangible progress” at improving implementation of the law, Pustay said at one hearing in 2012. (This was the same year that the DOJ’s own FOIA backlog nearly doubled.)<sup>36</sup> She also claimed that agencies throughout the federal government had recently released records in 94% of FOIA requests they processed, a statistic that others, including Tom Blanton of the National Security Archive and Rep. Mike Kelly (R-PA) found to be wildly misleading. According to Blanton,

[t]he only way the Department of Justice gets to that number is by leaving out nine of the 11 reasons the government does not answer your FOIA requests. Those other nine reasons are: fee-related issues that do not get resolved or the agency has a “No records” in response or it sends the request to another agency for a referral. If you add in those reasons why FOIA requesters go away unsatisfied, your actual response rate gets down to a more pedestrian, more realistic 55, 60 percent, roughly.<sup>37</sup>

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<sup>34</sup> U.S. Congress, House, Committee, *Addressing Transparency*. 156.

<sup>35</sup> *Ibid.*, 7.

<sup>36</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Safeguarding*. 7; 40.

<sup>37</sup> U.S. Congress, Senate, Committee, *We The People*. 23.

Kelly suggested that the actual response rate could be as high as 65%, but he also noted that many of the records agencies released were likely to be heavily redacted, meaning that even less information than one might assume was actually being disclosed to the public.<sup>38</sup> “[T]he stretches that were involved...[in Pustay’s testimony] were really extraordinary,” Blanton said, noting that “the entire community of folks...who care about the Freedom of Information Act disagree with the Justice Department on this.”<sup>39</sup> He concluded by saying that there was “a profound cognitive dissonance between the rosy view provided by the Justice Department on how FOIA is working, and the actual experience of requesters.”<sup>40</sup>

A year earlier, in 2011, Blanton’s organization had given the DOJ its annual Rosemary Award (named after President Nixon’s secretary Rose Mary Woods, who is known for mysteriously deleting eighteen minutes of audio recordings from White House tapes during the Watergate scandal), which is awarded to the agency with the worst open-government performance each year.<sup>41</sup> This came after the department issued new regulations for its own FOIA processing that, according to Blanton, “would have let officials lie to the public about [the] existence of records...among many other regressive provisions.”<sup>42</sup> The DOJ only put its proposed changes on hold after receiving widespread public criticism.<sup>43</sup>

Similarly, the House Committee on Oversight and Government Reform assigned the Justice Department a grade of “D” in a 2012 investigation into FOIA compliance throughout the federal government.<sup>44</sup> The investigation found that just three of 40 offices within the DOJ were

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<sup>38</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Ensuring*. 39.

<sup>39</sup> U.S. Congress, Senate, Committee, *We The People*. 22-23.

<sup>40</sup> *Ibid.*, 81.

<sup>41</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Safeguarding*. 12.

<sup>42</sup> U.S. Congress, Senate, Committee, *We The People*. 78.

<sup>43</sup> *Ibid.*

<sup>44</sup> U.S. Congress. House. Committee on Oversight and Government Reform. *FOIA is Broken: A Report*. 114<sup>th</sup> Cong., 1<sup>st</sup> sess., 2016. 5.

able to release requested information about their FOIA processing to the committee in a timely manner.<sup>45</sup> There was also evidence that the department was directly litigating against the OPEN Government Act, in part by filing an amicus brief in a recent Supreme Court case that endorsed a position that would render one of the law’s enforcement mechanisms virtually meaningless.<sup>46</sup> And the DOJ even went so far as to distance itself from the presumption of openness that President Obama had mandated on his first day of office (and that Obama asked the head of the DOJ, Attorney General Eric Holder, to enforce government-wide); when asked about this presumption in a 2011 Supreme Court case, a DOJ lawyer admitted that “[w]e do not embrace that principle.”<sup>47</sup>

How is it possible that the federal agency tasked with overseeing FOIA compliance throughout the government could so egregiously violate the law itself? Angela Canterbury of the Project on Government Oversight noted in a 2013 House hearing that the Office of Information Policy, the office within the DOJ tasked with monitoring FOIA compliance, had an inherent conflict of interest because the larger department is responsible for defending agencies when they withhold information through the law and are challenged in court.<sup>48</sup> Rep. Blake Farenthold (R-TX), among others, suggested that “one of the ways to deal with that would be go give an independent entity more authority to enforce FOIA.”<sup>49</sup> When members of Congress eventually passed the FOIA Improvement Act into law a few years later, though, it did not include any such measure.

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<sup>45</sup> Ibid., 5.

<sup>46</sup> U.S. Congress, Senate, Committee, *We The People*. 76.

<sup>47</sup> U.S. Congress, House, Subcommittee, *FOIA in the 21st Century*. 2.

<sup>48</sup> U.S. Congress, House, Committee, *Addressing Transparency*. 6.

<sup>49</sup> Ibid., 9.

What was unclear at the time was what was behind the DOJ's refusal to embrace the Obama administration's FOIA policies. Had the department independently decided to break the law, or were members of the Obama administration secretly encouraging this type of behavior, despite their public proclamations that government transparency was one of their top priorities? There was certainly evidence to suggest that the administration's FOIA practices were more complex and nuanced than they led the public to believe, which potentially provides support for the latter scenario; around the same time, some conservative transparency advocates started to claim that the Obama administration was denying or overly redacting their FOIA requests specifically because of their political philosophies. Like the failure of the DOJ and other federal agencies to update their FOIA regulations to reflect recent changes to the law, this was a clear sign that FOIA was not being implemented in an appropriate manner.

#### *Politicization of FOIA Requests*

During the first months of the Obama presidency, it appears that senior officials in the White House were already taking steps to undermine the President's public efforts to make his administration more transparent. After the White House started to post its visitor logs online, for example, officials were caught having regular meetings with lobbyists and others at a coffee shop across the street, presumably so that these meetings would not be publicly disclosed.<sup>50</sup> Additionally, on July 21, 2010, Ted Bridis of the Associated Press reported that beginning in mid-2009, just half a year following Obama's inauguration, copies of some FOIA requests to the Department of Homeland Security (DHS) were required to be sent to senior political advisors

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<sup>50</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Ensuring*. 25.



working under DHS Secretary Janet Napolitano for review prior to processing.<sup>51</sup> Bridis found that staff in the DHS's FOIA office were not allowed to release records that were considered to be politically sensitive without prior approval by these advisors, which often delayed disclosure for "weeks beyond the usual wait," if these records were disclosed at all.<sup>52</sup> And although the department rescinded this prior approval requirement in response to the AP's reporting, Secretary Napolitano's political staff retained the ability to halt the release of records at any time,<sup>53</sup> a practice that continued at other federal agencies until at least June 2015.<sup>54</sup> As reporter Sharyl Attkisson said at a hearing around the same time, "FOIA does not permit this political intervention, but it's routinely done."<sup>55</sup>

Some conservative FOIA requesters soon noticed that the involvement of these political advisors was having a real effect on the amount of information that agencies were disclosing. In his written testimony to the Senate Committee on the Judiciary in 2011, for example, J. Christian Adams, a reporter for the conservative news organization Pajamas Media (now known as PJ Media) shared several examples of the improper politicization of FOIA requests under the Obama administration. Adams had previously worked for five years as an attorney in the Civil Rights Division of the DOJ, and he claimed that he had consequently witnessed many of the malpractices he described firsthand.<sup>56</sup> Within the Civil Rights Division specifically, Adams

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<sup>51</sup> Bridis, Ted. "Despite Obama openness directive, Homeland Security created political filter for freedom of information requests," *The Associated Press*, July 21, 2010, [http://www.cleveland.com/nation/index.ssf/2010/07/despite\\_obama\\_openness\\_pledge.html](http://www.cleveland.com/nation/index.ssf/2010/07/despite_obama_openness_pledge.html).

<sup>52</sup> Ibid.

<sup>53</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Safeguarding*. 4.

<sup>54</sup> U.S. Congress, House, Committee, *FOIA is Broken*. 3.

<sup>55</sup> Sharyl Attkisson, "Written Testimony Submitted to the House Committee on Oversight and Government Reform Following the June, 2, 2015 Hearing "Ensuring Transparency through the Freedom of Information Act", (Committee on Oversight and Government Reform: U.S. House of Representatives, 2015).

<sup>56</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Ensuring*. 63.

alleged that Republicans often had to wait longer for the disclosure of records than Democrats did:

For example, Republican election attorney Chris Ashby of LeClair Ryan made a request for the records of five submissions made under Section 5 of the Voting Rights Act. Ashby waited nearly eight months for a response. Afterwards, Susan Somach of the “Georgia Coalition for the People’s Agenda,” a group headed by Rev. Joseph Lowery, made [a] request for 23 of the same types of records. While Ashby waited many months for five records, Somach waited only 20 days for 23 records. The requested records were identical in kind.<sup>57</sup>

In many cases, Adams said, “very short delays mark a request from an administration friend. But in no instance does a conservative or Republican requestor receive a reply in the time period prescribed by the law,” at least according to the agency FOIA logs that he examined.<sup>58</sup> “The logs demonstrate an unmistakable pattern,” he noted: “friends zoom in the express lane, while foes are stuck waiting on the shoulder.”<sup>59</sup>

There were also instances, according to Adams, when FOIA requests made by Republicans were totally ignored. He claimed that the Civil Rights Division never responded to requests from conservative media outlets but often responded to organizations such as NPR in just days.<sup>60</sup> Additionally, he said that while the Bush administration had responded to a *Boston Globe* request for certain DOJ records “well within the statutory [20-day] deadline” a few years earlier, the Obama administration never responded to a Pajamas Media request for the same records four years later.<sup>61</sup> Tom Fitton, the president of the conservative watchdog organization Judicial Watch, seemed to support the notion that the Obama administration was politicizing FOIA by revealing that, just two years into Obama’s first term, he had already filed 44 FOIA lawsuits

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<sup>57</sup> Ibid., 64.

<sup>58</sup> Ibid., 68.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid., 65.

<sup>61</sup> Ibid.

against the federal government for failing to enforce the law appropriately.<sup>62</sup> It is hard to imagine so many lawsuits being necessary for a more progressive organization to obtain information that was supposedly eligible for disclosure through the law. “[I]n terms of getting information from the administration,” he said, “it is as difficult if not more difficult than ever.”<sup>63</sup>

There is no evidence that President Obama himself played any role in encouraging agencies to bend the rules in this way. Throughout his tenure on office, however, he repeatedly criticized Fox News, the cable network known for its mix of conservative opinion programming and self-described “fair and balanced” reporting, for unfair coverage of his policy initiatives.<sup>64</sup> His administration even attempted to block the network from interviewing an official from the Treasury Department in an infamous 2009 incident that immediately sparked protests by the Washington bureau chiefs of five other TV news networks.<sup>65</sup> Consequently, even if the president never endorsed the politicization of FOIA processing, he certainly sent signals to those under his discretion that some organizations were more legitimate than others, arguably opening the door for unequal FOIA treatment.

The more members of Congress learned about the Obama administration’s implementation of FOIA as his presidency progressed, the greater the conviction seemed to become that another major update to the law was necessary. Although Republicans were naturally Obama’s loudest critics, there was also widespread support for a new FOIA amendment among Democrats, who saw it as an opportunity to remedy some of the longstanding problems with the law that 1996’s Electronic Freedom of Information Act and 2007’s OPEN Government

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<sup>62</sup> Ibid., 24.

<sup>63</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Ensuring*. 28.

<sup>64</sup> Wemple, Erik, "President Obama laments influence of Fox News," *The Washington Post*, November 29, 2016, [https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/11/29/president-obama-laments-influence-of-fox-news/?utm\\_term=.089ce75394ff](https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/11/29/president-obama-laments-influence-of-fox-news/?utm_term=.089ce75394ff).

<sup>65</sup> The Huffington Post. "White House’s Fox News Boycott Attempt Prompts Network Revolt," *The Huffington Post*, May 25, 2011, [http://www.huffingtonpost.com/2009/10/23/white-houses-fox-news-boy\\_n\\_331437.html](http://www.huffingtonpost.com/2009/10/23/white-houses-fox-news-boy_n_331437.html).

Act had failed to effectively address. Senator Patrick Leahy (D-VT), who had been instrumental in the passage of the other two amendments, for instance, continued to demonstrate his commitment to the law by working with Senator John Cornyn (R-TX) to introduce a bill that would establish a bipartisan commission to study FOIA and make recommendations to Congress on ways to improve it.<sup>66</sup> The Senate passed the bill unanimously,<sup>67</sup> and although the House never had a chance to vote and it consequently never became law, it still showed that there was a clear desire to make FOIA stronger. If President Obama was not going to improve the law, it appeared that members of Congress were ready to do so instead.

### **Legislative History of the FOIA Improvement Act**

The FOIA Improvement Act did not begin to take shape until President Obama's second term began in 2013. The process of drafting it, however, was informed by the testimonies of journalists, transparency advocates, and other FOIA experts at House and Senate hearings earlier in his presidency. These early hearings were primarily focused on examining the effects of the OPEN Government Act and the president's policy memorandums, which gave legislators an idea of which aspects of their earlier efforts were working, which were not, and whether there was anything they had omitted from previous updates to FOIA that should be included in the future. As a whole, these witnesses provided valuable recommendations to lawmakers about what was needed to make FOIA stronger.

The first version of what would become the FOIA Improvement Act was known as the "FOIA Oversight and Implementation Act of 2013," and it was introduced in the House of Representatives on March 15 of that year by Reps. Darrell Issa (R-CA) and Elijah Cummings

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<sup>66</sup> U.S. Congress, Senate, Committee, *The Freedom of Information Act: Ensuring*. 1.

<sup>67</sup> *Ibid.*

(D-MD), the Chairman and Ranking Minority Member of the House Committee on Oversight and Government Reform.<sup>68</sup> This came just two days after the committee had held a hearing on FOIA, and the legislation seemed to reflect many of the recommendations of those who had testified. It amended FOIA to require the more proactive disclosure of records online, further encourage agency compliance, and streamline the FOIA process to facilitate the release of records.<sup>69</sup> It also gave the newly-created Office of Government Information Services (OGIS) the ability to report its findings directly to Congress, required agencies to submit more data in their annual FOIA reports, and created a Chief FOIA Officers Council to encourage collaboration in the development of effective new FOIA regulations throughout the federal government.<sup>70</sup> Most importantly, though, it codified the presumption of openness standard that President Obama had ordered agencies to adopt in the FOIA memorandum that he issued on his first day in office.<sup>71</sup> If passed, this would ensure that future presidents would not be able to rescind this policy without obtaining congressional approval first.

On February 25 of the following year, the House passed the bill unanimously by a voice vote, but it was never voted on in the Senate.<sup>72</sup> Instead, Senators Patrick Leahy (D-VT) and John Cornyn (R-TX) introduced another bill, which was known as the “FOIA Improvement Act of 2014,” on the Senate floor a few months later.<sup>73</sup> This bill was substantively identical to the previous one, except for the fact that it clarified and lengthened the section that codified the

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<sup>68</sup> U.S. Congress. House, Committee on Oversight and Government Reform, *FOIA Oversight and Implementation Act of 2013: Report*, 113<sup>th</sup> Cong., 1<sup>st</sup> sess., 2013. H. Rep. 113-115. 6.

<sup>69</sup> *Ibid.*, 3.

<sup>70</sup> *Ibid.*, 3-4.

<sup>71</sup> *Ibid.*, 3.

<sup>72</sup> U.S. Congress. House, Committee on Oversight and Government Reform, *FOIA Oversight and Implementation Act of 2015: Report*, 114<sup>th</sup> Cong., 2<sup>nd</sup> sess., 2016. H. Rep. 114-391. 15.

<sup>73</sup> U.S. Congress. Senate, Committee on the Judiciary, *FOIA Improvement Act of 2014: Report*, 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., 2014. S. Rep. 113-287. 6.

presumption of openness standard.<sup>74</sup> The Senate unanimously passed this bill by a voice vote on December 8, 2014, but it died after the House failed to consider it before the 113<sup>th</sup> Congress ended a few weeks later.<sup>75</sup>

Senators Leahy and Cornyn, along with new Judiciary Committee Chairman Chuck Grassley (R-IA), reintroduced the bill on the Senate floor in February of the following year (naturally, it was now known as the “FOIA Improvement Act of 2015”).<sup>76</sup> As they mentioned in a report published two weeks later, the bill was nearly identical to the previous one, except for one minor technical change designed to clarify a new time requirement for posting records online.<sup>77</sup> Reps. Issa and Cummings introduced a similar bill in the House around the same time, and it was reported favorably by the Committee on Oversight and Government Reform two months later.<sup>78</sup> The reported version reflected three amendments to the original legislation that clarified the OGIS’s new responsibilities, strengthened the requirement that agencies pay for the litigation fees of requesters who substantially prevail in FOIA lawsuits, and restricted the use of one of the nine FOIA exemptions.<sup>79</sup> A year later, on March 15, 2016 (in the midst of the annual Sunshine Week celebration), a unanimous Senate passed a combined version of the two bills, and the House passed this version by a voice vote three months later, on June 13.<sup>80</sup> On June 30, President Obama signed the FOIA Improvement Act of 2016 into law.<sup>81</sup>

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<sup>74</sup> Ibid.

<sup>75</sup> U.S. Congress, House, Committee, *FOIA Oversight and Implementation Act of 2015*. 16.

<sup>76</sup> U.S. Congress, Senate, Committee on the Judiciary, *FOIA Improvement Act of 2015: Report*, 114<sup>th</sup> Cong., 1<sup>st</sup> sess., 2015. S. Rep. 114-4. 7.

<sup>77</sup> Ibid.

<sup>78</sup> U.S. Congress, House, Committee, *FOIA Oversight and Implementation Act of 2015*. 15.

<sup>79</sup> Ibid., 17.

<sup>80</sup> ProQuest Congressional. "Legislative History of the FOIA Improvement Act of 2016." ProQuest LLC.

<sup>81</sup> Ibid.

## **Clarifying the Presumption of Openness and “Foreseeable Harm”**

One of the things that is interesting about the FOIA Improvement Act is that the text of the legislation did not change much in the three years that it was under consideration in Congress. As the previous section suggests, most of the changes in each iteration of the bill were relatively minor and were unlikely to drastically affect how the law would be implemented on a daily basis. If anything, the hearings held during these three years largely served to reiterate the need for the proposed legislation rather than to help lawmakers rewrite and revise it. However, the provision that codified President Obama’s presumption of openness standard was unique in that one FOIA expert recommended that it be changed in a rather significant way, even if members of Congress ultimately refrained from doing so. In this section, I outline the development of this provision and lawmakers’ explanations (or lack thereof) about how they intended it to be implemented. Because it is commonly viewed as the most important part of the entire FOIA Improvement Act, it also serves as an ideal case study to which I can apply George Lovell’s legislative deferral model as I test my hypothesis that members of Congress have intentionally designed recent amendments to FOIA to fail.

As I have explained in previous chapters, in this project I examine whether how recent updates to the law are written help to explain why FOIA performance seems to have worsened over the past two decades. This is a supply-side approach that differentiates my work from most other FOIA scholarship, which explains the recent increase in FOIA denials and backlogs to be the result of a changing volume and composition of FOIA requests rather than the evolving legislation. Because members of Congress have taken the time to make a few major revisions to the law over the past 20 years and FOIA performance nevertheless appears to have continued to worsen, I suggest that it is possible that these lawmakers have deliberately written their

amendments to achieve this outcome, even if the amendments appear to be positive steps toward making the law stronger. Members of Congress might be incentivized to do so to satisfy their constituents' calls for greater government transparency, and thereby increase their chances at reelection, while simultaneously defending other interests that they personally consider to be more important, such as protecting the national security or safeguarding the executive branch from additional public scrutiny.

To test this hypothesis, I use a model designed by political scientist George Lovell. He describes a legislative deferral as the process through which members of Congress write controversial provisions into legislation that appear to accomplish one goal but are actually designed to be “reversed” by the courts so that they ultimately accomplish an entirely different goal.<sup>82</sup> Unelected judges consequently receive criticism for unpopular policy decisions rather than the elected representatives who are more easily held accountable for their actions. Lovell concludes that a legislative deferral has taken place when there is evidence that members of Congress (1) are aware of ambiguities within a bill, (2) predict that courts will later be forced to interpret these ambiguities, and (3) specifically reject alternative proposals to clarify these ambiguities.<sup>83</sup>

As I explained in chapter 2, however, I use a modified version of this model in my project that reflects how lawmaking has changed in the century since the laws that Lovell studies were passed; as a result, I conclude that a legislative deferral has occurred with a recent FOIA amendment when it is clear that lawmakers (1) knew that a provision within a bill was ambiguous, (2) recognized that a judge or government official would have to interpret this

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<sup>82</sup> George I. Lovell. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*. Cambridge, UK;New York;: Cambridge University Press, 2003. 41.

<sup>83</sup> Ibid.



ambiguity, and (3) chose to keep the ambiguity in the bill anyway, even if doing so could have an effect of weakening the law. (In addition to the courts, I am also looking for deferrals to federal agencies and the FOIA officials within them, as these agencies are tasked with interpreting and implementing the law on a daily basis. Mark Graber first suggested that expanding the legislative deferral analysis in this way was possible in a 2005 article that I previously summarized.<sup>84</sup>) In chapter 3, I concluded that a legislative deferral did indeed occur with 1996's Electronic Freedom of Information Act, but I was not able to find evidence of one in my chapter 4 analysis of 2007's OPEN Government Act. As the rest of this chapter explains, there is evidence that a legislative deferral did occur with the FOIA Improvement Act, serving to further support my hypothesis that congressmen and women designed the law to be ineffective.

The presumption of openness standard that is the subject of this case study was first implemented as a FOIA policy in modern history on President Obama's first day in office in 2009, when he issued a memorandum on FOIA reform to the heads of all executive branch agencies.<sup>85</sup> In it, he wrote that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."<sup>86</sup> Obama also instructed Attorney General Eric Holder to develop new FOIA guidelines for federal agencies that "reaffirm[ed] the commitment to accountability and transparency" that this presumption embodied.<sup>87</sup> About two months later, on March 19, Holder issued these new guidelines.<sup>88</sup> By doing so, he formally rescinded the Bush administration's previous FOIA policy in which the Department of Justice had vowed to defend

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<sup>84</sup> Graber, Mark A. "Constructing Judicial Review." *Annual Review of Political Science* 8, no. 1 (2005/06/15 2005): 425-51.

<sup>85</sup> Barack Obama, "Memorandum for The Heads of All Federal Departments and Agencies; Subject: The Freedom of Information Act."

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Eric Holder, "Memorandum for Heads of Executive Departments and Agencies; Subject: The Freedom of Information Act (FOIA)," ed. Office of the Attorney General (2009).

agency withholdings of information “unless they lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>89</sup> Instead, the DOJ would now “defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”<sup>90</sup> This first condition is commonly known as the “foreseeable harm” standard, and it is an important part of the FOIA amendment that legislators would eventually pass.

Obama’s presumption of openness was actually a return to a policy that had been issued by Attorney General Janet Reno during the Clinton administration,<sup>91</sup> so many government officials likely already had some idea of how to implement it. It is important to recognize, however, that this policy did not seem to have much of an effect on improving long-term FOIA performance throughout President Obama’s first few years in office; as discussed earlier in this chapter, the federal government as a whole would soon invoke a record number of exemptions to withhold national security information,<sup>92</sup> and individual agencies would largely fail to meet other FOIA performance goals such as reducing their backlogs.<sup>93</sup> Still, efforts to codify the presumption of openness would at the very least ensure that a future president could not easily adopt a more regressive policy, so it appeared that it would have at least some beneficial effects.

In the first version of the FOIA Improvement Act, released as the “FOIA Oversight and Implementation Act of 2013,” legislators proposed incorporating the presumption of openness

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<sup>89</sup> Ashcroft.

<sup>90</sup> Holder.

<sup>91</sup> U.S. Congress. House. Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform, *The State of the FOIA: Assessing Agency Efforts to Meet FOIA Requirements: Hearing before the Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform*. 110<sup>th</sup> Cong., 1<sup>st</sup> sess., February 14, 2007. 103.

<sup>92</sup> U.S. Congress, House, Committee, *Addressing Transparency*. 107.

<sup>93</sup> *Ibid.*, 100.

standard into the existing FOIA text by changing a provision that outlined the exemptions to FOIA disclosures to include the aforementioned concept of “foreseeable harm.” At the time, section (b) of the FOIA law read that section (a), which outlined agency responsibilities to disclose information, would “not apply to matters that are...” before listing the types of information exempted from the law.<sup>94</sup> The proposed legislation suggested modifying this provision to read that section (a) would “not apply to matters *that would cause foreseeable harm and* that are...” [my emphasis] before listing the same exemptions.<sup>95</sup> According to the representatives who wrote the legislation, this alteration of the language would “place the burden on agencies to demonstrate why information may be withheld, instead of on the public to justify release.”<sup>96</sup> However, they did not specify exactly how they expected agencies to determine whether releasing information might cause foreseeable harm, or what would constitute a foreseeable harm in the first place. Still, it seemed that this change would inevitably have a positive effect of limiting the amount of information that agencies could legally withhold though the law, as there was now a new requirement for agencies to satisfy before doing so.

By the beginning of the following year, the language in the original legislation had been modified to read that “[a]n agency may not withhold information under this subsection unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.”<sup>97</sup> Based on the available evidence, it is unclear why legislators felt the need to change the language in this way. However, the desired effect of limiting the withholding of records seemed to be the same.

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<sup>94</sup> *Freedom of Information Act*. U.S. Code 7 (2006), §§ 1 et seq.

<sup>95</sup> *FOIA Oversight and Implementation Act of 2013*, H.R. 1211, 113<sup>th</sup> Cong.

<sup>96</sup> U.S. Congress, House, Committee, *FOIA Oversight and Implementation Act of 2013*. 7.

<sup>97</sup> *FOIA Oversight and Implementation Act of 2014*, H.R. 1211, 113<sup>th</sup> Cong.

At a hearing before the Senate Judiciary Committee a few weeks later, Daniel Metcalfe, the Executive Director of the Collaboration on Government Secrecy and a former DOJ employee, did not reference this language in particular but did suggest that the idea behind a presumption of openness needed to be implemented in a very specific way. “There needs to be a focus on the implementation of the ‘foreseeable harm’ standard,” he said, “which by the way is a very specific, concrete thing; that’s how we implemented it in the Clinton Administration, not with some more amorphous term such as ‘presumption of openness,’ which doesn’t mean that much to a FOIA analyst in the trenches.”<sup>98</sup> Although the term “foreseeable harm” was already a part of the FOIA legislation, it seemed that the senators nevertheless took Metcalfe’s advice to heart, as they were clear in a subsequent report to explain exactly what they meant by the term in what appeared to be an effort to eliminate any confusion about it:

Under this standard, the content of a particular record should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by the applicable exemption. Agencies should note that mere “speculative or abstract fears,” or fear of embarrassment, are an insufficient basis for withholding information.<sup>99</sup>

Members of the Judiciary Committee also noted in the report that the foreseeable harm standard would apply to all the FOIA exemptions under which the discretionary disclosure of information could occur,<sup>100</sup> meaning that almost all requested records would be affected by the change.

In a hearing before the House Committee on Oversight and Government Reform the next year, in February 2015, however, one witness suggested that implementing the concept of foreseeable harm in this way would slow down the entire FOIA process and even had the

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<sup>98</sup> U.S. Congress. Senate. Committee on the Judiciary, *Open Government and Freedom of Information: Reinvigorating the Freedom of Information Act for the Digital Age*. 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 11, 2014. 1:20.

<sup>99</sup> U.S. Congress. Senate, Committee on the Judiciary, *FOIA Improvement Act of 2014*. 7.

<sup>100</sup> *Ibid.*, 8.

potential to inadvertently expose sensitive national security information. Frederick Sadler had recently retired from working for the Food and Drug Administration, where he had processed FOIA requests for more than 40 years.<sup>101</sup> He suggested in his testimony that the legislation as written would require the application of the foreseeable harm test to “even those exemptions which have a minimal discretionary component,” which he claimed had “the potential to unintentionally delay the Federal Government, increase backlogs, and almost inevitably result in increased disclosure-based litigation.”<sup>102</sup> According to Sadler, the foreseeable harm test would apply to too many exemptions that FOIA officials might consider invoking to withhold information, which he claimed would ultimately backfire by overwhelming the officials and slowing down the process for everyone. He went on to explain his opinion that the application of the test to some specific exemptions was unnecessary anyway because the exemptions already contained restrictions, set both by members of Congress in FOIA amendments and by the courts in FOIA litigation cases, that were sufficient to prevent the unnecessary withholding of information.<sup>103</sup>

Sadler also suggested that “there needs to be some additional clarification with regard to the test’s application.”<sup>104</sup> He was curious about how specifically the foreseeable harm analysis would be applied as FOIA officials considered releasing information. “Would the analysis need to be prepared in a formal document? Would that determination need to be confirmed by an expert in the subject matter under discussion? Would those analyses be releasable under the

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<sup>101</sup> U.S. Congress. House. Subcommittee on Government Operations of the Committee on Oversight and Government Reform, *Ensuring Government Transparency Through FOIA Reform: Hearing before the Subcommittee on Government Operations of the Committee on Oversight and Government Reform*. 114<sup>th</sup> Cong., 1<sup>st</sup> sess., February 27, 2015. 3.

<sup>102</sup> *Ibid.*, 11.

<sup>103</sup> *Ibid.*, 16.

<sup>104</sup> *Ibid.*, 17.

FOIA?,” he wondered.<sup>105</sup> It appeared that these were legitimate questions that members of the House and Senate had not yet considered. If a written foreseeable harm analysis or consultation with an expert were necessary each time FOIA officials wanted to invoke a discretionary exemption, for example, then Sadler’s concerns about increasing backlogs certainly seemed valid. And if information about this process itself surrounding a given FOIA request was releasable under the law, then it was possible that sensitive national security or other information could inadvertently be exposed, putting the American people at risk. It seemed that how Congress responded to these concerns would largely determine whether the application of foreseeable harm would be a success.

Ultimately, it appears that legislators chose to refrain from doing anything substantive to clarify this aspect of their legislation. They left the language of the provision itself the same and, in reports that they published in subsequent months, did not provide any meaningful supplementary context for the foreseeable harm requirement. In a House report released on January 7, 2016, for example, members of the Committee on Oversight and Government Reform wrote that a foreseeable harm inquiry “would require the ability to articulate both the nature of the harm and the link between the specified harm and the specific information contained in the material withheld,”<sup>106</sup> but they did not provide any additional information about what this articulation would specifically look like or whether the process itself would be disclosable through FOIA.

Using this example to test my legislative deferral theory is more complicated than either of the other case studies I analyzed as a part of this project because members of Congress seemed to be sending mixed messages in response to concerns about the foreseeable harm

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<sup>105</sup> Ibid.

<sup>106</sup> U.S. Congress, House, Committee, *FOIA Oversight and Implementation Act of 2015: Report*. 9.

standard in their bills. On the one hand, they kept the language “foreseeable harm” in their legislation rather than using the phrase “presumption of openness” instead after FOIA expert Daniel Metcalfe claimed that “foreseeable harm” was a “very specific, concrete thing” that FOIA officials would know how to implement.<sup>107</sup> The legislators also responded to this comment by explaining in a subsequent report that foreseeable harm analyses would be necessary prior to the use of all discretionary exemptions and that ““speculative or abstract fears”” were “an insufficient basis for withholding information.”<sup>108</sup> This seemed to be an effort to facilitate the disclosure of as much information as possible by limiting the ability of federal agencies to use exemptions.

On the other hand, though, members of Congress refused to clarify whether foreseeable harm analyses would have to be in writing and, if so, whether these written documents would themselves be eligible for disclosure through FOIA. As witness Frederick Sadler pointed out at a hearing in 2015, legislators’ decisions on these issues would directly determine the severity of FOIA backlogs and the likelihood that sensitive information could mistakenly be released to the public. If they refrained from making these decisions, it was implied that federal agencies and courts would ultimately be forced to make them instead.

Proving whether a legislative deferral occurred, then, seems complicated because it appears that legislators tried to make the foreseeable harm standard as expansive as possible but simultaneously failed to address legitimate concerns that doing so would ultimately slow down the entire process and consequently increase FOIA backlogs, rendering the foreseeable harm provision effectively meaningless; by specifying that the foreseeable harm standard would apply to all discretionary exemptions, legislators required agencies to complete foreseeable harm

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<sup>107</sup> U.S. Congress, Senate, Committee, *OPEN Government and Freedom of Information*. 1:20.

<sup>108</sup> U.S. Congress, Senate, Committee, *FOIA Improvement Act of 2014*. 7-8.

analyses for information that they may have otherwise withheld automatically, effectively creating a new criterion to be fulfilled and facilitating the disclosure of information. Yet without specifying how that criterion would be fulfilled, the legislators opened the door for complex and time-consuming analyses that would create delays for everyone. It almost seems as if, at least based on what legislators said publicly, the intentions behind the provision were good but the execution of these intentions was poor. As I explain, though, this is actually evidence of a masterfully crafted deferral.

The first requirement of a legislative deferral is evidence that members of Congress are made aware of a potential ambiguity within their bill. Because Daniel Metcalfe did not recommend that lawmakers change the language of their legislation but instead reiterated that the language they had chosen, requiring a “foreseeable harm” rather than a “presumption of openness,” was appropriate, the first criterion is not fulfilled in this instance. It is fulfilled, however, in the case of Frederick Sadler, who said that the legislation as it was written did not provide enough information about how specifically the required foreseeable harm analyses would be conducted (in writing, with the consultation of an expert, etc).

It also appears that the second criterion, namely that legislators be made aware of the fact that courts or federal agencies would consequently be forced to interpret the alleged ambiguity, is also fulfilled in this case, as legislators and Sadler were talking specifically about how agencies would implement the foreseeable harm test. (It is also likely that legislators understood that foreseeable harm analyses would inevitably be a part of FOIA appeal cases within the court system, although there is no direct evidence of this.) And because legislators did not change the language of their bill to clarify the ambiguity or provide any additional context on how it would be implemented, the third criterion is also fulfilled. Thus, insofar as a legislative deferral is



defined by these three criteria, it appears that one has taken place in this instance. Consequently, I am able state with confidence that members of Congress will be responsible if the implementation of the FOIA Improvement Act ultimately fails to improve FOIA performance.

This is a masterful example of a legislative deferral because lawmakers seemingly went out of their way to ensure that the foreseeable harm standard incorporated into their legislation was as expansive as possible, even though there was evidence (though notably not publicized by the lawmakers themselves) that expanding it in this way would potentially have the counterintuitive effect of limiting the release of information. Because requiring that agencies adopt a presumption of openness through their foreseeable harm analyses was commonly viewed as by far the most prominent portion of the entire legislation, it would therefore be easy for members of Congress to convince the American people that they were taking important steps to improve the law, when in reality they knew that any expected changes would not come to fruition. Bill sponsor Rep. Darrell Issa (R-CA), for example, said in a press release that the amendment was a “critical update” to FOIA that represented a “major milestone” and “a significant step forward to the accountable government the people deserve.”<sup>109</sup> My analysis suggests that Issa likely knew that this was not actually the case.

Only time will tell whether any backlash that arises as a result of the amendment’s likely failure to improve FOIA processing will have political costs for the legislators themselves, but it seems that they have already decided to point their fingers at agencies should the need arise. “It is the intent of Congress that agency decisions to withhold information...under the foreseeable harm standard be subject to judicial review for abuse of discretion,” they wrote in a 2015 Senate

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<sup>109</sup> Office of Congressman Darrell Issa, "Congressman Issa Applauds President’s Signing of FOIA Reform Bill" press release, July 1, 2016, <https://issa.house.gov/press-releases/2016/06/30/congressman-issa-applauds-presidents-signing-of-foia-reform-bill>.

Report.<sup>110</sup> This appears to ensure that any dissatisfaction with the FOIA Improvement Act will play out in the courts, and not on Capitol Hill.

## **Conclusion**

Shortly after the OPEN Government Act was passed in 2007, a new president would enter the White House, and he would not move out until the conclusion of his second term eight years later. Despite his early campaign promises to make his presidency the most transparent in American history, many advocates of government transparency now suggest that President Obama largely failed to do so. In an interview just three weeks before the president left office, White House Press Secretary Josh Earnest halfheartedly attempted to deflect this criticism when asked if the Obama administration had done enough to respond to FOIA requests. “Well there were hundreds of thousands of FOIA requests that were answered and responded to with at least some of the information that was requested,” Earnest replied.<sup>111</sup> It seemed to be a rather tepid response, especially from the person hired to serve as the president’s greatest advocate. Earnest suggested that a variety of institutional factors were the cause of FOIA’s shortcomings instead of the Obama administration’s policies,<sup>112</sup> although others certainly disagree.

With President Obama now out of the White House, though, it seems that FOIA Improvement Act he signed into law will have a more significant long-term impact on FOIA processing than other similar efforts made during his presidency, as it cannot be easily reversed by the Trump administration in its ongoing war against the news media. However, based on my analysis in this chapter, it appears that the amendment’s most important provision requiring

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<sup>110</sup> U.S. Congress. Senate. Committee. *FOIA Improvement Act of 2015*.

<sup>111</sup> Josh Feldman, “Josh Earnest: Obama Hasn’t Gotten Enough Credit for Being ‘Most Transparent’ President,” *Mediaite* (2016).

<sup>112</sup> *Ibid.*

foreseeable harm analyses prior to the withholding of records will ultimately be ineffective or potentially even counterproductive at improving FOIA performance, as, according to one FOIA expert, doing so will likely overwhelm agencies and subsequently increase backlogs. Because members of Congress did not respond to this concern by clarifying the foreseeable harm requirement and the expectations of federal agencies when implementing it, there is evidence to suggest that a legislative deferral occurred, meaning that legislators intentionally chose to refrain from strengthening the law in an attempt to protect some other, unidentified interests. As a result, if and when it becomes clear that FOIA Improvement Act has not actually improved the law, any criticism of the amendment that arises will likely fall on federal agencies rather than the legislators themselves—so the lawmakers preserve their chances at reelection, even without demonstrating responsiveness to the desires of their constituents.

It is important to recognize, though, that any future evidence that the FOIA Improvement Act has failed will not necessarily be the effect of the foreseeable harm requirement contained within it; as I have explained in previous chapters, there are two other, widespread theories in FOIA scholarship that attempt to explain why FOIA performance has worsened over the past 20 years, and I found plenty of evidence to support both of these notions throughout my research for this chapter. There seems to be widespread agreement, for instance, that a heightened concern for protecting the national security has caused agencies to deny an increasing portion of FOIA requests. Angela Canterbury of the Project on Government Oversight summarized the idea behind this argument succinctly when she said that “there continues to be two American governments. One looks like a democracy and the other is a national security state where claims

of national security usually trump openness and accountability.”<sup>113</sup> It appears that this national security state is continuing to grow in power and influence.

There are also many who believe that a lack of funding has continued to prevent federal agencies from spending the resources needed to enforce the law appropriately. Whether the law is enforced or not, Kevin Goldberg of the Sunshine in Government Initiative suggested in 2013, “the issue has always been a lack of resources.”<sup>114</sup> If this is indeed one of the causes of FOIA’s problems, it is likely that these problems will only grow worse in the coming years, as the FOIA Improvement Act did not increase funding to agencies to fulfill their added responsibilities under the law, even though it is expected to cost an additional \$22 million government-wide over the next five years.<sup>115</sup> And it is possible that this number does not even take into account the increase in the average FOIA request processing time that will likely occur as a result of the new foreseeable harm standard, which will require more FOIA officials to work longer hours processing FOIA requests.

What is clear is that, two decades following the passage of the Electronic Freedom of Information Act, legislators still do not appear to have found a solution that will make a real difference at improving FOIA performance, nor have they demonstrated that they have any particular desire to do so. In fact, it seems to work in the legislators’ best interests to pass laws that appear to strengthen FOIA but in reality fail to do so, even if that means that their constituents’ wishes are ignored and the government becomes ever more opaque. In the next chapter, I summarize my findings in the project as a whole and discuss their implications for

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<sup>113</sup> U.S. Congress, House, Committee, *Addressing Transparency*. 5.

<sup>114</sup> U.S. Congress, Senate, Committee, *We The People*. 68.

<sup>115</sup> U.S. Congress, House, Committee, FOIA Oversight and Implementation Act of 2015. 20.

freedom of information moving forward, especially now that a new president sits in the Oval Office.

## CONCLUSION

This thesis has outlined the development of the Freedom of Information Act from its original enactment in July 1966 to today. Over the course of its history, the law has been amended and modified on several occasions, but it still has the same goal of increasing government transparency that it did a half-century ago. FOIA's influence at holding government officials accountable throughout this time period is both impressive and undeniable, as journalists and other concerned citizens have used it to expose government fraud, waste, mismanagement, and negligence time and again over the past 50 years. Despite the many challenges that it now faces, the law continues to demonstrate its utility at shining a light on government activities that would otherwise be hidden in darkness; within the past few months, for example, the federal law has been used to provide insight into a recent security breach at a naval base in California,<sup>1</sup> the Drug Enforcement Agency's sudden decision to halt enforcement of laws governing the sale of opioids,<sup>2</sup> and a veteran's massacre of five Dallas police officers after doctors refused to treat his PTSD.<sup>3</sup> These stories are important, and they would not have come to light without FOIA.

Just because important information is still being disclosed through the law, however, does not mean that it is functioning properly. The stories and experiences of FOIA requesters that I

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<sup>1</sup> Brian Johnson. "New Navy Documents Reveal Communication Breakdown Between Nas Lemoore and CHP During Deadly Incident." *ABC30 Action News*, October 26, 2016, <http://abc30.com/news/new-navy-documents-reveal-communication-breakdown-between-nas-lemoore-and-chp-during-deadly-incident/1573214/>.

<sup>2</sup> The Washington Post. "Former DEA investigators: 'People were dying' while opioid cases languished" *The Washington Post*, October 22, 2016, [https://www.washingtonpost.com/video/national/former-dea-investigators-people-were-dying-while-opioid-cases-languished/2016/10/22/64d175c2-96fe-11e6-9cae-2a3574e296a6\\_video.html](https://www.washingtonpost.com/video/national/former-dea-investigators-people-were-dying-while-opioid-cases-languished/2016/10/22/64d175c2-96fe-11e6-9cae-2a3574e296a6_video.html).

<sup>3</sup> Garance Burke. "Soldier who killed 5 Dallas officers showed PTSD symptoms" *The Associated Press*, August 24, 2016, <http://bigstory.ap.org/article/db67234bb9a24041ab447858ffc2e1f4/soldier-who-killed-5-dallas-officers-showed-ptsd-symptoms>.

have shared throughout this project should serve as ample evidence that something has gone dangerously wrong; it often takes agencies months or years to disclose information, when the law requires that they do so within just 20 days. It also appears that the government is releasing less information overall than ever before, making it more difficult for journalists and others to do the important work of holding government officials accountable. In 2016, for example, the Obama administration denied more FOIA requests than at any point in history.<sup>4</sup> It also spent more money on FOIA lawsuits than ever before and a record \$478 million on the processing of FOIA requests.<sup>5</sup> The law is becoming more expensive for American taxpayers, even though they are getting less in return.

This project has focused on finding an explanation for why FOIA performance seems to have declined so rapidly. Specifically, I have tried to determine why the recent downward trend in performance has continued and even intensified following the three most recent efforts to reverse it—the Electronic Freedom of Information Act Amendments of 1996, the OPEN Government Act of 2007, and the FOIA Improvement Act of 2016. Upon their passage, all were heralded as major steps toward a more open government, yet the beneficial changes they promised do not appear to have had any tangible effects at actually improving the law. Throughout this thesis, I have tested my hypothesis that the amendments’ eventual failures to live up to the promises of their creators are not the result of legislative incompetence but rather something entirely different; instead, I argued that legislators intentionally designed the amendments to fail in attempts to uphold their personal policy interests, but that they did so covertly to satisfy their constituents and simultaneously increase their chances of reelection.

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<sup>4</sup> Ted Bridis. “Obama’s final year: US spent \$36 million in records lawsuits” The Associated Press, March 14, 2017, [https://www.apnews.com/0b27c4d4b23b436d805328694e58c605/Obama%27s-final-year:-US-spent-\\$36-million-in-records-lawsuits](https://www.apnews.com/0b27c4d4b23b436d805328694e58c605/Obama%27s-final-year:-US-spent-$36-million-in-records-lawsuits).

<sup>5</sup> Ibid.

My theory is based largely off the work of George Lovell in his book *Legislative Deferrals*. Lovell suggests that legislators can write legislation in ways that are purposefully ambiguous to invite judicial interpretation, and I argued that this is exactly what happened with the FOIA amendments I studied. When I tested this hypothesis, however, my results were mixed.

In chapter 3, I used the Electronic Freedom of Information Act as a case study. Based on the available information about the congressional deliberations surrounding the law, I was able to conclude that members of Congress incorporated a provision into it that was designed to worsen FOIA performance, even though it appeared to do the opposite. This provision allowed for the expedited processing of FOIA requests that were made by “person[s] engaged in disseminating information” in cases when requested documents were related to an issue of “compelling urgency to the public.”<sup>6</sup> After reading the transcripts of House and Senate hearings on the proposed legislation, it appears that legislators altogether ignored concerns that this provision would have an effect of weakening the law, either by increasing backlogs or limiting the use of expedited processing regulations already in place throughout the government. Because members of Congress did not clarify their language to alleviate these concerns, it is safe to assume that a legislative deferral occurred.

Chapter 4 was different in that I did not find any evidence of a legislative deferral. I examined the deliberations surrounding the OPEN Government Act of 2007 and concluded that the efforts of one legislator in particular, Senator Jon Kyl (R-AZ), helped to publicly clarify any provisions within the amendment that may have been confusing. As a result, federal judges and FOIA officials—along with the American public—would undoubtedly be aware of Congress’s

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<sup>6</sup> *Electronic Freedom of Information Act Amendments of 1996*, H.R. 3802, 104<sup>th</sup> Cong. July 12.



intent when passing the law, eliminating any possibility of lawmakers deceiving their constituents and pursuing other interests through a legislative deferral.

In chapter 5, I once again concluded that a legislative deferral took place, this time with the FOIA Improvement Act of 2016. The deferral within this amendment was particularly significant because it involved the most important portion of the entire legislation, a provision that codified President Obama's "presumption of openness" policy by requiring that agencies conduct foreseeable harm analyses before withholding information. Although such an effort to limit agency withholdings could seemingly only have beneficial effects, legislators once again ignored concerns that doing so would increase FOIA backlogs and decelerate the request process for everyone. Because there is evidence that these legislators knew that this provision would cause problems but still made no effort to change it in any noticeable way, it is safe to assume that they wanted this outcome to occur.

I was therefore able to determine that a legislative deferral occurred in two of my three case studies, which means that I am unable to conclude that my theory provides a comprehensive explanation for recent declines in FOIA performance; although there is evidence that a legislative deferral occurred with both the Electronic Freedom of Information Act and the FOIA Improvement Act, the absence of evidence to support this theory in relation to the OPEN Government Act suggests that there must also be other factors contributing to FOIA's problems. These findings are similar to Lovell's in his analysis of labor laws passed during the Progressive Era, as the author is only able to support his own legislative deferral hypothesis in two of his four case studies.<sup>7</sup> Still, he concludes that "participants' expectations about judicial reactions shaped

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<sup>7</sup> Lovell, George I. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*. Cambridge, UK; New York: Cambridge University Press, 2003. 41.

the content” of all four statutes he examines before they were enacted,<sup>8</sup> which I can similarly conclude about all three of the recent FOIA amendments; although there is no evidence of a legislative deferral with the OPEN Government Act, it is clear that lawmakers anticipated that their legislation would nevertheless be interpreted by courts and federal agencies, as Senator Jon Kyl demonstrated on the Senate floor. This suggests that FOIA lawmaking more generally often requires close inter-branch cooperation, which raises the possibility that some traditional assumptions about it—that federal agencies play no role in the process, for example—should perhaps be reexamined.

That I was able to support my hypothesis with 1996’s E-FOIA is particularly significant, as one might assume that a legislative deferral would be least likely in the United States prior to 9/11. My theory is based on the presumption that national security concerns might dissuade legislators from passing measures designed to facilitate the disclosure of information, as doing so could theoretically put the American people at risk. One would assume that these concerns would be less prevalent prior to the terrorist attacks, so my finding that a legislative deferral nevertheless occurred is noteworthy and increases confidence in the validity of my argument, as it proves that conditions do not need to be perfect for my theory to be supported.

Although I was not able to find evidence of a deferral in the scenario when it would presumably be most likely, the first amendment to the law following 9/11, there are several reasons why this does not necessarily undermine my assertion; as I discussed at the end of chapter 4, it is possible that legislators were responding to the Bush administration’s crackdown on FOIA disclosures immediately following the attacks, and that by the time they were ready to pass the OPEN Government Act of 2007 there was a consensus that some of the restrictions on

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<sup>8</sup> Ibid., 253.

releasing information could be eased. It is also possible that the majority of lawmakers intended to legislatively defer to agencies with the amendment, but that Senator Jon Kyl's proposal to clarify certain provisions on the Senate floor put them in a position in which they could not publicly protest for fear of political backlash. A third possibility is that legislators felt no need for a deferral because the amendment solely addressed procedural aspects of the law rather than substantive ones, so the OPEN Government Act had virtually no effect on increasing the disclosure of potentially sensitive information. Further research might examine whether any of these theories have merit, or whether there is some other explanation for this anomaly in my research.

It is also important to recognize that there is evidence to support two other theories that explain recent declines in FOIA performance more generally. While I focused on a supply-side problem in this project—namely that changes to FOIA itself have contributed to its problems—other theories contend that a changing and growing demand for information through FOIA has caused the problems. One suggests that limited resources have prevented agencies from processing all the requests they receive in a timely manner, thereby creating backlogs, and another contends that a greater proportion of recent requests have been related to sensitive national security concerns, thus allowing agencies to legally withhold more information. I chose to refrain from studying these explanations in depth in my project because they have already been the subject of FOIA scholarship, but I was able to find evidence to support each of them throughout my research, even when I was not necessarily looking for it—a sign that the theories are strong and should be taken seriously. My research, then, serves as yet another piece of the puzzle as scholars develop a more comprehensive understanding of the causes of FOIA's current problems. Only then is it possible to develop strategies for fixing them.

## The Future of FOIA

Despite the many changes to the Freedom of Information Act over the past half-century, it appears that the law's supporters and opponents have remained remarkably constant. The original legislation received unanimous support in Congress but was signed into law by a reluctant President Lyndon Johnson, who "had to be dragged kicking and screaming to the signing ceremony" because he "hated the very idea of the Freedom of Information Act."<sup>9</sup> Similarly, the amendment to the law enacted 50 years later, the FOIA Improvement Act, was also passed unanimously by the House and Senate but received significant private resistance from the Obama administration,<sup>10</sup> despite the president's public promises to make transparency a top administration priority. This pattern is perhaps understandable, as efforts to strengthen FOIA inevitably increase oversight of the executive branch but have no direct effect on members of Congress; a more robust law has the potential to embarrass or otherwise harm the president while leaving senators and representatives unscathed. As I explained throughout this project, though, oftentimes there are nevertheless incentives for these legislators to resist making genuine efforts to improve the law.

Even though Presidents Johnson and Obama both eventually yielded to public pressure and signed their FOIA legislation into law, however, executive branch resistance should still be seen as a major barrier to improving FOIA performance. Because there are no major penalties yet for federal agencies that fail to comply with the law's requirements, there are few disincentives preventing agencies from bending the rules and taking steps to limit oversight of

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<sup>9</sup> Erin C. Carroll. "Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press." *Utah Law Review* 2016, no. 2 (2016): 193-243. 208.

<sup>10</sup> Trevor Trimm, "New documents show the Obama admin aggressively lobbied to kill transparency reform in Congress," *Freedom of the Press Foundation*, March 8, 2016, <https://freedom.press/news-advocacy/new-documents-show-the-obama-admin-aggressively-lobbied-to-kill-transparency-reform-in-congress/>.

their own activities, especially when instructed to do so by the president himself. The Obama administration's refusal to implement FOIA appropriately, as I explained in chapter 5, serves as an example of how the executive branch can undermine what may otherwise be effective improvements to the law, as President Obama's own policies designed to improve performance were ultimately ineffective because of his administration's private refusal to comply with them. The reality, it seems, is that a certain degree of executive branch cooperation is necessary for FOIA to be successful.

As I publish this thesis, the United States is two months into the tenure of a new president. When Donald Trump was inaugurated on January 20, 2017, he delivered a populist address in which he promised that his administration would transfer power from Washington, D.C. back into the hands of the American people.<sup>11</sup> "For too long," he said, "a small group in our nation's Capital has reaped the rewards of government while the people have borne the cost...[Today] will be remembered as the day the people became the rulers of this nation again."<sup>12</sup> This speech followed months of campaigning during which then-candidate Trump had promised to "drain the swamp" of corruption in Washington.<sup>13</sup>

Based on my research for this project, it is clear to me that a robust Freedom of Information Act could be one of the most effective tools at President Trump's disposal to fulfill these promises. Trump is right in that corruption and waste are not uncommon in the nation's capital, and giving the American people a law that would help them uncover these malpractices themselves could help the president become the populist hero he aspires to be. Campaign trail

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<sup>11</sup> Donald J. Trump, "Inaugural Address," Washington, D.C., January 20, 2017, The White House <https://www.whitehouse.gov/inaugural-address>.

<sup>12</sup> Ibid.

<sup>13</sup> Isaac Arsndorf, Josh Dawsey, and Daniel Lippman, "Will 'drain the swamp' be Trump's first broken promise?," *POLITICO*, December 22, 2016, <http://www.politico.com/story/2016/12/trump-drain-swamp-promise-232938>.

rhetoric, however, does not always translate into actual policy, and early indications suggest that President Trump is unlikely to make efforts to strengthen FOIA anytime soon, primarily because of his distaste for the news media that uses the law on a regular basis.

Journalists actually only submit a small portion of FOIA requests—just 7.6%, according to a recent estimate<sup>14</sup>—but, as mentioned previously, the stories they uncover by using the law for their investigative reporting often cause major embarrassment for those in power, which undoubtedly explains executive branch resistance to FOIA over the past 50 years. Although President Trump has not yet articulated a FOIA policy, he has repeatedly attempted to delegitimize the press, which he has called “fake news,” “the opposition party,” and even the “enemy of the American people” for reporting on him that he claims is biased and unfair.<sup>15</sup> Unfortunately for Trump, though, this strategy does not appear to be working: every time the president comments about the “failing *New York Times*,” for example, new subscriptions to the newspaper skyrocket, according to its executive editor.<sup>16</sup> And despite Trump’s boasts about his influence over his 20 million Twitter followers,<sup>17</sup> they still tuned in to “Fake News CNN” more than ever before in 2016,<sup>18</sup> which suggests that his influence—at least on the public’s perception and consumption of the news—is more limited than one might assume.

In a recent column in *The Baltimore Sun*, media critic David Zurawik argued that although President Trump’s rhetoric against the news media has been troubling, his actions to

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<sup>14</sup> Cory Schouten, “Who files the most FOIA requests? It’s not who you think.” *Columbia Journalism Review*, March 17, 2017, <http://www.cjr.org/analysis/foia-report-media-journalists-business-mapper.php>.

<sup>15</sup> Mahita Gajanan, “Republicans Speak Out on Freedom of the Press After President Trump Calls Media the ‘Enemy,’” *Fortune*, February 19, 2017, <http://fortune.com/2017/02/19/donald-trump-republicans-media-enemy/>.

<sup>16</sup> Jill Disis, “New York Times editor: Trump tweets “wildly” boost subscriptions,” *CNNMoney*, February 26, 2017, <http://money.cnn.com/2017/02/26/media/new-york-times-editor-dean-baquet-subscriptions/>.

<sup>17</sup> Brain Stelter, “Donald Trump’s Twitter milestone: 20 million followers,” *CNNMoney*, January 16, 2017, <http://money.cnn.com/2017/01/16/media/donald-trump-twitter-20-million-followers/>.

<sup>18</sup> A.J. Katz, “2016 Ratings: CNN Has Most-Watched Year Ever,” *TVNewser*, December 28, 2016, <http://www.adweek.com/tvnewser/2016-ratings-cnn-has-most-watched-year-ever/315014>.

undermine it have been relatively limited thus far in comparison to those of the Obama administration.<sup>19</sup> Although I believe that this statement is correct, I worry that it will not be for long; the Trump administration has already started to threaten the notion of a free press by limiting participation in press briefings<sup>20</sup> and actively rewarding news outlets that cover the president favorably.<sup>21</sup> If the administration continues to act on its anti-media views, I fear that a lack of access to information in the United States will become a much bigger problem than it currently is with a weak FOIA alone.

Although it is still unclear whether the most recent update to the law—the FOIA Improvement Act of 2016—will successfully improve FOIA performance, all available information suggests that it will not. Evidence of a legislative deferral within the amendment and the recent inauguration of a decidedly anti-media, and arguably anti-information, president point to a bleak future for FOIA, at least in the near future. What information will be hidden from the American people as a result? And what will be the consequences of this increased secrecy, other than a less accountable government? These are unanswerable questions, but important ones to ask nonetheless. In recent history, FOIA has been updated about once a decade, so when the time eventually comes to update the law again, Americans will need to be ready, still asking these questions to demand the Freedom of Information Act that they deserve.

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<sup>19</sup> David Zurawik. “Trump’s war on press no match for Obama’s.” *The Baltimore Sun*, March 4, 2017, <http://www.baltimoresun.com/entertainment/tv/z-on-tv-blog/bs-ae-zontv-trumpvpress-20170304-story.html>.

<sup>20</sup> Ibid.

<sup>21</sup> David Ferguson. “CNN’s Brian Stelter rips Trump’s ‘Fox News presidency’: ‘He’s in a feedback loop with one outlet’,” *RawStory*, March 18, 2017, <https://www.rawstory.com/2017/03/cnns-brian-stelter-rips-trumps-fox-news-presidency-hes-in-a-feedback-loop-with-one-outlet/>.

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