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# Cook v. NARA Versus the Public's Right to Know

Sarah Lamdan

*CUNY School of Law*, [sarah.lamdan@law.cuny.edu](mailto:sarah.lamdan@law.cuny.edu)

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## ***Cook v. NARA* Versus the Public's Right to Know**

SARAH LAMDAN\*

In *Cook v. National Archives and Records Administration*<sup>1</sup>, the court misapplied the Freedom of Information Act's (FOIA) privacy exemption to hide presidential records, favoring secrecy over the public interest. The court set up a double standard by protecting George W. Bush and Richard Cheney's library reference requests—even though, under laws created during the Bush administration, librarians would face possible prison sentences for refusing to turn over similar requests.<sup>2</sup>

In 2013, a Gawker reporter named John Cook made a FOIA request to the National Archives and Records Administration (NARA) to get more information on “who's digging through what in former President George W. Bush and Vice President Dick Cheney's libraries.”<sup>3</sup> Cook hoped to get a glimpse of NARA's special access request policies and procedures because Bush, Cheney, and their representatives made thousands of secret requests to sift through presidential records before the public could see the papers.<sup>4</sup> The requests were secret because NARA maintains presidential records pursuant to the Presidential Records Act (PRA), which limits public access to presidential archives through several statutory embargoes. During the embargo periods, former presidents and vice presidents, and their designated representatives, are the only people who can look through the collection. This special privilege is provided by the PRA and carried out by NARA archivists through the “special access request” process.<sup>5</sup>

The *Cook v. NARA* court relies on Exemption 6, the FOIA exemption that protects records containing personal information, to make Bush and Cheney's special access requests off limits to the public. The court determines that the former officials' interest in privately researching for their memoirs outweighs the public's interest in seeing NARA's operations during secretive record embargo periods (which have historically been opportunities for special access recipients to destroy and exploit presidential records), denying FOIA's transparency directives.

This case note suggests that the Second Circuit tipped the balance too far in favor of privacy in *Cook v. NARA* by mistakenly (1) treating Bush and Cheney like ordinary academic scholars, (2) ignoring the open-government, transparency purposes of both the Presidential Records Act and the Freedom of Information Act, and (3) determining that PRA embargo periods are to provide former officials with unfettered access to their records.

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\* Associate Professor and Faculty Services Librarian, The City University of New York School of Law. The author wishes to thank Eyal, Benjamin, and Evelyn Lamdan. She would also like to thank her CUNY School of Law colleagues for their feedback and support throughout the writing process.

<sup>1</sup> *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 173 (2d Cir. 2014).

<sup>2</sup> Alison Leigh Cowan, *Four Librarians Finally Break Silence in Records Case*, N.Y. TIMES (May 31, 2006), <http://www.nytimes.com/2006/05/31/nyregion/31library.html>.

<sup>3</sup> Adam Klasfeld, *Records Challenge by Ex-Gawker Editor Unravels*, COURTHOUSE NEWS SERVICE (July 8, 2014), <http://www.courthousenews.com/2014/07/08/69343.htm>.

<sup>4</sup> *Id.*

<sup>5</sup> 44 U.S.C. § 2205 (2014).

I. *COOK V. NARA* AND THE FOIA—AN OVERVIEW

Journalist John Cook sought special access request records from the NARA-controlled George W. Bush Presidential Library in Dallas, Texas, and former Vice President Cheney's records at NARA's Washington, D.C., archives, made between February 2009 and October 2010, while the records were embargoed from public view. The PRA subjects presidential records to several embargo periods before they are released to the public.

During these embargo periods, former presidents, vice presidents, and their designated officers can access archived records by submitting special access requests.<sup>6</sup> Special access requests contain the requestor's identity and the specific item or information sought.<sup>7</sup> Cook did not seek the underlying presidential documents requested in Bush and Cheney's special access requests, but rather the records of the requests, which are part of NARA's PRA procedures.<sup>8</sup>

When NARA refused to provide its special access request records, John Cook sued the agency. In 2013, U.S. District Judge Kevin Duffy granted summary judgment in NARA's favor. Judge Duffy extended the limits of the FOIA's exemption for personal, private files beyond its reasonable limit to find that President Bush and Vice President Cheney have extensive privacy interests in not having their information requests "broadcast to the general public," for fear that such publication would have a chilling effect on their "academic research."<sup>9</sup> Along with the inflated FOIA privacy claim, Judge Duffy erroneously claimed that the PRA was designed to give the ex-officials a monopoly on NARA records.<sup>10</sup>

Cook published a quippy blog post, *Bush and Cheney are for Snooping In Everyone's Library Records but Theirs*, following the District Court decision. The blog post highlighted the irony of using library ethics, which require privacy for library patrons, to hide the special access requests of people who, under the guise of the librarian-reviled USA PATRIOT Act, invaded libraries across the country, demanding the library records of hundreds of private citizens.<sup>11</sup> Irony aside, in 2014 the Second Circuit affirmed the District Court's summary judgment decision in NARA's favor, concluding that the special access request records are protected from disclosure under Exemption 6 of the FOIA.

The Second Circuit uses the Exemption 6 balancing test to reach its decision. The test has two parts. In the first part, the court determines whether the files are "personnel, medical or 'similar' files," the kind of files that fall under Exemption 6.<sup>12</sup> In the second part of the test, the court determines whether disclosure of the files "would constitute a clearly unwarranted invasion of personal privacy." When public interest in records outweighs a privacy interest, the information must be disclosed.<sup>13</sup> To determine whether privacy interests outweigh public interests,

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<sup>6</sup> 44 U.S.C. § 2205(3) (2014).

<sup>7</sup> Cook v. Nat'l Archives & Records Admin., 758 F.3d 168, 173 (2d Cir. 2014).

<sup>8</sup> *Id.* at 175.

<sup>9</sup> Cook v. Nat'l Archives & Records Admin., 921 F. Supp. 2d 148, 157 (S.D.N.Y. 2013).

<sup>10</sup> *Id.*

<sup>11</sup> John Cook, *Bush and Cheney are for Snooping In Everyone's Library Records But Theirs*, GAWKER (March 28, 2012, 2:42pm), <http://gawker.com/5897168/bush-and-cheney-are-for-snooping-in-everyones-library-records-but-theirs>.

<sup>12</sup> 5 U.S.C. § 552(b)(6) (2014).

<sup>13</sup> Cochran v. United States, 770 F.2d 949, 955 (11th Cir. 1985) ("If the balance is equal

courts balance the privacy interests preserved by nondisclosure against the public interests in the files' contents.<sup>14</sup>

The *Cook v. NARA* court labels the special access request records "similar files," satisfying the first prong of the Exemption 6 inquiry,<sup>15</sup> placing NARA special access request records in the same category as passport files, medical records, and other papers that are of a personal, private nature. Then, the court moves to the balancing test in the second part of the Exemption 6 inquiry.

Because FOIA favors government transparency and records disclosure, the Exemption 6 balancing test requires a very high privacy interest and, conversely, has a very low public interest threshold.<sup>16</sup> The FOIA's aim to curb corruption and "hold the governors accountable to the governed"<sup>17</sup> is so significant that even substantial privacy interests may fail to outweigh the public interest. FOIA sometimes requires disclosure of private materials like names, salaries, and other personal information (over Exemption 6) if that information "shed[s] light on an agency's performance of its statutory duties."<sup>18</sup> In order to pass Exemption 6 muster, privacy threats must be real (not merely speculative)<sup>19</sup> and there has to be a real expectation of privacy, which is often reduced for public figures.<sup>20</sup>

Also, when looking at FOIA disclosure, a FOIA requestor's personal reasons for requesting records are irrelevant to the public interest analysis.<sup>21</sup> Courts are supposed to focus only on "the nature of the requested document" and "its relationship to the public interest" no matter why the requestor wants the information.<sup>22</sup> Courts have also found that, where records reveal agency processes and could also be used for an additional "derivative use" they should still be released.<sup>23</sup>

Despite the statutory and court-made directives to the contrary, the *Cook v. NARA* court invokes an unusually broad definition of Exemption 6 privacy, saying, "The privacy side of the balancing test is broad. 'It encompasses all interests involving the individual's control of information concerning his or her person.'"<sup>24</sup> In addition to using an overly pro-privacy standard, the court treats Bush and Cheney's special access requests differently than other, practically identical, special access requests. The court calls Obama administration special access requests, which are made by the incumbent president still in office, "official business" while deeming Bush and Cheney's documents private records, as if the nature of the documents somehow transformed because Bush and Cheney are past officials.<sup>25</sup>

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the court should tilt the balance in favor of disclosure.").

<sup>14</sup> Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976).

<sup>15</sup> U. S. Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982).

<sup>16</sup> U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 477 (2009) ("courts ordinarily discuss the 'public interest' as weighing in favor of disclosure").

<sup>17</sup> Brennan Ctr. for Justice at New York Univ. Sch. of Law v. U.S. Dep't of Justice, 697 F.3d 184, 194 (2d Cir. 2012).

<sup>18</sup> U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989).

<sup>19</sup> Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 878 (D.C. Cir. 1989).

<sup>20</sup> Common Cause v. Nat'l Archives & Records Serv., 628 F.2d 179, 184 (D.C. Cir. 1980).

<sup>21</sup> *Reporters Comm.*, 489 U.S. at 771.

<sup>22</sup> *Id.* at 772.

<sup>23</sup> U.S. Department of Justice, *supra* note 15, at 474–75.

<sup>24</sup> *Cook v. Nat'l Archives & Records Admin.*, 921 F. Supp. 2d 148, 156 (S.D.N.Y. 2013). (quoting *Wood v. F.B.I.*, 432 F.3d 78, 88 (2d Cir. 2005)) (other internal citations omitted).

<sup>25</sup> *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 172 (2d Cir. 2014).

The court treats ex-world leaders Bush and Cheney like ordinary teachers and students utilizing an ordinary public library, and not powerful ex-officials making special access requests to their archives, which are full of publicly owned historical documents.<sup>26</sup> This treatment creates an overly generous privacy grant and weighs it against an artificially minimized public interest.

## II. *COOK V. NARA'S EXEMPTION 6* IMBALANCE

NARA, like other federal agencies, must be accountable for its agency procedures and actions. NARA is capable of the same missteps as other agencies, including overstepping statutory guidelines and falling prey to regulatory capture, and it must be open to FOIA access to safeguard against those threats. This is especially true in light of past presidential administrations that have shown a propensity for regulatory capture.<sup>27</sup> NARA archivists are especially prone to presidential capture. Archivists are warned to be wary of the slippery slope between archive donors as providers of information and also as owners of information. This slope is even harder to navigate when the donor in question appointed you to your position and had the statutory power (or *has* the statutory power, in the case of special access requests from current administrators) to remove you from the position.<sup>28</sup> The president-appointed NARA archivists are also charged with administering PRA exemptions in favor of presidential privacy.<sup>29</sup> This tight president-archivist relationship makes the transparency of NARA's PRA embargoes and special access all the more critical.

### *A. Presidents Have a Reduced Expectation of Privacy, Especially Where Special Treatment from the Government Is Involved*

The court treats Bush and Cheney like average scholars, borrowing the Supreme Court language, "When the light of publicity may reach any student, any teacher, inquiry will be discouraged."<sup>30</sup> Although American presidents do have some expectation of privacy after serving their presidential term, they will never receive the full privacy of a nonpresidential citizen or an ordinary scholar. Presidents are, for the rest of their lives, quasi-governmental statesmen. Bush and Cheney remain American officials, the Former Presidents Act provides Bush a continued annual presidential salary, and they have permanent office space with the Administrator of General Services.<sup>31</sup>

Due to their quasi-governmental status, presidential records and materials are not private: "the volume of truly personal material is considered miniscule because a great number of what might ordinarily be construed as one's private activities are, because of the nature of the presidency, considered to be of a public nature."<sup>32</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Editorial, *The Halliburton Loophole*, N.Y. TIMES (Nov. 2, 2009), [http://www.nytimes.com/2009/11/03/opinion/03tue3.html?\\_r=0](http://www.nytimes.com/2009/11/03/opinion/03tue3.html?_r=0) (discussing Cheney's persuasion on the federal legislature).

<sup>28</sup> 44 U.S.C. § 2103 (2014).

<sup>29</sup> 44 U.S.C. § 2104 (2014).

<sup>30</sup> *United States v. Rumely*, 345 U.S. 41, 57 (1953).

<sup>31</sup> 3 U.S.C. § 102(a), (c) (2014).

<sup>32</sup> Brief for Petitioner at 21, *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168 (2d

Even communications that would be legally privileged in private citizen relationships are not privileged when a president is involved. For example, records of attorney client relations are not always private when the president is a client.<sup>33</sup> Decreased privacy occurs especially when presidential activities run astray of the public's trust. The PRA was created soon after Watergate to expressly safeguard against Watergate-like presidential secrecy by exposing records of presidential activities.<sup>34</sup> To understand NARA's PRA policies in light of FOIA, it is important to remember that the very goal of the PRA is to publicize presidential records.

Further, NARA itself is not private, but a wholly governmental entity, and a lower expectation of privacy exists when a government entity, rather than a private library, is the subject of disclosure. The National Archives are a federal agency containing the documents that create the fabric of American history and policy, not merely items of artistic or historical interest. Additionally, the presidential documents in this case are not ordinary library holdings but "historical resources that capture each incumbent's conduct in presidential office."<sup>35</sup> It is notable that, when a person requests government information via FOIA, the person's name is not exempted as private because of the high public interest in agency transparency.<sup>36</sup> John Cook's FOIA request record would not be exempt from FOIA disclosure, and neither should Bush and Cheney's special access requests for presidential records be off limits to public view.

Privacy is not only less robust for presidents utilizing special access requests because they are ex-world leaders receiving taxpayer-funded benefits, but also because they receive special treatment from a federal agency. People receiving a special benefit from a federal agency have minimal privacy rights in relation to that benefit.<sup>37</sup> The relationship between NARA and Bush and Cheney is a special one (a "VIP library card"<sup>38</sup>), granted only to officials, ex-officials, and their representatives. If Bush and Cheney truly want the same privacy expectations as ordinary citizens, they should be required to wait on a twelve-year FOIA line like everyone else.

Additionally, if Exemption 6 is truly meant to protect against "the injury and embarrassment that can result from the unnecessary disclosure of personal information,"<sup>39</sup> then it must be believed that revealing superficial special access requests (and not their underlying documents) would injure and embarrass Bush and Cheney. To borrow a phrase from a D.C. Circuit opinion applying the Exemption 6 balancing test, the contents of these special access requests are "hardly even a private matter" in light of all that the public already knows about the

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Cir. 2014) (No. 13-1228-cv), 2013 WL 3854283, at \*21.

<sup>33</sup> In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 914 (8th Cir. 1997) (unsealing Clinton attorney-client materials in Whitewater investigation).

<sup>34</sup> WENDY GINSBERG, CONG. RESEARCH SERV., R40238, THE PRESIDENTIAL RECORDS ACT: BACKGROUND AND RECENT ISSUES FOR CONGRESS 1 (2014), available at <https://www.fas.org/sgp/crs/secrecy/R40238.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> Sarah Shik Lamdan, *Protecting the Freedom of Information Act Requestor: Privacy for Information Seekers*, 21 Kan. J.L. & Pub. Pol'y 221 (2012).

<sup>37</sup> News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1202 (11th Cir. 2007) (quoting 2 James T. O'Reilly, *Federal Information Disclosure* § 16:53 (3d ed. 2000)) ("the legislative history of Exemption 6 disfavors privacy claims by those who receive a governmental benefit" (internal quotations and brackets omitted)).

<sup>38</sup> Brief for Petitioner, *supra* note 32, at 29.

<sup>39</sup> U. S. Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982).

Bush administration and its activities.<sup>40</sup> Courts have determined that, in relationships with NARA, a former official “can hardly be viewed as an ordinary private citizen.” It is unlikely that the ex-officials, who must publicize everything from medical information to information about their personal finances, would be embarrassed about NARA special access requests or truly believe them to be comparatively “intimate” in relation to their other disclosures to the public.

The *Cook v. NARA* court invokes library ethics to bolster its privacy determinations, saying that archivists and librarians are bound by patron privacy ethics.<sup>41</sup> While library ethics do create privacy expectations for ordinary teachers, scholars, and other patrons, they do not create the same expectation for ex-presidents accessing their own NARA archives. The American Library Association’s (ALA) code of ethics is mainly used to protect library patrons from government surveillance.<sup>42</sup> During the 1960s and 1970s a confluence of government encroachment on library patron privacy forced the ALA to create the privacy policy. After the Federal Bureau of Investigation (FBI) monitored Vietnam War protestors’ library visits to charge them with anti-government conspiracies<sup>43</sup> and Federal Treasury agents tried to force U.S. libraries to release circulation records of names of people who checked out books on bomb-making,<sup>44</sup> librarians drafted patron privacy ethics to curb the government surveillance activities.

These library privacy ethics are merely guidelines. They advocate confidentiality, but do not create a legally binding privilege like attorney-client or physician-patient relationships.<sup>45</sup> In fact, librarians have been thrown in jail for refusing to comply with federal agency access requests on the basis of privacy ethics.<sup>46</sup> Most states have laws creating library privacy rights,<sup>47</sup> but there is no federal law guaranteeing library privacy, and nothing stating that federal agencies like NARA, which fall under FOIA’s purview, can be protected from FOIA because they contain library collections.

There is also friction between library privacy and another great tenet of librarianship—freedom of information.<sup>48</sup> In the daily lives of library professionals, there are instances where transparency outweighs confidentiality. One librarian describes the ethical guidelines as being too vague to help in “sticky situations,” telling librarians to use library privacy assurances with “a mixture of instinct, tact, discretion, and common sense.”<sup>49</sup> Common sense as applied to the *Cook v. NARA* case dictates the release of information. Archive collections expressly intended to

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<sup>40</sup> *S. Utah Wilderness Alliance, Inc. v. Hodel*, 680 F. Supp. 37, 39 (D.D.C. 1988).

<sup>41</sup> *See Cook v. Nat’l Archives & Records Admin.*, 758 F.3d 168, 176–77 (2d Cir. 2014).

<sup>42</sup> American Library Association, CODE OF ETHICS OF THE AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/advocacy/proethics/codeofethics/codeethics>.

<sup>43</sup> Bruce M. Kennedy, *Confidentiality of Library Records: A Survey of Problems, Policies, and Laws*, 81 LAW LIBR. J. 733, 741 (1989).

<sup>44</sup> *Id.* at 741–42.

<sup>45</sup> Mark Stover, *Confidentiality and Privacy in Reference Service*, 27 REFERENCE Q. 240, 241 (1987).

<sup>46</sup> Bob Egelko, *Zoia Horn, Librarian Jailed For Not Testifying Against Protesters*, SFGATE (July 15, 2014), <http://www.sfgate.com/nation/article/Zoia-Horn-1st-U-S-librarian-jailed-over-alleged-5624023.php>.

<sup>47</sup> *State Privacy Laws Regarding Library Records*, AM. LIBRARY ASS’N (2015), <http://www.ala.org/advocacy/privacyconfidentiality/privacy/stateprivacy>.

<sup>48</sup> Stover, *supra* note 45.

<sup>49</sup> *Id.* at 242.

create a window into presidential activities fall squarely under the FOIA, and librarians agree that access to government information is vital to intellectual freedom.

*B. PRA and FOIA Are Transparency Laws Favoring Disclosure*

In *Cook v. NARA*, the Second Circuit claims “the balance struck by the PRA and its interplay with FOIA would be undermined if we were to hold that the former officials were not entitled to the full protection of Exemption 6 on the theory that they enjoyed only a ‘diminished’ privacy interest.”<sup>50</sup> This claim ignores the fact that FOIA is overwhelmingly in favor of agency record disclosure. Exemptions are not guarantees, and Exemption 6 litigation is full of disclosures due to “diminished” privacy interests.

The PRA was passed to keep presidential privacy in check and to force presidents to share information relevant to their presidency—namely presidential papers and documents, in order to provide access to “historical resources that capture each incumbent’s conduct in presidential office.”<sup>51</sup> There is no intent, in the statute, to protect presidential documents to avoid a chilling effect on memoir drafting.

Additionally, the goal of FOIA is agency record disclosure. There is a strong presumption in favor of transparency in the FOIA, and federal agencies cannot invoke exemptions merely because they don’t feel like sharing. In *Cook v. NARA*, the substantial public interest is clear. The release of PRA special access requests assure that nothing damaging is happening to the documents during their embargo period, and that nobody is using them for improper gain. Special access records also provide a derivative glimpse of history-in-the-making, which is a valid and permissible public interest according to FOIA jurisprudence on derivative public interests.<sup>52</sup> Very little is known about these mysterious embargo periods built into the PRA and about Bush and Cheney’s use of the archives during the embargo period. The records Cook requested would shed light on what happens to presidential documents during PRA embargoes and reveal how the agency works with former officials to maintain the taxpayer-funded archives.

The court cannot use Cook’s reason for requesting the records to measure public interest, rather the court must look at the actual capacity of the record to reveal PRA processes.<sup>53</sup> The FOIA is blind to the FOIA requestor’s purpose. Regardless of Cook’s purpose for obtaining the records, the Second Circuit must grant the release of the documents because of the public interest in the records and the records’ revelation of NARA’s statutory implementation. The identity and purpose of a FOIA requestor “has no bearing on the merits of his or her FOIA request.”<sup>54</sup>

*C. PRA Embargo Periods Are Not Meant to Give  
“Unfettered Access” to Ex-Officials*

The Court misinterprets the purpose of PRA record embargoes as a special opportunity for presidents to own and touch all of their papers before they “go

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<sup>50</sup> *Cook v. Nat’l Archives & Records Admin.*, 758 F.3d 168, 1777 (2d Cir. 2014).

<sup>51</sup> Ginsberg, *supra* note 34, at 1.

<sup>52</sup> See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).

<sup>53</sup> *Cook*, 758 F.3d at 178.

<sup>54</sup> *Reporters Committee*, 489 U.S. at 771.



public,” when in fact, the moment that NARA takes possession of the documents, they already belong to the public. The purpose of the five-year embargo is so that NARA can properly organize the records before opening them to public access. The five-year embargo is not for the sake of executive access, but to ensure that the administrators have time to “arrange, screen, describe and process the huge set of records turned over.”<sup>55</sup> Immediate access to the public would result in so many requests as to hamper the archival process. Bush and Cheney did not have any special property or privacy interests in the records.<sup>56</sup>

The PRA’s twelve-year embargo periods are only permitted when the president or ex-president can claim an exemption to public access based on a constitutionally based executive privilege or continuing national security concern.<sup>57</sup> This embargo is also not for privacy’s sake, or to provide a monopoly for presidential access, but to avoid national security breaches and to prevent a “chilling effect” on presidents and the frankness of advice they could expect from their staffs.<sup>58</sup> The embargo is limited to twelve years because its aim is to get the records to the public as quickly as possible and to prevent ex-officials from withholding materials from the public without a good policy reason to do so. The PRA’s drafters specifically favored a time-limited embargo to prevent ex-presidents from having an unlimited right to restrict records access. Drafters feared that former officials would try to close off availability, to assert privilege against the public, and “to permit trusted researchers to view the materials to the exclusion of others.”<sup>59</sup> The *Cook v. NARA* decision fails to recognize the transparency intent of the law.

In fact, after the Court handed down the *Cook v. NARA* decision, President Barack Obama amended the PRA to get presidential records more quickly and efficiently to the public. The Presidential and Federal Records Act Amendments of 2014 limit the embargo time permitted under the PRA and revise the definitions of PRA “records” to include a wider array of information.<sup>60</sup> This new law evinces the legislative directive that the PRA increase transparency. It establishes an embargo time limit, abolishing a policy Bush created via Executive Order giving the White House and former presidents uncontrolled discretion to decide whether NARA could release PRA documents.<sup>61</sup> In contrast, the *Cook v. NARA* decision revives Bush’s Executive Order directives, despite President Obama’s reversal of the Bush order.<sup>62</sup>

History proves that public access to special access request records is needed to prevent mishandling of presidential records. The PRA embargo periods have led to document corruption and destruction. In 2003, Samuel R. Berger, an adviser to President Bill Clinton, removed and destroyed classified PRA records during their embargo. Berger used a special access request to remove and destroy several versions of a 2000 report on the millennium terrorist plots. Some claimed that

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<sup>55</sup> H.R. REP. NO. 95-1487, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5740.

<sup>56</sup> 44 U.S.C. § 2202 (2014).

<sup>57</sup> 44 U.S.C. § 2204 (2014).

<sup>58</sup> H.R. REP. NO. 95-1487, *supra* note 55, at 5739.

<sup>59</sup> *Id.* at 5739–40.

<sup>60</sup> Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003.

<sup>61</sup> Exec. Order No. 13233, 3 C.F.R. 13233 (Nov. 1, 2001), *available at* <http://www.gpo.gov/fdsys/granule/CFR-2002-title3-vol1/CFR-2002-title3-vol1-eo13233>.

<sup>62</sup> Exec. Order No. 13489, 3 C.F.R. 13489 (Jan. 26, 2009), *available at* <http://www.gpo.gov/fdsys/granule/CFR-2010-title3-vol1/CFR-2010-title3-vol1-eo13489>.

Berger “was so cavalier as to stuff classified documents in his socks” during his NARA special access request visits.<sup>63</sup>

In 2011, Donald Rumsfeld exploited his special access to Bush-era PRA records to promote sales for his book. He posted embargoed materials on his website and published them in his book to entice people who had tried to access the materials through FOIA years before. As their FOIA requests “languished in the queue,” Rumsfeld obtained the documents to supplement his book, *Known and Unknown*, essentially increasing his book sales by selling the records.<sup>64</sup> This method of profiting through the exploitation of public records cannot be kept in check when NARA’s special access record processes are exempt from public view.

FOIA access to NARA’s PRA processes removes the aura of secrecy from presidential records. The PRA embargoes should not give past administrators opportunities to re-write or destroy historical records, and ex-executives may not pick and choose what the public gets to see. People have warned that lack of access to presidential records could “increase public mistrust of the presidency, inhibit academic understanding of the presidency, or increase the difficulty of identifying possible abuses of executive authority.”<sup>65</sup>

#### CONCLUSION

*Cook v. NARA* uses library privacy ethics to turn transparency law into a tool for hiding government records. By tipping the Exemption 6 balance, staging Bush and Cheney as purely private citizens, ignoring the transparency goals inherent in both the FOIA and the PRA, and mistaking PRA embargo periods as spans of unfettered access for former officials, the Second Circuit successfully hides records that reveal the activities of an agency charged with protecting vital presidential documents for public access. Like records of discussions between the Clintons and their attorney regarding the Whitewater scandal, these records dealing with Bush and Cheney’s use of NARA archives are not private due to low expectation of privacy and high public interest in access to the records.

As John Cook’s attorney said in a statement to the media, the Second Circuit’s ruling in *Cook v. NARA* “sidestepped the real thrust of Cook’s appeal” by not examining the public interest questions at stake and withholding the NARA records sought in Cook’s FOIA request.<sup>66</sup> In light of the years-long struggle between Cook and NARA, one has to wonder why Bush and Cheney didn’t just do the right thing, and release the records of their own volition.

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<sup>63</sup> Eric Lichtblau, *Report Details Archives Theft by Ex-Adviser*, N.Y. TIMES (Dec. 21, 2006), available at <http://www.nytimes.com/2006/12/21/washington/21berger.html>.

<sup>64</sup> Nate Jones, *Document Friday: How Donald Rumsfeld Cut the Queue to Get DOD Documents Declassified*, UNREDACTED BLOG (Sept. 16, 2011), <https://nsarchive.wordpress.com/2011/09/16/document-friday-how-donald-rumsfeld-cut-the-queue-to-get-dod-documents-declassified/>.

<sup>65</sup> WENDY GINSBERG, CONG. RESEARCH SERV., R40238, THE PRESIDENTIAL RECORDS ACT: BACKGROUND AND RECENT ISSUES FOR CONGRESS 8 (2012), available at <https://www.hsdl.org/?view&did=726625>.

<sup>66</sup> Miriam Rozen, *Court Denies Reporter’s Request for Bush Library Document Inquiries*, TEXAS LAWYER (July 21, 2014), <http://www.texaslawyer.com/id=1202663666773/Court-Denies-Reporters-Request-for-Bush-Library-Documents-Inquiries#ixzz30FBSEIOg>.