THE COMMON LAW RIGHT TO INFORMATION

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A once-thriving doctrine, today the common law right to information has been largely forgotten by U.S. courts at both the state and federal level. But courts have not paused to question whether the common law right still has a role to play in modern litigation. One reason may be the dearth of case law explaining the common law right's operation. Another may be that courts believe this doctrine has been eradicated by the advent of freedom of information laws. This article first brings together the disparate authority on the common law right in an attempt to pin down the precise contours of the doctrine. It then examines the operation of the various federal and state freedom of information statutes and compares them to the common law right. Then it considers whether these statutes preempt or displace the common law rights, ultimately concluding that the state common law right is unlikely to be displaced, while the federal common law right is more likely displaced. Finally, this article suggests several relatively narrow uses the common law may still serve today in the realm of public access to information.

I. INTRODUCTION

In 330 B.C., Aeschines, one of the great Greek orators of the Classical Age, stood upon the marble floors of an Athenian court and spoke of the importance of the public's right to inspect its government's records, a "fine thing, my fellow Athenians, a fine thing is the preservation of public records. For records do not change, and they do not shift sides with traitors, but they grant to you, the people, the opportunity to know whenever you want."[1]

1,500 years later, James Madison echoed a similar sentiment, stating that a "popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both . . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[2]

The public's right to information is a cornerstone of any democratic legal systems.[3] Indeed, a democratic government operating in secrecy is no democracy at all. The founding fathers realized the importance of an open government by requiring the president to "give to the Congress information

[1] JAMES P. SICKINGER, PUBLIC RECORDS AND ARCHIVES IN CLASSICAL ATHENS 1 (P.J. Rhodes & Richard J. A. Talbert eds., 1999).

[2] Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, 103 (Gaillard Hunt, ed. 1910).

[3] Jimmy Carter, *Foreward* to ACCESS TO INFORMATION: A KEY TO DEMOCRACY, 3 (Laura Neuman ed., 2002).

of the State of the Union."[4] When Congress investigated the defeat of United States forces by the Wabash Indians in 1791, the investigating committee requested the "persons, papers and records, as may be necessary to assist their inquiries."[5] George Washington was hesitant about divulging military and agency documents, and decided to confer with then Secretary of State Thomas Jefferson about the matter.[6] Jefferson advised Washington that the executive branch was required to operate in the open, and that the committee, as a representative of the public, had a right to monitor the executive's activities.[7]

Yet, the executive branch did not hold fast to Jefferson's sentiment. Early United States history, up until the early 20th Century, saw an executive branch cloaked in secrecy.[8] Many agencies had a reputation for releasing few, if any, documents, resulting in a significant lack of accountability.[9] The press constantly struggled to cut back "the weed of improper secrecy [that] had been permitted to blossom."[10] Government accountability was elusive, to say the least.[11]

Congress finally responded in passing the Freedom of Information Act (the "Federal FOIA"[12])—a statute that has had a profound impact on public oversight of executive agencies.[13] The Federal FOIA generally requires executive agencies to release records when requested by the public unless the documents fall under one of a number of specific exemptions.[14] State legis-

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[4] U.S. CONST. art. II, § 3.

[5] 2 ANNALS OF CONG. 493 (1849).

[6] *See* THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 179 (John P. Foley ed., 1900).

[7] *Id.* at 179–80.

[8] *See* H.R. REP. NO. 89-1497, at 23 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2419 (detailing the government secrecy problem that existed before FOIA statutes, explaining that the government operated under a presumption that all of its records should not be disclosed, and constituted an official cult of secrecy); *see generally* HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 198 (1953) (discussing the lack of a public right to inspect government documents).

[9] *See* H.R. REP. NO. 89-1497, at 23.

[10] *Id.*

[11] *Id.*

[12] *See generally* 5 U.S.C. § 552 (2012) (stating the information that agencies must make available to the public and the exceptions to this rule). The term "Federal FOIA" will be used to refer to the federal Freedom of Information Act. The term "FOIA" by itself will be used to refer to the general concept of either a state or federal freedom of information statute. Notably, however, states often call their FOIA statutes by different names, such as a "Right to Know" law. *See* sources cited *infra* notes 165, 169.

[13] *See* Beck v. Dep't of Justice, 997 F.2d 1489, 1489 (D.C. Cir. 1993) ("The purpose of the Freedom of Information Act . . . is to 'facilitate public access to Government documents'. . . . The Act is meant 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny'") (quoting United States Dep't of State v. Ray, 502 U.S. 164, 173 (1991).

[14] *See* 5 U.S.C. § 552(a)(1) (provisions related to certain mandatory disclosures).

latures were quick to follow suit, and every state now has some variation of a FOIA statute providing access to state agency records.[15] Before going further it should be mentioned: these statutes work. Both at the federal and state level, FOIA statutes have had a profound impact. Executive agencies have released hundreds of thousands of documents in response to FOIA requests.[16]

However, despite the fact that FOIA statutes have been a significant achievement in the fight for public access to information, they have come with their own challenges. First, agency backlogs and procedural hurdles have substantially reduced their efficacy. For example, some Federal FOIA requests have remained pending for 20 years without any record being produced.[17] While many agencies report that they process simple requests within an average of 30 days, some agencies, such as the Department of Justice, currently have requests pending from seven years ago. [18] Time might not be a luxury an individual can afford when she needs information for a current news report, to construct an emergency study, or to inform ongoing litigation.[19] For these individuals a FOIA statute may be of little value.

Second, many courts have affirmed agency denials even where the requestor appears to have significant need and the government interest in preventing disclosure appears slight.[20] In fact, some commentators have opined that courts take a relatively hands-off approach under the Federal FOIA and allow agencies to defeat requests by raising any conceivable evidence that one of the statutes' exemptions—such as vague confidentiality or privacy exemptions—applies.[21] As discussed in this article, some cases brought under the Federal FOIA indicate that courts may be looking harder at the gov-

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[15] *See generally* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 265–435 (Robert F. Bouchard & Justin D. Franklin eds., 1980) (providing an appendix listing state FOIA statutes).

[16] *See* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2011 3–4 (2011) [hereinafter SUMMARY OF ANNUAL FOIA REPORTS].

[17] *See Justice Department Repeats as Rosemary Award Winner for Worst Open Government Performance in 2012*, NAT'L SEC. ARCHIVE (Mar. 15, 2013), http://www.gwu.edu/~nsarchiv/news/20130315/.

[18] *See* SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 12–14. Some agencies provide expedited options for FOIA requestors that have a compelling need for timeliness—although many agencies avoid the practice. *See* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE: WHEN TO EXPEDITE FOIA REQUESTS (Jan. 1, 1983), http://www.justice.gov/oip/foia_updates/Vol_IV_3/page3.htm .

[19] Obviously, normal discovery techniques can often be used. But to reach documents outside of the scope of a court's subpoena power, FOIA requests are sometimes necessary.

[20] *See, e.g.,* McCutchen v. U.S. Dep't of Health & Human Servs., 30 F.3d 183, 184 (D.C. Cir. 1994) (preventing disclosure of the mere names of certain scientists that were investigated by the Department of Health and Human Services).

[21] *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 609, 616 (D.C. Cir. 1976) (rejecting the district court for applying too strict of a standard to agencies, and requiring only a good-faith effort to respond to FOIA requests). *See also infra* pp. 31–32.

ernment's proffered reasons for refusing FOIA requests than these critics suggest.[22] Regardless, where the government raises exemptions, the Federal FOIA is often not an option for individuals seeking government documents.

State FOIA statutes are even rifer with infirmities. Several states have restricted the types of records that the public may request.[23] Some allow agencies to refuse disclosures with little evidence.[24] Others have narrowed the class of individuals that may use the statute.[25] In short, while both the Federal and state FOIA statutes may have solved some problems, they are far from perfect. In fact, the United States Supreme Court recently confirmed that states may significantly restrict the class of people that can use state FOIAs.[26]

Yet, there is at least a theoretical alternative to *statutory* public information access. A *common law* right to information "antedates the Constitution."[27] Because both state and the Federal FOIAs have shortcomings, one might expect this common law right to be a regularly-used alternative. But not so. Attorneys and judges have become so mired in FOIA litigation they appear to have largely forgotten about the common law right to information. In fact, only a handful of cases have considered the common-law right since the rise of the FOIAs in the 1950s.[28]

Some courts and commentators suggest that the common law right has been displaced by these FOIA schemes.[29] The rationale makes sense. These comprehensive statutes express a legislature's attempt to codify or displace the common law right to public information. In enacting specific rules for when citizens can request information, and in setting out specific exemptions where no access should be allowed, Congress must have— as the argument goes— intended to displace the common law right.[30] However, there is little real authority affirming these contentions. Although some courts have found common law claims to be displaced in a given case,[31]

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[22] *See infra* Part II. A.
[23] *See infra* Part II. B.
[24] *See infra* Part II. B.
[25] *See infra* Part II. B.
[26] McBurney v. Young, 133 S. Ct. 1709, 1709, 1713 (2013).
[27] Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993).
[28] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (stating that the common law right is now "[a]n infrequent subject of litigation").
[29] *See infra* Part IV.
[30] *See infra* Part IV.
[31] *See, e.g.*, Ctr. for Nat'l. Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 936 (D.C. Cir. 2003) (refusing to recognize a common law right to information because of the existence of the Federal FOIA).

courts have not yet determined that the breadth of the common law right to information has been abrogated.[32]

What is more, the common law right to information and the FOIA frameworks appear, in theory, to operate differently to reach potentially different classes of cases. This leaves open the possibility that the common law right still could play some sort of gap-filling role in the public access discourse. A parallel problem is that, because of the dearth of common law right cases, and the inconsistency of the opinions, the boundaries of the common law doctrine are hard to pin down. Thus any sort of specific comparison between the common law right and a FOIA is challenging.

This article seeks to answer three questions in the pursuit of firmly settling the questions surrounding the common law right to information. First, what are the precise contours of the common law right to information in the United States? Second, was the common law right to information eradicated, as a legal matter, by the rise of state and the Federal FOIA statutes? Finally, if the common law right has survived in any meaningful way, how can it, and should it, be used?

To answer these questions, this article proceeds in three steps. First, the background law is explored. The operation of the common law right, the contours of state and Federal FOIA statutes, and the overlap and differences between the common law and the FOIAs are discussed. Second, the legal doctrines which settle conflicts between statutory schemes and common law rights are briefly explored, concluding that it is not clear that the entire common law right to information has been set aside at either the state or federal level. Finally, with an understanding of the doctrine, the statutory schemes, and what parts of the common law right are likely to survive these schemes—the article concludes with the suggestion that the common law right to information can still serve an important, if narrow, role as an alternative public access tool.

1. The Common Law Right to Information

A. Defining the United States Common Law Right to Information

The general United States common law right to information is a remnant of the old English common law rule that allowed citizens to inspect rec-

[32] *See infra* Part V.

ords.[33] The English common law right was rarely granted,[34] and was conditioned on a citizen showing of "direct and tangible" interest in specific information.[35] The English common law right required the information requester to show "some interest different from his interest as a member of the public."[36] Courts would then weigh this need or interest against the government's interests and decide whether to compel disclosure.[37] If the requester could not show the court she had a qualifying need for the information requested no right existed.[38]

In the United States, both federal and state courts[39] have recognized a common law right to information.[40] The Supreme Court squarely addressed the common law right to information in *Nixon v. Warner*; the most commonly cited common law right to information case. [41] There, the Court examined a request by a series of broadcasters for the White House tapes that were introduced in the Watergate litigation during the 1970s.[42] Although ultimately denying the request, the Court offered a detailed examination of the historical underpinnings of the common law right to information and clearly affirmed that there was a common law right "to inspect and copy public records and documents."[43]

The United States common law right has developed into two doctrines that are distinct in both authority and implementation. First, it is well accepted that the public has a First Amendment right to access certain crimi-

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[33] Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984) ("The Supreme Court [has] recognized that [the] English common law right of access was transferred to the American colonies."). For a discussion of the underpinnings of the English common law right, *see* Ferry v. Williams, 41 N.J.L. 332, 334–35 (NJ 1879); State v. Williams, 75 S.W. 948, 958 (1903); Nowack v. Fuller, 219 N.W. 749, 750 (1928).

[34] *Nowack*, 219 N.W. at 750.

[35] *Id.* at 751.

[36] *Id.*

[37] *See, e.g.*, *Williams*, 75 S.W. at 957 (stating that "the court does not grant . . . [disclosure] until it has taken into careful consideration all the facts and circumstances . . . .") (quoting WILLIAM W. COOK, A TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW 675 (3rd ed. 1894)).

[38] *See Williams*, 79 S.W. at 957. Similarly, when the Administrative Procedures Act was enacted in the U.S. and information was requested, seeking documents from executive agencies required an interest in or need for the information. Administrative Procedure Act, Pub. L. No. 79-404, § 3, 60 Stat. 237, 238 (1946).

[39] As a preliminary note, because there is a dearth of case law in this area, and because the doctrines theoretically operate in the same manner, much of the case law for the state and federal common law will be discussed together.

[40] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

[41] *Id.* at 598–99.

[42] *Id.* at 591.

[43] *Id.* at 597 (footnote omitted).

nal and civil proceedings and related records—under both the federal and various state constitutions.[44] This is a well-litigated area of law with courts drawing various lines in terms of what types of cases are subject to the right, and what types of records must be made available.[45] This constitutional right does not generally interact with FOIA statutes—mainly because FOIA statutes do not apply to judicial proceedings.[46] Thus, the constitutional right to information is not a focal point of this article.[47]

Second, and of more import to this article, both state and federal courts have long recognized the public's right "to inspect public records and documents."[48] This right extends to every branch of government.[49] The right as applied in the United States is similar to the English right to information. In the United States version, as in the English version discussed above, the government's interests—as well as private interests if the information in-

[44] *Richmond Newspapers* was the U.S. Supreme Court's first holding that the First Amendment allows a limited right to certain information in criminal cases. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563–64, 580 (1980). The *Richmond Newspapers* majority opinion also cited to colonial laws and charters that required open trials, such as the 1677 New Jersey Constitution, and the 1682 and 1776 Pennsylvania constitutions. *Id.* at 567–68. *See also* Press–Enter. Co. v. Super. Ct. of Cal., Riverside Cty., 478 U.S. 1, 13 (1986) (holding that the First Amendment requires a right of access to some preliminary hearings); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) ("Although the right of access to civil trials is not absolute, nevertheless, as a First Amendment right it is to be accorded the due process protection that other fundamental rights enjoy.").

[45] *See, e.g.*, Phoenix Newspapers, Inc. v. U.S. Dist. Ct., 156 F.3d 940, 946–47 (9th Cir. 1998); Grove Fresh Distrib., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 572–73 (8th Cir. 1988).

[46] OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUST., FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 32–36 (May 2004) (noting that the Federal FOIA only applies to certain administrative and executive agencies).

[47] The only place where the constitutional right is directly germane to this note is in the analysis of some case law where courts seem to apply a slightly different common law right to judicial records. *See infra* Part I.C. However, it should be noted that where the constitutional and common law rights are both implicated, courts may prefer the common law right. The constitutional right to access may trigger complex questions of constitutional law. "The common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988). "Under the First Amendment . . . the denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest." *Id.* at 253. *See also* Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CALIF. L. REV. 1537, 1559–60 (2006) (discussing the higher standard of review for the constitutional right of access). As a result, courts might cite to the canon of constitutional avoidance. *See, e.g.*, Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) ("[A] 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'") (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988)). This canon allows courts to avoid the constitutional complexities of the First Amendment right in situations where the common law right provides the basis for a decision.

[48] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Just., 331 F.3d 918, 936 (D.C. Cir. 2003).

[49] *Id.* at 936 ("This Court has held that the common law right of access extends beyond judicial records to the 'public records' of all three branches of government and we are bound by our precedent.") (citation omitted).

volves private individuals or companies—are weighed against the requester's interests in seeking the information.[50]

However, the exact contours of the United States common law right to information are notoriously hard to define.[51] State and federal courts have applied the doctrine only occasionally, which complicates any effort to pin down the doctrine's requirements.[52] Two areas of confusion have emerged over the history of the United States common law right to information; (1) whether, like the English version, a plaintiff needs to show a special need to have a right to information, and (2) what information may be sought and how interests should be balanced.[53]

B. The Proprietary Interest Requirement

The question of whether a proprietary interest is a threshold requirement for the common law right is important, because—as discussed later—a requirement of proprietary interest is a sharp departure from the FOIA framework which requires no such showing.[54] If one reviews the modern cases[55] applying the common law right in various United States courts since the nation's founding, it is unclear precisely what a plaintiff must initially show to trigger a right to information. Some courts have apparently followed the English rule in requiring plaintiffs to show some special need or interest in information before the common law right exists.[56] However, a substantial line of cases denounces this view and holds that the policies of

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[50] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978) (discussing the operation of the U.S. common law right to information).

[51] *See* Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.2d 897, 903 (D.C. Cir. 1996).

[52] *See Nixon*, 435 U.S. at 597–99 ("An infrequent subject of litigation, [the common law right's] contours have not been delineated with any precision."); *Wash. Legal Found.* 89 F.2d at 903.

[53] *Cf.* Anne Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, NOTRE DAME L. REV. 117, 121 (1990); Note, *The Common Law Right to Inspect and Copy Judicial Records:* In Camera *or On Camera*, 16 GA. L. REV. 659, 666–69 (1982).

[54] *See infra* Part II.

[55] There is a dearth of recent common law right to information cases because various FOIA statutes are typically relied on for access, and when the common law right is litigated it is usually in the context of judicial records. *Wash. Legal Found.*, 89 F.3d at 902 ("[T]he growth of the common law has been stunted in recent years by the spread of comprehensive disclosure statutes. . . . Since the Watergate cases, the common law right of access has been invoked in federal courts with some frequency, but still almost always in cases involving access to court documents.").

[56] *See, e.g.*, State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 334 (N.J. 1879) ("The documents in question are of a public nature, and the rule is that every person is entitled to the inspection of such instruments, provided he shows the requisite interest therein."); Daluz v. Hawksley, 351 A.2d 820, 823 (R.I. 1976) ("[T]his court recognizes the common law right of inspection by a proper person or his agent *provided* he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information."); *see also* Hanson v. Eichstaedt, 35 N.W. 30, 31 (Wis. 1887).

public access and open government are sufficient without any showing of need.[57]

The Second Circuit's decision in *United States v. Mitchell* is one such case. *Mitchell* indicated that many U.S. courts have approached the right as not requiring a threshold showing of special need, because all citizens have a right to the government's information.[58] The court stated:

> In England, the right was narrowly circumscribed, and only a limited number of persons enjoyed it. But the American courts tended to view any limitation as "repugnant to the spirit of our democratic institutions," and therefore granted all taxpayers and citizens access to public records. It was the courts' view that "no sound reason (could be) advanced for depriving a citizen of his right; for it is evident that the exercise thereof . . . will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service.[59]

However, *Brewer v. Watson*, a case cited by the Supreme Court in *Warner Communications* as authority for the Supreme Court's holding, clearly noted the need for a citizen to show a direct, proprietary interest in inspecting public records in order to use the common law right.[60]

State courts appear to be conflicted as well. In *Colscott v. King*, an Indiana Supreme Court case involving an agency's refusal to grant public access to tax records, the court noted:

> The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent, provided he had an interest in the matters to which such records related. Where, however, the inspection desired was merely to gratify idle curiosity, or motives which were purely speculative, the right of inspection, under the common law, was denied.[61]

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[57] *See, e.g.*, Boylan v. Warren, 18 P. 174, 176 (Kan. 1888); Hawes v. White, 66 Me. 305, 306 (Me. 1876); Burton v. Tuite, 44 N.W. 282, 285 (Mich. 1889); State *ex rel.* Cole v. Rachac, 35 N.W. 7, 8 (Minn. 1887); MacEwan v. Holm, 359 P.2d 413, 417 (Or. 1961); *see also* William Randolph Henrick, *Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except . . .",* 45 FORDHAM L. REV. 1105, 1108–1109 (1977) ("The nature of the interest required gradually became less personal: acting on behalf of a broader public interest (such as investigating official misconduct or a taxpayer's interest in a city's financial condition) became sufficient. Indeed, a number of jurisdictions began to abrogate the interest requirement entirely.") (footnotes omitted).

[58] United States v. Mitchell, 551 F.2d 1252, 1257 (D.C. Cir. 1976), *rev'd sub nom.* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).

[59] *Mitchell*, 551 F.2d at 1257 (footnotes omitted).

[60] Brewer v. Watson, 71 Ala. 299, 303–305 (1882).

[61] State *ex rel.* Colescott v. King, 57 N.E. 535, 537 (Ind. 1900); *see also* Geoffrey D. Neal, *State Government - The Arkansas Freedom of Information Act - Public or Private Record: A Simple Distinction Threatens the Future of Open Government in Arkansas,* Pulaski County v. Arkansas Democrat-Gazette, Inc., *371 Ark. 217, 264 S.W.3d 465 (Ark. Oct. 4, 2007)*, 31 UALR L. REV. 351, 354 (2009) ("The common law recognized a very limited right of public access to government records in favor of those seek-

However, *Colscott* ultimately rejected the proprietary interest requirement, citing *Burton v. Tuite*, a Michigan Supreme Court case that emphasizes the default openness of records regardless of a plaintiff's special needs:

> I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have.[62]

Similarly, a New Jersey case, *Ferry v. Williams*, compelled access to information even after acknowledging that "the realtor asserts no interest to be subserved by an inspection of these letters, except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells."[63] The *Ferry* court elaborated further on its rejection of the alleged requirement of a special need for information, focusing on "the more democratic character of our institutions."[64]

Ultimately, while some United States courts have required a special or proprietary need for information before the right exists—the majority of case law at both the federal and state levels indicates that no significant showing of need must be provided.[65] Most courts, focusing on traditional American democratic ideals, reason that all citizens have a right "of free access to and public inspection of public records."[66]

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ing to 'vindicate the public interest.' Access was often denied, however, because the inspector's purpose was based improperly on curiosity or commercial gain.") (quoting JOHN J. WATKINS & RICHARD J. PELTZ, THE ARKANSAS FREEDOM OF INFORMATION ACT 1–2 (4th ed. 2004)).

[62] Burton v. Tuite, 44 N.W. 282, 285 (Mich. 1889) (emphasis added).

[63] State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 334 (Sup. Ct. N.J. 1879).

[64] *Id.* at 337.

[65] The author was unable to find a single case decided within the past six years that required an explicit showing of proprietary interest to trigger the common law right to information. However, because the doctrine has been rarely litigated in recent history older cases that have required a showing of special interest are still arguably governing law. *See, e.g.*, Daluz v. Hawksley, 351 A.2d 820, 823 (R.I. 1976); *see also Henrick*, *supra* note 58, at 1108–1109 (noting that while many courts have relaxed the interest requirement, "[n]evertheless, absent a statute, the requirement of an interest in the document itself generally remains a prerequisite to inspection.").

[66] *See Burton*, 44 N.W. at 285; Nowack v. Fuller, 219 N.W. 749, 750 (Mich. 1928) ("If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people."); Laurie Romanowich, *Belo Broadcasting Corp. v. Clark: No Access to Taped Evidence*, 32 AM. U. L. REV. 257, 261 (1982) ("[T]he common law right, like the first amendment, creates 'an informed and enlightened public opinion.'") (quoting United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) *rev'd sub nom.* Nixon

But while courts generally appear to be moving away from requiring a proprietary need to trigger the common law doctrine, this may be less true where the records requested contain information about private citizens or companies. In these cases, where the purpose of the request is clearly not government accountability, courts appear more likely to require a special interest in information as a threshold.

First, some courts have expressed concern when requests are for commercial purposes, such as for competitive uses or merely to settle personal disputes. The court in *Warner Communications* stated reservations about releasing information for commercial exploitation:

> Underlying each of petitioner's arguments is the crucial fact that respondents require a court's cooperation in furthering their commercial plans. The court . . . has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material "to gratify private spite or promote public scandal."[67]

Second, the rationale behind the no-special-need rule is that citizens have a right to information based on democratic ideals.[68] This rationale does not easily translate where the requestor is seeking information about a private individual and the records just happen to be in the possession of the government.

In conclusion, most cases indicate that the United States common law right does not require a special need to information to trigger the right. However, in some jurisdictions there are older cases that have not been specifically overruled which hold that a proprietary interest is required—and even some modern courts appear to require a special interest where private concerns such as commercial uses are involved.

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v. Warner Commc'ns, Inc., 435 U.S. 589 (1978)).

[67] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 602–603 (1978). Some other courts have been explicit in valuing some types of purposes over others. For example, courts have asked whether the requester asserted "a purpose which tends to advance or further a wholesome public interest or a legitimate private interest." S. Jersey Pub. Co., Inc. v. New Jersey Expressway Auth., 591 A.2d 921, 930 (N.J. 1991) (quoting City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (1974)). *See also* Neal, *supra* note 62, at 354 ("The common law recognized a very limited right of public access . . . Access was often denied, however, because the inspector's purpose was based improperly on curiosity or commercial gain.") (citations omitted).

[68] *See* sources cited *supra* note 66.

C. The Common Law Right in Operation

There are two fundamental aspects of the common law right's operation: 1) determining if the type of document or information is appropriate for access, and 2) determining whether the private requester's proffered interests outweigh any opposing interests raised by the government.[69] Because this latter requirement of balancing the parties' interests is highly discretionary, this part of the doctrine has created the most confusion for courts.

To initially request a court to compel access to a document under the common law right, the right must apply to the type of document in question.[70] As a threshold matter, the document or information sought must be embodied in a government record—in other words, there must be a document created or held by the government.[71] Moreover, there are narrow categories of documents for which courts will never compel disclosure—such as documents specifically covered by national security statutes.[72]

Once a plaintiff has made an initial showing that the right applies to the document as a *prima facie* matter—and potentially makes a showing that she has a special need for the information—the court undertakes a careful balancing of competing interests.[73] Some courts treat the government and private requester on roughly equal terms during this balancing.[74] The bulk of cases appear to apply some sort of presumption of access in favor of the requester.[75] Still, because courts rarely expressly state that they are applying

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[69] *See* Wilson v. Brown, 962 A.2d 1122, 1130–32 (N.J. 2009).

[70] "That does not mean that a citizen has the right to obtain free of charge in the form he desires public records that are readily available in another form. The slip opinions of the United States Supreme Court are provided to depository libraries throughout the land. There is no common law right to obtain them in electronic form from the GPO." Mayo v. U.S. Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1993).

[71] For example, a common law right of access does not extend to records of a legal clinic at a public law school, "because clinical professors at public law schools do not act as public officers or conduct official business when they represent private clients at clinic." Sussex Commons Assocs., LLC v. Rutgers, 46 A.3d 536, 547 (N.J. 2012); *see also* Irval Realty, Inc. v. Board of Pub. Util. Comm'rs, 294 A.2d 425, 429–30 (N.J. 1972) (finding accident reports required under regulation promulgated by PUC within common law right); *New Jersey Expressway Auth.*, 591 A.2d. at 932 (considering memorandum of executive session at which executive director of Authority was fired not reached); Red Bank Register, Inc. v. Board of Educ., 501 A.2d 985, 987 (N.J. Super. Ct. App. Div. 1985) (considering curriculum reports developed by outside consultant for board of education).

[72] Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (noting that there are a "narrow range of documents . . . not subject to the right of public access at all because the records have 'traditionally been kept secret for important policy reasons'") (quoting Times Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989)).

[73] *Id.* at 1179.

[74] *See id.* at 1178–80.

[75] *See, e.g.*, *id.*; Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003); United States v. Criden, 501 F. Supp. 854, 859 (E.D. Pa. 1980) *rev'd*, 648 F.2d 814 (3d Cir. 1981); *See also* Henrick, supra note 48, at 1112.

a presumption—and even more rarely explain the precise strength of the presumption—whether future litigants can rely on a presumption is unclear.[76]

Courts have not provided significant insight on how the presumption works, or what must be shown to overcome it. The *Warner Communications* decision itself indicated there is some presumption for the public's access in the balancing[77]—although the presumption's weight is unclear. The court's holding was purposefully vague and explicitly passed on the question of the strength or nature of the presumption.[78] A case from the Eastern District of Pennsylvania rejected a "strong presumption" of public access, expressing "total disagreement" with the "expansive view of the common law right of access" promoted in some other cases.[79] The court emphasized that the vague language in *Warner Communications* was insufficient to create a robust presumption indicating the balancing should be nearly equal.[80]

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[76] Many cases do not explicitly refer to a presumption for public access, but instead simply balance competing interests. However, some cases espouse a powerful presumption for public access, which significantly tips the scales. See, e.g. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir.2003) ("[W]e start with a strong presumption in favor of access to court records."); Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (stating in the civil context that courts should "start with a strong presumption in favor of access" and that "[t]his presumption of access may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture'") (internal citations omitted); E.E.O.C. v. Erection Co., Inc., 900 F.2d 168, 170 (9th Cir. 1990) (referring to "the strong presumption in favor of copying access"); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) ("Under common law, there is a presumption of access accorded to judicial records.").

Notably, there are a number of judicial record cases that discuss a presumption, but these cases may not be applicable to non-judicial records. There are two problems with relying on judicial record cases to determine the existence or strength of a presumption. First, some authority indicates that access to judicial records creates a more significant public interest than non-judicial records. For example, the Third Circuit explained that the common law right "has particular applicability to judicial records." United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981); *see also Ex parte* Drawbaugh, 2 App.D.C. 404, 407 (1894) ("[A]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access."); United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) ("[T]he importance of 'public exposure to trial court proceedings' . . . is well-settled.") (internal citation omitted) *rev'd sub nom.* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).

These courts, which have often found strong presumptions in the judicial record context, might not have applied the same presumption in a non-judicial record case. Second, some courts invoke both the common law right to information and the constitutional right creating confusion about which doctrine is being applied. *See, e.g.*, *Rushford*, 846 F.2d at 253 (applying both the common law and constitutional doctrine).

[77] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 599–602 (1978).

[78] *Id.* (noting the court "need not undertake to delineate precisely the contours of the common-law right … [but that] on respondents' side is the presumption-however gauged-in favor of public access to judicial records") (emphasis added).

[79] United States v. Criden, 501 F. Supp. 854, 859 (E.D. Pa. 1980) *rev'd*, 648 F.2d 814 (3d Cir. 1981).

[80] *Id.*

However, other decisions emphasize that the public's right to access government documents is a "precious common law right" and "[w]hile the courts have sanctioned incursions on this right, they have done so only when they have concluded that 'justice so requires.'"[81] These courts begin with a strong presumption that the public should have access to any government document; placing a heavy burden on the government to overcome 1) any interests or needs the individual plaintiff has, as well as 2) the policy favoring wide public access and transparent government operations.[82]

At bottom, the dearth of case law makes delineating the precise effects of a presumption difficult, if not impossible. Some courts have found a presumption for public access to be virtually dispositive of cases. Other courts have apparently ignored any presumption and adopted a straightforward balancing approach. However, courts generally provide some presumption in favor of the requester—due to either policy reasons or the personal interests proffered by the requester.

Aside from whatever presumption a court might initially apply, the defining characteristic of the common law balancing test is the broad discretion trial courts wield. Trial courts wield wide discretion to determine whether the plaintiff's, or government's, interests wins.[83] There are virtually no clear standards guiding the court's decision, and the determination is inherently fact-based.[84] The Supreme Court in *Warner Communications* made a point to explain the fact-intensive, discretionary nature of the common law right balancing test:

> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate . . . the decision as to access is one best left to the sound discretion of the

[81] United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976) *rev'd sub nom.* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978).

[82] *See id.* at 1261; United States v. Webbe, 791 F.2d 103, 105 (8th Cir. 1986) ("[S]everal federal appellate decisions recognize[e] a strong presumption in favor of the common law right."); United States v. Guzzino, 766 F.2d 302, 304 (7th Cir. 1985); *In re* Nat'l Broad. Co., 653 F.2d 609, 613 (D.C.Cir. 1981) (stating access should be denied only "if the district court, after considering the 'relevant facts and circumstances of the particular case,' and after 'weighing the interests advanced by the parties in light of the public interest and the duty of the courts,' concludes that 'justice so requires'") (internal citations omitted).

[83] *See Warner Commc'ns, Inc.*, 435 U.S. at 599 ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."); *Webbe*, 791 F.2d at 106, 107; United States v. Rosenthal, 763 F.2d 1291, 1295 (11th Cir. 1985); *Criden*, 648 F.2d at 817 ("[A]ll parties agree that release of the tapes is a matter committed to the discretion of the trial court. . . . [T]he decision is uncontrolled by fixed principles or rules of law."); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 430–31 (5th Cir. 1981).

[84] *See Criden*, 648 F.2d at 817–18 (discussing at length the nature of doctrines that are specifically left to the discretion of the trial court).

> trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case. [85]

What can be said is that courts will weigh any interests raised by the government—whether it be confidentiality, encouraging individuals to confide in government officers, efficiency, etc.—against the private individual's interest in the information, as well as the general public's interests in being informed.[86] A New Jersey court noted a number of non-exhaustive factors, revealing the discretionary nature of the balancing, stating that the following should be considered:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials . . . [T]he court should balance against these and any other relevant factors . . . the importance of the information sought to the plaintiff's vindication of the public interest.[87]

It is difficult to articulate any bright line rule for when a court will decide to allow or prevent disclosure when applying its wide discretion to balance interests under the common law test. Courts have prohibited access where judges suspected that information was to be used "to gratify private spite or promote public scandal" through the publication of "the painful, and sometimes disgusting, details of a divorce case."[88] The *Warner Communications* case itself ended up affirming the President's decision to withhold the Watergate tapes, but it remained unclear precisely which of the President's arguments was relied on—one of which was that the President had a property right in his voice.[89]

One principle that *is* clear from a review of the relevant case law, and the very nature of the courts' balancing process, is that courts maintain control over the substantive decision to compel access to information. The court

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[85] *Warner Commc'ns, Inc.*, 435 U.S. at 598–99.

[86] *See* S. Jersey Publ'g. Co., Inc. v. New Jersey Expressway Auth., 591 A.2d 921, 926 (N.J. 1991) (New Jersey Supreme Court went through the balancing process at some length).

[87] *Id.*

[88] *In re* Caswell, 29 A. 259, 259 (R.I. 1893); *see also* King v. King, 168 P. 730, 731 (Wyo. 1917).

[89] *Warner Commc'ns, Inc.*, 435 U.S. at 589, 600 (considering claims of unfair appropriation of the President's voice).

wades through the facts, and considers the significance of both sides' interests. A presumption, if one applies, makes it more likely that the plaintiff will win even where the government cites some interest in nondisclosure.

Another ramification of the court's wide discretion is a lack of significant appellate review. *Warner Communications* noted in this vein that the "few cases that have recognized [the common law] right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[90]

Thus the trial courts' application of the common law balancing test is generally reviewed only for abuse of discretion—leaving the trial court with the ability to tailor disclosures to the parties' specific needs and interests.[91]

II. FREEDOM OF INFORMATION STATUTES

A. The Operation of the Federal FOIA

The Federal FOIA allows any person[92] to request any record from any federal agency or government-controlled entity on any subject without saying why the record was requested.[93] "Record" has been interpreted expansively to include information stored on any form of media.[94] The Federal FOIA does not apply to records held by state or local governments, the courts, private individuals or private companies.[95] The Federal FOIA does

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[90] *Id.* at 599.

[91] *See* San Jose Mercury News, Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999) ("Where the district court conscientiously undertakes this balancing test, basing its decision on compelling reasons and specific factual findings, its determination will be reviewed only for abuse of discretion.").

[92] This term is broad, referring to people, corporations, or other entities. 5 U.S.C. § 551(2) (2012); *see also* U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (treating a union as a 'person' requesting information under FOIA).

[93] 5 U.S.C §552(3) (2012).

[94] *See* David C. Vladeck, *Information Access-Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1797 (2008) ("The right of access conferred by FOIA could not have been more broadly conceived. It allows 'any person' . . . to request any record from any federal agency or government-controlled entity on any subject . . . . [T]he breadth of FOIA's coverage is driven home by the fact that the word 'record' is read expansively to include not just paper records but also information stored on virtually any form of media."); Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 165 (2004) (photographs are records); McCutchen v. U.S. Dep't of Health & Human Servs., 30 F.3d 183, 185 (D.C. Cir. 1994)(explaining that an agency denying a FOIA request has the burden of justifying withholding the information); Armstrong v. Exec. Office of the President, 1 F.3d 1274, 1283 (D.C. Cir. 1993) (computer-backups are records); Save the Dolphins v. U.S. Dep't of Commerce, 404 F. Supp. 407, 411 (N.D. Cal. 1975) (motion picture is a record).

[95] U.S. H.R. COMM. ON OVERSIGHT & GOV'T REFORM, A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS, H.R. REP.

not apply to the President, or to the President's advisors.[96] Moreover, it does not apply to the legislature.[97]

Agencies need only conduct a "reasonable" search for requested documents.[98] What is "reasonable" is determined under the circumstances, and generally allows the agency to refuse disclosure because of excessive time or expense.[99] If the documents do not show up in a reasonable search, the agency's duties are met and the requester is left record-less.[100]

Under the Federal FOIA requesters may be able to recover statutory attorney's fees.[101] This allows entities that cannot afford extensive litigation over a common law right to hire attorneys willing to represent them for the statutory payment. Congress realized in the 1970's that, because there was no intrinsic value to public document requests, only "well-heeled" individuals were able to utilize the Federal FOIA.[102] Congress thus crafted a scheme for awarding attorney's fees to certain plaintiffs successful in bringing a Federal FOIA claim.[103] Under the scheme, any plaintiff that has "substantially prevailed" in a FOIA suit may receive "reasonable attorney's fees and other litigation costs reasonably incurred."[104] To "substantially prevail" a requestor must show that the Federal FOIA suit was both reasonably necessary and played a role in causing the disclosure of information.[105]

NO. 103-104, pt. 6, at 5 (1993).

[96] Nat'l Sec. Archive v. Archivist of the U.S., 909 F.2d 541, 545 (D.C. Cir. 1990).

[97] *See* 5 U.S.C. §551(1)(A) (2012).

[98] *See* 5 U.S.C. §552(3)(C); *see also* Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (S.D.N.Y. 2000).

[99] Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir 1998) ("FOIA demands only a reasonable search tailored to the nature of a particular request.").

[100] *See id.* (holding that the state department was not required to comply with FOIA request, because FOIA only requires the department to use reasonable efforts to find documents—and it would take unreasonable effort to reconstruct and find the requested documents); *see also*, Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 161–62 (1975) (discussing reasonable search requirement); Landmark Legal Found. v. E.P.A., 272 F.Supp. 2d 59, 64 (D.D.C. 2003) (discussing whether the EPA conducted a reasonable search in response to a FOIA request); Allnutt v. Dep't of Justice, 2000 WL 852455 at *12 (D. Md. Oct.23, 2000) (holding that an agency need not conduct extensive research in response to a FOIA request); Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985) (stating that an agency is not required to "answer questions disguised as a FOIA request").

[101] 5 U.S.C. § 552(a)(4)(E)(i).

[102] *See* 1 FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 99 (1974).

[103] 5 U.S.C. § 552(a)(4)(E).

[104] 5 U.S.C. § 552(a)(4)(E)(i).

[105] *See* Crooker v. U.S. Parole Comm'n, 776 F.2d 366, 367 (1st Cir. 1985); Guam Contractors Ass'n v. U.S. Dep't of Labor, 570 F.Supp. 163, 166 26 (N.D. Cal. 1983).

Unlike the common law right which applied a vague balancing test, the Federal FOIA provides for nine specific exemptions to public access.[106] If none of the nine exemptions are triggered, the agency must disclose the requested record.[107] Unlike the common law test, which balances the parties' interests in every case, the parties' interests are weighed under the Federal FOIA only where one of a select few exemptions are triggered.[108] The nine exemptions state that agencies need not divulge records for one of a variety of public policy reasons.[109] Two of the most utilized—and contentious—involve privacy[110] and confidentiality.[111] Other examples of exempted categories of documents include: certain internal operating documents, documents containing trade secrets or confidential financial information, documents containing private medical information, and some types of records compiled by law enforcement personnel.[112] In short, these exemptions represent Congress's codification of the various interests the government has long used to deny information requests under the common law right to information.[113]

The Federal FOIA statute is designed to operate without judicial interference. However, if an agency refuses to comply with a FOIA request by alleging that one of the exemptions are triggered, the requester may seek judicial review of the agency's decision.[114] It is settled that the burden is on the government to establish that one of FOIA's statutory exemptions ap-

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[106] The exemptions include: national security, internal agency personnel rules and practices, information already specifically exempted from disclosure by other federal law, trade secrets and confidential commercial information, internal agency memoranda and policy discussions, personal privacy, law enforcement investigations, federally regulated banks, oil and gas wells. 5 U.S.C. § 552(b)(1–9). Notably, only the exemption for information specifically exempted under other laws is mandatory. *See* § 552(b)(3).

[107] § 552(b).

[108] To determine whether some of the exemptions apply the court does balance interests. However, the balancing is between the public policy behind the disclosure and the government's proffered interests—for example, in confidentiality. The balancing does not consider the plaintiff's proffered reasons for needing or wanting the information under the federal FOIA. *See infra* Part III.

[109] *See* § 552(b).

[110] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 2; § 552(b)(6).

[111] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 2; § 552(b)(4).

[112] *See* § 552(b).

[113] *See, e.g.*, Farley v. Worley, 599 S.E.2d 835, 844 n.10 (W.Va. 2004) ("The federal FOIA codifies this judicially crafted rule.").

[114] *See* § 552(a)(6)(C)(i). In addition, courts have interpreted the federal FOIA as requiring exhaustion of an agency's internal remedies for disclosure denials before seeking judicial review. *See* Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61–62 (D.C. Cir. 1990) (referring to the Administrative Procedure Act's exhaustion requirement).

ply.[115] Moreover courts, in theory, are directed to apply a de novo review of the agency's refusal.[116]

The statute and regulations lay out various procedural requirements, including that responses to FOIA requests be made promptly.[117] But agency delay remains one of the major hurdles to FOIA's efficacy.[118] The Justice Department alone received 63,103 FOIA requests in fiscal year 2011.[119] However, the agency only processed 63,992 requests during the same year.[120] Backlogged requests across government agencies rose from 69,526 in 2010 to 83,490 in 2011.[121] In 2011, the Department of Labor averaged a delay of 214.9 days in answering requests.[122] Another agency, the Council for Environment Quality, averaged 484.8 days.[123]

In 2011, the Justice Department granted only 69.5% of the Federal FOIA requests submitted.[124] The most common exemptions cited for denials were exemption 6 (personal and medical files), 7c (invasion of personal privacy), and exemption 7e (law enforcement investigation information).[125]

The other major challenge to FOIA's efficacy has been the interpretations of the FOIA exemptions by many agencies.[126] For example, agencies have refused FOIA claims because individuals did not "reasonably describe" the request or were otherwise "improper" in their requests.[127] Finally, courts have often delayed reviewing Federal FOIA decisions.[128]

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[115] *See, e.g.*, Miller v. U.S. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985).

[116] § 552; McCutchen v. U.S. Dep't of Health & Human Servs., 30 F.3d 183, 185 (D.C. Cir. 1994) ("Under FOIA, the burden is on the agency to justify withholding requested information and the agency's refusal to disclose it is subject to de novo review by the district court.").

[117] *See generally* § 552 (providing procedural requirements for compliance).

[118] *See* Shannon E. Martin & Gerry Lanosga, *The Historical and Legal Underpinnings of Access to Public Documents*, 102 LAW LIBR. J. 613, 627 (2010) ("[T]he timeliness of responses to [FOIA] requests, even in the age of digital communication, has continued to be a problem in some federal agencies").

[119] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 2.

[120] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 3.

[121] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 10.

[122] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 13.

[123] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 14.

[124] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 4.

[125] SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 7.

[126] *See* Melissa Guy & Melanie Oberlin, *Assessing the Health of FOIA After 2000 Through the Lens of the National Security Archive and Federal Government Audits*, 101 LAW LIBR. J. 331, 332 (2009) ("[T]he increased use of alternative designations (such as SBU) to restrict government information present a significant threat to the effectiveness of FOIA.").

[127] *See* SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 16, at 5.

[128] *See* Martin & Lanosga, *supra* note 119 ("FOIA court cases have also worked very slowly through the system. Some cases have lasted over a decade and received much notoriety.").

Some past problems regarding FOIA efficacy stem from presidential intervention. In 2001, Attorney General John Ashcroft issued a directive to executive agencies allowing them to deny FOIA requests if there was any plausible basis.[129] Ashcroft's memo stated that the Department of Justice would defend any agency refusals if there were any plausible basis for the agency's refusal to disclose.[130] Agencies were warned to assess disclosure decisions carefully and that decisions to disclose records "should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure."[131] The Ashcroft memorandum replaced a memorandum issued by Ashcroft's predecessor, Attorney General Janet Reno, which instructed the Justice Department not to defend agency withholdings under FOIA unless there was a real governmental interest for refusing disclosure.[132] The impact of Ashcroft memorandum's was severe. Agencies found it much easier to refuse disclosure of information that prior administrations would have released.[133]

President Obama has promised to increase FOIA's effectiveness by encouraging agencies to apply an affirmative presumption of "openness" to all information requests.[134] In this vein Attorney General Eric Holder instituted guidance documents delineating new guidelines that encourage openness and compliance with FOIA requests even where a request could "technically" be denied.[135] In a memorandum from 2009, President Obama leaves little doubt that executive agencies should comply with FOIA requests except where the government's interest is exceptionally significant:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. 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 ex-

[129] Memorandum from Att'y Gen. John Ashcroft on the Freedom of Information Act for Heads of Exec. Dep'ts and Agencies (Oct. 12, 2001), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf.

[130] *Id.*

[131] *Id.*

[132] Memorandum from Att'y Gen. Janet Reno on the Freedom of Information Act for Heads of Exec. Dep'ts and Agencies (Oct. 4, 1993), *available at* http://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum.

[133] *See* Guy & Oberlin, *supra* note 127, at 340 (describing agency responses to FOIA and the difficulties involved in getting agencies to disclose requested information).

[134] Memorandum on the Freedom of Information Act, DAILY COMP. PRES. DOC. 2009 DCPD No. 00009 (Jan, 21, 2009), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900009/pdf/DCPD-200900009.pdf.

[135] Memorandum from Att'y Gen. Eric Holder on the Freedom of Information Act to Heads of Exec. Dep'ts and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf

> pense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.[136]

Agencies have been slow to incorporate and comply with the President's and Attorney General's directives. Most agencies have not even updated their FOIA policies since these changes were instituted.[137]

The courts themselves vacillate in how strictly the exemptions are applied when reviewing agency refusals. It is outside the purview of this article to make any empirical claims in terms of how restrictive or favorable courts are in applying the Federal FOIA exemptions. The only point made here is that courts appear to balance the public against the government interest to different degrees—and that commentators disagree about how courts apply the exemptions.

Some say that many courts have largely become willing to uphold agency denials of FOIA requests[138] upon even the slightest government showing that confidentiality or some other interest specified by the FOIA exemptions is at play.[139] One commentator sums up this tendency some courts have to defer to agency refusals by broadening the ambit of exemptions:

> Courts have interpreted exemptions in FOIA and other statutes for trade secrets and confidential business information quite expansively, creating a broad and widening gap in the public's ability to acquire environmental information generated by corporations and submitted to the government to enable it to carry out its environmental-protection responsibilities.[140]

Another commentator sums up judicial preference for agencies as follows:

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[136] *See* Memorandum on the Freedom of Information Act, DAILY COMP. PRES. DOC. 2009 DCPD No. 00009.

[137] *Justice Department Repeats as Rosemary Award Winner for Worst Open Government Performance in 2012*, *supra* note 17. The National Security Archive's audit of federal agencies shows that 53 out of 100 agencies have not updated their regulations since Congress amended the Federal FOIA in 2007. The Archive report also indicates that only one of the three agencies that updated have even complied with the requirements of the statute. *Id.*

[138] In fact, some courts have simply deferred to agencies' procedural decisions to a large extent, for example, finding lengthy delays permissible as long as the court believes the agency is acting in "good faith" and with "due diligence." *See generally* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976) (rejecting the district court for applying too strict of a standard to agencies, and requiring only a good-faith effort to respond to FOIA requests).

[139] *See, e.g.*, Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 514 (2006).

[140] David Vladeck, *Information Access-Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, REDORBIT (Aug. 22, 2008), www.redorbit.com/news/business/1529719/information_access srveying_the_current_legal_landscape_of_federal_righttoknow_laws/.

> [The Supreme] Court has tipped the scales significantly in favor of a broadly construed and vaguely framed right to privacy over the public's right of access to government-held information. . . .The Court maintains that even a minimal privacy interest is sufficient to raise Exemption 6 as a bar to disclosure. Further, the FOIA's "central purpose" is to provide access to only those records that directly shed light on official agency activities and performance. Finally, when an FOIA requester seeks law enforcement records to investigate government wrongdoing, then the requester must establish a sufficient reason for obtaining the documents by producing evidence that the alleged government impropriety might have occurred.[141]

If these commentators are correct FOIA's efficacy has largely been blunted in certain types of information requests. For example, in the case of requests for records containing personally identifiable information the government can easily deny the request by showing even a slight interest in maintaining confidentiality.[142] A requestor may have an important need for information, and be unlucky enough to find herself before a court that believes even minimal government interests trigger an exemption automatically.[143]

At least some courts affirm agency denials based on a relatively weak government interest as long as an exemption appears triggered. For example, some courts have held that information need only be minimally private to trigger an exemption.[144] These courts have held that records need not contain highly intimate or personal details to be exempted, often easily refuting FOIA requests where private individual information is present in the requested record.[145] Even information in a passport has been held to trigger the privacy exemption.[146]

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[141] Halstuk & Chamberlin, *supra* note 140, at 514.

[142] *See generally* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C. Cir. 1992) (holding that reports submitted to the Nuclear Regulatory Commission would be automatically ruled confidential and outside of reach of the federal FOIA if the reports were voluntarily given and not ordinarily disclosed to the public).

[143] *E.g., compare* McCutchen v. U.S. Dep't of Health & Human Servs., 30 F.3d 183 (D.C. Cir. 1994) (holding that a group of scientists' privacy interest in not having their names released in relation to a misconduct hearing was sufficient to trigger the privacy exemption under FOIA), *with* GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109 (9th Cir. 1994) (finding exemption not met where records sought had some information regarding private company sub-contractors).

[144] The foundational case for the proposition that the privacy standard is minimal is *U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982) which held that the privacy exemption triggered even where the documents did not contain intimate or highly personal information. The Court stated that "we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information . . . [t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." 456 U.S. at 602.

[145] Halstuck & Chamberlin, *supra* note 140, at 542 (discussing the "minimal privacy" standard).

[146] *Washington Post Co.*, 456 U.S. at 600–601.

Moreover, courts have held that requests under the Federal FOIA should be permitted only where disclosure serves the Act's "central purpose" of shedding light on agency activities—thus where this purpose is not met, disclosure is much less likely to be required.[147] Consequently, if the government can argue an individual is seeking public records for uses unrelated to "shedding light" on agency actions, he or she may operate at a significant disadvantage during the courts' application of the common law balancing test.[148]

The Supreme Court has stated that "the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable" in some situations where certain exemptions are raised.[149] For example, the Court in *Nat'l Archives & Records Admin. v. Favish* that:

> Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.[150]

However, other courts have been willing to conduct a more careful and scrutinizing analysis, and have found the exemptions met only where the government is able to show a high degree of confidentiality, privacy, or other qualifying interest.[151]

Courts are more likely to apply the FOIA exemptions categorically as opposed to the factual balancing found in common law right to information cases.[152] For example, courts sometimes find a Federal FOIA exemption is

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[147] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989).

[148] *See id.* at 773, 775 ("There is, unquestionably, *some* public interest in providing interested citizens with answers to their questions about Medico. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve."); *see also* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004) ("FOIA is often explained as a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism.") (internal citations omitted).

[149] *Favish*, 541 U.S. at 172.

[150] *Id.*

[151] *See, e.g.*, Painting & Drywall Work Pres. Fund, Inc. v. Dep't of Hous. & Urban Dev., 936 F.2d 1300, 1302 (D.C. Cir. 1991) ("A court must identify the privacy interest served by withholding information and then the public interest that would be advanced by disclosing it. Having done so, the court must determine 'whether, on balance, disclosure would work a *clearly unwarranted* invasion of personal privacy.'") (emphasis added) (internal citations omitted).

[152] Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992) ("The circumstances of this case lend themselves to categorical treatment. It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and

met in situations involving voluntary disclosures of information—without any balancing.[153] The text of the statute itself simply exempts certain information as opposed to calling for a case-by-base balancing of interests.[154]

Furthermore, even when a balancing does occur, courts generally weigh the public interest against the specific government interest at issue—the individual's interest has no place in the analysis.[155] Under the Federal FOIA, if an exemption is not met for one person, it is not met for anyone.[156] In other words, the statute works much more like an "on-off" switch than a discretionary judicial process.

Several conclusions can be drawn about the operation of the Federal FOIA. First, there are procedural challenges to using the statute in light of agency backlogs and procedural hurdles. Second, courts appear to apply exemptions categorically, usually finding the exemption triggered, or not, without undergoing careful balancing of the requester's interest. Third, where courts do conduct balancing for certain exemptions such as privacy or confidentiality, they are not always consistent and may favor the government's refusal to disclose. Fourth, courts never consider the requestor's private interests when determining whether an exemption is triggered. These last two points highlight a fundamental difference from the common law right to information. While the common law right vested the decision of whether to compel disclosure to courts, many of the policy decisions about whether disclosure should happen under the Federal FOIA have been made by Congress.

B. The Operation of State FOIAs

Shortly following the passage of the Federal FOIA, every state enacted a similar open records statute giving various entities broad access to state and local agency records.[157] Many state FOIA statutes are similar to the federal

injure the provider's interest in preventing its unauthorized release.").

[153] *Id.*

[154] *See* 5 U.S.C. § 552(b) (2012).

[155] *Painting & Drywall Work Pres. Fund, Inc.*, 936 F.2d at 1302 ("Because FOIA requires disclosure to 'any person,' the balancing of the privacy against the public interest cannot depend on the identity and specific purpose of the party requesting the information. If it must be released to one requester, it must be released to all, regardless of the uses to which it might be put.") (citations omitted).

[156] *Id.*

[157] *See* Herald Pub. Co., Inc. v. Barnwell, 351 S.E. 2d 878, 881 (S.C. Ct. App. 1986) ("[T]he legislature of every state as well as the Congress of the United States has enacted open meeting laws, or freedom of information acts, in some form or another.").

version.[158] In fact, the similarities are so compelling that state courts have often looked to federal case law as persuasive authority in state FOIA disputes.[159] California, Maryland, New York, Oregon, and the District of Columbia all modeled their information statutes in part or whole on the Federal FOIA.[160]

Most state statutes, like the Federal FOIA, have either been construed in favor of wide disclosure, or specifically state some sort of presumption of disclosure.[161] Thus, in most states, there may be little difference operationally between state and Federal FOIAs—even if there are some minor differences.

Yet, some of the state statutes do not parallel the Federal FOIA. For example, Nevada's FOIA statute states "that all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person."[162] If a legal authority has not specifically declared a document to be confidential, the statute requires the agency to "use [a] balancing test, applied in consultation with its legal counsel."[163]

Some states have limited the individuals who can utilize the state FOIA framework, allowing access of information to "citizens" of their states.[164] This would leave the common law right as the only option for people who do not meet the statute's user requirements.

In fact, in 2013 the United States Supreme Court held that a state's restriction of its FOIA statute to its own residents does not run afoul of the constitution—perhaps paving the way for other states to aggressively police

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[158] *See, e.g.*, Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n., 436 A.2d 266, 270 (Conn. 1980); Bredemeier v. Kentwood Bd. of Educ., 291 N.W.2d 199, 201 (Mich. Ct. App. 1980) (noting the similarity of the Federal Freedom of Information Act statute and the state Freedom of Information Act statutes in Connecticut and Michigan, respectively).

[159] *See, e.g.*, Laramie River Conservation Council v. Dinger, 567 P.2d 731, 733 (Wyo. 1977) (holding that Wyoming provision is similar to the federal Freedom of Information Act provision and thus interpreted in a similar manner); Sattler v. Holliday, 318 S.E.2d 50, 51–52 (W. Va. 1984).

[160] 1 CRIM. PRACTICE MANUAL, STATE INFO. PRACTICE § 21:58 (6th ed. 2004).

[161] In reviewing the cases from Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, n. 6 (1996) (citing cases and statutes from all fifty states), it is clear there is a strong presumption of disclosure generally.

[162] NEV. REV. STAT. ANN. § 239.010 (West 2011).

[163] *Id.*

[164] ALA. CODE § 36-12-40 (2013); ARK. CODE ANN. § 25-19-105 (2013); CAL. GOV'T CODE § 6253 (West 2013); DEL. CODE ANN. tit. 29. § 10003 (West 2013); MO. ANN. STAT. § 109.180 (West 2013); MONT. CODE ANN. § 2-6-102 (West 2013); NEB. REV. STAT. ANN. § 84-712.01 (West 2012); N.H. REV. STAT. ANN. § 91-A:4 (2013); N.J. STAT. ANN. § 47:1A-5 (West 2013); 65 PA. STAT. ANN. § 67.701 (West 2013); TENN. CODE ANN. § 10-7-503 (2014); VA. CODE ANN. § 2.2-3704 (2012).

this restriction.[165] Writing for a unanimous court, Justice Alito left no doubt that states may restrict their FOIA statues so that only their own residents may utilize them.[166] The Court dismissed petitioners' "sweeping" argument that a right to public records is a "fundamental" right.[167] The Court, in short, confirmed that for out-of-state residents, FOIA is simply not an option if they want to seek state public records.

Other states have narrowed the statute to only be available to "persons" thus excluding corporations or other entities.[168] This would require a corporation to use the common law right because the FOIA statute is not an option.

Most state FOIA statutes operate like the Federal FOIA in that an information requester need not show any need or interest in information to make a request.[169] However, some states require some sort of interest, or conduct a mandatory balancing of interests, before requiring disclosure.[170] Where privacy, confidentiality, or a wide range of other interests such as the best interest of the state militates against disclosure, some states enter different balancing schemes to determine whether information should be disclosed.[171] Remarkably, one state explicitly allows interested individuals to seek an injunction to prevent disclosure under the state FOIA for a compelling reason.[172]

State FOIAs have numerous exemptions and nuances not contemplated by the Federal FOIA. For example, in Pennsylvania, until the law was recently repealed, a disclosure that would result in the loss of federal funds was exempted from the statutory right to information.[173] In Nevada, divorce

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[165] McBurney v. Young, 133 S.Ct. 1709 (2013). The statute at issue was Virginia's FOIA. *See* VA. CODE ANN. § 2.2-3700 (2012).

[166] *McBurney*, 133 S.Ct. at 1720.

[167] *McBurney*, 133 S.Ct. at 1712.

[168] ARIZ. REV. STAT. ANN. § 39-121 (2013); COLO. REV. STAT. § 24-72-203 (2014); CONN. GEN. STAT. ANN. § 1-19 (West 2013); D.C. CODE § 2-532 (2013); FLA. STAT. ANN. § 119.07 (West 2013); IND. CODE ANN. § 5-14-3-3 (West 2013); IOWA CODE ANN. § 22.2 (West 2013).

[169] *See, e.g.*, Mans v. Lebanon Sch. Bd., 290 A.2d 866, 867 (N.H. 1972) (stating that a requester's rights "do not depend upon his demonstrating a need for the information"); N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 601 A.2d 693, 695 (N.J. 1992).

[170] *See, e.g.*, Child Prot. Grp. v. Cline, 350 S.E.2d 541, 543 (W.Va. 1986) (applying the balancing mandated under Virginia law).

[171] *See* Stone v. Consol. Publ'g Co., 404 So. 2d 678, 681 (Ala. 1981) ("Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.") (citing MacEwan v. Holm, 359 P.2d 413 (Or. 1961)); Nowadzky, *supra* note 162, at 79–80 (discussing various state balancing schemes and presumptions)

[172] IOWA CODE ANN. § 22.2.

[173] 65 PA. STAT. ANN. § 66.1(2) (West 2014) (repealed).

action information is exempted.[174] At the same time, Nevada's FOIA generally gives wide access to all records created by state or county offices.[175] Some states have no restrictions on personnel records—others do not allow inspection.[176] Some states have attempted to create robust privacy statutes that foreclose the use of the state FOIA for large classes of documents.[177]

Some state statutes operate in unique ways. For example, Maryland's open records law divides confidential information into two categories: 1) required denials and 2) permissible denials.[178] Denials are required when the public record is privileged or confidential, or when inspection would be contrary to a state statute, a federal statute or regulation, rules of the court, or a court order.[179] Agencies then have discretion to refuse disclosure in a wide variety of circumstances where some privacy, confidentiality, or other government interests are implicated by the disclosure. New Jersey's right-to-know law does not contain "specific substantive standards that define exclusions from its coverage."[180] Instead, it leaves the task of delineating which records are confidential to the executive or judiciary.[181]

The state FOIAs largely operate like the federal version in that most states have a powerful presumption for disclosure. State statutes often include specific exemptions that are either triggered—or not—without balancing the requestor's private interests. However, some state FOIAs do operate differently, either restricting who can use the statute, exempting large classes of documents from the statute's reach, or creating unique balancing tests or other schemes.

III. COMPARING FOIAS AND THE COMMON LAW RIGHT

Several differences arise when comparing the common law right to information and FOIAs. First, FOIA statutes and the common law right are different procedurally. Under FOIA statutes, individuals request specific documents. The agency then must undertake a "reasonable" search for the documents either specifically identified or containing information requested—if a reasonable search does not reveal the documents requested, the

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[174] NEV. REV. STAT. § 239.010 (2011) (repealed 2008).
[175] *Id.*
[176] *See* CAL. GOV'T CODE § 6254 (West 2014).
[177] *See, e.g., id.*
[178] MD. CODE ANN., STATE GOV'T § 10-615 to 10-618 (LexisNexis 2009).
[179] *Id.*
[180] McClain v. Coll. Hosp., 492 A.2d 991, 996 (N.J. 1985).
[181] *Id.*

agency has complied with its duties and the requester leaves with nothing. The common law right allows requestors to petition the court to compel an agency to disclose information. This right is an open-ended ability to "inspect" records. While in some cases it may operate similarly to a FOIA request—a court orders disclosure of specific documents—the common law right grants requesters a wide right to gain access to records even where the documents' precise nature are unknown.[182] This distinction potentially removes one common agency tactic for FOIA refusals: "we did not find the document after a reasonable search." More importantly, the common law right allows persons to seek relatively timely disclosure by petitioning the court directly without having to exhaust an agency backlog of requests. Under the common FOIA scheme, to petition the court in the event that an agency refuses to disclose a document a requester must first wait in the agency backlog, and then she must proceed through the normal litigation process only after the agency's request process is exhausted.[183]

This procedural difference creates the possibility for a difference in the timeframe for request responses. While agencies are notorious for wading through backlogs for years before responding to a request, the common law right to access would potentially require access to records within a more prompt timeframe. The common law right has no statutory boundaries or processes for the agency to rely on, and the requester may inspect the documents him or herself.[184] A robust common law right today might operate similarly to FOIA frameworks, with backlogs and agencies, not requestors, as the primary document collector. But the potential exists for different procedural options, more flexibility in what information is accessible,[185] and courts with more discretion to weigh party interests.

Second, the common law right and FOIA statutes could have different threshold requirements before information may be requested. As discussed above, courts vacillate on whether a showing of special interest is required

[182] *See* Board of Educ. of Newark v. New Jersey Dep't of Treasury, 678 A.2d 660, 665–66 (N.J. 1996); Education Law Center v. New Jersey Dep't of Educ., 966 A.2d 1054, 1071 (N.J. 2009) (citing Higg–A–Rella Inc. v. Cnty. of Essex, 660 A.2d 1163, 1168 (N.J.1995)).

[183] *See* Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir. 1990) (requiring agency exhaustion before allowing judicial review of FOIA denial). Another difference between the common law right and the FOIA schemes is that at least the Federal FOIA allows a plaintiff to collect attorney's fees. 5 U.S.C. § 552(a)(E)(i). There is no analogous fee-shifting scheme under the common law right.

[184] Admittedly, this is a very general analysis only meant to highlight the issue. *See* Daluz v. Hawksley, 351 A.2d 820, 823 (R.I. 1976) (holding that a person or their agent has a common law right to inspection only when the person has demonstrated a specific interest).

[185] Requestors would potentially have more flexibility in a common law scheme because there are no bright-line exemptions. Requestors could argue that even documents long denied under precedent should be disclosed in extreme cases where important interests are asserted—while FOIA schemes do not even allow courts to consider this option. *See Education Law Center*, 966 A.2d at 1071–1072.

before disclosures are granted under the common law right.[186] The threshold requirement would create a substantive difference for plaintiffs in those states and courts that would require a special need to trigger a common law right. Courts may balance the parties' interests more favorably for the individual requester within a framework where plaintiffs have already shown a proprietary need for information to get into court. This is in sharp contrast to a FOIA requester who, according to the statute, need show no special need for information to submit a request.

Third, the substantive standard for whether an individual's right to a document supersedes the government's interests differs between the doctrines. The common law right balances the individual's interests versus the government's— applying a presumption for the plaintiff ranging from the relatively slight to severe depending on the court.[187] This is an intensely factual balancing in which the court considers each side's interest and the facts of the situations. Courts can consider factors that appear relevant under the circumstances. They make the policy decisions and determine whose interests are more compelling.

In contrast, the FOIA framework automatically requires disclosure unless the government can establish a specific exemption applies. If an exemption applies, disclosure may be withheld, period. While the balancing is sometimes factual in a FOIA case, there are defined substantive standards for when the government may—and may not—deny disclosure. In other words, while courts are the primary determiners of document disclosure under the common law, the legislature is the primary determiner in FOIA schemes. The court is merely present to determine whether the government has satisfied the language of a statutory exemption as a legal matter, not to consider the merits of the plaintiff's claims to the information in an abstract sense. FOIA creates a categorical approach to information disclosure—the information is either in or out. The same type of record will consistently be either accessible or inaccessible regardless of the requestor's interests. Cases, in theory, should not vary if the same type of record is at issue, unlike the common law approach, which is specifically permitted to vary from case to case based on the interests raised. Another difference arises where FOIA calls for some balancing—such as where the confidentiality or privacy exemptions are raised—and the court only considers public interests in disclo-

[186] *See supra* Part I.1.B.

[187] *See* Henry H. Perritt, *Sources of Rights to Access Public Information,* 4 WM. & MARY BILL RTS. J. 179, 196 (1995) ("Unlike FOIA, these common law doctrines balance the interest of the requester in obtaining access against the interest of the public entity in denying access.").

sure rather than the requester's individual needs or interests in seeking the information.

Some cases and commentators indicate that courts may be more comfortable with upholding agency refusals where certain exemptions are raised, or biased in favor of government agencies as a whole. While President Obama's administration may help curb the anti-disclosure mentality from the agency-side, it is unclear how agencies approach disclosure. Also, some cases indicate that requests for personal purposes, rather than government-monitoring, are disfavored under FOIAs.[188] For agencies applying a "deny first" approach to document requests because of these substantive safeguards in favor of the government, FOIA may create costs and hurdles by dissuading individuals from combating the agency machine. The common law, on the other hand, allows individuals to go to court and receive an order compelling disclosure.

In terms of state FOIAs, it is difficult to generalize about differences and similarities. Some state FOIAs have mechanisms that call for balancing similar to the common law right. Other state FOIAs have only created narrow tools for specific situations with the legislature being explicit in their intent to only supplement the broader common law right.[189]

IV. DISPLACEMENT OF THE COMMON LAW RIGHT TO INFORMATION

Before considering whether the common law right has any practical use for public access today, the threshold question must be answered: can litigants even use the common law right when, arguably, statutory codifications of the right exist? In terms of whether the common law right survives, federal and state FOIAs must be dealt with separately. This is because federal common law rights are construed more narrowly than state common law rights.[190] In fact, as shown below, in some states an attempt to abrogate a common law right is downright difficult—but federal common law rights are frequently abrogated.

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[188] *See* Neal, *supra* note 62, at 354 (discussing disfavored purposes under the common law right).

[189] As discussed in Part II.B., some state legislatures have enacted statutes that explicitly maintain the common law right's operation. *See, e.g.,* WIS. STAT. § 19.35 (2012). In these states, the state FOIA statutes appear to merely be a supplement— telling courts that in some situations, records must be disclosed or withheld, but that otherwise the court maintains its discretionary powers.

[190] *See, e.g.*, Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755, 769 (2013), NAT'L ASS'N OF ATT'YS GEN. & U.S. DEP'T OF JUSTICE, ENV'T & NATURAL RES. DIV., GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION 20 (2013), http://www.justice.gov/enrd/ENRD_Assets/Guidelines-for-joint-state-federal-civil-environmental-enforcement-litigation.pdf.

There are three primary ways that legislation can destroy common law rights: express preemption, displacement, and conflict preemption.[191] As a preliminary note, the Federal FOIA is unlikely to affect state common law rights to information. These doctrines require that a legislature expressly or impliedly intend to abrogate a law (or making complying with both impossible).[192] There is little overlap between the Federal FOIA and state common law rights, because each addresses different sets of agencies—namely state and federal.[193] Moreover, there is generally a presumption against preemption.[194] As Congress has not indicated any intent to preempt, it does not appear that the state common law right has been entirely preempted.[195]

But the Federal FOIA's displacement of the federal common law right—and state FOIAs' displacement of state common law rights—is more plausible. Both state and federal legislatures have the power to abrogate judicially-created legal doctrines by replacing—or displacing—the common law right.[196] For displacement to occur courts must determine that the state or federal law regulates the same subject matter that the common law right regulates to such an extent that the statute evinces the legislatures' intent to displace the former.[197] The difficulty is in determining when a legislature has regulated a specific doctrine to the extent that the common law right is displaced.

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[191] *See* Altria Grp. v. Good, 555 U.S. 70, 76 (2008).

[192] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–204 (1983) ("It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms . . . [or] Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'") (quoting Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

[193] There are instances where states have enacted privacy laws which could raise issues about federal FOIA preemption, but such issues are outside of the scope of this article which deals with the operation of the doctrines generally. *See, e.g.*, Animal Welfare Soc. v. Univ. of Wash., 884 P.2d 592, 604–605 (1994) (discussing the conflict between Washington State's Public Records Act and the federal Freedom of Information Act).

[194] Geier v. American Honda Motor Co., 529 U.S. 861, 906 (2000) (Stevens, J., dissenting) ("Under 'ordinary. . . principles of conflict pre-emption,' therefore, the presumption against pre-emption should control.") (internal citation omitted).

[195] *See infra* Part IV.B.

[196] *See* Angel Gomez, III, *Preemption and Preclusion of Employee Common Law Rights by Federal and State Statutes*, 11 INDUS. REL. L.J. 45, 47 n.8 (1989).

[197] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947). As explained below, there is no indication that Congress specifically stated it preempted any other laws. Thus, only general field displacement is possible.

A. Federal FOIA's Displacement of Federal Common Law

Generally, legislatures must overtly express their intention to abrogate common law rights—otherwise the common law rights survive.[198] Moreover, canons of construction require that statutes be interpreted to avoid abrogating common law rights where possible.[199]

However, the Supreme Court's decision in *Erie Railroad Co. v. Tompkins* complicated this rule by severely limiting federal common law.[200] In short, this case stands for the principle that federal courts should apply state common law as a general matter, and that federal common law has a very limited place in the federal legal system.[201] Some of this rationale is based on federalism concerns and superiority of state common law rights. The United States Supreme Court has stated that "if state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."[202]

However, in the case of the common law right to information, this concept is less relevant. State common law rights generally cannot be used to compel federal agencies so federal common law is the only option.[203] Still, modern jurisprudence on federal common law rights emphasizes that situations where federal common law rights exist are "few and restricted."[204] They essentially fall into two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and "those in which Congress has given the courts the power to develop substantive law."[205] As discussed infra[206], one of the policies behind the common law right is monitoring the government, thus the federal common law right to information may be necessary to protect the "uniquely federal interest" of monitoring federal agencies. The latter category is not applicable because Congress has not specifically given the courts the task of maintaining a

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[198] *See* Pleak v. Entrada Prop. Owners' Ass'n, 87 P.3d 831, 835 (Ariz. 2004); Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000) ("[I]f a statute abrogates the common law, the abrogation must be by express wording or necessary implication.").

[199] NBZ, Inc. v. Pilarski, 520 N.W.2d 93, 96 (Wis. Ct. App. 1994) ("The canons of construction provide that a statute does not abrogate any rule of common law unless the abrogation is so clearly expressed as to leave no doubt of the legislature's intent.").

[200] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[201] *Id.* at 78 ("There is no federal general common law").

[202] City of Milwaukee v. Illinois, 451 U.S. 304, 313 n.7 (1981).

[203] Medtronic, Inc. v. Lohr, 518 U.S. 470, 496, 500 (1996).

[204] *Milwaukee*, 451 U.S. at 304.

[205] Nat'l Audubon Soc. v. Dep't of Water, 869 F.2d 1196, 1201 (9th Cir. 1988) (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

[206] *See infra* p. 48.

common law right to information. In contrast, some statutes such as the *fair use* provision of the Copyright Act specifically grant the courts common law discretionary power.[207]

Even if the federal common law right to information is not automatically destroyed under *Erie*, the doctrine may still be displaced by the Federal FOIA scheme. The Supreme Court has explained how to determine whether a federal common law right exists in the context of federal interstate nuisance claims. In *Milwaukee*, the Court held that if an act by Congress had displaced the federal common law by creating a comprehensive act in a field, the common law remedy is displaced and no longer available.[208] However, the Court's reasoning relied on an inference that Congress intended legislation to address the specific question raised by the litigants in the case.[209] In other words, the Court did not merely ask whether Congress legislated in an area as a general matter, but whether Congress meant to regulate the specific claim brought by litigants.[210] If so, the common law right no longer exists because "[w]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal court disappears."[211]

The Supreme Court does not hesitate to find that federal common law rights are no longer available where Congress has addressed the right in question. Federal common law is easily displaced by Congressional action even arguably aimed at the subject of a common law right. For example, in *Milwaukee*, the Supreme Court found that the Clean Water Act displaced the claim at issue because Congress had already provided a remedy for similar types of claims.[212]

The most obvious argument in support of displacement of the common law right to information is that Congress has created a carefully-tailored legislative scheme in the Federal FOIA that addresses the same claims brought under the common law right. Congress created specific exemptions and a specific right to certain types of information. If this leaves some indi-

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[207] *See* 17 U.S.C. § 107 (2012); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994).

[208] *Milwaukee*, 451 U.S. at 313–15.

[209] *Id.* at 319–20.

[210] *Id.* at 315, 317.

[211] *Id.* at 314. More recently, the Court in *Am. Elec. Power Co. v. Connecticut* explained the displacement test as "simply whether the statute 'speaks directly to [the] question' at issue." 131 S. Ct. 2527, 2537 (2011) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

[212] *Milwaukee*, 451 U.S. at 316. Similarly, in *Am. Elec. Power Co.*, the Court noted that "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." 131 S. Ct. at 2537 (quoting *Milwaukee*, 451 U.S. at 317).

viduals without a tool to access certain information—it may be that Congress decided the information should not be disclosed.

Of the few federal courts that have considered whether the common law right to information is displaced, most have found that it has.[213] The rationale is that Congress has crafted a careful balancing of public and government interests in the Federal FOIA and that allowing federal common law claims would undermine this scheme. These courts have created a blanket approach that emphasizes the sole manner of compelling document requests—absent discovery in litigation—is the Federal FOIA.[214] The DC Circuit explained this rationale at length:

> FOIA provides an extensive statutory regime for plaintiffs to request the information they seek. Not only is it uncontested that the requested information meets the general category of information for which FOIA mandates disclosure . . . we have concluded that it falls within an express statutory exemption as well. It would make no sense for Congress to have enacted the balanced scheme of disclosure and exemption, and for the court to carefully apply that statutory scheme, and then to turn and determine that the statute had no effect on a preexisting common law right of access. Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure . . . we cannot craft federal common law when Congress has spoken directly to the issue at hand.[215]

In *Warner Communications*, the Supreme Court assumed that the common law right of access covered tapes sought by the media.[216] However, the Court denied the common law claims because the Presidential Recordings Act specifically provided a statutory scheme for seeking access to tapes of this kind.[217] Regardless of whether the statute would actually provide access, the existence of the scheme indicated that Congress had already regulated the merits of the plaintiff's claim—for better or worse.[218] This "alternative means for public access tip[ped] the scales in favor of denying release."[219] In *U.S. v. El-Sayegh*, the D.C. Circuit directly applied the reasoning from *Warner Communications*, holding that a statutory FOIA disclosure scheme displaced the common law right.[220] The Court broadly stated

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[213] *See, e.g.*, Ctr. for Nat'l. Sec. Studies v. U.S. Dep't. of Justice, 331 F.3d 918, 936–37 (D.C. Cir. 2003); United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997).

[214] *See Ctr. for Nat'l. Sec. Studies*, 331 F.3d at 936. In fact, the Supreme Court in *Warner Communications* found the common law right to information displaced by a record disclosure statute. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 589 (1978).

[215] *Ctr. for Nat. Sec. Studies*, 331 F.3d at 936–37.

[216] 435 U.S. at 599.

[217] *Id.* at 603–606.

[218] *Id.* at 604–605.

[219] *Id.* at 606.

[220] United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997).

that the "appropriate device [for access to executive records] is a Freedom of Information Act request addressed to the relevant agency."[221]

After *El-Sayegh*, the D.C. Circuit applied the common law right in *Center for National Security Studies v. U.S. Dep't of Justice* and also found the federal common law inapplicable.[222] But the Court appeared to narrow its holding to the factual circumstances, noting that the parties did not dispute that the Federal FOIA was directly applicable and that an exemption was squarely triggered.[223] Where an exemption was clearly present, the court reasoned that "it would make no sense for Congress to have enacted the balanced scheme of disclosure and exemption, and for the court to carefully apply that statutory scheme, and then to turn and determine that the statute had no effect on a preexisting common law right of access."[224]

The language in these cases does not necessarily reach every common law right to information case that could be brought. Rather, these courts found the common law displaced only because Congress had *addressed the specific claims brought by the specific parties where an exemption was triggered.* No court appears to have held that every type of common law right to information claim is completely displaced at the federal level.

In fact, the common law right still exists in terms of judicial and legislative branch claims. The Federal FOIA does not apply to those branches, thus it may be difficult to argue that Congress has already addressed common law right to information requests served on either one.[225] Also, assuming that a court agrees that the federal common law right protects a uniquely federal interest by providing for needed citizen oversight so that the *Erie* holding is not an issue—there are no federal statutes addressing these types of claims.

It remains an open question whether there may still be common law right to information claims concerning federal executive agencies that are unaddressed by the Federal FOIA (and potentially still in reach of the common law right). Potentially, plaintiffs expressing a compelling need for information could argue that the Federal FOIA was not specifically designed for their situation. The Federal FOIA was designed to provide full access to

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[221] *Id.*

[222] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 936–37 (D.C. Cir. 2003).

[223] *Id.* at 937.

[224] *Id.*

[225] *See generally* John B. Shumadine, *Striking a Balance: Statutory Displacement of Established Federal Common Law and the* D'oench *Doctrine in* Murphy v. F.D.I.C. *and* Motorcity of Jacksonville Ltd. v. Southeast Bank, 51 ME. L. REV. 129, 136 (1999) (discussing congressional intent).

any individual seeking a record regardless of their need.[226] Thus, a requestor could argue that Congress has not addressed claims where individuals have a special, proprietary need for the information—because the Federal FOIA treats all requestors the same, and has no avenue for those with a special need.

Ultimately, federal courts are unlikely to allow claimants to bring common law right to information claims where the records appear to fit squarely within categories regulated by the Federal FOIA's scheme. Courts are likely to find that the Federal FOIA directly addresses a requestor's claim and that Congress has thus displaced the common law right. That said, displacement is not an exact science, and requestors still have arguments for non-displacement in the federal context, albeit a slim chance of success.

B. Displacement of the State Common Law Right to Information

The doctrines concerning displacement of state common law are distinct from the doctrine of federal common law displacement. Courts have long held that "where there [is] an established common law rule of decision, [there can be no] statutory displacement absent an explicit indication of such a congressional intention."[227] Courts appear generally unwilling to find displacement absent such express statements. The Indiana Supreme Court stated that other than field preemption "[a]n abrogation of the common law will be implied [only] where the two laws are so repugnant that both in reason may not stand."[228] The Connecticut Supreme Court stated that common law remedies are only inappropriate "where their application would eviscerate the force of the provisions of a statute."[229]

While the general presumption against abrogation of state common law is well-settled, it is not without limitation. Displacement may happen even where the legislature is not explicit but has sufficiently addressed a specific situation via statute. Specifically, a legislature's complete regulation of a subject matter through statute allows courts to infer an intent to abrogate alternative common law remedies.[230]

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[226] *See supra* Part II.A.

[227] Shumadine, *supra* note 226, at 138.

[228] Caesars Riverboat Casino, LLC v. Kephart, 934 N.E.2d 1120, 1123 (Ind. 2010).

[229] Location Realty, Inc. v. Colaccino, 949 A.2d 1189, 1201 (Conn. 2008).

[230] *See, e.g.*, Blount v. Stroud, 904 N.E.2d 1, 9 (Ill. 2009); *Caesars*, 934 N.E.2d at 1123–24; Cavadi v. DeYeso, 941 N.E.2d 23, 35 (Mass. 2011); Genies v. State, 10 A.3d 854, 863, 866–67 (Md. Ct. Spec. App. 2010), *aff'd*, 43 A.3d 1107 (Md. 2012); Briefing.com v. Jones, 126 P.3d 928, 936 (Wyo. 2006).

However, the presumption against the abrogation of common law cannot be overstated. State law generally presumes that common law is not abrogated or displaced.[231] Some state courts have required express legislative language before setting aside common law principles.[232] A review of various state cases reveals that most courts have required either: 1) a direct conflict between the common law and a statute, or 2) express legislative language to displace or abrogate.[233]

A small number of courts have already considered whether state FOIAs have displaced common law rights to information. There is no clear consensus in these decisions. A recent Michigan case that published shortly before this article went to publication resoundingly held that Michigan's FOIA displaced any state common law right.[234] First, the court noted that as a general rule the "common law remains in force until it is affirmatively modified."[235] The court also pointed to the lack of "published case law in this state directly on point."[236] The court then held, in part analogizing to the federal cases in this area, that no common law right exists in Michigan following enactment of the state's FOIA:

> Michigan's FOIA provides a comprehensive statutory scheme that governs requests for public records held by public bodies. FOIA provides a detailed course of conduct for individuals to pursue in order to obtain public records. Included within the scheme are statutory exemptions for certain types of information. As we have explained above, MCCA's records fall within one of those exemptions. The Legislature has determined that those records are not subject to disclosure. It would be illogical to conclude that this comprehensive legislation has no effect on plaintiffs' pre-existing common law right to access MCCA's records.[237]

Similarly, the Superior Court of New Jersey has held that in enacting a statute relating to examination of workmen's compensation records, the

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[231] *See, e.g.*, HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 936–37 (8th Cir. 2007).

[232] *See, e.g.*, Lee v. Detroit Med. Ctr., 775 N.W.2d 326, 335–36 (Mich. Ct. App. 2009).

[233] *Id.*; Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law") (quoting United States v. Texas, 507 U.S. 529, 534 (1993)); *HOK Sport, Inc.*, 495 F.3d at 936–37; Young v. Beck, 251 P.3d 380, 383–84 (Ariz. 2011); People v. Ceja, 229 P.3d 995, 1001 (Cal. 2010); Robbins v. People, 107 P.3d 384, 387, 390 (Colo. 2005); Clancy Sys. Int'l v. Salazar, 177 P.3d 1235, 1237 (Colo. 2008); A.W. Fin. Servs., S.A. v. Empire Res., Inc., 981 A.2d 1114, 1122 (Del. 2009); Cecere v. Loon Mountain Recreation Corp., 923 A.2d 198, 202 (N.H. 2007); Williams v. Spitzer Autoworld Canton, L.L.C., 913 N.E.2d 410, 416 (Ohio 2009); Rogers v. Meiser, 68 P.3d 967, 973 (Okla. 2003); Sorensen v. State Farm Auto. Ins. Co., 234 P.3d 1233, 1239 (Wyo. 2010).

[234] Coal. Protecting Auto No-Fault v. Mich. Catastrophic Claims Ass'n, 2014 Mich. App. LEXIS 916 (May 20, 2014).

[235] *Id.* at *24.

[236] *Id.*

[237] *Id.* *27.

state legislature had determined that disclosing certain documents "is adverse to the public interest."[238] Once the legislature had made such a decision, the common law right is not applicable any time these public interests are implicated.

However, New Jersey courts have found that the common law right of the public to inspect records coexists with state FOIA rights.[239] Courts in New York,[240] Washington,[241] West Virginia,[242] and Wisconsin[243] have all held that the common law right to information is not abrogated by enactment of state FOIAs. One New Jersey court has noted the important place the common law right still serves, in light of some legislatures' narrowing of the definition of public records or those entitled to use the statute: "[t]he range of public records available under the Right to Know Law is narrower than under the common law . . . the common-law and statutory rights are not mutually exclusive. The two complement each other, together embodying the State's strong commitment to access to public records."[244] Other courts have avoided the issue by interpreting the statutory scheme as simply codifying the common law right without engaging the displacement question.[245] Still other courts have assumed the common law right still exists, without engaging the question deeply.[246] Notably, two legislatures went so far as to specifically provide that the common law right to information is *not* abolished by a state's freedom of information statute.[247] One of them has been specifically interpreted to be much narrower than the common law right.[248]

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[238] Accident Index Bureau, Inc. v. Male, 229 A.2d 812, 816 (N.J. Super. Ct. App. Div. 1967).

[239] S. Jersey Publ'g Co., Inc. v. N.J. Expressway Auth., 591 A.2d 921, 927 (N.J. 1991); Irval Realty, Inc. v. Board of Pub. Util. Comm'rs, 294 A.2d 425, 428 (N.J. 1972); Beck v. Bluestein, 476 A.2d 842, 848 (N.J. Super. Ct. App. Div. 1984).

[240] Delaney v. Del Bello, 405 N.Y.S.2d 276, 280 (N.Y. App. Div. 1978).

[241] Nast v. Michels, 730 P.2d 54, 58 (Wash. 1986).

[242] Daily Gazette Co. v. Withrow, 350 S.E.2d 738, 746 n.9 (W.Va. 1986).

[243] WIS. STAT. ANN. § 19.35 (West 2010).

[244] *S. Jersey Publ'g Co. Inc.*, 591 A.2d at 927; *see also Irval Realty*, 294 A.2d at 429 (stating that Right to Know Law "clearly was not intended to diminish or in any way curtail the common law right of examination").

[245] *See, e.g.*, Breighner v. Mich. High Sch. Athletic Ass'n, 683 N.W.2d 639, 649 (Mich. 2004) ("The FOIA was enacted to continue the common-law right Michigan citizens have traditionally possessed to access government documents."); Evening News Ass'n v. Troy, 339 N.W.2d 421, 427–28 (Mich. 1983).

[246] *See* Walen. v. Dep't of Corr., 505 N.W.2d 519, 528 n.19 (Mich. 1993) (Riley, J. dissenting) ("Moreover, even if the FOIA did not permit general access to public records, our common law would almost certainly permit such access.").

[247] N.J. STAT. ANN. § 47.1A–1 (West 2002); WIS. STAT. ANN. § 19.35.

[248] *See* McCalin v. College Hosp., 492 A.2d 991, 995 (N.J. 1985).

Although concrete answers do not emerge out of the displacement analysis, key guiding principles do exist. First, federal courts are likely to find the common law right displaced any time a plaintiff's claim to federal agency records appears to fit within FOIA's exemptions. In these cases, the federal common law's limited nature, coupled with congressional intent to address the plaintiff's claim make it very likely that courts will find displacement.

However, at the federal level, it remains an open question whether there are situations in which a plaintiff might bring a claim that Congress has not addressed with the Federal FOIA. It is clear that not all federal common law rights to information are displaced. For example, access to judicial and legislative records is not generally addressed by FOIAs—thus it would be difficult to credibly argue that the legislature has displaced any common law rights in these areas. But beyond these areas, the scope remains unclear.

Second, at the state level, the common law rights are more likely to remain, although this is far from certain. Courts could, and some have[249], found that a state legislature has addressed a specific claim by choosing to create a relevant exemption to a FOIA statute. Then again, it may simply make little difference in some situations. In balancing the government's interests under a common law right claim, the court would likely consider the legislature's intent to protect certain documents. Furthermore, some state FOIAs specifically provide for a balancing test to be used, making their operation almost identical to the common law operation. If a court were to allow a common law claim in parallel to a state FOIA litigants will likely have to weigh which of these two available tools—which overlap significantly—best fit with their needs.

V. THE COMMON LAW RIGHT TO INFORMATION'S PLACE IN THE CURRENT PUBLIC ACCESS FRAMEWORK

As explained above, the common law right at both the federal and state level does not appear to be wholly and irrefutably displaced. In situations where the state or Federal FOIA does not appear to address the plaintiff's claim to information, the common law is potentially available in theory. The question then becomes, assuming that a court does not find displacement of every permutation of the common law right to information, what purpose might the common law rights serve now that we have comprehensive state and Federal FOIA statutes?

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[249] *See* cases cited, *supra* note 231.

As a preliminary note, most litigants may not want to use the common law right to access information because of its inherent limitations. In other words, the problems inherent in the common law doctrine that spurred the creation of FOIAs in the first place will make FOIA the better option in many situations.[250] For any public document reached by FOIA, unless an exemption is raised, a litigant need show no special interest and enjoys a powerful presumption of access. The burden is on the government to provide a legal argument that the requested documents trigger an exemption; otherwise, the individual has an uncontestable right. Further, the requester can go straight to the agency, avoiding costly litigation.

Litigants are likely to utilize the common law right only when: 1) a litigant wants to avoid FOIA backlogs or the procedural hurdles of FOIA requests, 2) a document arguably falls within a FOIA exemption, and the litigant wants to avoid the potentially government-favored exemptions,[251] or 3) state or Federal FOIAs simply do not address the record in question—such as where a state FOIA does not extend to a nonresident requester.

In terms of state FOIA statutes, many states have crafted statutes with notable restrictions or limited rights. This creates a narrow, but important, class of cases where the common law right remains essential. For example, states like Alabama and Arkansas only allow certain individuals to use the FOIA[252], or have artificially narrowed the types of documents that can be sought.[253] Virginia's restriction of its FOIA statute to its own residents was recently upheld and will potentially spur additional restrictions in similar veins.[254]

In these cases, a persuasive argument can be made that the legislature has not addressed these claims and that the common law right still exists given that the legislature has only regulated a specific group of individuals or claims. Some may argue that these legislatures meant to foreclose access altogether in any situation not reached by a FOIA statute. However, this is unlikely in light of the profound public access principles commonly espoused by courts and legislatures.[255] More likely, these legislatures only meant for the default presumption for access to be afforded to the litigants and the types of documents described in the FOIA statutes and that other

[250] *See infra* Part V.
[251] *See* Nowadzky, *supra* note 162, at 70.
[252] *See* Nowadzky, *supra* note 162, at 76–77.
[253] *See* Nowadzky, *supra* note 162, at 80, 86–91.
[254] *See* McBurney v. Young, 133 S.Ct. 1709, 1720 (2013).
[255] *See infra* Part II.B.

cases should proceed according to the more factually-intense common law right analysis.

This view is bolstered by the many cases and legislative declarations stating that the common law and state FOIA statutes were meant to work in tandem.[256] As explained above, courts may be comfortable with coexistence, giving litigants the option of what tool to use depending on the situation. Where a litigant would prefer FOIA's default presumption of disclosure and clear exemption, she can file a FOIA request; where a litigant requires a careful balancing of interests—her own and the government's—the common law right is available.

To the extent that states indeed see the value of a common law right to information playing a gap-filler role; it would behoove state legislatures to enact safe-harbor language as some legislatures have already done.[257] The displacement doctrine is a judicially created doctrine which presumes congressional intent from a legislature's statutes. A court would have trouble finding displacement where a legislature has specifically announced its intent to preserve the common law right.

Litigants in state courts are likely to resort to their state FOIA. State FOIAs are set up to be user-friendly, give requesters powerful default presumptions of access, and the process is streamlined with less court involvement and discretion to get mired in during litigation. However, for situations where exemptions are likely to be triggered, the litigant may be able to ask the court for a factual balancing of interests, rather than resorting to the minimal-government-interest standard most state FOIAs employ—although courts may end up finding the common law displaced in these situations. It remains unclear.

The Federal FOIA is a different matter. Many courts have already found the federal common law right to be foreclosed. As discussed in Section IV.A, the federal common law is narrowly construed, and where Congress regulates in the vicinity of a common law doctrine, courts err on the side of displacement. However, these courts have also been ruling on specific factual scenarios where an exemption was clearly triggered and thus it was clear the legislature was regulating in the area. It may be that individuals would be capable of using the common law right to compel disclosure where an exemption is not triggered—for example, to avoid FOIA's procedural hurdles and backlogs. Courts could find that the mechanisms for disclosure created by the Federal FOIA displace as easily as the exemptions,

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[256] *See* S. Jersey Publ'g Co. Inc. v. N.J. Expressway Auth., 591 A.2d 921, 927 (N.J. 1991).

[257] *See* statutes cited *supra* note 248.

but courts have not been faced with this scenario, so it remains unclear. Also worth noting, requesters may have better luck arguing against displacement where a requester seeks documents from the legislative branch which is not addressed by the Federal FOIA.

Litigants could make the same arguments against displacement in the federal context as the state context, but displacement is more likely at the federal level and thus the risk of losing is severe. A litigant could argue that Congress has not regulated special need cases in passing the Federal FOIA. The Federal FOIA operates like an on-off switch as to specific documents, either every member of the public gets access, or every member is foreclosed. [258] For a special situation where someone shows a powerful need for information, courts may be persuaded that the legislature has not yet addressed the issue. Courts could issue protection orders or utilize other mechanisms to ensure that, for example, confidential information was not publically released—but still compel disclosure because of a special need for access to the information. Importantly, the common law right considers the individual interests in question. This makes it more likely that FOIA—which concerns public interests—is distinct from an individual's right to public documents flowing, at least in part, from a proprietary interest in the information.[259]

VI. CONCLUSION

Under federal law, where a FOIA exemption is likely to be triggered, the common law right to information may not provide assistance to those seeking access to information. The limited nature of federal common law coupled with the direct congressional regulation of the specific claims at issue make displacement almost certain.

Courts have not been faced with a situation where an exemption was not triggered and a requester attempted to use the Federal FOIA to avoid procedural backlog or other hurdles. A court may have a harder time finding displacement where an exemption is not at play, and thus Congress arguably did not intend to regulate the area. But it may be that this is a meritless option, even if it were allowed by a court. Requesters can seek documents under the Federal FOIA without even filing a lawsuit, they can seek statutory

[258] *See supra* Part II.A; Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004) ("Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.").

[259] It should be noted that the public interest in disclosure and open government is clearly still an important element of common law right jurisprudence.

attorney's fees which make paying for information easier, and when no exemption is triggered there is a strong presumption favoring requestors with a heavy burden on the government to defeat the request. Moreover, where individuals need information from the legislative or judicial branch the common law right remains a robust option.

Under state law, a common law right claim is more widely available. Some courts may find displacement, but many courts are likely to allow a common law right claim to go forward by recognizing that the FOIAs and the common law right are coextensive and alternative tools for seeking information access. The difference may be irrelevant in many states, because courts either consider the legislature's statutory intent in the common law weighing, or because the state FOIAs already envision a balancing process that weighs individual party interests. However, where a requester has a special need for information which is not considered under a state's FOIA, the common law right—and the accompanying interest balancing test—may be a requester's only chance of access.