WHEN SECRECY TRUMPS TRANSPARENCY: WHY THE OPEN GOVERNMENT ACT OF 2007 FALLS SHORT

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I. INTRODUCTION

On December 31, 2007, President George W. Bush signed the OPEN Government Act of 2007 into law.[1] The legislation amends the Freedom of Information Act ("FOIA"),[2] which has been significantly revised several times since its enactment in 1966.[3] Congress last amended FOIA in 1996, at which time lawmakers clarified that government records in all forms—including computer databases and any other digital or electronic formats—are subject to the disclosure requirements of FOIA.[4]

The OPEN Government Act enhances public and press access to government-held information in several important procedural ways. Briefly, provisions under the 2007 amendments: (1) strengthen and speed agency compliance with FOIA requests;[5] (2) establish tracking numbers for each FOIA request so that users can follow the progress of their requests online;[6] (3) identify agencies that reject requests for capricious and arbitrary reasons;[7] (4) re-

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1 Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, Pub. L. No. 110-175 (2007).

2 Freedom of Information Act, 5 U.S.C. § 552 (2000).

3 *See* Pub. L. No. 89-487, 80 Stat. 250 (1966); Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 94-409, 90 Stat. 1241 (1976); Pub. L. No. 99-570, 100 Stat. 3207 (1986); Pub. L. No. 104-231, 110 Stat. 3048 (1996).

4 110 Stat. at 3049.

5 *See* OPEN Government Act §§ 4, 6–8.

6 *Id.* § 7.

7 *See id.* § 5.

quire FOIA compliance of any private-sector companies or other entities with government contracts;[8] and (5) award litigation costs to FOIA requesters whose requests are refused and who subsequently prevail in a lawsuit against the government to release the records.[9] These amendments represent significant procedural improvements and take an important step toward greater government transparency. However, the amendments fail to address systemic obstacles to a transparent government that have developed since the last significant overhaul of the statute in 1974.[10]

The Supreme Court of the United States has granted the Central Intelligence Agency ("CIA") a near-total exemption to FOIA, giving the CIA sweeping powers to sidestep strict classification procedures, to withhold unclassified and declassified information, and to avoid de novo judicial review of CIA decisions to withhold information.[11] As a result, the CIA has broad and unreviewable discretion to withhold files, records, and documents that the Agency contends may contain sensitive, though unclassified, information.[12]

In addition, the Supreme Court has expanded FOIA's privacy exemptions[13] to the extent that government agencies may withhold records simply on the grounds that a record contains identifying information regarding an individual.[14] Under this Court-crafted FOIA privacy rationale, an agency can refuse to release information simply because that disclosure could lead to an unwarranted invasion of privacy of the individual identified in the record—even if the privacy interest is minimal. In its latest FOIA privacy opinion, the Court held that when a FOIA requester seeks information for the stated purpose of investigating government malfeasance—and a federal agency subsequently raises a privacy exemption to justify nondisclosure of a record—the requester must provide evidence of wrongdoing in advance to overcome the Court-crafted privacy protection standard.[15]

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8 *See id.* § 9.

9 *Id.* § 4.

10 *See* Pub. L. No. 93-502, 88 Stat. 1561 (1974).

11 *See* CIA v. Sims, 471 U.S. 159 (1985).

12 *See id.* at 182–90 (Marshall, J., concurring); *see also* Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies*, 17 STAN. L. & POL'Y REV. 353, 355–56 (2006) (detailing the effects of the *Sims* holding on CIA secrecy).

13 *See* 5 U.S.C. § 552(b)(6) (2000) (safeguarding personal information contained in personnel, medical, and similar files); *id.* § 552(b)(7)(C) (protecting private information contained in law enforcement records).

14 *See* Dep't of State v. Washington Post Co., 456 U.S. 595, 600–01 (1982) (holding unanimously that even a minimal individual privacy interest is sufficient to trigger personal privacy Exemption 6 (Personal Privacy), and a file need not contain highly intimate personal information to be withheld).

15 *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004) ("Where there is a privacy interest protected by Exemption 7(C) [Law Enforcement] and the public interest being asserted is to show that responsible officials acted negligently or otherwise

By granting the CIA a near-total exemption from FOIA and by expanding FOIA's privacy exemptions, the Supreme Court has gradually but severely narrowed the scope of government agency accountability by reducing FOIA's public interest standard in disclosure while expanding government interests in secrecy.[16]

This article demonstrates the vital need for Congress to reevaluate FOIA's core premises, and to provide legislative remedies needed to correct FOIA's current shortcomings. Part II examines the historical events and legislative history leading to the enactment of the Freedom of Information Act of 1966. Part III discusses the FOIA ratification fight that led to the crafting of the Act's exemptions. Part IV analyzes the amendments to FOIA, culminating with the OPEN Government Act of 2007. Finally, Part V identifies how the Supreme Court's current interpretation of the national security and personal privacy exemptions obstructs the American public's right to know "what their government is up to."[17]

II. THE RATIONALE BEHIND THE FREEDOM OF INFORMATION ACT

A. Fostering and Preserving Democracy

Congress passed the Freedom of Information Act of 1966 to make public the activities and processes of the federal government's approximately one hundred federal agencies and departments.[18] The scope of information that the agencies collect is wide and diverse. Such information ranges from Federal Bureau of Investigation ("FBI") compilations of criminal activities by organized-crime figures with ties to government contractors,[19] to United States Census Bureau statistics revealing zip codes with the highest and lowest per capita household incomes in the nation.[20] FOIA requesters are equally varied and include journalists, attorneys, private individuals, private detectives, public interest groups, prison inmates, small businesses, large corporations, and ad-

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improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure.").

16 *See, e.g., id.* (limiting access to police records where privacy exemption standards are satisfied); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (denying third-party access to an Federal Bureau of Investigation rap sheet under the privacy exemption); *Sims*, 471 U.S. 159 (allowing the CIA to refrain from disclosing the identity of individuals and institutions conducting research for the CIA).

17 *Reporters Comm.,* 489 U.S. at 773.

18 Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250.

19 *See Reporters Comm.,* 489 U.S. at 757.

20 *See* Assembly of the State of Calif. v. Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992) (allowing the State Assembly to access computer tapes containing census statistics).

vocacy organizations as ideologically disparate as the environmental organization Greenpeace[21] and the conservative watchdog group Judicial Watch.[22] As it has often been said, FOIA is available to "scholars" and "scoundrels" alike.[23]

FOIA creates a judicially enforceable public right of access to the vast storehouses of information gathered by the federal government in all forms and formats.[24] It reflects a "general philosophy of full agency disclosure," limiting agency discretion over whether information may be released to the public.[25] FOIA grants the public a right to examine the records held by the roughly eighty federal administrative and regulatory agencies such as the Federal Emergency Management Agency and the Federal Communications Commission, as well as the fifteen executive branch departments, including the President's cabinet offices.[26] FOIA also applies to cabinet subdepartments, such as the Census Bureau in the Department of Commerce, and all federal government controlled corporations, such as mortgage insurers Fannie Mae and Freddie Mac, which are overseen by the Department of Housing and Urban Development.[27] FOIA does not, however, apply to records held by Congress, state or local governments, the courts, or private individuals.[28] Nor does it apply to the President, the personal staff of the President, nor those whose sole function is to advise and assist the President, such as the Council of Economic Advisors.[29] Additionally, it further requires that the government make public certain information without a request. For example, agencies must publish in the *Federal Register* any organizational descriptions or procedural rules.[30] Other records, such as final agency opinions, must be made available in public reading rooms.[31]

Under FOIA, "any person" can request a record, and a requester is not required to provide a purpose for which the record is being requested.[32] The term "record" has been defined broadly to include reports, e-mails, letters, manuals, photos, films, and sound recordings.[33] These materials can be in any form or

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21 *See* Knight v. CIA, 872 F.2d 660 (5th Cir. 1989) (explaining that Knight brought this case in order to obtain information from the CIA regarding the sinking of a Greenpeace vessel).

22 *See* Judicial Watch, Inc. v. Dep't of Energy, 412 F.3d 125 (D.C. Cir. 2005).

23 Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986).

24 *See* 5 U.S.C. § 552 (2000).

25 S. REP. NO. 89-813, at 38 (1965).

26 U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 32–36 (2004) [hereinafter FOIA GUIDE].

27 *Id.* at 32 n.5.

28 *Id.* at 32–35.

29 *Id.* at 35 & n.12.

30 *See* 5 U.S.C. § 552(a)(1).

31 *See* 5 U.S.C. § 552(a)(2).

32 FOIA GUIDE, *supra* note 26, at 44, 46.

33 44 U.S.C. § 3301 (2000).

format, including digital and computerized files.[34] Furthermore, FOIA places the burden on the government to explain its decisions refusing disclosure.[35]

The chief rationale behind FOIA is that without public access to government-held information, the nation and the body politic would be deprived of information that is vitally important to evaluate the performance of government agencies.[36] FOIA also holds accountable the officials and bureaucrats who conduct the nation's business.[37] For example, government information can reveal government plans (or a lack of plans) in the event of widespread natural disasters; reports that disclose how the government intends to ensure energy sources for future generations; and updates on the government's progress in keeping American cities safe from terrorist attacks. In the decades since its enactment, FOIA has been used, among other things, to disclose corruption, waste, and fraud in the federal government, and to identify serious health hazards, unsafe drugs, and dangerous consumer products.[38]

The exhaustive legislative history of FOIA[39] makes clear that preserving and fostering democratic principles lays at the heart of the statute. The general public must have a judicially enforceable right of access to government-held information so that they may hold accountable those who govern them, from high ranking officials to lower level bureaucrats. As one of FOIA's principal drafters declared, "[p]ublic business is the public's business."[40]

It is also clear, however, that tensions may arise when the public's right to obtain government-held information conflicts with other societal concerns, such as the government's needs to protect national security, law enforcement investigations, and trade secrets. In such instances, there may be a legitimate reason to keep information on government activities confidential, at least for a time. For example, disclosure of imminent battle plans may endanger the lives

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34 5 U.S.C. § 552(f)(2).

35 5 U.S.C. § 552(a)(4)(B).

36 *See* H.R. REP. NO. 104-795, at 6–7 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3449–50.

37 *Id.*

38 Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, § 2(a)(3), (4), 110 Stat. 3048, 3048.

39 *See* H. REP. No. 89-1497 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418; S. REP. No. 89-813 (1965); H.R. REP. No. 93-1380 (1974) (Conf. Rep.); H.R. REP. No. 94-880 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2183; H.R. REP. No. 104-795, *as reprinted in* 1996 U.S.C.C.A.N. 3448.

40 HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS, xiii (1953). Harold L. Cross was counsel to the American Society of Newspaper Editors and a legal adviser to the subcommittees for the Government Operations Committee, which was responsible for drafting the FOIA bill. First Amendment Center, Harold L. Cross Biography, http://www.firstamendmentcenter.org//biography.aspx?name=cross&SearchString='Harold_L._Cross' (last visited Apr. 16, 2008).

of military personnel and undermine a war effort. Government records that enhance the accountability of law enforcement agencies can also, if disclosed, endanger the safety and lives of law enforcement personnel and their families, undercover informants, and witnesses. The safety and lives of covert intelligence agents and their sources may also be jeopardized by disclosures of certain information. Resolving the challenges posed by such tension lies in striking a workable balance that protects legitimate confidentiality interests, yet also places emphasis on full disclosure.[41]

B. A General Philosophy of Full Disclosure

FOIA's legislative history repeatedly emphasizes that the law was intended to provide the fullest disclosure possible.[42] FOIA lawmakers observed that tensions among competing values are characteristic of a democratic society and must be resolved by a balancing of interests: "[a]t the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files."[43] Hence, Congress created nine FOIA exemptions to establish certain categories of information that agencies may withhold from the public.[44] These enumerated exemptions provide the only bases for nondisclosure under the statute. They are discretionary and they are to be narrowly interpreted by agencies and the courts.[45]

Prior to FOIA's enactment, the public had no recourse when the government denied access to public records.[46] The first recorded condemnations of federal agency secrecy and demands for reform came from the American legal establishment more than thirty years before Congress enacted FOIA.[47] The American Bar Association ("ABA") complained that there were no requirements, statutory or otherwise, for providing and enforcing public disclosure of agency rules, agency operations, and decision making procedures. According to its 1934 report on administrative law, federal agencies promulgated thousands of complex rules and regulations, often complicated by supplements and frequent amendments.[48] Some administrative orders were made known weeks or months

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41 S. REP. No. 89-813, at 38.

42 *See supra* note 39.

43 S. REP. No. 89-813, at 38.

44 5 U.S.C. § 552(b)(1)–(9) (2000); *see also infra* tbl. 1.

45 H.R. REP. No. 93-1380, at 228–29 (1974) (Conf. Rep.); *see also* Chrysler v. Brown, 441 U.S. 281, 293 (1979).

46 *See* CROSS, *supra* note 40, at 197.

47 *See* Erwin Griswold, *Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation,* 48 HARV. L. REV. 198, 198–200 (1934).

48 *Report of the Special Committee on Administrative Law, in* 59 REPS. OF AM. B. ASS'N 539, 553–54 (1934).

after being implemented and were poorly organized, making public examination difficult.[49] President Franklin D. Roosevelt responded to the ABA's criticism by forming a committee headed by the United States Attorney General's Office to examine administrative agency procedures and recommend reforms.[50] However, its work was suddenly interrupted when the United States entered World War II.

After the end of World War II, the public was hungry for information about world events that were both astonishing and alarming. The threat of nuclear war became a feared reality. Communism swept far beyond the Soviet Union's borders and sped its ascendancy into China. The Cold War chilled international relations, and a new conflict loomed in Korea. In response to these events, the United States government increasingly shrouded its agency processes from public inspection. In 1947, famed constitutional scholar and civil libertarian Zechariah Chafee, Jr., observed that while "state secrets are nothing new," government secrecy continued to grow and was becoming "a more and more serious danger."[51]

Angry over growing government secrecy, news producers launched a campaign for the public's "right to know."[52] At the head of the media's right to know phalanx were the Associated Press Managing Editors Association, the Radio-Television News Directors Association, and the Society of Professional Journalists (then known as Sigma Delta Chi).[53] Knight Newspapers Executive Editor Basil L. Walters declared in 1950 that "all public records belong to the people; that officials are merely the servants of the people; that newspapers are the eyes of the people, keeping the eternal spotlight on officials and on public records."[54] The news media gained the support of reform-minded members of Congress along with a broad public coalition that included the nation's legal establishment, and a host of public interest and consumer groups.[55]

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49 *See id.* at 554.

50 McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON & ORG. 180, 197 (1999).

51 1 ZECHARIAH CHAFEE JR., GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS 13 (1947).

52 The phrase "right to know," was coined by Associated Press Executive Director Kent Cooper in 1945 when he stated that "[t]here cannot be political freedom in one country, or in the world, without respect for 'the right to know.'" N.Y. TIMES, Jan. 23, 1945, at 18.

53 *See generally* CROSS, *supra* note 40.

54 American Society of Newspaper Editors, *Newspapers Awake to Constant Threat to Press Freedom*, THE BULL., Feb. 1, 1950, at 2.

55 *See* Welford v. Hardin, 315 F. Supp. 768, 769–70 (D.D.C. 1970) (noting that consumer groups, which were among FOIA's early users, strongly supported FOIA because it allowed access to research findings given to agencies by government-regulated businesses and industries, such as data regarding the use of pesticides, which was first made public after researchers sued the government to obtain the information); *see also* Consumers Union of U.S. v. Veterans Admin., 301 F. Supp. 796, 798, 808–09 (S.D.N.Y. 1969) (describing

In an effort to appease the media and the longtime grievances of the ABA,[56] Congress passed the Administrative Procedure Act ("APA") in 1946.[57] However, this legislation quickly proved to be an inadequate tool to foster transparency. The stated purpose of the APA was to establish procedures among the myriad federal agencies, which prior to the act made their own rules and regulations for releasing information to the public.[58] In particular, the APA included a public information provision specifically intended to provide access to "matters of official record" held by government agencies.[59] As Senate Report 752 noted, "[a]dministrative operations and procedures are public property [that] the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance."[60]

In practice, however, the APA contained numerous caveats and loopholes that federal agencies routinely exploited to block public access to their records. For example, the APA gave agencies the discretion to withhold documents as "confidential for good cause found," but the law provided no definition for this vague phrase.[61] Section 3 also allowed the government to withhold any information "requiring secrecy in the public interest," but there were no guidelines as to what would qualify as a public interest standard.[62] Perhaps the greatest obstacle to disclosure was the section 3 rule that requesters of information were required to be "properly and directly concerned" with the information sought.[63] This phrase permitted agencies to deny access to persons requesting information if the information did not pertain specifically to the requesters themselves.[64] This restriction thus blocked third parties, such as journalists, attorneys, public interest groups, scientists, and historians, from obtaining government records. The Department of Justice, which was charged by Congress with enforcing APA compliance, not only failed to exercise oversight but also engaged in "gross, clear, flagrant and continued violations" of section 3.[65]

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how the Consumers Union used FOIA to obtain hearing aid testing results from the Veterans Administration).

[56] *See* Robert O. Blanchard, *The Freedom of Information Act—disappointment and hope,* COLUM. JOURNALISM REV., Fall 1967, at 17.

[57] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

[58] S. REP. No. 79-752, at 7 (1945).

[59] *Id.* at 13.

[60] *Id.* at 12.

[61] Administrative Procedure Act § 3.

[62] *Id.*

[63] *Id.*

[64] H. REP. No. 89-1497, at 27 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2423. For example, the Postmaster General declared in 1959 that "the public was not 'properly and directly concerned' in knowing the names and salaries of postal employees." *Id.*

[65] *S. 1160, S. 1336, S. 1798, and S. 1879; Bills to Amend the Administrative Procedure Act and for Other Purposes: Hearings Before the Subcomm. on Admin. Practice and Proce-*

Against the backdrop of this flawed public access statute and mounting global unease, government secrecy expanded further. In 1951, President Harry S. Truman issued Executive Order 10,290, which for the first time allowed nonmilitary civilian agencies to classify information.[66] According to Truman, the press had disclosed ninety-five percent of the nation's secret information and therefore, this order was necessary to protect American interests abroad.[67] The Truman order prescribed "regulations establishing minimum standards for the classification, transmission, and handling, by departments and agencies of the Executive Branch, of official information which requires safeguarding in the interest of the security of the United States."[68] It was a sweeping decree, applying to all federal agencies and departments and granting bureaucrats unreviewable authority to withhold government information.[69] The order authorized nonmilitary agency bureaucrats to stamp materials "Top Secret," "Secret," "Confidential," and "Restricted" without defining these categories.[70] Moreover, there was no system to review or appeal the classifying decisions.

C. An Angry Press Responds

The media's response was swift, led by the most celebrated broadcast journalist of that era, Edward R. Murrow. Murrow told his broadcast audience that Truman's order extended secrecy "into vast areas where, by no stretch of the imagination would legitimate security interests be involved."[71] A *Wall Street Journal* editorial declared that a "free government lives on the freedom of the people to know what their government is doing. There are risks in this, of course, but they are not near so great as the risks we run if government . . . deprive[s] the people of the freedom to know [what] they are doing."[72]

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dure of the S. Comm. on the Judiciary, 89th Cong. 144 (1965) (statement of Kenneth Culp Davis, University of Chicago law professor and consultant to the Moss subcommittee). Congress eventually acknowledged that the statute was "full of loopholes which allow[ed] agencies to deny legitimate information to the public." S. REP. No. 89-813, at 38 (1965). The United States Supreme Court criticized the APA for being "plagued with vague phrases," and providing "no remedy for wrongful withholding of information." EPA v. Mink, 410 U.S. 73, 79 (1973).

66 Exec. Order No. 10,290, 3 C.F.R. 471, 472 (1952). Previously, Roosevelt issued an order establishing classification rules for the military only. *See* Exec. Order No. 8,381, 3 C.F.R. 117, 117–18 (1940).

67 *See When Mr. Truman Sounded off on Responsibilities of the Press*, EDITOR & PUBLISHER, Oct. 13, 1951, at 7, 62. For example, Truman cited a map published in *Fortune* magazine that depicted the locations of nuclear research plants, even though the Department of Defense had not approved its publication. *Id.*

68 Exec. Order No. 10,290, 3 C.F.R. at 471–72.

69 *See* CROSS, *supra* note 40, at 206.

70 Exec. Order No. 10,290, 3 C.F.R. at 474–75.

71 A.M. SPERBER, MURROW: HIS LIFE AND TIMES 360 (1986).

72 *The Freedom of Ignorance*, Editorial, WALL ST. J., Sept. 27, 1951, at A6.

James S. Pope, chairman of the American Society of Newspaper Editors Freedom of Information Committee, commissioned a study on secrecy within the federal and state governments.[73] Pope asked one of the nation's top newspaper lawyers, Harold L. Cross, to conduct the report.[74] In his resultant report, Cross detailed the extent to which the federal and state governments routinely denied public requests for access to information.[75] He characterized federal agencies as an "official cult of secrecy" that used "tortured interpretation[s] of acts of Congress" to justify withholding public records.[76] Cross attributed the "heavy increase of secrecy"[77] to an attitude among federal bureaucrats that records were "quasi-confidential, privileged communications."[78]

The Cross study identified two major legal hurdles that obstructed public access to federal agency records. The first was the loophole-riddled section 3 of the APA.[79] The second was an arcane 1789 law known as the Housekeeping Statute, which granted agencies the authority to store and use records.[80] Agencies contended that this obscure law also granted bureaucrats the power to establish their own rules for disclosure.[81] Agencies successfully cited the phrase "custody, use and preservation" of records as their authority to justify withholding government information.[82] Pope called the Housekeeping Statute the "fountainhead of secrecy" in administrative agencies.[83] The study provided the government reform movement with a specific goal—amending the APA and the Housekeeping Statute.[84]

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73 *See* CROSS, *supra* note 40, at viii–ix.

74 *See id.* at viii.

75 *See id.* at viii–ix.

76 *Id.* at 246.

77 *Id.* at 9.

78 *Id.* at 198 (conceding that executive records are "quasi-confidential," but arguing that selection of information that the public has some right to know has become an "official right").

79 *See supra* notes 61–63 and accompanying text.

80 The Housekeeping Statute provides that:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it.

5 U.S.C. § 301 (2000); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 486 n.81 (2002) ("The Housekeeping Act consolidated into one place various housekeeping powers that had been conferred on department heads in prior acts.").

81 *See* H.R. REP. No. 89-1497, at 23–24 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2419–20.

82 *See* CROSS, *supra* note 40, at 216.

83 James S. Pope, *The Cult of Secrecy*, NIEMAN REPORTS, Oct. 1951, at 9.

84 H. REP. No. 89-1497, at 23, *as reprinted in* 1966 U.S.C.C.A.N. at 2419 (noting that Cross also identified the "executive privilege concept" as in need of reform).

The congressional campaign for agency transparency was led by Representative John E. Moss (D-CA). In 1955, Moss launched a formal House investigation into agency secrecy.[85] He capitalized on the momentum created that year when the Hoover Commission[86] released a blistering condemnation of government secrecy and called for reform of the APA.[87] The House then formed the Special Government Information Subcommittee in 1955, and Moss, who by then had emerged as one of the leading congressional critics of agency secrecy, was appointed its chairman.[88] From November 1955 through April 1959, the subcommittee "held 173 public hearings and investigations and issued seventeen volumes of hearings transcripts and fourteen volumes of reports."[89] The first action taken by the subcommittee was to remove the vaguely worded provisions in section 3 of the APA, which permitted agencies to deny records if requested materials were "confidential for good cause found," required "secrecy in the public interest," or were not "properly and directly" concerning the requestor.[90] Meanwhile, a Senate bill to amend the APA was introduced by Senator Thomas Hennings (D-MO), an early supporter of information policy reform and Moss's counterpart in the Senate.[91]

Routinely, advocates for reform faced resistance from both federal agencies and witnesses who testified at hearings and were hostile to the idea of amending the Housekeeping Statute and the APA. None of the agencies supported reform, arguing that the cost of implementing the legislation and bureaucratic requirements were disproportionate to the public benefit that the reform would provide.[92] Agency opposition was led principally by Representative Clare

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85 *See* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 172 (1998).

86 The First Commission on Organization of the Executive Branch of the Government was established in 1947 and chaired by former President Herbert C. Hoover. This Commission, commonly referred to as the Hoover Commission, "[s]tudied and investigated organization and methods of operation of the Executive branch of the Federal Government, and recommended organization changes to promote economy, efficiency, and improved service." The Nat'l Archives, Records of the Commissions on Organization of the Executive, http://www.archives.gov/research/guide-fed-records/groups/264.html (last visited Apr. 16, 2008).

87 *See* H.R. REP. No. 89-1497, at 23–24 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2419–20.

88 *See* MOYNIHAN, *supra* note 85, at 172 (explaining that Moss urged the creation of the subcommittee).

89 HELEN N. KRUGER, THE ACCESS TO FEDERAL RECORDS LAW 1 (1967).

90 *Id.* at 1–2.

91 103 CONG. REC. 7490 (1957).

92 *See* JAMES T. O'REILLY, 1 FEDERAL INFORMATION DISCLOSURE 12 (3d. ed. 2000). The State Department protested that fulfilling record requests would "impose a crushing burden upon the Department's personnel . . . ." STAFF OF S. COMM. ON THE JUDICIARY, 85TH CONG., A BILL TO AMEND THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 46 (Comm. Print 1959). The Department of Agriculture objected that it would be "unreasonable, extremely burdensome, and costly" to require agencies to publish their rules and

Hoffman (R-MI), who denied that agencies refused to disclose their activities to the public. Hoffman accused the Moss Committee of being the pawn of a power hungry and greedy newspaper industry and journalists who sought access to information for political purposes.[93] Hoffman argued that a federal open records law would allow journalists to obtain government information that they could use out of context and exploit in order to advance the political agendas of the media and journalists themselves.[94]

In 1958, Congress ended agency abuses of the 180 year-old Housekeeping Statute with a bill that made clear that the Housekeeping Statute did not grant agencies the power to withhold records from the public.[95] Still, government agencies stubbornly shrouded their activities from public view. For example, in 1962, the National Science Foundation ruled that it was not "in the public interest" to disclose cost estimates submitted by unsuccessful contractors in connection with a multi-million dollar deep sea study.[96] From 1962 to 1964, there were six failures by NASA to launch a moon probe spacecraft designed by the Jet Propulsion Laboratory—at a cost of $18 million each at the time—but investigative reports on what went wrong were kept secret.[97] And, during the height of the Cold War, the United States Navy refused to disclose why the U.S.S. Kitty Hawk was completed nearly two years behind schedule and forty-eight percent over the $120 million bid by the contractor.[98]

By 1963, prompted by frustration over agency and administration stonewalling, Congress decided to craft an entirely new federal open records law, rather than revise the loophole-riddled APA. Moss was appointed head of the new Foreign Operations and Government Information Subcommittee, which, among other objectives, was to complete the reform of the federal information

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orders in the *Federal Register*. *Id.* at 5. The Civil Service Commission complained that the law would "lead to endless controversy over our authority to withhold such records from public inspection and would create an intolerable situation . . . ." *Id.* at 10. The United States Postal Service contended that the statute would compel the Office to "open its files of pornographic material to all members of the public, including minors . . . ." *Id.* at 36.

93 H.R. REP. No. 85-1461, at 25–28 (1958).

94 *Availability of Information from Federal Departments and Agencies: Hearings Before the H. Comm. on Government Operations,* 84th Cong. 8 (1956) (statement of Clare Hoffman, Member, House Comm. on Gov't Operations).

95 *See* Pub. L. No. 85-619, 72 Stat. 547 (1958); *see also* H.R. REP. NO. 89-1497, at 23–24 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2419–20.

96 H.R. REP. No. 89-1497, at 26, *as reprinted in* 1966 U.S.C.C.A.N. at 2422. It was later discovered that the firm that won the lucrative contract was not the lowest bidder.

97 Associated Press, *Moss Battles 'Secrecy Curtain,'* CHRISTIAN SCIENCE MONITOR, May 11, 1964, at 3.

98 *Id.*

dissemination and access policy.[99] That year the precursor bill to FOIA, Senate Bill 1666, was introduced.[100]

III. ROUGH ROAD TO RATIFICATION

Predictably, Senate Bill 1666 was met with strong opposition from the federal agencies, led by the Department of Justice, which wanted the law revised to exempt several categories of information from disclosure.[101] The original version drafted by the Moss Committee contained only three exemptions: (1) information exempt by executive order for reasons of national defense; (2) information exempt by existing congressional statutes; and (3) information exempt by reason that, if disclosed, would be a clearly unwarranted invasion of personal privacy.[102] By the time the final bill moved through Congress, six additional exemptions were added as a result of often contentious negotiations between Congress and the Department of Justice.

The final version of FOIA, enacted in 1966, contained nine exemptions that shield from disclosure matters that are: (1) classified as national security information; (2) related to internal agency personnel information; (3) specifically exempted from disclosure by statute; (4) trade secrets and other confidential business and financial information; (5) inter- and intra-agency memoranda; (6) files involving personal privacy; (7) law enforcement investigation records; (8) reports from regulated financial institutions; and (9) geological data for oil and gas drilling.[103]

Table 1 – FOIA Exemptions

Exemption Number	Exemption Subject Matter
1	National Security
2	Agency Personnel
3	Existing Exemptions
4	Trade Secrets
5	Agency Memoranda
6	Personal Privacy
7	Law Enforcement
8	Financial Institutions
9	Geological Data

99 MOYNIHAN, *supra* note 85, at 172.
100 S. REP. NO. 88-1219 (1964).
101 *See id.* at 11.
102 110 CONG. REC. 17,668 (1964).
103 *See* 5 U.S.C. § 552(b)(1)–(9) (2000).

From the outset, the Moss committee recognized the need to protect defense information properly classified by Presidential Executive Order. This was evinced by the inclusion of an exemption to protect national security information in the original FOIA draft.[104] This protection was ultimately embodied in Exemption 1 (National Security).[105]

Executive branch concerns led to a number of demands for additional nondisclosure protections. For example, agencies pushed for Exemption 2 (Agency Personnel) to protect agencies from harassment regarding trivial internal matters of little public interest, such as employee work schedules and parking permits. These materials have been described more extensively in the legislative history to include procedural manuals for employees, operating rules, records used for internal housekeeping, and information pertaining to litigation in which the agency is a party.[106] The Supreme Court subsequently held that Exemption 2's general purpose is to "relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."[107]

The exemption stating that FOIA would not nullify any existing statutes was included in the first draft of the legislation to mollify agencies that opposed FOIA. Agencies feared that FOIA would override agency authority to withhold confidential information protected under already existing laws.[108] This protection became Exemption 3 (Existing Exemptions).

Exemption 4 (Trade Secrets) was included to protect the proprietary information of businesses and corporations by safeguarding matters pertaining to "trade secrets and commercial or financial information."[109] Federal agencies persuaded Congress that government-regulated businesses—such as drug manufacturers, food producers, and telecommunications firms—needed assurances that the proprietary and confidential business information they were required to submit to federal agencies would be protected.[110] Under Exemption

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104 110 CONG. REC. 17,666 (1964); *see also* Open Letter from Thomas C. Hennings, Jr., U.S. Senate, to the national press (Oct. 27, 1958) (on file with author) ("With another session of Congress just a few months away, it is time now to step up action against another improper secrecy practice . . . . the widespread misuse of the public information section of the Administrative Procedure Act as authority for keeping secret information about government operations which [do] not have the slightest connection with the requirements of national security, military operations, or justified personal privacy.").

105 5 U.S.C. § 552(b)(1).

106 H.R. REP. 89-1497, at 31 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427.

107 Dep't of Air Force v. Rose, 425 U.S. 352, 369–70 (1976).

108 *See* Robert O. Blanchard, *A History of the Federal Records Law*, UNIV. MO. COLUM. SCH. JOURNALISM, Nov. 1967, at 7.

109 Freedom on Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250, 251 (1966).

110 S. REP. NO. 88-1219, at 6 (1964).

4, FOIA would not apply to business information that would "customarily not be released to the public by the person from whom it was obtained."[111]

Agency decision making procedures themselves are shielded under Exemption 5 (Agency Memoranda). The legislative intent behind Exemption 5 was to protect the government by preventing litigants from using FOIA for discovery purposes.[112] This exemption protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[113] Hence, the exemption recognizes, and excludes from discovery, the three major common law privileges: (1) the attorney work-product privilege; (2) the attorney-client privilege; and (3) the deliberative-process privilege. The documents ordinarily covered by the deliberative-process privilege include pre-decisional advisory opinions, pre-decisional recommendations, and deliberations reflecting the decision making process.[114] Also protected are early drafts of final reports[115] and e-mails that are part of the agency deliberative process.[116] The exemption does not protect post-decisional reports and documents.

FOIA drafters themselves advocated for protection of personal privacy. As early as 1960, the committee agreed that an exemption protecting unwarranted invasions of privacy was necessary to avert potential abuses of the statute for political or personal reasons.[117] This exemption drew on the national experience of the Senator Joseph McCarthy hearings, which were still painfully fresh in the public mind.[118] During that tumultuous period, journalists justifiably feared they could lose their jobs if branded a Communist, regardless of whether the charge was true.[119] These concerns were ultimately embodied in Exemption 6 (Personal Privacy).

Initially, FOIA lawmakers did not see a need for Exemption 7 (Law Enforcement).[120] Instead, they asserted that adequate protections shielding sensi-

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111 *Id.* (including examples such as manufacturing processes, business sales information and data, workforce information, stock inventories, and customer lists).

112 H.R. REP. No. 89-1497, at 31, *as reprinted in* 1966 U.S.C.C.A.N. at 2427.

113 5 U.S.C. § 552(b)(5) (2000).

114 *See* FOIA GUIDE, *supra* note 26, at 391.

115 *See id.* at 392.

116 Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 482–83 (2d Cir. 1999).

117 *See 5 U.S.C. 1002 Discussed*, UNIV. MO. COLUM. SCH. JOURNALISM, Dec. 1960, at 3.

118 *See id.*

119 *See* MARGARET A. BLANCHARD, EXPORTING THE FIRST AMENDMENT: THE PRESS-GOVERNMENT CRUSADE OF 1945–1952, at 380–83 (1986).

120 Exemption 7 is the most detailed of the statutory exemptions. It contains six specific harms that could reasonably be expected to result from disclosure of a law enforcement record or document. The exemption shields from disclosure matters that are:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a

tive law enforcement files already existed under other federal and state statutes.[121] The Department of Justice successfully argued that unrestricted public access to law enforcement records, particularly pending investigations, could pose a threat to the safety and lives of witnesses and undercover informants.[122] Exemption 7 reflects Congress's efforts to balance the need for transparency of law enforcement operations to ensure accountability against the government's need to keep information confidential to safeguard effective investigations and prosecutions. In some instances, even closed case files can leave clues for criminals or their representatives, pointing to the identities of informants. As originally enacted in 1966, the exemption provided only that agencies were allowed to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."[123] After its enactment, courts broadly construed Exemption 7 as creating a virtual "blanket" exemption for all investigatory files, regardless of whether they concerned civil or criminal information, whether the requested law enforcement investigations were pending or closed, and whether disclosure could or would cause any harm. [124]

Exemption 8 (Financial Institutions) was designed to protect the interests of businesses regulated by federal agencies. It shields information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[125] Congress included this exemption at the insistence of the federal banking regulatory agencies, which argued that protections for financial institutions are necessary to safeguard the security of the banking industry.[126] Exemption 8 covers federal records containing information regard-

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person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (2000).

121 S. REP. NO. 88-1219, at 7 (1964). For example, the Jenks Act controls the timing of the release of discovery materials to the defense. 18 U.S.C. § 3500 (2000).

122 *See* Malizav v. U.S. Dept. of Justice, 519 F. Supp. 338, 349–50 (S.D.N.Y. 1981).

123 Pub. L. No. 89-487, 80 Stat. 250, 251 (1966).

124 FOIA GUIDE, *supra* note 26, at 499.

125 5 U.S.C. § 552(b)(8).

126 O'REILLY, *supra* note 92, at 253–54.

ing the operations of the nation's financial systems and their regulatory agencies, mainly the Federal Reserve System, the office of the Comptroller of the Currency, and the Federal Home Loan Bank Board.[127] Courts have interpreted Exemption 8 interests to also extend to nondepository institutions and to financial institution records held by an agency that does not regulate the institution.[128] Courts have upheld this exemption's broad application, reasoning that disclosure of bank examination reports "of any type" could erode public confidence in a financial institution.[129]

Finally, Exemption 9 (Geological Data) covers "geological and geophysical information and data, including maps, concerning wells."[130] This is the least often invoked exemption, which, according to its legislative history, was intended to protect independent prospectors as well as the established gas and oil industries against speculators.[131] Federal agencies contended that this protection was needed because seismic and geological exploration data, and scientific and technical information were not covered by Exemption 4's (Trade Secrets) "trade secret" and "confidential commercial information" categories.[132] According to leading FOIA authority James T. O'Reilly, Exemption 9 is the "most suspect" of FOIA's exemptions because its protection is already embodied in Exemption 4 (Trade Secrets).[133] Nonetheless, courts have interpreted Exemption 9 to extend a special category of confidentiality protection to such agencies as the Department of Interior's Bureau of Land Management, the Environmental Protection Agency, and the Federal Power Commission.[134]

FOIA's legislative history makes clear that its exemptions are to be narrowly construed, and, outside of these limited categories, "all citizens have a right to know."[135] Justice William Brennan, writing for the Supreme Court majority in one of the earliest FOIA opinions, observed that Congress enacted FOIA to "pierce the veil" of government secrecy so that the public can evaluate the government's performance and promote governmental accountability.[136] He also wrote that the statute's "basic purpose reflected 'a general philosophy of full agency disclosure'" unless information falls under one of the

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127 *Id.* at 253.

128 Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 293–94 (D.C. Cir. 1991).

129 Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978).

130 5 U.S.C. § 552(b)(9).

131 H.R. REP. NO. 89-1497, at 11 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2428–29.

132 *Id.*

133 O'REILLY, *supra* note 92, at 256.

134 *Id.* at 257.

135 S. REP. No. 89-813, at 41 (1965); *see also* Chrysler v. Brown, 441 U.S. 281, 293 (1979) ("Congress did not design the FOIA exceptions to be mandatory bars to disclosure.").

136 Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976).

nine exemptions.[137] Further, the Court held that the statutory exemptions are strictly limited and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[138]

The FOIA bill was approved by the Senate on October 13, 1965,[139] and passed by the House on June 20, 1966.[140] President Lyndon B. Johnson signed FOIA into law on July 4, 1966, despite overwhelming agency objections and his own misgivings.[141] When Johnson signed FOIA into law, he was enthusiastic, stating:

> This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.[142]

His reservations remained evident, however, in a strongly worded caveat he added to his signing statement regarding the prerogatives of executive privilege: "[T]his bill in no way impairs the President's powers under our Constitution to provide for confidentiality when the national interest so requires."[143]

Despite overwhelming congressional support and a unanimous vote by the House, FOIA's first few years were disappointing to the law's advocates. This was mainly due to the fact that many agencies failed to comply with the law because of deliberate evasion, ignorance of their responsibilities, or pressure from superiors.[144] Agencies used various ploys to discourage FOIA use: bureaucrats claimed they could not find documents;[145] long delays in responding to FOIA requests were commonplace;[146] agencies broadly interpreted the exemptions to justify withholding and denied requests on technicalities; and clerical research charges were often exorbitant, ranging from $3.00 to $7.00 per hour, making specialized access requests well beyond the reach of most individuals.[147] Ultimately, these tactics delayed compliance in those instances when agencies actually followed the law, and they raised costs beyond reasonable levels.

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137 *Id.* at 360–61 (quoting S. REP. NO. 89-813, at 38).

138 *Id.* at 361.

139 111 CONG. REC. 26,820–21 (1965).

140 112 CONG. REC. 13,661 (1966).

141 O'REILLY, *supra* note 92, at 15. In fact, it is a misconception that the date was selected for its symbolism. The actual reason the bill was signed on Independence Day is that it was scheduled to die on July 5. Johnson simply waited until the last possible moment, finally accepting that a veto would have been unpopular and politically unwise. *See id.*

142 Statement by the President Upon Signing the "Freedom of Information Act," 2 PUB. PAPERS 699 (July 4, 1966).

143 *Id.*

144 *See* H.R. REP. NO. 92-1419, at 15–17 (1972).

145 *Id.*

146 *Id.*

147 *Id.*

Although the Department of Justice was charged with overseeing agency compliance, there was virtually no oversight.[148] FOIA requesters who were denied records seldom sued because courts typically ruled in favor of agencies, thus reducing any incentive to pursue costly litigation.[149] As then-University of Chicago law professor and FOIA critic Antonin Scalia observed, FOIA was reduced to a "relatively toothless beast, sometimes kicked about shamelessly by the agencies."[150]

IV. AMENDING THE FREEDOM OF INFORMATION ACT

A. Overhauling a Flawed Statute

Congress shared the blame for the government's failures to comply with FOIA. Critics charged that the years of compromise and negotiation left FOIA ineffective largely as a result of vague or poor drafting that permitted agencies to interpret the exemptions broadly in order to justify withholding documents.[151] Critics called the statute's text "sketchy," "imprecise," and "ineffective."[152] In 1972, Congress acknowledged that the "efficient operation of the Freedom of Information Act has been hindered by five years of [agency] foot-dragging . . . [and] widespread reluctance of the bureaucracy to honor the public's legal right to know."[153] Lawmakers observed that these compliance problems created a particular problem for the press because "news is a perishable commodity."[154]

By 1974, the political climate was ideal for government reform and congressional amendments to strengthen FOIA. The public was stunned by revelations of corruption and widespread malfeasance in President Richard M. Nixon's administration.[155] Shocking accusations emerged not only from the

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148 *Id.* at 17.

149 *Id.*

150 Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG., Mar.–Apr. 1982, 14–15.

151 *See* H.R. REP. No. 92-1419, at 8–10; *see also* Victor H. Kramer & David B. Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49, 52 (1974) ("FOIA hardly represents the apogee of legislative draftsmanship.").

152 O'REILLY, *supra* note 92, at 20.

153 H.R. REP. No. 92-1419, at 8.

154 *Id.* at 9.

155 *See generally* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

news media, but also from government investigators and prosecutors in what came to be known as the Watergate scandal.[156]

Spurred by two years of strong public denunciations over the Watergate scandal, Congress passed a series of amendments to enhance FOIA's disclosure requirements.[157] Chief among these reforms were revisions to Exemption 1 (National Security)[158] and Exemption 7 (Law Enforcement)[159] because both contained overbroad language that led to arbitrary enforcement and made it possible for agencies to justify withholding decisions.

Exemption 1 (National Security), which pertains to information classified as secret, is the only FOIA exemption whose criteria are determined by the President and not by Congress.[160] Its original language stated only that FOIA did not apply to matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[161] Under this original language, the government was able to withhold material on the mere assertion that the material was classified.[162] In effect, agencies were the only arbiters of whether a requested document was actually classified according to presidential guidelines.[163] Congress revised Exemption 1 to permit de novo judicial review of purportedly classified information, allowing a judge to examine a document to confirm that the withheld information actually fell within proper classification guidelines as established by executive order.[164]

This congressionally imposed check on agency claims that requested information was classified came as a direct response to a 1973 Supreme Court FOIA decision that denied access to records on national security grounds.[165] Congress revised Exemption 1 (National Security) after the Court upheld an Environment Protection Agency decision not to release a report on a proposed

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156 *See generally* JOHN W. DEAN, BLIND AMBITION (1976); BARRY SUSSMAN, THE GREAT COVERUP: NIXON AND THE SCANDAL OF WATERGATE (1992).

157 For the twenty months that the 1974 FOIA amendments moved through the House and Senate, various congressional committees and a special prosecutor were investigating the Watergate political corruption scandal. Although the 1974 amendments were not developed as a direct response to the Watergate scandal, the amendments gained political momentum as the investigations deepened. *See supra* notes 155–56.

158 5 U.S.C. § 552(b)(1) (2000).

159 *Id.* § 552(b)(7).

160 *See id.* § 552(b)(1).

161 Freedom of Information Act of 1966, Pub. L. No. 89-487 § 3(e)(1), 80 Stat. 250, 251.

162 *See* H.R. REP. NO. 93-1380, at 228–29 (1974) (Conf. Rep.).

163 *See supra* note 70 and accompanying text.

164 *See* H.R. REP. No. 93-1380, at 229. Under Exemption 1's (National Security) revised language, judicial oversight is still strictly limited. A judge cannot challenge the classification standards adopted by a president; a judge can only determine whether the information was classified according to its content and whether proper procedure for classification was followed as set forth in an Executive Order. *Id.*

165 *See* EPA v. Mink, 410 U.S. 73, 84 (1973).

underground nuclear test off the Alaskan coast.[166] The Court held that classified documents were exempt from judicial review.[167] The Court accepted the government's argument that the assertion of classification in an affidavit was sufficient to justify withholding the documents from the public.[168] Justice Byron R. White, writing for the majority, explained that Exemption 1, as written, provided no oversight process to review whether proper procedure was used to classify a document.[169] Responding to this decision, Congress asserted that the Court's opinion contravened FOIA's legislative intent, and lawmakers revised national security Exemption 1 explicitly to nullify the *Mink* holding.[170]

In arguing for de novo review, Moss contended that there was no reason that judges should not review even sensitive matters of national security in light of the long history of agency secrecy.[171] He added that judges were not legally bound to accept a bureaucrat's affidavit, stating that "a particular document was properly classified and should remain secret."[172] Additionally, Senator Jacob Javits (R-NY) said that the 1974 Amendments reflected how the American public had come to expect more government openness and accountability on national security and foreign policy issues. Javits explained that "the whole movement of Government, especially in view of the Government's experience in Vietnam, Watergate, and many other directions . . . should be toward more openness rather than being toward more closed."[173]

In addition to establishing judicial review in a dispute involving Exemption 1 (National Security), Congress clarified that agencies may not refuse to disclose nonexempt information based upon the rationale that the requested in-

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166 *Id.* The report was requested by Representative Patsy Mink (D-HI) who wanted to examine the environmental impact statements contained in the report. The government refused to disclose the impact statements, contending that the report was classified "top secret" and, therefore, any material contained in the report was exempt from disclosure under Exemption 1 (National Security). *Id.* at 75–77. The government also cited Exemption 5 (Agency Memoranda) to defend its withholding decision. *Id.* at 85. The D.C. Circuit held that the national security exemption only allowed the executive branch to withhold those portions of the requested documents that were classified, not the entire record. *Id.* at 78. The D.C. Circuit remanded and directed the lower court to conduct an in camera review of the files to determine whether the specific information requested was not classified and could be released. *Id.*

167 *Id.* at 84.

168 *Id.* at 83–84.

169 *Id.* at 83 ("Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures . . . . But Exemption 1 does neither.").

170 *See* H.R. REP. No. 93-1380, at 229 (1974) (Conf. Rep.).

171 *See* STAFF OF H. COMM. ON GOVERNMENT OPERATIONS & STAFF OF S. COMM. ON THE JUDICIARY, 94TH CONG., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 257–58 (Comm. Print 1975).

172 *Id.*

173 *Id.* at 311.

formation is contained in a record that also includes classified or nonexempt information. Under this revised provision, an agency must separate and release any "reasonably segregable portion" of a record after deleting the exempt portions.[174]

Congress also amended Exemption 7 (Law Enforcement) in the 1974 amendments.[175] There were a variety of critics of Exemption 7 agency abuses, including news organizations, public interest groups such as Public Citizen,[176] and congressional law enforcement interests.[177] For example, Senator Edward Kennedy (D-MA), chair of the Senate FOIA Amendment hearings in 1974, referenced the stunning impact of the Watergate corruption scandal as one reason to strengthen FOIA.[178]

Exemption 7 (Law Enforcement) shielded "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."[179] The 1974 amendment narrowed the scope of Exemption 7 by creating six specific categories of harm that the government must prove to withhold information.[180] In its amended form, Exemption 7 required a two-step analysis. First, it must be determined whether the requested information qualified as "investigatory records compiled for law enforcement purposes."[181] Second, it must be determined whether disclosure threatened one of the six categories of harm.[182]

In a highly unusual off-the-bench comment, Chief Justice Earl Warren publicly denounced the argument that FOIA benefited only the news industry. He explained that "when we open up Government files and documents, we are not affording the press any preference, but . . . we are making available to all citi-

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174 Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 2(c), 88 Stat. 1561, 1564.

175 *Id.* § 2(b).

176 *See* About Public Citizen, http://www.citizen.org/about/ (last visited Apr. 16, 2008) ("Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts.").

177 O'REILLY, *supra* note 92, at 45 n.5.

178 *Id.* Commenting on the previous day's session of the Watergate Committee Hearings, Kennedy said:

> If yesterday's [Watergate] testimony . . . teaches us anything, it demonstrates beyond debate that Government secrecy breeds Government deceit . . . . High Government officials sat around in the Attorney General's office calmly discussing the commission of bugging and mugging and kidnapping and blackmail . . . . Federal officials who want their activities to remain hidden from public view are going to have to tell us why, and their reasons are going to have to be very convincing and very specific.

Id. (quoting *Executive Privilege: Hearing Before a Subcomm. of the S. Judiciary Comm and a Subcomm. of the S. Comm. On Gov't Operations*, 93d Cong. 209–10 (1973).

179 Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250, 251.

180 Freedom of Information Act Amendments of 1974 § 2(b).

181 *Id.; see also supra* note 123.

182 *Id.*

zens alike the opportunities to know what their Government is doing."[183] After a year of floor debates and private negotiations between congressional lawmakers and executive branch officials, Congress passed the 1974 amendments only to face a veto by President Gerald R. Ford.[184] Congress overwhelmingly overrode Ford's veto on a second vote, with the House voting 371–31 and the Senate voting 65–27.[185]

Two years later, Congress reiterated its broad disclosure policy when it amended Exemption 3 (Existing Exemptions).[186] As in 1974, Congress explicitly took this action to nullify a Supreme Court ruling that contravened FOIA's legislative intent.[187] In 1975, the Court upheld a Federal Aviation Administration ("FAA") ruling to reject a consumer-rights FOIA request for FAA reports on the operations and maintenance performance of commercial aircraft.[188] The FAA based its ruling on the Federal Aviation Administration Act of 1958, which granted the FAA Administrator the authority to determine the public interest in an FAA-held record.[189] The Court found that in light of the "continuing close scrutiny" by Congress, it must assume that Congress exercised informed judgment as to the needs of the FAA, and thus Exemption 3 permitted nondisclosure.[190]

Congress revised Exemption 3 (Existing Exemptions) by creating a two-part test to limit agency discretion to reject a FOIA request.[191] In its original 1966 language, Exemption 3 stated only that FOIA did not apply to matters "specifically exempted from disclosure by statute."[192] Congress amended this lan-

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183 120 CONG. REC. 8167 (1974) (speech by Chief Justice Earl Warren to the National Press Club regarding the 1974 amendments to FOIA).

184 Ford vetoed the legislation, arguing it was "unconstitutional and unworkable." He objected mainly to the in camera de novo judicial review power granted in the revised version of Exemption 1 (National Security). *See* Veto of Freedom of Information Act Amendments, 2 PUB. PAPERS 374–76 (Oct. 17, 1974).

185 120 CONG. REC. 36,633 & 36,882 (1974).

186 Freedom of Information Act Amendments of 1976, Pub. L. No. 94-409, 90 Stat. 1241, 1247.

187 *See* H.R. REP. NO. 94-880, at 23 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2183, 2205.

188 Adm'r, Fed. Aviation Admin. v. Robertson, 422 U.S. 255 (1975).

189 *Id.* at 266–67. The FAA withheld the information, asserting that the Federal Aviation Act of 1958 qualified as a withholding statute under Exemption 3. *Id.* at 257–58. The Court accepted the FAA's argument that the agency administrator possessed wide discretion to withhold requested government records if the administrator believed disclosure does not advance a public interest. *Id.* at 266–68. Congress decried the Court decision for misconceiving the intent of Exemption 3. A House report declared that the ruling gave an agency administrator "*cart[e] blanche* to withhold any information he pleases." H.R. REP. No. 94-880, at 23, *as reprinted in* 1976 U.S.C.C.A.N. at 2205.

190 *Robertson*, 422 U.S. at 267.

191 H.R. REP. No. 94-880, at 23, *as reprinted in* 1976 U.S.C.C.A.N. at 2205.

192 Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250.

guage to clarify that FOIA does not apply to matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[193]

In 1986, Exemption 7 (Law Enforcement) was modified for a second time.[194] This second round provided a victory for the Department of Justice, which had pressured Congress for nearly a decade to expand the scope of the law enforcement privilege.[195] First, the Department of Justice and the FBI wanted Congress to drop the term "investigatory records" and to replace it with the broader term "records or information."[196] This new language would permit withholding of information compiled for law enforcement purposes, regardless of whether the information was contained in an "investigatory record."[197] In 1982, the Court held that the term "investigatory record" referred to any document that "contains or essentially reproduces all or part of a record that was previously compiled for law enforcement reasons."[198] Hence, a document summarizing law enforcement information, or a compilation of law enforcement information, would qualify for Exemption 7 in the same manner as the original document, file, or record.

Second, the standard allowing agencies to withhold information under Exemption 7 was lowered, making it easier for the government to reject a FOIA request to protect law enforcement procedures. Under the 1974 amendment to Exemption 7, withholding was allowed if disclosure would result in a specified harm.[199] Under the revised 1986 standard, disclosure was permitted if a harm "could reasonably be expected" to result.[200] The 1986 changes "broadened the potential sweep of the exemption's coverage considerably."[201]

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193 Freedom of Information Act Amendments of 1976, Pub. L. No. 94-409, 90 Stat. 1241, 1247.

194 *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207–48.

195 *See* FOIA GUIDE, *supra* note 31, at 502–03 (noting that the Justice Department and other federal law enforcement agencies had persuaded Congress that the D.C. Circuit had so narrowed the field of protected police records that law enforcement was being impaired).

196 *Id.*

197 *Id.*

198 FBI v. Abramson, 456 U.S. 615, 624 (1982).

199 Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974).

200 Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-48, 3207-49.

201 FOIA GUIDE, *supra* note 26, at 503. On the pro-disclosure side of the ledger, Congress enhanced public access policy when legislators reduced charges to obtain records and broadened fee waivers. *See* Freedom of Information Reform Act of 1986 § 1803.

The FOIA amendments of 1974 and 1976 strengthened agency disclosure obligations and reiterated congressional intent for the broadest disclosure possible. But a new challenge to transparency, one that was unanticipated by FOIA's original drafters, was emerging in the 1970s. The era of computers and digital information technology was dawning.

B. The Electronic Freedom of Information Act

Government scientists began using the first electronic computer in November 1945.[202] Although analog computing machines and desktop calculators had been in use for years, World War II created a special need for complex mathematical ballistic computations.[203] The project began in 1942, but the computer was not completed until a few months after the Japanese surrendered, too late to use in the war.[204] In 1955, when congressional hearings began laying the foundation for FOIA, the federal government had only forty-five computers.[205] Ten years later, the computer inventory for the federal government grew to 1,826.[206]

By June 1971, the federal government operated roughly 6,000 computers with a hardware inventory valued at $23.2 billion.[207] The original text of FOIA made no mention of public access to computers or databases,[208] nor did the 1974 amendments.[209] However, some computer experts and technology scholars cautioned Congress of the potential information-access problems that lay ahead. During hearings regarding the 1974 FOIA amendments, Congress heard testimony that bureaucrats who controlled the government's computing systems would possess "an intimidating power to dismiss requests for computerized data as either non-feasible (no programs exist to retrieve such information), or too time-consuming and therefore too costly."[210]

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202 *See* MARTIN CAMPBELL-KELLY & WILLIAM ASPRAY, COMPUTER: A HISTORY OF THE INFORMATION MACHINE 96 (1996).

203 *See id.* at 81. Development of the atomic bomb was accomplished by use of pre-computer technology. *See id.* at 79.

204 *Id.* at 82, 96.

205 S. REP. NO. 104-272, at 8 (1996).

206 *Id.*

207 ALAN F. WESTIN & MICHAEL A. BAKER, DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY 29–30 (1972).

208 *See* Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250.

209 *See* Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561.

210 *Freedom of Information, Executive Privilege, Secrecy in Government: Hearings Before the Subcomm. On Administrative Practice and Procedure and Separation of Powers of the S. Comm. on the Judiciary and the Subcomm. On Intergovernmental Relations of the S. Comm. on Government Operations*, 93d Cong. 106 (1978) (statement of Harrison Wellford, Center for the Study of Responsive Law).

Indeed, critics accurately foresaw that agency officials would use digital technology and computerization to justify refusing FOIA requests. As early as 1976, agencies began denying FOIA requests for computerized information, contending that FOIA did not compel agencies to provide government information in databases,[211] or to disclose information in digital formats, such as floppy disks or, later, compact discs.[212] Some agencies disclosed requested information, but provided it only in the form of a printout, refusing to provide the FOIA requester with an electronic version of that record.[213]

Because FOIA did not establish an explicit right of public access to electronic data, such policies were made by judges on a case-by-case basis. The case law was inconsistent and tended to favor government decisions to deny access. Although some courts held that computer data may be subject to FOIA,[214] courts also ruled that the government was not obligated to provide citizens with electronic versions of public records[215] or to program computers to compile information in order to fulfill a FOIA request.[216]

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[211] *See, e.g.,* SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) (holding that computer documents in the National Library of Medicine need not be made available to the public under FOIA); Baizer v. U.S. Dep't of the Air Force, 887 F. Supp. 225 (N.D. Cal. 1995) (holding that a government computer database containing United States Supreme Court decisions need not be made available to the public under FOIA as it is considered library reference material and not "agency records").

[212] *See* Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin & Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 559–60 (1993) (discussing the practice of gaining public access to computerized government records).

[213] *See* Dismukes v. Dep't of the Interior, 603 F. Supp. 760 (D.D.C. 1984). For example, the Cox newspapers national news service requested an inventory of nonmilitary government aircraft from the General Service Administration ("GSA"). The GSA refused to release the database and instead dumped thousands of pages of documents on the news service, many of which included indecipherable computer language. It was only after Cox sued the GSA in federal court—a costly option that most individuals could not afford on their own—that the agency released the electronic version of the records. *See H.R. 1281, War Crimes Disclosure Act, Health Information Privacy Protection Act, and S. 1090, Electronic Freedom of Information Improvement Act of 1995: Hearing on H.R. 1281 and S. 1090 Before the Subcomm. On Government Management, Information, and Technology of the Comm. on Government Reform and Oversight*, 104th Cong. 82 (1996) (testimony by FOIA expert Allan R. Adler, Vice President, Legal and Government Affairs, Association of American Publishers).

[214] *See, e.g.,* Long v. IRS, 596 F.2d 362 (9th Cir. 1979).

[215] *See, e.g.,* SDC, 542 F.2d 1116 (1976); *Baizer*, 887 F. Supp. 225; *Dismukes*, 603 F. Supp. 760.

[216] *See, e.g.,* Yeager v. Drug Enforcement Admin., 678 F.2d 315, 327 (D.C. Cir. 1982) ("FOIA does not mandate that the DEA use its computer capabilities to 'compact' or 'collapse' information as part of its duty to disclose reasonably segregable information.").

In 1985, Congress held its first hearings on electronic information collection and its dissemination by federal agencies.[217] The resulting House Report warned that agency control over computerized information was tantamount to a government information monopoly.[218] The report concluded there was indeed "a risk that agencies may be able to exert greater control over information in electronic information systems than is possible with data maintained in traditional, hard-copy formats."[219]

Even as momentum was building in Congress to amend FOIA by providing provisions addressing electronic information, federal agencies resisted calls for change. Agencies argued that government costs would greatly increase and unacceptable backlogs would result if a requester could demand information in any computer format.[220] They insisted they should not bear the burden of paying for the new costs associated with the computerized storage of information.[221] The agencies were supported in their argument by the Department of Justice, which objected to electronic FOIA access contending that a rule that allowed the requester to receive information in a preferred format was both unreasonable and expensive.[222]

Against the backdrop of rapid computerization and mounting pressure to modernize FOIA, Senator Patrick Leahy (D-VT) introduced legislation on November 7, 1991, that would revise FOIA to explicitly state that the disclosure requirements applied to agency records in any format, including electronic forms.[223] But again, repeating the history of FOIA since the 1950s, agencies stubbornly resisted congressional efforts to make government-held information accessible to the public. Fifty-eight percent of agencies that responded to a 1989 Department of Justice questionnaire reported that they did not believe they needed to provide a FOIA requester with records in electronic formats.[224] Another study found that seventy-five percent of agencies said they had no

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217 *See Electronic Collection and Dissemination of Information by Federal Agencies: Hearings Before a Subcomm. of the Comm. on Government Operations,* 99th Cong. 1 (1985).

218 *See* H.R. REP. NO. 99-560, at 9 ("The new technology of electronic data distribution can undermine the practical limitations and legal structures that have prevented Federal agencies from exploiting the ability to control access to and distribution of the information that the government collects, creates and disseminates.").

219 *Id.* at 1–2.

220 *The Electronic Freedom of Information Improvement Act: Hearing on S. 1940 Before the Subcomm. on Technology and the Law of the S. Comm. on the Judiciary*, 102d Cong. 65 (1992).

221 *Id.* at 68.

222 *Id.* at 17–18.

223 *See* 137 CONG. REC. 30,861 (1991).

224 Harry A. Hammitt, *OIP Releases Results of Electronic Records Survey*, 16 ACCESS REPORTS, Nov. 14, 1990, at 2.

duty to create or modify computer programs for the purpose of searching and locating specified records.[225]

In 1996, after five years of hearings, agency opposition, and several revisions of the bill, Congress passed the Electronic Freedom of Information Act ("EFOIA").[226] Lawmakers made clear that FOIA's access rules applied to records in all forms, including electronic and computerized formats, as well as those in paper, microfiche, film, and other pre-digital formats.[227] Additionally, agencies are required to provide nonexempt records in the format the requester desires, such as a paper printout or a computer disk,[228] and agencies are directed to locate records by a computerized search, if necessary to fulfill a FOIA request.[229] In making these revisions, Congress explicitly nullified two circuit court opinions that blocked electronic access to government-held information.[230]

EFOIA further required agencies to publish on the Internet commonly requested information about governmental operations such as agency annual reports, statements of agency rules and policy, agency adjudicative opinions, and FOIA handbooks.[231] Before 1996, information that was subject to the automatic disclosure requirements was either published in the *Federal Register* or available for copying in reading rooms.[232]

After the enactment of EFOIA in 1996, Congress did not formally enact additional amendments to the statute until the OPEN Government Act of 2007.[233] However, in the wake of the September 11, 2001 terrorist attacks, Congress expanded the scope of Exemption 2 (Agency Personnel) to include some previously nonexempt information, particularly "sensitive critical infrastructure."[234] Under the USA PATRIOT Act,[235] Congress created a category of information called "critical infrastructure," which was defined as "systems and

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225 *Id.*

226 Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048.

227 *See* H.R. REP. No. 104-795, at 11–12, 19–22 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3454–55, 3462–65.

228 *See id.* at 20.

229 Electronic Freedom of Information Act Amendments § 5.

230 *See* SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) (holding that a medical database created by a government agency is not an agency record for the purposes of FOIA); Dismukes v. Dep't of the Interior, 603 F. Supp. 760 (D.D.C. 1984) (holding that an agency may determine the format in which to release disclosable records).

231 *See* Electronic Freedom of Information Act Amendments §§ 4, 10, 11.

232 *Id.* §§ 3, 4.

233 OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

234 FOIA GUIDE, *supra* note 26, at 191–92.

235 United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[236] Critical infrastructure includes, but is not limited to, bridges, tunnels, public and privately operated power plants, ports, dams, nuclear plants, and chemical plants.[237]

The Department of Justice considers "critical infrastructure" information to be within the scope of Exemption 2 (Agency Personnel).[238] Exemption 2 has been further extended to include ten categories of Homeland-Security-Related Information:

> (1) information that would reveal the identities of informants; (2) information that would reveal the identity of undercover agents; (3) sensitive administrative notations in law enforcement files; (4) security techniques used in prisons; (5) agency audit guidelines; (6) agency testing or employee rating materials; (7) codes that would identify intelligence targets; (8) agency credit card numbers; (9) an agency's unclassified manual detailing the categories of information that are classified, as well as their corresponding classification levels; and (10) inspection and examination of data concerning border security. [239]

The post-September 11th expansion of Exemption 2's provision is not technically an amendment to FOIA, but seems to represent the current congressional and Department of Justice interpretation of the exemption's scope in the face of "heightened concerns about national security and . . . the growth of both worldwide and domestic terrorism."[240]

Congress passed key procedural amendments to FOIA with the enactment of the OPEN Government Act of 2007.[241] These amendments strengthen public access to government-held information through a series of provisions. First, the Act makes it easier for FOIA requesters to recoup legal fees in specified instances when they must resort to suing an agency in order to obtain requested documents, and a court subsequently compels the agency to disclose the information.[242] It also directs the United States Attorney General to report to Congress on arbitrary and capricious agency rejections of FOIA requests,[243]

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236 42 U.S.C. § 5195c(e) (2000).

237 *See generally* JOHN MOTEFF & PAUL PARFOMAK, CRITICAL INFRASTRUCTURE AND KEY ASSETS: DEFINITION AND IDENTIFICATION (2004) (tracking the evolution of the definition of critical infrastructure).

238 FOIA GUIDE, *supra* note 26, at 192. Courts have broadly construed the expanded protection under Exemption 2. *See* Living Rivers v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313 (D. Utah 2003) (upholding a Bureau of Reclamation decision to use Exemption 2 (Agency Personnel) to refuse an environmental group's FOIA request for maps of areas below the Hoover Dam).

239 FOIA GUIDE, *supra* note 26, at 216–18.

240 *Id.* at 192.

241 OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

242 *Id.* § 4.

243 *Id.* § 5.

and prohibits an agency from assessing search and copying fees if the agency fails to release requested information within statutory time limits.[244] Additionally, the Act establishes tracking numbers for each request so that FOIA users can follow the progress of their requests online.[245] Further, it redefines the term "record" under FOIA's disclosure requirements to also include information gathered by private, nongovernmental entities under contract with a federal agency.[246] Finally, the Act defines "representative of the news media" and "news," and it regards a freelance journalist as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity.[247]

V. OBSTRUCTING THE PUBLIC'S RIGHT TO KNOW

Although the OPEN Government Act's procedural changes make the FOIA process more efficient, the 2007 amendments do not solve significant systemic problems within the statute that have developed over time. FOIA's legislative history evinces a broad policy of maximum disclosure, and the United States Supreme Court consistently reinforced this principle in the first two decades after FOIA was enacted.[248] Justice Byron White, in an early FOIA opinion, wrote: "Without question, [FOIA] is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to . . . secure such information from possibly unwilling official hands."[249] Justice William Brennan declared that FOIA's legislative history makes it "crystal clear" the congressional objective of the Act was to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[250]

Under FOIA's statutory scheme, courts decide whether the government correctly rejected a FOIA request pursuant to an exemption if the requester subsequently appeals to the courts to settle the dispute.[251] Beginning in the 1980s, the balance between disclosure and secrecy was reset by a Supreme Court with

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244 *Id.* § 6.
245 *Id.* § 7.
246 *Id.* § 9.
247 *Id.* § 3. Presumably, this provision is intended to allow freelancers and bloggers to apply for expedited review, to speed their records requests.
248 *See, e.g.,* Dep't of Air Force v. Rose*,* 425 U.S. 352, 360–61 (1976) (affirming the Second Circuit's holding that case summaries of honor and ethics hearings maintained in the United States Air Force Academy's Honor and Ethics Code reading files are not exempt from FOIA).
249 EPA v. Mink, 410 U.S. 73, 80 (1973).
250 *Rose*, 425 U.S. at 361.
251 5 U.S.C. § 552(a)(4)(B) (2000).

new membership.[252] Over the years, the Court gradually constricted the ambit of agency transparency in two particular areas: (1) information that pertains to national security (Exemption 1);[253] and (2) information pertaining to personal privacy protection (Exemptions 6 and 7).[254]

A. Secrecy in the Name of Security

The attacks of September 11th and subsequent events have drawn into question the viability of the Supreme Court's holding in *Central Intelligence Agency v. Sims*, which exempted the CIA from virtually any disclosure requirements under FOIA.[255] In *Sims*, the Director of Central Intelligence was granted broad and unreviewable authority to protect intelligence sources and methods from unauthorized disclosure.[256] Under the sweeping powers established by the Court, the CIA can avoid strict classification procedures for withholding information,[257] and can also withhold unclassified and declassified information on an assertion that "intelligence sources and methods" could be compromised.[258] Further, the *Sims* ruling permits the CIA to avoid de novo judicial review of its assertions that "intelligence sources and methods" are actually at stake.[259]

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[252] President Reagan appointed Justice Sandra Day O'Connor in 1981, Justice Antonin Scalia in 1986, Justice Anthony Kennedy in 1988, and promoted William Rehnquist to Chief Justice in 1986. *See* Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Apr. 16, 2008).

[253] 5 U.S.C. § 552(b)(1).

[254] *Id.* § 552(b)(6) & (7)(C)

[255] *See* CIA v. Sims, 471 U.S. 159, 159–60 (1985).

[256] *Id.* at 168–70. *Sims* concerned a FOIA request for records detailing a series of illegal CIA psychological experiments conducted in the United States between 1953 and 1966. *Id.* at 161–64. These CIA psychological tests were an illegal violation of the charter that established the Agency. Under the National Security Act, the CIA was specifically denied powers of domestic intelligence gathering, specifically, "no police, subpoena, law enforcement powers, or internal-security functions." National Security Act of 1947, Pub. L. No. 80-253, §102(d)(3), 61 Stat. 495, 498. This CIA sponsored research, code-named Project MKULTRA, was authorized in an effort to compete with Soviet and Chinese experiments in brainwashing and interrogation techniques. *See Sims*, 471 U.S. at 161–62. About 80 public and 185 private research facilities participated in the clandestine project in which unsuspecting subjects were given then-experimental drugs such as LSD. *See id.* at 161–62 & n.2. Information about these experiments and other questionable CIA activities, such as domestic spying during the Vietnam War era, was leaked to the press and reported in newspapers, prompting Congress to investigate CIA operations. *See, e.g.,* Seymour Hersh, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years,* N.Y. TIMES, Dec. 22, 1974, at A1.

[257] *Sims,* 471 U.S. at 183–84 (Marshall, J., concurring).

[258] *See id.* at 172–75 (majority opinion).

[259] *Id.* at 189–90 (Marshall, J., concurring).

The CIA was able to acquire this extraordinary degree of unreviewable control over its own information by avoiding the strict guidelines established by Congress in Exemption 1 (National Security). In *Sims*, rather than classifying the records in question in under Exemption 1, the CIA relied on Exemption 3 (Existing Exemptions), as section 102(d)(3) of the National Security Act of 1947 specified that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."[260] Writing for the majority, Chief Justice Warren Burger reversed the D.C. Circuit's decision, explaining that the lower court's definition of "intelligence sources" was too narrow and would have disclosed too much information.[261] The D.C. Circuit defined an "intelligence source" as someone who is guaranteed confidentiality, and provides "information of a kind the [CIA] needs to perform its intelligence function effectively."[262] Under this definition, the CIA would have been required to release the names of researchers who did not explicitly request confidentiality.[263]

In Burger's view, a narrow "intelligence source" definition ignored the practical necessities of intelligence gathering and the unique responsibilities of the CIA.[264] He noted that "[t]o keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosure that would unnecessarily compromise the Agency's efforts."[265]

As a result, the Supreme Court fashioned a new definition: "An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations . . . related to the Agency's intelligence function."[266] According to Burger, the Court's definition of "intelligence source" comports with the National Security Act's plain text and legislative history, which suggest broad authority for the Director of Central Intelligence to withhold any information that may compromise intelligence sources and methods.[267] He emphasized the importance of showing "great deference" to CIA

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[260] *Id.* at 164 (majority opinion) (quoting National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495).

[261] *See id.* at 173–75.

[262] *Id.* at 164.

[263] *See id.* at 166.

[264] *Id.* at 174–75.

[265] *Id.* at 169.

[266] *Id.* at 177. It is noteworthy that the source for this definition was the CIA itself. *See* Sims v. CIA, 642 F.2d 562, 576 n.1 (D.C. Cir. 1980) (Markey, C.J., dissenting) ("The Agency's definition: An intelligence source generally is any individual, entity or medium that is engaged to provide, or in fact provides, the CIA with substantive information having a rational relation to the nation's external national security.").

[267] *Sims,* 471 U.S. at 168–70, 178.

discretion, explaining that the granting of such power is sound policy because the director is the only person familiar with the entire intelligence situation.[268] Burger flatly rejected the idea that judges should have the power of de novo review, which is mandated by Exemption 1 (National Security).[269] He asserted that de novo review in CIA cases posed inherent dangers because judges have "little or no background in the delicate business of intelligence gathering."[270] Since *Sims*, the lower courts have recognized that once the Director of Central Intelligence has determined the source cannot be revealed, "the matter is beyond the purview of the courts."[271]

In a concurring *Sims* opinion, which reads more like a vigorous dissent, Justice Thurgood Marshall harshly criticized the majority for permitting the CIA to evade the requirements of Exemption 1 (National Security).[272] Under Exemption 1, FOIA does not apply to matters that are both "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact . . . properly classified pursuant to such Executive order."[273] The exemption's text reflects the legislature's intent to provide for judicial review of purportedly classified documents to confirm that the material does indeed fall under the enumerated categories of information that can be classified under executive order, and to verify that the material was classified according to prescribed procedures.[274]

Marshall agreed with the majority that the definition of "intelligence source" crafted by the D.C. Circuit[275] was too narrow and would result in releasing more material than should be disclosed.[276] However, he argued that the majority went to the other extreme, crafting a "sweeping alternative."[277] He rejected the majority definition of "intelligence source," contending that it improperly equated "intelligence source" with the nearly limitless term, "information source."[278] Such a definition, he wrote, provided "an irrebuttable presumption of secrecy over an expansive array of information" held by the CIA, including information that was of no intelligence value.[279] Newspapers, road maps, and telephone directories could potentially fall under the Court's defini-

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268 *Id.* at 179.
269 *Id.* at 176.
270 *Id.*
271 Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989).
272 *Sims,* 471 U.S. at 182 (Marshall, J., concurring).
273 5 U.S.C. § 552(b)(1) (2000).
274 *See* H.R. REP. No. 93-1380, at 228–29 (1974) (Conf. Rep.).
275 *See supra* note 266.
276 *Sims,* 471 U.S. at 181–82, 194 (Marshall, J., concurring).
277 *Id.* at 182.
278 *Id.* at 187.
279 *Id.* at 191.

tion of "intelligence source."[280] Marshall contended that the majority's broad definition of "intelligence source" exceeded the plain meaning and legislative history of "any congressional act," and that it conflicted directly with FOIA's broad mandate for disclosure.[281] Marshall asserted that by invoking Exemption 3 (Existing Exemptions) to withhold the information, the CIA "cleverly evaded" judicial de novo review, which was "carefully crafted . . . to limit the Agency's discretion."[282]

Marshall explained that Exemption 1 (National Security) would have allowed for the same outcome—the withholding of the identities of researchers who participated in the illegal mind control experiments—while at the same time preserving limits on CIA discretion.[283] He characterized Exemption 1 as "the keystone of a congressional scheme that balances deference to the Executive's interest in maintaining secrecy with continued judicial and congressional oversight."[284] Marshall further observed that "Congress, it is clear, sought to assure that the Government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure."[285]

Since 1985, the *Sims* precedent has blocked access to CIA-held information in a long line of cases that cover a wide array of issues of public interest.[286] In 2004, for example, the Supreme Court denied certiorari to a D.C. Circuit deci-

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280 *Id.*

281 *Id.* at 182.

282 *Id.* at 189–90.

283 *Id.* at 183–84. Marshall noted that under President Ronald Reagan's Executive Order on classification, in effect at the time, "the Agency need make but a limited showing to a court to invoke Exemption 1 for that material." *Id.*

284 *Id.* at 183.

285 *Id.* at 182 (citing S. REP. No. 89-813, at 45 (1965)). According to Marshall, the term "intelligence source" does not have any single and readily apparent definition compelled by the plain language of section 102(d)(3), as the majority held. The legislative history of the National Security Act suggests only a congressional intent to protect individuals who might be harmed or silenced if they were identified. *Id.* "The heart of the issue is whether the term 'intelligence source' connotes that which is confidential or clandestine, and the answer is far from obvious." *Id.* at 186. Marshall offered a compromise definition, which he said comports with the statutory language and legislative history of the National Security Act while also falling within the congressionally imposed limits on the CIA's exercise of discretion. He interpreted "intelligence sources" as referring "only to sources who provide information either on an expressed or implied promise of confidentiality." *Id*. Marshall defended his definition, arguing it would meet the CIA's concerns about confidentiality because it would protect not only "intelligence sources," but also protect the kind of information that would lead to identifying such a source. *Id.* at 187.

286 *See, e.g.,* Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55 (D.C. Cir. 2003) (rejecting the center's request for access to a CIA compilation of Cuban leaders' biographies); Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990) (rejecting an historian's request for access to CIA records allegedly concerning the disappearance of Jesus de Galindez); Knight v. CIA, 872 F.2d 660 (5th Cir. 1989) (rejecting a request for classified CIA information about the 1985 sinking of a Greenpeace vessel).

sion that cited *Sims* repeatedly in its rationale to allow the government to withhold basic information on persons detained after the September 11, 2001 terrorist attacks.[287] As recently as September 2007, *Sims* was cited by the government to deny a FOIA request for two Presidential Daily Briefs dating back more than forty years to the Johnson Administration.[288] In that case, the Ninth Circuit observed that "after *Sims*, there exists 'a near blanket FOIA exemption' for CIA records."[289]

Granted, even if Congress required the CIA to follow stricter procedures for withholding documents under Exemption 1 (National Security)—particularly the de novo judicial review provision—obstacles to access would still arise because the president determines classification criteria, and those standards vary with each administration.[290] Also, federal agencies historically have overused the "classified" stamp, creating vast storerooms of "secret" documents.[291] As such, Congress needs to pass a new FOIA-related intelligence information paradigm; one that would provide for more government transparency and access to the kinds of intelligence information essential for meaningful public discourse. Such paradigm must be balanced with the government's need to protect confidential sources, which is an inherent aspect of effective intelligence operations.

B. Personal Privacy

In order to resolve the tension between an individual's right to privacy and the public's right to obtain government-held information, privacy scholar Alan F. Westin observed that democracies must "set a balance between government's organizational needs for preparatory and institutional privacy and the need of the press, interest groups, and other governmental agencies for the knowledge of government operations required to keep government conduct responsible."[292] Congress intended to strike precisely such a balance when it

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287 Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).

288 Berman v. CIA, 501 F.3d 1136 (9th Cir. 2007).

289 *Id.* at 1140 (quoting Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992)).

290 *See* Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (establishing classification designations which only the President or his designee may assign).

291 *See* N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) ("[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.").

292 ALAN F. WESTIN, PRIVACY AND FREEDOM 25 (1967).

created FOIA privacy Exemption 6 (Personal Privacy)[293] and Exemption 7 (Law Enforcement).[294] In a balancing test between competing interests, it is not necessary to conclude that in order to protect one, the other must "either be abrogated or substantially subordinated."[295]

To date, the Supreme Court has decided eight FOIA privacy-related cases.[296] Of these, the Court has ruled in favor of disclosure in only the first case, *Department of Air Force v. Rose*, in which the Court handed down a forcefully stated pro-disclosure opinion.[297] After Rose, the Court began to realign the balance in favor of privacy over disclosure in a series of decisions. This downward trajectory began in *Department of State v. Washington Post Co*., in which the Supreme Court decided an issue derived from the *Rose* opinion.[298] In *Rose*, the Court noted that privacy Exemption 6 (Personal Privacy) did not exempt

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293 5 U.S.C. § 552(b)(6) (2000) (shielding from disclosure matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

294 5 U.S.C. § 552(b)(7)(C) (2000) (protecting matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy").

295 S. REP. 89-813, at 38 (1965).

296 *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) (holding that FOIA-related privacy interests include surviving family members of deceased subjects of a FOIA request and erecting the "sufficient reason" test for releasing information sought specifically to investigate government corruption); Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355 (1997) (rejecting on privacy grounds an environmental group's FOIA request for contact information of individuals who received a Bureau of Land Management newsletter about the future of the Oregon High Desert); U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (rejecting on privacy grounds a FOIA request by unions for phone numbers of federal employees for the purposes of contacting them about union membership); U.S. Dep't of State v. Ray, 502 U.S. 164 (1991) (rejecting a request for identifying information on Haitians who had been deported from the United States to Haiti); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (rejecting a journalist's FOIA request for a computerized FBI rap sheet of a reputed crime figure suspected of bribing a congressman to obtain a federal contract, on grounds that releasing the information would be an invasion of privacy because the rap sheet would not shed any light on official agency operations or activities); FBI v. Abramson, 456 U.S. 615 (1982) (rejecting a journalist's FOIA request for FBI reports requested by President Nixon, who ordered FBI background checks on his political enemies, on grounds that information originally compiled for law-enforcement purposes does not lose its privacy-exemption status merely because the information is reproduced in a new document for nonlaw-enforcement purposes); Dep't of State v. Wash. Post Co., 456 U.S. 595 (1982) (rejecting a FOIA request by the *Washington Post* for passport-application information on two Iranian nationals who traveled under the protection of U.S. passports during a period of strained relations between Iran and the United States); Dep't of Air Force v. Rose, 425 U.S. 352 (1976) (upholding a FOIA request by law review editors for summaries of honor and ethics violations at the United States Air Force Academy).

297 *See Rose*, 425 U.S. 352.

298 *Wash. Post,* 456 U.S. at 601.

every incidental invasion of privacy—it protected only those disclosures that would constitute clearly unwarranted invasions of personal privacy.[299] However, the Court did not define the term "incidental invasion of privacy."

The *Washington Post* case undertook the task of clarifying the meaning of a FOIA-related "incidental" invasion of privacy.[300] This opinion, which was the first to favor privacy over disclosure, was written by Chief Justice William Rehnquist, one of the dissenters in *Rose*.[301] In Rehnquist's view, even a minimal privacy interest—one that touches on non-intimate information—was sufficient to trigger Exemption 6 (Personal Privacy).[302] Rehnquist explained that identifying information, such as a person's "place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal."[303] He added, however, that such information would be exempt if disclosure would constitute "a clearly unwarranted invasion of [the] personal privacy.[304] The *Washington Post* opinion thus provided the historically recalcitrant federal agencies with an Exemption 6 loophole that agency officials could exploit in order to refuse a FOIA request.[305] As one commentator has noted, the Court concocted a balancing scheme that allowed federal agencies to use FOIA privacy exemptions as "shields" to "repel" requests for any records that contain any personally identifiable information.[306]

In 1989, the Supreme Court created the "core purpose" rationale, which further strengthened agency withholding decisions. In *Department of Justice v. Reporters Committee for Freedom of the Press*, the Court substantially reduced the scope of FOIA's public interest standard when it held that an invasion of privacy would be "clearly unwarranted" if the information disclosed

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299 *Rose*, 425 U.S. at 382.

300 *Wash. Post,* 456 U.S. 595.

301 *See Rose*, 425 U.S. at 389–90 (Rehnquist, J., dissenting).

302 *Wash. Post,* 456 U.S. at 600–02. The Court upheld the government's decision to withhold information sought by the newspaper regarding two prominent Iranians. In September 1979—a period of great tension between the United States and Iran following the Iranian revolution—the *Washington Post* wanted to confirm an unofficial report that two officials of Iran's revolutionary, anti-American government were traveling under U.S. passports. *Id.* The State Department cited Exemption 6 (Personal Privacy) and asserted that the passport information would qualify as "similar files," and that disclosure would be a "clearly unwarranted invasion of privacy." *Id.* at 596. According to Rehnquist's interpretation of House and Senate reports, which he noted did not define "similar files," Congress intended for Exemption 6 "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Id.* at 599.

303 *Id.* at 600.

304 *Id.*

305 *See* Lillian R. Bevier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 489–96 (1995) (discussing the critical issues left undecided after *Wash. Post*).

306 *See id.* at 485.

extended beyond the narrowly defined "core purpose" of FOIA.[307] The Court then noted that "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."[308] Justice John Paul Stevens, writing the unanimous opinion in this Exemption 7 (Law Enforcement) case, emphasized that FOIA's purpose was to enable the public to evaluate government operations and performance.[309] The Court concluded that the only FOIA-related public interest to be recognized in a privacy challenge was that of revealing "agency action" that directly "shed any light on the conduct of any Governmental agency or official."[310]

In his concurring opinion, Justice Blackmun, characterized Steven's holding in *Reporters Committee* as overbroad and as contravening Exemption 7's plain language, its legislative history, and case law.[311] Blackmun argued that the Court opinion exempting all rap sheet information from FOIA's disclosure requirements overreached the facts in the case.[312] Blackmun offered a hypothetical situation in which a rap sheet disclosed a congressional candidate's conviction of tax fraud before he ran for office.[313] The FBI's disclosure of that information could not reasonably be expected to constitute an invasion of personal privacy, much less an unwarranted invasion, because the candidate gave

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307 Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–74 (1989). In *Reporters Committee* the Court upheld the government's decision not to release a computerized FBI "rap sheet" on a Pennsylvania businessman linked to the mob. This FOIA privacy dispute arose after the late CBS investigative reporter Robert Schakne requested the rap sheet on Charles Medico, who was identified by the Pennsylvania Crime Commission as an owner of Medico Industries, a legitimate business dominated by organized-crime figures. *Id.* at 757. Medico's company received defense contracts allegedly in exchange for political contributions to former Representative Daniel J. Flood (D-PA). Flood, who eventually resigned in disgrace and was convicted of bribery charges, had been under official scrutiny for corruption at the time of Schakne's investigation into the relationship between Medico and Flood. *Id*.

308 *Id.* at 774. The Court held that the FBI can withhold "rap sheets" on private citizens even though the information might be available in public records at local or state offices. The Court reasoned that the disclosure of the FBI's compilations of an individual's criminal records is an "unwarranted" invasion of privacy under Exemption 7(C) because rap sheets do not reveal information about how government operates and thus fall "outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 775.

309 *See id.* at 773.

310 *Id.* at 772–73.

311 *See id.* at 781 (Blackmun, J., concurring) ("I do not believe that Exemption 7(C)'s language or its legislative history, or the case law, support interpreting that provision as exempting *all* rap-sheet information from the FOIA's disclosure requirements.").

312 *See id*. at 780–81.

313 *Id.* at 780.

up any interest in preventing disclosure of this information when he chose to run for office.[314]

The majority view in *Reporters Committee* demonstrated the Court's current interpretation of FOIA's core purpose, setting forth the principle that the statutory goal of FOIA is limited to disclosing only official information that "sheds light on an agency's performance."[315] What the majority definition ignores, however, is the vast storehouse of information compiled by the government that is vital to the public interest, but does not necessarily directly shed light on the performance of government agencies. For example, Federal Aviation Administration airline maintenance records, results of Federal Drug Administration clinical trials, and census and economic data compiled by the Department of Commerce all contain information that is of high public interest, but does not reveal government operations and conduct under the Court-crafted "core purpose" doctrine. The kinds of records that would not fall under this narrow definition include: air travelers who want to know about airline safety on particular airlines and aircrafts; patients who require medication and want to know about the safety of the drugs they are taking; a prospective home buyer who may want to learn whether the land has a history of toxic-waste problems; parents who want to know the driving histories of their babysitters, nannies, and school bus drivers; and corporations and businesses who want government-held information for commercial reasons.

In a 1998 case that relied on *Reporters Committee*, Justice Ruth Bader Ginsburg argued in a lone concurrence that the "core purpose" argument advanced by the Court in *Reporters Committee* cannot be found anywhere in FOIA's language.[316] She argued that a requester is not required to show that disclosure would serve any public purpose, "let alone a 'core purpose' of . . . advancing 'public understanding of the operations or activities of the government.'"[317] Ginsburg characterized the "core purpose" test as a "restrictive definition" of the public interest in disclosure that "changed the FOIA calculus."[318] Before *Reporters Committee* was decided, courts held it was "fully consistent" with FOIA's statutory language to judge an invasion of personal privacy as "warranted" even if the requested information was "unrelated to informing citizens about Government operations."[319]

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314 *Id.*

315 *See id.* at 773 (majority opinion).

316 *See* U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 508 (1994) (Ginsburg, J., concurring).

317 *Id.* at 507.

318 *Id.* at 505.

319 *Id*. at 508. Ginsburg noted, for example, that in a 1989 Court opinion, *U.S. Dept. of Justice v. Tax Analysts*, the Court required disclosure of Department of Justice compilations of district court tax decisions to the publishers of *Tax Notes*, a weekly magazine. "That

Sen. Leahy, Chairman of the Senate Judiciary Committee and leading supporter of EFOIA, clarified in Senate Report 272 that the *Findings* section of the Senate-sponsored version of EFOIA was specifically intended to counter the Supreme Court's narrow interpretation of FOIA's "core purpose."[320] Nevertheless, the majority opinion in *Reporters Committee* is a seminal ruling, providing the precedent for two later Supreme Court FOIA-related privacy decisions[321] and several lower federal court rulings.[322]

Taken together, the *Washington Post* and *Reporters Committee* holdings indicate that a FOIA request for disclosure that may implicate even a minimal privacy interest is almost automatically rejected unless the requester can establish that the desired information is an official record that directly sheds light on government activities. The Court further diminished FOIA-related public interest in its most recent decision, *National Archives and Records Administration v. Favish,* when it established a new standard for disclosing a record when the requester's purpose is to investigate government wrongdoing.

In *Favish,* the Court first recognized that FOIA-related privacy interests apply to surviving family members of deceased subjects of a FOIA request.[323] However, the Court did more than resolve only the immediate question of FOIA-related family privacy. In deciding this question, the Court created a strict and unprecedented test for disclosing information. The test applies when the information is sought to investigate government malfeasance, and the government withholds the information on the grounds that disclosure would lead

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disclosure," Ginsburg said, "did not notably 'ad[d] to public knowledge of Government operations.'" *Id.* (citing U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 156–57 (1989)).

320 S. REP. No. 104-272, at 26–27 (1996) ("The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government. Effort by the courts to articulate a 'core purpose' for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness.").

321 *See* Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355 (1997) (rejecting on privacy grounds an environmental group's FOIA request for contact information of individuals who received a Bureau of Land Management newsletter about the future of the Oregon High Desert); U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (rejecting on privacy grounds a FOIA request by unions for phone numbers of federal employees for collective bargaining purposes).

322 *See, e.g.*, Sweetland v. Waters, 60 F.3d 852 (D.C. Cir. 1995) (denying a record request by a White House employee seeking information to aid him in pursuing an employment discrimination claim); McNamera v. Dep't of Justice, 974 F. Supp. 946 (W.D. Tex. 1997) (denying a record request by a reporter asking for information regarding a $1.1 billion cocaine-smuggling sting).

323 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004) (denying FOIA request for copies of death scene and autopsy photos pertaining to the 1993 death of White House Deputy Counsel Vincent Foster, Jr.).

to an unwarranted invasion of privacy under Exemption 7 (Law Enforcement).[324]

Justice Anthony Kennedy, writing for the majority, considered the problem of balancing FOIA-related public interests against privacy interests when a requester's purpose is to investigate government wrongdoing.[325] Kennedy recognized that FOIA embodied a presumption in favor of disclosure. Thus, when requesting documents, requesters need not give reasons for their requests nor have a preconceived notion of how the information may be used.[326] However, Kennedy added that when disclosure impacted privacy interests protected under Exemption 7 (Law Enforcement), "the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable."[327] Further, to determine whether an invasion of privacy would be permissible whenever Exemption 7 is triggered, Kennedy held that a FOIA requester must meet a two-part test to establish "a sufficient reason" for disclosure.[328] First, the requester must show that there is a significant public interest in the requested information, and, second, the requestor must demonstrate that disclosure of the materials is likely to advance that significant public interest.[329] "Otherwise, the invasion of privacy is unwarranted," Kennedy wrote.[330]

Finally, Kennedy held that a requester must meet a specific standard to satisfy the "sufficient reason" test whenever the purpose of a request is to investigate whether "responsible officials acted negligently or otherwise improperly in the performance of their duties."[331] Under such circumstances, the requester must produce evidence of "misfeasance or another impropriety" in advance of the disclosure in order to overcome a "presumption of legitimacy" accorded to official government conduct and records.[332]

In the aggregate, the narrowly construed Court-created privacy framework embodied in *Washington Post, Reporters Committee*, and *Favish* establish an irrebuttable presumption of nondisclosure that stands in sharp contrast to FOIA's extensive legislative history. There is no basis to conclude that Con-

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[324] *Id.* at 172–74.
[325] *Id.* at 171.
[326] *Id.* at 172.
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.* at 173.
[332] *Id.* at 172–74. ("Where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.").

gress intended for a minimal privacy interest to trigger a privacy exemption or that FOIA's "core purpose" is to only reveal information that directly reflects official government activities and performance. Nor is there any foundation for the Court's mandate that FOIA requesters must demonstrate that disclosure would advance a substantial public interest. And there certainly is no evidence in the legislative history of Exemption 6 (Personal Privacy) and Exemption 7 (Law Enforcement) that supports the Court's requirement that FOIA requesters investigating allegations of government wrongdoing must offer evidence of wrongdoing in order to obtain the information they seek.

Congress has repeatedly reiterated the statute's strong presumption of government openness, and the Supreme Court has consistently recognized this principle for more than two decades after FOIA's enactment.[333] The Court's current FOIA-related privacy framework seems to be the result of judicial overreaching that is contrary to the democratic principles of accountability and transparent governance in an open society.

VI. CONCLUSION

As the legislative history chronicled in this article shows, FOIA's original crafters intended a policy that provided maximum disclosure. In past amendments—those of 1974,[334] 1976,[335] and 1996[336]—Congress revised the FOIA exemptions explicitly to override court opinions that contravened the statute's legislative intent to preserve the democratic principles of government transparency.[337] Yet, it has been more than thirty years since an exemption has been amended to strengthen FOIA. During this period, the United States and the world have experienced upheavals in virtually every aspect of society—change brought about by a series of powerful revolutionary forces.

Since 1976, the last time Congress revised an exemption, the Soviet Union has collapsed, the world has been transformed by the Internet into a unified electronic economic market and electronic marketplace of ideas, freedom of information has gone global with sixty-eight nations now boasting Freedom of

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333 *See* U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 493–94 (1994) ("FOIA reflects 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'").

334 Pub. L. No. 93-502, 88 Stat. 1561 (1974).

335 Pub. L. No. 94-409, 90 Stat. 1241 (1976).

336 Pub. L. No. 104-231, 110 Stat 3048 (1996).

337 *See, e.g.,* Adm'r, FAA v. Robertson, 422 U.S. 255 (1975); EPA v. Mink, 410 U.S. 73; SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976); Dismukes v. Dep't of the Interior, 603 F. Supp. 760 (D.D.C. 1984).

Information laws,[338] the United States has been attacked on its own soil as stateless terrorism proliferates on a once unimaginable worldwide scale, and now the nation is embroiled in its largest and deadliest war since Vietnam. As the 9/11 Commission aptly observed, it is "a very different world today."[339]

In these times of increasing government secrecy, it is up to Congress to once again summon the political will necessary to strengthen FOIA and remedy the misguided Court decisions that have undermined the public's right to know "what their government is up to."

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[338] *David Banisar,* FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT RECORD LAWS 2–3 (2006), http://www.freedominfo.org/documents/global_survey2006.pdf.

[339] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 399 (2004).