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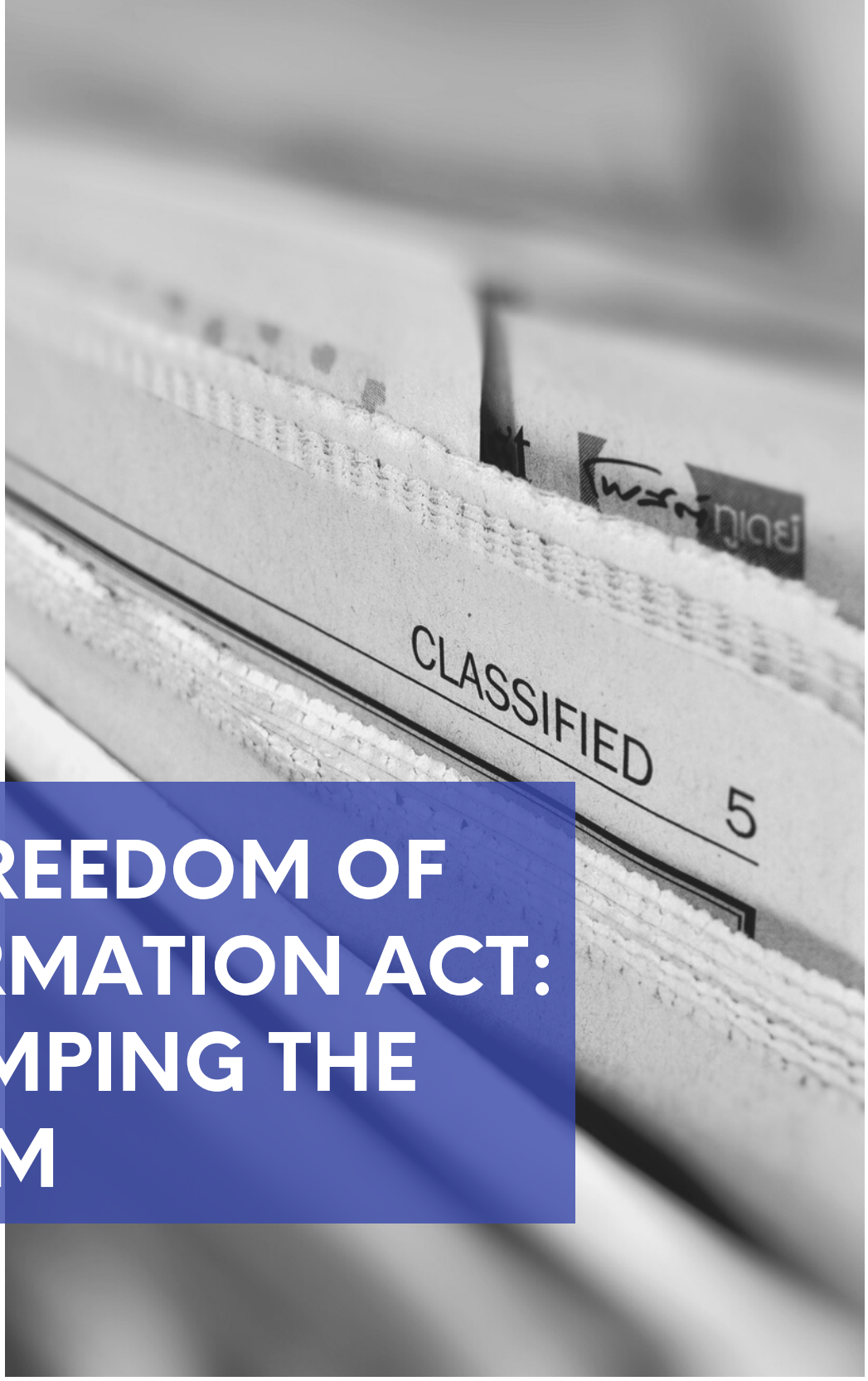

THE FREEDOM OF INFORMATION ACT: REVAMPING THE SYSTEM

THE COUNCIL TO MODERNIZE GOVERNANCE

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The Freedom of Information Act: Revamping the System

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INTRODUCTION

The Freedom of Information Act (FOIA) is a landmark law in the quest for government that is responsive to the American people. In its nearly 60-year history, it has done a lot of good in shining sunlight on the activities of government.

Yet, it has never fully lived up to its promise. As outlined in our July 2023 White Paper,[1] a number of challenges remain. Agencies are still routinely miss their congressionally mandated deadlines to provide responsive records and are getting worse. [2] Agencies are poorly structured to respond to requests and may lack appropriate technology to meet their tasks.[3] Laws that were intended to make records available to all Americans have become inadvertent barriers to disclosure.[4] And agencies themselves often view responding to public records request as a secondary burden (at best) rather than a key tool for ensuring democratic accountability.[5]

Addressing these challenges requires bold thinking for how to improve government responsiveness. Tweaking around the edges of the FOIA law or making positive reforms in the direction of more transparency have been attempted several times over the years with little to show for it but an even more byzantine regulatory scheme. Too many times, agencies either ignore these new statutory mandates or develop creative strategies to frustrate public requesters. While the justifications may be reasonable at times, such as scarce agency resources in the face of a perceived weaponization of FOIA, the result is nonetheless reduced transparency and a de facto requirement for litigation to break loose records on even mundane requests in a timely fashion.

Sunshine advocates need solutions that force fundamental change at the statutory level and apply to every agency. There needs to be greater uniformity across agency regulations and practice, as well as more ownership by agency lawyers and officials.

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[1] Gary Lawkowski and Curtis Schube, "The Freedom of Information Act: A History of Chasing Transparency," Council to Modernize Government, July 2023. https://modernizegovernance.org/the-freedom-of-information-act-a-history-of-chasing-transparency/.

[2] "Summary of Annual FOIA Reports for Fiscal Year 2022," Department of Justice, accessed Sept. 18, 2023,12, https://www.justice.gov/oip/page/file/1581856/download. "The Increase in FOIA Lawsuits Isn't the Problem—It's Agencies Underfunding their Transparency Obligations," American Oversight, Mar. 17, 2020, https://www.americanoversight.org/the-increase-in-foia-lawsuits-isnt-the-problem-its-agencies-underfunding-their-transparency-obligations.

[3] "FOIA Searches: Key Challenges and Findings," National Archives, Sept. 29, 2021, https://www.archives.gov/ogis/about-ogis/chief-foia-officers-council/tech-comm-foia-searches-challenges-09-29-2021; Anne Weismann, "The FOIA is Broken, But is it Beyond Repair?", Citizens for Responsibility and Ethics in Washington, June 30, 2020, accessed June 13, 2023, https://www.citizensforethics.org/reportsinvestigations/crew-investigations/the-foia-is-broken-but-is-it-beyond-repair/.

[4] Office of Government Information Services, *Responses to Questions for the Record—Alina M. Semo, Director, Office of Government Information Services*, Sept. 20, 2022, https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%20-%20Semo%20-%202022-03-29.pdf.

[5] Ibid. 1. "We need to recognize that federal agencies believe that their primary mission is not to collect, process, and respond to FOIA and Privacy Act requests. . . . Against this backdrop . . . FOIA staffing typically comes last, sometimes as an afterthought, with whatever staffing is not otherwise diverted to the agency's primary mission."

This paper attempts to kickstart that conversation. By radically changing the way certain records are treated from their creation through leveraging modern technology to ensure the public is not left searching for a needle in the haystack, the benefits can flow both to the public as well as federal agencies, as their FOIA burden is reduced and compliance is more straightforward.

I. Improving Transparency Through Proactive Disclosure

One of the great innovations of FOIA is that it allows anyone to request records from the federal government. People do not have to justify why they want to know what their government is doing in their name.

One downside of this approach is that people have to know what to ask for.

This can be challenging in the best of circumstances. Members of the public may not know—and may even be trying to find out—which agency officials work on specific issues. Government—especially the federal government—is notorious for the development of what to the outsider may seem like a foreign language, composed of obscure acronyms and idiosyncratic references to projects and activities.

It is a language that few even highly attuned requesters are truly fluent in, which can make it difficult for requesters to utter the right shibboleth to access the agency files they are seeking. In principle, the burden is on the agency to help translate reasonably framed requests. In practice, at many agencies, the agency staff assigned to FOIA are not necessarily the same people engaged in the day-to-day programmatic work of the agency and may have little more insight than the general public.[6] Far too often, agency officials use cramped interpretations of FOIA requests to avoid disclosing embarrassing information, forcing requesters into a sophie's Choice between writing a broadly worded request that will take years to process (at best) or a narrow, targeted request that risks missing the information truly sought.

After years of small changes around the edges that are fended off by the agencies, it is time to upend the system. The system's design should be one whose default setting is transparency rather than the current adversarial relationship that exists between requester and custodian. The mechanism for this type of transformational change may lie in proactive disclosures that don't require a request from the public – a process currently in place for a very small portion of records.

Under the current law, there are certain categories of information that must be proactively disclosed, including final opinions and orders in the adjudication of cases, rules and regulations, statements of policy, and records that have been requested by the public three or more times.[7]

[6] "FOIA Searches: Key Challenges and Findings."

[7] 5 U.S.C. § 552(a)(1)-(2).

This is insufficient given the number of records that exist and are regularly requested to inform the public of the daily activities and most influential forces on key decision-makers. While the inclination might be to say, make it all public and searchable as records are created, this is unlikely to be practical from a legal or policy perspective and would face significant technical hurdles. Conceptually, however, it is precisely the radical change in approach needed to break the logjam facing requesters and devouring resources at federal agencies. So where do we start?

a. Proactively Disclose the Full Administrative Record

Under FOIA, agencies are required to proactively disclose final opinions, along with concurring and dissenting opinions, that support final agency adjudications. They are also required to publish final rules in a compendium known as the Federal Registrar.

These documents are essentially a summary of why an agency made the decision it made. However, they are not the full record. When an agency is challenged in court, it is required to produce a larger universe of documents known as the administrative record. These are the supporting documents that underpin a final agency decision.

Agencies should proactively disclose their entire administrative record, not just the final agency decision. This would allow the public to understand what agency officials are really relying on when they make decisions. By doing so, they would be in a better position to evaluate the substance of those decisions.

Moreover, the concept of an administrative record is something that agencies and courts are already well familiar with. Agencies already have to produce an administrative record when they are challenged in court. It draws on a concept that is already well-developed and does not require defining new terms on a blank slate.

Some agencies already do this, or at least come close. For example, as a matter of policy, the Federal Election Commission ("FEC") goes beyond the mandatory disclosure provisions and proactively publishes much of the file in its enforcement actions, including recommendations, reports, and memoranda from the Office of the General Counsel, that might otherwise be considered "deliberative."[8]

The FEC's proactive disclosure is not necessarily coextensive with its administrative record, but it comes much closer than the minimum requirements of final opinions, concurrences, and dissents. By doing so, it provides tremendous value to the public. Members of the public get a better sense of what factors the agency views as significant. The disclosure also furthers a basic purpose of FOIA by preventing the rise of "secret law."

[8] Federal Election Commission, Statement of Policy, "Disclosure of Certain Documents in Enforcement and Other Matters," *Federal Register* 81, no. 148 (Aug. 2, 2016): 50702.

b. Proactively Disclose Calendar Entries and External Communications with Senior Agency Leaders

Being a senior agency leader, particularly a high-level political appointee, can be a tough job. Officials are under constant scrutiny from the public, interest groups, and even Congress. At times, it can feel like it would be easier for agencies to just make senior officials' email inboxes public to avoid a cavalcade of FOIA requests.

This interest is understandable. After all, senior officials are the ones with the greatest burdens, and the ones often asked to resolve the thorniest, most impactful policy questions.

One more way to balance the need to govern with the intense public interest in senior officials is to proactively release senior agency officials' daily calendars and communications with external (non-governmental) parties.

This proactive disclosure should include meeting requests submitted to agencies, as well emails and other electronic communications between senior officials and outside entities. In terms of scope, it should be applied to senior agency officials, including Presidentially appointed, Senate confirmed officers, what are called "non-career Senior Executive Service" employees, who are generally senior political appointees, other top-level non-career officials, such as those serving in "GS-14," "GS-15," and equivalent positions,[9] their respective administrative staff, and their public relations staff.

Time is one of the most valuable resources for senior agency officials, including cabinet-level officers. As a result, it is rare for outside parties to walk in and meet with a cabinet secretary or similar official. Often, before meeting with a senior official, external groups or agency staff will prepare a meeting request describing who wants the meeting and why. These memoranda are valuable to the American people because they provide insight into how senior officials are choosing to spend their time and what people and groups are seeking to influence their decision making. Senior officials' calendars are also frequently requested, so proactive release will provide a reduced burden on agency FOIA officials.

Similarly, official emails and other electronic communications between senior agency officials and external groups are valuable to the American public because they show both who is trying to influence agency action and what groups agencies are reaching out to assist in disseminating their message. Indeed, a significant number of FOIA requests – and subsequent lawsuits – surround these records. Executed successfully, this reform can have a sizable impact on agency FOIA burdens.

There is a necessary balance to be struck. Ordinary citizens interact with government in many ways. Most of these interactions are run-of-the-mill discussions that do not implicate broad policy concerns. Many of these interactions also implicate heightened privacy interests. Moreover, the

[9] "GS-14" and "GS-15" refers to positions on the "general schedule," which sets the pay rates for most civilian federal officials. GS-14 and 15 classifications are the highest positions on the general schedule and are generally reserved for top-level employees.

volume of external communications between lower-level staff and the public run the risk of excessive disclosure that makes it difficult to separate the wheat from the chaff.

Therefore, it is desirable to limit affirmative disclosure to the subset of agency officials where the public interest is the greatest while maximizing the reduced burden to agency FOIA officials and attorneys. These are the people who are most likely to be involved in policy-level decisions that have broad implications. Moreover, they are less likely to be involved in interactions with the general public that implicate sensitive privacy concerns. The average citizen is unlikely to communicate with the Secretary of Veterans Affairs regarding the personal health situation; they are highly likely to communicate such information with front line VA staff.

In many ways, this process would function much like how the Office of Information and Regulatory Affairs (OIRA) handles public input on agency rulemakings. OIRA is an office within the Office of Management and Budget at the White House. Under a series of Executive Orders, most significantly Executive Order 12866,[10] OIRA coordinates the review of agency regulations that are deemed "significant," either because they are expected to have a large economic impact or because they raise significant policy questions. As part of its review process, OIRA meets with and receives written communications from the public.

Pursuant to Executive Order, OIRA is required to inform the public of the names of attendees and dates of meetings with people who are not employed by the federal government, as well as a summary of the subject matter discussed.[11]

c. Proactive Disclosure of Ethics Records

Concerns about conflicts of interest are inevitable in government. When an agency official is plausibly accused of taking an official action under circumstances where it is possible to question their impartiality, one of the first questions the public and oversight authorities ask is "did you consult with your agency's ethics office? If so, what did they say?"

On its face, agency ethics guidance has many of the indicia of a final agency action that should be subject to FOIA. However, agencies are inconsistent in how they treat ethics opinions, with some taking the view that they are deliberative or even protected by the attorney-client privilege. Often, agencies cite to the fact that, strictly speaking, ethics advice is just that: advice. Federal officials can choose to follow it or roll the dice and disregard it. This position disregards the significant weight that is often afforded to ethics guidance, particularly in investigations by inspectors general or congressional committees.

In order to better inform the public, agencies should proactively disclose all impartiality determinations made by agency ethics officers. Many times, these are the "close calls" that draw the biggest controversy and lead to questions of potential conflicts. Proactively releasing these

[10] "Executive Order 12866 of September 30, 1993, Regulatory Planning and Review," *Federal Register* 58, No. 190. https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

[11] Ibid.; OIRA, EO 12866 Meetings, https://www.reginfo.gov/public/do/eom12866Search.

records would attempt to head off the controversy that naturally follows agencies' failure to timely hand over this analysis and (usually) authorization from ethics officials. Waivers from ethics obligations present similar potential for controversy and require agency resources to explain in the absence of transparency. Today, agencies are only required to release agency ethics waivers "upon request."[12] This process is underinclusive, inefficient, and requires members of the public to know to ask for such records. Rather than waiting for specific requests, agencies should proactively disclose ethics waivers as a matter of course.

In addition, agencies should proactively disclose "post-government" memoranda for senior government officials when they leave federal service. When officials leave government, agency ethics offices typically provide an exit memorandum reminding officials of their continuing ethical duties. These memoranda should be proactively disclosed for senior officials in order to ensure their continued compliance with their duties to the American people.

Taken together, these proactive disclosures of ethics guidance will help reassure the American people that decisions made by the government are on the level and are not subject to undue conflicts of interest. They will also pave the way for the mandatory proactive release of additional ethics records such as recusal agreements, financial disclosure reports, and similar records that can unduly contribute to a public perception of misconduct when withheld or not easily accessible.

d. Proactive Disclosure of Final Settlement Agreements

Too often, the Department of Justice views itself as "the government's lawyer," rather than the lawyer for the American people. This can lead to excessive secrecy.

One example of this is the failure to routinely disclose final settlement agreements. While the existence of a settlement agreement is often a matter of public record, the terms are often hard to find, if they are publicly available at all.

In 2018, the Secretary of the Interior issued an order requiring transparency in settlement agreements, including the proactive disclosure of settlement agreements on the Department's website.[13] This Order included a number of safeguards, specifically excluding certain categories of settlement agreements where the Department is acting more like a private party than a government agency, such as personnel and tort settlements, excluding cases where there is a judicial order mandating confidentiality, and allowing for the Secretary to make a determination

[12] 5 C.F.R. § 2640.304.

[13] Department of Justice, "Secretary's Order 3368: Promoting Transparency and Accountability in Consent Decrees and Settlement Agreements," Sept. 11, 2018, https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3368_promoting_transparency_and_accountability_in_consent_decrees_and_settlement_agreements_0.pdf. In the interest of transparency, one of this paper's authors was involved in the creation of Secretary's Order 3368 while in government.

to withhold certain agreements under certain circumstances. Unfortunately, in 2022, the Biden Administration discontinued this practice.[14]

Contrary to this retrenchment against transparency, there should be a general presumption of proactive disclosure for final settlement agreements. Just as a corporate board would want to know the terms of any settlement agreement a company's lawyers negotiated with an opposing party, the American people should be able to see what their government is doing to incur liability, particularly when it is acting in its capacity as a government.

This practice would also reduce the risk of collusive "sue and settle" agreements, where the government settles with a special interest group in order to make it easier to achieve its policy objectives without having to go through normal policy channels.

e. Timing and Format of Release

There are several existing proactive disclosure requirements for agencies that are, in practice, not adhered to or prioritized. However, these should not be optional or left to linger until agencies determine they want to dedicate resources to releasing the specific categories of records. Agencies and individual custodians should have a fixed, automatic deadline for making proactive disclosures that reduces agency discretion and incentivizes full compliance. For instance, within 45 days after a final decision is made, the full administrative record should be posted publicly with Administrative Procedure Act challenges to the underlying agency action available immediately thereafter if not released. Similarly, calendars, external communications, and ethics records should be made public shortly after their creation without waiting on custodians' approval or endless agency review. As the system to store and sift through this information gets refined, additional types of records can be added.

Proactive disclosures will only be effective at changing agency behavior if agency discretion is reduced or, in some cases, removed. Without built-in triggers, technological requirements, and automatic release timelines – with clear personnel actions for non-compliance – these proactive disclosures are unlikely to increase transparency or reduce agency burdens. Technology should be harnessed to do much of the heavy lifting so covered records are automatically made public within a set time period of after creation or a relevant date passing.

II. Reforming Agency Incentive Structures

Increased proactive disclosure has the potential to reduce the burden on agencies caused by FOIA by reducing the number of FOIA requests (and subsequent litigation). In addition, there are a number of structural changes that can improve agency incentives so that FOIA is not a secondary concern, at best.

[14] Department of Interior, "Secretary's Order 3408: Rescission of Secretary's Order 3368," June 17, 2022, https://doi.gov/sites/doi.gov/files/elips/documents/so-3408.pdf.

a. Ensure FOIA Benchmarks are Included in Employee Performance Standards

In the Open Government Act of 2007, Congress directed the Office of Personnel Management (OPM) to look at changes to executive branch personnel management policies that could improve FOIA responsiveness, including examining "whether performance of compliance with [FOIA] should be included as a factor in personnel performance evaluations for any or all categories of federal employees and officers."[15] Similarly, in 2015, the Department of Justice released model FOIA performance standards for Department employees in different types of roles, including supervisors and FOIA professionals.[16]

Since that time, the adoption of performance standards has been mixed. A 2020 report by the Office of Government Information Services (OGIS) noted "fewer than one-third (30 percent) [of respondents] reported that their agencies have FOIA performance measures for non-FOIA professionals, while nearly half (47 percent) reported that they do not."[17] OGIS noted that barriers to adopting performance standards include "[o]ther competing priorities" and a belief that "FOIA work for non-professionals is [considered a] collateral duty."[18]

This may be translated from the dry language of government reports as "not my job." Many federal employees view responding to FOIA requests as an afterthought because, based on the metrics on which they are evaluated for promotions, bonuses, and other employment considerations, it is. Individual incentives are not aligned with congressional priorities or the need for transparency to the American public.

This should be corrected. In 2007, Congress directed OPM to evaluate whether FOIA benchmarks should be included in employee evaluations. As the 2020 OGIS report shows, there has been little progress since. While FOIA is not (and will not be) the top priority for most federal employees, it should still be a component of employee performance evaluations for all federal employees.

Adding FOIA standards to employee evaluations would also serve to reinvigorate the principles behind the sanctions provisions of FOIA. In theory, under the text of the law, individual federal employes are subject to disciplinary investigations when they fail to abide by FOIA's provisions.

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[15] *Openness Promotes Effectiveness in our National Government Act of 2007*, Public Law 121, U.S. Statutes at Large 2524, (Dec. 31, 2007) § 11. ("OPEN Government Act of 2007").

[16] Department of Justice, *Memorandum for Heads of Departments and Components: Ensuring Compliance with Freedom of Information Act and Oper Government Directive Requirements in Employee Performance Appraisal Records and Work Plans*, Oct. 2, 2015, https://www.justice.gov/media/802466/dl?inline.

[17] Office of Government Information Services, *OGIS Issue Assessment: Freedom of Information Act (FOIA) Performance Measures for Non-FOIA Professionals*, National Archieves, Sept. 29, 2020, 3-4, https://www.archives.gov/files/ogis/assets/foia-perf-measures-for-nfp-assessment-29-sept-2020.pdf.

[18] Ibid. 10.

In practice, the sanctions provisions are effectively dead letters.[19] Adding FOIA standards to employee performance reviews would add an accountability mechanism that is currently lacking in practice.

Different employees have different levels of responsibility and different FOIA burdens. Accordingly, as OGIS emphasized, "[a]gencies should be flexible" in how they incorporate FOIA standards into employee reviews. But they should incorporate such standards nevertheless.

b. Limit Non-Essential Travel for Agencies with Significant FOIA Backlogs

Leo Tolstoy famously wrote "All happy families are alike; each unhappy family is unhappy in its own way."[20] It is similar with agency FOIA responses. While agencies with effective FOIA operations may share some common traits, agencies with poor responses often have their own unique considerations. This makes imposing top-down best practices difficult.

Instead, FOIA can be improved by incentivizing agencies to develop their own solutions to addressing cultural and resource allocation challenges to compliance. At the individual level, this can be accomplished in part through the inclusion of FOIA performance standards. At the agency level, however, a broader remedy is necessary.

A frequent complaint from agencies is that they lack appropriate staff and resources to timely respond to FOIA requests. This recommendation seeks to align internal agency incentives and provide an automatic mechanism to mitigate resource concerns.

One way to incentivize agencies to find their own solutions is to impose automatic restrictions on non-essential travel, including to conferences and other events, for agencies with significant FOIA backlogs. The logic of this recommendation is simple: if agency employees have time to travel, they have time to meet their FOIA obligations.

This remedy works on two levels.

First, many agency conferences are more properly viewed as perks of office than as mission-essential obligations. Removing these perks creates an incentive for agency employees to find ways to fix their own problems.

Second, it increases both the monetary and personnel resources available to address FOIA backlogs. Employees who are not traveling have more time to address their own FOIA responsibilities or be re-tasked to assist others. Moreover, in adopting this proposal Congress can

[19] David E. Pozen, "Freedom of Information Beyond the Freedom of Information Act," University of Pennsylvania Law Review 165, no. 1097 (2017): 1099 (noting "sanctions for improper withholding are virtually never applied."); Paul M. Winters, "Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974," Georgetown Law Journal 84, no. 617 (1996): 618 (finding only one instance of a court invoking the sanctions provision between 1974 and 1996).

[20] Leo Tolstoy, *Anna Karenina*.

authorize agencies to reallocate travel funds to FOIA programs, providing additional resources for technical solutions to FOIA problems.

c. Shift the Burden of Defending FOIA Litigation from the Department of Justice to the Individual Agencies

Individual agencies should be authorized, and perhaps required, to appear in court and defend themselves in FOIA lawsuits.

In general, when an agency is sued, it is represented in court by the Department of Justice, often through the local United States Attorney's Office. This can create a number of problems.

For example, it creates a lot of work for the Department of Justice, particularly for Assistant United States Attorneys in the D.C. U.S. Attorney's Office. Between much of the federal government being headquartered in D.C. and provisions in FOIA that allow venue in D.C. for any FOIA case, by one estimate FOIA cases make up almost a quarter of the civil docket in the D.C. District Court.[21]

It also creates additional delays by virtue of informational mismatches. By statute, FOIA cases are supposed to be expedited, with the government directed to file an answer to a complaint in 30 days.[22] In practice, however, Department of Justice attorneys frequently request additional time to respond to complaints, often citing the need to confer with the agency regarding the request.

Moreover, it means that Department of Justice attorneys have only a limited view of the true situation at an agency, and to what type of request or pace an agency is able to respond.

It does not have to be this way. Some agencies, particularly "independent" agencies, have their own litigation authority. For example, the FEC is authorized by Congress to have its own attorneys appear in court and defend it.[23] This authority should be extended to all agencies with in-house lawyers for FOIA cases.

Directing agencies to represent themselves in FOIA has several advantages. First, it helps internalize the costs of agency truculence, particularly in delay cases. This has the potential to change agency behavior by ensuring that agencies are not able to relieve themselves of their FOIA burdens by passing issues off to the local U.S. Attorney's Office. Agency Offices of General Counsel are often involved in the review and production of FOIA records. Under this approach, they can either work to respond to requests in a timely manner on the front end or take on the extra work of responding to a lawsuit. They cannot outsource it.

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[21] *See American Ctr. for Law and Justice v. United States Dep't of Homeland Sec.*, 573 F.Supp.3d 78, 83 (D.D.C. 2021).

[22] 5 U.S.C. § 552(a)(4)(C).

[23] 52 U.S.C. § 30106(f)(4).

Second, it means that the person who is standing in front of the judge making representations about the agency's response and ability to respond is better informed about agency practice. It also increases accountability because those same individuals will go back to their agency and regularly interact with the people responding to a FOIA request, not just reach out once every few months when a court filing is due.

Third, it frees up resources in the Department of Justice, particularly in the Washington, D.C., U.S. Attorney's Office. That U.S. Attorney's Office has a number of important responsibilities, including prosecuting rising crime in the District of Columbia. The American people will be better served if it is focused more on these other tasks rather than responding to FOIA cases, particularly if this refocusing can be accomplished without sacrificing transparency.

One concern with this recommendation is that it may lead to a decrease in consistency as different agencies take different approaches in litigation. This concern is likely overestimated.

Different agencies—and sometimes even the same agency—already take different positions. For example, in some cases, requesters can send the exact same language to multiple agencies and get anything from responsive records to a claim to a response that the agency is unable to process the request in return.

Moreover, the approach of the relevant lawyers is already inconsistent—some lawyers may take a more adversarial approach while others take a more cooperative approach in representing the same agency.

In addition, FOIA responses themselves are already largely decentralized and managed by each agency, if not each component within an agency. Thus, while consistency, particularly in government speaking with one voice, is important, it is likely an overstated goal.

Finally, this concern can be mitigated by offering agencies an option for the Department of Justice to assume litigation responsibilities upon a determination by senior agency officials.

d. Provide Automatic Attorneys' Fees for Non-Frivolous Delay Claims

Congress should amend the attorneys' fees provisions to allow for automatic recovery of fees for non-frivolous delay claims in cases where agencies have failed to begin producing responsive records, issuing a no records response, or making a determination not to process a request within 60 business days.

Such fees should be paid out of agency appropriations and explicitly justified as a sanction on agencies for failing to comply with FOIA. Automatic fees should be capped at $125 per hour, while successful plaintiffs can still seek a higher award of "reasonable" attorneys' fees under the same terms as today.

As written today, FOIA allows plaintiffs to recover reasonable attorneys' fees and costs when they "substantially prevail" in litigation. The purpose of the attorneys' fees provision is to ensure FOIA requesters are able to receive adequate representation in litigation and prevent agencies from

discouraging successful FOIA requests by effectively imposing a "litigation tax" on requesters. As structured, it is not intended to be a punitive regime.

The award of attorneys' fees is generally discretionary. Through judicial construction, courts, particularly in the D.C. Circuit, where many FOIA cases are brought, have adopted an additional set of criteria, known as "entitlement" standards for assessing when they will award fees to a requester. Thus, while the award of fees is a relatively common occurrence, it is not automatic.

Delay claims are FOIA lawsuits where a requester is challenging the agency's pace of production, rather than the adequacy of its search or propriety of any claimed exemptions. Notwithstanding FOIA's mandate that agencies respond with 20 business days, many agencies fail to provide a substantive determination of whether it will or will not provide responsive records, let alone fully process and respond to a request, within the prescribed time frame.

This proposal incorporates four key nuances.

First, it focuses on requests that have been pending far beyond the statutory response period. Agencies frequently assert that the 20-day timeline to respond in FOIA is unrealistic given their processes and workloads. This provides a grace period between when an agency is supposed to respond and when it is punished for not responding.

Second, it focuses on the actual production of records. This sets a higher standard for response. The D.C. Circuit has ruled that the 20-day response timeline merely requires a "determination" from an agency, not the actual production of records, let alone the complete production of responsive records.[24]

Third, it caps automatic attorneys' fee recovery rates at $125 per hour. This is the presumptively reasonable rate of fees under the Equal Access to Justice Act ("EJA").[25] This is significantly below the market rate for attorneys in the D.C. Circuit, the most active FOIA venue.[26] This limits—though does not eliminate—the risk that an automatic fee recovery will encourage additional litigation, prevents automatic fee recovery from becoming a large windfall for lawyers, and reenforces that automatic fee recovery is intended to be punitive rather that just compensatory.

Fourth, it operates in tandem with, not in place of, the recovery of reasonable attorneys' fees by prevailing parties. The goal of this reform is to provide an incentive for agencies to begin

[24] *Citizens for Resp. and Ethics in Wash. v. FEC*, 711 F.3d 180, 190 (D.C. Cir. 2013).

[25] EJA allows courts to grant a higher fee where "an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A).

[26] The prevailing rate for attorneys in the D.C. market is subject to some dispute. The D.C. U.S. Attorney's Office uses the Fitzpatrick Matrix for presumptively reasonable hourly rates, which begins at $467. Department of Justice, "The Fitzpatrick Matrix, accessed Sept. 19, 2023, https://www.justice.gov/usao-dc/page/file/1504361/download. The D.C. Circuit has traditionally used the Laffey Matrix, which begins at $413, though increases more rapidly for more experienced attorneys. "Laffey Matrix, laffeypatrix.com, accessed Sept. 19, 2023. http://www.laffeymatrix.com/see.html. Either lodestar rate is significantly higher than $125 per hour.

producing records quickly, not deprive meritorious requesters of appropriate compensation or reimpose the "litigation tax."

III. Increasing Uniformity and Reducing Arbitrary Decisions

While all agencies are required to adhere to the statutory requirements of FOIA, virtually every agency has developed their own unique implementing regulations. Undoubtedly, agency missions vary greatly with many possessing unique records that require special treatment (*e.g.*, records related to social security benefits, individual or business tax records, law enforcement activities, etc.). In this regard, agencies should be able to chart their own path provided it is consistent with the spirit of transparency and advancing the public interest.

Unfortunately, many agencies have taken this opportunity and used it to frustrate requesters and erect unnecessary bureaucratic hurdles. Some changes are necessary at the statutory level to reassert the focus on transparency.

a. Introduce Estoppel for Substantially Similar Requests

It is not uncommon to submit the same request to several agencies and receive a wide variety of responses. One agency may immediately begin processing the request while another denies the ability to interpret it. Similarly, one may presumptively grant a fee waiver while another declares the same records subject to a whole host of search and review fees based on the exact same set of statements justifying why the release of the records is in the public interest. From a requester's view, it is difficult to see the varied responses as anything other than bureaucratic obfuscation. Whether it is FOIA offices underwater or agencies attempting to subvert transparency is of little concern since the result is more work, greater resource drain, and less transparency all around.

The principle is simple – agencies should act consistently and objectively. If one agency can reasonably interpret a request, another should be barred from claiming a substantially similar is overbroad or that they need additional unnecessary detail such as all recipients' email addresses before processing.[27] In the same vein, if one agency can fulfill a request, another should not be able to claim the substantially similar request fails to seek a federal record.

Similarly, agencies should be restricted from making inconsistent fee determinations. If an organization qualifies as a "media organization" by one agency, there is no basis for another classifying it differently.

By reducing arbitrary agency action, fewer agency resources will be spent processing appeals and wading through litigation. It's time to put an end to pointless bureaucratic hurdles that have seemingly developed over recent years as a response to an increased FOIA burden.

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[27] Ben Weingarten, "The 'Freedom of Information' Bureaucrats Have Our Number: Catch-22," Real Clear Investigations, September 20, 2022. https://www.realclearinvestigations.com/articles/2022/09/20/the_freedom_of_information_bureaucrats_have_our_number_catch-22_852542.html.

IV. Other Structural and Administrative Challenges

In addition to expanding more fundamental changes to how the most requested records are treated, there are a few targeted changes Congress and agencies can make to address specific problems in the FOIA system that may have an outsized impact.

a. Create a Separate Process for Immigration Files

This recommendation is similar to several recommendations advanced by the Freedom of Information Act Advisory Committee in 2022.[28]

Two agencies receive more FOIA requests than all others combined and comprise the majority of the backlog in processing FOIA requests: the Department of Homeland Security and the Department of Justice.[29] The majority of requests to the Department of Homeland Security involve immigration records, the largest category of which are "Alien Files" that are used "(1) to apply for immigration benefits and (2) support an alien in a pending immigration proceeding, such as removal proceedings, release from detention, or bond hearings," while a "substantial volume" of the Department of Justice's FOIA requests concerns records of proceedings of non-citizens before immigration judges.[30]

Put differently, FOIA is effectively being used to conduct civil discovery in administrative hearings and proceedings where there is no recourse to traditional discovery procedures.

Congress should establish a separate process for aliens and other interested parties to obtain immigration records from the Department of Justice and/or the Department of Homeland Security that is better tailored to the needs of immigration proceedings.

In the alternative, the agencies themselves should develop an alternative process for aliens to obtain access to pertinent immigration records. The Department of Justice has recently taken steps to set up an alternative records request process for records of proceedings for non-citizens.[31] The Department of Homeland Security should take a similar approach.

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[28] Alina M. Semo, "Report to the Archivist of the United States: Freedom of Information Act Federal Advisory Committee 2020-2022," Committee Term Final Report and Recommendation, June 9, 2022, 22-25. https://www.archives.gov/files/ogis/foia-advisory-committee/2020-2022-term/foia-advisory-committee-reportrecommendations.final_.draft_.6.8.2022.docx.pdf.

[29] Department of Justice, "Summary of Annual FOIA Reports for Fiscal Year 2022," accessed Sept. 19, 2023. https://www.justice.gov/oip/page/file/1581856/download.

[30] Semo, "Report to the Archivist," 22-25.

[31] Executive Office of Immigration Review, "Request an ROP," accessed Sept. 19, 2023, https://www.justice.gov/eoir/ROPrequest; Semo, "Report to the Archivist," 23. ("On March 8, 2022, to provide *pro se* aliens with access to [records of proceedings], [the Office of the Chief Immigration Judge] and [Board of Immigration Appeals] instituted a new process to request an ROP outside of FOIA.")

At the core of these alternative pathways is processing requests for immigration records outside of the FOIA process with different personnel, often in the originating agency components. This encourages quicker responses and frees up agency FOIA personnel to focus on other requests.[32]

b. Clarify that Section 508 of the Rehabilitation Act is Not a Barrier to Proactive Disclosure

Section 508 of the Rehabilitation Act requires federal agencies to ensure that electronic information and data is accessible to members of the public with disabilities.[33] It is an important law for making sure government information is transparent and available for all Americans.

But there is tension between Section 508 and increased proactive disclosure. Making documents Section 508 compliant can be a time-consuming process that delays the release of government records.

This tension has been noted as an area of concern repeatedly by both the Freedom of Information Act Ombudsman and the Freedom of Information Act Advisory Committee.[34] The Ombudsman has made several recommendations to Congress, including two that involve increased government funding and one of that calls for "legislation providing that, in lieu of proactively posting 508-compliant FOIA documents, agencies may instead post a 508-compliant index of these documents. Individuals could then request 508-compliant copies of documents listed in the index."[35]

The problem with the Ombudsman's approach is that it still requires all citizens to make additional FOIA requests, effectively defeating the purpose of proactive disclosure.

We propose two alternative approaches.

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[32] For example, the Social Security Administration previously "utilized analysis from other components outside of the Central FOIA processing division to expeditiously process simple" requests for commonly requested records such as "decedents' Forms SS-5 (Applications for Social Security Cards); claim files; and genealogical information." Semo, "Report to the Archivist," 24.

[33] Electronic and Information Technology, 29 U.S.C. § 794d (2000).

[34] Office of Government Information Services, *The Freedom of Information Act Ombudsman- Past, Present & Future 2019 Report for Fiscal Year 2018*, National Archives, accessed Sept. 19, 2023,

https://www.archives.gov/files/ogis/assets/ogis-2019-annual-report-for-fy-2018.pdf; Office of Government Information Services, *The Freedom of Information*

Act Ombudsman 2021 Report for Fiscal Year 2020, National Archives, accessed Sept. 19, 2023, https://www.archives.gov/files/ogis/assets/ogis-2021-annual-report-for-fy-2020.pdf; and Office of Government Information Services, *The Freedom of Information Act Ombudsman 2022 Report for Fiscal Year 2021*, National Archives, accessed Sept. 19, 2023,

https://www.archives.gov/files/ogis/reports/ogis-2022-annual-report-final.pdf; Semo, "Report to the Archivist," 24.

[35] "*The Freedom of Information Act Ombudsman- Past, Present & Future 2019 Report for Fiscal Year 2018"* 17.

First, for new categories of proactively disclosed records, agencies may produce 508-compliant indexes while also publicly releasing non-508 compliant versions of the underlying documents on the timelines described above.[36] Agencies should then be required to produce 508-compliant versions of index records on a shorter timeframe outside of the FOIA process upon request.

Second, compliance with deadlines for proactive disclosure should factor into assessing where compliance with section 508 would pose an "undue burden" to an agency. Section 508 has an exception for when compliance would cause an "undue burden" on the agency. However, only one government agency is known to have "received support from their legal staff to invoke the 'undue burden' clause."[37]

Section 508 is supposed to be a sword that promotes government transparency for all Americans. It should not be used as a shield to withhold records from the people or delay proactive disclosure. Accordingly, Congress should clarify that, while Section 508 compliance is a priority, it is not a barrier to proactive disclosure.

CONCLUSION

There is no single magic bullet to ensure that FOIA lives up to its lofty goals. But through these bold solutions we can make some progress in swinging the pendulum in favor of transparency and disclosure while also seeking to ease undeniable burdens that have overwhelmed federal agencies. Requesters, agencies, and the courts could all use the relief.

[36] Ibid. § I(d).

[37] "*Responses to Questions for the Record—Alina M. Semo.*"