THE FREEDOM OF INFORMATION ACT IN THEORY AND PRACTICE

by

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Abstract

This thesis examines the varying theoretical justifications for the Freedom of Information Act, compares the corresponding expectations of use to the actual use patterns, and seeks to provide a more robust rationale for information access. Based on FOIA usage, the thesis concludes that conventional theories supporting public access to government information may be supplanted by an alternative theory involving public ownership of government information.

The legislative history of the Freedom of Information Act, along with its predecessor laws and its subsequent amendments, reveals both explicit and implicit justifications for the Act. These theories, in turn, are accompanied by certain expectations of use. An examination of the concept of a public right to know, as the bedrock upon which FOIA is built, reveals the strengths and weaknesses of the Act's underlying conventional wisdom. A review of seminal Supreme Court and appellate court cases shows judicial interpretation of the Act's intent. An examination of the Act's use, through analysis of agency FOIA Logs obtained under the Freedom of Information Act, demonstrates patterns and practices not anticipated by Congress. From these patterns of use, and from considerations of intellectual property law and the relationship between a sovereign public and representative government, an alternative theoretical rationale for FOIA is proposed.

Congress opened federal government operations to greater public scrutiny by passing the Freedom of Information Act in 1966. The philosophical underpinning for the Act was summed up in the concept of a "public right to know," but Congress expressed multiple theoretical justifications for providing greater public access. These explicit justifications included enhancing the electorate's ability to govern itself, providing information as a watchdog on government and balancing Executive Branch power.

Implicit justifications included the belief that enhanced information access would provide partisan advantage; and, obliquely, the concept of public ownership of government action.

The analysis of FOIA usage shows the self-governance, watchdog and balance-of-power explanations do not easily fit with the predominant use of the Act by commercial interests. This disparity has driven skeptics to urge a scaling back of information access. Access rights may be strengthened, however, by considering government information to be a form of public property.

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INTRODUCTION

Every discussion of the Freedom of Information Act starts with James Madison:

> "A popular Government without popular information or the means of acquiring it is but a Prologue to a Farce or a Tragedy, or perhaps both...and a people who mean to be their own Governors must arm themselves with the power which knowledge brings."[1]

Congress repeatedly invoked Madison's famous "prologue to a farce or a tragedy" phrase in crafting the Freedom of Information Act.[2] Subsequent legislative amendments, judicial rulings interpreting the Act and considerable scholarly analysis likewise rely upon Madison's stirring rhetoric to explain FOIA. In his words are the seeds of the two most common theories, related but also distinguishable, undergirding information access. Simply put, lawmakers justified the legislation on the grounds that information is a necessary tool for self-governance; and, that information provides for monitoring a possibly unreliable government. Information, that is to say, is a means for perfecting the republic.

Unfortunately, Madison's words are being misappropriated by the lawmakers, judges and scholars who use his quote and his Founding Father credentials as rationale for public access to government documents. This misuse of Madison symbolizes a weak link in the overall theoretical foundation for FOIA; ironically, the result can be a narrowing rather than a broadening of public access. Theories yield expectations of use, and the theories supporting information access embedded in Madison imply FOIA will be used for certain purposes relating to a "popular Government" and "a people who mean to

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[1]Madison to W.T. Berry, 4 Aug. 1822, *The Writings of James Madison,* ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1910), 103.
[2]5 U.S.C. 552.

be their own governors." When these expectations are not met, the information-access law loses credibility and invites narrowing.

This thesis examines the conventional theories underlying the Freedom of Information Act, compares the resulting expectations of use with actual use of FOIA, and seeks resolution by identifying an alternative theory of public access. By knowing the most suitable theory, we can better guide future implementation and modification of the law.

The conventional theories supporting FOIA have common roots in the concept of a "public right to know." Traditionally, access proponents maintain in the face of considerable evidence to the contrary that there is a constitutional right to know. By rooting public access in the Constitution, these proponents hope to guarantee more robust access than is available under legislatively established rights. More generally, the phrase "right to know" has been used loosely and without intellectual backing -- much like Madison's "farce or tragedy" quote. As will be seen, the thesis concludes with the suggestion that maximum public access might be best supported by stressing the public right to *have* more than the public right to *know*.

This thesis critiques Madison's "farce or tragedy" quote, to explain both the embedded theories of information access and the ways in which the specific quote has been misused. The legislative history of FOIA, along with its predecessor laws and subsequent amendments, reveals the multiple theories and accompanying expectations of use held by Congress. The conventional primary theories can be summarized as self-governance, watchdog and balance-of-power. The secondary theories, those that arise implicitly or within the shadows of the debate, can be summarized as partisan advantage and sovereign claim.

Madison's assertion that "a people who mean to be their own Governors must arm themselves with the power which knowledge brings" -- though misused through the

FOIA debate -- stands for the self-governance theory. This was the most commonly invoked theory during initial consideration of FOIA.

"We must remove every barrier to information about, and understanding of, government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever-more demanding role of responsible citizenship," FOIA's primary author, Rep. John Moss, D-Calif., declared.[3]

Moss said his legislation would "accomplish that objective by shoring up the public right of access to the facts of government."[4] Embedded in Moss's argument are several ideas: notably, that the public has a *right* to governmental information, and that the information gained will equip the public for responsible *citizenship*. In so arguing, Moss was following free-speech theorist Alexander Meiklejohn. As Meiklejohn put it, "just so far, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion (which) is relevant to that issue, just so far the result must be ill-considered."[5] By this reasoning, FOIA enables more well-considered decisions by virtue of making those decisions better informed.

The watchdog theory is articulated in Madison's warning -- though, again, it was misused through the debate -- that a government without popular information is a "prologue to a farce or a tragedy." That is to say, inevitable government misbehavior must be monitored to avoid catastrophe, and what the monitoring requires is access to information on the government itself. Thus, Rep. Melvin Laird declared at the time of FOIA's passage that the legislation "helps to shred the paper curtain of bureaucracy that covers up public mismanagement with public misinformation, and secret sins with secret silence."[6]

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[3] *Congressional Record*, 20 June 1966, 13641.
[4] Ibid.
[5] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government,* (New York: Harper Press 1948), 15-16.
[6] *Congressional Record*, 20 June 1966, 13648.

. A refinement of the above theories, couched in an explicit expectation for the law's future use, dealt with information as a tool for the government watchdogs specifically within the press. The House Republican Policy Committee in May, 1966 cited the media first in a recitation of FOIA's potential users. The law, GOP members said, would aid "reporters as representatives of the public, citizens in pursuit of information vital to their interests, and members of Congress as they seek to carry out their constitutional functions."[7]

A third theory puts forth FOIA as a tool for improving the balance-of-power among federal branches of government. "From its earliest days...the Freedom of Information act has reflected the constant push and pull of the separation of powers between the Congress and the Executive Branch," the People for the American Way noted in a 1986 report.[8] Congressman Garner Shriver, R-Kan., emphasized that "ours is still a system of checks and balances; therefore, as the balance of government is placed more and more at the federal level, the check of public awareness must be sharpened."[9] Shriver was thus acknowledging the effort to affect the balance of power, but adeptly displaced the added power to the public rather than to the legislative branch.

In addition to the conventional self-governance, watchdog and balance-of-power theories, implicit explanations through the initial FOIA debate included the notion that enhanced information access would yield partisan advantage. This was the theory that dared not speak its name. Though not articulated during congressional debate, partisan considerations significantly contributed to the Democratic push for freedom-of-information legislation during the Eisenhower administration and the Republican push for freedom-of-information legislation during the Kennedy and Johnson administrations.

Hint of other theories also arise, including the possibility of a public property

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[7]Ibid., 13648.
[8]People for the American Way, "The Freedom of Information Act After Twenty Years," *quoted in Congressional Record,* 99th Congress, 1st sess., 1986, June 26, 1986, 16015.
[9]Ibid., 13652.

right in the information maintained by government. Thus, lawmakers in justifying FOIA's predecessor, the Administrative Procedure Act, noted that the Act's public information provision "has been drawn upon the theory that administrative operations and procedures are public property which the general public...is entitled to know."[10] As this thesis will explore, the notion of government information as public property conveys significant policy consequences, and may yield greater public access than the conventional self-governance, watchdog or balance-of-power theories.

Once written, the Freedom of Information Act required interpretation. Courts have sought to clarify the core purpose of the Act; that is, the driving theory that will explain the proper balance between access and other governmental objectives. Thus, in one 1978 case, the Supreme Court summed up "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors responsible to the governed." [11] Here, the Court essentially restated the two primary conventional theories. The self-governance theory is expressed in one phrase, "hold the governors responsible to the governed," while the watchdog theory is given emphasis in another phrase, "check against corruption."

At times, by strictly identifying the driving theories of FOIA to be self-governance and watchdog, the Court has limited access to information not fitting within these confines. Congress, in turn, has periodically modified the Act and in so doing restated its own theoretical intent. Most significantly, the 1996 Electronic Freedom of Information Act amendments included as part of the official legislative findings the statement that FOIA existed to provide access for "*any* person for *any* public or private use."[12]

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[10]H. Rpt. 752, 79th Congress, 1st sess., 198.

[11]*NLRB v. Robbins Tire and Rubber Co*., 437 U.S. 214, 241. (1978*).*

[12]House Government Reform and Oversight Committee, "Electronic Freedom of Information Act Amendments of 1996," 104th Cong., 2d sess., 1996, H. Rept. 104-795, *reprinted in 1996 United States*

To examine the law as it is being implemented, this thesis utilizes annual agency reports, analyses by interest groups, congressional oversight hearings and journalistic accounts. This thesis also employs a primary-source examination of FOIA records themselves obtained directly from federal agencies. Under the Freedom of Information Act, I filed a series of requests with approximately two dozen federal agencies, seeking copies of the agencies' so-called FOIA logs. These are the records identifying individual requests; they are a window into the categories of information being sought and the nature of the information-requesting population. My requests for FOIA logs included one round of requests for the fiscal 1998 logs, and follow-up requests for the fiscal 1999 and 2000 logs.

The logs vary greatly from agency to agency, making strict comparisons difficult. Some, like that of the International Trade Administration, are handwritten. Some, like that of the Defense Intelligence Agency, don't list the name of requesters. Some, like that of the Central Intelligence Agency, don't list the business affiliation or first name of the requesters. Some logs, like those maintained by the Environmental Protection Agency, are analyzed by the agency itself to answer such questions as who's making information requests.

Consequently, this analysis of FOIA use combines the anecdotal with the quantitative. FOIA logs for different agencies are selected to illustrate different facets of FOIA usage patterns including: The scarcity of media requests, the predominance of repeat players among the media requesters, the proliferation of disfavored requesters at certain agencies, the nature of commercial requesters and the significance of what I term library function requests.

The FOIA logs help clarify the law's usage compared to congressional expectations. Thus, the EPA's most recent analysis reveals that 1 percent of the agency's

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Code Congressional and Administrative News, 3462.

FOIA requests came from the media, while 89 percent come from attorneys, environmental consultants or private industry.[13] My review of FOIA logs further illuminates the particular types of information being sought. Thus, at the National Security Agency, requests for contract information ranked second in terms of total requests -- behind the requests for Unidentified Flying Object information.[14] Neither type of request was expected by Congress.

The seeming mismatch between actual use and prior justifications drives considerable controversy, with one scholar noting that "in spite of the lofty rhetoric trumpeted by its supporters, FOIA rarely contributes to the awareness of the electorate."[15] This supposed failure of expectations has driven some to seek curtailment of some FOIA provisions.

This thesis will seek to derive an appropriate theoretical underpinning for the Freedom of Information Act based upon the law's concrete application. A continued insistence upon the self-governance or watchdog rationale may turn out to yield an overly cramped interpretation of the law. Instead, the public property rationale that received relatively little rhetorical attention during FOIA's drafting provides a good fit between theory and practice. Moreover, this may be precisely the rationale best suited to an expansive understanding of the law in the Age of Information.

[13]Environmental Protection Agency 1998 FOIA report, *available at* http://www.epa.gov/foia/foiarept.htm.
[14]National Security Agency 1998 FOIA log.
[15]Amy Rees, "Recent Developments in FOIA," Duke Law Journal 44, (April 1995), 1223.

I

THE RIGHT TO KNOW

A.

Constitutional and Common Law Claims

The notion of a public "right to know" permeates the information-access debate. The phrase begs several questions, including: right to know *what*, and from whence does the right arise? Answers to these questions will define the boundaries for information access. The phrase implies, through the context in which it arises, that the right in question applies to information in the hands of the government; thus, the public has a right to know what the government knows. But the phrase also implies that the nature of the information and the purposes to which it will be put are irrelevant. It is the right to *know*, period.

The asserted right to know provided the philosophical underpinning for proponents of the Freedom of Information Act. The term subsequently has achieved iconic status, loosely employed even by skeptics of FOIA legislation, with one opponent of FOIA-amending legislation conceding that there was a "right to know, like any other right."[16] The term, though, is also of relatively recent origin; legal scholar David O'Brien pins the first use to a Jan. 23, 1945 speech by the executive director of the Associated Press.[17]

Those who believe most fervently in a right to know seek the deepest historical roots for the professed right. This was particularly so prior to passage of the Freedom of Information Act, as information-access champions sought to advance their cause. Thus, the American Society of Newspaper Editors in a July 12, 1957 "Declaration of Principles" asserted grandly that "the American people have a right to know, as the heirs

[16]Statement of Sen. Robert Taft Jr., *Congressional Record*, 21 Nov. 1974, 36873.
[17]David M. O'Brien, *The Public's Right to Know*, (New York: Praeger Publishing): 1981, 2.

of Magna Charta (and) the inheritors of the privileges and immunities of the English common law."[18]

Missouri Sen. Thomas C. Hennings, Jr. in 1959 traced right-to-know roots back through the Founding Fathers and beyond to England. In 18th century England, Hennings argued, there had developed "the concept of a right in the people to know what their Government was doing" and he further contended that "the framers of our Constitution recognized the existence of such a right and were strongly influenced by it."[19]

Hennings enlisted the Supreme Court in the cause, by citing *Grosjean v. American Press Co*.[20]In striking down a state's tax on media, the Court recounted the various 18th century English efforts to tax newspapers, and the opposition that arose from those who sought "full information in respect of the doings or misdoings of their government."[21] The framers of the U.S. Constitution, the Court stated in *Grosjean*, were "familiar" with the English struggle -- and, by this reasoning, the framers of the Constitution were equally motivated by the desire to protect the right to know.

Hennings further found support for his notion that "the people's right to know is an implicit part" of the Constitution in Article I, Section 5, Clause 3, which requires the House and Senate to "keep a Journal of its Proceedings, and from time to time publish the same." Peering still closer, Hennings said the requirement in Article II, Section 3 that the president "shall from time to time give to the Congress Information of the State of the Union," evidenced constitutional support for a "right to know." During the Constitutional Convention debate over this provision, delegate James Wilson was recorded as noting that "the people have a right to know what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings."[22]

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[18]Ibid.
[19]Thomas C. Hennings, Jr., "Constitutional Law: The People's Right to Know," 668.
[20]297. U.S. 233 (1946).
[21]*cited in* Thomas C. Hennings, Jr., "Constitutional Law: The People's Right to Know," 668.
[22]*cited in* Conrad Philos, "The Public's Right to Know and the Public Interest -- A Dilemma Revisited,"

Hennings then leaps to the conclusion that "the right to know was so much taken for granted by the Founding Fathers that it was not deemed necessary to include it in the original Constitution."[23]

Skeptics retort that this affirmative access established with the publication requirement was limited; as one scholar noted, the "time to time" publication requirement marked "a retreat from the requirement in the Articles of Confederation that the Congress publish its Journal monthly."[24] Moreover, the Articles of Confederation excluded from publication matters relating to treaties, alliances and military operations, whereas the Constitution imposed no such limits and gave the discretion to Congress to exempt from publication "such parts as may in their judgment require secrecy."[25] This could be read as giving Congress more leeway in restricting information access. And, the drafters of the Constitution explicitly rejected a proposal to publish all House proceedings, reasoning that some government business should not be transacted in public. Congress's own early actions did not evince high regard for public access. Meetings of the U.S. Senate were not open to the public until February 1794. James Madison would not permit the publishing of his constitutional convention notes during his lifetime, and they did not appear in public until 1840 -- four years after his death, and well after the debates in question.[26]

Beyond the answers-by-example that may or may not be found in the practices of the Constitutional Convention, Hennings and his allies further identified the First Amendment as an implicit source for the right to know. In 1955, at the start of the long road toward passage of FOIA, Congressman John Moss opined that "not only are (the people) entitled to know, but by rights inherent in the Constitution, they have the right to

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Federal Bar Journal, (January 1959) 41, 44.
[23]Ibid., 669.
[24]McWeeney, "The Unintended Consequences of Political Reform," 31.
[25]U.S. Const., art. I sec. 5.
[26]David M. O'Brien, *The Public's Right to Know*, 37.

know."[27]

It is, in fact, possible that rights can be considered bound in the Constitution even in the absence of explicit text. The Supreme Court has detected a right to travel through the Fifth Amendment[28], a right of association through the First Amendment,[29] the rights to acquire useful knowledge and to marry[30]and, famously, a right to privacy in the penumbras and emanations of several amendments.[31] It is not out of the question that a right to know could likewise be similarly recognized.

Thus, in the 1980 case of *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court dealt with the question of whether the public -- through its agents, the press -- had a right to attend a criminal trial.[32] In a very fractured opinion the Court did find that the public had a right to attend the trial. Chief Justice Burger, writing for a plurality, found the right to attend the criminal trial within the First and Fourteenth amendments, noting that "free speech carries with it some freedom to listen" and recounting a previously articulated notion of a "First Amendment right to receive information and ideas."[33] Justice Stevens, writing separately, burnished this observation by declaring that the Court "unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."[34]

The *Richmond Newspapers* case, though, is a weak reed to lean on. Considerable scholarly opinion maintains to the contrary that neither the First Amendment nor any other combination of constitutional language can be reworked into full-fledged support

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[27]*cited in* McWeeney, "The Unintended Consequences of Political Reform," 21.
[28]*Kent v. Dulles*, 357 U.S. 116 (1958).
[29]*NAACP v. Alabama*, 357 U.S. 449 (1958).
[30]*Meyer v. Nebraska*, 262 U.S. 390 (1923).
[31]*Griswold v. Connecticut,* 381 U.S. 479 (1965).
[32]*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
[33]448 U.S. 576.
[34]448 U.S. 583 (Stevens concurring.)

for a right to know. Archibald Cox concluded that "such a right would stray far from the words and original meaning of the constitutional guarantees,"[35] while David M. O'Brien found in his comprehensive survey nothing in the legislative history and subsequent court interpretations of the First Amendment to support a constitutional basis for the right to know.[36]Chief Justice Burger himself, he of the *Richmond Newspapers* ruling favorably cited by right-to-know proponents, noted in another information-access case that the Court never "intimated a First Amendment guarantee of a right of access to all sources of information within government control."[37] A skeptical Ohio Court of Common Pleas, in an opinion unearthed by David M. O'Brien, dismissed "the so-called right of the public to know (as) a rationalization developed by the Fourth Estate to gain rights not shared by others."[38]

Pre-FOIA courts, when presented with questions of public access, likewise offered scant support for a legal "right to know." One year before Congress passed FOIA, the Supreme Court in the 1965 case of *Zemel v. Rusk* confronted a challenge to the U.S. ban on travel to ostracized Cuba. The Court upheld the travel ban, with Chief Justice Earl Warren analogizing the case to a man claiming a right to enter the White House in order to gather information. "The right to speak and publish," Warren wrote, "does not carry with it the unrestrained right to gather information."[39]

The assertions of a right to know were given their strongest force prior to FOIA's passage. The arguments were a necessary part of the debate, and an important means for information-access proponents to press their case. In the years since, the phrase has remained in common circulation, but it is somewhat untethered; it is a rhetorical coin that for all its widespread use has lost its intellectual backing.

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[35]Archibald Cox, *The Courts and the Constitution*, (Boston: Houghton-Mifflin 1987) 233.
[36]David M. O'Brien, *The Public's Right to Know*, 53.
[37]*Houchins v. KQED*, 438 U.S. 1, 9 (1978).
[38]*Dayton Newspapers, Inc. v. City of Dayton*, 259 N.E. 2d 522 (1970).
[39]*Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

B.

The Right to Know: Information and the Value of Informed Speech

Speech without information is sound without meaning. The right to speak, therefore, makes sense only if the speech content itself is meaningful: if it is informed. By this reasoning, Freedom of Information Act advocates come to the conclusion that there exists a right of access to information. Competing schools of thought conjure different conceptions of the information involved: one holds a narrow view of information that's relevant to core political speech, while the other envisions information more broadly.

The narrow conception regards relevant information as political. Alexander Meiklejohn summoned the image of a town meeting to describe this conception of speech.[40] The meeting concerns core matters of public policy: roads, schools, the common defense. To such a meeting, all men are free to come and free to think their own thoughts. But as Meiklejohn describes it, this town meeting is also regulated by rules of conduct necessary to permit the achievement of a common purpose; "the meeting has assembled, not primarily to talk, but primarily by means of talking to get business done."[41] To advance this purpose, speech can be cut off. Indeed, Meiklejohn states that the town meeting "as it seeks for freedom of *public discussion of public problems* would be wholly ineffectual unless speech were abridged."[42] (Italics added.) The abridgment of speech is designed to allow the surfacing of all information relevant to the public policy matter at hand, while editing out the tangential, the repetitive, the crackpot. Famously, Meiklejohn concludes that "what is essential is not that everyone shall speak, but that

[40]Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, 22
[41]Ibid., 23.
[42]Ibid.

everything *worth saying* shall be said."[43](Italics added.)

In one light, Meiklejohn's argument is fully consistent with what would later be fleshed out as a self-governance theory for information access. He says, "Just so far as, at any point, the citizens who are to decide an issue are acquainted with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered."[44] To the extent the citizen is seeking information relevant to a policy decision, Meiklejohn's is indeed an argument for greater information access.

Meiklejohn's image of the town meeting, though, also explicitly restrains information flow. The moderator makes decisions as to the relevance of a request to speak. That deemed irrelevant to the policy matter is ruled out of order and shut down. When Meiklejohn says that if ideas are "*responsibly* entertained by anyone, we, the voters, need to hear them,"[45] (italics added) he is communicating that irresponsibility is not to be countenanced. Some judgmental entity -- the moderator -- is reaching into the mind of the would-be speaker and evaluating the nature of the thoughts held there.

Meiklejohn explicitly separated speech into two tracks, when he described the "merchant advertising his wares (and) paid lobbyist fighting for the advantage of his client" as being "utterly different from that of a citizen who is planning for the general welfare."[46]The latter enjoys full constitutional protection under Meiklejohn's scheme, while the former does not. Meiklejohn, as it happened, was writing before the Supreme Court upheld the constitutionally protected status of commercial speech.[47]And even without benefit of the Court's ruling, it is not entirely clear why a paid lobbyist fighting for a client's interest should be considered any different than an individual fighting for their own interest. It can't simply be because the lobbyist is being paid, and hence has a

[43]Ibid.
[44]Ibid., 26.
[45]Ibid., 27.
[46]Ibid., 39.
[47]*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

financial motive. Consider a property owner angry over federal government plans to restrict use of land to protect endangered species habitat. Are the protests motivated by a grand conception of the inviolable nature of private property, or by hopes of making a profit by selling this particular unencumbered parcel of property? It does not matter; the government will not reach into the mind of the political speaker in this case. Why, then, should the profit motive of the paid lobbyist undermine free-speech protection?

Meiklejohn's division of speech, in a freedom-of-information context, would yield easier access to one type of information as opposed to another. He enthuses about "the right of the citizens of the United States to know what they are voting about,"[48]and only information consistent with this electoral purpose would be freely accessible. This is strictly information for self-governance purposes. By contrast, he seeks to distinguish the electoral speech with the "private desire for private satisfaction,"[49]and this latter form of speech/information can be properly constrained.

A constitutional thinker of a different cast, Robert Bork, suggested a similar division in speech type. Articulating a view that he would later come to revise, Bork asserted that "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or...pornographic."[50] He subsequently elaborated that his notion of protected speech extended to that "essential to running a republican form of government," including "speech about moral issues, speech about moral values, religion and so forth, all those things (that) feed into the way we govern ourselves."[51] This two-tier conception divides speech, and the information conveyed within, to the camp of that which is useful for self-governance, and that which is not.

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[48]Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, 62.
[49]Ibid.
[50]Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 147 (1971) 1., 31.
[51]*Congressional Record*, 17 Sept. 1987, 24329.

The implications for information access flow from the reduced claims that anyone has on non-political information; that is, information not directly useful for self-governance. Meiklejohn ringingly declares that "the First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game...(and) private intellectual curiosity."[52] Meiklejohn's formulation would mean that merely curious "intellectual aristocrats" would lack the same access rights as those social-minded souls interested in the general welfare. This allows the government, again, to reach into the mind of the information requester to determine motive. The academic researcher, the merely curious and the crackpot are all cast into one, information-denied category. Indeed, Meiklejohn explicitly states that perhaps "the time has come when the guarding of human welfare requires that we shall abridge the private desire of the scholar...to study whatever he may."[53]

In this context, Henry Perritt later noted:

> "Certain content is closer to the core of that (self-governance) concern than are other contents. For example, the proceedings of a state legislature are much easier to relate to robust public debate than are the records of public utility easements across private property."[54]

The broader conception of speech and information is presented by Thomas Emerson, who contended the right to know should be considered "an integral part of the system of freedom of expression, embodied in the First Amendment and entitled to support by legislation or other affirmative government action."[55] Indeed, Emerson insisted the case for the constitutionally embodied right to know was "overwhelming," and he identified multiple functions supposedly served by this handmaiden of the right to communicate. The right to know, Emerson said, is essential to personal self-fulfillment, a significant method for seeking the truth; and, at heart, "necessary for collective decision-

[52]Meiklejohn, *Free Speech and its Relation to Self-Government*, 45.
[53]Ibid., 100.
[54]Henry Perrit, "Sources of Rights to Access Public Information," 210.
[55]Emerson, "Legal Foundations of the Right to Know," 2.

making in a democratic society."[56]

Emerson's view of information thus includes Meiklejohn's self-governance focus, but also goes well beyond. Though the "self-fulfillment" term is unfortunately redolent of the human potential movement with all its touchy-feely squishiness, it points to the frontiers identified by a Supreme Court that has construed the First Amendment to cover such forms of expression as armband-wearing[57], flag-burning[58], nude dancing[59] and commercial advertising.[60] A self-fulfillment foundation for the First Amendment, as preferred by Emerson, would open the way for manifold and seemingly unlimited uses of the Freedom of Information Act. Mere curiosity, intellectual appetite, the search for titillation or proof for paranoid conspiracy theories -- all could be understood as aspects of self-fulfillment.

Emerson identified flaws in Meiklejohn's favorite analogy of the town meeting. The essential point about a town meeting, in Meiklejohn's view, was not that everyone be permitted unfettered ability to talk, but that everything worth saying had been said. As Emerson noted, this analogy "injects the government into decisions on the content, political relevance and worth of the speech."[61] In a Freedom of Information Act context, a Meiklejohnian moderator would likewise be in a position to judge the political relevance and social value of information requests.

But while going beyond Meiklejohn, Emerson allied himself with Meiklejohn as asserting that the public, as sovereign, "must have all information available in order to instruct its servants, the government."[62] In this, Emerson is aligning himself with the conventional self-governance argument that Meiklejohn confines himself to. Arguing by

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[56]Ibid.
[57]*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[58]*Texas v. Johnson*, 491 U.S. 397 (1989).
[59]*Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991).
[60]425 U.S. 748.
[61]Emerson, "Legal Foundations of the Right to Know," 5.
[62]Ibid., 14.

analogy, Emerson cited the constitutional right of the judiciary to obtain executive branch information in the course of an investigation of the White House.[63] Making an intriguing though not necessarily persuasive stretch, Emerson speculated that the public's right to executive branch information would flow from the same reasoning "if one conceives of the citizenry as constituting a fourth branch of government."[64] That is: if the judiciary can compel information disclosure, and if Congress too can obtain executive branch information, then the public as sovereign over all branches must surely enjoy the same right.

Emerson marshaled some sympathetic Supreme Court opinions in support of his argument. Thus, in a 1969 decision supporting the right of individuals to embrace pornography in their own homes, the Court asserted that "it is now well established that the Constitution protects the right to receive information and ideas."[65] Here, the information being received -- sexually explicit images designed to arouse desire -- convey no apparent political content. It is, nonetheless, protected under a conception of the First Amendment that goes well beyond Meiklejohn's or Bork's self-governance emphasis. Emerson turned, as well, to dissenting opinions for rhetorical support. Thus, in dissenting against the Court's decision not to recognize a First Amendment right of the press to interview prison inmates, Associate Justice William O. Douglas summoned forth "the right of the people, in true sovereign under our constitutional scheme, to govern in an *informed* manner."[66] (Italics added.) Emerson conceded that "the contours of the right to know remain obscure."[67] But by piecing together Supreme Court opinions upholding information-reception rights, along with vividly worded dissents like those of Justice Douglas, Emerson sought to accomplish two goals. He was asserting both a

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[63] *United States v. Nixon*, 418 U.S. 683 (1974).
[64] Emerson, "Legal Foundations of the Right to Know," 15.
[65] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).
[66] *Pell v. Procunier*, 417 U.S. 817, 839. (1974).
[67] Emerson, "Legal Foundations of the Right to Know," 3.

constitutional basis for the public's right to obtain information, and he was presenting a broad rather than narrow vision of what that protected information could be.

In so doing, Emerson also periodically imply limits on this claimed right. As anyone must, he recognized the necessity to keep sensitive national security information, criminal investigations, diplomatic negotiations and the like out of the public spotlight. Emerson's enumerated lists largely track the nine enumerated exemptions under FOIA.

In the phrasing of his argument, there are also implied -- though apparently unintentional -- constraints. Emerson said there is "a constitutional right in the public to obtain information from government sources *necessary and proper for the citizen to perform his function as ultimate sovereign*."[68] (Italics added.) This implies an act of judgment, as the holder of information determines whether or not the information's release is necessary and proper for the citizen. But what of the merely curious, the idler, the paranoid? Emerson's phrasing suggests such an individual's claim might fall short.

Emerson immediately emphasized that the right to claim information "would extend, as a starting point, to all information in the possession of the government" and that "it is hard to conceive of any government information that would not be relevant to the concerns of the citizen and the taxpayer."[69] And the body of his argument does, in fact, make clear that Thomas Emerson sought to expand and not narrow the right of access to information. But employing phrases such as "necessary and proper for the citizen to perform his function as ultimate sovereign" to describe the rationale for information disclosure sustains an implied limit on the nature of information disclosed.

As seen in this brief review of Meiklejohn and Emerson, the theoretical justifications deployed on behalf of information disclosure become limitations as well as expansions. By emphasizing the First Amendment's focus on core political speech, Meiklejohn allows for limits on non-political speech; and, correspondingly, for limits on

[68]Ibid., 16.
[69]Emerson, "Legal Foundations of the Right to Know," 16.

public access to non-political information held by the government. The town-meeting moderator enjoys considerable power to limit: to limit expression, and to limit access. Emerson's broader conception of self-fulfillment extends well beyond core political speech. Correspondingly, this conception allows for broader public access to information held by the government. Emerson's broader view appears closer to the First Amendment as interpreted by a Supreme Court that has granted protection to expressions going well beyond the strictly political. Meiklejohn and Robert Bork both came later to revise and extend their core-political conception of protected speech. It appears that the prevailing theory holds up the First Amendment as reaching broadly beyond the strictly political; this, in turn, will have consequences for how the Freedom of Information Act is to be properly read.

II

THE MISUSE OF MADISON'S ARGUMENT

Return, now, to James Madison's famous quote, the misuse of which has both characterized Freedom of Information Act discourse and illustrated the core theories invoked to explain the Act.

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives them."[70]

For half-a-century, Madison's words have been press-ganged into service on behalf of information-access. In 1950, in a significant development in the pre-history of the Freedom of Information Act, the American Society of Newspaper Editors hired *New York Herald Tribune* lawyer Harold Cross to examine the status of information-access laws. Cross's work would be both polemical and scholarly; more than a comprehensive survey of state and federal laws and practices, it would be driven by the assertion that "citizens of a self-governing society must have the *legal* right to examine and investigate the conduct of its affairs" and that "these rights must be elevated to a position of the highest sanction if the people are to enter into full enjoyment of their right to know."[71] The result was a 405-page book entitled *The People's Right to Know,* which would become a primary sourcebook for the authors of the Freedom of Information Act.

Cross concluded that the political justification for a fundamental right of freedom of information "by means of access to official information has been recognized in general terms since the birth of the nation by philosophers, statesmen and legal authors."[72] Cross

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[70]Madison to W.T. Barry, 103.
[71]Harold Cross, *The People's Right to Know*, (New York: Columbia University Press, 1953) xiii.
[72]Ibid., 129.

then served up the Madison quotation as part of a rhetorical smorgasbord of what he termed "typical instances" of such observations. As most others have since, Cross was thereby placing the Madison quote in a specific government-information context.

During congressional debate on FOIA passage, the Madison quote was dutifully evoked by Reps. David King[73], Donald Rumsfeld,[74] Cornelius Gallagher[75] and the like. Once the Act was in place, Madison's quote became a favorite flavoring for legal scholars and judges. Madison's quote was deployed ironically as a headline for one *Duke Law Journal* article examining the unmet expectations of FOIA.[76] The *Yale Law Journal* in a 1975 review of the Act approvingly quoted Madison before citing Vietnam and Watergate as proof that "as a nation, we have come perilously close in the last decade to demonstrating the truth of his prophecy."[77] Then-federal judge Patricia Wald took Madison's quote for an *Emory Law Journal* article in support of the proposition that "the fear of closed, inaccessible power was real, even (with) the government of the Founding Fathers."[78] Fred Cate employed the quote in an *Administrative Law Review* analysis whose purpose was manifestly to narrow application of FOIA.[79]

Senate Judiciary Committee chairman Sen. Orrin Hatch brought the Madison quote front and center to start a series of 1981 FOIA hearings; whose political purpose, as well, was to narrow some of the Act's applications.[80] And when Associate Justice William O. Douglas argued for greater disclosure in FOIA case, he insisted that "we

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[73]*Congressional Record*, 20 June 1966, 13646.
[74]Ibid. at 13654.
[75]Ibid. at 13659.
[76]Amy E. Rees, "Recent Developments regarding the Freedom of Information Act,"1183.
[77]Elias Clark, "Holding Government Accountable: The Amended Freedom of Information Act," 84 *Yale Law Journal* (1975), 769.
[78]Patricia Wald, "The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values," 33 *Emory Law Journal* (Summer 1984), 649, 653.
[79]Fred H. Cate, D. Annette Fields, James K. McBain, "The Right to privacy and the Public's Right to Know," *Administrative Law Review* 46 (Winter 1994) 41, 42
[80]Senate Committee on the Judiciary, Subcommittee on the Constitution, "Freedom of Information Act," 97th Cong., 1st sess., 15 July 1981, 1.

should remember the words of Madison" while fighting against the executive branch's "carte blanche to insulate information from public scrutiny."[81]The examples could be multiplied, many times over.

It makes sense that Madison would be so cited as an authority on behalf of freedom-of-information. The constitutional force of nature, co-author of the *Federalist Papers*, Bill of Rights advocate, opponent of the Alien and Sedition Act and loving husband of Dolly had few peers even among the Founding Fathers. His long years of attention to democratic theory and the problems of self-governance naturally associate him with notions of *governmental* information. The presumption among those who hear Madison's quotation in the context of a modern freedom-of-information debate must be that Madison too was speaking not only of governmental information, but also at a time when the Founding Fathers were theorizing about what information and expressive rights Americans should have.

The presumption is wrong. The quote is misused. And the result is emblematic of a misplaced emphasis in setting out the theoretical rationale for the Freedom of Information Act.

Madison's quotation comes from a six-plus page letter written in August 1822 to a former Republican senator from Kentucky named William Taylor Barry. At the time of the letter, Barry was teaching politics and law at Kentucky's Transylvania University.[82] Barry had written Madison on June 30, enclosing printed circulars concerning proposals for a public education system in Kentucky. Barry was seeking Madison**'**s advice concerning state plans for education; as Madison noted in reply, Barry had written as a member of "the Committee, of which your name is the first, (that's) taken a very judicious course in endeavoring to avail Kentucky of the experience of elder States in

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[81]*EPA v. Mink*, 410 U.S. 73, 111 (Douglas, J. dissenting.), (1973).

[82]*Biographical Directory of the United States Congress*, entry for William Taylor Barry, at http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000192.

modifying her Schools."[83]Correspondingly, Madison's response was concerned entirely with the question of a publicly funded higher-education system.

Madison's frame-of-mind was expressed in the always-omitted sentence that immediately precedes the "prologue to a farce or a tragedy" line, where he noted that "the liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded."[84] Every paragraph that follows concerns the particular education question facing Kentucky's voters and legislators. Thus, Madison praised "Learned Institutions" as the "favorite objects with every free people (which) throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty."[85] This is the point he meant with the insistence that people arm themselves with knowledge.

Toward this end, Madison urged, in addition to the customary "Reading, Writing & Arithmetic," the teaching of geography. A "Planatarium (*sic*) of the Cheapest construction" might help students in understanding the solar system**,** he advised; properly taught, students might gain "a taste for Books of Travels and Voyages" and eventually an appetite for history. This was Madison's "knowledge (that) will forever govern ignorance." He was speaking of maps and grammar books, not internal government documents. And his favored "means of acquiring" information were consequently public schools, properly endowed.

This complete context is never mentioned in the myriad deployments of the Madison quotation throughout the long freedom-of-information debate. The omission of this higher-education context is the original sin in the freedom-of-information debate. Madison's words are so vivid that the prelude to a farce or a tragedy quotation has helped rivet political attention to one particular theory of information access. This is

[83]Ibid., 108.
[84]Madison to W.T. Barry, 103.
[85]Ibid., 105.

troublesome because, as David M. O'Brien notes, "there is no evidence that Madison or any other members of the constitutional conventions or the first Congress supported the view that the people have a directly enforceable constitutional right to know."[86]

On one level, the proliferating misuse of the Madison quote illustrates why Associate Justice Antonin Scalia may be onto something when he voices skepticism about the worth of legislative history. The congressmen who recited Madison during FOIA debate were, we can be certain, simply reading from a compilation of lively sounding quotes prepared by staff. It's the intellectual equivalent of reaching blindly into *Bartlett's Quotations* in preparation for an after-dinner speech.. It's not, however, a reflection of a full intellectual embrace of a body of thought, because the quote selected is severed from context.

On another level, the proliferation of Madison's quote propagates a particular theory that has come to dominate information-access discourse. Though the misuse of the James Madison quotation did not cause the congressional focus on self-governance as the driving theory behind the Freedom of Information Act, it did contribute. Thus, Thomas Emerson, in support of his contention that the right-to-know can be found within the First Amendment, cited Madison's quote as stating "the elementary facts" on behalf of this argument.[87]

When the putative elementary facts are wrong, the conclusion may veer off course as well. The misguided emphasis on Madison leaves information-access proponents leaning on a weak reed. Specifically, the over-deployment of the Madison quote places too much weight on the self-governance and watchdog theories of information access. Consequently, information-access proponents are left in a vulnerable position when usage of the Freedom of Information Act does not comport with self-governance and watchdog

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[86]David M. O'Brien, *The Public's Right to Know*, (New York: Praeger Publishers, 1981) 29.
[87]Thomas I. Emerson, "Legal Foundations of the Right to Know," *Washington University Law Quarterly*, (1976): 1.

expectations. It may not be necessary to retire the Madison quote altogether, as it does reflect important ideas. As the rationale for an information-access law, however, the Madison quote sorely needs reinforcement.

III

FOIA: THE PRELUDE

A

The Administrative Procedure Act

From the mists of theory, the road to the Freedom of Information Act began taking shape. The initial effort was to enable the public to navigate through an ever-more complicated federal government.

Congress sought to provide public access to internal government decision-making through establishment of the *Federal Register* in 1935, and the *Code of Federal Regulations* in 1937. In both cases, the government acted to affirmatively disclose through publication information about agency action. Subsequently, the Administrative Procedure Act sought to bring order to federal government operations, which had grown so confoundingly entangled during the New Deal and World War II

The Administrative Procedure Act was more than a decade in the making; preceded by studies conducted by presidential commissions, extensive hearings by the Senate Judiciary Committee in 1938, and consideration of related legislation in the two years immediately prior to World War II. All concerned sought to rationalize and make uniform the administrative state that senators in 1940 had described as a "present situation of indescribable confusion...(and) unnecessary fumbling in the administrative process."[88]

In total, the APA was characterized as an "outline of minimum essential rights

[88] *cited in* House Committee on the Judiciary, *Administrative Procedure Act,* 79th Cong., 1st sess., H. Rept. 79-1980*, reprinted in 1946 United States Code Congressional and Administrative News,* 1197.

and procedures."[89] The measure required agencies to issue as rules certain information about their organization and procedure, detailed the requirements for administrative hearings and set forth judicial review requirements.

Informing the public about government agency actions was central to the entire effort, and lawmakers characterized the Act's public information elements as "in many ways among the most important, far-reaching and useful provisions."[90] Section 3 of the Act required agencies to publish in the *Federal Register* such fundamental information as: rules and policies, procedures, opinions and places where additional information could be obtained.

Through use of vague terms, however, Congress also allowed the Section 3 information provisions to become an impediment to public access. The Act permitted information to be withheld concerning "any function of the United States requiring secrecy *in the public interest*." (Italics added.) The Act further specified that the agency records be made available "to persons *properly and directly concerned*, except information held confidential for *good cause* found." (Italics added.) The Act left up to the executive agencies themselves the power to determine what was in the public interest and what was a good cause.

The express purpose behind the "directly and properly concerned" test was to serve individuals entangled in federal agency proceedings. In a twist that Meiklejohn would have approved of, lobbyists or special interests beyond that of an individual were left outside the privileged realm of being deemed directly and properly concerned.[91]

The "properly and directly concerned" test further gave executive agencies additional grounds for denying access to information. It is comparable to a limited rule for legal standing**.** Not just anyone can gain access to the public records, nor for any old

[89]Ibid., 1205.
[90]House Committee on the Judiciary, *The Administrative Procedure Act,* 79th Cong., 1st sess., H. rept. 79-752, 198.
[91]McWeeney, 104.

reason. The information-seeker, like the litigant, must first establish grounds for what they seek. It sets a narrow foundation for information access, and not just because of the discretion it allows executive agencies in determining who may be "properly" and "directly" concerned. This limitation also implies a cramped theoretical justification for the public's acquisition of government information. There is no general entitlement to information, by this phrasing, but only a highly targeted claim. Expanding this claim became the life's work of a previously obscure congressman named John Moss.

B.

John Moss and the Information Subcommittee

John Moss seemed an unlikely candidate to champion freedom of information. The Sacramento Junior College graduate and former automobile and tire salesman ran an appliance store while getting involved in Democratic politics.[92] He served two routine terms in the California Assembly before being elected to the House of Representatives in 1952, where in his freshman term he supported Republican President Dwight Eisenhower's programs 63 percent of the time.[93]

Ambition apparently had as much to do as ideological commitment with Moss's initial leadership of the information-access fight. As a member of the lowly House Post Office and Civil Service Committee, Moss was said to be eager to "get onto something more important;" investigative reporter Clark Mollenhoff, one of the instigators of the information-access fight, said Moss "saw this as something where he could be a committee chairman and also have a great deal."[94] He did not, at first, have a fully developed philosophy concerning the right of access to government information, though

[92]Paul Edwin Kostyu, "The Moss Connection: The Freedom of Information Movement, Influence and John E. Moss, Jr." Ph.D. dissertation Bowling Green State University 1990, 29.
[93]Ibid., 32.
[94]Ibid., 39.

one of his aides said he was "emotionally and intellectually attracted." [95]

But as his top aide said, "John Moss (was) not stupid, and he knew damn well that, handled properly, (freedom of information) wouldn't hurt him a bit."[96] He recognized, as well, the value of leading charges against a Republican administration. He advised one colleague that "we will be able to do a job which will be most favorably received, and should be of value to the Democratic Party."[97]

Two forms of ambition, then, helped motivate the congressman generally credited with shepherding FOIA into law: personal ambition and party ambition. As Moss's chief of staff later summed it up, "the fact of politics made the investigation possible (and) Moss knew that. He was elected as a Democrat and he was a damn good one."[98] Conversely, the sole Republican on the subcommittee -- Michigan Rep. Clare Hoffman -- "knew his role on the subcommittee was to protect the party, advance the party philosophy and keep the administration informed."[99] These motives of competing party and personal interest were every bit as important as abstract political philosophy in the shaping of the legislation. Indeed, the partisan advantage-seeking epitomized by Archibald's observation that "if it had been a Republican Congress there would have no initiation of an investigation of (Republican administration) secrecy"[100] can be considered one underlying theory of information access legislation.

Such advantage-seeking on behalf of either the individual or the party appears to be a less elevated rationale for information-access legislation than an asserted right to know. It can be likened, in this respect, to the commercial exploitation of FOIA that would later develop as the primary use of the law. Partisan and personal advantage, like commercial

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[95]Ibid., 48.
[96]Ibid., 49.
[97]Ibid., 54.
[98]Ibid., 217.
[99]Ibid., 218.
[100]Ibid., 217.

advantage, sound not at all like the kind of ideals for which the Founding Fathers strove or FOIA's authors wrote. Yet, the Constitution is built upon a hard-headed recognition of personal political behavior. The theory of checks and balances is not made less commendable simply because it's rooted in the recognition of how individuals and political bodies will strive selfishly. So, too, with FOIA's birth: from the clash of personal and political agendas came legislation whose effect transcended the specific motives at play. And, perhaps, so too with FOIA's usage by commercial exploiters: from the individual seeking of commercial advantage comes a relatively more open government whose general benefits transcend the specific search for profit. What Adam Smith observed of the market economy can be applied to the politics of information-freedom:

> "It is not from the benevolence from the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self-interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our own necessities but of their advantages."[101]

So it was with FOIA. The law came about through an entirely political process, and was at least as much a product of ambition, party striving and self-love as it was of high-minded theoretical ideals. But from this same unseemly stew, we also expect our dinner. The Special Subcommittee on Government Information was created in June 1955, based on the explicit rationale of information as a tool of self-governance. In his letter appointing Rep. Moss as chairman of the panel, House Government Operations Committee chairman Rep. William Dawson declared that "an informed public makes the difference between mob rule and democratic government." Dawson, though, also hinted at the limitations such a rationale might establish on the types of information released, when he added that if the "*pertinent* and *necessary* information on government activities is denied the public, the result is a weakening of the democratic process."[102] (Italics

[101] Adam Smith, *Wealth of Nations*

[102] *cited in* House Committee on Government Operations, *Freedom of Information Act*, 93rd Cong., 2d

added.) This characterization implies that some types of information, being unnecessary or even impertinent, might be outside the proper zone of coverage of an eventual freedom of information law. This conflict, or wavering back and forth, between the access required by a self-governance theory and the restrictions implied by reliance on the same theory is characteristic of the FOIA debate.

Moss's subcommittee undertook more than a decade of hearings into the federal government's information-handling procedures. Moss initiated the work on Nov. 7, 1955, with what he termed an "informal discussion" among journalists and scholars. The convened journalists at the inaugural hearing of Moss's subcommittee shared an assumption that, as *Louisville Courier-Journal* executive editor James S. Pope put it, "freedom of information is a basic right" rooted in the same philosophical soil from which sprang the freedom "that you could print anything you could get."[103]

At the kickoff hearing of Moss's panel, Harold Cross advised that "there can be no practical utilization of the right of freedom of speech and freedom of the press without access to something to talk about and print."[104] A second underlying notion recurring throughout the hearing held government secrecy as a malignant force. Thus, *Washington Post* executive editor J.R. Wiggins approvingly quoted Lord Acton as observing that "everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion."[105] Embodied in this observation is the idea that information-requesters -- members of the press, for instance -- are a watchdog that keeps government honest. Because the public "does not have time to go" to various government hearings and file rooms, Pope explained, "it is our job to try to tell them"

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sess., 1974, H. Rept. 93-876.

[103]House Subcommittee on Government Information, *Availability of Information from Federal Departments and Agencies: Panel Discussion with Editors et. al*., 79th Cong., 1st sess., ., 4.

[104]House Subcommittee on Government Information, *Availability of Information from Federal Departments and Agencies: Panel Discussion with Editors et. al*, xx.

[105]Ibid., 7.

what is afoot in government.[106] Or, as Philadelphia Bulletin executive vice president Richard Slocum said, "we are individual trustees of a public right."

The gathering of reporters at the dawn of the legislative history of the Freedom of Information Act carried the implication that reporters would become a major user of any information-access law. The subcommittee's inaugural hearing thus set certain expectations for later use of the legislation; expectations that, as will be seen, have been hardly met. Just below the hearing's surface, though, broader notions circulated.

One notion was suggested however briefly, by Moss himself, when he stressed that "we are not concerned with what use the press or any other group makes of the information it collects."[107] This asserted indifference to the use of information is a bracing alternative to the generally articulated notion that information was needed so people could properly govern themselves. An aggressive reading of the subcommittee's inaugural testimony suggests, as well, another latent notion about the nature of government information. In looking at the Civil Service Commission's asserted protectiveness over the information it collected, Pope complained about the "arrogant statement of a belief that they have complete *proprietary* rights in everything that happens in that department."[108] (Italics added.) Pope's use of the term "proprietary" opens a door into a much larger room. He was saying that bureaucrats thought information in their possession was their *property*, to be used or hoarded as they saw fit. Implied here are several alternative views: that information is not, in fact, property; or, that it is property but it does not belong to the bureaucracy that holds it.

Moss's subcommittee continued to meet and collect examples of government withholding information. Throughout, the media led the charge. Thus, between 1955 and 1960, Moss's subcommittee tallied 176 formal complaints about unwarranted government secrecy. Of these,

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[106]Ibid., 5.
[107]Ibid., 3.
[108]Ibid.

37 percent came from journalists and 44 percent came from individual members of Congress or from congressional committees.[109] However small the sample might be, the numbers emphasized that journalists would become the most likely to utilize an information-access law. The high number of complaints from Congress also suggests that balance-of-power interests play an important part, and that Congress itself would likewise become a frequent user of an information-access law. In neither case would the presumptions be met by actual practice.

In his study of Moss, doctoral student Paul Edwin Kostyu noted that some 85 newspaper stories had been clipped concerning the information panel in 1955. This grew to 159 in 1956, and 344 in 1957.[110] Kostyu further noted that the significance of the increasing press attention was less on the ability to galvanize a largely indifferent public, and more on the ability to influence political elites. "The public was not to play a (major) role in the right-to-know policy making," Kostyu noted.[111] The public's relative indifference to the issue in its formative years foreshadowed the general public's later relatively insignificant use of the law.

C.

The 1958 Information Provisions

Moss's first successful legislative effort was a relatively modest bid to tighten what he characterized as information loopholes under a long-standing and previously obscure statute. Citing a claim that "executive officials have let every file clerk become a censor" and that executive agency bureaucrats were resorting to "a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws,"[112] lawmakers led by Moss sought to set free more information by restraining executive branch reliance on a 1789 statute.

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[109]McWeeney, 77.
[110]Ibid., 184.
[111]Ibid., 192.
[112]House Committee on Government Operations, *Records and Information--Withholding by Federal Officers and Agencies, 85th* Congress, 2d sess., 1958, H. Rept. 1461, *reprinted in 1958 United States Code Congressional and Administrative News* 3352.

The 1789 statute in question was sometimes referred to as an office "housekeeping" measure, passed during George Washington's administration to enable executive branch officials to set up their offices.[113] It was codified as Title 5 of Section 22 of the United States Code, which authorized department heads to prescribe regulations "for the government of his department...and preservation of the records, papers and property appertaining to it." Nearly a century after its routine passage, the housekeeping statute had new life breathed into it when the Justice Department under President Rutherford B. Hayes cited the language in 1877 as justification for denying a reporter access to patronage files.[114]

Similar justifications became commonplace by the time of Moss's mid-1950s congressional hearings. In response to Moss's questions, eight executive departments cited Section 22 of Title 5 as the legal authority for denying access to information. Illustratively, a witness for the Post Office explained that "we do not look upon it as a statute to restrict information, but it is a statute that will prescribe under what conditions inquirers may receive the information."[115] The phrasing conveys the underlying presumption that information flows only under certain "conditions;" unless those conditions are right, the information remains locked up like an unthawed lake in winter. The 1958 legislation, H.R. 2767, sought to correct this by adding to Section 22 of Title 5 the admonition that "this section does not authorize withholding information from the public or limiting the availability of records to the public."

The legislation laid bare several competing views of information access. Proponents contended that except in cases where disclosure was explicitly forbidden, the burden of proof that the restrictions are necessary should rest with the government. This comes close to saying that access is to be presumed failing an explicit prohibition of such

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[113]Ibid.
[114]Ibid.
[115]*cited in* Ibid, 3356.

access; according to proponents, this is part of the executive branch's conceded "duty to keep the people informed on what it proposes to do and why."[116] Here, there are hints of self-governance.

Balance-of-power tensions were also apparent throughout the debate, with the State Department complaining that the measure "would appear to be an attempt to limit the exercise of executive discretion which must continue to be vested in the heads of the various agencies." When he signed the measure into law, President Harry Truman emphasized the executive branch's prerogatives in the balance-of-power equation, by stressing that the bill "is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the Executive Branch is inherent in the Constitution."[117] Note, here, the vague terms "appropriate" and "public interest." These are the terms whose very ambiguity gives the Executive Branch maximum authority in withholding information, and which would eventually be narrowed through the Freedom of Information Act.

More generally, the debate defined competing views of what the public had a right to know.

"If the people desire the right to 'know all' their government is thinking, saying, doing and the reasons therefor, an amendment to the Constitution is the proper method for implementing that desire," Rep. Clare Hoffman declared.[118] Hoffman asserted a confined right of access, limiting it to "the individual to know *where his own interests are involved* and can be served without injury to the public."[119](italics added.) Grossly worded, this is the standard balancing test. Though Hoffman's phrasing begs important questions

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[116]Ibid.

[117]White House press release, 12 Aug. 1958, *cited in* Thomas C. Hennings, Jr., "Constitutional Law: The People's Right to Know," *American Bar Association Journal* 45 (July 1959): 667.

[118]"Additional Views of Hon. Clare E. Hoffman," in Ibid, 3363.

[119]Ibid.

including who will determine injury, and what extent of public injury might be permitted, the notion of stopping information access short of public injury is conventional wisdom. Whether it's the Supreme Court identifying categories of information like troop shipments in wartime that might be subjected to governmental prior restraint,[120] or Congress identifying nine exceptions to the generalized right of access provided under the Freedom of Information Act, public injury has been generally accepted as a justification for denying information.

A far more stringent limitation, though, is communicated by Hoffman's phrasing that an individual enjoys a right to know "*where his own interests are involved*." By this view, mere curiosity is insufficient motive; arguably, so is a generalized interest in a public manner whose particular application may be remote. In essence, this is offering a very narrow view of informational *standing*; what an individual can know is confined to their particular circumstances. This is consistent with the Administrative Procedure Act's restriction of information access to those who are "properly concerned" with the matter at hand. By implication, the circle of one's "own" interests gets drawn narrowly rather than broadly; by further implication, it falls to a government agency to draw the lines.

The right to know was further limited in part, Huffman argued, by sheer practicality. Huffman said that "if an appreciable number of citizens should at approximately the same time exercise the proposed rights, the departments would be rendered helpless."[121] This kind of cost-benefit assessment, balancing the benefits of access to information against the governmental costs of providing the information, would be later fleshed out by intellectual provocateurs such as then-professor Antonin Scalia, when Scalia would write of the "free lunch aspect of FOIA...(that) takes money from the Treasury that could be better spent elsewhere" and the "unthinking extravagance and disregard of competing

[120] *Near v. Minnesota*, 283 U.S. 697 (1931)

[121] Additional Views of Hon. Clare E. Hoffman, 3373.

priorities" embodied by certain FOIA provisions.[122] Employing the scales of efficiency and cost-benefit analysis -- in Hoffman's term, "practicality" -- inevitably limits the degree of public information access.

Hoffman further sought to distinguish the interests of the public from the interests of those he considered the true proponents of the legislation -- the press. Noting that his own congressional office had received no public letters concerning Moss's legislation, Hoffman asserted there "is no overwhelming desire from the people for protection of their right to know."[123] Rather, he said, the measure was "primarily one demanded by the press, which is ever on guard." Hoffman meant no compliment by this; he clearly considered the press as meddling in matters outside their proper concern. This characterization suggests, as well, a presumption that those reporters who are "ever on guard" would consequently become heavy users of an information-access law.

[122]Antonin Scalia, "The Freedom of Information Act Has No Clothes." *Regulation* (March-April 1982): 14.

[123]Additional Views of Hon. Clare E. Hoffman, 3374..

D.

Setting the FOIA foundation

From 1955 to 1960, Moss held 173 hearings through his information subcommittee and published 17 volumes of transcripts and 14 volumes of reports.[124]The thrust of Moss's subcommittee markedly softened once his own party took control of the White House with the election of President John F. Kennedy. For the first two years of Kennedy's term, Moss's information subcommittee did not hold any hearing at all on the subject.[125]This expansion and contraction of the information subcommittee demonstrates the unspoken partisan aspect of information-access.

In 1964, the so-called Freedom of Information Bill (S. 1666) was the subject of four days of hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee. Representatives of the press were again among the leading proponents of the measure, while executive branch representatives "unanimously disagreed with at least certain provisions of the bill."[126] The debate during hearings seemed at times to reflect two conflicting notions of what the legislation was about. Reporters argued for the bill on behalf of a watchdog function, with a recitation of various government abuses and seemingly unjustified information-withholdings. Executive branch officials argued for efficiency and minimal interference with regulatory responsibilities.

The Senate on July 28, 1964 passed the legislation by voice vote**.** The measure required agencies to make their records public, subject to eight exceptions that included trade secrets, personnel and medical files and certain investigative records.[127] The legislation gave a right of action in federal court for those seeking withheld information. Senators

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[124]Patricia M. Wald, "The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values," *Emory Law Journal* 33 (Summer 1984): 649, 650.
[125]Paul Edwin Kostyu, "The Moss Connection," 264.
[126]*1964 CQ Almanac*, (Washington: CQ Books, 1965), 415.
[127]Ibid.

explained the legislation as a tool to ensure, in the words, of then-Sen. Everett Dirksen, "fair and just administrative proceedings." More generally, the legislation was based on a notion of entitlement to information: save for the enumerated exceptions, the public as a whole was entitled to government agency information. This was a departure from the Administrative Procedure Act's limitation of information release to those members of the public deemed "properly and directly concerned."

Despite passage of the Senate bill, the House took no action on a companion measure, and the legislation died at the end of the 88th Congress. Moss reintroduced his bill at the start of the 89th Congress, in February 1965, Sen. Edward Long of Missouri re-introduced freedom-of-information legislation closely modeled on his previous bill. Long was a newcomer to the issue, having taken it up following the death of long-time information-access advocate Sen. Thomas Hennings. Long's putative interest in freedom of information stemmed from "the involvement of the (University of Missouri) in his home state and to the favorable publicity it would win him...anything that would get him publicity, that was his game," one observer later noted.[128] As noted earlier, Moss was also driven in part by personal and party ambition. On the sliding scale of motive purity, the unlamented Sen. Long was closer to the zone of pure selfishness than Rep. Moss, but as politicians they shared a common interest in gaining favorable publicity and party service.

Motives matter, as theory matters; but motives are not dispositive when assessing legislation. Whatever was in Sen. Long's unremarkable mind when he moved legislation becomes entirely unimportant once legislation is erected as positive law. The facts speak for themselves, and they are not diluted by questions of internal motive. What matters, ultimately, is what the law says and not what psychodynamics and political machinations drove the law into place. So, too, it will be with the question of FOIA usage. As it will

[128]Paul Edwin Kostyu, "The Moss Connection," 264.

turn out, the primary users of FOIA are motivated by commercial interests: they want to make money, and use the Freedom of Information Act to help them. But these motives, though much denounced, may not be dispositive.

Amidst all these various motives both high and low, then, the stage was finally set for Congress to act**.**

IV

THE FREEDOM OF INFORMATION ACT

A.

The legislation and its passage

The years of congressional hearings developed a rich record for lawmakers unhappy about government information procedures and the access impediments established under the Administrative Procedure Act. Thus, in 1961, the Secretary of the Navy determined that the agency's telephone directories contained information solely relating to internal management and therefore did not have to be made public.

The sweeping language of the proposed information-access legislation -- in particular, the concept of granting access to "any person" -- worried administration officials who appreciated the likely consequences of removing tests for good cause. The State Department in March 1965 warned that this change in standards would encourage "fishing expeditions" by those motivated by nothing better than a "capricious curiosity" or idle whim."[129] President Lyndon Johnson himself was said to have decried Moss's efforts as "terrible;" he reportedly wanted to know "what's Moss trying to do to me?" and he beseeched congressional leaders to ensure that Moss was "brought into line."[130]

"'What is Moss trying to do, screw me?'" the president had asked the leaders in the House. "'I thought he was one of our boys, but the Justice Department tells me his goddamn bill will screw the Johnson Administration!'"[131]

Despite the fact that it was Congressman Moss and his special subcommittee that had done the lion's share of work for more than a decade, cautious House and Senate

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[129]McWeeney, 105.

[130]Jeremy Robert Trower Lewis, "The Freedom of Information Act: From Pressure to Policy Implementation," (Ph.D. diss. The Johns Hopkins University, 1982) 31.

[131]*cited in* Paul Edwin Kostyu, "The Moss Connection," 237.

members opted to move a less sweeping Senate version of the bill. Fearful of subjecting the measure to weakening amendments, House proponents steered clear of any effort to strengthen the measure on the House floor.[132]Still, President Johnson wavered, his own skepticism fueled by Executive Branch resistance. His deputy defense secretary, Cyrus Vance, recommended a veto as did the Department of Health, Education and Welfare; three federal agencies recommended signing the bill, while four had no objection and five offered no recommendation at all.[133]

After seriously considering pocket-vetoing the measure -- a reflection of the balance-of-power considerations at play -- an ambivalent Johnson ended up signing FOIA on the next-to-last day permitted him. This happened to be July 4. If he had not signed the bill by July 5, it would have been pocket-vetoed; and though Johnson might well have preferred the measure to fade away in this fashion, its overwhelming passage by both House -- on a 307-0 margin -- and Senate made that politically untenable. Congressman John Moss, though, was neither invited to the bill-signing in far-away Texas nor even advised it was going to take place.[134]

The legislation made three major changes in the underlying Administrative Procedure Act's information provisions. It eliminated the "properly and directly concerned" test, which had permitted government agencies to deny information requests by those deemed lacking in proper motive. It replaced the APA's vague "in the public interest" and "good cause" justifications for denying information requests, with the explicitly enumerated nine exemptions. And, it established a judicial cause of action, enabling requesters to seek court orders compelling release of executive branch information.

Congress exempted itself and the judicial branch from the Act.

The Act exempted from disclosure, among other matters, trade secrets and private

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[132]Peter Hernon and Charles R. McClure, *Federal Information Policies in the 1980s: Conflicts and Issues,* (Norwood, New Jersey: Ablex Publishing, 1987), 59.
[133]Paul Edwin Kostyu, "The Moss Connection," 239.
[134]Ibid., 242.

commercial or financial information obtained by the government. As lawmakers noted, "a citizen must be able to confide in his Government,"[135] and the trade secret exemption was meant to protect both private companies and the government's own continued ability to obtain trade and financial information. Further reflecting the balancing act between public and private interests, the Act also exempted personnel and medical files and other documents "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[136] The notion here is that the public right to know must be weighed against the individual's right of privacy. Similarly, the exemption for information that "must be kept secret to protect the national defense or to advance foreign policy"[137] reflects a balance between a public right to know and the government's ability to conduct sensitive operations. The most specific exemption among the nine, covering "geological and geophysical information and data concerning wells, including maps," invoked a more strictly political balance: it helped pacify oil-state lawmakers like Lousiana Sen. Russell Long and the Texas-bred president.[138]

B.

The Theories Underlying FOIA

Examination of the final FOIA debate, and related documents, reveals several theoretical justifications for the Act were at play. These were the self-governance, watchdog and balance-of-power justifications. There were, as well, hints of other explanations: in particular, partisan advantage appeared as a subterranean force powering the Act's passage. And, latently, there were at least rhetorical suggestions of public ownership claims on government information.

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[135]H. Rept. 89-1494., 2427.
[136]Ibid., 2428.
[137]Ibid., 2427.
[138]Jeremy Robert Lewis Trower, "The Freedom of Information Act," 367.

The committee report presenting the Freedom of Information Act asserted that "it is vital to *our way of life* to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."[139] (Italics added.) The committee report did not further elaborate on the derivation of the "right of the public to know." The reference to "our way of life," however, suggests self-governance. This is further borne out in the committee's later assertion that "a democratic society requires an intelligent, informed *electorate*, and the intelligence of the *electorate* varies as the quantity and quality of the information varies."[140]

This is a very specific self-governance focus to FOIA. The term "electorate" means the "body of qualified voters,"[141] and thereby relates specifically to those engaged in the most basic process of governance: voting for representatives. This is, in fact, a limited population. It is the adult population, for one; at the time of passage of the 1966 Freedom of Information Act, it was the population of those U.S. citizens 21 or older. Though FOIA was written and justified on the basis of providing more access to government information, not less, this explicit reference to informing the *electorate* could be a limiting rather than an expanding justification. It could mean that information deemed irrelevant to voting or other public policy behavior would be outside the scope of the information-access law. This would be the Meiklejohn/Bork view.

This justification could also mean that those U.S. residents not part of the body of qualified voters would also be outside the scope of those covered by the information-access law. Felons and ex-felons, for instance, who have lost their right to vote are not part of the electorate; neither are minors. Later congressional oversight of FOIA would in fact examine the usage of the Act by felons, prompting some consideration of limiting

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[139]H. Rept. 89-1494., 2423.
[140]Ibid., 2429.
[141]*American Heritage Dictionary*, 2d. ed., s.v. "electorate."

access by this disfavored population.

Lawmakers gave their own gloss and justifications during floor debate.

The underlying principle of the legislation was the concept of a public **right to know**. Moss rooted the legislation directly in the First Amendment's guarantee of free speech and free press. Observing these were self-evidently not created as merely "empty rights," Moss argued that "inherent in the right of free speech and of free press is the right to know."[142] Conservative Rep. Donald Rumsfeld likewise asserted that "based on the experience of England, the Founders of our nation established -- by law and by the acknowledgment of public men -- the theory that the people have a right to know."[143] When Indiana Democrat John Roush talked of secrecy-minded bureaucrats "*trespassing* on (the public's) right to know**,"**[144] (italics added), his phrasing presumed the right was pre-existing. The public already enjoyed the right to know, and Congress through the Freedom of Information Act was simply providing a procedure to vindicate this right. There is a hint in such framing that the right to know sprang from the deep wellspring of natural law.

The **self-governance** theory was given its most boiled-down description by Connecticut Democrat John Monagan, who linked FOIA to the notion that "it is impossible to vote intelligently on issues unless one knows all the facts surrounding them."[145] Packed in this statement is the notion that the information obtained through FOIA would directly guide public votes. When Rep. Rumsfeld spoke of "an informed, intelligent *electorate*" (italics added) and of how "the public who must have full access to the facts of government *to select intelligently* their representatives to serve in Congress and the White House,"[146] (italics added) he was directly linking information to the singular act of voting.

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[142]*Congressional Record*, 20 June 1966, 13642.
[143]Ibid., 13654.
[144]Ibid., 13658.
[145]Ibid., 13652.
[146]Ibid., 13653.

Voting is a narrow aspect of self-governance, a subset of the larger theory. Speaking more broadly, but still within the self-governance notion, Rumsfeld identified FOIA as a means of "ensuring an informed citizenry which can support or oppose *public policy* from a position of understanding and knowledge."[147] (Italics added.) This more expansive picture of self-governance, by going beyond the simple and sporadic act of voting, captures a greater share of what it is that citizens actually do. At the same time, this remains a confined assessment of the uses of information, covering the ranges of public policy and governance, but ignoring other uses -- for instance, commercial gain or the satisfaction of curiosity.

The **balance-of-power** rationale was raised with nearly equal frequency, as lawmakers noted how the inherent tensions between the legislative and executive branches are played out in part in a fight over information. Missouri Republican Durward Hall characterized the measure as "a great step on the part of the legislative branch...toward proper restoration of the tried and true principle of separation of powers."[148] Proponents built this argument on the long history of Congress struggling against assertions of executive privilege**.** As then-Rep. Bob Dole put it, "since the beginnings of the Republic, the people and their elected representatives in Congress have been engaged in a sort of ceremonial contest with the executive bureaucracy over the freedom-of-information issue."[149]

The balance-of-power rationale for FOIA was further revealed by the Act's own limitations. In defining the term "agency" to determine coverage, lawmakers specifically excluded the legislative branch. In balance-of-power terms, this is comparable to an arms treaty mandating intrusive inspections being applied to one party but not another.

Latent within the balance-of-power rationale was a **partisan** explanation for the Act.

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[147]Ibid., 13654.
[148]Ibid., 13655.
[149]Ibid.

When Wisconsin Republican Melvin Laird declared that "this is not a partisan bill, *at least here in Congress*, "[150] (italics added), he was clearly implying President Lyndon Johnson had turned the measure into a partisan conflict. The House Republican Policy Committee formally blamed the "Johnson-Humphrey Administration" for bottling up the legislation, and Rep. Laird asserted "we of the minority (party)" would prefer to have the legislation take effect in time for the 1966 campaign season.[151] The House Republican Policy Committee took pains to denounce the "credibility gap that has affected the Administration pronouncements on domestic affairs and Vietnam," the "on-again, off-again, obviously less-than-truthful" statements and the "jungle of falsification, unjustified secrecy and misstatement by statistic" practices of the Johnson administration.[152]

The **watchdog** theory was the third part of the triumvirate, joining the self-governance and balance-of-power theories**.** Information access under this theory is cast as a way to keep the government honest. This is a somewhat different argument than claiming information is necessary for self-governance, and it contains several threads. One thread is the notion that a third party -- typically, the press, though it could also be any public interest group -- will be an intermediary between government and citizen. It's the third party that watches government on behalf of the private citizen; as Judge Patricia Wald would later write in her assessment of FOIA, "the modern American citizen relies upon professional reporters and authors, investigators and advocates, to sound the alarm when necessary."[153] The watchdog-function argument is also based on the idea that waste, fraud and abuse breed in government secrecy; sunlight is not only the best disinfectant, but the mere threat of public exposure can prevent infection from growing in the first place. This watchdog function would subsequently be described by legal analysts as the

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[150]*Congressional Record*, 20 June 1966., 13647.
[151]Ibid., 13648.
[152]"Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160," *reprinted in* Ibid.
[153]Wald, "The Freedom of Information Act," 653.

"most important" and "symbolic central pillar" of the Act.[154]

Consistent with the long series of hearings in which journalists had played a key role, the FOIA debate emphasized the press as both the instigator and the beneficiary of the freedom-of-information measure. Illinois Democrat Roman Pucinski -- himself a one-time reporter for the Chicago Sun-Times[155] -- characterized the legislation as "giving our free press the tools and information it needs to present a true picture of government properly and correctly to the American people."[156]

The prospect of **commercial exploitation** of the new information access arose only briefly during debate. One California Republican, a rear admiral in the Naval Reserve named William Mailliard,[157] engaged in a brief colloquoy with Moss to ensure the maritime industry could use FOIA to uncover information about the maritime construction subsidy.[158]Illinois Republican John Anderson likewise cited as a potential information seeker "the contractor whose low bid has been summarily rejected without any logical explanation."[159] Anderson and Mailliard, though, were the only lawmakers to rhetorically assay FOIA's commercial potential. Moreover, by drawing a scenario in which the frustrated contractor with a proper low bid was confronting a decision that had no "logical explanation," Anderson was linking the commercial use to the higher-minded watchdog function. Though acknowledging the commercial potential of information, this kind of scenario distances lawmakers from the pure commercial argument.

The initial FOIA debate yielded small hints, as well, of a **property claim** in the information held by government. Thus, Rep. Laird's statement that the legislation would

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[154]Fred H. Cate, D. Annette Fields, James K. McBain, "The Right to privacy and the Public's Right to Know," *Administrative Law Review* 46 (Winter 1994) 41, 42.

[155]*Biographical Directory of the United States Congress*, entry for Roman Pucinski, at http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000559

[156]*Congressional Record*, 20 June 1966, 13648.

[157]*Biographical Directory of the United States Congress*, entry for William Mailliard, at http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000070.

[158]*Congressional Record*, 20 June 1966, 13646.

[159]Ibid., 13658.

enable "the citizen *and the taxpayer* to obtain the essential information about his government which he needs and *to which he is entitled*,"[160] (italics added) conveys hints of a property claim. By specifying the taxpayer as having a claim to government information, as being entitled to the information, Laird could be read as making a property argument above and beyond the separate claim that citizens need information. So, too, Florida Democrat Dante Fascell said the legislation would free up for the American people "the information *to which they are entitled* and the information they must have to make their full contribution to a strong and free national government."[161] (Italics added.)

Taken together, then, the legislative history of the initial Freedom of Information Act demonstrates lawmakers envisioned the Act would primarily serve self-governance, watchdog and balance-of-power purposes. In subsequent amendments, lawmakers elaborated upon and clarified their expectations.

C.

The 1974 Amendments

Problems quickly surfaced. These included insufficient definitions for key terms including agency, records, files and persons; imprecise wording for certain exemptions, and ambiguity surrounding the necessity to "promptly" provide records.[162]

These repeated problems with implementation of the law led Congress, coincidentally fired up over executive branch secrecy and malfeasance in the Watergate matter, to revise FOIA in 1974. The amendments were in the works before Watergate became a synonym for Executive Branch corruption and secrecy, but the stars were in alignment. As Judge Wald would note, by the time the amendments reached the House and Senate floor, "the Executive's clout and credibility in Congress were at an all-time low (and) Watergate

[160]Ibid., 13648.
[161]Ibid., 13649
[162]McWeeney, 133.

created a vacuum into which the demands for FOIA reform flooded."[163] Because the amendments were passed over the veto of President Gerald Ford, and because they occurred amidst Watergate's executive-versus-legislative struggle, they exemplify FOIA's balance-of-power dynamic**,** flavored with a partisan twist**.** Thus, Sen. Edward Kennedy, D-Mass., pressed the 1974 amendments as a "visible and concrete repudiation by Congress of both the traditional bureaucratic secrecy of the establishment and the special anti-media, anti-public, anti-Congress secrecy of the Nixon administration."[164] At the same time, the conventional self-governance theory also undergirded the 1974 amendments. Though opposing the amendments, Republican Sen. Robert Taft, Jr. accepted the notion that "it is elementary that people cannot govern themselves, that this cannot be a government of the people, if the people cannot know the actions of those in whom they trust to discharge the functions of government."[165]

The 1974 amendments developed following a series of congressional oversight hearings into implementation of the original law. The 1974 amendments tightened loopholes that were being exploited by bureaucracies, and further empowered the judiciary. The amendments required agencies to release documents even to those requesters who had provided an imperfect description, so long as an agency professional familiar with the subject could find the relevant records with a reasonable amount of effort. The amendments set a new 10-day time limit for responding to requests. Responding to a Supreme Court interpretation that had blocked judges from conducting *in camera* reviews of classification decisions,[166] the amendments increased judicial authority to conduct such reviews. The amendments expanded the agencies covered by FOIA, to include those within the Executive Office of the President such as the National

[163]Wald, "The Freedom of Information Act," 659.
[164]*Congressional Record*, 21 Nov. 1974, 36865.
[165]Ibid., 36873.
[166]*Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973).

Security Council, as well as government-controlled corporations such as Amtrak. The balance of power dynamic was further explicitly demonstrated with the requirement that the executive agencies report annually to Congress on FOIA compliance, and a further requirement that the Justice Department annually report on FOIA litigation.[167]

The Ford administration opposed the amendments on various grounds. Pentagon officials worried about judges second-guessing classification decisions, while the Justice Department said the new deadlines for responding to FOIA requests were too rigid and could actually cause requests to be denied. In the course of opposing a provision regarding the payment of attorney's fees, the Justice Department noted that "although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category."[168] This argument conveys the notion that since information is freed for self-governance purposes, some requests that are purely "commercial" don't deserve the same level of support presented through an attorneys fees provision.

President Ford vetoed the bill on Oct. 17. He termed the legislation unconstitutional and unworkable, citing specific objections to the provisions permitting courts to inspect classified documents and the setting of specific timeframes for responding to FOIA requests. Ford's aides would later say that he had been unwisely pushed into vetoing the measure by President Nixon's holdover cabinet members including Attorney General William Saxbe.[169] In pressing for the override, lawmakers frequently promoted the watchdog theory, with Sen. Edward Kennedy describing the revised FOIA as a way to "strike at secrecy in government whenever it exists, because it is the incubator for corruption."[170]Within a month, the House by a 371-31 margin and the

[167]H. Rept. 93-876.
[168]Appendix 1: Agency Views, Ibid.
[169]Jeremy Robert Trower Lewis, "The Freedom of Information Act," 72.
[170]*Congressional Record*, 21 Nov. 1974, 36869-70.

Senate by a 65-27 margin had overridden Ford's veto.

D.

The 1986 Freedom of Information Reform Act

Congressional hearings during the Reagan administration focused attention on alleged abuses of FOIA; in particular, the use of the Act by criminals and the dominant use by corporate requesters. Thus, Sen. Orrin Hatch kicked off a 1981 oversight hearing by declaring the FOIA "must be held accountable" as it "has at times frustrated rather than fulfilled its basic mission of ensuring Government efficiency and informing voters."[171] By Hatch's description, *efficiency* was central to FOIA's purpose, along with the self-governance notion embodied by informing *voters*. Efficiency could be characterized as either a watchdog function -- ensuring proper government operations through oversight -- or as a separate category of administrative fine-tuning.

Hatch and other lawmakers called increasing attention to what Hatch described as instances of FOIA "disrupt(ing) vital national security and law enforcement activities."[172] Assistant Attorney General Jonathan Rose told the Senate Judiciary Committee that "some of the application of the act may not be in the public interest (because)...it appears that the effectiveness of criminal law enforcement investigative agencies may well have been impaired" by use of the Act.[173] CIA Director William Casey unsuccessfully asked that the CIA, National Security Agency and Defense Intelligence Agency be granted a "total exclusion" from FOIA so as to avoid "the wasteful and debilitating diversion of resources (and) eliminate the danger of court-ordered release of properly classified information."[174]

The 1986 amendments consequently broadened the law enforcement exemptions

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[171]Senate Committee on the Judiciary, Subcommittee on the Constitution, "Freedom of Information Act," 97th Cong., 1st sess., 15 July 1981, 2.
[172]Ibid.
[173]Ibid at 160.
[174]Ibid. at 595.

to address the loopholes allegedly being exploited by criminals. Documents that "could reasonably be expected to disclose the identity of a confidential source" or "would disclose techniques and procedures for law enforcement investigations or prosecutions" were added to the existing law enforcement exemption.[175] President Reagan, in his statement upon signing the legislation, said that by "substantially broaden(ing)" the law enforcement exemptions, Congress "considerably enhance(d) the ability of Federal law enforcement agencies...to combat drug offenders and other criminals."[176]

The amendments also established a several-tiered fee system, with the primary distinction drawn between commercial users and others. The new fee structure explicitly subsidized all users except those with a primarily commercial motivation; as the first two hours of search time and first 100 pages of document duplication were made free. The multi-tiered fee system, with the highest subsidy granted those with the apparently highest public-interest claim on the information, reflected an interest in salvaging the original self-governance and watchdog purposes of FOIA. Indirectly, it also demonstrated the congressional recognition that commercial uses had come to dominate the Act.

[175]Public Law 99-570, *Anti-Drug Abuse Act of 1986*, 99th Cong., 2d sess.

[176]President Ronald Reagan, "Statement by President Ronald Reagan Upon Signing H.R. 5484, 22 *Weekly Compilation of Presidential Documents* 1463, 3 Nov. 1986.

E.

The 1996 Electronic Freedom of Information Act Amendments

The federal government had 45 computers in 1955, when the first congressional hearings were held to lay FOIA's foundation. By 1994, the federal government owned more than 30,000 personal and mainframe computers.[177] The 1996 amendments to FOIA, dubbed the Electronic Freedom of Information Act, responded to the proliferation of computer technology.

Lawmakers cited the long delay in agency response, and said FOIA needed to be updated to reflect new information storage and retrieval techniques. Their allies, as in the very beginning of the FOIA fight during the mid-1950s, were reporting organizations.

The legislation made explicit that electronic records were subject to FOIA, and that requesters could ask for the information in whatever format the agency kept it in. The legislation specified that certain requesters could obtain expedited handling if they could attest that delay posed an imminent threat; a faster track was also made available to those "primarily engaged in the dissemination of information to the public" who could claim a "compelling urgency" to inform the public.[178] In a nod to bureaucratic reality, the legislation further extended to 20 days the length of time agencies had for an initial response. The establishment of two response tracks is consistent with a watchdog rationale; it is a form of administrative preference, or time subsidy, for information requests that serve the watchdog function.

These revisions kept within the traditional FOIA framework, giving an electronic spin to the traditional system of what author Michael Tankersley termed "request and

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[177]House Government Reform and Oversight Committee, "Electronic Freedom of Information Act Amendments of 1996," 104th Cong., 2d sess., 1996, H. Rept. 104-795, *reprinted in 1996 United States Code Congressional and Administrative News*, 3454

[178]House Government Reform and Oversight Committee, "Electronic Freedom of Information Act Amendments of 1996," 3461.

wait."[179] But the legislation also gave executive agencies a more affirmative duty to anticipate requests, and to make available via the Internet information of likely interest. Under the original FOIA, agencies had to deposit in "reading rooms" certain records and indices. The 1996 Amendments expanded this, requiring the agencies to make available records "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests."[180] Moreover, the agencies are now required to make available -- in essence, to publish -- this information through electronic reading rooms established over the Internet.

E-FOIA's authors emphasized the broadest possible notion information access. The original FOIA, lawmakers declared in 1996, established a "presumptive right**"** of the public to obtain records, with no requirement "to show a need or reason."[181] By then enumerating a variety of FOIA uses, from private vendors to journalists, the E-FOIA authors were suggesting a body of justifications that went well beyond the self-governance and watchdog functions that had been so central to the original debate. Commercial exploitation of FOIA has little or nothing to do with self-governance, at least as self-governance is commonly understood; the citation of commercial use is therefore a recognition that the value of information access cannot be confined to self-governance. As part of the official findings, lawmakers specified that the law existed to provide access for "*any* person for *any* public or private use."[182](Italics added.) Idle curiosity, mere meddling, profit-seeking, conspiracy-mongering or watchdogging -- all such matters of motive among information-seekers were simply deemed irrelevant.

This broader justification was not fleshed out in the sparse legislative record. Nonetheless, the theory of access briefly enunciated in the 1996 amendments -- "any

[179]Michael Tankersley, "How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age," *Administrative Law Review* 50, (1998): 421.
[180]5 U.S.C. s. 552(a)(2).
[181]House Government Reform and Oversight Committee, "Electronic Freedom of Information Act Amendments of 1996," Ibid.
[182]Ibid., 3462

person for any public or private use" -- moves well beyond the old self-governance and watchdog theories. By giving such broad-brush coverage, law professor James T. O'Reilly notes, "the Amendments legitimize public use of the FOIA to access even private information, without regard to the purpose or motivation underlying the request."[183] Though lawmakers did not explain the amendments in quite this same way, O'Reilly contends the 1996 language moves FOIA past "what had been the core purpose of...access for a public purpose,"[184] and affords requests for private purposes the same level of deference. A disapproving O'Reilly contends the result of this change is "to turn the FOIA from a window for oversight of the actions of government into a library of resources about others."[185]

The authors of the 1996 amendments professed no such intent; at least, with any level of detail. Instead, in their public justifications, lawmakers devoted more rhetorical attention to the "many disclosures of waste and fraud in the federal government"[186] that resulted from use of FOIA. The official findings enunciated in the legislation even identified these socially beneficial disclosures by type; "the Freedom of Information Act has," the findings stated, "led to the identification of unsafe consumer products, harmful drugs, and serious health hazards."[187] Moreover, the 1996 Amendments embodied this watchdog notion by requiring agencies to expedite media requests where there is "urgency to inform the public concerning actual or alleged federal government activity."

By allowing the media to cut in line in front of other FOIA requesters, the 1996 Amendments all but bestow upon the media the status of official watchdogs. Giving

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[183]James T. O'Reilly, "Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy?", *Administrative Law Review* 50, (1998): 371, 372.
[184]Ibid., 373.
[185]Ibid., 376.
[186]House Government Reform and Oversight Committee, "Electronic Freedom of Information Act Amendments of 1996, 3450.
[187]Ibid.

expedited access to the media "certainly (has) symbolic significance,"[188]as Tankersley notes; the symbolism is bound up in the watchdog rationale for FOIA. Like the previous amendment imposing a multi-tier fee system, this also reflected a continued tinkering with the Act in an effort to boost the lagging self-governance and watchdog uses.

The E-FOIA's recounting of "exposures" and "revelations" resulting from FOIA, and the resulting "appropriate corrective responses," further emphasizes the watchdog rationale for information access. The counting of "many" such valuable disclosures suggests the law can prevail when subjected to cost-benefit analysis; whatever the law costs to implement, there are offsetting benefits in the revelations that prompt a "higher degree of probity and conscientiousness in the performance of government operations."[189] In the walk-up to passage of the E-FOIA legislation, there were hints as well of other rationale. Villanova University Law School Professor Henry H. Perritt, Jr., asserted as an example in 1995 that "to deny public access to electronic formats...denies the public the benefits of *publicly funded* public record formats and significantly impairs public accessibility to public information by increasing the cost of search and retrieval."[190] (Italics added.) Like other information-access advocates before and since, Perritt does not flesh out any argument entailed in the fact of the information's public-funding aspect. It appears, then, that Perritt is simply engaging in rhetorical enhancement when he writes of "publicly funded public record formats." Except that, the seed of a different theory may also be latent in such phrasing. Perritt is playing to an apparent sentiment that what's paid for by the public belongs to the public regardless of motive or content.

Lawmakers did not explore such notions very carefully, though they occasionally

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[188]Michael Tankersley, "How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age," 452.
[189]Ibid.
[190]Henry H. Perrit, Jr., "Sources of Rights to Access Public Information," *William & Mary Bill of Rights Journal* 4 (Summer 1995*):* 179, 182.

made passing references. In a vein similar to Perritt, E-FOIA co-author Sen. Patrick Leahy made note of the fact that "since taxpayers foot the bill for the collection and maintenance of (government) information, they should get prompt access upon request."[191] Beyond this observation concerning public investment in the information, Leahy did not go, though he did specify that lawmakers with E-FOIA intended "to allow *any* person to access government information for *any* purpose." (Italics added.)[192] This undifferentiated access, Leahy noted, was an extension of FOIA beyond what some conceived as the original core purpose of making agency records and information available to the public only when such material would shed light on the activities and operations of government. "Such a limit on the release of information under FOIA," Leahy noted, "distorts the statute's openness."[193]

[191]Senator Patrick Leahy, "The Electronic FOIA Amendments of 1996: Reformatting the FOIA for On-Line Access," *Administrative Law Review* 50 (1998): 339, 340.
[192]Ibid.
[193]Ibid.

V.

JUDICIAL INTERPRETATIONS OF FOIA THEORY

The lawmakers who authored FOIA enlisted the judiciary on behalf of the fight against Executive Branch secrecy. By granting judicial review of information-withholding decisions, FOIA provided both a tool for leveraging open agency operations, and incentive for agencies to preempt litigation by disclosing requested records. Necessarily, judicial review also created another forum for the articulation and testing of the theories underlying the Freedom of Information Act.

In broad terms, courts have recognized that FOIA establishes a presumption of public access to government records save for those cases covered by the nine specified exemptions. Delineating the boundaries of this presumption, courts have had to explore the significance both of the identity of the information-requester, and of the nature of the information sought. One general rule that has taken shape is that information-holders are to be indifferent as to the status and identity of information-requesters. Despite initial appearances, this indifference principle forces more rather than less public access to records.

Conversely, courts have also shaped a rule that mandates close attention to the nature of the records being requested. Unlike the indifference principle that applies to the status and identity of information-requesters, this rule reduces public access to some records. This differential access rests on the judicial reading of the congressional theories underlying FOIA.

The judicial interpretation of FOIA theory was typified in the 1978 case of *NLRB v. Robbins Tire and Rubber Co.*[194] The Court had to decide whether the National Labor

[194]*NLRB v. Robbins Tire and Rubber Co*., 437 U.S. 214 (1978)

Relations Board was forced under FOIA to disclose witness statements prior to an unfair labor practice hearing. In ruling that the witness statements fit under Exemption 7, regarding investigative records whose release might interfere with enforcement proceedings, the Court summed up:

> "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democracy society, needed to check against corruption and to hold the governors responsible to the governed."[195]

Consistent with the themes of the original congressional debate, the Court here was citing multiple theories. The assertion that an informed citizenry is "vital to the functioning of a democratic society" hearkens back to self-governance, as does the idea of information helping hold governors responsible to the governed. The notion that information is needed to "check against corruption" is a second theoretical front, the watchdog theory.

These self-governance and watchdog interpretations of FOIA alternate throughout the history of Supreme Court consideration of the Act. Thus, in the 1980 case of *GTE Sylvania, Inc. v. Consumers Union*[196], the Court was considering whether information could be obtained when the agency holding the material had been enjoined from disclosing it in federal district court. The Court ruled that the enjoined material could, in fact, be withheld. In so ruling, the Court emphasized the watchdog theory underlying FOIA's passage, contending that "the attention of Congress was primarily focused on the efforts of officials to prevent release of information *in order to hide mistakes or irregularities committed by the agency*."[197](Italics added.) This is watchdog theory.

Self-governance theory as a filter for considering FOIA requests has recurred just as often. Justice Stevens would stress this focused concept of access in the case of *Press-*

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[195]437 U.S. 214, 241.
[196]*GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980)
[197]445 U.S. 375, 385.

Enterprise v. Riverside County Superior Court, when he stated in a concurring opinion that "a claim of access cannot succeed unless access makes a positive contribution to this process of self-governance."[198] This test for access can prove quite demanding, as it requires an evaluation of how the information sought relates to governance. Motives such as mere curiosity, and information of purely titillating or commercial interest, may under this test rule out access. Stevens' phrasing thus illustrates how the perceived theory of FOIA can be employed to limit rather than broaden access. By restricting FOIA's purpose to self-governance, Stevens would read out of the Act whole volumes of information.

The Stevens opinion also illustrates how courts have taken to comparing the nature of requested records to the judicial understanding of FOIA's theoretical purpose. In the 1976 case of *Department of the Air Force v. Rose*[199], the Supreme Court confronted a FOIA request from pesky New York University Law School students. The students sought disciplinary records maintained by the Air Force Academy, for use in a study of military academy justice. The Court held that the disciplinary records did not enjoy protection under FOIA's exemptions; noting that disclosure was the primary objective of the law and that there was no blanket exemption for all personnel files.

Clearly, this case marked a victory for public access. It did so, though, in a way that permitted the Court to examine the relative value -- that is, the public interest value -- of the information being sought. The Court held that Exemption 2 of FOIA, relating to internal personnel rules and policies, was "not applicable to matters subject to such a genuine and significant public interest." The thrust of the exemption, Justice Brennan wrote for the majority, was to relieve agencies from the burden of responding to requests on matters "in which the public could not reasonably be expected to have an

[198] *Press-Enterprise v. Riverside County Superior Court*, 464 U.S. 501, 518 (Stevens concurring) (1984).
[199] *Dept. of Air Force v. Rose*, 425 U.S. 352 (1976).

interest."[200]The disciplinary case summaries of the nation's future military leaders, the Court ruled, were matters by contrast in which the public *would* have a proper interest. This Court ruling happened to limit the applicability of Exemption 2. But by allowing an examination of the public-interest value in the information being sought, the Court set a standard that could be used to limit rather than expand public access.

The Court hasn't always laid emphasis on the presumed public-interest value of requested information. Illustrative in this regard is the 1989 case of *Department of Justice v. Tax Analysts,*[201] in which a company sought tax court opinions issued by scattered district courts but compiled by the Justice Department. The Court, as analyst Henry Perritt noted, declined to use the case to narrow the definition of "agency record;" material *obtained* by the government agency, as well as that created by the agency, would be equally covered under FOIA.[202] A private study in the files of an agency would be as subject to FOIA as a study conducted by agency personnel. The fact of agency possession, not the question of agency origination, is what matters. This holding supports what will be seen as an alternative theory of FOIA: the library function, whereby information-requesters use the Act to obtain records on agency shelves even if the records are unrelated to agency operations.

The Court in *Tax Analysts* rejected arguments that FOIA did not mandate disclosure of documents readily available from other sources. Thus, under the Court's ruling, a FOIA request for a document as banal and commonly available as an agency telephone book would have to be complied with.[203] The Court's reasoning bears watching here. Neither the low self-governance value of the document in question, nor the seeming silliness of the request matters: the Court calculated that users would follow

[200]425 U.S. 352, 369.
[201]492 U.S. 136 (1989).
[202]Ibid. at 149.
[203]Ibid. at 145 n.5

the course of least resistance and not generally employ FOIA for such routine requests.[204] The Court is thereby taking itself -- and the information-holding government agencies -- out of the business of judging the wisdom or merits of a FOIA request. What's also important in this case is the dog that didn't bark. Justice Blackmun, dissenting, complained that the Tax Analysts company requesting the information was a "commercial enterprise" whose demand for information "adds nothing whatsoever to public knowledge of Government operations."[205] Blackmun's dissenting argument was two-fold: that the commercial motive of the requester, and the supposedly low value of the requested information for self-governance or watchdog purposes, should impose a higher burden on the FOIA request. Blackmun's argument, however, won no converts. By implication, then, the Court in this case was clarifying that neither the motive and identity of the requester, nor the public weight of the information sought, determined public accessibility.

The *Tax Analysts* ruling was thus a victory for the indifference principle. A more significant ruling the same year retained the indifference principle as to the identity of information-requesters, but set great importance on the nature of the records requested. In the 1989 case of *U.S. Department of Justice v. Reporters Committee for Freedom of the Press,*[206] the Court confronted a request from CBS News to review criminal rap sheets compiled by the FBI. The fact that the information-seekers were reporters did not matter, the Court concluded. As Justice Stevens wrote, "the identity of the requesting party has no bearing on the merits of his or her FOIA request" and thus "the rights of the two press (requesters) in this case are no different from those that might be asserted by any other third party."[207]This aspect of the ruling was fully in keeping with prior Court opinions; as

[204]Henry H. Perritt, Jr, "Sources of Rights to Access Public Information," 188.
[205]492 U.S. 146.
[206]*Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989).
[207]Ibid. at 771.

had been stated in a 1975 case, Congress "fully intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest (in a particular document.)"[208]

Because this ruling denies preferential press access to information, it might seem to narrow the power of FOIA. It is certainly in keeping with the Court's prior holdings in *Pell v. Procunier*[209]and *Houchins v. KQED*[210] that journalists don't enjoy preferential constitutional rights of access to government operations. In this portion of the *Reporters Committee* ruling, though, the Court is actually maintaining a broad and undifferentiated theory of information access. It clarifies that government agencies will be indifferent as to the identity of those filing FOIA requests. Granting the press preferential access would be tantamount to allowing government agencies to judge the identity, and by implication the motives, of information requesters. This would be close in principal to the old Administrative Procedure Act's limitations that only those properly and directly concerned with information might obtain it.

Ensuring government indifference about the identity of information-requesters suggests, as well, government indifference as to the motives of the requesters. Thus, Justice Stevens noted that as the purpose of FOIA was to open agency action to public scrutiny, decisions about granting requests would settle on the nature of the requested document "rather than on the particular purpose for which the document is being requested."[211] As the Court would note in the 1982 case of *FBI v. Abramson*[212], involving a journalist's request for FBI files on White House enemies, "Congress did not differentiate between the purposes for which information was requested."[213] In the

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[208]*NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975).
[209]*Pell v. Procunier*, 417 U.S. 817 (1974).
[210]*Houchins v. KQED*, 438 U.S. 1 (1978).
[211]489 U.S. 749, 771.
[212]*FBI v. Abramson*, 456 U.S. 615 (1982).
[213]456 U.S. 615, 631.

particular case of journalist Howard Abramson, this meant the laudatory public watchdog purpose of tracking FBI abuses would not be enough to persuade the Court to allow information release. And yet, while tough luck for Abramson, this indifference-to-purpose properly expands the pipeline through which information might flow.

The Court's main holding in the 1989 *Reporters Committee for Freedom of the Press* case, though, also tightened the pipeline. The majority opinion asserted that "official information that sheds light on an agency's performance" is properly released under the law, but that "disclosure of information about private citizens that is accumulated in various government files but that *reveals little or nothing about an agency's own conduct*"[214](italics added) is not to be released. This interpretation limits the relevant FOIA-accessible information to the operations or activities of the government itself; the mere fact that the government holds the records does not make the records subject to release.

This limitation strikes at what has, in fact, been a significant type of use: what might be termed the library function use of FOIA. Library-function requesters use the Act to request information not because they want to know how government works, but because they want know what's on the government's bookshelves. The Court's opinion in the *Reporters Committee* case, while focused in particular on the government's ability to withhold private information being sought under FOIA, was praised by some as:

> "an important step towards limiting the misuse of FOIA (since) the 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 to be so disclosed."[215]

By focusing on "agency performance," the Court in the *Reporters Committee* case

[214]489 U.S. 772.

[215]Cate, "The Right to Privacy and the Public's Right to Know," 45.

gave leave to other agencies and lower courts to narrow the information pipeline. As James T. O'Reilly noted, the *Reporters Committee* finding represented a clear articulation of a "core purposes" analysis, whereby the core purpose of FOIA was explicitly said to be increasing public understanding of public agency operations. This, in turn, would permit future courts to weigh the relative public interest involved. Thus, for instance, the First Circuit Court of Appeals in a subsequent 1993 case allowed the CIA to refrain from responding to a FOIA request filed by the former wife of an alleged CIA operative.[216] The circuit court leaned on the *Reporters Committee* ruling that "the only cognizable interest for purposes of FOIA is the 'citizens' right to informed about what their government is up to." Consequently, the circuit court concluded that "that purpose...is not fostered by disclosures of information about private citizens...that reveals little or nothing about an agency's own conduct."[217]

Similarly, in 1997, the Supreme Court ruled that the Bureau of Land Management could keep secret one of its mailing lists.[218]The Oregon Natural Desert Association sought the mailing list through FOIA, so it might mail those recipients some of its own propaganda. The appellate court had agreed the mailing list could properly be disclosed on the theory that there was substantial public interest in obtaining additional information. Referring back to the *Reporters Committee* ruling, though, the Supreme Court stated that the purposes for which information was being sought were not relevant -- thus, the Oregon Natural Desert Association's intent to use the mailing list in a certain way should have no bearing on the handling of its request. Instead, the Court ruled, "the only relevant public interest in the FOIA balancing analysis' is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its

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[216]*Maynard v. CIA*, 986 F.547 (1st Cir.) (1993).
[217]Ibid. at 566.
[218]*Bibles v. Oregon Natural Desert Ass'n*., 117 S. Ct. 795 (1997).

statutory duties' or otherwise let citizens know `what their government is up to.'"[219] This is watchdog theory being applied in the cause of limiting rather than expanding public information access.

Thus, the perceived theory underlying FOIA -- the Act's underlying purpose as interpreted by the Court -- becomes the guiding principle for determining degree of access. With FOIA defined entirely as a tool for monitoring government action, whole volumes of information are read out of the Act. In one illustrative case, a U.S. District Court judge refused to force release of Drug Enforcement Administration records concerning surveillance of a suspected drug trafficker. The *Albuquerque Tribune* reporter making the information request said she wanted the documents to track allegations of drug trafficking and arson. The DEA refused to release the documents on privacy grounds, and the judge agreed -- citing *Reporters Committee* -- that such allegations weren't relevant to understanding *agency* action.[220]

This same restrictive interpretation, relying on a strict notion of FOIA as a tool for government-monitoring, carried the day for Justice Thomas in the 1994 case of *United States Department of Defense v. FLRA*.[221] Aggrieved union members sought the names and addresses of bargaining unit employees maintained by federal labor authorities. Justice Thomas, though, responded for the Court's majority that "the relevant public interest supporting disclosure in this case is negligible, at best."[222] While conceding the released information would allow unions to communicate more efficiently, Thomas concluded the disclosure would "reveal little or nothing *about the employing agencies or their activities*." (Italics added.) Under Thomas's strict application of the government-monitoring theory of FOIA, the union's claim upon the information therefore fell short.

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[219]Ibid.
[220]*Albuquerque Publishing Co. v. Department of Justice*, 726 F. Supp. 851 (D.D.C. 1989), *cited in* Cate, "The Right to Privacy and the Public's Right to Know," 60.
[221]*U.S. Dept. of Defense v. FLRA* (1994).
[222]Ibid.

As Justice Ginsburg noted in her concurring opinion in the *Department of Defense v. FLRA* case, Thomas was following the course set out by the 1989 *Reporters Committee* ruling that had "changed the FOIA calculus" to identify the core purpose of disclosure as "advancing public understanding of the operations or activities of the government."[223]In Ginsburg's view, this course was contrary to the undifferentiated access intended by FOIA's authors.

Citing other Court precedent, Ginsburg construed the Act as meaning that "a FOIA requester need not show in the first instance that disclosure would serve *any* public purpose*."*[224] (Italics added.) In Ginsburg's view, FOIA applied regardless of whether the requester wanted to open agency actions to the light of public scrutiny, advance public understanding of government operations or serve some dark private motive -- such motives should not matter one whit. Ensuring that the "identity and particular purpose of the requester is irrelevant," Ginsburg correctly noted, "serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness."[225]

Ginsburg, concurring in an another case termed *U.S. Dept. of State v. Ray*[226] reiterated 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."[227]Ginsburg's reading of the Act would mandate indifference as to both the identity of the requester and the nature of the records requested. Such indifference, even while denying special dispensation for reporters or other self-appointed watchdogs, sustains in fact more rather than less public access.

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[223]Ibid. (Ginsburg, J., concurring).
[224]Ibid.
[225]Ibid.
[226]502 U.S. 164 (1991).
[227]Martin E. Halstuk, "Blurred Vision: The Supreme Court's FOIA Opinions on Invasion of Privacy," in *Access Denied: Freedom of Information in the Information Age*, edited by Charles N. Davis and Sigman L. Splichal, (Ames: Iowa State University Press, 2000), 140.

Over the course of several decades, then, the Supreme Court has focused on the asserted central principles of the Freedom of Information Act. While holding that the Act is to be read broadly in supporting disclosure, the Court's attention to the self-governance and watchdog theories has also -- as in the seminal *Reporters Committee* case -- narrowed rather broadened information access. Perhaps ironically, this narrowing by reference to the asserted self-governance and watchdog theories has occurred at the same time as the actual usage of the Act has been broadening.

Congress, through the 1996 E-FOIA amendments, has now seemed to reconcile this split in favor of Justice Ginsburg's broad reading of the Act**.** Ginsburg's interpretation of the Act as applying regardless of the "identity and particular purpose of the requester" was sustained by the 1996 legislative finding that information was to be provided to any person for any public or private use. Thus, the prior Supreme Court interpretations that emphasized the self-governance and watchdog aspects of FOIA as the Act's core purpose appear to have been set aside. Indifference -- to identity, motive and intent of the information requester -- has been elevated to the status of ruling principle. The result is, or is likely to become, a broadening of the information deemed accessible to the public.

VI.

FOIA USAGE

A.

General Costs and Studies

Freedom costs.

When lawmakers were considering initial passage of FOIA, stab-in-the-dark estimates pegged federal costs of administering the Act at about $50,000 a year. By 1974, the federal government spent an estimated $100,000 implementing FOIA; following the 1974 amendments, FOIA use and accompanying administrative costs dramatically rose. By 1981, the costs for implementing the Act were estimated to range anywhere from $47 million and $250 million.[228]Current costs are reported to be in excess of $100 million, an amount which includes both administration and litigation.

Beyond dollars directly spent on filling and litigating FOIA requests, agencies pay indirectly through inefficiencies and encumbered operations. The filling of a FOIA request places demands on non-FOIA officers as well; phones are answered, files searched, time is spent -- even, without doubt, time is spent avoiding actions that create the kind of file that's subject to FOIA and release. There are opportunity costs in meeting FOIA demands; the CIA, for instance, complains about using intelligence officers for responding to information requests rather than for meeting the nation's intelligence-gathering needs.

To these complaints of administrative inefficiency, courts and FOIA defenders have essentially responded: tough. "The FOIA," one circuit court stated in a much-cited case, "was not designed to increase administrative efficiency, but to guarantee the

[228]Wald, "The Freedom of Information Act," 660.

public's right to know how the government is discharging its duty to protect the public interest."[229]

Indeed, the FOIA fee structure is specifically designed so that the full costs of compliance are not captured in the fees charged. These fees have evolved to reflect public policy considerations. The highest charges are imposed for information requested for "commercial use," the lowest charges apply to requests by scholars and reporters, and all fees may be waived "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government..."[230]

This fee structure serves several purposes. As Robert Gellman notes, the statutory limits on fees is meant to prevent government agencies from using exorbitant fees to enact copyright-like controls over the information.[231]The fee system, moreover, specifically re-articulates what had been two primary theories underlying FOIA in the first place. By granting cheapest access to information that contributes to "public understanding of the operations or activities of the government," the amended statute breathes life into the self-governance and the watchdog visions of information access.

Cost arguments invite a reply involving benefits. Thus, on the law's 20th anniversary, Sen. Edward Kennedy, D-Mass., declared that "because of this act, our country has become stronger, our people more knowledgeable and our democracy more secure."[232] The People for the American Way, in its own 20-year retrospective, explicitly asserted that "the democratic ideals of an informed citizenry and self-government have burned more brightly" as a result of the law.[233]

Press champions, drawing upon FOIA's watchdog rationale, specifically

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[229]*Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971).
[230]5 U.S.C. s. 552(a)94)(A)(iv)(II).
[231]Robert M. Gellman, "Twin Evils," 1031.
[232]*Congressional Record*, 26 June 1986, 16015.
[233]People for the American Way, *The Freedom of Information Act After Twenty Years,* reprinted in Ibid.

attributed numerous important media revelations to the Act. Thus, lawmakers in 1981 were presented with a rundown of such FOIA-enabled press reports as: an Energy Department study showing plutonium workers might be susceptible to cancer, sloppy college bookkeeping that obscured possible misuse of federal funds, tests of New Mexico drinking water that disclosed high levels of radioactivity. In a similar vein, FOIA's press champions cited the books and articles that relied upon the Act to reveal the inner workings of government on such topics as the 1956 Suez crises, the Alger Hiss controversy, the Bay of Pigs controversy and more.[234]

Such recitations seek to justify FOIA on the basis of the underlying theories that prevailed during initial consideration of the Act. Congressman Moss and his allies cited information as a tool for self-governance, the watchdog principle and the essential role of the press during the initial FOIA debate. for each of these notions, then, examples would be summoned to demonstrate the Act's effectiveness. The examples are meant to say that whatever the Act's implementation costs, the public benefits have been worth it.

The enumeration of press scoops and FOIA'd revelations necessarily focus attention on the *qualitative* aspects of the Act's use. A cost-benefit assessment in strictly *quantitative* terms is more problematic for the self-governance and watchdog proponents. The conventional view has been expressed by Thomas George McWeeney, who concluded that "though the FOIA has unquestionably been used for purposes consistent with the intention of its founders, such usage clearly represents a small proportion of the overall FOIA activity."[235]

The Congressional Research Service discovered the usage trends in 1972, in a survey whose overall conclusions remain generally valid today. The CRS surveyed federal agencies for FOIA requests submitted between July 1967 and July 1971. Of the 1,503 requests identified, 43

[234]Wald, "The Freedom of Information Act," 661.

[235]Thomas George McWeeney, "The Unintended Consequences of Political Reform: An Assessment of the Impact of the Freedom of Information Act," (Ph.D. diss., Georgetown University, 1982), 7.

percent came from corporations or law firms. Only 6 percent came from the media, and 2 percent came from Congress.[236]

The General Accounting Office, in a 1978 assessment, found that businesses and law firms made up 58 percent of the requests reviewed at selected agencies, while requests from individuals accounted for only 14 percent of the total.[237] At the Army Aviation Systems Command, for instance, businesses accounted for 305 out of 393 requests received; this is the domination of commercial use still seen. Moreover, of the 305 business requests, 112 came from just two specific California companies.[238] This is the domination by a relatively small circle of users, that is likewise still seen. This usage pattern -- the domination by business requests -- was said by government officials interviewed by the GAO to illustrate how "the act is not being used by individuals as the Congress might have envisioned."[239] Certainly, the fact that only 21 of the 2,515 requests reviewed by GAO came from the news media flew in the face of congressional expectations that the media would be a significant user of the Act.

The corporate requests are, predictably, even more common in agencies that collect significant amounts of business information in the course of fulfilling government responsibilities. Thus, in 1979, the Food and Drug Administration reported that 86 percent of its requests came from the regulated industry, private attorneys and third-party companies making requests on behalf of the regulated industry.[240]

> By 1981, the General Accounting Office found that only one of every 20 FOIA requests was being made by a journalist, scholar or author. Private companies and their lawyers were making by far the greatest number of requests. Half of the 57,000 annual FOIA requests to the Defense Department were said by the Department in 1981 to come

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[236]McWeeney, 137.
[237]General Accounting Office, *Government Field Offices Should Better Implement the Freedom of Information Act,* LCD-78-120, 25 July 1978, 36.
[238]Ibid.
[239]Ibid.
[240]McWeeney, 186.

from defense contractors and their representatives seeking to support for their litigation efforts.[241]

The corporate, profit-seeking use of FOIA strikes a surface contrast with the public-minded virtues enunciated by the Act's authors. This seeming contradiction, moreover, has incited calls to restrict FOIA's application. Authors in the *Administrative Law Review* complained that "such an extension of the FOIA violates the purpose of the Act and transforms it into a vehicle serving purely private interests, to the detriment of its intended public interest."[242] Likewise, Amy Rees cited the commercial and financial information as "not the stuff that comprises the heart of democratic self-rule." This cites back to self-governance theory. In light of the corporate exploitation of FOIA, Rees argued, there was "an attenuation of the link between the information sought and the process of informing the *electorate*."[243] (Italics added.)

As Jeremy Robert Trower Lewis suggests, however, at least some of the business information requests can be considered "legitimately a part of advanced democratic government."[244] Businesses seek information relating to inspections, rules and regulations and to matters that will aid in understanding contract opportunities -- in other words, all information involving the businesses' interaction with government. The relevance of the self-governance theory of FOIA can be extended, then, beyond the individual voting members of the electorate to include as well the corporate bodies that are also part of our civic culture.

Perhaps the most remarked-upon facet of FOIA usage concerns the missing media. After serving as chief cheerleader for the legislation, the media has dramatically faded in importance as an actual user of the tool it helped design. A primary cited reason

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[241]Ibid., 671.
[242]Cate, "The Right to Privacy and the Public's Right to Know," 44.
[243]Rees, "Recent Developments in FOIA," 1187.
[244]Jeremy Robert Lewis Trower, "The Freedom of Information Act," 142.

is the delay in obtaining information. As Copley News Service reporter Ben Shore noted sarcastically in 1972, "it does me a lot of good to go to court and sue when I have a deadline in 15 minutes."[245]

The unexpected uses included information requests made for malicious purposes. In 1978, the Senate Judiciary Subcommittee on Criminal Law concluded that "it can be safely said" that FOIA's authors did not foresee "the utilization that would be made of the act by organized crime and other criminal elements."[246] Such use undermines the expectation that information will empower citizens' legitimate self-governance interests. If Moss and other lawmakers were correct in arguing that FOIA's purpose was to improve the republic, the acquisition of information by criminals could be construed as evidence that the law went too far.

A 1982 survey by the Drug Enforcement Administration purported to show that 85 percent of agents thought FOIA was inhibiting their operations,[247] while Rear Admiral Edward A. Burkhalter asserted in 1983 that FOIA was "one of the more productive means by which the Soviets have acquired large amounts of valuable information." By the early 1980s, the FBI was claiming that 16 percent of its requests came from prisoners, while the Drug Enforcement Administration asserted in 1977 testimony that over 60 percent of its requests came from "the criminal element."[248]

Having reviewed past studies of FOIA usage, it is time to examine contemporary usage patterns; primarily, through the lens of FOIA Logs obtained under the Freedom of Information Act. The individual agencies selected reflect different facets of the patterns of use; because of the variation in detail recorded by agencies, they also reflect different aspects of the requesting community.

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[245]Ibid., 342.
[246]quoted in *Congressional Record*, 27 Sept. 1986, 26769.
[247]Ibid., 26778.
[248]McWeeney, 201.

B.

Environmental Protection Agency

The Environmental Protection Agency is an independent regulatory entity within the Executive Branch. The Agency is responsible for setting regulations and monitoring compliance on air, water and land pollution.

In Fiscal 1999, the Agency received 18,841 FOIA requests on top of the 4,104 requests left pending from the previous year. The EPA recorded a decrease -- of 11.2 percent -- in the number of requests filed in 1999 compared to 1998. The EPA explains that "this decrease is due largely because the Agency is continuing to place many routinely requested records and databases on the Internet."[249] Not simply a case of bureaucratic beneficence, this proactive publication of commonly requested materials also reflects the 1996 E-FOIA Amendments.

The EPA requires a full-time FOIA infrastructure to meet the high demand. The Agency had 94 full-time FOIA-focused employees, and reported another 529 worked on FOIA matters part-time. The Agency spent $6.2 million on FOIA administration and collected $457,533 in fees; the 7.4 percent collected in fees was noticeably higher than that collected by FERC.[250]

The EPA merits attention because, alone among federal agencies, it publishes its own assessment of the FOIA requesting population. The EPA's assessment vividly illustrates how FOIA use differs from the common expectations for the Act. To wit: only 235 requests, or 1.2 percent, in fiscal 1999 came from the media. This is the approximate range for most federal agencies examined in this thesis. Another 428 requests, or 2.3 percent, came from public interest groups.[251] Media and public interest groups represent the most easily identified facets of the

[249]Ibid.
[250]Ibid.
[251]Ibid.

watchdog community. The conventional watchdog theory would seem to be undermined by the fact that under 4 percent of all requests to this major federal regulatory agency come from recognized watchdog entities.

Only four requests came from members of Congress. This is entirely consistent with other federal agencies, many of which receive no congressional requests at all. On its face, this undermines the balance-of-power theory of FOIA. However, the balance-of-power theory can also be indirectly supported by public information requests. The public can be seen as a congressional surrogate, opening a second front on the Executive Branch and thereby aiding legislators.

Only 1,180, or 6.2 percent, of the requests were identified as coming from "private individuals." This, too, approximates the order of magnitude found in many -- though not all -- federal agencies. Organizations and companies use FOIA; private individuals, by and large, do not. This could reflect the higher degree of governmental sophistication within corporate/organized interests as opposed to individuals. Individuals are simply less equipped, with time, resources or knowledge, than organizations to invest in FOIA requests. By definition, moreover, companies are organized around common interests and have greater incentive than private individuals to use the Act. As has been noted in the political context:

> "(Those who) have the largest net gains from action -- or the largest net losses from inaction -- will tend to participate. This is consistent with economic reasoning; participation is costly, so only those with the most to gain or lose will participate."[252]

Predictably, then, 87.9 percent of the EPA's requests were classified as "commercial." This makes perfect sense, as the commercial requesters are those with the most to gain or lose. Within this broad category of "commercial" requests, requesters identified as "environmental consultants" account for a big share: 4,909 of the total, or 26 percent. Attorneys, whose clients and therefore purposes cannot always be determined

[252]Joe B. Stevens, *The Economics of Collective Choice*, (Boulder: Westview Press), 238.

but who clearly also reflect a commercial interest, account for the largest number of requests: 5,270, or 31.3 percent of the total. Requesters identified as "private industry" accounted for 3,986, or 21 percent.[253]

The EPA's analysis usefully illustrates the domination of commercial exploitation of the Freedom of Information Act. The attorneys and environmental consultants represent the interests of private industry; in conventional FOIA assessments, these private interests are cast as being "opposed to" or "in contrast with" the public interests conjured by FOIA's authors.

This thesis, however, argues for a three-pronged response to the commercial exploitation of FOIA. The first prong is based on the indifference principle enunciated by Justice Ginsburg, and specified in the legislative findings of the 1996 E-FOIA Amendments. The Freedom of Information Act, by this reading, exists to maximize public access regardless of requester identity or the nature of the record requested. Thus, information-holders are to remain properly indifferent to the commercial uses. It is information *per se* to which the public enjoys access by virtue of the Act; the commercial nature of the requester is thus irrelevant. The second prong of the response holds that the surface commercial intent of the FOIA requests is not inconsistent with the self-governance, watchdog and balance-of-power theories. From the penumbras and emanations of private interests serving themselves comes a public good. The third prong of the response holds the indifference principle as consistent with a library function explanation for FOIA. In the information marketplace, the government as an information-holder is properly petitioned through FOIA

[253]EPA, *Fiscal 1999 FOIA Log*.

C.

Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission is an independent agency that oversees licensing and operation of hydroelectric and other power generating facilities.

The Commission maintains a detailed and computerized FOIA Log, which includes a summary of each request up to about 30 words, the name of the requester and the requester's affiliation, and the dates associated with receiving and responding to the request. For the calendar year 1999, FERC received 61 Freedom of Information Act requests. The FOIA workload in 1999 was sufficiently light that the Commission had no full-time FOIA officer; the work was handled part-time by the equivalent of 1.4 employees.

The Commission reported spending $497,000 on FOIA operations in 1999 -- all for administration, and none for litigation. Only $2,660 in fees were collected, amounting to .05 percent of the total costs.[254]

Analysis of the FOIA Log, obtained under FOIA, show that 23 of the 61 requests in calendar year 1999 came from attorneys. This accounted, by far, for the greatest share of requests. Four of the requests came from reporters, five from public interest groups and none came from Congress. Seven requests came from what appear to be potential FERC contractors; that is, companies hoping to contract with FERC for services.

This simple tally of known requester identity would suggest that balance-of-power and partisan considerations are largely irrelevant in the practice of FOIA with the Federal Energy Regulatory Commission; note the utter lack of requests from Congress. The watchdog theory would be illustrated, under this simple tally system, by the total of

[254]Ibid.

nine requests coming from reporters and public interest groups. A skeptic could suggest that nine out of 61 requests, or less than 15 percent of the total, hardly vindicates FOIA as a tool for watchdogs. Conversely, the requests coming from attorneys and regulated industries would feed skeptics' assessment that FOIA has mutated into a tool for commercial exploitation.

This interpretation of usage would be seemingly buttressed by the fact that there are nearly as many requests coming from potential FERC contractors as from the watchdog agents of the press and public interest groups. Thus, the Sept. 10, 1999 request by the Neal R. Gross Co. for "pricing data from the current contract between FERC and Ace Court Reporting" or the March 3, 1999 request for the contract awarded "the current contractor who is running the FERC's Child Development Center"[255] exemplify the use of FOIA as a tool for business development.

The FOIA usage, however, invites other interpretations as well.

As a regulatory agency, FERC compiles significant amounts of information about regulated companies. It thus becomes a type of public library, with FOIA requests serving as the library card for others interested in checking out the compiled information. The library function involves no particular oversight on government operations *per se*, as is most clearly demonstrated when the FOIA request specifies only information submitted *to* an agency.

For instance, on Sept. 29, 1999, the Wisconsin Department of Natural Resources requested "detailed project cost and cash flow analyses submitted to FERC" in conjunction with licensing requests on various Wisconsin projects.[256] Few state agencies make FOIA requests, making this request a little unusual. This case typifies, however, the library function use of FOIA to obtain information collected by the federal government. The apparent interest is not in the government's own oversight, project administration or

[255]FERC 1999 FOIA Log
[256]Ibid.

even the manner of information collecting. The federal government is simply a pass-through; FOIA is a straw stuck into the information pool of otherwise private interests.

Similarly, the firm Murphy & Maconachy on March 30, 1999 used FOIA to seek "all public files and documents concerning the activities at Connecticut Light & Power Company."[257] This is a library function request, though it's made to a library with far more acquisition muscle than most. Federal regulators compelled the private regulated interests to submit information. A standard library acquires that which has been published; that is, voluntarily offered for sale. Federal agencies enjoy the ability to reach into private bookshelves and secure documents for public access.

The intent any library subscriber has for volumes requested may be inferred but cannot always be known definitively. Thus, it is not always possible to cleanly delineate a purely library function request from one that entails a self-governance or watchdog function. For instance, attorney James Turner on Jan. 4, 1999 requested the full text of a FERC decision involving a Cabot Corp. project.[258] Simply from the FOIA Log summary, one can't tell whether the requester was examining FERC procedures or the Cabot Corp.'s operations.

Federal agencies collect information in several ways, which the FERC FOIA Log helps distinguish. In the course of regulating, agencies can affirmatively seek out information; through inspections, for instance. Or, agencies can be relatively more passive in receiving information. The information compiled, whether through active inspections or relatively passive reception, can be sought through the library function use of FOIA.

Thus, on Feb. 25, 1999 a public interest group called CPR Fish sought "all environmental and public use inspection reports" concerning a hydroelectric project on

[257]Ibid.
[258]Ibid.

the Cowlitz River."[259] This is a library function request, active division. The inspection reports sought entailed the active collecting of information by FERC personnel. A library function request, passive division, occurred on May 12, 1999, when resource Data International sought an information "submission by Mississippi Power Co." and other companies.[260] The information submissions come to the agency without much input from the regulators. Requests for information obtained actively may shed more light on agency operations than requests for information obtained passively. The CPR Fish request, for instance, could shed light on the quality and aggresiveness of the FERC inspections, or on the details of the private-but-regulated Cowlitz River facility. The former would meet the "agency performance" standard enunciated in the *Reporters Committee* opinion identifying FOIA's alleged core purpose; the latter might not. But without reaching into the mind of the requester and divining intention, such judgments become elusive.

There is, moreover, a fluid and potentially arbitrary dividing line between active and passive collection of information. Care must be taken in such interpretation. Requester identity is uncertain. The attorneys that account for one-third of the requests, for instance, are seeking documents on behalf of clients whose identity can only be speculated at in some instances. Presumably, for instance, the number of requests stemming from regulated companies is considerably higher than would be suggested by the FOIA Log; knowing how many would require piercing the veil of attorney-client privilege.

The library function use of FOIA is thus an umbrella characterization, that may encompass other characterizations as well. For instance, the Mother Lode Chapter of the Sierra Club in 1999 sought information on the El Dorado Irrigation District and "causes, duration, amount (and) remediation" of sedimentary spills into the South Fork of the

[259]Ibid.
[260]Ibid.

American River.[261]Tallying simply by requester identity would count this as coming from a public interest group, inviting the interpretation that the watchdog or monitoring function is the best explanation for the request. Note, however, what it is that the dog is watching. The Sierra Club in this instance was not, apparently, monitoring federal government operations. FERC, though the recipient of the FOIA request, is not the informational target; it is the simply library that holds the information being sought. The watchdog function, then, is being applied not against the government agency but against something else.

In sum, the FERC FOIA Log illustrates how information requests can be best explained by a theory never articulated during congressional consideration of the Act: the library function. Requesters seek information held by the government agency, though the information may or may not shed light on operations of the agency itself. As noted in the *Tax Analysts* case, agency acquisition and not creation is the key in evaluating such requests.

D.

Office of the U.S. Trade Representative

The U.S. Trade Representative's office supports the chief U.S. trade negotiator, and serves as the principal trade policy advising body to the president.

Like the Federal Energy Regulatory Commission, USTR receives relatively few FOIA requests: 78 in calendar year 2000. The USTR reported taking a median time of 29 days to process requests using two full-time FOIA staffers. Of the $177,231.34 spent on FOIA administration in 1999, the Office recouped only $312.30 in fees -- considerably less than 1 percent.[262]

Analysis of USTR's 2000 FOIA Log, obtained through a Freedom of Information

[261]Ibid.
[262]USTR, *Fiscal 1999 Annual FOIA Report*.

Act request, pinpoints common elements in the media's use of FOIA as well as the pitfalls in FOIA analysis. Of the 78 requests received by USTR in calendar year 2000, 19 appear to come from reporters. This number must be considered a close approximation rather than a settled fact. As with all other federal agencies, except for EPA, USTR does not itself identify requesters in the annual FOIA report; requester identification on the FOIA log is sketchy. Thus: requester Scott Winokur was identified as being with the *San Francisco Examiner* in the recording of his July 17, 2000 request. This is an easy count for the media. The request recorded immediately after his came from a "Tami Sheheri," whose job affiliation was not listed by USTR.[263] On its face, this would be counted as unknown affiliation. However, Sheheri's request to another federal agency identified her as being with APBnews.com. Thus, only by comparing requests across different agencies, or in other ways conducting additional research, can a more complete count be obtained.

Besides illustrating the ambiguity and lack of uniformity in FOIA reporting systems, the Winokur and Sheheri requests exemplify two key aspects of the media's use of FOIA. These are: the media's focus on the legislative as opposed to the executive branch, and the media's banal and unimaginative use of the Act.

Winokur sought from USTR "communications from 1993 to the present between Senators Dianne Feinstein, Barbara Boxer and Rep. Nancy Pelosi and (the USTR) office regarding trade with or U.S. company operations in the People's Republic of China." Sheheri sought "any and all correspondence received from Vice Presidential candidate Senator Joe Lieberman and/or his staff from January 1, 1994 to present."[264]

Such requests for congressional correspondence are the most common kind of FOIA request filed by reporters, with any federal agency. Of the 19 media requests to USTR in 2000, seven sought congressional correspondence. This actually greatly

[263]Ibid.
[264]Ibid.

understates the importance of congressional correspondence requests; the 2000 USTR total was skewed by a large number of requests from a British reporter focused on some United Kingdom issues.

There is a fine irony in the media's narrowly focused use of FOIA to demand congressional correspondence. Congress, of course, exempted itself from the Act. By seeking congressional correspondence to executive agencies, though, the media exploits a side door into congressional operations. While Congress sought to shield itself from prying eyes through FOIA self-exemption, the media's FOIA focus is on congressional correspondence. Serves Congress right, one is tempted to say.

The media's concentration on congressional correspondence is the shadow side of a near-total lack of media interest in monitoring executive agency operations. The reporters' concern is entirely with what the members of Congress wanted rather than what the executive agency is doing. Requesting congressional correspondence may vindicate a watchdog explanation for FOIA; however, ignoring executive branch operations undermines the watchdog rationale for the Act. This is in keeping with the overall tendency of Washington-based reporting, which typically shuns executive agency doings.[265] Moreover, the wording of Sheheri's request -- identifying "Vice Presidential candidate" Joe Lieberman -- and its timing in the summer of 2000 reveals the reporter's motivation. Having attained national significance because of his selection as vice presidential candidate, Lieberman was being subjected to the standard reporting backgrounder. This illustrates how the watchdog function, as practiced by the media, typically is idiosyncratic and hook-centered. It occurs not routinely but when there is a particular news hook -- a campaign or a brewing scandal -- to follow.

The requests to USTR also show another aspect of the media's use of FOIA: the domination by a very small circle of reporters. Of the 19 media requests to USTR in

[265]Michael Doyle, "Missed Information: The Reporting Tool that Reporters Don't Use," *Washington Monthly* (May 2000), 38.

2000, 13 came from just two reporters: Rob Evans from the London *Sunday Telegram* and Michael Ravnitzky of APBnews.com. After factoring out the handful of such reporters who file FOIA requests, media usage of the Act falls to minuscule levels.

The requests to USTR suggest, as well, the political intelligence-gathering use of the Act. Opposition researchers use FOIA to find out what clients and targets alike have been doing. Thus, on Jan. 21, 2000, Democratic attorney Robert F.Bauer sought correspondence to USTR from former senator and then-presidential candidate Bill Bradley. Likewise, on Jan. 12, 2000, Sen. John McCain -- then a presidential candidate facing questions about his dealings with federal agencies -- sought "copies of all correspondence between myself or my staff and your agency" from 1988 to the present.[266]

Opposition researchers can be excruciatingly detailed in their requests. In 1998, for instance, an opposition researcher demanded from the Legal Services Corp. all "letters, memos, telephone log entries, message receipts, notations of conversations, meeting notes, e-mail messages, fax cover sheets, reports, statistics (and) calendar entries" dealing with Republican gubernatorial candidate Dan Lungren -- going back to the time that Lungren was 18 years old.[267] Inevitably, because of the transparency of FOIA, elements of sneakiness and covertness slip into such political intelligence-gathering requests.

Thus, a requester identified as "Juan de Leon" sought from USTR on April 19, 2000 all correspondence concerning Sen. Jeff Bingaman -- as well as copies of all other FOIA requests concerning Bingaman. In other words, "Juan de Leon" wanted to know not only about Bingman, but about who else was wanting to know about Bingaman. The same requester sought correspondence from Bingaman's wife, and former Justice

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[266]USTR, *2000 FOIA Log*.
[267]Michael Doyle, "Missed Information," 39.

Department official, Anne Bingaman.[268]

But who was "Juan de Leon"? It was evidently the same "Juan de Leon" claiming a Phoenix address, who on Oct. 23, 2000 requested documents from the Maine Bureau of Motor Vehicles concerning the driving records of then-presidential candidate George W. Bush. "Juan de Leon" was the first individual to request Bush's driving records, just 10 days before a Democratic activist revealed Bush's 24-year-old drunk driving arrest.[269] Reporters' subsequent efforts to track down "de Leon" were unavailing; the Phoenix phone book showed no telephone listing for such an individual, and the address used for the information requests was a Mailboxes Etc. mailbox in a Phoenix strip mall.[270]In brief, "Juan de Leon" was a *nom de guerre* for someone engaged in political warfare.

Such political cloak-and-dagger work may seem unsavory. It is, however, entirely consistent with a self-governance theory of FOIA. The electorate gains more information about candidates because of the candidates' use of the Act. The information ferreted out, may have negative connotations, but it is no less a facet of self-governance.

E.

National Security Agency

The National Security Agency collects signals intelligence; it makes and breaks codes, and eavesdrops worldwide. Or, as the Agency prefers to put it, it "coordinates, directs and performs highly specialized activities to protect U.S. information systems and produce foreign intelligence information."[271]

Once dubbed No Such Agency for its intense secretiveness, the Agency does not

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[268]USTR, *2000 FOIA Log*.
[269]Dieter Bradbury, "Mystery DUI Query Surfaces," Portland Press Herald, 5 Nov. 2000 at A1.
[270]Ibid.
[271]National Security Agency, "About the National Security Agency," at http://www.nsa.gov/about_nsa/index.html.

post on its Internet site the annual FOIA report published by other federal agencies; cost and personnel figures are thus unavailable for comparison. When applied to the Agency's substantive work, this intense secrecy invites lurid speculation.

A review of the NSA FOIA Log for Fiscal 1998, obtained through a FOIA request, found roughly 832 requests had been filed with the Agency.[272] The requesting population is unique. The corporate and attorney requests that predominate in most other federal agencies appear to be relatively few in number with the NSA. But of the 832 requests in 1998, 117 -- or about 12 percent -- were for information relating to Unidentified Flying Objects. This was, far and away, the most common class of requests to the Agency.

Thus, an individual identified as P. Romanov filed a request, marked 9412-98, for "information and research on nine flying saucers you have in an underground U.S. Air Force hanger at Groom Air Force Base, Nevada." Likewise, a Lauri Yolaine in request 9036-98 sought the NSA files on "extraterrestials of Roswell and Men in Black," and a Derek Liddell in request 9121-98 sought "documents relating to a near head-on collision between a helicopter and a UFO on 10/18/75 in Mansfield, Ohio." The general thrust of this major class of requests may have been summed up by a Craig Thomas, who in request 9066-98 explained "I am a UFO fanatic and was wondering if you could send me some documents concerning Unidentified Flying Objects."[273]

On first fly-by, such requests might seem both utterly bizarre and far beyond any standard theoretical rationale for FOIA. In fact, the requests can be fit into several theoretical frameworks. Many of the requests can be considered a library function use of FOIA; the requesters assume the National Security Agency is the government's library of information on UFOs. In this, they are little different from the requesters who sought from the Federal Energy Regulatory Commission documents concerning the operations

[272]National Security Agency, *Fiscal 1998 FOIA Log*.
[273]Ibid.

of a private hydroelectric facility.

Similarly, however bizarre seeming, some of the requests serve the watchdog function. The individual demanding information on the nine flying saucers that the NSA supposedly kept at a secret Air Force base was certainly attempting to monitor government operations. He may have been wrong in the particulars: maybe the flying saucers are kept in New Jersey instead of Nevada. The very purpose of the watchdog function, though, is to find out the facts of government operations, so errors in public assumption are to be expected. Moreover, the requests for secret files represent a manifestation of the public skepticism about government that some of FOIA's authors hoped to address. As one CIA historian noted, in an assessment of the CIA's role in UFO study, "the distrust of our government is too pervasive to make the issue amenable to traditional scientific studies of rational explanation and evidence."[274]

The danger in making presumptions about the wisdom or sanity of particular information requests is illustrated in the outcome of FOIA lawsuits filed by UFO fanatics. As a result of litigation, and consistent with requirements of the 1996 E-FOIA Amendments, UFO-related documents are now published on the NSA's Internet site. Thus, because of FOIA, it's possible to read the September 1976 memo describing how Iranian F-4 jets scrambled near Tehran to chase a UFO that had extraordinarily bright colored lights and "an inordinate amount of maneuverability;" as the jets approached, they inexplicably lost their communication and instrumentation.[275]

The public interest -- that is, what which the public is interested in -- cannot always be predicted. No FOIA author predicted that the most common use of the Act at one of the government's most important agencies would turn out to involve Unidentified Flying Objects. But instead of being parodied as a search for little green men, these

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[274]Gerald K. Haines, "CIA's Role in the Study of UFOs, 1947-90." *Studies in Intelligence* (1997) at http://www.odci.gov/csi/studies/97/unclas/ufo.html
[275]Ibid.

unexpected requests can be understood as entirely consistent with the watchdog rationale or at least the library function of FOIA.

F.

Small Business Administration

The Small Business Administration offers financing, training and advocacy for small businesses.

The SBA received 3,126 Freedom of Information Act requests in Fiscal 2000. The requests tend to be simple, and easily processed; the SBA reported taking a median time of only three days to process the requests using two full-time staffers. The agency spent $338,112 in FOIA administration, and collected $10,916 in fees -- or about 3.2 percent of the total.[276]

The SBA's freedom-of-information operations are noteworthy because they reflect what might be considered wasted or unnecessary use of FOIA. But, as with the seemingly paranoid UFO-related requests, the requests to the SBA that might appear unnecessary can in fact be fit into one of the standard theoretical underpinnings for FOIA.

A review of the SBA *2000 FOIA Log*, obtained through a FOIA request, allows for closer analysis. Between Jan. 1 and March 30, 2000, the Log recorded 169 requests filed with SBA headquarters. Though this is the central point for SBA administration, it does not receive all FOIA requests filed with SBA; others may be filed directly with regional or lower-level offices.

Of all requests received during this three-month period, at least 16 -- or about 10 percent -- sought mundane public information for which no FOIA request was required. Thus, on Jan. 25, 2000, Armando Martinez filed a FOIA request simply to receive "a list

[276]Small Business Administration, *Fiscal 2000 Annual Report*, at http://www.sba.gov/foia/foia00report.html.

of free information on free grant programs."[277] Similarly, on Jan. 31, Tommy Lee Jenkins likewise filed a FOIA request for "information on starting a business."[278]

This class of mundane requests accounts for the largest, easily identified class of FOIA requests to the SBA. The requests appear to be an entirely unnecessary use of the Act. The SBA maintains a toll-free information line to answer precisely the kind of service-providing questions asked by Messrs. Martinez and Jenkins; there are also some 1,000 Small Business Development Centers nationwide designed to offer in-person assistance, in addition to regional SBA offices.[279]Moreover, FOIA requests to learn more about government services do not seem to fit well with either the self-governance or watchdog explanations for the Act. These requesters are not so much ensuring government works properly, as they are seeking out what government can do for them; electoral choices are not likely to be shaped by the information gained, which is in any event public already.

Using FOIA foolishly, though, does not mean the request lacks theoretical justification. It can mean, in part, that the requester is simply unaware of what the government can and cannot do, or what the government does or does not have in its possession. A foolish FOIA request is tantamount to a shot-in-the-dark request; we judge it to be foolish only because we have the advantage of more information. More basically, the foolish requests to the SBA -- that is, those requests for information already made public as a matter of course by the agency -- represent the instrumental function of government. Individuals seek to use the government agencies, and the information they hold, as instruments for personal advantage. But that's perfectly fine; that's what the agencies exist to do. So those who seek to use government for their own betterment -- for instance, through obtaining business start-up loans -- are not so different from those

[277]SBA, *2000 FOIA Log*.
[278]Ibid.
[279]SBA, "Answer Desk," at http://www.sba.gov/answerdesk.html.

seeking to make government work better. Both use FOIA to more fully understand that which may otherwise by remote and walled-off.

G.

Drug Enforcement Administration

An element of the Justice Department, the Drug Enforcement Administration handles investigations of drug violations as well as regulatory matters concerning controlled substances.

Overall, the Justice Department is one of the busiest agencies when it comes to FOIA requests. The Department received 235,042 requests in Fiscal 2000, with the Immigration and Naturalization Service and FBI receiving the most among individual agencies. The Department employed 1,007 full-time FOIA staffers and spent $65.6 million processing requests.[280]

Examining the Drug Enforcement Administration's FOIA Log, obtained through a Freedom of Information Act request, reveals another aspect of the Act's usage. In Fiscal 2000, a typical year, the DEA received 2,380 requests; in Fiscal 1998, the DEA likewise received roughly 2,000 requests. Of the requests in 1998, at least 57 came from prisoners -- so identified through their characteristic addresses listed on the FOIA Log.[281] As a percentage of the total, this is not particularly high -- only about 3 percent. But among identifiable categories of requesters, only the media filed a comparable number of requests with the DEA. And, in fact, the number of requests from prisoners is probably considerably higher than that identified through the FOIA Log.

Prisoners represent a FOIA-using population that was unexpected, disfavored -- and persistent. An inmate at Lompoc federal prison in California, for instance, reported in

[280]Department of Justice, *Fiscal 2000 Annual FOIA Report*, at http://www.usdoj.gov/oip/annual_report/2000/00foiapg5.htm
[281]Drug Enforcement Administration, *1998 FOIA Log*.

a letter to this author that "I have probably sent at least two hundred FOIA requests."[282] This inmate's experience, moreover, shows how difficult it can be to track the actual number of prisoner FOIA requests.

> "What I have noticed is that if I send a FOIA request directly from prison, I get any number of responses: partial, none, don't provide the documents requested...because of this treatment, I have for quite a while prepared FOIA requests (and) send them home, where they are mailed. Since undertaking this approach, I have had great success and am treated totally different than before."[283]

This inmate has, in effect, developed his own version of the FOIA clearinghouse that commercial requesters use to shield their identity. FOIA service agencies, for a fee, will file requests on behalf of clients who want confidentiality and who know the requests will themselves be subject to release. So, too, with this inmate; he uses his family to file his requests on the theory that they will receive better treatment than one identified as coming from, as in his case, "#60465-065, U.S.P. Lompoc." As the inmate explained, "the secret to success is using some creative approaches for your requests."[284]

Prisoner requests have bedeviled federal agencies for years. Within the Justice Department, the Bureau of Prisons received 21,236 FOIA requests in Fiscal 2000, third-highest among Justice agencies behind the INS and the FBI. Certainly, prisoners accounted for many of these requests. As early as 1981, a Justice Department official estimated that 40 percent of the FOIA requests to the DEA came from prisoners, and another 20 percent "are from individuals whom the DEA can identify as being connected with criminal drug activities."[285] The Justice Department further reported at the time that about 11 percent of the requests to the FBI came from prisoners and that, more generally:

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[282]Tim Arnett, letter to author, 16 May 1999.
[283]Ibid.
[284]Ibid.
[285]Senate Committee on the Judiciary, , *Freedom of Information Act*: *Hearing before the Subcommittee on the Constitution*, 97th Cong., 1st sess., 15 July 1981, 160.

> "Individuals connected with criminal activities have made extensive use of the FOIA to obtain investigatory records about themselves or to seek information about ongoing investigations, Government informants or Government law enforcement techniques."[286]

The disfavored population of prisoners was far from the minds of FOIA's authors when they wrote the Act; and, certainly, the use of the Act by criminal elements falls into the category of unintended consequences. Without justifying each and every request, though, prisoner requests can be recognized as meeting a particularly poignant form of the watchdog function. Prisoners use FOIA to monitor government law enforcement activities and techniques; so do investigative reporters and public interest groups. The difference may simply be that the prisoners are monitoring activities that were directed at themselves and their compatriots, while reporters and public interest groups are monitoring activities directed at third parties. But in terms of serving a watchdog function, these requests share a common theme. Because they are stigmatized and generally lacking in political power, however, prisoners invite the generalization that all their information requests are made with malign intent. Consequently, the prisoner requests invite tightening of FOIA, and imposition of further constraints on information release.

Prisoners' use of FOIA represents, in its most vivid form, the proliferation of information requests beyond the *expectations* of the Act's authors. Like commercial requesters, who hope to gain profit advantage through information, prisoners are easily typecast as a non-meritorious population. Because prisoner and commercial requests are beyond the expectations of FOIA's authors, they are also commonly said to be beyond FOIA's *intent* as well. Expectations and intent, however, are not synonomous. Narrowly construed, expectations and intent may indeed by aligned; thus, FOIA's authors expected and intended the Act to be used by reporters and the electorate. Expectations, though, go only so far as the legislative imagination. Broadly construed, the intent to expose

[286]Ibid.

government operations and provide for a watchdog over potential abuses may be vindicated by specific uses that arise from beyond the limits of the legislative imagination. Prisoner requests, like commercial requests, can thus serve self-governance and watchdog functions even if we don't like the character or even the explicit motive of the individual requester.

H.

Food and Drug Administration

The Food and Drug Administration is responsible for promoting and protecting the nation's health, by regulating and products that include cosmetics, certain foods, medical devices and pharmaceuticals.

The FDA is a busy information-processing agency. In Fiscal 2000, it received 25,011 Freedom of Information Act requests; it took a median time of 11 days to respond to simple requests, and 65 days to respond to more complex requests. There are 75 full-time FOIA officers working for the agency, and a total of $6,726,036 was spent on administering and litigating FOIA during the year. The agency collected $703,142 in fees, amounting to 10.5 percent of total costs.[287]

As was noted more than 20 years ago, "the drug industry and its primary trade association, the Pharmaceutical Manufacturers Association, are aware of the FOIA and have moved to incorporate it into their portfolio of scanning mechanisms."[288] The industry users gained this awareness quickly, but use has since relatively stabilized; from 2,000 total requests to the FDA in 1974, the number increased to 13,052 in 1975 and 21,778 in 1976.[289] No longer an extraordinary mechanism, FOIA requests have instead

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[287]Food and Drug Administration Act, *Fiscal 2000 Annual Freedom of Information Act Report*, at http://www.fda.gov/foi/annual2000.html

[288]David B. Montgomery, Anne H. Peters, Charles B. Weinberg, "The Freedom of Information Act: Strategic Threats and Opportunities," *Sloan Management Review* (Winter 1978): 5.

[289]*FDA Fiscal 2000 FOIA Report*.

become a standard operating tool for regulated industries. The FDA is thus a recurring poster child for the claim that the Freedom of Information Act serves primarily commercial interests.

An analysis of the FDA's 2000 FOIA Log, obtained under a Freedom of Information Act request, reveals several other telling components of FOIA practice. In particular, the FDA is illuminating because it shows how information-brokering and information-shielding companies have sprung up as intermediaries between government agencies and private interests. In January 2000, the FDA recorded 1,741 FOIA requests. Of these, at least 458 -- or 26 percent -- were filed by FOIA-service companies.[290] These are companies that file requests on behalf of clients; they offer expertise in the technical aspects of requesting government information, as well as the comfort of anonymity for the private interests.

The two most prolific FOIA-service companies among FDA requesters are called FOI Services, Inc. and AAC Consulting Group. Conveniently located in Rockville, home to the FDA, the latter firm assures potential clients that "AAC is committed to maintaining the confidentiality of all of our work product (and) under no circumstances would AAC release any information concerning a client to a third party..."[291] This anonymity contributes to commercial advantage; companies researching either products or competitors don't want to tip their hands. More benignly, these anonymous requests might be likened to a form of anonymous speech. Attorneys also serve this shielding function in filing FOIA requests. However, the volume and technical detail of private information filed to the FDA, and the commercial stakes involved in the regulated products, appear to have invited the niche development of this highly targeted FOIA-service industry.

Illustratively, on Jan. 4, 2000, FOI Services Inc. filed a FOIA request for

[290]Food and Drug Administration, *2000 FOIA Log*.
[291]AAC Consulting Group, at http://www.aacgroup.com.

documents on "glass or silicon oxide or siloxane coatings used on polyethylene terephthalate bottles."[292] For the anonymous client, this highly specific information is potentially profitable enough that it makes economic sense to hire a third-party information requester to obtain it.

Niche information developments can likewise be found in the media requests to the FDA. In January, about 67 of the requests -- 3.8 percent -- came from identified media sources.[293] Half of these came from FDC Reports, a trade press company that publishes a dozen daily and weekly newsletters. *The Rose Sheet*, for instance, covers the "toiletries, fragrances and skin care" industry to a fare-thee-well. The FDC Reports publications epitomize the trade press whose client base demands a level of information specificity that can require consistent use of FOIA. The more closely a media organization feels it is in its interest to reveal the actual operations of an agency, the more likely it is to use FOIA as a tool for agency-monitoring rather than as the indirect window into legislative behavior. Turn-of-the-wheel agency developments are newsworthy to trade press like FDC Reports, whereas general circulation media is more likely to use FOIA to obtain congressional correspondence.

Even here, though, the media requests are often an effort to use information collected by the government as a window not into government behavior, but into private industry plans and practices. Thus, on Jan. 7, 2000, Fox-2 News requested reports filed with the FDA by United Technologies.[294] This is library function, passive division: the media requester is using FOIA to reach onto the federal agency's bookshelf, as a way of peering through the agency into the otherwise private operations of a corporation. There is also library function, active division, reflecting the information obtained through the more assertive regulatory powers of the federal agency. Thus, on Jan. 5, 2000, Reuters

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[292]*FDA 2000 FOIA Log*
[293]Ibid.
[294]Ibid.

news service requested copies of FDA warning letters sent to industry for the prior week.[295] These warning-letter requests are among the most common type of media requests to the FDA. Though they do reflect FDA monitoring, they are primarily a way for the media to monitor, not the FDA, but the industry.

Another noteworthy aspect of the FDA requests is the relatively low use by public interest groups. In January, about 31 -- or 1.7 percent - of the requests were filed by identifiable public interest groups such as the Center for Science in the Public Interest.[296] These filings were sometimes library function requests seeking information relating to private companies; sometimes they were watchdog function requests seeking to shed light on government operations.

I.

Department of Agriculture

The Department of Agriculture manages farm support, food stamp, research and regulatory programs relating to the nation's food and fiber supply.

The Department is one of the busiest in responding to FOIA requests. In Fiscal 2000, the Department received 140,239 requests. The 55 full-time and 478 part-time required $8.1 in million administering FOIA, with about 4 percent of this spent on litigation.[297]

Like other agencies, the Department has been attempting to ease the FOIA burden by proactively publishing electronically some of the most commonly requested documents. For instance, the Department established an online "Purchase Cardholder Information System." The numerous interested parties that formerly used FOIA to obtain lists of holders of government credit cards -- in other words, the departmental purchasing

[295]Ibid.
[296]Ibid.
[297]Department of Agriculture, *Fiscal 2000 Freedom of Information Act Annual Report*, at http://www.usda.gov/news/foia/foia2000.htm.

agents -- can thus be diverted into this electronic format.[298]

The widespread use of FOIA to identify purchasing agents and thereby enhance a private company's ability to contract with the government was, like the other facets of commercial use of the Act, not contemplated by FOIA's authors. Like the other facets of commercial use, it is not easily explained by the standard self-governance, balance-of-power or watchdog rationale. In seeking private gain, though, the commercial users are serving a type of watchdog function even if that is not their stated aim. The FOIA has, at least potentially, opened government purchasing operations to greater competition because more companies are able to obtain the information necessary to make informed and competitive bids. The self-interest of the would-be contractors in effect deputizes them to serve as watchdogs over the government's contracting.

FOIA requests to the Department of Agriculture may be filed either with individual agencies within the Department, such as the Farm Service Agency or the Agricultural Marketing Service, or with departmental headquarters. Individual agencies directly receive the bulk of requests, because the FOIA-using community has learned it is most efficient to file directly with the policy agencies rather than through central headquarters.

Between Jan. 3, 2000 and March 30, 2000, headquarters logged in 176 FOIA requests. At least nine of the requests reviewed dealt directly with specific Agriculture Department contracts; for instance, Lexmark International on Jan. 11, 2000 sought documents concerning "information systems contracts and offers,"[299] while on March 20 Alfred A. Norfleet sought a "copy of security contract between USDA and Security USA."[300]

The requests to headquarters repeat consistent themes found in other federal

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[298]Ibid.
[299]Department of Agriculture, *2000 FOIA Log*
[300]Ibid.

agencies; for instance, the paucity of media requests. Of the 176 requests logged by headquarters during the period studied, only five can be identified as coming from reporters. For example, on Jan. 11, Fox-32 News in Chicago sought documents on "Loretta O'Rourke in Joliet, Illinois, who operates O'Rourke's Kennels and...documents relating to complaints."[301]

Obtained under a Freedom of Information Act request, the Agriculture Department's FOIA Log is particularly useful in showing the division and overlapping of information categories. For purposes of illustration, requests were divided into efforts to monitor government operations, private operations or the interface of government and private.

Government monitoring, for instance, is illustrated by the Jan. 3, 2000 request by the Boise Cascade Corp. for documents relating to the Department's "roadless directive."[302]This concerned the Clinton administration's plans for ending road building on some 60 million acres of Forest Service land. The documents sought by Boise Cascade would, presumably, reveal the Department's inner decision-making process. Indeed, a federal judge subsequently ruled in 2001 -- in response to a lawsuit filed by Boise Cascade -- that the Forest Service had violated decision-making procedures in development of the roadless policy. This is the watchdog principle, vindicated through use of FOIA. And yet, note the identity of the requester. Boise Cascade, as a company engaged in the business of logging on both public and private lands, has a clear commercial interest in the government's decision-making. This illustrates how commercial intent in a FOIA request is not incompatible with the watchdog function; in serving its private needs, the individual commercial requester is providing functional oversight of the public agency..

About 25 of the 176 requests reviewed could be similarly categorized as

[301]Ibid.
[302]Ibid.

government monitoring; another example being the Feb. 1 request by the Ross & DePaulo law firm for documents on the "recent closure of the Blackwater Canyon Rail Trail to hikers and bikers, because of hazards, by the ranger of the Monongahela National Forest."[303]

Another 20 or so of the requests could be categorized as involving a direct government-private interface. For instance, on Jan. 6 the law firm of Foulston & Siefkin sought documents concerning Agriculture Department "licensing and regulation of Safari Zoological Park" in Kansas along with information on "humans being bitten or attacked by animals owned by Safari Zoological Park."[304]One certainly hears the clanking of a lawsuit behind this request. Beyond this, the information sought could be understood either as illuminating the government side or the private side of a government-private interface. The licensing and regulation documents sought could show the sufficiency or insufficiency of government oversight; it's a watchdog request, in the sense that it reveals government operations. But it's also a library function request; the law firm wants to check out from the government's bookshelves everything collected from the Safari Zoological Park.

A roughly equal number of requests, about 20, could be categorized as targeting strictly private information -- that is, information on private enterprises -- held by the government. On Feb. 28, for instance, the law firm of Carmody & Torrance sought "documents concerning Frank Sexton Enterprises (and the) Summer Maid Creamery in Doylestown, PA."[305] Such requests, though, can quickly slip from one analytical category to another. The Agriculture Department's information on Frank Sexton Enterprises could be the product of government inspections, or could be information submitted by the company on its own.

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[303]Ibid.
[304]Ibid.
[305]Ibid.

Thus, the Agriculture Department requests reflect the commonplace library function use of FOIA; moreover, the requests illustrate how information held by the government can reflect either private, public or public-private interface information.

J.

Defense Intelligence Agency

The Defense Intelligence Agency is a combat support element of the Department of Defense. It collects and analyzes information designed to enhance military capabilities.

Overall, the Defense Department maintains a busy and costly information-processing operation. There were 97,266 requests to the Department in fiscal 2000, and $36.5 million was spent in processing and litigating the requests. The DIA accounts for only a fraction of the total number of FOIA requests to the Department. Of 96,479 FOIA requests processed by the Department in fiscal 2000, 835 were processed by the DIA. Despite receiving far fewer requests than the Army, Navy or Air Force, the DIA reported a backlog of unfilled FOIA requests that was as big or bigger than the busier departments. Moreover, the DIA's median age for backlogged cases -- 812 days -- was considerably longer than any other Defense Department entity. The DIA employs eight full-time FOIA officers, and spent $475,569 processing requests in 2000[306]

The DIA requests illustrate how information-collecting agencies may receive a different class of requests than regulatory or contracting agencies. For example, the Defense Logistics Agency received 16,303 FOIA in Fiscal 2000[307]; this was more than the Air Force, and presumably included a significant percentage of commercially oriented requests targeting contract opportunities. The Defense Department's Directorate for Freedom of Information and Security Review, which is the central clearinghouse for

[306]Department of Defense, *Fiscal 2000 Freedom of Information Act Annual Report*, at http://www.defenselink.mil/pubs/foi/00report.pdf
[307]Ibid.

Defense Department FOIA requests, recorded about 255 FOIA requests in the month of October, 1999. Of these, about 20 explicitly sought contract information; as in the Oct. 4 request by Alfred Lisiewski for "information on renovating toilet room plumbing contract No. MDA946-97-BA007."[308]

An information-collecting agency like DIA, by contrast, invites a greater percentage of pure library function requests.

An analysis of the DIA Fiscal 2000 Log, obtained under the Freedom of Information Act, shows that 448 requests were received between Jan. 1 and June 30, 2000. Of these, only about 50 could be categorized as something other than a library function request.

The relatively infrequent watchdog requests were exemplified by the request identified as Case No. 227-2000, which sought documents on "U.S. policy toward South Africa." Likewise, Case No. 275-2000 sought documents on the Eisenhower administration's "New Look" defense strategy. The information sought bore directly on government policy and behavior.

By contrast, the vast majority of requests to the DIA seek to take advantage of the information collected by the Agency in the course of its own work. The Agency is an active library, gathering, analyzing and storing information that then is checked out by the public through FOIA. Illustratively, on Feb. 22, 2000, the DIA logged in 11 FOIA requests. One, Case No. 217-2000, perhaps understandably sought documents on "spontaneous human combustion." Other requests received that day sought documents on Israeli intelligence services, Czech intelligence services, Soviet activities in Cuba, political and ethnic violence in Rwanda and what was described as "the unprecedented deployment of two Russian submarines off U.S. coasts last year."[309]

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[308]Department of Defense, Directorate for Freedom of Information and Security Review, *Fiscal 2000 FOIA Log*.
[309]Defense Intelligence Agency, *2000 FOIA Log*.

Such library function requests exemplify the public wanting to know *what* the government knows; but they are not, typically, a means to monitor *how* the government knows it. Sometimes, however, requests to know what the government knows are motivated by a desire to know *how* or to *what extent* the government collects information. Thus, the Oct. 12, 1999 request to the Defense Department for "information on the Philadelphia Experiment on the U.S.S. Eldrich involving time travel" could be characterized as an effort to find out not only *what* the government knows about time travel, but about *how* the government is collecting information on the subject. That is, the request reflects on both the government operations involved in the collection of information, and on the information itself.

Time travel notwithstanding, the majority of requests to DIA reflect a library function use of the Freedom of Information Act. As an information-gathering agency itself, with no regulatory function to speak of and relatively little contracting power, the DIA is the type of agency most likely to be subjected to library function requests.

K.

National Science Foundation

The National Science Foundation was established to promote science and engineering, primarily through grants and cooperative agreements.

The Foundation is not very active as a FOIA target; only 192 requests were received in Fiscal 2000. The NSF handles requests entirely through part-time assignments, and spent but $146,710 on FOIA operations during the year.[310]

The noteworthy aspect of the National Science Foundation's FOIA use, as analyzed through the FOIA Log obtained under a Freedom of Information Act request, is how little use academic reseachers make of the Act. Because of the nature of the agency,

[310]National Science Foundation, *Fiscal 2000 Annual Freedom of Information Act Report*, at http://www.nsf.gov/pubs/2001/ogc0101/ogc0101.html.

one might expect the academic community would actively use FOIA to illuminate NSF operations. And yet, of the 124 requests received between Jan. 1, 2000 and Sept. 22, 2000, only nine could be identified as coming from an academic or research institution. Thus, a Hendrix College professor on July 12 sought documents relating to four NSF engineering proposals.[311] Attempting to count the number of academic-oriented requests also demonstrates another recurring aspect of FOIA usage: the wide variation in information recorded by government agencies and provided as part of the FOIA logs.

There are a number of requests to the NSF for specific grant information; but, because no return addresses are included for the requester, it becomes difficult to identify affiliation. Still, other requests beside the scholarly appear to predominate.

Thus, 10 of the requests -- roughly the same as can be identified as coming from academic institutions -- sought lists of NSF credit-card holders. As seen earlier, these requests are designed to identify purchasing agents, for the future targeting by potential contractors. Another seven requests were related to political opposition research efforts; for instance, on July 31, two separate letters were received seeking documents on "Richard 'Dick' Cheney," while on May 20 a requester sought correspondence on Senate candidate Rick Lazio.[312]

The relative infrequency with which academic researchers use FOIA is common across other federal agencies. The Treasury Department headquarters, for instance, received about 135 FOIA requests between Jan. 1, 2000 and March 30, 2000.[313] (Like other federal agencies, the Treasury Department logs many requests directly at individual component agencies such as the Internal Revenue Service or Secret Service.) Of the headquarters total during this quarter, only four -- or about 3 percent -- came from researchers with an apparent academic intent. For example, on March 10, 2000

[311]National Science Foundation, *Fiscal 2000 FOIA Log*.
[312]Ibid.
[313]Department of the Treasury, *Fiscal 2000 FOIA Log*.

Stephanie Leitch of the Art Institute of Chicago requested documents on "wartime art looting." The other three requests that can be categorized as of academic or scholarly intent were filed by Robert Orr of the Brookings Institution; Orr's requests, moreover, appear to have been filed in 1995 with another federal agency, and only found their way to the Treasury Department in March 2000.[314]

The extraordinary delay in filling Orr's request is actually not extraordinary at all, and it helps explain some of the academic disinterest in FOIA. Long delays amounting to years are not uncommon, particularly among some agencies including the FBI, the CIA and the State Department. The State Department is noteworthy because it typically reports having more requests backlogged each year than it fills; in fiscal 2000, for instance, the State Department received 3,611 requests during the year but had 5,782 in the backlog at the end of the year. Astonishingly, the State Department reports taking a median time of 518 days to fill "expedited" requests, while routine and complex requests take a median time of 694 days.[315] This author's mid-January request for the State Department's FOIA Log had still not been graced with even an initial response by May 1, notwithstanding the putative 20-day deadline for responses.

The State Department is not alone. In a related vein, this author filed a FOIA request with the Central Intelligence agency on April 16, 1992 for records relating to Electronic Data Systems, the business started by then-presidential hopeful H. Ross Perot. On Feb. 11, 1999, unbeknownst to the author, the CIA located two responsive documents and forwarded them to the Defense Intelligence Agency. And on March 30, 2001, the DIA released a redacted five-page memo. The response came nine years following the original request.[316]The memo itself revealed intelligence-gathering at its most make-work and mundane: it summarized an article published in the Australian magazine *Defence*

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[314]Ibid.

[315]Department of State, *Fiscal 2000 Annual Freedom of Information Act Report*, at http://foia.state.gov/anrept00.pdf.

[316]Defense Intelligence Agency to author, 30 March 2001.

Industry and Aerospace Report.

Such long delays potentially diminish the value of the information sought, especially for reporters working in a time-sensitive environment. Information obtained about Perot in 2001 is far less valuable than information obtained in the context of a presidential campaign. Such long delays thus undermine the watchdog function credited to FOIA. Long delays consequently create a disincentive for use; again, especially for reporters. But, as seen as well in the low number of academic researchers who use the Act, reporters are not the only potential users who shun FOIA.

L.

Department of Health and Human Services

The Department of Health and Human Services administers a wide variety of public health and welfare programs. Its component agencies include the Food and Drug Administration and others that maintain an active FOIA program.

The Department received a total of 58,401 FOIA requests in Fiscal 1999, and spent $11 million in administering and litigating the Act. The Department secured $992,198 in fees; the 9 percent fee payment amounted to one of the highest percentages of any federal agency.[317]

A review of the first 200 FOIA requests filed with the Department's headquarters in fiscal 1999, recorded on the FOIA Log obtained under the Freedom of Information Act, is useful in summarizing the overall, government-wide pattern of FOIA usage. Of the initial requests, about 41 came from individuals for whom no organizational affiliation was cited on the FOIA Log.[318] Lack of obvious affiliation confounds analysis, but it is perfectly illustrative of the veil of uncertainty that surrounds a considerable part of FOIA use. When we don't know who the requesters are, we cannot easily divine their intent or the motive. This, in turn, complicates efforts to categorize requests as fitting a particular theory.

Attorneys comprised the largest identifiable population among the reviewed HHS requesters. At least 35 of the first 200 requests came from individuals associated with law firms; this is generally consistent with other federal agencies. Attorneys, by definition, represent clients, and it can be presumed these requests are commercial in nature. Thus,

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[317]Department of Health and Human Services, *Fiscal 1999 Annual Freedom of Information Act Report*, at http://www.hhs.gov/foia/99anlrpt.html

[318]Department of Health and Human Services, *Fiscal 1999 FOIA Log*.

Request No. 99-001 from the firm Fontheim & Hammonds sought "documents pertaining to RFP 282-99-0001."[319] This appears to typify the classic commercial request, with no obvious watchdog, self-governance or balance-of-power consideration involved.

Other attorney requests, however, show the elusiveness of categories. Request No. 99-084 from the law firm Thompson & Scott sought "statistics on composition of Centers for Disease Control employees by race, age, gender."[320] The law firm, clearly, was acting on behalf of a client. A simple categorization of request by identity of requester -- in this case, an attorney -- would therefore mark this as commercial. And yet, there's a strong hint of watchdog-type litigation in the specific nature of this request. By seeking employment demographic information on this federal agency, the law firm may not only be serving the needs of a client and its own commercial interests, but also a substantial watchdog purpose in monitoring government employment practices.

Only three of the requests came from congressional offices. Thus, Request No. 99-113 from the office of Sen. Jesse Helms sought a copy of a "Community Sexual Risk Reduction Program" document.[321] This is a request that combines balance-of-power and watchdog considerations; in its rarity, this congressional request reflects the pattern found in all federal agencies. Congress, contrary to suggestions made during the drafting of FOIA, largely ignores the law.

Only two of the requests came from academic institutions. This reflects the government-wide pattern of academic disinterest in the FOIA's potential.

Nine of the requests, or roughly 5 percent, came from reporters. Thus, in Request No. 99-066, the *Los Angeles Times* sought documents relating to a controversial medical program at the University of California at Irvine.[322] The reviewed media requests to the

[319]Ibid.
[320]Ibid.
[321]Ibid.
[322]Ibid.

Department of Health and Human Services were somewhat unusual, in that none were for copies of congressional correspondence; congressional correspondence, as seen earlier, is the most common target of media FOIA requests. The low number of HHS media requests typify, however, how reporters are largely absent from the population of FOIA users. The media requests illustrate, moreover, how the Act's putative watchdog function is typically turned upon a non-executive entity. None of the nine media requests reviewed could properly be cast as shedding light on the operations of the Department of Health and Human Services. Instead, the requests invariably sought information on assorted medical centers and reseachers.

Watchdog, these requests may be. They do not, however, show media interest in the federal agency itself except in so far as the agency is a keeper of documents. In this, the Department of Health and Human Services illustrates how the library function has become paramount in FOIA usage.

VII.

PUBLIC PROPERTY ASPECTS OF INFORMATION

A.

Implicit Claims of Public Ownership in Government Records

The analysis of FOIA usage shows that the conventional theories supporting the Act -- self-governance, watchdog and balance-of-power -- do not provide a clean fit with the ways the Act is most commonly employed. Actual use is commonly defined as being synonomous with the identity of the information-requester. The domination by commercial interests and the persistent requests by disfavored populations like prisoners and UFO cranks is thereby cast as evidence that the Act has failed to meet expectations and intent. Often, the proffered solution is to constrain the Act so that usage patterns are forced into closer alignment with the conventional theories. James T. O'Reilly, for one, declared that "public funds should not be appropriated to aid the efforts of privately motivated FOIA requesters, as such requests do not protect the value of government efficiency."[323]

But as further shown in the analysis of FOIA usage, the identity of the information-requester does not necessarily exhaust the possibilities. The commercial identity and presumed commercial motives of a requester need not be inconsistent with a self-governance or watchdog function being served. Moreover, the conventional theories of self-governance, watchdog and balance-of-power need not be the only ones applicable to FOIA. There are other theories for which the commercial motives of information-requesters pose no contradictions. The library function use of FOIA, seen to be so commonplace, explains *how* the Act is being applied; *why* such a library function can be

[323]James T. O'Reilly, "Expanding the Purpose of Federal Records Access," 389.

justified can be explained in part through examination of another theory of information access.

Throughout the initial consideration of FOIA, and in the years since, an offhand-but-persistent theme has suggested itself. This is the notion that the public has some ownership claim on government information, and this ownership claim provides the right of access. This recurring if subterranean theme offers access-maximizing consequences, because of the leeway that people have in use and enjoyment of their own property. This theme is also consistent with the library function use of the Act.

In excavating the subterranean ownership theme, it must first be recognized that the Freedom of Information Act is a misnomer. FOIA does not, in fact, allow the free flow of government information, nor does it allow the public to know what the government knows. The Act speaks of access not to information but to "agency records." The latter term was left undefined by Congress, but there is a clear distinction between free-floating information and a concrete agency record. The latter is information that has been fixed in a particular medium.

Information, as the federal National Commission on Libraries and Information Science noted in 1982, is an intangible which can be made available in any media. As an intangible, information is not consumed by use; it can be resold or given away with no diminution of its content.[324] "Government information" entails certain additional elements. The Office of Management and Budget identifies "government information" as that which is "created, collected, processed, transmitted, disseminated, used, stored or disposed of by the federal government."[325]

For purposes of the Freedom of Information Act, then, "government information" is that which has been committed to a physical format and thereby assumed that status of

[324]Peter Hernon and Charles R. McClure, *Federal Information Policies in the 1980s: Conflicts and Issues,* (Norwood, New Jersey: Ablex Publishing, 1987) 5.
[325]Ibid.,

an agency record. The Supreme Court has further clarified that to qualify as an agency record, an agency must either create or obtain the requested materials.[326]The Freedom of Information Act title is thus clever legislative marketing, but the law is more properly considered an Open Access to Government Documents Act. And, in fact, the initial title of the Senate version of the legislation was the accurate but mundane Federal Public Records Act.[327]

Records, more so than intangible information, can be construed as property. It is property, in the case of public records, in which the government has made an investment by dint of creation or acquisition. This fact of government -- that is, public -- investment has been cited repeatedly if off-handedly throughout FOIA considerations.

Thus, when Rep. Melvin Laird was explaining his support for the Act, he cited the "citizen and *the taxpayer*" (italics added) who would now "obtain the essential information about his Government which he needs and to which *he is entitled*."[328] (Italics added.) It is noteworthy that Laird would invoke a taxpayer's entitlement in justifying public access to government records. Embedded within this reference is a profound notion of ownership. Having paid for the records through the taxes that support government activity, the taxpayer must of necessity have an owner's claim: an entitlement. So when Rep. Dante Fascell likewise spoke of FOIA making "available to the American people the information *to which they are entitled* and the information they must have to make a full contribution to a strong and free national government,"[329] he might be understood as making two distinct theoretical arguments. The latter part of his phrase -- "full contribution to a strong a free national government" -- is the traditional self-governance theory underlying FOIA. But the first part -- "information to which they

[326]*Dept. of Justice v. Tax Analysts*, 492 U.S. 136 (1989).
[327]*Congressional Record*, 20 June 1966, 13643.
[328]*Congressional Record*, 20 June 1966, 13648.
[329]Ibid. at 13649.

are entitled" -- suggests an ownership argument. To be *entitled* is to have rights of usage by virtue of holding title, or ownership.

Admittedly, this formal sense of entitlement is not fleshed out. There is every likelihood that Reps. Laird and Fascell were merely using the term loosely to stress the public's claim on government information, rather than technically to indicate the public's specific ownership of the information. Still, this theme of public entitlement to government information recurs throughout freedom-of-information discourse, often wed to the conventional theories justifying public access. Thus Richard Nixon, while commenting on an executive order concerning the classification of government records, stated that "fundamental to our way of life is the belief that when information which *properly belongs to the public* is systematically withheld by those in power, the people soon become...incapable of determining their own destinies."[330] (Italics added.)

When Yale Law School Professor Elias Clark summed up FOIA's first decade, he asserted that "this statute is founded upon the philosophy that because governmental decisions *belong to the public*, the people, as of right, may claim access to them."[331] (Italics added.) Professor Clark might have been speaking generally, that he meant "belong" in the sense of being naturally associated with. Government decisions are the concern of the public, by this interpretation.

The word "belong," though, can also have a distinct technical meaning: it can mean "to be the property of."[332] So, too, President Clinton asserted that "government information is a *public asset*."[333] (Italics added.) When Henry H. Perritt, Jr. was exploring the sources of rights of access, he denounced a New Jersey statute that "denies

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[330]*quoted in* People for the American Way.
[331]Elias Clark, "Holding Government Accountable: The Amended Freedom of Information Act," *Yale Law Journal* 84 (March 1975): 741, 742.
[332]American Heritage Dictionary 2d ed., s.v. "belong."
[333]*quoted in* Branscomb, *Who Owns Information*, 172.

the public the benefits of *publicly funded* public record formats..."[334] (Italics added.) This recurring but rarely elaborated-upon theme deserves considerably more attention. Indeed, the typically offhand nature of the references suggest that speakers are reminding the audience of something that is known already and needs nor further explication.

B.

Information and Intellectual Property

Intellectual property law suggests at least some support for the notion that *government* information is *public* information, in the technical and specific sense that the public owns it.

Public information, according to the now defunct U.S. Office of Technology Assessment, is "that which is collected and/or developed *at government expense* or as required by public law, and not considered to be classified, personal, or otherwise subject to exemption" under FOIA or the Privacy Act.[335] (Italics added.) When government invests in information -- when governmental resources are utilized to create, collect, process and all the rest -- then the information becomes public save for those exempted areas enumerated in law.

Henry Perritt, Jr. elaborated upon the property considerations of government when he noted that public officials are performing public duties when collecting and assembling information. Under the Supreme Court's analysis in intellectual property cases, such work cannot be copyrighted.[336] If not copyrighted, information is in the public domain -- literally, owned by the public. Thus, Perritt cites a case from the First

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[334]Henry H. Perritt, Jr., "Sources of Rights to Access Public Information," *William & Mary Bill of Rights Journal* 4, (Summer 1995) 179, 183.
[335]*quoted in* Ibid.
[336]Henry H. Perrit, Jr., "Sources of Rights to Access Public Information," *William & Mary Bill of Rights Journal* 4 (Summer 1995*)*: 179.

Circuit Court of Appeals in which the Massachusetts Building Officials and Code Administration claimed a copyright for a basic building code. A private publisher took that code and sold it as its own. No problem, the appellate panel ruled: the public "owns the law" both because of salaries paid by the taxpayer but because "each citizen is a ruler, a law-maker" and therefore "citizens are the authors of the law."[337] This ruling, as Perritt drew out, was in line with a succession of mostly 19th century cases.

Information, *per se*, typically cannot be copyrighted. As Pamela Samuelson notes, "American intellectual property law has generally resisted regarding information as something in which its discoverer or possessor can have a property interest."[338] Ideas or facts can't be copyrighted; copyright is limited to the author's particular expression of those ideas and facts.[339]

The government agency holds information; in a sense, the government owns it, but it is an unusual kind of ownership. It is an ownership that does not convey quite the same rights and privileges as the other kinds of ownership. The Copyright Act of 1976 prohibits the federal government from claiming copyright protection for its work.[340] As Robert Gellman notes, this prohibition had previously been enacted under the Printing Act of 1895; prior to 1895, it was "generally recognized that copyrighting of federal government materials was improper."[341] By denying copyright protection for such information and keeping it in the public domain, a public policy of maximum information dispersion was served.

The Copyright Act's prohibition on copyrighting of government work combines

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[337]*Building Officials & Code Administration v. Code Technology, Inc*., 628 F.2d 730, 734 (1st Cir. 1980).
[338]Pamela Samuelson, "Information as Property: Do *Ruckelshaus* and *Carpenter* Signal a Changing Direction in Intellectual Property Law?", *Catholic University Law Review* 38 (1989): 365.
[339]*Harper and Row Publishers v. Nation Enterprises*, 471 U.S. 539, 556 (1985).
[340]17 U.S.C. s. 105.
[341]Robert M. Gellman, "Twin Evils: Government Copyright and Copyright-Like Controls over Government Information," *Syracuse University Law Review* 45, (1995): 999, 1024

with the Freedom of Information Act to "ensure public availability and unrestricted use of government data."[342] The legislative history of the Copyright Act of 1976 specifically noted that the intention was "to place all works of the United States Government, published or unpublished, in the public domain."[343] Copyright is a form of information control -- who holds the copyright can control when and how the information is disseminated -- and a government granted copyright power could effectively censor embarrassing or otherwise inconvenient information. The specified-by-statute inability to obtain copyright, conversely, diminishes the government's ability to impose such permit private copyrighting of judicial opinions.

The Second Circuit Court of Appeals took judicial note of this fact in the 1985 case of *Legi-tech v. Keiper*, in which an electronic publishing company sought to provide access to legislative information. New York state officials wanted to constrain access, prompting the Second Circuit to observe:

> "The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seems to obvious to require extended discussion...such actions are an exercise of censorship that allows the government to control the form and content of the information reaching the public." [344]

The Freedom of Information Act and the Copyright Act thus offer parallel considerations. Because federal agency documents and data can't be copyrighted, they can be copied and used however anyone sees fit. The purposes for which the documents and data are sought matter not a whit, and the government cannot reach into the mind of the requester to evaluate motive or intent. It is material in the public domain; that is to say, in the public ownership. The government, in a manner of speaking, is simply the custodian of the public information. So, too, with agency records ought under FOIA; save

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[342]Ibid. at 1004.
[343]*cited in* Ibid. at 1025.
[344]*Legi-Tech v. Keiper*, 766 F.2d 728, 733 (2d. Cir. 1985).

indirectly for the question of determining fees, questions of motive and intent do not arise. The Copyright Act establishes that the government information is in the public domain, while the Freedom of Information Act provides the public the means of accessing it.

Shaded this way, the underlying FOIA philosophy speaks of ownership, not motive. Because government decisions, and implicitly the information used for them, are the property of the public, the public can claim maximum access.

CONCLUSION

Theory matters. The theory or theories employed to justify legislation carry a standard for measurement that invite comparison to the actual implementation of the statute. Consistency between theory and expectation on the one hand, and implementation on the other, yields a conclusion that the legislation is a success. Inconsistency prompts demands for reform, or for "reform." Judges, meanwhile, try to penetrate through particular facts into the heart of the matter, so the underlying theory might be applied anew.

The conventional theories articulated during consideration of the Freedom of Information Act, and invariably if misleadingly summed up in Madison's "farce or tragedy" quote, carried expectations that have not been met. At least, they have not been met in the way lawmakers most commonly expressed them.

The self-governance theory has been one of the three most dominant ideas in FOIA history. The theory holds that public access to government information is necessary so the the electorate can properly make policy and political decisions. As demonstrated, this self-governance theory is infected with a latent argument for minimizing public access. If information held by the government is deemed irrelevant to self-governance purposes, it is held to be outside of the public's reach. This is parallel to Meiklejohn's and Bork's concept of core political speech being protected by the First Amendment, while frivolous or merely artful speech unrelated to governance is unprotected.

As applied to FOIA usage, the self-governance theory carries expectations that information requesters will want agency records to inform public policy decisions. The surface of actual FOIA usage falls far short of this standard. The EPA's documentation

that 89 percent of FOIA requesters are attorneys, industry representatives or consultants illustrates the general proposition that commercial use dominates FOIA. In a related vein, a high percentage of FOIA requests seek information that bears on private rather than on public matters. Thus, the Agriculture Department FOIA Log revealed about as many requests targeted private information collected by the department as targeted department operations. Likewise, requests to the Food and Drug Administration are typically concerned not with FDA operations but with keeping an eye on competitor companies. When FOIA requesters seek this kind of information on private interests, the nexus to self-governance appears to be weak. The information may aid a private interest in its private commercial dealings, but it seems at best only tangentially related to the expectations associated with a self-governance.

FOIA usage provides similarly scant vindication for the watchdog theory. The watchdog theory is related to self-governance, but centers on the core concept that public access to information will prevent or root out government misbehavior. The low watchdog use of FOIA is shown, in part, by the low number of media requests. At the EPA, only 1.2 percent of all FOIA requests in fiscal 1999 came from the media. At Agriculture Department headquarters, only 5 of 176 requests reviewed came from the media.

Moreover, those media requests that are filed reflect a cramped conception of watchdogging. Nearly half of all media requests to the Office of the U.S. Trade Representative sought congressional correspondence. This is indicative -- it actually understates -- the degree to which media users focus on the legislative instead of executive branch. In addition, 13 of 19 requests to USTR came from just two reporters. At the Food and Drug Administration, only 3.8 percent of requests reviewed came from the media; and of these, half came from just one media organization. This, too is indicative of a government-wide phenomenon: media use of FOIA is concentrated in a

relative handful of reporters.

Self-styled public interest groups represent another type of watchdog requester; these groups, too, are under-represented relative to congressional expectations. At the EPA, only 2.3 percent of requests come from public interest groups. At the FDA, only about 1.7 percent of the reviewed requests came from such groups.

A watchdog use of information is not, of course, confined to the media or a public interest group. It is, in fact, difficult to rule out a watchdog function on some requests that may appear idiosyncratic. An individual's request for information, say, on the National Security Agency's secret base for outer space aliens can provide a serious watchdog service even if the request appears ludicrous. Perhaps the government is mistreating the aliens; it would be useful to know. Still, analysis of requests to various agencies shows that only a minority of requests can be characterized as providing the kind of information useful in monitoring potentially problematic government action. At the Agriculture Department, only 25 of 176 requests reviewed could be characterized as purely watchdogging government action.

The third primary conventional theory justifying FOIA involved balance-of-power considerations. The core concept was that enabling congressional and public access to executive branch information, augmented by judicial review, would rebalance power against an overly powerful bureaucracy. Here, too, the record is mixed at best. Members of Congress essentially ignore the information-access tool. None of the requests reviewed to the Federal Energy Regulatory Commission came from Congress. Only four of the requests to the EPA came from Congress. Moreover, the congressional requests tend, like those from the media, to be very cramped. Typically, the requests come from a congressional office in search of correspondence to the executive agency. Thus, during the first few months of 2000, the office of Sen. John McCain was a consistent filer of FOIA requests to different agencies. From each, McCain's office sought copies of

correspondence that the senator -- and presidential candidate -- had sent previously. The purpose was neither watchdogging the agency nor balancing power. The purpose was to determine the senator's own political vulnerabilities that might be exposed through his correspondence with the agency.

The balance-of-power theory, though, need not rely entirely on evidence of direct congressional usage of the Act. As cited during FOIA consideration, equalizing information access can re-balance power even it's the public and not Congress making the specific information requests. When then-Rep. Bob Dole stressed how "*people and* their elected representatives in Congress have been engaged in a sort of ceremonial contest with the executive bureaucracy over the freedom-of-information issue,"[345] (italics added) he was hinting at this notion.

The administrative, financial and reporting obligations -- critics would call them "burdens" -- imposed on Executive Branch agencies by the Act also carry a balance-of-power function regardless of the information sought. Executive Branch power is checked, to some degree, as the agency is weighted down by information-access requirements.

Notwithstanding these secondary effects, FOIA usage by and large appears not to explicitly vindicate any of the primary conventional theories deployed during consideration of the legislation. Analysis of FOIA usage through agency FOIA logs, however, goes only so far. There is a veil over FOIA use that clouds our understanding.

Requests to the Food and Drug Administration funneled through FOIA service agencies illustrate our clouded understanding of FOIA use. About one-quarter of all requests to FDA were made by just two such FOIA service agencies, which provide both expertise and anonymity. The identity of the substantive requester -- the client -- is secret. This secrecy complicates analysis and categorization of use. Without knowing the requester's identity, it becomes difficult to assess intent. The records requested do

[345] *Congressional Record*, 20 June 1966, 13655.

provide some clue; they can be categorized in gross terms as covering private information, or government-action information, or some combination. But the full-blooded nature of the request can be appreciated only through the acquisition of more detail.

This is analogous to the complications involved in knowing and categorizing, more generally, how FOIA is used. FOIA service companies mask significant details of a request; more generally, too, the identity of any requester and the subject of can request can mask a deeper theoretical import. Thus: a company seeks profit, and considers government information useful toward this end. The company hires an attorney or FOIA service company and files a request with an apparent money-making intent. The request is scored as "commercial," thereby undercutting the congressional expectations for FOIA.

But this surface analysis misleads; it confuses motive with outcome. Commercial requests, too, can serve a watchdog, self-governance or balance-of-power function.

A voter undertakes an act of self-governance by submitting a ballot, regardless of the individual's motivation. Politics *presumes* selfish motivation; voters may be motivated by hopes of securing a healthy tax break, a government subsidy, cleaner air to breathe. The selfish interests motivate like-minded individuals to congregate in parties, associations, special interest groups. Such factions are presumed in our system of government:

> "A landed interest, a manufacturing interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government."[346]

So, the fact that an individual or a faction is pursuing a "a landed interest, a

[346] *The Federalist* No. 10 at 124 (James Madison) (Isaac Kramnick ed., 1987).

manufacturing interest, a moneyed interest" while seeking government information does not automatically cast the information request as beyond the realm of self-governance. When the Boise Cascade Co. filed a FOIA request for Agriculture Department documents on the Clinton administration's roadless-forests initiative, the immediate motive was profit. Acting rationally in its economic self-interest, the company was seeking information about a policy that would limit its ability to harvest and thereby profit from that federal land. But in the course of doing so, the company was also informing the self-governance needs of its employees. Information obtained through FOIA could help the company and its political allies fight the roadless-forests regulation, either in the legislative and regulatory arenas or through political campaigns.

Such a commercial request can likewise vindicate the watchdog and balance-of-power theories. Though a commercial request, motivated by profit, this FOIA search could shed light on government misbehavior. Indeed, it can be presumed that Boise Cascade officials were hoping to find smoking-gun memos to expose Clinton administration misdeeds. Similarly, the myriad FOIA requests by political opposition researchers can be serving a watchdog function even if the intent is selfish and low-minded political advantage. An opposition researcher, like a political campaign more broadly, can simply be a watchdog in attack mode.

So, too, with the balance-of-power theory. The members of Congress who wrote FOIA felt the executive branch enjoyed too much power through a virtual information monopoly. Power is re-balanced, to some degree, by virtue of the broader information dispersal enabled by FOIA. The Freedom of Information Act is like a series of pipes run into a dangerously swollen reservoir. The pipes draw off water, for what may be a host of motives: irrigation, drinking supplies, flood control, recreation. Whatever the motives, the effect is to bring the reservoir into better balance. It is the case that Congress essentially ignores FOIA as an information-gathering tool. But by enabling greater public

access to information, the Act evens out an information imbalance regardless of the motives of individual requesters.

In this light, the FOIA requests filed by disfavored populations like prisoners or UFO fanatics can be appreciated as serving multiple public purposes deeper than the surface intent might indicate. The 57 identified prisoners who filed requests with the Drug Enforcement Administration might have been motivated by revenge, boredom, curiosity or a search to prove their own innocence. Whatever the motive, one byproduct is to more equally distribute information in a way that both provides a watchdog on government action and a re-balancing of power. Likewise, the UFO fanatics that bombard the intelligence agencies with requests may be motivated by neurosis, paranoia, or an over-active imagination. And yet: FOIA-released documents, viewed apart from whatever questionable motives might prompt requesters, serve an undeniable watchdog function.

In this way, imperfect requests can vindicate important rights. The commercial, paranoid or merely curious requests, though imperfect in light of the explicit congressional expectations, can serve purposes deeper than themselves. Indifference to identity, motive or surface intent of an individual information request can thus clarify the deeper function being served and ensure the broadest possible distribution of information held by the government. This indifference principle guarantees widest possible diffusion of the freedom. As Judge Wald noted, the First and Fourteenth Amendments protect the Ku Klux Klan marchers in Skokie as much as they protect the civil rights workers in Mississippi; rights do not distinguish "between the good guys and the bad guys."[347] This is proper judicial indifference.

So, too, in information requests; the rights of access are broadest when they are applied without distinction between requesters. For all the congressional justifications

[347]Wald, "The Freedom of Information Act," 671.

and expectations that surround the statute, the Freedom of Information Act itself has expressed this indifference principle. One of the original statute's key components was the elimination of the "properly and directly concerned" test established by the Administrative Procedure Act. The APA empowered Executive Branch officials to determine whether information requesters were "properly and directly" concerned with the matter in question. In eliminating this test, FOIA established the principle that information is to be released unless one of the nine enumerated exemptions applied. The Freedom of Information Act thereby requires the Executive Branch to be perfectly indifferent to the requester's identity. The result is broader information disclosure.

Thus, when the Supreme Court in the *Reporters Committee* case clarified that reporters enjoy no greater access to information under FOIA than any other requester, the indifference principle was properly upheld. Contrary to impressions, this aspect of the ruling supports a broadening rather than a narrowing of information access. Permitting reporters greater access would establish a two-tier system of information citizenship; the perverse result, given the very low number of media requests currently under FOIA, could be an overall reduction rather than increase in information flow to the public.

The indifference principle was further emboldened in response to the *Reporters Committee* ruling, because of how Congress revised FOIA itself. The Supreme Court in *Reporters Committee* established the rule that FOIA, as originally written, existed to shed light on agency action. Records irrelevant to agency action -- private information, for instance -- were thus said to be outside the core purpose of FOIA. In this part of the ruling, the Court was wedding FOIA to the self-governance and watchdog theories; it was a shotgun wedding, whose effect was contrary to the indifference principle.

But in the 1996 Electronic Freedom of Information Amendments, Congress specified that information was to be released to "any person for any public or private

use."[348] The effect appears to be to bury the Supreme Court's core-purposes analysis in *Reporters Committee*. Instead of a core purpose of self-governance or watchdog function, Congress has restored and emboldened the indifference principle. Under the 1996 amendments, Executive Branch officials are to be indifferent to the identity and the surface intent of the information requests.

Because the Freedom of Information Act establishes such a far-reaching public policy of open access, the indifference principle is not always given solo billing. The rationale that's certainly closer to the conventional theories articulated by FOIA's authors, and that may be more marketable to the public, still centers on self-governance and/or watchdog functions. Thus, the influential Second Circuit Court of Appeals would declare that FOIA "expresses (a) public policy in favor of disclosure so that (the) public might see what activities federal agencies are engaged in; to that end, any member of (the) public is entitled to have access to any record..."[349] In this explanation, the appellate court is actually wedding two distinguishable ideas. First, the court is asserting that the policy of disclosure is justified by the necessity of allowing the public to see "what activities federal agencies are engaged in." This is self-governance or watchdog theory in action. But then, by clarifying that any member of the public is entitled to have access to "any record," the court is going beyond simple governance. "Any record" might have nothing at all to do with governance or the federal agency.

Indeed, the review of FOIA usage in this thesis shows that "any record" comes closer to describing the actual use of the Act than does "see(ing) what activities federal agencies are engaged in." The "any record" standard can be explained by the concept of a federal agency as a library of information. The library function may provide the best explanation for how FOIA is actually used. As seen, a considerable percentage of all

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[348]House Government Reform and Oversight Committee, "Electronic Freedom of Information Act Amendments of 1996," 104th Cong., 2d sess., 1996, H. Rept. 104-795, *reprinted in 1996 United States Code Congressional and Administrative News*, 3462.

[349]*A. Michael's Piano v. Federal Trade Commission*, 18 F.3d 138 (1994.)

FOIA requests seek records containing information with little bearing on agency operations. The information of interest concerns private matters, or public actors outside of the agency to whom the request is directed.

The self-governance, watchdog and balance-of-power theories all provide political justifications for *why* FOIA is in place. Moreover, even commercial and idiosyncratic requests may serve as a byproduct these self-governance, watchdog and balance-of-power theories. It is the library function, though, that best explains *how* the Act is most often used. The congressional findings in the 1996 amendments -- FOIA exists to serve "any person for any public or private use" -- adjusts the core purpose of the Act to a state of perfect indifference suitable for a library.

The unfortunate aspect of the library function is that it seems to lack grounding in either theory or good public policy. Thus, James T. O'Reilly complained that as a result of the 1996 FOIA amendments "taxpayer funds now support a library function to and from which those taxpayers interested in the production of widgets can make information about widgets."[350] O'Reilly's disapproval invites the questions: what public policy is advanced by establishing federal agencies as information libraries, and what theoretical rationale can support such establishment?

The answer is two-fold. The public policy served is that the leveling out of information disparities will encourage rational decisions and equalize bargaining power. The FOIA theory that supports this public policy may be best rooted in the property claims that a sovereign public has on its government, though the self-governance, watchdog and balance-of-power theories also provide support.

Inadequate information can lead to inefficient markets.[351] Enabling greater public information access can contribute to greater efficiency. Thus, using FOIA to obtain information about a competitors' contract bid can contribute to smarter competition and

[350]James T. O'Reilly, "Expanding the Purpose of Federal Records Access," 382.
[351]Joe B. Stevens, *The Economics of Collective Choice*, 66.

better bids. The ultimate beneficiary may be the public. Using FOIA to obtain information about a private actor's operations can contribute to better bargaining between members of the public and the private entity.

Politically, too, asymmetric information distribution can skew decisions. Government agencies not only "almost always have better information" than their legislative sponsors,[352] they invariably have better information than the public at large. Through FOIA, this information distribution is made more symmetrical. The public is placed in a better bargaining position when it has the ability to obtain the same information as is held by the government agency. It is not necessarily information of a particular type but information *per se* whose distribution through FOIA serves a public purpose.

That could be a hard sell in Congress. The self-governance, watchdog and balance-of-power theories that dominated debate during FOIA's birth are politically attractive. And, as suggested in this thesis, these conventional theories can find some support in the actual use of FOIA. Indeed, as further suggested in this thesis, the conventional theories can be vindicated even with requests that appear to serve only a blatantly commercial purpose. But complete reliance on these theories also inevitably leads to a type of cognitive dissonance -- a recognition that much use of FOIA can't be shoehorned into the expectations created by the theories.

Another theory can help; not alone, but in concert with the governance-centered theories that are commonly advanced. This is the theory of public ownership of the government's works: Under this theory, the public enjoys access rights by virtue of ownership of the information collected by government.

The government holds information; the public requests it. This dynamic, central to FOIA operations, conveys a notion of separation: the public and the government are

[352]Ibid., 271.

distinct species. This alienation has been highlighted fueled by the rhetoric of politicians themselves. Politicians encourage this visceral view that the government is something apart from the people, as when the former television sportscaster-turned-congressman J.D. Hayworth floridly complained about "those who always ask us to tax and spend and take more of your money to run a bigger and bigger and bigger Federal Government."[353] In a FOIA context, this alienation is conveyed in the image of a member of the public making petition to the government for documents the government has in its possession.

But whose possession is it? That is another way of asking, how truly distinct are public and government? As Alexander Meiklejohn noted, "the governors and the governed are not two distinct groups of persons. There is only one group -- the self-governing people. Rulers and ruled are the same individuals."[354] And this: "it is not our representatives who govern us. We govern ourselves, using them."[355]A sovereign people -- literally, a self-governing people -- enjoy a very specific relationship to the government that carries implications for the actions of government. The public owns the government and its undertakings. One of the undertakings of government -- often, it seems, the primary undertaking -- is the accumulating of information.

As seen, the notion of information being bought and paid for by the public through the agency of government has been implicit throughout FOIA's history. The observation by Mr. Justice Brennan that documents "were developed with public funds and with Government assistance and, in large part, for governmental purposes" was a more-than passing reflection of this idea. This idea has likewise been communicated through the repeated observations that information held by the government is a "public asset" -- President Clinton's words -- to which the public is entitled. Bought and paid for by the public, information held by the government is every bit as accessible as public

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[353]*Congressional Record*, 14 Nov. 1995, H12203.
[354]Alexander Meiklekjohn, *Free Speech and its Relation to Self-Government*, 6.
[355]Ibid., 37.

land.

As with public land, there are limits to access. Through the agency of government, restrictions are established to protect the resource in the public's interest. On public land, certain habitat is protected from extraction, access hours may be limited and usage confined. None of the restrictions, though, convert the public land into something other than public property. In information, too, certain records are exempt from disclosure and access may be limited in the service of public policy; for instance, to further national security or protect privacy of individuals. None of the restrictions, though, convert the information resource into something other than public property.

The public land analogy might be better cast as a public library analogy. It is the library function that explains a considerable share of total FOIA requests. Combining the public-property claims with the library function turns some FOIA-skeptical arguments on their head. Thus, James T. O'Reilly cited the taxpayer aspects as rhetorical support for his complaints about FOIA turning government agencies into library. We are meant to feel outraged at "taxpayer funds" being used for mere private and commercial gain. Perhaps, though, it's the other way around. The fact that taxpayer funds were used means the information does properly belong to the public after all. The public built and operates the "library function" through taxpayer resources, and thereby gains a right to use what has been acquired. And, the librarian is indifferent to the identity or intent of the information-requester.

The Freedom of Information Act, of course, extends only to the Executive Branch. If the public has a claim on Executive Branch information by virtue of having funded its collection, a similar claim might also be made on the other two branches as well. In practical terms, however, this theory lacked sufficient weight to overcome the one-sided nature of information access preferred by Congress. In this case, the balance-of-power preferences of legislators prevailed; practical politics trumped good theory.

What, then, of the judiciary? The federal government -- that is, the public -- spends $4.3 billion a year for judiciary branch operations.[356] If the public property claim applies on its face, surely it would apply to an area where so many public resources are devoted. And, as seen, judicial opinions cannot be copyrighted because they are in the public domain; they are, literally, the public's property.

Information access, however, does not trump all else. Even with property, there are understood to be certain limitations on usage; public nuisance, for one. As Alexander Meiklejohn noted, "the liberty of owning and using property is, then, as contrasted with that of religious belief, a limited one. It may be invaded by the government, and the Constitution authorizes such invasion."[357] The nature of federal judicial operations -- involving highly particularized personal facts, law enforcement matters and a deliberative process that the Founding Fathers intentionally sought to isolate from raw political pressure -- all mitigate against public access of the kind provided through FOIA.

This property notion of government information is consistent with the legislative findings in the 1996 Electronic Freedom of Information Act Amendments that records are to be made public -- subject to the enumerated exemptions -- to any person for any use. The government is indifferent to motive and intent. The government permits the taking of timber from public land, but does not weigh the motives of the resource users; whether the wood will be used for condominiums, newsprint or baseball bats matters not at all. Presumably, the rational self-interest of the user will balance the request for the public resource against the benefits to be gained. The government permits the taking of books from the public library, but does not weight the motives of the resource users; whether the books will be used for self-improvement, to inform public discourse or to entertain matters not at all.

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[356]*The Third Branch: Newsletter of the Federal Courts*, December 2000, at http://www.uscourts.gov/ttb/dec00ttb/dec00.html.

[357]Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper & Brothers, 1948), 2.

The government, through the Freedom of Information Act, permits the harvesting of information from the government's hands; though, unlike timber, this information has the public-good characteristic of permitting non-rival consumption. The cutting of a tree by one logger rules out the cutting of that tree by another, while the use of information by one individual does not rule out the use of that information by another. But whether the information will be used for political debate, for monitoring government misbehavior or to maximize private profit matters not at all. It is the public's, to do with as it chooses.

The self-governance, watchdog and balance-of-power theories are the triumvirate that escorted the Freedom of Information Act into law. They are muscular theories, and reflect true public benefits -- byproducts -- of the Act's usage. They are, in fact, more often vindicated by the Act's usage than they are often given credit for, as even commercial and paranoid requests can serve public interests. They stand beside, though, another theory that is invulnerable to complaints about missed expectations, that maximizes information dispersal, and that helps restore the proper relationship between a sovereign public and the agencies of government. It is the public, all along, that owns the information requested through the Freedom of Information Act. And the right given force by the Act is not so much the right to know, as it is the right to have what is one's own.

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