Years from now, people will look back on today and say, “You mean we privatized the prisons so there’s no profit unless the prison is full?” You’d think someone in kindergarten could figure out how stupid that is.
President Obama on FOIA (Memo of Jan. 21, 2009)

As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.
Justice Scalia (1982)

FOIA “is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.”
“The FOIA process is broken. Unnecessary complications, misapplication of the law, and extensive delays are common occurrences. Agencies fail to articulate reasons for delays or explain how to navigate the process. Requesters wait months, not weeks, before receiving any response.”
Yet almost every reporter on our staff can recite aneurysm-inducing tales of protracted jousting with the public records offices of government agencies. Local, state and federal agencies alike routinely blow through deadlines laid out in law or bend them to ludicrous degrees, stretching out even the simplest requests for years. And they bank on the media’s depleted resources and ability to legally challenge most denials.

Many government agencies have gutted or understaffed the offices that respond to public records requests. Even when agencies aren’t trying to stymie requests, waits for records now routinely last longer than most journalists can wait — or so long that the information requested is no longer useful. This, in turn, allows public agencies to control scrutiny of their operations.
ProPublica

• Charles Orstein—
  • Spent over 3 years trying and failing to get names of DOD health care personnel—DENIED because WAR

• Paul Kiel—
  • Spent over two years wresting from Treasury heavily redacted audits of banks participating in the Home Affordable Modification Program—because bank TRADE SECRETS

• Jesse Eisinger—
  • Sought investigative files for closed probe of a bank. 20 boxes meant FIFO, which meant 36 months to start process; worked with FOIA officer to narrow request but still captured 12 boxes, FIFOed again; requested just one box—any box. Box disclosed! But so heavily redacted, “[i]t was like looking at the scroll of code from the Matrix.”
Examples of recent scholarship

• Critics of the current regime
  • David Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. Penn. L. Rev. 1097 (2017) (proposing a shift to a model of affirmative disclosure)
  • Margaret B. Kwoka, FOIA, Inc., 65 Duke L. J. 1361 (2016) (proposing to affirmative disclosure)

• Criticism of the critics
FOIA’s Basic Structure

• Affirmative disclosure, § 552(a)(1), (a)(2)

• Requesters can ask for any other “agency” “record,” § 552(a)(3)

• But, exemptions (and exclusions), § 552(b), (c)

• And lots of other complications relating to fees, deadlines, appeals, FOIA officers, etc.
Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
“agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency
“record”

“record” and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.
Tax Analysts (1989)

Agency records:

- Agency must create or obtain the requested materials, and
- Agency “must be in control of the requested materials at the time the FOIA request is made”
Some of what FOIA Gives Gets Taken Away

• 9 exemptions, § 552(b),

• Exclusions under § 552(c).
9 exemptions (paraphrased)

- Ex. 1—classified for national security
- Ex. 2—personnel rules and practice
- Ex. 3—information protected from release by another statute
- Ex. 4—trade secrets, commercial or financial information
- Ex. 5—inter or intra-agency memoranda which wouldn’t be available in litigation
- Ex. 6—personnel, medical files where disclosure would constitute clearly unwarranted invasion of personal privacy
- Ex. 7(A)-(F)—protection for various records or info compiled for law enforcement purposes
- Ex. 8—records related to regulation or supervision of financial institutions
- Ex. 9—geological and geophysical info and data [e.g., oil wells]
How this all plays out ...

- FY 2016—788,769 requests received
  - Office of Information Policy, Summary of Annual FOIA Reports for FY 2016
- Processed by notoriously underfunded, under-resourced compliance staffs spread across agencies
- Short statutory deadlines; long real-life wait times
- Most requests from corporate, profit-seeking entities
Bureau of Prisons, FY 2016

- Received 7,664 requests; processed 7,496
- 1,338 pending requests at end of FY
- 2,332 full grants; 2,422 partial grants/partial denials; 192 full denials based on exemptions
- Exemptions 6, 7(C), and 7(F) heavily used
- 25 “Full-Time FOIA Staff”
- Total “costs”—about $2.5 mill.
More BOP data, FY 2016

Response time for final agency action on processed perfected requests

• Simple requests
  • Average response time: 19.62 days
  • Highest: 135

• Complex requests
  • Average response time: 67.85 days
  • Highest: 1385 days

• Expedited requests
  • Average response time: 84.77 days
  • Highest: 450 days
Making contractor records into agency records

- Cardin bill makes “record[s] relating to” non-federal prisons into “agency record[s]” subject to FOIA
- Imposes duty to disclose by “covered agency” unless exemption triggered or disclosure prohibited by law
- Non-federal prison must maintain records “readily reproducible and reasonably searchable by the covered agency”
Exemption 5 inapplicable?

• Exemption 5 protects:
  “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested”

• Doesn’t seem applicable to non-agencies
Reverse FOIA

- Trade Secrets Act—broadly bars unauthorized disclosure by federal employees of commercial or financial data

- Courts have held that the TSA covers at least as much as Exemption 4, which exempts:
  “trade secrets and commercial or financial information obtained from a person and privileged or confidential”
Maximum reach of Ex. 4

Information that meets these three requirements:

- “commercial or financial”
  “Courts have little difficulty in regarding information as ‘commercial or financial’ if it relates to business or trade.” DOJ Guide to the Freedom of Information Act, Exemption 4.

- “obtained from a person”
  I.e., from just about anyone but the federal gov’t

- “confidential” ...
Critical Mass on “confidential”

• Voluntarily disclosed information—
  • Confidential if the info of a kind that the submitter would not customarily disclose to the public.

• Compulsory submissions—
  • Confidential if disclosure likely either:
    • “to impair the Government’s ability to obtain necessary information in the future” or
    • “to cause substantial harm to the competitive situation” of the entity that submitted the information
Where does this all leave us?

• Cardin bill—All information a contractor memorializes in any form available to the agency
  • Viable outside of special contexts like private prisons? (Cf. Tom Petty)
• Most requests will be commercial (or, for BOP, from prisoners)
• Dogged journalists and nonprofits will sometimes be able to use FOIA to obtain important information that would otherwise stay buried
• In addition to any delays from agencies (which will likely increase), can anticipate extensive Reverse FOIA litigation from contractors
• Affect conduct of contractors? Potential sunlight=better behavior? Or record less?
Supplemental approaches

• Affirmative disclosure regime?
  • Cf. § 552(a)(1), (2); Pozen, Kwoka

• Make more contractor information into “agency records” under current law by encouraging or requiring agencies to demand more information from contractors?