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The Right to Know ... Or Not: The Freedom of Information Act, 1955-1974

Tommy C. Brown

Introduction

In May 2014, the executive council of the Society of American Archivists (SAA) adopted a resolution prepared by the Committee on Advocacy and Public Policy detailing the organization's official position regarding the Freedom of Information Act (FOIA). By supporting "all efforts to strengthen the federal Freedom of Information Act," the council drew attention to a number of loopholes within the law that effectively limited the public's access to government records. According to the resolution, after decades of litigation and numerous amendments to the original FOIA, federal agencies continue to resist the law's full implementation, interpret the exemption provisions far too broadly, and fail to produce requested materials in a timely manner – agencies often ignore FOIA requests altogether while sometimes taking months or even years to answer requests. Moreover, presidents have routinely weakened the law through Executive Orders while executive departments find new and inventive ways to stonewall or clog up the entire process.¹ The public's "right to know" increasingly falls victim to what former SAA president Timothy Ericson once referred to as the "Iron Curtain" of governmental secrecy.²

Five months after adopting the FOIA resolution, SAA joined the American Library Association and dozens of FOIA advocacy groups in an open letter to President Barack Obama, urging the president to take a more active role in proposing legislation that would codify much-needed changes to strengthen the law.³ Since the September 11, 2001, attacks on the World Trade Center, the

¹ "Society of American Archivists Council Meeting Minutes, May 22–24, 2014, Chicago, Illinois," http://www2.archivists.org/sites/all/files/0514-Minutes_adopted%207-15-14.pdf.

² Timothy L. Ericson, "Building Our Own 'Iron Curtain': The Emergence of Secrecy in American Government," *American Archivist* 68, no. 1 (Spring/Summer 2005): 18–52.

³ "Coalition Letter to President Obama on FOIA Reforms," <http://www.commoncause.org/policy-and-litigation/letters-to-government-officials/coalition-letter-to-president.html?referrer=https://www.google.com/>.

government has taken unprecedented steps curtailing access to information, a move roundly criticized by transparency advocates including many in the archival community. And despite some initial success undoing the damage of his predecessor, Barack Obama has in recent years been less than enthusiastic fulfilling his own 2009 directive that "all agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government."⁴ Ironically, the White House announced on March 16, 2015 (a day celebrated annually as Freedom of Information Day), that the Office of Administration would no longer subject itself to FOIA requests, a rule originally adopted by the Bush Administration. The Associated Press subsequently accused the administration of setting new records "for censoring government files or outright denying access to them . . . under the U.S. Freedom of Information Act."⁵

For archivists and other transparency advocates, understanding the history of the Freedom of Information Act may shed light on recent events and why efforts to maintain open records and strengthen the FOIA continue regardless of which political party occupies the White House. Few people in the archival community would disagree that the FOIA and all of the various state and local sunshine laws enacted over the past century have strengthened democratic governance throughout the country. Yet, as Timothy Ericson asked in his presidential address to the SAA in 2004, "why have [archivists] not been more zealous in embracing our ethical responsibility to 'discourage unreasonable restrictions on access' with respect to government records that are being unreasonably restricted by the millions?"⁶ To be sure, the organization's efforts over the past several years highlighting the FOIA's deficiencies and advocating for revisions have in part addressed Ericson's question, but much remains to be done.

⁴ U.S. President, Memorandum, "Memorandum of January 21, 2009, Freedom of Information Act," *Federal Register* 74, no. 15 (January 26, 2009): 4683.

⁵ U.S. President, Rules and Regulations, "Removal of Published Rules to Align Published Policy with Current Sources of Law," *Federal Register* 80 no. 51 (March 17, 2015): 13757; Associated Press, "Obama Administration Sets New Record for Withholding FOIA Requests," *PBS Newshour Rundown*, March 18, 2015, <http://www.pbs.org>.

⁶ Ericson, "Building Our Own Iron Curtin," 21.

This article explores the early history of the Freedom of Information Act from the establishment of the Special Subcommittee on Government Information in 1955 to the amendments added in the wake of the Watergate scandal in 1974. It argues that, from the beginning, executive departments and federal agencies took full advantage of the various exemptions within the law to shield themselves from prying eyes, a precedent that continues to this day. It also looks at the ways in which large companies attempted to use the act to gain competitive advantages in the marketplace. Indeed, despite congressional intent, it was largely the business world and not necessarily the average citizen or the press that routinely sued the government for access to information. Finally, it suggests that federal courts more often than not ruled in favor of openness when it came to FOIA cases. The courts made a concerted effort to balance the public's right to know with the need for security, privacy, and confidentiality. Yet, in a handful of important cases, the courts handed down decisions that effectively gutted portions of the law, prompting Congress to move forward with amendments to circumvent these verdicts. In view of the fact that 2016 marks the FOIA's 50th anniversary, this study will hopefully be a timely reminder of the law's significance and the important role that archivists play in advocating for open records at all levels of government. It is also a reminder that "open records," "freedom of information," and "public records" are not just theoretical expressions used by archivists who work with records at the national level. For nearly five decades the FOIA has influenced, both directly and indirectly, state and local legislation that affects archivists throughout the United States.

Early History of the FOIA, 1953–1966

In 1953, attorney and open records advocate Harold Cross wrote: "Public Business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings." Cross argued that through a series of executive orders, departmental rules and regulations, and various legal statutes "the Executive Departments and the administrative agencies have been enabled to assert the power to withhold practically all information they do not see fit to disclose." His research and subsequent book on government

records and public access – sanctioned by and presented as a report to the American Society of Newspaper Editors (ASNE) – is often credited for laying the groundwork for the Freedom of Information Act.⁷

In the years immediately following the end of World War II, most Americans expected the government's unprecedented war-time secrecy operations to diminish as Europe and Asia entered into a post-war rebuilding phase. Yet, with the onset of the nuclear age and the ensuing Cold War, a wave of anti-communist sentiment washed over the nation, engulfing millions of Americans who feared increasingly the possibility of a nuclear holocaust. The nation's national security apparatus thus began a whole new phase of secrecy and censorship as Republican and Democratic administrations worked to protect the nation's military secrets and clamp down on information leaks. Harry Truman issued several executive orders to this effect during his presidency, including a 1951 directive that placed new restrictions on the flow of government information. Three years later, the Eisenhower Administration created the Office of Strategic Information (OSI), a move widely criticized by the ASNE and other news organizations. The OSI worked to protect the nation's scientific, industrial, and economic information, and protect such information from falling into the hands of individuals or organizations that might threaten national security. During the 1950s and early 1960s, government agencies additionally created over 30 information classifications, including the popular "Official Use Only" and "Confidential" stamps often used to protect information. According to Harold Cross, "never before in our national history has Presidential power been asserted in terms so all embracing."⁸

In the wake of such unprecedented levels of secrecy, control, and suppression of federal records, the ASNE's Freedom of Information Committee worked diligently compiling information,

⁷ Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (New York: Columbia University Press, 1953), xiii, 230–231.

⁸ "Editors for Easing Truman News Ban," *New York Times*, November 16, 1952; "Agencies Defend Information Bar," *New York Times*, November 3, 1955; "Congress Urged to Curb Secrecy," *New York Times*, December 18, 1955; Herbert N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport, CT.: Greenwood Press, 1999), 19.

educating member editors, and combatting government secrecy. Committee chair James Pope criticized federal regulations that closed off information and insulated federal departments from outside scrutiny. "Almost all the administrative news of our Government is so controlled," he observed. "Departmental records have been put into a privileged, quasi-confidential status under which there is no press or public inspection as a matter of right." During the 1950s, using Cross's research to build and present their case, the committee actively engaged members of Congress and successfully recruited a number of influential politicians, including Democratic congressman John E. Moss from California.⁹

As chair of the congressional Special Subcommittee on Government Information (commonly known as the Moss Subcommittee), Moss quickly became the leading advocate for legislative solutions to limitless government secrecy and the executive suppression of millions of federal records unrelated to national security. To illustrate the absurdity, he once penned an article for the *New York Times* in which he criticized various executive departments for invoking the 1789 "Housekeeping Law" as an excuse for withholding government documents. "Congress never intended – nor did President Washington request – a law permitting federal officials to put the padlock of secrecy on public information about the operations of Government," Moss argued.¹⁰ In 1958, in the face of opposition from every executive department of the presidency, Congress amended the Housekeeping Law by adding one sentence to the original language: "this section does not authorize withholding information from the public or limiting the availability

⁹ Herbert N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport, CT.: Greenwood Press, 1999), 17–18.

¹⁰ John E. Moss, "Anti-Secrecy Law is Hailed by Moss: Californian Calls Amending of 1789 Act an Advance in the Right to Know," *New York Times*, August 17, 1958. Title IV, Executive Departments, Section 161, otherwise known as the "Housekeeping Law," states simply: "The head of each Department is authorized to prescribe regulations not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

of records to the public."¹¹ President Dwight Eisenhower reluctantly signed the bill but insisted that the executive branch retained inherent powers under the Constitution to withhold information critical to the public interest.¹²

In addition to amending the Housekeeping Law, the Moss Subcommittee proposed amendments to the Administrative Procedure Act, originally adopted in 1946 to establish a uniform set of procedural standards for federal administrative agencies to follow. Despite specific language directing agencies to publish their rules, opinions, orders, and public records, many refused to do so, citing provisions within the law that allegedly protected government documents held in the "public interest" as well as information related to agencies' internal management. The Federal Aviation Administration, for instance, refused to release taped recordings of conversations between pilots and air traffic controllers recorded during major aircraft accidents, even though the agency routinely published edited transcripts of these tragic last-minute exchanges. The U.S. Army similarly denied requests from various news organizations for testimony transcripts related to hearings and court-martial, even though the trials themselves were open to the public. The Atomic Energy Commission refused to release photographs of the two atomic bombs used by the United States against Japan during World War II for fear that doing so would attract "worldwide repercussions." The Department of Defense rejected requests to make public a study of the nation's air raid warning system, ostensibly because doing so might embarrass various governmental agencies in charge of the program. Dozens of similar examples seemed to confirm what many feared; that withholding information from the public had become more or less routine practice within the federal bureaucracy.¹³

Moss condemned what he believed to be flagrant violations

¹¹ An Act to Amend Section 161 of the Revised Statutes With Respect to the Authority of Federal Officers and Agencies to Withhold Information and Limit the Availability of Records, Pub. L. No. 85-619, 72 Stat. 547 (August 12, 1958).

¹² "Eisenhower Signs Information Bill," *New York Times*, August 15, 1958.

¹³ Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong. 9–12 (October 28, 1964) (statement of Earl F. English, Dean, School of Journalism, University of Missouri).

of both the spirit and the letter of the law. "Federal agencies," he argued, "have seized on certain words or phrases in the law to keep information secret, not only from the public but from Congress. This is a tortured interpretation of a law intended to make information available."¹⁴ Even with the addition of new amendments, the Eisenhower, Kennedy, and Johnson administrations continued to take advantage of loopholes within the system.

By 1965, as the Moss Subcommittee continued its mission for greater public access to government information, it became clear that minor changes to existing laws would never provide adequate safeguards against an overly zealous bureaucracy bent on censorship and secrecy. By this time, even the most innocuous items, such as telephone directories published by the Department of the Navy, remained off-limits to the public. At one point the Postmaster General decided that the names and salaries of postal employees were equally outside the purview of the general public. And the Board of Engineers for Rivers and Harbors decided not to release their board minutes, which included valuable information related to contract awards.¹⁵

Legislation soon to become the Freedom of Information Act accelerated in Congress after Moss gained a number of Republican cosponsors, including second-term congressman Donald Rumsfeld who became one of the act's most passionate supporters. Major newspaper outlets such as the *Washington Post* campaigned in favor of the law's passage: "The principles it involves have been extensively debated for the last decade ... Its great contribution to the law is its express acknowledgement that citizens may resort to the courts to compel disclosure where withholding violates the

¹⁴ Foerstel, *Freedom of Information and the Right to Know*, 35–37; Administrative Procedure Act, Pub. L. No. 79-404, 79th Congress (1946); "Congress Asked to Curb Secrecy," *New York Times*, April 25, 1957.

¹⁵ It should be noted that Moss and other members of congress, primarily Democrats, had for years supported a tough, comprehensive public records law, but executive branch opposition coupled with resistance from prominent legislators in both parties killed those attempts. Indeed, in the early 1960s, there were even efforts to defund or completely abolish the committee altogether. Michael R. Lemov, *People's Warrior: John Moss and the Fight for Freedom of Information and Consumer Rights* (Madison, NJ.: Fairleigh Dickinson University Press, 2011), 59–60.

law."¹⁶ With a wave of press support and a massive amount of political wrangling between the House and Senate versions of the bill, Moss finally accomplished the task that he had been working toward for over a decade. Lyndon Johnson was reluctant to sign the bill into law, however, waiting until the last possible moment to do so. Indeed, Johnson's press secretary at the time, Bill Moyers, later claimed that "LBJ had to be dragged, kicking and screaming, to the signing ceremony. He hated the very idea of open government, hated the thought of journalists rummaging in government closets. He dug in his heels and even threatened to pocket veto the bill."¹⁷ Despite serious reservations concerning the new legislation, which the president laid out in a press release several days after the event, Johnson nevertheless signed the bill into law on Independence Day, 1966.

The FOIA amended section 3 of the Administrative Procedure Act, directing executive agencies to disclose identifiable records upon request unless such records fell within one or more of nine specific exemptions.¹⁸ For the first time, Congress devised a mechanism whereby "any person" – a distinct departure from the historical model restricting access to everyone except those "properly and directly concerned" with government business – could obtain information generated by the executive branch, with provisions for judicial review should agencies deny access to their records.¹⁹ In a

¹⁶ *Washington Post* editorial quoted in Lemov, *People's Warrior*, 61.

¹⁷ Bill Moyers quoted in Lemov, *People's Warrior*, 67.

¹⁸ The FOIA exempted all information "(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells."

¹⁹ An Act to Amend Section 3 of the Administrative Procedure Act, Pub. L. No. 89-487 (July 4, 1966). See also, Dwayne Cox, "Title Company v. County

memorandum to the various departments and agencies, Attorney General Ramsey Clark noted that the new law "leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act." Clark's directive bolstered congressional intent by insisting that the government could no longer operate under an assumption of secrecy; the impetus for withholding records now fell upon the agencies themselves. Predictably, executive agencies began the process of nondisclosure almost immediately, interpreting the exemption clauses as broadly as possible, using them as shields against the free flow of information. The attorney general's insistence "that there be a change in government policy and attitude" did not always take root in the bureaucracy, leading to a whole new era of litigation.²⁰

Despite Congress's intentions to the contrary, the exemption provisions armed the government with nine newly-codified excuses for withholding information. It became increasingly clear that within the first few years after the law's implementation the Freedom of Information Act had quickly turned into the freedom *from* information act. Even so, the judicial review provision of the FOIA paved the way for citizens and organizations to challenge the government in court for unlawfully restricting the free flow of information. From 1966 to 1974, the bulk of the legal action surrounding the new law largely revolved around four of the nine exemptions: executive privilege (1), trade secrets (4), internal memoranda (5), and investigatory files (7). In the eight years following the law's implementation approximately half of the FOIA cases filed in federal courts involved these four exemptions.²¹

Executive Privilege

The idea of executive privilege is as old as the common law itself, dating back in the United States to the first Washington Administration. During the 1796 debate over the Jay Treaty, for

Recorder: A Case Study in Open Records Litigation, 1874–1918," *American Archivist* 67, no. 1 (January 2004): 46–57.

²⁰ Ramsey Clark, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (Washington D.C.: U.S. Government Printing Office, 1967), iii.

²¹ *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* (U.S. Government Printing Office, 1974), 120–123.

instance, George Washington refused to disclose treaty documents to members of the House of Representatives citing the need for secrecy and the constitutional provision that only the Senate had the power to ratify treaties. Every president since Washington has utilized the concept, some much more than others.²² Under the Administrative Procedure Act, the executive branch frequently construed the phrase "in the public interest" to mean whatever the government wanted when it came to executive privilege. During the FOIA debate, a report from the Congressional Committee on Government Operations noted sarcastically: "No government employee at any level believes that the "public interest" would be served by disclosure of his failures or wrongdoings, but citizens . . . can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy." The FOIA attempted to limit this language by specifying that information could only be restricted by executive order in matters specifically related to secrecy and national defense.²³

One of the first court challenges to the executive privilege exemption came in 1967 when Julius Epstein, a journalist and research associate at Stanford University's Hoover Institution, sued the Secretary of the Army over access to records regarding Operation

²² Jerald Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* (Berkeley: University of California Press, 1970), 176–177. There are many examples of executive privilege. During the congressional investigation of the Aaron Burr conspiracy, Thomas Jefferson refused to turn over personal letters that he believed would compromise confidential informants. Andrew Jackson later declined to hand over a copy of a presentation he had made during a cabinet meeting outlining his reasons for withdrawing federal funds from the Bank of the United States. Theodore Roosevelt once removed records related to the federal Bureau of Corporations from a government office building, transported them to the White House, and challenged the Senate, who had requested to see the items, to come over and retrieve them. "The only way the Senate . . . can get these papers now is through my impeachment," he reportedly declared. See Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), 44–47, 84.

²³ Clarifying and Protecting the Right of the Public to Information, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). In recent decades, both the Bush and Obama Administrations have arguably pushed the limits of this provision. From the wiretapping and enhanced interrogation controversies under Bush, to current debates involving Operation Fast and Furious and the Benghazi attack under Obama, both presidents have used the national security provisions in the FOIA to shield their administrations from public scrutiny.

Keelhaul, the forced repatriation of anti-communist Soviet citizens following World War II. These files, originally created by Allied Force Headquarters and classified top secret, resided in the U.S. Army archives for years until relocated to the National Archives and Records Service, General Services Administration (now the National Archives and Records Administration or NARA) sometime during the late 1950s. The district court and the court of appeals supported the government's rejection of Epstein's petition for access. By refusing to hear the case, the U.S. Supreme Court essentially upheld the appeals court decision. Although the opinions are couched in legal language consistent with the courts' interpretation of the FOIA's deference to the executive branch in matters related to secrecy, foreign policy, and national defense, the evidence suggests that in this case the judiciary was particularly cognizant of Cold War realities. Even though the documents in question were more than 20 years old, there was no need to release information that may further complicate foreign relations (or in light of the Vietnam debacle, give the government yet another black eye in foreign policy). Epstein pointedly criticized the ruling, especially the courts' decision not to invoke an in-camera review of the files: "the courts found that they had not the power to subpoena the documents and that classification was 'appropriate.' How they could decide that classification of about 300 documents was appropriate without having seen a single one, is hard to explain." To be sure, the judiciary's interpretation of the executive privilege exemption in *Epstein* appears to have been in direct conflict with congressional intent that the courts utilize the "broadest latitude" when examining cases related to secret documents.²⁴

The issue of in-camera inspection came up again in a landmark case that Representative Patsy Mink from Hawaii once described as the "Waterloo of the Freedom of Information Act." In *Environmental Protection Agency v. Mink*, 32 members of Congress joined her in a request to inspect documents related to an underground nuclear test scheduled to take place on Amchitka Island in Alaska. Mink and other critics of nuclear testing in the Pacific Ocean believed that such powerful blasts along seismically active

²⁴ Epstein v. Resor, 296 F. Supp. 214 (1969); Epstein v. Resor, 421 F. 2d 930 (1970); Epstein v. Resor, 398 U.S. 965, 90 S. Ct. 2176 (1970); Julius Epstein, "A Case for Suppression," *New York Times*, December 18, 1970.

zones threatened to set off earthquakes that could potentially create deadly tsunamis in the region.²⁵ The Cannikin Papers (reflecting the operation's code-name) included about nine items, some classified top-secret, which served as an administrative review of the proposed test. The Richard Nixon Administration rejected Mink's request: "These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy."²⁶ While the U.S. District Court for the District of Columbia sided with the president, the appeals court reversed that decision. The executive cannot classify an entire file top secret when only a few documents actually fit that description. The appeals court ordered the district judge to inspect the file in-camera to determine which documents should be properly disclosed. The EPA appealed and the case soon became one of the Supreme Court's most important, yet widely-criticized, FOIA cases.²⁷

In an extraordinarily broad interpretation of the executive privilege exemption, the high court's 5-3 ruling effectively banned the lower courts from conducting in-camera inspections of materials classified top-secret by the executive branch. In his concurring opinion, Justice Potter Stewart shifted the blame to the legislature, insisting that Congress "has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."²⁸ Justice William Douglas countered that the court's ruling not only misconstrued congressional intent, but in effect nullified the FOIA when it came to just about anything the executive branch wished to label top secret. "The majority makes the stamp sacrosanct," he argued, "thereby immunizing stamped documents from judicial scrutiny ... The Executive Branch now has carte blanche to insulate information from

²⁵ Despite the controversy, the government conducted the test on November 6, 1971, without incident. The *Mink* case, however, continued through the federal court dockets for several years after the test.

²⁶ John W. Dean to Patsy T. Mink, July 30, 1971. Patsy T. Mink Papers, Library of Congress, Washington D.C.,

http://www.loc.gov/rr/mss/images/mink_dean_smst.jpg.

²⁷ *Environmental Protection Agency v. Mink*, Civil Action No. 1614-71 (1971); *Environmental Protection Agency v. Mink*, 464 F. 2d 742 (1971).

²⁸ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S. Ct. 827 (1973).

public scrutiny whether or not that information bears any discernible relation to the interest sought to be protected" by the executive privilege exemption.²⁹

Patsy Mink later described the court's ruling as a "fabricated interpretation of the Act." By removing the "public interest" wording from the Administrative Procedure Act, she noted, Congress clearly wished to change the way the executive handled information, including top secret documents. Why then would the legislature, in passing the FOIA, replace one ineffective statute with another allowing the executive branch to continue along the same path as before? If the court is correct in its ruling, she observed, then "Congress declared that any document – for example, the Manhattan telephone directory or the Encyclopedia Britannica – could be classified 'Top Secret' by being so stamped by any of the army of federal employees authorized to classify documents under authority of the general Executive Order."³⁰ Although the Supreme Court's decision in *Mink* dealt a serious blow to proponents of the FOIA, it triggered an immediate response from members of Congress who wished to overrule the court's decision, strengthen the law, and close the loopholes. Congress amended the law in 1974 specifically to address these issues.

Trade Secrets

In the 1965 legislation, Congress added an exemption for trade secrets specifically to protect confidential business and commercial information obtained by the government from inadvertently or purposely falling into the hands of competitors or the public. Should the Food and Drug Administration, for example, collect information related to Kentucky Fried Chicken's special spice mix for Colonel Sander's Original Recipe, the trade secrets provision was designed to protect these types of closely-guarded secrets. Yet, despite congressional intent and the seemingly plain language of the law, the government often applied this exemption erroneously.

²⁹Ibid; "Justices Back Full Secrecy of Documents on Security," *New York Times*, January 23, 1973.

³⁰Patsy T. Mink, "The Mink Case: Restoring the Freedom of Information Act," *Pepperdine Law Review* 1, vol. 2 (December 1974): 18, <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2241&context=plr>.

In *Benson v. General Services Administration*, for instance, the GSA denied Henry Benson's request for documents pertaining to Auburn Industrial Center's purchase of real estate previously owned by the government. Benson argued that the Industrial Center, in which he was a partner, needed the information for clarification purposes in order to address an IRS inquiry into the transaction. Citing the trade secrets exemption, GSA insisted that the records contained confidential and privileged financial information and were therefore closed to public inspection. The U.S. District Court for the Western District of Washington disagreed, ruling that all of the requested documentation, with the exception of an outside credit report, should be disclosed to Benson. The U.S. Court of Appeals for the Ninth Circuit later affirmed the lower court's decision. Both courts agreed that since almost all of the information was directly related to Auburn Industrial Center, the GSA had no legal grounds under the FOIA to withhold the documents.³¹

In a similar ruling, the U.S. Court of Appeals for the District of Columbia granted Grumman Aircraft Corporation's request to review orders and opinions issued by the government Renegotiation Board, despite the Board's insistence that the documents contained confidential information protected by the trade secrets exemption. The Board held extraordinary power over companies with government contracts, including the authority to demand that Grumman repay millions of dollars in excess profits from one of its fighter aircraft projects. Grumman's attorneys insisted that undisclosed government documents would help prove their case. The appeals court suggested that the Board redact confidential information but otherwise ordered the release of all requested documents. Writing for the majority, Judge David Bazelon insisted that, "in the future, the Board can avoid the problem by deleting identifying details from each opinion or order and then making it available to public inspection as a matter of course."³² In both

³¹ *Benson v. General Services Administration*, 289 F. Supp. 590 (1968); *General Services Administration v. Benson*, 415 F.2d 878 (1969).

³² *Grumman Aircraft v. Renegotiation Board*, 425 F. 2d 578; 138 U.S. App. D.C. 147 (1970). Judge David Bazelon is recognized as one of law's most important judicial proponents. More often than not he interpreted the language of the law broadly and the nine exemptions narrowly. See Victor Kramer and David

Benson and *Grumman*, the courts ruled strongly in favor of disclosure even if it meant additional headaches for government departments in terms of time and manpower spent redacting information or otherwise preparing documents for public release.³³ Although the government eventually released a host of documents related to the national board, Grumman insisted that it make all information available, including documentation from local and regional boards. At this point the Supreme Court ruled that local and regional board decisions were not permanent decisions and were therefore protected by the internal memoranda exemption of the FOIA.³⁴

In cases involving the trade secrets exemption, the judiciary attempted to balance the people's right to know with the government's responsibility to maintain confidentiality. Because the FOIA statute never adequately defined the term "confidential" the courts were forced to come up with a working definition of their own. By examining both case law and the congressional record the courts generally agreed that information placing government contractors at a competitive disadvantage or creating an atmosphere of distrust that threatened to derail future projects would be considered confidential.³⁵ Yet, despite this understanding, the courts did not always see eye to eye in their application. In *Petkas v. Staats*, for instance, the D.C. District Court upheld the government's Cost-Accounting Standards Board in their decision to deny access to

Weinberg, "The Freedom of Information Act," *Georgetown Law Journal* 63, no. 1 (October 1974): 49–67.

³³ All federal agencies now have full time employees dedicated solely to answering an ever-increasing mountain of FOIA requests. The controversy surrounding former Secretary of State Hillary Clinton's emails, for example, resulted in a surge of FOIA requests at the State Department. Government agencies often struggle to keep up with demand in such cases.

³⁴ *Renegotiation Board v. Grumman*, No. 73-1316, 421 U.S. 168; 95 S. Ct. 1491; 44 L. Ed. 2d 57 (1975).

³⁵ In *National Parks and Conservation Association v. Morton*, the United States Court of Appeals for the District of Columbia found that "apart from encouraging cooperation with the government by persons having information useful to officials, [the trade secrets exemption] serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication. See *National Parks and Conservation Association v. Morton*, 498 F. 2d 765; 162 U.S. App. D.C. 223 (1974).

financial disclosure statements previously submitted by Lockheed Aircraft and three other major American corporations. The court conducted an in-camera inspection of the documents in question and concluded that the data contained sensitive and confidential information. The appeals court, however, reversed and remanded the decision, insisting that the district court reconsider whether disclosure would indeed hinder the government's future ability to obtain needed information or substantially harm the companies' competitive position. If not, the board should release Lockheed's financial statements.³⁶

From cost analyses to employment procedures and project details, federal law requires government contractors to submit all manner of information documenting their business and hiring practices. Once the FOIA went into effect, companies began using the trade secrets exemption as well as other provisions in the law to prevent federal agencies from disclosing these reports to the public. These "reverse FOIA suits," as they have often been called, are those in which the "submitter of information – usually a corporation or other business entity, that has supplied an agency with data on its policies, operations, or products – seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request."³⁷ In such cases, as the argument goes, the law requires the government to withhold the information. As a government defense contractor, for instance, Hughes Aircraft Company submitted affirmative action plans to the Department of Labor. The reports purportedly contained confidential information related to minority hiring, firing, and promotion practices. When the National Organization for Women filed a FOIA request to inspect Hughes's 1974 plan for the Culver City Plant, the company cried foul, insisting that the plan fell under the trade secrets exemption. Disclosure would reveal labor costs, they argued, allowing competitors to calculate profit margins and underbid Hughes on future contracts. The U.S. District Court for the Central District of California found that Hughes's affirmative action plan had only "marginal utility ... to a competitor." Moreover, Hughes and

³⁶ *Petkas v. Staats*, Civ. A. No. 2238-72, 364 F. Supp. 680 (1973); *Petkas v. Staats*, No. 73-2153, 501 F. 2d 887; 163 U.S. App. D.C. 327 (1974).

³⁷ "Freedom of Information Act Guide, May 2004," United States Department of Justice, http://www.justice.gov/oip/foia-guide-2004-edition-reverse-foia#N_2_.

other aircraft manufacturers routinely shared wage and salary information with one another, thus undercutting the entire premise of the company's case. The court concluded that Hughes was apparently "more concerned about embarrassment" than it was about its competitors gaining a competitive edge as contractors.³⁸

In a similar reverse FOIA case, *Sears, Roebuck, and Company* sued the General Services Administration to prevent disclosure of its affirmative action plans and equal opportunity documents. Sears contended that releasing the information would allow other companies to calculate labor costs, expansion plans, and sales volume, thus undermining their competitive position and violating the trade secrets exemption. The D.C. District Court found that Sears had produced no real evidence to support their assertions and ordered the information released. Both *Hughes* and *Sears* illustrate that in reverse FOIA cases involving the trade secrets exemption, the courts often established a high bar for companies attempting to prevent the government from disclosing their information. Yet, the courts were not unsympathetic to those who demonstrated a potential for real harm. After reviewing evidence and hearing testimony from the Conference of National Park Concessioners, for example, the D.C. Circuit Court agreed that disclosing concessioner information would compromise their competitiveness and damage their businesses. Experts testified that because the Park Service required its concessioners to provide detailed information related to assets, liabilities, net worth, cash position, investments, accounts receivable, expenses, fixed assets, and other highly sensitive business data, releasing such data would undercut concessioners' position within the market.

Internal Memoranda

While the trade secrets exemption of the FOIA proved to be a useful tool for government agencies, individuals, and businesses pursuing nondisclosure, the internal memoranda exemption (which includes both inter-agency and intra-agency communications) often provided even more room for bureaucratic mischief. Congress added the exemption to protect the free flow of ideas within government

³⁸ Carolyn Kuhl, "Protection from Government Disclosure: The Reverse-FOIA Suit," *Duke Law Journal* 1976, no. 2 (May 1976), 330–365; *Hughes Aircraft v. Schlesinger*, 384 F. Supp. 292 (1974).

agencies, safeguard the deliberative process from outside interference, and prevent premature disclosure of rules and decisions prior to finalization. Yet, federal agencies invoked the provision so often that they found themselves subject to a flurry of litigation. Judge David Bazelon, known widely for his support of the FOIA, noted that the exemption "encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum."³⁹

Bazelon also argued that internal memoranda could in fact be subject to disclosure in cases where the government cited such documentation as the sole evidence for taking action. In 1968, the Maritime Subsidy Board ordered American Mail Line to refund nearly \$3.3 million in excess subsidy overpayments. As a branch within the U.S. Maritime Administration, the Subsidy Board has the power to demand repayment of subsidies considered to be fraudulent or excessive. Although the board based its decision on a thirty-one page memorandum prepared internally by board staff, it included only the last five pages of the document in its official order. When American Mail Line asked to inspect the full report the government refused, citing the internal memoranda exemption of the FOIA. The D.C. District Court initially ruled in the government's favor, but the Court of Appeals promptly reversed the decision. The court declared, "the question which must be decided is whether an administrative agency may take affirmative action against a private party by means of a decision in which it states that the *only* basis for such action is a certain specified memorandum and then refuse to disclose the memorandum to the party affected by the action."⁴⁰ In *Gulick*, the actions of the Maritime Subsidy Board clearly violated the spirit, if not the letter, of the internal memoranda exemption. Had the board's actions been allowed to stand, it would have sent a negative message to every government contractor and business involved with federal agencies.

The International Paper Company used the arguments in *Gulick* as the basis for its FOIA lawsuit against the Federal Power Commission (FPC). International wanted access to staff memoranda

³⁹ Victor Kramer and David Weinberg, "The Freedom of Information Act," *Georgetown Law Journal* 63, no. 1 (October 1974): 65.

⁴⁰ *American Mail Line v. Gulick*, 411 F. 2d 696; 133 U.S. App. D.C. 382 (1969).

as well as other documentation related to FPC legal action and regulatory decisions directly governing (and adversely affecting) the paper company's natural gas business. The Power Commission denied the request and both the district court and the U.S. Court of Appeals for the Second Circuit sustained the commission's decision for nondisclosure. The appeals court concluded that, unlike *Gulick*, the memoranda sought in this case was not the sole basis for the government's decisions in its dealings with International, nor did correspondence to and from FPC staffers qualify as final orders subject to FOIA requests. The viewpoints of individual staff members could be easily misconstrued or even "grossly misleading, especially when applied to the ultimate findings and conclusions reached by the FPC as a whole, because at best they are only advisory in character."⁴¹

The courts in *Gulick* and *International Paper* established the principle that "pre-decisional memoranda" not referenced in final agency decisions would be exempt from disclosure, while "decisional memoranda" would be accessible. The courts argued that while the pre-decisional phase of the policymaking process is the point at which adversarial views and opinions are expressed and confidentiality required, the decisional phase reflects an agency's finished product and must be open to the public.⁴² Thus, the government had an obligation to fulfill Freedom of Information requests involving internal memoranda linked to federal agencies' final decisions. Two Freedom of Information suits launched in the early 1970s, *Sterling Drug v. Federal Trade Commission* and the *Grumman* case mentioned previously, became perfect test cases for this interpretation of the internal memoranda provision of the law.

In 1966, Sterling Drug acquired the Lehn & Fink company, the maker of Lysol brand disinfectants and deodorizers. When the Federal Trade Commission (FTC) declared the acquisition a violation of the Clayton Act, Sterling asked to inspect FTC records regarding other similar acquisitions for use in its argument against the commission – specifically those documents related to Miles Laboratories' (a competitor) successful acquisition of the S.O.S.

⁴¹ *International Paper Company v. Federal Power Commission*, 438 F.2d 1349 U.S. App. (1971).

⁴² Gregory Waples, "The Freedom of Information Act: A Seven-Year Assessment," *Columbia Law Review* 74, no. 5 (June, 1974): 939.

Company.⁴³ The FTC denied Sterling's request, prompting the company to launch a FOIA suit against one of the most powerful agencies in Washington D.C. The district court initially ruled in favor of the government, but the D.C. Court of Appeals divided the sought-after information into three categories: documents prepared by the commission staff, those prepared by individual commission members, and those issued by the full commission. The court declared all staff and commissioner communications to be pre-decisional and hence off limits to disclosure. Any documents or portions of documents emanating from the commission as a whole, however, must be disclosed to Sterling Drug. "These are not the ideas and theories which go into the making of the law," the majority opinion concluded, "they are the law itself, and as such should be made available to the public." In his dissenting opinion, Chief Justice Bazelon questioned whether all of the documents in the first two categories "need never be disclosed." The burden of proof should be upon the FTC to demonstrate that every document, regardless of any artificial categories, should be withheld from the public.⁴⁴

In *Grumman*, the U.S. Supreme Court reversed an earlier verdict by the U.S. District Court for the District of Columbia that decisions made by the Renegotiation Board's regional offices were considered final orders and thus available for public inspection. The court accepted the government's argument that opinions passed by the regional boards were essentially "pre-decisional consultative memoranda" subject to change or rejection by the national Board, thus constituting internal memoranda. Simply put, the Freedom of Information Act guaranteed the availability of final opinions issued by government agencies, but the high court in this case determined that regional reports were not final; only the national board could issue final opinions. In a similar case, *Wellford v. Hardin*, the U.S. Department of Agriculture denied Harrison Wellford's request to inspect bi-weekly reports of the Slaughter Inspection Division as well as the minutes of the National Food Inspection Advisory Committee. The USDA cited, among other provisions, the internal memoranda exemption of the FOIA. The U.S. District Court for the

⁴³ The Clayton Antitrust Act of 1914 was one of several laws aimed at preventing the formation of large, monopolistic enterprises in the United States.

⁴⁴ *Sterling Drug v. Federal Trade Commission*, 450 F.2nd 698; 146 U.S. App. D.C. 237 (1971).

District of Maryland initially ruled in favor of Wellford but later reversed itself when Secretary of Agriculture Clifford Hardin produced additional documentation verifying, to the court's satisfaction at least, that the bi-weekly reports and committee minutes were in fact opinion-based, pre-decisional documents that qualified for non-disclosure.⁴⁵

The courts in *Gulick*, *Sterling Drug*, *Grumman*, and *Wellford* demonstrated a tendency to side with the government. Since the FOIA was such a monumental departure from the way in which the government usually operated, the courts were forced to interpret several provisions largely from scratch. To be sure, congressional intent regarding the internal memoranda exemption often proved elusive and sometimes contradictory. Even Congressman Moss, who argued that all documents related to agency decisions should be disclosed once final action was taken on a matter, admitted that, "I don't think it possible at this time to go that far in drafting language."⁴⁶ Moreover, despite the judiciary's overall attempt to err on the side of openness whenever possible, the courts exhibited great respect for administrative procedure when it came to the internal workings of governmental agencies. Judges were mindful of their role in protecting the bureaucracy's need for internal policy debates free from outside interference or fear that honest opinions may one day end up in the hands of the media or be used in legal action against individuals or agencies.

Investigatory Exemption

As it turned out, the internal memoranda exemption was the only USDA argument the court accepted in the *Wellford v. Hardin* decision. The bulk of the government's case stemmed from the USDA's use of the investigatory exemption in the FOIA. This provision quickly became one of the government's favorite shields against the free flow of information, and the courts weighed in frequently to determine the legal bounds of this heavily litigated exemption. The provision protects information related to federal law enforcement endeavors by guarding against the disclosure of files that would reveal the government's investigatory methods and legal

⁴⁵ *Wellford v. Hardin*, 330 F. Supp. 915 (1971).

⁴⁶ John Katz, "The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act," *Texas Law Review* 48 (1970): 365.

strategies. It also protects the identity of confidential sources, an essential element in any investigation. Importantly, despite the government's abuse of the exemption, the courts attempted to accommodate challengers whenever possible. In the *Wellford* decision, for example, Harrison Wellford, Executive Director for the Center for the Study of Responsive Law, requested copies of warning letters previously sent by the USDA to non-federally-inspected meat and poultry processors suspected of engaging in interstate commerce.⁴⁷ Both the district court and the U.S. Court of Appeals rejected the government's contention that these records were investigatory files on the grounds that the information had already been delivered to the parties involved and would not interfere with any ongoing investigations. The appeals court rejected the USDA's argument that releasing the reports would discourage non-federally-inspected meat and poultry plants from voluntarily complying with federal guidelines. "The Freedom of Information Act was not designed to increase administrative efficiency," the court reasoned, "but to guarantee the public's right to know how the government is discharging its duty to protect the public interest."⁴⁸

The courts, however, were careful to ensure federal agencies' ability to carry out ongoing investigations and protect confidential sources. In 1967, the Food and Allied Workers of Puerto Rico accused Barceloneta Shoe Corporation of violating the Labor Management Relations Act. The National Labor Relations Board (NLRB) interviewed witnesses, Barceloneta asked to inspect these records prior to the hearing, and the NLRB claimed that the records fell under the investigatory files exemption and were therefore off limits to disclosure during the investigation. The U.S. District Court for the District of Puerto Rico agreed – premature disclosure could hinder the government's ability to collect information during future

⁴⁷ Ralph Nader created the Center for the Study of Responsive Law in 1968 as a social action organization focused primarily on environmental and consumer protection issues. It is also important to note that meat and poultry products sold and shipped out of the state of origin must be inspected by federal meat inspectors.

⁴⁸ Gregory Waples, "The Freedom of Information Act: A Seven-Year Assessment," *Columbia Law Review* 74, no. 5 (June 1974): 943-944; Allen Ashman, "What's New in the Law," *American Bar Association Journal* 57 (September 1971), 924-925; *Wellford v. Hardin*, 315 F. Supp. 175 (1970); *Wellford v. Hardin*, 444 F.2d 21 (1971).

investigations.⁴⁹ This reasoning proved especially true in cases involving government informants. In 1971, Cowles Communications, a multimedia news corporation, asked to inspect Immigration and Naturalization Service (INS) files on Salvatore Marino, a member of organized crime operating in San Jose, California. Although the INS invoked the investigatory files exemption, Cowles contended that the provision did not apply because the government had no pending proceedings in the Marino case. The district court ruled that disclosing such documents might endanger informants, harm the government's ability to investigate, and violate personal privacy. On the other hand, the government could not withhold the records by merely concluding that they fell under the exemption. The court ultimately decided to conduct an in-camera review of the documents in question and issue a ruling accordingly.⁵⁰

Both *Barceloneta* and *Cowles* demonstrate the courts were particularly hesitant to release information related to ongoing investigations, especially if that evidence would eventually become available through the customary discovery process. The courts were equally hesitant to release documents containing law enforcement techniques or the various methods for gathering evidence. When the Internal Revenue Service (IRS) indicted Anthony Imbrunone for tax evasion, the defendant asked to inspect portions of the manuals used by the Audit Division in their investigation. Imbrunone considered these documents administrative in nature, but the government claimed they fell under the FOIA exemption for law enforcement material. In a detailed affidavit, Singleton B. Wolfe, director of the Audit Division of the IRS, explained that the manuals in question contained "specific investigatory techniques and tolerances which provide [IRS] personnel with an effective and efficient methodology to be used in conjunction with their law enforcement efforts." The U.S. District Court for the Eastern District of Michigan agreed with the IRS.⁵¹

Not all of the cases involving law enforcement techniques

⁴⁹ *Barceloneta v Compton*, 271 F. Supp. 591 (1967). See also Bernard Samoff and Jeffery Falkin, "The Freedom of Information Act and the NLRB," *Boston College Law Review* 15, no. 6 (July 1974): 1267–1290.

⁵⁰ *Cowles Communications v. Department of Justice*, 325 F. Supp. 726 (1971).

⁵¹ *United States v. Imbrunone*, 379 F. Supp. 256 (1974).

were as straightforward as the *Imbrunone* case. In some instances the courts applied this provision so broadly that it seemed to undermine the whole purpose of the Freedom of Information Act. In 1971, Frank Frankel and other stockholders of Occidental Petroleum Corporation asked the Securities and Exchange Commission (SEC) to inspect records of a recently-settled government investigation into the company's real estate business. The government's case against Occidental prompted the stockholders' class action suit. After multiple requests and waiting more than two months without a response from the SEC, Frankel launched a FOIA suit against the agency. While the SEC argued that the requested documents were exempt as investigatory files, the district court ordered the files released. On appeal, however, the Second Circuit Court of Appeals reversed the ruling, contending that disclosure threatened to reveal the agency's investigatory techniques and procedures. In his dissent, Judge James L. Oakes argued that the district court's previous in-camera inspection of the files should have been more than adequate to dispense the investigatory argument and release the documents, especially since the government's case against Occidental had already been settled. Indeed, it seems illogical that out of 7,000 documents related to the investigation, none apparently fit the circuit court's criteria for disclosure.⁵²

The courts tended to be somewhat more balanced in cases where the government invoked nondisclosure on inactive or pending investigatory files that may or may not ever be used in any future litigation. In the late 1960s the Securities and Exchange Commission (SEC) investigated reported incidents of off-board trading – the purchase or sale of market securities by sidestepping the exchange. M.A. Schapiro & Co., a large Wall Street investment brokerage, asked to inspect the records accumulated during the course of the investigation. When the SEC denied their request, the company filed suit under the FOIA. The D.C. District Court ruled the records did not fall under any of the four exemptions invoked by the government. The investigatory files provision did not apply because the SEC had no plans to pursue legal proceedings "within the reasonably near future." The court noted that it had been six years since the end of the investigation "and these documents have not

⁵² *Frankel v. Securities and Exchange Commission*, 460 F.2d 813 (1972).

been, nor is it alleged that they will be, the basis for either a criminal or civil action against anyone."⁵³ In a similar case, the D.C. District Court supported Fred Black Jr.'s request to inspect FBI files connected with an illegal 1964 surveillance operation conducted by the agency against Black. Not only did the government admit that the operation was not for law enforcement purposes, the court noted that it had "been over ten years since the surveillance has been conducted, and the [FBI] has not brought an action against [Black] and admits all investigation for any possible action has been long since concluded. Under these circumstances, the investigatory file exemption is obviously not applicable."⁵⁴

In all of these cases, and many more not included here, government agencies consistently invoked the law enforcement/investigatory exemption in their efforts to shield themselves from the public's prying eyes. The federal courts at every level muddied the waters further by issuing conflicting rulings. Some courts favored blanket exemptions for any and all records compiled for law enforcement purposes, while others preferred a more narrow interpretation that favored disclosure or partial disclosure. In any event, the investigatory provision remained controversial and became one of the areas of most concern when Congress began investigating the FOIA's effectiveness in the early 1970s and amended the law in 1974.

The 1974 Amendments

The federal government's abuse of the four exemptions presented in this study – executive privilege, trade secrets, internal memoranda, and investigatory – was in many ways responsible for Congress's push to strengthen the law. In 1972, six years after the enactment of the Freedom of Information Act, the congressional Committee on Government Operations began the process of interviewing witnesses, gathering facts, and presenting its case for amending the original legislation. The report revealed that while thousands of citizens had gained access to government information through the new law, an entrenched culture of secrecy within the executive branch continued to put up significant roadblocks. Federal

⁵³ *M.A. Schapiro v. Securities and Exchange Commission*, 339 F. Supp. 467 (1972).

⁵⁴ *Black v. Sheraton Corporation*, 371 F. Supp. 97 (1974).

agencies in both the Johnson and Nixon administrations developed increasingly sophisticated techniques for evading disclosure. The FOIA's nine exemptions, designed to be narrowly-defined exceptions to the rule, quickly became weapons in the government's fight against openness. In his testimony before Congress, Ralph Nader concluded that government "officials at all levels . . . have systematically and routinely violated both the purpose and specific provisions of the law. These violations have become so regular and cynical that they seriously block citizen understanding and participation in government. Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access."⁵⁵

A Congressional Research Service statistical analysis conducted in 1972 at the behest of Congress documented a whole host of "shortcomings," due primarily to bureaucratic resistance to records disclosure. While some agencies furnished detailed data with specific information, others submitted incomplete, distorted, or otherwise unusable information. A few departments manipulated the data by counting thousands of routine requests for information as FOIA requests. The Department of the Air Force was "way out of line" when it reported that it had received over 200,000 formal FOIA requests, 170 percent more than the next highest number. Conversely, the Civil Service Commission reported zero formal requests, a clear indication that the agency either kept no records or "apparently has no interest in implementing the law." Agencies routinely cited multiple provisions within the law to deny access; the nine exemptions proved to be especially popular in this regard. The average response time for initial FOIA requests was approximately 33 days for all agencies, while the response time for appeals varied, with the Small Business Administration averaging eight days and the Department of Labor taking nearly four months. At least four agencies "seem to be in no hurry to expedite requests for information" under the FOIA. Even when individuals sued it sometimes took years to gain access, and that is only in those cases

⁵⁵ Administration of the Freedom of Information Act, Twenty-First Report by the Committee on Government Operations Together with Additional Views, H.R. Rep. No. 92-1419 (1972), 6-8; Ralph Nader, "Freedom of Information: The Act and the Agencies," *Harvard Civil Rights-Civil Liberties Law Review* 5, no. 1 (January 1970): 2.

where the government lost.⁵⁶

Dozens of witnesses testified before the Subcommittee on Foreign Operations and Government Information – chaired by staunch FOIA advocate William S. Moorhead from Pennsylvania – providing even more evidence for strengthening the act. Attorneys for the Center for the Study of Responsive Law, for example, explained the USDA's "contamination tactic," one of many devices designed to discourage freedom of access. When the Center asked to inspect folders containing the records of nonfarm pesticide use, the agency refused, claiming that the requested files were intermixed with confidential documents that may disclose trade secrets. "It would be too much work for our staff to read through all of the correspondence to remove references to confidential information," one official responded. On its face this excuse may appear plausible if not for the fact that the Center had already requested the same documents two years prior, giving the government plenty of time to rework the files. "The final straw," attorney Harrison Wellford noted, "was when the USDA stated that if the information were made available, it would cost \$91,840 to prepare the registration files for public viewing."⁵⁷ In testimony after testimony, these kinds of tactics appear to have been routine operating procedure for a number of federal agencies and departments.

During the hearings, Congressman Moorhead expressed disappointment that members of the press, who had been some of the most outspoken advocates in favor of the original 1966 legislation, were among the least likely to seek legal action against the government. "After more than four years of operation," he observed, "only a handful of newspapers ... have actually invoked the provisions of the act to the limit by going into the Federal courts to fight for their first amendment rights."⁵⁸ Ward Sinclair of the

⁵⁶ Special Analysis of Operations of the Freedom of Information Act, Prepared by the Congressional Research Service, Library of Congress, 118 Cong. Rec. H9950-9953 (1972).

⁵⁷ Hearings Before a Subcommittee of the Committee on Government Operations: U.S. Government Information Policies and Practices-Administration and Operation of the Freedom of Information Act (hereafter cited as Hearings), Part 4, 92nd Cong. 1253-1255 (March 14, 1972) (statement of Harrison Wellford, Center for the Study of Responsive Law).

⁵⁸ Hearings, Part 4, 92nd Cong. 1278 (March 17, 1972) (statement of Congressman William S. Moorhead).

Louisville Courier-Journal responded that journalists must often decide whether pursuing information in the face of uncooperative agency officials is worth the time and effort, especially when the pressure of meeting deadlines runs contrary to the government's tendency to drag things out for weeks or months at a time. On one occasion, he explained, the Department of the Interior rejected Sinclair's written requests for copies of the Treleven Project, a costly project related to coal mining safety that the agency came close to funding without any bids or alternative proposals. For four months the department stonewalled, claiming that the report fell under the internal memoranda provision, "hiding all the while behind the Information Act." Their lawyers, Sinclair observed, "were able to correctly surmise that it was not a document absolutely essential to my work and they correctly guessed that it was not an issue that a Kentucky newspaper was likely to go to court over."⁵⁹

Another reporter, James B. Steele of the *Philadelphia Inquirer*, testified about his investigation into the Philadelphia office of the Federal Housing Administration (FHA). He uncovered a profiteering scheme where speculators purchased old, dilapidated houses, made minimal, low-cost repairs, then sold the homes to poor families at inflated prices, all with the blessings of the FHA. With evidence suggesting a conspiracy between FHA staff, federal fee appraisers, and speculators, Steele requested the names of the appraisers and specific appraisal information. When the local office rejected his initial request, the *Inquirer* submitted a formal FOIA request to both the regional office of Housing and Urban Development (HUD) and the national office in Washington, D.C. HUD secretary George Romney reluctantly released the names of the appraisers but argued that the appraisals themselves were protected by the interagency memoranda and investigatory exemptions of the FOIA, a claim later rejected by the courts. Congressman John Moss, who not only championed the original law but was also a licensed real estate broker, voiced his opinion in no uncertain terms. "I think this is about as outrageous a thing as I have heard," he remarked. "I think it a perfect example of the outrageous attitude ... within the bureaucracy which grows ever more ominous in its desire to control

⁵⁹ Hearings, Part 4, 92nd Cong. 1280–1281 (March 17, 1972) (statement of Ward Sinclair, Washington Bureau, *Louisville Courier-Journal*).

what we know, think, and do." In his concluding remarks, Steele testified that despite a court order some ten days earlier HUD had still not released the documents.⁶⁰

The subcommittee also heard testimony from Archivist of the United States James B. Rhoads and Deputy Archivist James E. O'Neill. To fulfill its dual role of caring for the nation's non-current records and making them available to the public, the National Archives and Records Service operated fifteen Federal Records Centers, six presidential libraries, and housed some 30 billion pages of federal records. During the hearing, much of the testimony revolved around the department's efforts to manage and declassify over 150 million classified documents, dating mostly from the World War II era.⁶¹ Although both archivists explained the importance of working with members of the intelligence community to accomplish this task as quickly as possible without compromising military secrets, committee members were bluntly skeptical about involving other agencies in the decision-making process. Congressman Moorhead summarized the committee's position:

If this committee could do one thing, it is to urge you to be on the side of the people's right to know, be there, advocate, prevail. I would like to see you have the ultimate decisionmaking power at least for documents past a certain age. It seems to me that the Archives has a better grasp of that than do the naturally secrecy-minded people of the CIA, or State or Defense Departments. So I urge you to be strong and tough and don't let them maintain unnecessary

⁶⁰ Hearings, Part 4, 92nd Cong. 1294–1298 (March 17, 1972) (statement of James B. Steele, *Philadelphia Inquirer*; statement of John Moss); "Speculators Make a Killing on FHA Program," *Philadelphia Inquirer*, August 22, 1971.

⁶¹ Richard Nixon's Executive Order 11652 authorized the Archivist of the United States to downgrade and declassify "material transferred to the General Services Administration for accession into the archives." In addition, "all information . . . more than thirty years old shall be systematically reviewed for declassification. In his review, the Archivist will separate and keep protected only such information . . . as is specifically identified" by the head of each department. See "Executive Order 11652: Classification and Declassification of National Security Information and Material," *Code of Federal Regulations, 3A The President, Appendix* (Washington D.C.: Government Printing Office, 1973), 158, 162.

secrecy.⁶²

Under intense questioning, both archivists assured the committee of their commitment to providing public access to the largest number of documents possible, whether classified or not. As such, they argued, their dedication to the Freedom of Information Act and the concept of open records was solid.

Between 1972 and 1973, the subcommittee heard testimony from nearly 200 witnesses including lawyers, journalists, newspaper editors, citizen action groups, and representatives from every major government agency and department. Ironically, more than a dozen federal agencies revised their FOIA regulations just before or during the course of the congressional hearings; two departments, the Department of Labor and Department of Transportation, released new regulations only hours before their representatives testified before the subcommittee. Once testimonies ended, the Foreign Operations and Government Information Subcommittee began deliberation on a series of amendments to the FOIA. In 1974, Congress enacted new rules to strengthen the Freedom of Information Act.

Between the congressional hearings and the adoption of new legislation in 1974, two important events helped to push the amendments through. The Supreme Court's 1973 decision in *Environmental Protection Agency v. Mink* angered open records advocates and surprised members of Congress. The court eliminated in-camera review, effectively stripping the judiciary of its power in handling FOIA requests on national defense and foreign policy matters, thus giving the executive branch "carte blanche" in these areas. It then blamed Congress for the law's "unquestioning deference to the Executive."⁶³ Senator Edmund Muskie from Maine took issue with the court's suggestion that Congress was the culprit. The whole point of the FOIA was to open access, not give the executive more excuses for secrecy. "Obviously, something must be done to correct this strained court interpretation," he argued. Why should the American people trust a federal judge to deal

⁶² Hearings, Part 7, 92nd Cong. 2613 (May 8, 1972) (statement of James B. Rhoads and James E. O'Neill, National Archives and Records Service).

⁶³ Lerry P. Ellsworth, "Amended Exemption 7 of the Freedom of Information Act," *American University Law Review* 25, no. 1 (Fall 1975): 37-38.

appropriately with competing claims in the Watergate scandal "but not trust him or his colleagues to make the same unfettered judgements in matters allegedly connected to the conduct of defense or foreign policy."⁶⁴ Muskie's reference to Watergate reveals the second important event. The Watergate debacle simply reinforced an already skeptical public's view that the executive branch was out of control. The actions of the Nixon Administration before, during, and after the Watergate scandal motivated Congress to move more quickly on the FOIA amendments. Along with the *Mink* decision, Watergate created one of those rare perfect storms for getting things done in Congress.

Both houses of Congress passed similar bills that were eventually reconciled in conference. In October 1974, less than two months after Nixon's resignation from the presidency, the Senate approved unanimously the FOIA conference report, with the House following suit 349 to 2. President Gerald Ford, who had recently pledged "an open and candid administration," promptly vetoed the bill, insisting that the new amendments "would violate constitutional principles, and give less weight before the courts to an executive determination involving the protection of our most vital national defense interests."⁶⁵ Congressman Moorhead condemned the president's action and urged his colleagues in both houses to override Ford's veto. "Such unwarranted and illogical action," he argued, coming just weeks after the president's open government pledge "forces us to recall all of the sordid happenings of his predecessor's administration that were first spawned and then covered up by abuses of Government secrecy."⁶⁶ While the vote in the Senate was much closer than the original vote on passage, each house secured the necessary two-thirds majorities to override the president's veto. In ordinary times such solidarity between the parties would be nearly impossible, but the poisoned political atmosphere that existed between the legislative and executive branches in the wake of the

⁶⁴ 120 Cong. Rec. S17023 (May 30, 1974) (statement of Sen. Muskie).

⁶⁵ "Congress, the Press and Federal Agencies Are Taking Sides for Battle Over Government's Right to Secrecy," *New York Times*, November 15, 1974; Vetoing H.R. 12471, Amend Freedom of Information Act, H. Doc. No. 93-383, at 383 (1974).

⁶⁶ 120 Cong. Rec. 36593 (November 19, 1974) (statement of William S. Moorhead).

Watergate affair opened the door for a bipartisan override.

The amendments corrected a number of weaknesses in the original law. First and foremost, Congress addressed its displeasure with judicial interpretations of the executive privilege exemption (as demonstrated in *Mink*) as well as the investigatory memoranda provision. Indeed, the vast majority of congressional debate focused on these two items. Congress narrowed the exemption for top secret information to documents specifically designated by executive order and properly classified as such. Importantly, it authorized the courts to inspect files in-camera when necessary, and required agencies to release any "reasonably segregable portion" of a file or document. As far as the investigatory exemption is concerned, Congress wanted to crack down on the government's tendency to invoke nondisclosure on entire files or folders, even when the majority of documents within the files were unrelated to an investigation. Under the new law, once an agency classified "records" (as opposed to the old terminology "files") as investigatory, they must then meet at least one of six new criteria to legally withhold the records from the public.⁶⁷ In other words, if the government could not prove that releasing investigatory records would cause harm in one of the six areas, then it was obliged to disclose the information.

The new amendments addressed several other issues discussed during the congressional hearings. Congress imposed well-defined timetables by limiting agencies to ten working days to reply to initial requests, twenty days to reply to appeals, with an additional ten day allowance for unusual or unforeseen circumstances.⁶⁸ The

⁶⁷ The government must be prepared to prove that releasing an investigatory record would cause harm under at least one of the following six circumstances: "(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

⁶⁸ A recent study conducted at Syracuse University concluded that nine of the twenty-one federal agencies studied failed to meet the minimum timetables and a full two-thirds of the agencies failed to provide any meaningful response to FOIA inquiries. "Two-thirds of Federal Agencies Flunked Freedom of Information Act Test," *Washington Examiner*, April 28, 2015.

law required agencies to provide documents at no charge or a reduced charge in cases where the information would benefit the public as a whole. It also required government agencies and departments to publish quarterly indexes and distribute or otherwise make them available to the public at or below cost. Finally, Congress added additional provisions for disciplining government personnel who "acted arbitrarily or capriciously" in cases involving nondisclosure.

While members of the Ford Administration predicted dire consequences resulting from the new law's implementation, no such catastrophes ever materialized. Archivist Trudy Peterson observed in 1980 that despite some unforeseen consequences – which is to be expected from any piece of legislation – the amended FOIA "is working, releasing some information that the agencies would like to withhold and withholding some information that requesters would like released, probably striking a balance."⁶⁹ Since 1974, the Freedom of Information Act has been amended seven times, with additional executive orders issued by Ronald Reagan, George W. Bush, and Barack Obama also affecting the law's standing. Requests for information under the FOIA quadrupled in 1975 and the numbers have continued to climb ever since. In 2014, federal agencies and departments received over 700,000 requests under the law, released information either in full or in part 55 percent of the time, denied over 38,000 requests, and reported a backlog of over 150,000 requests.⁷⁰ Clearly the thirst for information shows no sign of subsiding in the near future.

Conclusion

In conclusion, the fight for codified access to government records at the federal level began in earnest in the early 1950s with a handful of open records advocates led by California congressman John Moss. The Freedom of Information Act, signed into law by Lyndon Johnson in 1965, opened the door to a new era of citizen access to government information. The early years saw a barrage of requests for information, mostly from businesses and corporations who sought to improve their competitive status in the marketplace.

⁶⁹ Trudy Huskamp Peterson, "The National Archives and the Archival Theorist Revisited, 1954–1984," *American Archivist* 49, no. 2 (Spring 1986): 131.

⁷⁰ "What is FOIA," www.foia.gov.

Yet, despite congressional intent and the attorney general's directive that agencies embrace a new culture of openness, the government retrenched and actually began using the law as a tool for nondisclosure. Government agencies were especially prone to hide behind the executive privilege, trade secrets, internal memoranda, and investigatory exemptions. Although the courts attempted to balance the people's right to know with the government's need for secrecy in specific areas, it took a series of amendments to overcome court decisions that had effectively dismantled significant portions of the original law. The 1974 amendments strengthened the law, closed a number of loopholes, and paved the way for an explosion of new FOIA requests that began almost immediately after passage. Unfortunately, in the 50 years since the Freedom of Information Act was first passed, the government's appetite for secrecy has in many ways continued unabated. With every new amendment added it seems that executive agencies and departments find new ways to avert disclosing their records.

Since its passage, the federal Freedom of Information Act has influenced state and local open records legislation nationwide. Although many states had already passed their own laws, the FOIA inspired others to follow suit, while federal court decisions played an influential role in how state courts interpreted their own laws. As experts in the field of record keeping and access, archivists have a unique perspective in advocating for open records laws at all levels of government. This is particularly true for federal, state, and college-level archivists who must work within the confines of these legislative mandates. While understanding the importance of confidentiality and exercising profound respect for the individual's right to privacy, archivists should continue to engage and promote legislative remedies to executive overreach. Indeed, in its statement of core values the Society of American Archivists maintains that, "although access may be limited in some instances, archivists seek to promote open access and use when possible. Access to records is essential . . . and use of records should be both welcomed and actively promoted."⁷¹

As government agencies become ever more secretive, it is

⁷¹ "SAA Core Values Statement and Code of Ethics,"

<http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics>.

incumbent upon the archival community to resist this trend. In the wake of the 1972 FOIA hearings, Representative John Moss analyzed the differences between democracies and dictatorships. In a democratic society, he noted, the people hold their leaders accountable through free elections and a fully informed electorate. Dictators, with utter contempt for the masses, must control both the flow of information and the people in order to protect the ruling elite. "If the few are adroit in their maneuverings — propaganda, secrecy, distortions, omissions, and outright lies — they can hold the reins of government" almost indefinitely, Moss contended. "A democracy without a free and truthful flow of information from government to its people is nothing more than an elected dictatorship. We can never permit this to happen in America."⁷²

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⁷²Administration of the Freedom of Information Act, Twenty-First Report by the Committee on Government Operations Together with Additional Views, H.R. Rep. No. 92-1419 (1972), 93.