

U. S. Experience with Freedom of Information Law: Congressional Activism, News Media Leadership, and Bureaucratic Politics*

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Abstract

This article provides perspective on three fundamental forces that have shaped the freedom of information phenomenon in the United States and that may be relevant in addressing access issues in other nations: the development of the administrative state, Congressional activism, and the news media. Ultimately, however, FOI success relies on an openness culture in governmental agencies.

Resumen

Este artículo expone la perspectiva de tres fuerzas fundamentales que conformaron el fenómeno de acceso a la información en los Estados Unidos, y que pueden ser relevantes para enfatizar asuntos de acceso en otros países: el desarrollo del Estado administrativo, el activismo parlamentario y los medios de comunicación. Sin embargo, a fin de cuentas, el éxito del acceso a la información pública depende de una cultura de apertura en las oficinas de gobierno.

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The U.S. Freedom of Information Act (FOIA) is the most heavily used access law in the world. The U.S. government last year processed more than two million requests under the FOIA. Among many other news-making releases this year, for example, an environmental group won a federal judge's decision under the FOIA to obtain documents on the Bush administration's energy policies that Vice President Cheney had vowed to withhold. Similarly, the FOIA provided the essential leverage that compelled the State Department finally to release 4,667 previously secret documents on the "dirty war" in Argentina — generating front-page headlines both in the U.S. and internationally. As the third such freedom of information law in the world (after Sweden in 1766 and Finland in 1951), the 1966 U.S. law represents a fundamental shift in governance that it is almost impossible to overstate — establishing as it does a presumption of openness and ownership by the people of the government's information. That's the good news.

Now for the bad news. In stark contrast to such exemplary new freedom of information laws as South Africa's, the U.S. FOIA has no explicit constitutional basis, which must instead be inferred from provisions in the Bill of Rights on freedom of expression, freedom of the press, freedom to petition for redress of grievances, and other constitutional checks and balances on executive power including Congressional oversight. Also, the vague language in the U.S. FOIA's nine exemptions has given rise to thousands of lawsuits and a complicated body of often-contradictory caselaw. Combined with the normal bureaucratic tendency to avoid risk and tightly control information, such legal disputes have enabled an enormous variation among different federal agencies in their degree of compliance with the law. For example, while the law sets 20 working days as the deadline for responses, the median processing time

for a complex FOIA request — meaning a request that requires searching through files for multiple items rather than retrieving a single identified document — ranges from 13 days at the Veterans' Administration to 1,788 days (almost five years) at the Department of Energy. Five years as the median means that half the Energy requests took even longer!

For these and many other reasons, including the distinctive legal system in the U.S., the U.S. FOIA does not provide nearly the model for other countries that North Americans assume. Far better statutory models may be found in the model law developed by the NGO Article 19, in the access to information law passed in South Africa two years ago, and in the access law passed this year in the Mexican state of Sinaloa — which is superior in many respects to the Mexican federal law enacted only weeks later. However, there are several areas of U.S. experience with freedom of information law that do provide extremely useful and interesting *political* lessons for FOI campaigners in other countries. Specifically, this paper focuses on the politics of FOIA and will highlight three fundamental motivations for the U.S. FOIA that are relevant to other countries, and one fundamental determinant of U.S. FOIA implementation that successful FOI campaigners need to keep in mind. To summarize: The three fundamental motivations for FOIA in the U.S. were bureaucratic rationalization, Congressional activism, and news media leadership. The fundamental determinant of successful FOIA implementation in the U.S. has been agency culture.

1. The Politics of U.S. FOIA — Bureaucratic Rationalization

Seen in the long view, the U.S. Freedom of Information Act is the outgrowth of a century-long process of rationalizing the federal bureaucracy, or, put another way, the rise of the administrative state. Necessary, but not sufficient, for the enactment of the U.S. FOIA was the substantial bureaucratic foundation that grew up in the federal government beginning early in the 20th century. At the same time that doctors, lawyers and academics were successfully seeking prestige and higher incomes by organizing their professions and imposing barriers-to-entry (such as bar exams, educational credentials, professional associations), a similar professionalization came to government service. The political dynamic was led by the “progressive” movement of Theodore Roosevelt and other self-styled reformers who challenged economic monopolies, sought to address social problems like poverty and infant mortality, and fought the then-prevalent “machine” politicians — often ethnically-based and usually in the big cities — by exposing political and business corruption, bribes, nepotism, and patronage. (Thus did the generic public interest in clean government mesh with the self-interest of these mostly white, mostly middle- and upper-class reformers in their political advancement.) The core reforms seized on to solve these problems were the creation and expansion of a professional civil service to staff the government, together with much greater government intervention into and regulation of various sectors of U.S. society. For example, the Federal Reserve Board, regulating the money supply and banks, dates from 1913, as does the U.S. Department of Labor, regulating the workplace. The Federal Trade Commission, which deals with anti-trust and other market regulation, dates from 1914.

The rise of the professional bureaucracy brought far more systematic approaches to record-keeping in the federal government, including the first surveys of governmental archives and the first standardized information systems. The growth of the U.S. government — most dramatic during the two World Wars, as the administrative state turned into the national security state — required writing things down, and being able to find them later. The informal arrangements of the pre-bureaucratic era no longer sufficed when the task of government was to move hundreds of thousands of armed soldiers across the Atlantic or Pacific oceans, provide them the logistics to fight a war, and bring them back. The era of “normalcy” (as President Harding called it) between the two World Wars also saw its contribution to the professionalization of the bureaucracy and ultimately to freedom of information, with new laws establishing the U.S. National Archives in 1934 — previously, government records were preserved, or more likely not, by the agency that created them — and the *Federal Register* in 1935, for formal, daily publication of agency actions and regulations. In one famous case in 1934, government attorneys arguing a lawsuit before the Supreme Court were embarrassed to find their case was based on a non-existent regulation. After six years of the *Federal Register* produced a bookshelf-full of agency actions, the Congress in 1941 created the *Code of Federal Regulations*, as an authoritative compilation of current law and regulation.

These disclosure mechanisms were building blocks for a future freedom of information process. The key actors pushing these reforms ranged from professional associations of lawyers and historians to crusading anti-corruption politicians. Perhaps the most surprising allies for more open government came from the private sector, responding to the administrative state's increasing interventions in mar-

kets and society in the early 20th century and culminating with the establishment of the national security state during World War II , characterized by President Eisenhower's famous term, "the military-industrial complex". In effect, the mobilization by government of private industry for war production, the massive expansion of government contracting, and the resulting surge in economic growth sparked a parallel growth in the numbers and variety of "stakeholders" such as corporate contractors, industrial and service unions, lobbyists, lawyers, trade associations, and representatives of regulated industry. All had an interest in affecting agency actions, and the *Federal Register* as it existed then only published final actions, rather than proposed actions. A crucial turning point came in 1946, with passage of the Administrative Procedure Act. The APA created the right of "notice and comment", in which agencies had to provide some period for public comment before new regulations or proposed changes to existing regulations could go into effect. For the first time, stakeholders had a formal, legally reviewable process for participating in federal agency decision-making. Ironically, the APA also included a flawed public information section intended by its drafters to open government files, but which worked so poorly because it allowed so much discretion to the bureaucrats that it was ultimately repealed and replaced by the FOIA in 1966 (see below).

The point of this narrative of bureaucracy is to emphasize that the U.S. FOIA is not a stand-alone solution to government secrecy. In the U.S. case, reformers had to begin with threshold requirements to create, maintain and preserve government records, and to regulate agency information systems and archives. The process of bureaucratic expansion also created an interactive effect, so that at the same time that government was making its own

record-keeping more efficient for internal purposes, it also faced increasing public demand for access to those records as well as for participation in shaping any new regulations. The U.S. FOIA grew on a substantial bureaucratic foundation, as one more of a wide variety of accountability and efficiency mechanisms — some of which, like the requirement to maintain formal records systems documenting the activities of government, are probably a prerequisite to any kind of successful FOI process.

2. The Politics of U.S. FOIA — Congressional Activism

Bureaucratic rationalization may have been the base for freedom of information in the U.S., but the engine of reform can only be found in Congressional activism. Usually this was very much politically-inspired, in the same way that the world's first freedom of information law in Sweden in 1766 came from the previous opposition party's new majority in Parliament seeking to find out what the previous regime had been up to. This dynamic was essential to the passage of the U.S. FOIA in 1966, as was the "separation of powers" in the U.S., in which the U.S. Constitution creates a fundamental tension between the branches of government — especially between the executive and the legislative — as a core limit on power, in the name of checks-and-balances. Also, Congress has its own interests in openness for public relations purposes, given its representational and electoral underpinnings that generate a certain responsiveness to the public.

Congress took the leading role in governmental openness from the earliest days of the republic. During the Constitutional Convention in 1787, influential delegate James Wilson turned back the proposal that each chamber of the

proposed Congress should have discretion as to which parts of its journal should be published, with the following pronouncement: "The people have the right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings".

More than a century before the executive branch developed a *Federal Register*, Congress had established a *Register of Debates* (1824), and a weekly chronicle of every step in legislative proceedings (1833). In 1860, Congress established the Government Printing Office to publish all bills, congressional reports and proceedings (which became a daily publication in 1865), and the GPO quickly assumed responsibility for much of the executive branch's printing and publications as well, including wide distribution through a system of "depository libraries" in each state and ultimately in every Congressional district.

Congress was also the leading "stakeholder" affected by the rise of the U.S. administrative state and national security state in the 20th century. President Truman first rose to political prominence as a U.S. Senator leading Congressional oversight of the war effort during World War II. In the decade after World War II, the federal bureaucracy became less and less responsive to requests for information from the public and from Congress, for many reasons. Wartime censorship and information restrictions had exacerbated normal bureaucratic risk aversion. Civil servants were intimidated by public hysteria over Soviet espionage and wild claims about "card-carrying Communists" — the centerpiece of Sen. Joseph McCarthy's and others' intimidating Congressional investigations in search of disloyal Americans inside and outside government. Agencies also felt threatened by various postwar conversion efforts at reducing the federal workforce. Secrecy was the bureauc-

racy's self-protective reaction, and it also served Presidents well when confronted with a critical Congress. A key moment occurred when the early Eisenhower administration claimed to have fired suspected Communists in the executive branch, but then refused to provide Congress with the records of how this was done within any civil service protections. This episode was the beginning of a life-long crusade for freedom of information by Rep. John Moss, a Congressman from Sacramento, California, who served on an obscure post office and civil service subcommittee of the House of Representatives.

The elections of 1954 brought opposition (Democratic) control of the House of Representatives and the establishment of new special subcommittee on government information, chaired by Rep. Moss, to challenge Eisenhower administration secrecy. The basic Moss method was to collect tips from journalists, other Congressional staff, and agency employees about specific secrecy problems, follow up with formal letters and staff visits to question the agency involved, create documented files on each case, and then hold public hearings accompanied with lots of press coverage. After years of hearings and one legislative reform in 1958 — amending the “housekeeping” statute so it could not be used as a withholding statute — Moss and other reformers became convinced that only a formal statutory right of access could address the systemic problems his subcommittee had uncovered. Moss's chief staffer later wrote that if the Republicans had retained control of the House in 1955, no secrecy investigation would have been launched; and likewise, if a Democrat occupied the White House in 1955, there would have been no investigation of secrecy by a Democratic House of Representatives.

By 1966, Moss's crusade had even attracted a number of Republicans, interested as they were in holding Demo-

cratic presidents Kennedy and Johnson accountable. One of the most eloquent floor statements made during the 1966 passage of the U.S. FOIA was by then-Congressman Donald Rumsfeld (Republican of Illinois), who commented

no matter what party has held the political power of government, there have been attempts to cover up mistakes and errors ... [D]isclosure of government information is particularly important today because government is becoming involved in more and more aspects of every citizen's personal and business life, and so access to information about how government is exercising its trust becomes increasingly important." Much less enthusiastic was President Johnson, who waited until the last possible day to sign the bill, avoided any public signing ceremony, and issued a signing statement that emphasized more the dangers of openness than the advantages.

President Johnson had much less to worry about than he thought. The 1966 statute had several major flaws, including no deadlines for compliance, no penalties for violation, and no statutory direction for independent court review of government withholdings on national security grounds. This reinforced judges' reluctance to override the executive, and the bureaucracy developed several creative ways to prevent openness, including withholding entire files when only a small portion qualified under one of the FOIA exemptions. Several members of Congress led by Patsy Mink, a Democrat from Hawaii, became so frustrated that they sued the Environmental Protection Agency to obtain documents on underground nuclear testing and its environmental consequences. The Supreme Court ruled in 1973 that agencies must release "segregable portions" of otherwise exempt documents, but pointed out that the FOIA did not permit a court to review a governmental claim of national security secrecy. This decision got Congress's attention, coming as it did on top of the eight-year record

of bureaucratic obstruction to FOIA, and in the middle of front-page revelations about secret bombing in Cambodia and the Watergate break-ins orchestrated by the Nixon White House against its political opponents. These scandals, rooted in government secrecy, drove Congressional action for greater openness.

In fact, during the same months in 1974 that President Nixon was desperately attempting to prevent his own impeachment, Congress developed a series of amendments to the FOIA that would dramatically strengthen the act. The new amendments set deadlines for compliance and specifically authorized court review of national security withholdings, among other changes. Agencies like the Federal Bureau of Investigation tried to restrain the Congress, proposing compromise language that limited the reforms. One of the key Congressional staff subsequently obtained his own FBI file under the FOIA, including a series of memos the FBI legislative office wrote about meetings with him when he was counsel to Senator Edward Kennedy working on the 1974 FOIA amendments. One memo from June 17, 1974 quotes the White House legislative affairs office as ordering the FBI to cease its Congressional meetings and negotiating, because “they want no changes made in this legislation since they want it to remain as bad as possible to make their case stronger for sustaining a certain veto”.

By the time the FOIA amendments passed — in their “as bad as possible” form — President Nixon had resigned, but President Ford promptly vetoed the bill. The veto statement emphasized the administration’s belief that it was unconstitutional for a court to overrule a national security secrecy claim made by the executive branch, as the bill provided. President Ford’s senior staff took up the fight to sustain the veto: the new White House chief of staff was

that former Illinois congressman named Donald Rumsfeld, and the deputy chief of staff was the 34-year-old Dick Cheney. The fight over the FOIA amendments was a defining experience; nearly 30 years later Vice President Cheney remembered it as the beginning of a lamentable “erosion of presidential powers” — which certainly explains some of the motivation behind the Bush administration’s penchant for secrecy today. But Congress overrode the veto (overwhelmingly in the House and more narrowly in the Senate), and those amendments are the core of the U.S. FOIA as we know it today. The new strengthened provisions generated an explosion of requests as soon as the law went into effect in 1975 — more than 100,000 a year rising almost every year to the level of over two million a year today.

Congressional activism on access to information peaked during the 1970s, as a result of scandals over Vietnam, Watergate, and illegal government surveillance — all of which involved extensive deception of Congress by the executive branch. The 1974 FOIA amendments were only one of a series of openness statutes, some of which allowed access by requests, and others which required government pro-actively to publish the information involved. Among this patchwork quilt of laws were: the 1978 Presidential Records Act, which ensured public ownership of records that had previously been treated as the personal property of presidents; the 1972 Federal Advisory Committee Act, which opened to public scrutiny the process by which government obtained advice from private individuals; the 1974 Privacy Act, which required government to publish complete lists of all data systems that contained personally-identifiable information and gave individuals rights of access to that data; the 1976 Government in the Sunshine Act, which opened the deliberations of multi-

member federal agencies; the Fair Credit Reporting Act, which allowed for access to and correction of financial and credit records; the Buckley amendment establishing an individual's right of access to one's educational records, and a wide range of environmental laws that included provisions for public access to data on environmental impacts, toxic waste dumps, and water and air quality.

Congress went into reactive mode with the election of Ronald Reagan in 1980, but even so largely prevented the new administration's proposed rollback of FOIA. The new director of the Central Intelligence Agency, William Casey, opened the assault with legislative proposals exempting the CIA and the rest of the intelligence community completely from FOIA, and likewise the FBI. After several years of debate, Congress ultimately exempted only some specific categories of CIA "operational files" that would reveal sources and methods (1984), and at FBI certain categories of informant records in law enforcement actions (1986).

The high point of recent Congressional activism on FOIA came in 1996, with passage of the "E-FOIA" amendments. While the courts had consistently held that FOIA covered electronic records, there was no stated policy across government to that effect, which allowed agencies to obstruct electronic records requests, daring the requesters to go to court. The E-FOIA amendments expanded FOIA explicitly to cover electronic records, slightly lengthened FOIA's response deadlines from 10 working days to 20 in an attempt to set a time period that the courts would enforce, and required agencies to develop "electronic reading rooms" for on-line publication of frequently-requested materials. Potentially, the E-FOIA amendments will result in much more pro-active publication of government information, reducing the need to go through FOIA with formal requests;

but only a few agencies have yet fulfilled the law's requirements.

Today the outlook for Congressional activism on FOIA is grim. As one headline in the *New York Times* announced: "Industry Seeking Rewards From G.O.P.-Led Congress" (3 December 2002, p. A28). While several industries, such as government contractors and pharmaceutical makers, are among the most frequent users of FOIA, the leading donors to the new Republican majority were the extractive industries like oil, gas and mining, whose interests lie in reduced government regulation and reduced environmental oversight. Similarly, after intensive business lobbying, the bill creating the new Department of Homeland Security included a FOIA exemption for information submitted voluntarily by industry on critical infrastructure matters — a provision that could be a black hole for currently available information on public health threats, for example. With the federal bureaucracy reverting to its habitual secrecy, a White House busy fighting wars on terrorism and potentially in Iraq and thus emphasizing national security secrecy, and a Congress dominated by special interest lobbying, there remains only one bastion for freedom of information in the U.S. — the media.

3. The Politics of U.S. FOIA — News Media Leadership

The first organized campaign in support of the people's right to know did not emerge in the U.S. until 1950, under the leadership of the American Society of Newspaper Editors. These influential editors took note of the same censorship and secrecy restrictions dating from World War II, the same post-war anti-Communist paranoia underlying the McCarthyism purges, and the same growth of the perma-

ment national security bureaucracy that was also motivating members of Congress like John Moss to challenge government secrecy. The editors retained one of the top newspaper lawyers in the country, Harold Cross, to review federal, state and municipal information access; and Cross's thorough report, published in 1953 under the title *The People's Right to Know*, demonstrated that government at every level was systematically denying access to information and that the press had a particular responsibility to lead the fight for access.

The Cross report established a baseline argument for freedom of information, and energized media groups across the country to take up the cause. For example, the editors created an ongoing committee of their society to focus on freedom of information issues, and recruited some of the country's leading journalists to serve on and chair that committee — including James Russell Wiggins, the senior editor of what was rapidly becoming the leading paper in the nation's capital, *The Washington Post*. In Congressman Moss's judgment, "it was largely due to the ASNE" that his subcommittee was even created in 1955. Editors and journalists ensured widespread coverage for the Moss committee's work, and led investigations into government news management under Presidents Eisenhower and Kennedy. In effect, the editors and other press groups developed a three-part strategy:

- focused reporting in the news pages about government suppression of information,
- frequent editorials in the opinion pages denouncing government secrecy, and
- sophisticated lobbying in Congress by newspaper legal counsel and other corporate representatives of the media.

The media-led campaign succeeded in 1966, with passage of the U.S. FOIA, but the media were among the first to bump up against the limits of this initial statute. The period from 1966 to 1974, when reformers succeeded in putting teeth in the FOIA, featured probably the greatest shifts in U.S. history in public opinion on subjects like trust-in-government. This period saw the rise of the consumer and environmental movements, the scandals of Vietnam and Watergate, and the peak of investigative journalism exposing governmental and societal failures ranging from faulty automobiles and dirty water to massacres of civilians in Vietnam and Chile. The FOIA contributed to a number of these media stories, but the prevalent media FOI experience was one of interminable delays and bureaucratic stonewalling. By the time of the 1974 amendments, the media's three-part FOIA strategy of news reporting, editorials, and lobbying was in higher gear than at any time since the 1950s; but now, the press was joined by consumer advocates like Ralph Nader and a wide range of civil society groups with their own interests in more open government.

The U.S. media still have today the ability to win victories like the 1974 amendments, but Congress is now missing in action. For example, only a veto by President Clinton in November 2000 prevented Congress from enacting the first-ever "official secrets act" in the U.S., a statute imposing criminal penalties (over and above the standard administrative ones of loss of security clearance and job) on officials who "leaked" any classified information. Previously, only very narrowly defined categories of secret information carried criminal penalties; but the Senate Intelligence Committee passed the secrets act through Congress without any public hearings and as an attachment to the intelli-

gence appropriations bill where it would attract the least public notice.

Then, in 2001, the handful of Congress members who had pushed the secrets act the year before saw their chance, with a new President in George W. Bush who would not veto such a statute. At the end of August 2001, the Senate scheduled a pro forma hearing for early September, and staff told critics that the bill would sail through in a matter of days without changes. But public interest groups and media lobbyists alerted the press, and when Senators returned from their August holiday, they found a thick pile of hostile editorials from newspapers across the country blasting the secrecy bill. There is a certain bracing effect when the intelligence committee chairman, Senator Bob Graham of Florida, comes back from an overseas trip and reads the *Sarasota Herald-Tribune* ("Government in the dark") and the *St. Petersburg Times* ("Classified silencing"), when committee vice chairman Senator Richard Shelby of Alabama sees the *Florence Times-Daily* headline "Stop, thief!" ("The bill is a thief in disguise that would rob the American people of their right to know"), when committee member Jay Rockefeller of West Virginia reads the *Morgantown Dominion Post* ("A bad idea returns"), when Diane Feinstein of California checks the *San Francisco Chronicle* ("Sunshine is not a crime"), or when Richard Durbin of Illinois sees his *Chicago Tribune* ("burning down the house to roast the pig"). The committee canceled the hearing, pulled the secrecy provision from the intelligence appropriations bill, and ordered up another study of whether such a bill was needed. This year, the study found it was not -a huge victory for the right to know. Newsclips are the best-read item in the White House, too; and the real story behind the story of the Senate Intelligence Committee

dropping the secrecy bill is that if you want to move Washington, make headlines.

News media use of the FOIA continues to make headlines, bringing probably the greatest public notice to the value of the law. While more than half of the federal government's two million FOIA requests last year were from veterans and their families seeking personnel and medical records, and journalists' requests amounted to only about 5 percent of the total, the breadth and depth of news coverage that is based on results from FOIA requests proves the public value of the FOIA more so than any other evidence we have. For example, just in the past year, the following news stories came directly from FOIA requests, to U.S. federal and state agencies:

"Eating well: Second Thoughts on Mercury in Fish", by Marian Burros, *The New York Times*, 13 March 2002, p. F5. FOIA documents from the Food and Drug Administration revealed intense pressure from the commercial tuna industry when the FDA recommended that pregnant women avoid shark, swordfish, tilefish and mackerel because of high levels of mercury contamination that could cause brain defects or delays in mental development in their children. After three meetings with tuna industry representatives, the FDA said nothing in its fish guidance about one of the most significant sources of mercury in the American diet, tuna, the best-selling fish in the U.S. accounting for more than a third of seafood sales. The documents were obtained by the NGO, Environmental Working Group; now FDA is revising its guidance to include tuna.

"Veep Tried to Aid Firm: Key role in India debt row", by Timothy J. Burger, *(New York) Daily News*, 18 January 2002, p. 10. FOIA documents from the Energy Department showed Vice President Dick Cheney tried to help the Texas-based energy giant Enron collect a \$64 million debt from the Dabhol energy project in India, by raising the subject with the leader

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of the Indian opposition party during a Washington D.C. meeting. The White House had maintained that the now-bankrupt Enron, involved in multiple fraud investigations, enjoyed no special favors from the President or Vice-President. Enron's founder had contributed more than \$600,000 to President Bush's political campaigns over the years; and the top White House economic adviser had been on the Enron payroll as a \$50,000 a year consultant. The documents noted that "President Bush cannot talk about Dabhol" and that the economic adviser "was advised that he could not discuss Dabhol." But top White House staff described Cheney's intervention as "good news" in internal e-mail released through FOIA.

"Reagan, Hoover, and the UC Red Scare", by Seth Rosenfeld, *San Francisco Chronicle*, 9 June 2002, p. A1.

"Feinstein demands answers from FBI: Report on UC activities generates «deep concern»", by Seth Rosenfeld, *San Francisco Chronicle*, 23 June 2002, p. A1. FOIA documents obtained after a 17-year legal battle showed the FBI had conducted unlawful intelligence activities at the University of California at Berkeley, the nation's largest public university, in the 1950s and 1960s, including covert support for movie star Ronald Reagan's first successful campaign for state governor pledging to suppress student protests. The FBI also secretly campaigned to get UC President Clark Kerr fired, conspired with the director of the CIA to pressure the university's Board of Regents to "eliminate" liberal professors, and mounted a covert operation to manipulate public opinion and infiltrate agents provocateurs into non-violent student dissent groups. California's senior U.S. Senator followed up the story with Congressional queries about the current state of FBI political surveillance activities.

"Sailors exposed to deadly agents", by Lee Davidson, *The Deseret News* (Salt Lake City, Utah), 24 May 2002, p. A1. Seven years after *The Deseret News* published FOIA documents showing Utah-based U.S. Army scientists had exposed

hundreds of sailors to germ and chemical warfare tests in the 1960s, the Pentagon finally and officially acknowledged using actual chemical and biological warfare agents in the tests, including the nerve agents VX and sarin and deadly staphylococcal enterotoxin. The admission will allow the hundreds of affected veterans to receive disability and health benefits previously denied them.

“Suit targets mercury-laced vaccinations”, by Margaret Cronin Fisk, *The Recorder* (American Lawyer Media), 26 March 2002, p. 1. FOIA documents obtained from the Centers for Disease Control by a group of parents of autistic children showed that the amount of mercury contained in a standard preservative (thimerosal) for vaccines given in the first three months of life would dramatically increase the risk of autism in children who received those vaccinations. Dozens of lawsuits are now being filed across the U.S. against vaccine and thimerosal makers.

“I-PASS has a new role: I-Spy”, by Robert C. Herguth, *Chicago Sun-Times*, 7 October 2002, p. 8. Illinois’ electronic highway toll paying system has turned over information on drivers’ dates, times, locations, and amounts of toll transactions in response to at least 10 subpoenas in crime probes, administrative proceedings and even a divorce, according to documents obtained through the Illinois state FOIA. Drivers deposit money in a highway department account and get a transponder for their windshields that allows for automatic deduction of tolls without even stopping at tollbooths, thus reducing congestion. But now criminal investigators and even divorce lawyers have discovered the database and more subpoenas are expected.

“NIH to Give Hormone Maker Data; Researchers Are Worried Wyeth Will Manipulate Findings”, by Susan Okie, *The Washington Post*, 19 October 2002, p. A10. Under the FOIA, Wyeth Pharmaceuticals, the drug company that makes the most widely used hormone products, obtained from the National Institutes of Health the still-unpublished data from a massive

government study of hormone therapy. The researchers had halted part of the study in July 2002, announcing that for healthy post-menopausal women, combination therapy with the hormones estrogen and progestin did more harm than good, with small but statistically significant increases in heart disease, breast cancer, stroke and blood clots. In September, Wyeth released new labeling reflecting the new findings, and says it requested the data for evaluation purposes. Wyeth had supplied the researchers with \$20 million worth of the drugs for testing.

"History recorded from the messages of victims", by Alain De-laqueriere and Tom Torok, *The New York Times*, 26 May 2002, p. 25. The New York state and city FOIAs allowed reporters to obtain the emergency dispatch logs, transcripts of 911 calls, and audio tapes made by the New York Police and Fire Departments on September 11, 2001, and then to find more than 140 people who communicated with individuals on the upper floors of the twin towers of the World Trade Center before they collapsed. *New York Times* reporters documented 406 instances in which people on the top floors communicated with the world outside after the first plane struck, including cell phone, fax and e-mail messages. One victim's widow called the scrutiny invaluable: "There are so many issues that need to be looked at to understand what went wrong, what happened and what could be done differently".

"Embassy documents say Hastert belittled rights concerns in Colombia", by Ken Guggenheim, *Associated Press*, 4 May 2002. State Department documents obtained through the FOIA show that current Speaker of the U.S. House of Representatives, Dennis Hastert of Illinois, told Colombian military officers during a May 1997 visit to Colombia that he was 'sick and tired' of human rights considerations controlling U.S. anti-drug aid, and that the military should bypass the Clinton White House and come directly to Congress for aid. The documents, obtained by the National Security Archive, also show that a key U.S.-trained counternarcotics unit was "bedding down"

with a Colombian brigade linked to right-wing paramilitaries and major human rights abuses.

4. The Politics of U.S. FOIA — Agency Culture

The examples above of news media success with FOIA — and particularly the names of the agencies involved — point to the core dynamic that determines effective implementation of U.S. freedom of information laws. Some agencies comply and some don't. The reasons for the variations between agencies rise directly from their differing cultures. For example, the list above notes the 17-year legal battle that was necessary to force the Federal Bureau of Investigation to turn over documents on its illegal activities at the University of California. Dating back to the time of the infamous J. Edgar Hoover, the FBI has resisted outside scrutiny, and has developed so many layers of internal secrecy that its own information systems are in chaos. Only days before convicted terrorist Timothy McVeigh was scheduled for the death penalty, FBI field offices “found” hundreds of relevant documents that had never been produced for the trial despite 15 directives from headquarters. If this is how an order from the FBI director is treated, one can only imagine how an outsider's FOIA request is handled.

Agency culture is a complex sociological phenomenon with multiple variables including leadership, mission, external prestige, stakeholder relationships, esprit de corps, and comparative resources. Agency culture is not necessarily unchanging, but as every anthropologist knows, such cultures persist in the face of change, and even mutate in unexpected ways. For example, the State Department in the 1980s had a reputation for delay and obfuscation to FOIA requesters that ranked it with the CIA and other

intelligence agencies as among the worst offenders. But when the U.S. Senator who headed the FOIA subcommittee then assumed the chair of the subcommittee that handled the State Department's budget, suddenly the agency "found" a million dollars in its administrative accounts to clear up its backlog of FOIA requests. Then, as President Clinton appointed a series of human rights activists to high positions in the State Department during the 1990s, gradually a new perspective began to take hold in the agency's culture — a perspective that began to see how openness and declassification of previously sacrosanct diplomatic messages might actually assist the stated goals of U.S. foreign policy in encouraging human rights, the rule of law, and democratization. The CIA, of course, continues to miss this point, and to resist declassification on any grounds other than burnishing the spies' reputations.

The introduction to this paper contrasted the Veterans' Administration's response time of 13 days to complicated requests to the Energy Department's 1,788 days. Agency culture explains all. The VA is perpetually the target of Congressional budget cutters, since it administers a cornucopia of veterans' benefits that collectively amount to billions of dollars. The VA defends itself bureaucratically by taking good care of its customers, its clients, the military veterans and their families who are the beneficiaries of VA expenditures, and who file most of the FOIA requests the VA receives. Similarly, veterans receive preference in civil service hiring throughout the federal government; and no department other than the Pentagon has a higher percentage of former military in its employment. Veterans take care of veterans.

By contrast, the Energy Department grew out of the nuclear weapons establishment, which created the federal government's first secrecy systems, and today Energy's

duties include the nuclear weapons labs and the cleanup of the environmental disasters left by nuclear weapons production. In the 1990s, Republican critics of President Clinton became convinced that Chinese political contributions were winning access to nuclear secrets, and forced the Energy Department into re-reviewing hundreds of millions of pages of declassified documents that were more than 25 years old, at a cost of tens of millions of dollars — all in the name of preventing the spread of nuclear secrets. The taxpayer would probably have been better off if the government had let all the pages out and dared Osama bin Laden to find anything useful — the review would have tied up Al-Queda for years.

Agencies like the Food and Drug Administration and the Centers for Disease Control have adopted openness as part of their agencies' missions. For the FDA, this means they can be responsive to one of their most influential constituencies, the drug companies, but also their comparatively fast processing of FOIA requests assists doctors and public health agencies better to understand risks and benefits. At the CDC, their public health education mission means not only that they respond quickly to FOIA requests, but they also have developed one of the more sophisticated publication efforts, dedicated to pro-active dissemination of CDC information to alert the public and health professionals.

Leadership makes a huge difference even in agencies with similar missions and employees. For example, when President Clinton in 1995 ordered systematic release of 25-year-old secrets, the Air Force took the lead inside the Defense Department, reviewing its highest-level policy-relevant and sensitive documentation first, so that the toughest decisions could be taken early in the process. The Secretary of the Air Force was the first woman to

hold that position; she decided to distinguish her tenure by embracing the new openness principles. In contrast, the Navy avoided the tough decisions on sensitive documents, and filled its declassification quota by processing trivial administrative documents.

So the lesson from the U.S. experience for new implementers of FOIA laws is that the key factor in setting agency culture on FOIA is the top official assigned to implement the law, and the reinforcing mechanisms for the bureaucrats who process FOIAs. At the Central Intelligence Agency, which had resisted the FOIA in 1966 and 1974, the implementation assignment went to CIA staff who, critics said, had failed as covert agents abroad, who had failed as intelligence analysts at home, and who could not be fired because they didn't drink enough or take money from foreign intelligence services and were content to serve out their days frustrating journalists and historians with unresponsive responses. In contrast, at the Health and Human Services Department, the implementation job went to a senior civil servant named Russell Roberts who used the new law both to protect his own integrity against political appointees above him, and to build constituencies outside the agency for more accountability. Roberts created a "FOIA career ladder" at HHS, in which a civil servant could rise to the highest level of the civil service just by superior performance in handling FOIA requests and managing efficient FOIA processes. Through salary increases and promotions based on FOIA work, HHS developed a series of widely-admired FOIA officers who served as models for other agencies. Roberts ultimately founded a professional association for government FOIA officers, the American Society of Access Professionals, to train each other in best practices and advance the status of FOIA officers. As a member and a former elected officer of ASAP, I am among

those encouraging that the Society live up to its name as an "American" organization, by helping government officials, journalists and civil society create fraternal societies in each country in the hemisphere.