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Inside FOIA, Inc.

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I. THE UNANTICIPATED COMMERCIAL FOIA REQUESTERS

The Freedom of Information Act (FOIA) has a lofty goal: to open the doors of government offices and allow the public a front-row seat in watching over government affairs.[1] In turn, this sort of bright transparency should enhance our participatory democracy and the accountability of our elected officials.[2] To that end, Congress envisioned the news media as among the most important users of FOIA.[3] No doubt, FOIA has served precisely that purpose on many occasions—examples which represent victories for openness and accountability. Yet, journalists and watchdog groups make up a tiny fraction of requesters seeking information under the law.[4]

By contrast, the legislative history of FOIA reveals almost no contemplation of commercial uses for the law.[5] According to journalist Michael Doyle's thorough canvassing of the extensive legislative history, only twice did a member of Congress raise a potential commercial use for FOIA: one representative wanted

1. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (describing FOIA as protecting the public's right to know "what our government is up to" (quoting EPA v. Mink, 410 U.S. 73, 105 (1973))).
2. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).
3. *Frequent Filers: Businesses Make FOIA Their Business*, SOC'Y PROF. JOURNALISTS (July 3, 2006), http://www.spj.org/rrr.asp?ref=31&t=foia [http://perma.cc/ZD92-MNXA].
4. *See generally* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (conducting an empirical analysis of six federal agencies' FOIA logs).
5. *See* Michael Doyle, The Freedom of Information Act in Theory and Practice 42-47 (May 2001) (unpublished M.A. thesis, Johns Hopkins University) (on file with author).

assurance that the maritime industry could use FOIA to access information about certain government subsidies, and another hypothesized that FOIA would be useful to a losing bidder for a government contract to find out reasons for the result.[6] Even these commercial uses that were mentioned are tied to the central theme of government oversight—that is, ensuring proper subsidies and contracting processes.

From its inception, however, FOIA has been heavily used by businesses. As early as 1972, a Congressional Research Service survey identified commercial businesses or law firms as nearly half of requesters,[7] and in 1978, the Government Accountability Office reported that 58% of requests it studied were submitted by businesses and law firms, noting that the purposes of those requests were largely "not contemplated by the Congress."[8] Today's picture is no different. In particular, according to my study of FOIA logs from 2013, the majority of requests at some agencies are made by commercial requesters.[9] These agencies include large regulatory agencies such as the Securities and Exchange Commission (SEC), with 69% of its requests classified as commercial in 2013; the Food and Drug Administration (FDA), with 85% commercial requests that year; and the Environmental Protection Agency (EPA), with 79% commercial requests that year.

As we head into FOIA's next fifty years, it is worth examining how FOIA is being used at the end of this previous half-century. Moreover, to the extent FOIA is being used in unanticipated ways, it is worth asking whether FOIA is the best way to meet information needs unrelated to government transparency and accountability. Rather than use FOIA to provide public oversight as Congress envisioned, businesses use FOIA to advance primarily private interests such as obtaining information about their competitors, providing due diligence services to their clients, and advancing private litigation.[10]

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6. *Id.* at 46.

7. *Id.* at 46, 66.

8. U.S. GOV'T ACCOUNTABILITY OFFICE, LCD-78-120, GOVERNMENT FIELD OFFICES SHOULD BETTER IMPLEMENT THE FREEDOM OF INFORMATION ACT ii (1978).

9. The design of my study is reported in detail at Kwoka, *supra* note 4, at 1379-80. In brief, from a comprehensive list of agencies that reported over 1,000 total requests in a year and which collected over $10,000 in fees—an indication of a significant number of commercial requesters—I studied those agencies whose responses to my own FOIA requests for their FOIA logs were sufficiently timely and complete to allow for analysis. Those six agencies were the Securities and Exchange Commission (SEC), the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), the Defense Logistics Agency (DLA), the Federal Trade Commission (FTC), and the National Institutes of Health (NIH).

10. *See generally* Kwoka, *supra* note 4, at 1379-1414 (describing commercial use of FOIA in detail).

Even further afield from FOIA's core mission is the practice of information reselling: some commercial requesters have business models based on requesting federal records en masse under FOIA and reselling those records, often in the form of access to a database, at considerable profit.[11] This practice may have the superficial appearance of increasing access to federal records through a market solution. In reality, the high access fees ensure that only business insiders will access those records, and the resellers themselves emerge as a powerful force in determining which federal records will come to light at all.[12] Moreover, these resellers flood agencies with voluminous requests, straining FOIA offices' resources to the potential detriment of other requesters.[13]

Perhaps most striking is the character of commercial requests. Businesses tend to request the same types of records repeatedly, often submitting hundreds or even thousands of requests per year for a particular kind of record. For example, at the Defense Logistics Agency, the vast majority of FOIA requests seek abstracts of bids for government contracts.[14] Though each request pertains to a different bid or contract, the type of record requested is the same each time.

Precisely because of the routine nature of commercial requests, FOIA is a poor vehicle for meeting commercial requesters' demands for government information. And this inefficiency comes at a price: agencies spend millions—and sometimes tens of millions—of dollars processing FOIA requests, and recoup very little of the costs through fees paid by requesters, even commercial requesters.[15] For example, in fiscal year 2013, FDA's FOIA operations cost $33,570,981.[16] While a full three-quarters of FDA's requests that year were from commercial entities, the agency recouped only $328,438 from commercial re-

11. *See, e.g.*, *About Mark Edwards*, BIOSCIENCE ADVISORS, http://www.biosciadvisors.com/about [http://perma.cc/H6K9-WV7R]; *About Us*, FOI SERVICES, INC., http://www.foiservices.com/brochure/about.cfm [http://perma.cc/NB9Q-TYA5]; *Online Database*, DAY & DAY INC., http://www.dayandday.com/dla-database.html [http://perma.cc/T3G3-QXHM].

12. *See* Kwoka, *supra* note 4, at 1424-26.

13. *See id.* at 1422-24. In fact, the volume of such requests may create delays that in turn fuel the use of private resellers to access government information more quickly. *See id.* at 1425.

14. *See id.* at 1401-04.

15. *See id.* at 1416-20.

16. *Freedom of Information Annual Report 2013*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/RegulatoryInformation/FOI/FOIAAnnualReports/ucm386584.htm [http://perma.cc/X4C4-65ZC]. This number excludes FDA's litigation costs associated with FOIA, which cost the agency an additional $1.46 million. *Id.*

questers in fees.[17] Over forty percent of all commercial requests that year were processed without charging any fees at all.[18]

In my previous work, I therefore proposed an aggressive affirmative disclosure regime in which agencies would identify the types of records routinely requested and publish comprehensive databases of those documents, thereby preempting the flood of commercial requesting.[19] Meeting commercial information needs head-on in this fashion would remove substantial burdens from agencies' FOIA offices, perhaps freeing up resources to better serve other requesters. It would also provide information equally to all, eliminating the private warehousing of federal records that can then be sold—usually for a substantial fee—to profit a private entity.[20] In this way, the data from our first fifty years of FOIA can help us understand the demand for government information and shed light on ways to improve access for the next fifty.

II. THE PROMISE AND LIMITS OF AFFIRMATIVE DISCLOSURE

The theory of using affirmative disclosure to preempt the need for hundreds or even thousands of FOIA requests is facially appealing. Nonetheless, questions routinely emerge about the feasibility of such a proposal. Some cite as impediments the costs of building a brand-new database and the ongoing costs of maintaining it. Others cite concerns about the treatment of certain records that may be exempt from mandatory disclosure under FOIA based on concerns for privacy or commercial confidentiality.

Rather than defeating the possibility of affirmative disclosure, however, these concerns merely highlight the fact that the practicality of implementing such a regime will necessarily depend on agency-specific and even record-specific factors. Here, I use the experience of agency officials at the three large regulatory agencies included in my previous study—the EPA, SEC, and FDA—to assess the feasibility of my affirmative disclosure proposal from the agency perspective. This Part demonstrates that despite some limitations and hurdles, affirmative disclosure is often a practical way to address commercial requesting.

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17. U.S. Food & Drug Admin., Freedom of Information Act Responses to June 24, 2014, Feb. 12, 2015, Feb. 13, 2015 and Apr. 21, 2015 Requests by Margaret B. Kwoka (on file with author) [hereinafter FDA Data].

18. *Id.*

19. Kwoka, *supra* note 4, at 1429-36.

20. As the vice president of one information reselling company, Day & Day, put it, "If they did that [affirmative disclosure], a good part of our business would go away . . . . So I think it's a bad idea." Gardiner Harris, *House to Weigh Overhaul of Open Records Process*, N.Y. TIMES (Jan. 11, 2016), http://www.nytimes.com/2016/01/11/us/politics/house-to-weigh-overhaul-of-open-records-process.html [http://perma.cc/5MZ4-3D4P].

To begin, the promise of affirmative disclosure is currently best exemplified by the EPA, which has now rolled out an initiative that precisely addresses routine commercial requests. By the EPA's own estimate, 80% of the FOIA requests it has historically received are for environmental records concerning a particular property identified by an address.[21] These site-specific records were most often requested by consulting firms, which were conducting site assessments for their clients prior to commercial real estate deals to assess any environmental hazards or other risks.[22]

To address these requests, the EPA created an online search tool called MyProperty which "provides a single, printable report based on individual address searches" and "allows real estate agents, mortgage banks, engineering and environmental consulting firms and the public to determine if EPA databases have records on a specific property without filing a Freedom of Information Act (FOIA) request."[23] In fact, the EPA promises that the results obtained through the online search "will be identical to the information you would receive by filing a FOIA request with [the] EPA for these records."[24]

Further, the agency just launched in September 2016 a second version of the website, which provides not only search results, but also certain due diligence certificates sought by requesters, thereby "eliminat[ing] those requests totally," according to a senior FOIA official at the EPA.[25] Preempting 80% of EPA's FOIA requests will inevitably free up resources in the agency's FOIA office, help reduce delays and backlog, and perhaps increase the level of service provided to the remaining requesters. Moreover, records will be available for everyone to see equally, making information available for potential public ben-

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21. Larry Gottesman, Chief, FOIA and Privacy Act Branch, U.S. Envtl. Prot. Agency, Remarks at the Freedom of Information Act Advisory Committee Meeting (Apr. 19, 2016), http://ogis.archives.gov/foia-advisory-committee/2014-2016-term/documents/04-19-2016-meeting-transcript.htm [http://perma.cc/VWZ4-HCQL].

22. *See* U.S. Envtl. Prot. Agency, Freedom of Information Act Responses to June 8, 2015 Requests by Margaret B. Kwoka (on file with author). The data covers calendar year 2013 and was compiled from responses to the June 8, 2015, request and from online data available at the FOIAonline database. FOIAONLINE, http://foiaonline.regulations.gov [http://perma.cc/VN9G-2K22].

23. *MyProperty*, U.S. ENVTL. PROTECTION AGENCY, http://www3.epa.gov/enviro/html/fii/myproperty/index.html [http://perma.cc/F2S8-PZXM].

24. *Id.*

25. Remarks of Larry Gottesman, *supra* note 21; *see also What's New*, U.S. ENVTL. PROTECTION AGENCY, http://www3.epa.gov/enviro/html/fii/myproperty/MyPropertyWhatsNew.html [http://perma.cc/TT2S-YCC7] (detailing the improvements in the new version of MyProperty, including "printed certificates" that can be "used as proof of due diligence for the real estate community when a search does not yield any records for a specific property or specific location").

efit, such as research or reporting. While the system is so new it may not yet be possible to ascertain specific costs and benefits, this sort of initiative should be studied as a model for affirmative disclosure.

The SEC presents another example where, based on conversations with senior agency FOIA officials, it appears there are highly promising areas in which affirmative disclosure could preempt the need for routine commercial FOIA requesting. The bulk of the SEC's requests fall into two categories. First, businesses, and in particular information resellers, request thousands of exhibits attached to public filings with the SEC that had been held under a confidential treatment rule for a particular period of time.[26] Second, due diligence firms request thousands of investigative files per year, seeking information that might suggest an SEC inquiry or regulatory risk of a company targeted for a business deal.[27]

In each of these areas, there are possibilities for affirmative disclosure to preempt the need for bulk commercial requesting. As to exhibits submitted with public filings under a confidential treatment rule, those confidential treatment orders expire after a designated period of time, typically ten years.[28] According to SEC FOIA officials, some requesters are filing FOIA requests for those documents the moment the confidential treatment order expires.[29] At some point several years ago, some SEC officials promoted the idea of having those documents automatically posted to EDGAR, the online database of public SEC filings, at the time the order expires, thereby preempting the need for FOIA requests.[30] Current FOIA officials confirm there is no obvious barrier to implementing such a system, but noted that the previous proposal never came to fruition because of resource constraints.[31] This example perhaps demonstrates the need for Congress to allocate more resources to affirmative disclosure initiatives.

To be sure, requests for investigative files present a more complicated picture. Current SEC FOIA officials noted that investigative files often contain records that are exempt from mandatory disclosure under FOIA, and those files

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26. *See* U.S. Sec. & Exch. Comm'n., Freedom of Information Act Responses to Sept. 5, 2014, Feb. 12, 2015, Feb. 13, 2015, and Apr. 21, 2015 Requests by Margaret B. Kwoka (on file with author).

27. *Id*; *see also* Kwoka, *supra* note 4, at 1384-88 (describing requests made to the SEC).

28. 17 C.F.R. § 200.83(c)(7) (2016).

29. Video Conference Call Interview with Barry Walters, Chief FOIA Officer, U.S. Sec. & Exch. Comm'n; Olivier Girod, Deputy Chief FOIA Officer, U.S. Sec. & Exch. Comm'n; Mark Siford, Counsel to Chief FOIA Officer, U.S. Sec. & Exch. Comm'n; and John Livornese, FOIA Officer, U.S. Sec. & Exch. Comm'n (July 21, 2016).

30. *Id.*

31. *Id.*

have to be carefully reviewed before any material is released.[32] Nonetheless, as Barry Walters, Chief FOIA Officer at the SEC, noted, due diligence firms learn just as much (if not sometimes more) from a so-called "no records" response than from the release of records.[33] When the SEC finds no investigative records on a target company, after all, that gives a due diligence firm an important piece of information in assessing the regulatory risk of that company. Mr. Walters agreed that, in theory, a database akin to EPA's MyProperty could allow users to search for investigative files for particular companies and, at the very least, could provide a "no records" response when applicable or alternatively direct users to file a FOIA request for records that do exist.[34] Eliminating FOIA requests that result in "no records" responses would itself remove thousands of requests from the SEC's FOIA queue.[35]

Not all agencies' FOIA dockets allow for straightforward affirmative disclosure solutions to bulk commercial requesting. I have previously suggested that the FDA has easy targets for affirmative disclosure, including FDA facility inspection reports known as Form 483s, which are requested en masse—particularly by information resellers—under FOIA.[36] However, Sarah Kotler, director of the FOIA program at the FDA, has noted that only about 25% to 35% of the total 10,000 to 12,000 Form 483 inspection forms the FDA issues each year are ever requested under FOIA, and the agency never has to process the remaining forms for release.[37] While, in the year I studied, 93% of the requested 483s were released in full, review of each record is still required to identify the small percentage of records that contain confidential information

32. *Id.*

33. *Id.*

34. Among the officials I spoke with, some suggested that companies may be upset if the fact that SEC investigatory records about them exist is made easily accessible. Nonetheless, there was widespread agreement that there was no legal impediment to a search engine that could simply detail whether or not such records exist. *Id.*

35. While the SEC FOIA logs do not break down responses sufficiently to ascertain precisely how many of the investigative files requests resulted in "no records" responses, in fiscal year 2015 the SEC reported that, of a total 16,207 requests of all kinds, 9,737 resulted in a "no records" response. *Freedom of Information Act (FOIA): Annual Report for Fiscal Year 2015*, U.S. SEC. & EXCHANGE COMMISSION 7 (2015), http://www.sec.gov/foia/arfoia15.pdf [http://perma.cc/QK88-AN84]. Given that investigative file requests are one of the two biggest categories of requested records, it is fair to assume a significant portion of "no records" requests would be preempted by the kind of database system I am describing.

36. *See* Kwoka, *supra* note 4, at 1434-35.

37. Sarah Kotler, Director of the Freedom of Info. Act Program, Food & Drug Admin., Address at the FOIA Advisory Committee Meeting (Apr. 19, 2016), http://ogis.archives.gov/foia-advisory-committee/2014-2016-term/documents/04-19-2016-meeting-transcript.htm [http://perma.cc/5XGP-JHDM].

exempt from disclosure.[38] Accordingly, to simply release all such forms proactively would require substantially more work than processing only those requested. In such cases, where detailed record-by-record review is required and where a minority of the total records in a given category are currently requested under FOIA, more information would be needed to fully assess the costs and potential benefits of processing all the records in a given category for affirmative disclosure.

Examining the particular categories of records to which an affirmative disclosure model might be applied reveals that preempting whole categories of commercial FOIA requests is often very possible. As the EPA and SEC examples demonstrate, some categories of records simply do not implicate the need for record-by-record review. In some cases, the agency even has an existing database that can be harnessed for affirmative disclosure. Existing resources and the contents of the records are therefore important factors in an agency's success. In fact, as Office of Information Policy (OIP) Director Melanie Pustay's essay in this collection describes, various agencies already engage in a wide range of categorical disclosure by publishing full databases. OIP itself could promote the expansion of this practice by issuing guidance to agencies to evaluate their FOIA logs annually for opportunities to use categorical affirmative disclosure to preempt large swaths of FOIA requests.

Even where stumbling blocks exist, however, additional resources—principally funding for specialized personnel and sometimes infrastructure upgrades—can often overcome them, as would be the case at the FDA. This lesson in and of itself may guide Congress in future FOIA reforms to consider allocating additional funding toward precisely these sorts of proactive disclosure initiatives. Not only would such initiatives increase the overall transparency of the government, making categories of records available equally to all, but they would reduce the burden on FOIA staff and possibly focus their efforts on requests that go to the heart of government accountability.

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38. FDA Data, *supra* note 17.