

# THE YALE LAW JOURNAL

MARGARET B. KWOKA

## First-Person FOIA

**ABSTRACT.** The Freedom of Information Act (FOIA) embodies a radical notion. By allowing any person to request any records for any reason, it was meant to open up government for all to see. Investigative journalists, watchdog groups, and concerned citizens would all jump at the chance to hold officials accountable and unearth secretive government actions. The numbers seem to support a FOIA success story: after all, the government now consistently receives over 700,000 FOIA requests a year.

As it turns out, however, it is not journalists and nonprofits who are making hundreds of thousands of requests. In my previous article, *FOIA, Inc.*, I documented how commercial requesters have dominated the FOIA landscape at some agencies, particularly large regulatory agencies. In doing so, they have transformed FOIA into a sort of giveaway to businesses, to the potential detriment of those whose requests promote government oversight.

This Article reveals the unexpected uses of FOIA at another group of agencies, particularly those focused on law enforcement and benefits provision. At these agencies, FOIA requests are dominated by individuals seeking records about themselves: for example, their own medical files, immigration records, or investigation files. In fact, these requesters—whom I call first-person FOIA requesters—appear to vastly outnumber commercial requesters. At the Department of Homeland Security alone, more than 200,000 first-person requests are filed each year. Using original datasets and interviews with requesters, this Article documents the extent and nature of first-person FOIA requesting at seven federal agencies. It also demonstrates that, while these requests may serve vital private interests for each requester, they largely do not serve the public's interest in knowing what its government is up to.

These accounts not only suggest that FOIA may be suffering under the weight of unintended uses, but also reveal how first-person requesters are often ill-served when they are forced to use FOIA simply because no good alternative exists. Moreover, it reveals how agencies themselves duplicate work and hinder their own objectives by requiring that first-person information needs be met through FOIA. Important conclusions follow from these insights. Agencies should meet first-person information needs head-on by designing sensible processes for obtaining commonly needed personal information. Alleviating the need to resort to FOIA would provide benefits that inure to individuals, agencies, and the public's interest in transparency.



**AUTHOR.** Associate Professor, University of Denver Sturm College of Law. I owe a debt of gratitude to the Hughes-Ruud Research and Development Fund for providing financial support for this research and to my home institution for its support. I benefited greatly from presentations of this work there, as well as at the Law and Society Association Annual Meeting, and the Second Annual Administrative Law Workshop at Ohio State University. I also am very grateful to Kent Barnett, Emily Bremer, Bernard Chao, Brian Feinstein, César Cuauhtémoc García Hernández, Nicole Godfrey, Danielle Jefferies, Tammy Kuennen, Nancy Leong, Kevin Lynch, Jon Michaels, Rachel Moran, Nicholas Parrillo, Justin Pidot, Michael Sant’Ambrogio, Miriam Seifter, Bijal Shah, Peter Shane, Michael Siebecker, and Chris Walker for invaluable feedback I received on earlier versions of this work. Finally, I owe a deep debt of gratitude to Sydney Boyle, Nathan Fall, Leah Perczak, Patrick Sweet, and Elizabeth Weil, all of whom provided outstanding research assistance.



## ARTICLE CONTENTS

INTRODUCTION	2207
I. COMPETING TRANSPARENCY GOALS	2211
A. FOIA and Democracy	2211
B. Protecting Privacy	2215
C. The Process of First-Person Requesting	2217
II. FIRST-PERSON USE OF FOIA	2220
A. Department of Homeland Security	2224
B. Department of Veterans Affairs	2230
C. Social Security Administration	2234
D. Equal Employment Opportunity Commission	2237
E. Other Agencies	2240
III. THE FOIA MISMATCH	2243
A. FOIA Is Not Due Process	2244
B. Duplicative Work for Agencies	2249
C. Flooding FOIA	2253
IV. EXPAND ACCESS, SHRINK FOIA	2255
A. Administrative Discovery	2256
B. Eliminate Request-and-Return	2261
C. Online Access	2262
D. Not Everything Is FOIA	2265
CONCLUSION	2268

## INTRODUCTION

Sometimes the Freedom of Information Act (FOIA) makes all the difference, just not in the way one might expect. Take WM, an immigrant trying to avoid deportation by proving that he had the government's permission to live and work in the United States:

WM is an El Salvadoran national who was in removal proceedings in California. His attorney submitted a FOIA request because he needed to show that WM had timely registered for Temporary Protected Status [a type of immigration benefit] under 8 U.S.C. § 1254a and also to obtain information concerning WM's prior voluntary departure in 1990. WM needed this evidence to prove that he was entitled to an asylum hearing in immigration court and to prevent his erroneous deportation.

Counsel for WM filed a FOIA request with USCIS [United States Citizenship and Immigration Services] on April 22, 2014. While awaiting the results of the FOIA request, WM's counsel sought relief from imminent deportation in U.S. District Court for the Eastern District of Virginia. This petition for relief was denied for lack of jurisdiction. Counsel sought a stay of removal from the Fourth Circuit Court of Appeals. The Fourth Circuit initially issued a stay of deportation but thereafter terminated the stay of deportation for lack of jurisdiction after receipt of a motion from the Department of Homeland Security [(DHS)]. Counsel sought to reopen WM's case with the immigration court and to obtain a stay of removal. The immigration court denied the motion to reopen but granted the motion for a stay of removal. Unfortunately for WM, the court did not grant the motion until about a week after DHS had deported him back to El Salvador.

USCIS produced the FOIA results on June 21, 2014. The FOIA response showed that the USCIS erroneously terminated WM's grant of Temporary Protected Status. Had WM had access to this prior to his deportation from the United States, counsel asserts that he would have been able to avoid deportation and reopen his removal proceedings based on an error of law.<sup>1</sup>

This story may seem strange for a variety of reasons. Does the government not have to turn over evidence that would be favorable to WM's case? Can WM not

---

1. Brief for American Immigration Lawyers Ass'n as Amicus Curiae Supporting Appellees at 12-13, *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086 (9th Cir. 2015) (Nos. 11-17948, 12-17765).

at least seek such evidence through discovery? Does WM not have any other way of accessing records about himself? And why FOIA? Is FOIA not meant to enable journalists and watchdog groups to uncover controversial, secret government actions and hold elected leaders accountable? How does WM's FOIA request advance those goals?

The answers to these questions are surprising. In immigration proceedings and many other administrative contexts, individuals have no mechanism besides FOIA for obtaining their own records, be they immigration files, law enforcement records, medical history, family events, financial affairs, or investigatory materials about their own complaints. FOIA serves as a stopgap measure for these individuals. These requests may be made by the individual or their representative, such as their lawyer. They may, as with WM, substitute for discovery. They may also aid in accessing government benefits or be a necessary step in securing services on the private market. I call these first-person FOIA requests.

These requests are frequently vital to the requester's interests and promote the fairness and accuracy of agency processes. They do not, however, advance Congress's primary goal in enacting FOIA: to promote public democratic oversight of government activities. In fact, FOIA has been overrun with requests that do not serve its imagined purpose. The number of FOIA requests the federal government receives has steadily risen each year, and in each of the last four fiscal years that number exceeded 700,000 requests.<sup>2</sup> In fiscal year (FY) 2016, for the first time, the number spiked to more than three-quarters of a million total requests filed.<sup>3</sup> This level of public engagement with the law is frequently cited as evidence of FOIA's success.<sup>4</sup> Even government officials, while noting concerns about costs and burdens to government agencies, still tout the number of requesters as evidence that "the statute is functioning well."<sup>5</sup>

The sheer volume of FOIA requests alone, however, cannot demonstrate the law's success in accomplishing its oversight mission. In fact, low numbers of news media requesters suggest that FOIA may largely be serving other, unanticipated purposes. In previous work, I documented one significant category of

---

2. *FOIA.gov*, U.S. DEP'T JUST., <http://www.foia.gov> [<http://perma.cc/U7P2-5Y9Z>].

3. *Id.*

4. See, e.g., H.R. REP. NO. 104-795, at 10 (1996); Jennifer Nash & Daniel E. Walters, *Public Engagement and Transparency in Regulation: A Field Guide to Regulatory Excellence*, PENN PROGRAM ON REG. 13 (June 2015), <http://www.law.upenn.edu/live/files/4709-nashwalters-ppr-researchpaper062015.pdf> [<http://perma.cc/QNZ9-YBGZ>].

5. *Hearing on FOIA Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Reform*, 114th Cong. 1 (2015) (statement of Frederick J. Sadler), <http://oversight.house.gov/wp-content/uploads/2015/02/2-27-2015-Gov-Ops-Hearing-on-FOIA-Sadler.pdf> [<http://perma.cc/E5BL-C3WF>].

these other FOIA requesters: commercial requesters.<sup>6</sup> At some agencies, commercial requesters (defined as requesters who use FOIA to further profit-making objectives) make the majority – even the vast majority – of requests. These requests not only further primarily private interests, but also appear to distort FOIA’s operation as a whole. And there is no good reason to use FOIA for these purposes: evidence suggests that the information businesses seek from government agencies often could be better delivered through a targeted affirmative-disclosure model.<sup>7</sup> Under such a model, agencies would analyze their own FOIA logs to identify categories of records that are routinely requested and publish those categories proactively in a searchable, downloadable, indexed database for all to use equally.<sup>8</sup>

This Article reveals another distortion in FOIA’s present-day operations. At many federal agencies, first-person FOIA requesters constitute the overwhelming bulk of requesters. Indeed, their ranks likely outnumber commercial requesters government-wide. On the one hand, the mismatch between FOIA’s design and its actual use undermines its efficacy for democratic accountability. Resources are diverted to these unintended uses, clogging FOIA offices and hindering requesters whose use aligns with Congress’s vision for FOIA. On the other hand, FOIA is often also an inefficient mechanism for agencies to deliver first-person information; in many cases, tailored alternatives would facilitate better governmental administration from the agency’s perspective.

Equally important, however, are the interests of the individuals trying to access their own files, which FOIA often devastatingly fails to serve. In a variety of contexts, FOIA is slower than other obvious ways that agencies could provide first-person information to the public.<sup>9</sup> Late FOIA responses can result in the wrongful denial or delay of important benefits or, as in WM’s case, an inability to effectively defend against enforcement proceedings. Moreover, FOIA essentially requires a collateral proceeding, in which members of the public may have to file an administrative appeal or even a lawsuit to enforce their rights to access records. They may not have the resources to pursue an additional dispute with the agency and thus may never obtain full access. While these individuals may not have formal due-process claims to broader access rights, forcing them to resort to FOIA undermines due-process interests in fair proceedings and accurate

---

6. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016).

7. *Id.* at 1429–33; *see also* Margaret B. Kwoka, *Inside FOIA, Inc.*, 126 YALE L.J. F. 265, 268 (2016).

8. *See* Kwoka, *supra* note 6, at 1431; *see also* Memorandum No. M-13-13 from Sylvia M. Burwell, Dir. Office Mgmt. & Budget, to Heads of Exec. Dep’ts & Agencies (May 9, 2013), <http://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf> [<http://perma.cc/NM5U-FBJJ>] (calling on agencies to proactively release data in useable formats).

9. *See infra* Part IV.

agency determinations. Reforms should promote alternative avenues for would-be first-person requesters – both to better meet their needs and to refocus FOIA operations on serving requesters who are central to the statute’s purpose.

This Article provides the first in-depth account of first-person FOIA requesting based on original datasets of FOIA logs from select federal agencies and on interviews with lawyers who use FOIA in their representation of clients before those agencies. The Article proceeds in four Parts. Part I sets out a framework for understanding FOIA’s central purpose of facilitating government oversight and democratic accountability and suggests that, despite its current shortcomings, FOIA still plays an indispensable role in that regard. It further documents the balance FOIA strikes between government transparency and the protection of personal privacy. Personal privacy is the basis for withholding requested records in two different places in the law, and Congress envisioned that most records concerning particular individuals would fall outside of FOIA’s primary purpose. Part I further defines what constitutes a first-person FOIA request for the purposes of this study and describes how agencies are required to process such requests under the law.

Part II reports the analysis of original datasets from seven federal agencies within several different departments, each demonstrating a significant number of first-person FOIA requests. At some agencies, the tens or hundreds of thousands of first-person FOIA requests make up nearly all of the requests received. This Part not only analyzes the nature of the requests and identities of the requesters, but also documents the motivations behind the requests. To do so, this Part relies on interviews with lawyers who represent clients in matters before these agencies and who make frequent first-person requests on behalf of their clients. This Part shows the variety of ways in which first-person requests serve vital private interests. It further demonstrates that these requests primarily advance these private interests, not the public’s interest in transparency.

Part III details the mismatch between FOIA and private individuals’ needs for first-person information held by the government. On the side of the private individuals, FOIA often serves a due-process-like function, providing information that can help private individuals make their case before an administrative body and improving the fairness and accuracy of the proceedings. But because FOIA was not designed for that purpose, it serves that function poorly, requiring a collateral proceeding that often delays or denies full access to the relevant information. For the agencies, FOIA may well be an inefficient delivery mechanism, requiring far more steps than would obvious alternatives. And for FOIA, the flood of first-person requests is likely to overwhelm agencies’ capacity to process all requests, potentially crowding out those uses that go to the heart of its imagined purpose.

Part IV proposes an alternative vision. It proposes context-specific alternative avenues for first-person access to government information, which agencies could adopt to reduce the need to rely on an ill-fitting FOIA mechanism. These alternatives – which include administrative discovery rights, online portals, and burden-shifting in certain administrative processes – would both improve public access to first-person government-held information and result in a smaller, more targeted, and more effective FOIA practice that meaningfully checks government secrecy and promotes democratic accountability.

## I. COMPETING TRANSPARENCY GOALS

At first blush, it may seem odd to examine the practice of using FOIA to obtain what is, at base, private information. After all, private information does not appear to aid the public’s oversight of government activities. Moreover, private information is typically the sort of information we want the government to protect, not disclose. Nonetheless, FOIA serves as a stopgap measure that allows individuals to obtain information about themselves – and the need is so great that hundreds of thousands of such requests are filed every year. This Part documents this tension and analyzes the intersection of FOIA and the Privacy Act, which regulates individuals’ rights to their own information.

### A. FOIA and Democracy

Congress envisioned FOIA as a means for opening up the executive branch to public scrutiny so as to facilitate democratic oversight and accountability.<sup>10</sup> The idea was simple: the public, Congress itself, and most notably the press would be able to obtain government records to find out what the government is doing.<sup>11</sup> Government activities could then be publicized, debated, and acted upon. Any wrongdoing would come to light, and the public could voice its opinions in the streets, in agencies’ public processes, in the courts, and at the ballot box. It has reached axiomatic status that members of the public need to know “what their government is up to”<sup>12</sup> in order to hold government accountable.

---

10. See H.R. REP. NO. 89-1497, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429; S. REP. NO. 88-1219, at 8 (1964).

11. See Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 451 (2012).

12. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).



Recent examples demonstrate that FOIA has served as a powerful tool in accomplishing precisely this goal. Not long ago, after a two-year legal battle in federal court, the *New York Times* obtained through FOIA summaries of interviews of Umar Farouk Abdulmutallab, the so-called “underwear bomber” who failed in his attempt to bring down a U.S. airplane on Christmas in 2009.<sup>13</sup> The documents show that Mr. Abdulmutallab was cooperative and forthcoming in his account of his conversion to jihadism and that he provided compelling testimony about Anwar al-Awlaki’s direct involvement in plotting this and other attacks. After the Obama Administration killed al-Awlaki, an American citizen, in a targeted drone strike in Afghanistan in 2011, public debate ensued around not only the constitutionality of targeted killings of Americans abroad, but also of the strength of the evidence against al-Awlaki. As the *New York Times* described, the documents it obtained under FOIA “suggest that the Obama [A]dministration had ample firsthand testimony” about al-Awlaki’s involvement, and “play into the debate President Trump has renewed about whether torture is ever necessary to get useful information from terrorism suspects.”<sup>14</sup>

The news media avail themselves of FOIA for lower-profile government oversight as well. *ProPublica*, for example, requested U.S. Department of Health and Human Services (HHS) letters closing investigations of privacy-law violations by healthcare providers. Its examination of the letters revealed that the federal government rarely fines medical providers for violating their patients’ privacy. Instead, it almost always resolves complaints by sending a letter “reminding providers of their legal obligations, advising them on how to fix purported problems, and, sometimes, prodding them to make voluntary changes.”<sup>15</sup> *ProPublica* also demonstrated that such letters end investigations, even for repeat offenders.<sup>16</sup> This reporting suggests that federal enforcement of privacy laws is insufficient, especially given that “[f]or patients whose medical information is exposed, the effects can be far-reaching.”<sup>17</sup>

---

13. Scott Shane, *Inside Al Qaeda’s Plot To Blow Up an American Airliner*, N.Y. TIMES (Feb. 22, 2017), <http://www.nytimes.com/2017/02/22/us/politics/anwar-awlaki-underwear-bomber-abdulmutallab.html> [<http://perma.cc/SYT8-JNCF>].

14. *Id.*

15. Charles Ornstein, *The Secret Documents That Detail How Patients’ Privacy Is Breached*, PROPUBLICA (July 21, 2016, 8:00 AM), <http://www.propublica.org/article/the-secret-documents-that-detail-how-patients-privacy-is-breached> [<http://perma.cc/Y3LE-247J>].

16. Charles Ornstein & Annie Waldman, *Few Consequences for Health Privacy Law’s Repeat Offenders*, PROPUBLICA (Dec. 29, 2015, 5:00 AM), <http://www.propublica.org/article/few-consequences-for-health-privacy-law-repeat-offenders> [<http://perma.cc/MW7M-GZAX>].

17. *Id.*

In fact, information obtained under FOIA routinely forms the basis of news stories. One nonprofit has documented hundreds of news stories made possible by FOIA requests<sup>18</sup> and has started a *Without FOIA* Tumblr, which shows the law's impact by highlighting "FOIA-Powered" stories.<sup>19</sup> A research institute that has comprehensively studied FOIA litigation concluded that the subject matter of lawsuits brought under the statute "reads very much like the news headlines" because news media use FOIA to "probe further behind the headlines, and to create new headlines of their own."<sup>20</sup> These compiled examples illustrate current uses of FOIA that are precisely aligned with Congress's principal goal in enacting the statute: "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."<sup>21</sup>

Nonetheless, the news media have well-documented and legitimate complaints about FOIA, centering on serious delays and obstructionism that often make filing a FOIA request a futile exercise. Their experiences range from frustrating to absurd, such as a reporter who won an appeal from a denial months after the story could have made the most difference, or a reporter whose request for emails from two officials was designated as "complex" because it concerned records not housed within the FOIA office itself.<sup>22</sup> Perhaps unsurprisingly, then, the best estimates consistently place news media requesters as responsible for only single-digit percentages of FOIA requests.<sup>23</sup> In the most recent and most

---

18. *The "FOIA Files,"* SUNSHINE IN GOV'T INITIATIVE, <http://sunshineingovernment.org/wordpress/the-foia-files> [<http://perma.cc/2DZX-4WRE>].

19. *Without FOIA*, TUMBLR, <http://withoutfoia.tumblr.com> [<http://perma.cc/R3BC-RZ2M>].

20. *FOIA Lawsuits Mirror News Headlines in FY 2016*, FOIA PROJECT (Dec. 9, 2016), <http://foiaproject.org/2016/12/09/foia-lawsuits-make-news-headlines-in-fy-2016> [<http://perma.cc/FY5U-UZ43>].

21. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted). For a fuller accounting of the legislative history of FOIA and the heavy involvement of the news media in advocating for, supporting, and drafting the legislation that would become FOIA, see Fenster, *supra* note 11, at 451-66.

22. Cezary Podkul et al., *Delayed, Denied, Dismissed: Failure on the FOIA Front*, PROPUBLICA (July 21, 2016, 8:01 AM), <http://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front> [<http://perma.cc/7C5Z-4MZ4>].

23. See U.S. GOV'T ACCOUNTING OFFICE., LCD-78-120, GOVERNMENT FIELD OFFICES SHOULD BETTER IMPLEMENT THE FREEDOM OF INFORMATION ACT 25, 36 (1978) (reporting only 21 of 2,515 requests reviewed in a 1978 study as coming from the news media); Kwoka, *supra* note 6, at 1381 (reporting news media requesters in 2013 at the Securities and Exchange Commission (SEC) (23% or 3%, depending on how one requester is categorized); the Food and Drug Administration (FDA) (12%); the Defense Logistics Agency (1%), the Federal Trade Commission (FTC) (14%), and the National Institutes of Health (5%)); Michael Doyle, *The Freedom of Information Act in Theory and Practice* (May 2001) (unpublished M.A. thesis, Johns

comprehensive attempt to document who uses FOIA, a dataset of 229,000 requests at eighty-five agencies placed news media use of FOIA at just 7.6% of all requests.<sup>24</sup>

To be sure, FOIA is hardly the only, or even the dominant, transparency mechanism. Professor David Pozen recently catalogued a set of information-forcing mechanisms that could theoretically serve as alternatives to FOIA.<sup>25</sup> These include requiring affirmative disclosure of certain categories of records, conditioning legal effect on prior publication, protecting whistleblowers and leakers, and congressional monitoring.<sup>26</sup> These mechanisms at various times have served as powerful tools for uncovering secret and controversial governmental programs (think Edward Snowden and the National Security Agency (NSA)<sup>27</sup>) and governmental wrongdoing (think congressional investigations of Trump campaign ties to Russia<sup>28</sup>).

FOIA is nevertheless unique in at least two key respects. First, the agenda is set by government outsiders. That is, under FOIA, the requester specifies the subject and target of inquiry.<sup>29</sup> Alternative mechanisms all involve government agencies, individual government employees, or Congress deciding what the

---

Hopkins University) (on file with the author) (reporting, for example, that in 1999, 1.2% of Environmental Protection Agency (EPA) requests came from the news media and 2.3% from public interest groups; 3.8% of FDA requests came from the news media and 1.7% from public interest groups; 2.8% of Department of Agriculture (USDA) requests came from the news media; 5% of HHS requests came from the news media); *Frequent Filers: Businesses Make FOIA Their Business*, SOC'Y OF PROF. JOURNALISTS (July 3, 2006), <http://www.spj.org/rrr.asp?ref=31&t=foia> [<http://perma.cc/22ZK-LGHA>] (reporting 6% of requests from news media in a study of 6,439 FOIA requests to eleven Cabinet-level departments and six large agencies in 2005).

24. Max Galka, *Who Uses FOIA? - An Analysis of 229,000 Requests to 85 Government Agencies*, FOIA MAPPER (Mar. 13, 2017), <http://foiamapper.com/who-uses-foia> [<http://perma.cc/BFW2-3KFU>].
25. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1107-11 (2017).
26. *Id.*
27. See Sarah Childress, *How the NSA Spying Programs Have Changed Since Snowden*, FRONTLINE (Feb. 9, 2015), <http://www.pbs.org/wgbh/frontline/article/how-the-nsa-spying-programs-have-changed-since-snowden> [<http://perma.cc/3FEL-EPLF>] (detailing the reactions of the American people and policymakers to revelations by Edward Snowden regarding the extent of NSA surveillance programs).
28. See Amber Phillips, *Is the Big Story 'Unmasking' or Trump-Russia Connections? Congress Can't Decide*, WASH. POST (June 3, 2017), <http://www.washingtonpost.com/news/the-fix/wp/2017/06/01/should-congress-focus-its-russia-investigation-on-unmasking-and-what-does-that-even-mean> [<http://perma.cc/C27D-SBGW>] (describing Congress's reactions to leaked information regarding White House ties to Russia).
29. 5 U.S.C. § 552(a)(3)(A) (2012).

public should be concerned about. When the public, and in particular the press, decides what it wants, it can react to the topics and concerns of the day and circumvent insider concerns about embarrassment or institutional legitimacy. Ex ante requirements, such as affirmative disclosure, can never predict with complete accuracy the records that will become most important for public oversight. And reactions by insiders, such as would-be whistleblowers and leakers, depend on those individuals' idiosyncratic views about what the public should know, as well as the risks they are personally willing to incur to provide that information.

Second, FOIA allows for judicial review to conclusively determine the public's rights to information. Other than affirmative disclosure, which has the limits in scope described above, no other information-forcing mechanism is reviewed by the independent third branch and thus no other mechanism provides an enforceable right to information. To be sure, the judiciary has not fully held up its end of the bargain in FOIA cases; I have explored aspects of this problem in other work.<sup>30</sup> But it remains true that without a remedy in court, transparency is somewhere between an aspiration and luck of the draw. Accordingly, FOIA's objective and its practical design remain vital components of a democratic society. Reforms should thus seek to better align FOIA in practice with its theoretical underpinnings.

### *B. Protecting Privacy*

Despite a relatively specific goal of promoting democratic accountability, largely through the press, FOIA's central provision requires that an agency, "upon any request for records . . . shall make the records promptly available to any person."<sup>31</sup> There is no limitation on this right of access based on the purpose of the request, the value of the information to democratic oversight, or the identity of the requester. In fact, in an implicit acknowledgement that FOIA requests do not uniformly serve the goal of political accountability, the statute provides for special treatment of some categories of requesters when considering what fees an agency may charge. For commercial requesters, a full range of fees can be charged to recoup the agency's actual costs in searching for records, reviewing them for possible redactions or withholdings, and duplicating them for the requester.<sup>32</sup> For news media and research requesters, only the cost of duplication

---

30. See generally Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013) (documenting the ways in which the judiciary defers to the government's position in FOIA cases despite the de novo standard of review enumerated in the statute).

31. 5 U.S.C. § 552(a)(3)(A) (2012).

32. *Id.* § 552(a)(4)(A)(ii)(I).

can be assessed.<sup>33</sup> And for all other requesters (that is, the average individual filing a FOIA request), agencies can levy search and duplication charges, but cannot recoup the personnel time for reviewing the records.<sup>34</sup> In fact, on top of the preferential fee category for the news media, FOIA provides that agencies should waive all otherwise applicable fees “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”<sup>35</sup> Thus, the statute gives some favorable status to requests that go to FOIA’s core purpose, but does not exclude other uses.

Still, the statute balances FOIA’s principal goal of promoting democratic accountability against the various competing concerns about important interests that could be harmed by disclosure: interests such as national security, law enforcement investigations, trade secrets, and, most relevant here, personal privacy. The statute accommodates these interests by providing exemptions to FOIA’s mandatory disclosure provision.<sup>36</sup> In these exemptions, personal privacy appears twice. Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,”<sup>37</sup> and Exemption 7(C) covers “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to

---

33. *Id.* § 552(a)(4)(A)(ii)(II). This fee category applies to requests that are not “for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” *Id.*

34. *Id.* § 552(a)(4)(A)(ii)(III).

35. *Id.* § 552(a)(4)(A)(iii). To qualify for a waiver, a request must also be “not primarily in the commercial interest of the requester.” *Id.*

36. FOIA’s nine exemptions cover records that are (1) classified; (2) contain certain internal personnel rules or practices of an agency; (3) exempted by another statute; (4) trade secrets or confidential commercial or financial information; (5) privileged; (6) personnel or similar files the release of which would constitute a “clearly unwarranted invasion of personal privacy”; (7) certain law enforcement records; (8) related to bank examinations, operations, or supervision; and (9) geological data concerning wells. *Id.* § 552(b).

37. *Id.* § 552(b)(6); see *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 602 & n.4 (1982) (holding although Exemption 6 specifies only “personnel and medical files or similar files” as a threshold matter, “similar files” include any record that “applies to a particular individual”).

constitute an unwarranted invasion of personal privacy.”<sup>38</sup> These two privacy exemptions have been, for years, “the most cited FOIA exemptions,” together accounting for “[o]ver half of the exemptions cited by agencies.”<sup>39</sup>

Interestingly, the privacy exemptions are the only two exemptions in FOIA that expressly balance the protected interest against the “basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’”<sup>40</sup> Because only “clearly unwarranted” (Exemption 6) and “unwarranted” (Exemption 7(C)) invasions of privacy will justify withholding, what is a “warranted” invasion of personal privacy depends on whether and to what degree disclosure will advance the public’s interest in agency oversight. To that end, if the records shed light on “an agency’s performance of its statutory duties,” the public interest in disclosure may overcome a privacy interest.<sup>41</sup>

Nonetheless, the legislative history of the privacy exemptions suggests that Congress considered most information about private citizens to fall outside FOIA’s main purpose, because it does not generally promote public understanding of government activities. A House Report at the time of FOIA’s original enactment explains:

The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public.<sup>42</sup>

### *C. The Process of First-Person Requesting*

First-person FOIA requests are those requests for which the identity of the requester and the subject matter of the request are the same. That is to say, when John Doe requests from a particular agency all records about John Doe, that constitutes a first-person FOIA request. The Department of Justice (DOJ) refers to

---

38. 5 U.S.C. § 552(b)(7)(C).

39. *Summary of Annual FOIA Reports for Fiscal Year 2015*, U.S. DEP’T JUST. 7 (2016), [http://www.justice.gov/oip/reports/fy\\_2015\\_annual\\_foia\\_report\\_summary/download](http://www.justice.gov/oip/reports/fy_2015_annual_foia_report_summary/download) [<http://perma.cc/X36J-F9UW>] [hereinafter *FOIA Summary 2015*].

40. *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (quoting *Rose v. Dep’t of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

41. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).

42. H.R. REP. NO. 89-1497, pt. IV, at 8 (1966) (statement of Rep. Dawson).

these requests as first-party requests and, as early as 1980, began issuing guidance to agencies specifically about the handling of first-person requests.<sup>43</sup> One thing about first-person FOIA requests is perfectly clear: the privacy exemptions described above protect individuals' interests, not the government's interests, and thus they cannot be invoked against a person requesting information about himself or herself.

The rights and obligations surrounding first-person requests, however, implicate not only FOIA's requirements, but also the requirements of the Privacy Act of 1974. The Privacy Act has four basic objectives: (1) to restrict disclosure of private information; (2) to grant individuals a right of access to their own records; (3) to allow individuals an opportunity to amend agency records about themselves that are inaccurate; and (4) to require agencies to comply with "fair information practices" regarding collection and maintenance of private information.<sup>44</sup> To that end, the Privacy Act provides that, upon request, a person shall have a right to inspect and to have a copy made of records maintained about himself.<sup>45</sup> It also provides that agencies shall not disclose such records "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," subject to enumerated exemptions.<sup>46</sup> Because one of the exceptions listed is any disclosure required by FOIA,<sup>47</sup> the "net effect of the interaction between the two statutes is that where the FOIA requires disclosure, the Privacy Act will not stand in its way, but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency."<sup>48</sup>

- 
43. See Office of Info. Policy, *FOIA Counselor: Privacy Act/FOIA, Conflict or Harmony?*, U.S. DEP'T JUST. (Jan. 1, 1980), <http://www.justice.gov/oip/blog/foia-update-foia-counselor-privacy-actfoia-conflict-or-harmony> [<http://perma.cc/5G39-Z763>]. The earliest reference that this research uncovered to "first-party" requests was found in a 1978 law-review article and references the Privacy Act requesting process. See Peter F. Flaherty, *The Freedom of Information Act and the Privacy Act of 1974: A Study in Conflicts*, 5 NOTRE DAME J. LEGIS. 26, 30-34 (1978). Courts have subsequently adopted the "first-party" language with respect to Privacy Act requests as well. See *Shapiro v. Drug Enf't Admin.*, 721 F.2d 215, 220 (7th Cir. 1983) (quoting language of § 552a(b)(2) to distinguish first-party access to FOIA exemptions from third-party requests); see also *Greentree v. U.S. Customs Serv.*, 674 F.2d 74 (D.C. Cir. 1982) (quoting language of § 552a to indicate first-party requests are not exempt from authorized agencies).
44. Office of Privacy & Civil Liberties, *Overview of the Privacy Act of 1974*, U.S. DEP'T JUST. 4 (2015), <http://www.justice.gov/opcl/file/793026/download> [<http://perma.cc/VVF3-TEN5>].
45. 5 U.S.C. § 552a(d)(1) (2012).
46. *Id.* § 552a(b).
47. *Id.* § 552a(b)(2).
48. *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1189 (11th Cir. 2007).

One key distinction between the applicability of the Privacy Act and FOIA is that the Privacy Act covers only records maintained by the agency within a “system of records,” which has a narrow statutory definition encompassing only those systems in which information is retrieved by an individual’s name or personal identifier.<sup>49</sup> Thus, an agency may have records about an individual that are not part of a system of records for the purposes of the Privacy Act, but that would be available pursuant to a FOIA request. Nonetheless, because of the large overlap, agencies are directed to process requests under both statutes regardless of how the request is designated.<sup>50</sup>

Typically, an agency requires a first-person FOIA requester to file a certification of the requester’s identity to ensure that records are only released to the person whom they concern.<sup>51</sup> Privacy waivers can be filed with a request so that records about an individual can be released to a third party.<sup>52</sup> For example, if a lawyer files a request for information about her client, although the lawyer may formally be the requester, she can file a privacy waiver signed by the client and obtain the client’s information. These types of requests operate as first-person requests, even though the requester is a third party, because the requester is representing the individual’s interests.

In the case of a first-person request (either individually or through a representative with a privacy waiver), the privacy exemptions to FOIA cannot be invoked to withhold records or portions thereof, but other FOIA exemptions may still apply to some or all of the requested records. For example, records may be subject to exemptions based on certain law enforcement purposes, on the deliberative process privilege which protects the agency’s decision-making process, on classification, or on the grounds that they contain confidential commercial information.<sup>53</sup> Just like any other FOIA requester, if information is withheld in response to a first-person FOIA request, certain remedies are available. A requester can administratively appeal a denial to a higher agency authority and, if

---

49. 5 U.S.C. §§ 552a(a)(5), 552a(a)(8)(B)(i).

50. *Overview of the Privacy Act of 1974*, *supra* note 44, at 119.

51. See, e.g., *Certification of Identity Form DOJ-361*, U.S. DEP’T JUST. <http://www.fbi.gov/file-repository/u-s-department-of-justice-form-361-certification-of-identity.pdf/view> [<http://perma.cc/6K9F-4WA2>].

52. See, e.g., U.S. Immigration & Customs Enf’t, *Privacy Waiver Authorizing Disclosure to a Third Party*, U.S. DEP’T HOMELAND SECURITY, <http://www.ice.gov/doclib/news/library/forms/pdf/60-001.pdf> [<http://perma.cc/2H97-SQK9>].

53. See 5 U.S.C. § 552b (2012).



unsuccessful there, can bring a lawsuit in federal court for a judge to determine the question of withholding de novo.<sup>54</sup>

## II. FIRST-PERSON USE OF FOIA

The government holds myriad records that pertain to specific individuals.<sup>55</sup> Individuals' financial information is held not only at the Internal Revenue Service (IRS) (taxes), but also, for example, at the Department of Education (federally backed student loans) and at the Department of Housing and Urban Development (federally backed mortgages). Our medical information is held not only at the Centers for Medicaid and Medicare Services (government-provided benefits), but also at the Veterans Health Administration (VHA) (VA hospital treatment) and at the Social Security Administration (SSA) (disability benefits). And the government holds a vast array of data about our suspected or confirmed unlawful activity across a spectrum of law enforcement agencies, such as the Federal Bureau of Investigation (FBI) (federal crimes), the Drug Enforcement Agency (drug crimes), the IRS (civil and criminal tax violations), and the agencies within the Department of Homeland Security—Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS)—that enforce civil immigration laws.<sup>56</sup>

Agencies maintain a list of all requests they receive under FOIA, known as a FOIA log. These logs typically have a variety of fields of information, such as the date of the request, the requester's name, the subject matter of the request, and how the request was resolved.<sup>57</sup> Unfortunately, there are no standard requirements for what the logs contain and no generalized requirement that agencies publish their FOIA logs on their website.<sup>58</sup> Though many agencies do publish

---

54. *Id.* §§ 552(a)(4)(B), (a)(6)(A)(i). If an agency does not respond to a request or an appeal within the twenty business day deadline, the requester is deemed to have exhausted his administrative remedies and can proceed directly to court. *Id.* § 552(a)(6)(C)(i).

55. See Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 439-42 (2008).

56. All of the agencies listed in this paragraph receive significant numbers of FOIA requests. *FOIA Summary 2015*, *supra* note 39, at 2-3, 6.

57. For a relatively wide-ranging public collection of agency FOIA logs, the largest single source of these records compiled to date, see *Browse by Government Agency*, FOIA MAPPER, <http://foiamapper.com/agencies> [<http://perma.cc/2M5Q-Y43E>]. See also *What Is a FOIA Log?*, FOIA MAPPER (Mar. 29, 2016), <http://foiamapper.com/what-is-a-foia-log> [<http://perma.cc/WC9N-NXNX>] (defining FOIA logs).

58. See 5 U.S.C. § 552(a)(2)(D). Only one of FOIA's affirmative disclosure obligations even arguably applies to FOIA logs of some agencies, and that is the frequently requested records provision which would require agencies that receive frequent requests for their logs and release

some version of their logs, those logs often have only a few fields of basic information, rather than the complete set of data the agency maintains.<sup>59</sup>

Accordingly, to better understand first-person FOIA requesting practices, I conducted this research in two phases. First, I submitted my own FOIA requests for FOIA logs for FY 2015 to a targeted group of agencies. From the 364 units within departments and separate agencies (collectively referred to as agencies hereinafter) that submit an annual FOIA report to DOJ, I identified fifty-five agencies that received a sufficient volume of requests (more than one thousand in FY 2015) to make their FOIA operations more than de minimis work of the agency.<sup>60</sup> From that list, I identified twenty-two agencies that appeared likely to receive a substantial number of first-person FOIA requests based on the nature of the agency's work.<sup>61</sup> I submitted a request to each of these agencies for their FOIA logs containing certain fields, including the request identification number, the name of the requester, the organizational affiliation of the requester, the date of the request, whether a privacy waiver was submitted with the request, the result of each FOIA request (granted, granted in part, denied, or otherwise disposed), the basis for denial if applicable, and the date of resolution. Out of the twenty-two agencies, only six produced FOIA logs with the critical fields necessary for inclusion in this study; another three agencies have been included based on their publicly available logs.<sup>62</sup>

---

them pursuant to those requests to also make those logs available on their website. *Id.* § 552(a)(2)(E).

59. See, e.g., *FOIA Log 2014*, U.S. DEP'T STATE, [http://foia.state.gov/searchapp/DOCUMENTS/July2014/F-2015-02530/DOC\\_oCo5732671/Co5732671.pdf](http://foia.state.gov/searchapp/DOCUMENTS/July2014/F-2015-02530/DOC_oCo5732671/Co5732671.pdf) [<http://perma.cc/KXY9-Y2FM>] (showing only the reference number, requester name, subject, date received, and status of case); *FOIA Log First Quarter 2017*, INTERNAL REVENUE SERV., [http://www.irs.gov/pub/irs-utl/fy\\_2017\\_q1\\_foia\\_log-20170502.pdf](http://www.irs.gov/pub/irs-utl/fy_2017_q1_foia_log-20170502.pdf) [<http://perma.cc/RJ4A-29QS>] (showing only reference number, track, subject matter, status, received date, closed date, and information denied).
60. *Annual FOIA Reports—FY 2015*, U.S. DEP'T JUST. (June 8, 2016), <http://www.justice.gov/oip/annual-foia-reports-fy-2015> [<http://perma.cc/9YVL-MHH3>].
61. Although this determination was necessarily subjective, I read the websites of each agency carefully to ensure I understood the primary work of the agency and included the agency if its work involved significant law enforcement or benefits provision, or if it appeared that the agency would collect personal information that individuals might want. I excluded agencies that did not appear to conduct work that would provide large systems of personal information, such as the Fish and Wildlife Service at the Department of the Interior and the Animal and Plant Health Inspection Service at the USDA. I also excluded agencies whose logs I had previously obtained in the course of other research and for which I therefore knew that first-person requesting was not prevalent, such as the EPA and the SEC, where commercial requesters dominate.
62. Of the twenty-two agencies to which I submitted requests, six agencies produced sufficiently detailed logs in a format susceptible to analysis and the findings therefore are reported in this

Second, I analyzed the logs for frequent FOIA requesters by organizational affiliation, which allowed me to further document first-person FOIA requests made by representatives of the target of the request. For example, when a lawyer represents a client and uses a FOIA request in the course of that representation to obtain information about the client, I count that as a first-person request. I then contacted many such representatives and interviewed them to understand how and why using FOIA helped them in their representation of clients.<sup>63</sup> These interviewees have been given pseudonyms in this Article to protect their confidentiality and the confidentiality of their law firms.

The agencies discussed in this Part represent those for which I was able to obtain sufficiently useful data – either in response to my FOIA requests or from the agencies’ websites – and which document significant amounts of first-person FOIA requesting. My case studies in no way represent a statistical sampling of requests government-wide, but they do offer deep insight into FOIA practice at these agencies. Moreover, because some of the agencies studied are among the highest-volume recipients of FOIA requests annually, their experiences are in and of themselves significant drivers of FOIA requests government-wide.

---

Article. Those agencies are: HHS – Administration for Children and Families; Department of Labor (DOL) – Occupational Safety and Health Administration; DOL – Wage and Hour Division; Department of Veteran Affairs (VA) – Veterans Health Administration; Equal Employment Opportunity Commission; and the Social Security Administration. Another seven agencies produced some version of their FOIA logs, but the data were not sufficiently complete to be included in this study, either because of missing fields or extensive redactions. Those agencies are: Department of Defense (DOD) – United States Army; DOD – United States Navy; Department of Interior – Bureau of Indian Affairs; DOL – Mine Safety and Health Administration; Department of Treasury – Internal Revenue Service; National Archives and Records Administration; Office of Personnel Management. Three more agencies responded to my request by referring me to the version of their FOIA logs they publish on their websites. I included two of those agencies in this study: Department of Homeland Security (DHS) – Customs and Border Protection and DHS – Immigration and Customs Enforcement. The third, DOJ – United States Marshals Service, was insufficiently complete to be included. The remaining six agencies did not produce any records in a timely enough fashion to be included in the study, though two – designated with asterisks – have since produced some incomplete records. These agencies are: DOD – United States Air Force; DHS – United States Citizenship and Immigration Services; DOJ – Federal Bureau of Investigations\*; DOL – Employment and Training Administration; VA – Veterans Benefits Administration; and National Labor Relations Board\*. Despite USCIS’s failure to respond, it is included in this study based on the version of the logs published on the agency’s website.

63. I conducted semi-structured interviews pursuant to a protocol approved by the University of Denver Institutional Review Board. Interviewees all provided informed consent, and were guaranteed confidentiality as to their identities and the identities of the law firms or consulting firms at which they work. Accordingly, interviews are cited using pseudonyms. All transcripts of interviews are on file with the author.

One obstacle to understanding first-person FOIA requests is privacy considerations. DOJ has issued guidance to agencies that “FOIA requesters, *except when they are making first-party requests*, do not ordinarily expect that their names will be kept private; therefore, release of their names would not cause even the minimal invasion of privacy necessary to trigger the balancing test.”<sup>64</sup> Accordingly, agencies routinely redact the names of first-person FOIA requesters when made in their own names, and they redact the names of the target of the request when the request concerns information about an individual.<sup>65</sup> However, these redactions also provide an opportunity: one way to identify likely first-person requests is to look for requests for which the subject matter is redacted to protect personal privacy, meaning that the request was for records about an individual person. While there may be minor exceptions, if a request concerns an individual, it will almost always be made by that person or their representative because no one else would be able to access those records for privacy reasons. Thus, a privacy redaction in the subject matter field of a FOIA log will nearly always represent a first-person FOIA request.

To set the stage briefly, it is useful to understand how concentrated FOIA requests are at certain agencies. In the latest reported year, FY 2016, the federal government received a total of 788,769 requests.<sup>66</sup> There were 115 departments and agencies that separately reported on FOIA activities to DOJ.<sup>67</sup> Among those, DHS received 325,780 requests, or 41% of the federal government’s total requests.<sup>68</sup> After DHS, the next highest-volume agency is DOJ at 73,103 requests, or 9% of the federal government’s total.<sup>69</sup> Indeed, there are only nine agencies that receive more than 20,000 requests, eighteen that receive between 1,000 and 20,000 requests, twenty-six that receive between 100 and 957, and sixty-two agencies that receive less than 100 requests per year.<sup>70</sup> Thus, FOIA requests are largely concentrated in a relatively small number of agencies.

The findings below represent a detailed account of first-person requests at a group of federal agencies with relatively high volumes of FOIA requests. These accounts demonstrate one common thread: first-person requesting almost never

---

64. *FOIA Guide, 2004 Edition: Exemption 6*, U.S. DEP’T JUST. (May 2004), <http://www.justice.gov/oip/foia-guide-2004-edition-exemption-6> [<http://perma.cc/HU7M-EX4J>].

65. Despite DOJ’s guidance on this issue, some agencies withhold the entire field of requester names.

66. *Summary of Annual FOIA Reports for Fiscal Year 2016*, U.S. DEP’T JUST. 2 (2016) [hereinafter *FOIA Summary 2016*], [http://www.justice.gov/oip/reports/fy\\_2016\\_annual\\_report\\_summary.pdf/download](http://www.justice.gov/oip/reports/fy_2016_annual_report_summary.pdf/download) [<http://perma.cc/HH98-L4WT>].

67. *Id.* at 17.

68. *Id.* at 2.

69. *Id.* at 2-3.

70. *Id.* at 3.

advances FOIA's statutory purpose of promoting the public's oversight of government activities or transparency to the public writ large. First-person requesting largely serves private, not public, interests. That is not to say that no first-person requests can ever serve oversight goals, but such a function is not the norm. Time and time again, first-person FOIA is poorly aligned with FOIA's core mission.

A. *Department of Homeland Security*

DHS now consistently receives the largest volume of requests in the federal government by a staggering margin: in FY 2016, it received 325,780 requests, or 41% of the federal government's total 788,769 requests.<sup>71</sup> In FY 2015, the year used in this study, DHS received 281,138 of the government's 713,168 requests, or 39%.<sup>72</sup> Within DHS, in FY 2015, a full 95% of requests were received in just three components, namely the three principal immigration enforcement agencies: USCIS, ICE, and CBP.<sup>73</sup> To varying degrees, the FOIA logs published for each of these three components shed light on the nature of these hundreds of thousands of FOIA requests.<sup>74</sup>

One thing regarding these three agencies is clear: nearly all requests received are first-person requests. To begin, DHS's own characterization of the dominant force behind its volume of FOIA requests is that they are first-person in nature. In its FY 2015 annual report to DOJ concerning its FOIA activities, DHS explained that these components "receive the bulk of FOIA requests from individuals seeking immigration related records."<sup>75</sup> DHS's FOIA website lists top topics

---

71. *Id.* at 2.

72. *2015 Freedom of Information Act Report to the Attorney General of the United States*, U.S. DEP'T HOMELAND SECURITY 5 (Feb. 2016) [hereinafter *DHS 2015 FOIA Report*], <http://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-report-fy-2015.pdf> [<http://perma.cc/5RQE-XK4C>]; *FOIA Summary 2016*, *supra* note 66, at 2.

73. *DHS 2015 FOIA Report*, *supra* note 72, at 6. USCIS received 150,897, ICE received 101,578, and CBP received 77,746, for a total of 330,221 out of DHS's total 348,878 that year. *Id.*

74. I filed FOIA requests with each of these three agencies on April 16, 2016. USCIS acknowledged the request but never responded. ICE responded by directing me to the publicly available version of their logs on their website. I filed an appeal on June 23, 2016, to which no response was ever received. CBP responded by directing me to the publicly available version of their logs on their website. I filed an appeal on June 18, 2016, to which no response was ever received. Thus, as of this writing, none of the three provided data beyond what is publicly available on the website, and thus, however imperfect and incomplete, I resorted to reliance on the public data.

75. *DHS 2015 FOIA Report*, *supra* note 72, at ii. To this category of the three agencies discussed here, DHS added a fourth, the Office of Biometric Identity Management (OBIM), contained

for FOIA requests, the first of which is for “Aliens and Asylees” to request “[d]ocuments in the Alien File,” which is the file kept by USCIS on each noncitizen.<sup>76</sup>

The FOIA logs confirm this account. For example, at ICE, out of 100,762 requests, 98,928 have a redaction for personal privacy in the subject matter field, indicating that a full 98% of requests are first-person in nature.<sup>77</sup> Indeed, 88,611 requests have the subject matter listed identically: “records pertaining to (b)(6)(b)(7)(C)” (the two privacy exemptions).<sup>78</sup> Many other formulations of the same statement also appear hundreds of times each, such as “all records pertaining to (b)(6)(b)(7)(C)” or “records relating to (b)(6)(b)(7)(C).”<sup>79</sup> Similarly, at USCIS, out of 165,233 total requests, 163,050 or 99%, have subject matters withheld pursuant to the privacy exemptions.<sup>80</sup>

Interestingly, while CBP is the only agency to use the seemingly transparency-promoting FOIAonline system in which all requests and responses are publicly logged,<sup>81</sup> 52,402 out of 53,917 requests available in the system for FY 2015 have subject matters “under Agency review.” Nonetheless, the presumptive reason that the subject matters of these requests are under review is for a possible (b)(6) or (b)(7)(C) privacy redaction, pegging the percentage of first-person requests at CBP at 97%. Also revealing is that lawyers and law firms make up the bulk of requesters at these agencies, and numerous law firms are making over 100 requests per year. At ICE, only 28,684 requests (or 28%) were made by individuals with no organizational affiliation.<sup>82</sup> By contrast, an astonishing sixty-

---

within the National Protection and Programs Directorate (NPPD). *Id.* The NPPD received 13,781 requests in FY 2015. *Id.* at 5.

76. *Top FOIA Requests by Topic*, U.S. DEP’T HOMELAND SECURITY (June 13, 2017), <http://www.dhs.gov/top-foia-requests-topic> [<http://perma.cc/3ZND-S3PW>].
77. *FOIA Library*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 3, 2017) [hereinafter *ICE Data*], <http://www.ice.gov/foia/library> [<http://perma.cc/UT5A-2XG9>] (follow “ICE FOIA Logs” tab). The dataset compiled included the months between October 2014 and September 2015, representing FY 2015.
78. *Id.*
79. *Id.*
80. *Electronic Reading Room*, U.S. CITIZENSHIP & IMMIGR. SERVS. [hereinafter *USCIS Data*], <http://www.uscis.gov/about-us/electronic-reading-room> [<http://perma.cc/L9GW-2PK4>] (filter by “FOIA Logs”). The dataset compiled includes the months between October 2014 and September 2015, representing FY 2015.
81. FOIAONLINE [hereinafter *CBP Data*], <http://foiaonline.regulations.gov> [<http://perma.cc/67E8-ANA8>] (follow “Search” tab, then select “U.S. Customs and Border Protection”). A dataset was compiled covering all available information from October 1, 2014 to September 30, 2015, representing FY 2015.
82. *ICE Data*, *supra* note 77. Despite not coming from law firms, the nature of the individual requests appears to be the same. Of those requests without an organizational affiliation, 27,632

seven organizations are responsible for more than 100 requests each. Every one of those organizations appears to be a law firm. The single largest requester, Rudolph, Baker & Associates, rings in at 871 requests in FY 2015. The next most frequent requesters are the Law Office of Manuel E. Solis (691), the Law Office of Robert B. Jobe (545), and Immigration Group, LLC (428).<sup>83</sup> Similarly, at CBP, though a far smaller percentage of organizational affiliations are available in the data, ten law firms made more than 100 requests in FY 2015, including these top five: Rudolph, Baker & Associates (607), Law Office of Manuel E. Solis (406), Coghlan Law Office (359), Immigration Group, LLC (328), and Law Office of Stephen R. Espinoza (174).<sup>84</sup> At USCIS, the logs do not contain an organizational affiliation of the requester, but the same names appear in their top requester list: James Rudolph (presumably of Rudolph, Baker & Associates) again tops the list at 1,167 requests, Manuel Solis is second with 713 requests, followed by Robert Jobe at 586, and Stephen Coghlan at 518.<sup>85</sup> And again, like at ICE, seventy-two requesters at USCIS are responsible for more than 100 requests each in FY 2015.<sup>86</sup>

These top requesters are all relatively small law firms focusing on immigration representation. For example, Rudolph, Baker & Associates appears to have only two partners and three office locations, and bills itself in its banner as “Immigration Lawyers.” The firm lists its first three specialties as “Deportation Defense,” “Work and Family Visas,” and “Citizenship & Naturalization.”<sup>87</sup> The Law Office of Robert B. Jobe lists twelve total attorneys at one office location, and all of its practice areas focus on immigration.<sup>88</sup> The Law Office of Manuel E. Solis boasts seven locations (Chicago, Los Angeles, and five cities in Texas), but still lists only eight attorneys and describes itself primarily as “helping clients achieve the best possible result in all kinds of immigration matters.”<sup>89</sup> Immigration

---

have a (b)(6) designation in the subject matter of the request, indicating that 96% of these requests are first-person. *Id.*

83. *Id.*

84. *CBP Data*, *supra* note 81.

85. *USCIS Data*, *supra* note 80.

86. *Id.*

87. *Our Services*, RUDOLPH, BAKER & ASSOCIATES (2017), <http://www.rudolphbaker.com> [<http://perma.cc/2NVV-EUTK>].

88. *LAW OFF. ROBERT B. JOBE*, <http://jobelaw.com> [<http://perma.cc/G5Q2-2GK9>].

89. *About the Firm*, MANUEL SOLIS L. FIRM, <http://www.manuelsolis.com/about> [<http://perma.cc/8TDK-JNEW>].

Group, LLC,<sup>90</sup> Bay Area Immigration,<sup>91</sup> and the Law Offices of Stephen R. Espinoza<sup>92</sup> are all similar.

To understand why noncitizens and their lawyers are requesting records about themselves from USCIS, ICE, and CBP, I interviewed a group of immigration attorneys. Four attorneys agreed to participate after I contacted several top-requesting law firms. Another three attorneys that I interviewed are full time practitioners holding themselves out as immigration-law specialists, who submit a more moderate number of requests. Among the interviewees were partners (including founding partners), senior attorneys, and associates. This approach provided a range of perspectives on how immigration lawyers use FOIA to advance their clients' interests.

The government has a variety of information on noncitizens, most of which is contained in what is described as the "Alien File" or "A-File."<sup>93</sup> This file can include prior visa applications, registration with the government, notes from in-person interviews the client may have given with immigration officials, records documenting a prior ICE apprehension, and data on entries into and exits from the country.<sup>94</sup> Uniformly, the lawyers with whom I spoke used FOIA to request their clients' A-Files or all records about their clients; they sometimes also requested records about clients' family members.<sup>95</sup> This account corroborates the indications from the data that first-person requesting drives FOIA use at these agencies.

The lawyers with whom I spoke identified several categories of immigration work for which FOIA is an essential tool, removal defense first among them. Professor Geoffrey Heeren has documented the utility of access to the A-File in

---

90. IMMIGR. L. GROUP, LLC, <http://www.immigration-group.com/services.html> [<http://perma.cc/27DL-H833>].

91. BAY AREA IMMIGR., <http://www.bay-area-immigration.com> [<http://perma.cc/TAM5-KGTV>]. This firm is also referred to as "Coughlan Law Office."

92. LAW OFFS. STEVEN R. ESPINOZA, <http://srelaw.com> [<http://perma.cc/9BNM-YSUA>].

93. U.S. Citizenship & Immigration Servs., *A-Files Numbered Below 8 Million*, DEP'T HOMELAND SECURITY (Feb. 9, 2016), <http://www.uscis.gov/history-and-genealogy/genealogy/files-numbered-below-8-million> [<http://perma.cc/XF4C-2QEV>].

94. Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1604-07 (2014).

95. Telephone Interview with Peggy Brewer, Att'y, Law Firm 3 (May 19, 2017); Telephone Interview with Robert Blackshear, Att'y, Law Firm 2 (Apr. 19, 2017); Telephone Interview with Russell Flores, Att'y, Law Firm 1 (Apr. 14, 2017); Telephone Interview with Gloria Glen, Att'y, Law Firm 1 (May 1, 2017); Telephone Interview with Elizabeth Hilton, Att'y, Law Firm 1 (May 2, 2017).



representing clients facing possible removal (also known as deportation).<sup>96</sup> A client's prior statements, for example, can help a lawyer prepare the client to testify and for cross examination that may occur based on any inconsistencies.<sup>97</sup> Some lawyers who represent clients in removal proceedings, which occur in an administrative immigration court, said they file a FOIA request as to each and every client.<sup>98</sup> One lawyer explained that the charging documents are sometimes wrong and that the individual immigration officers often "don't understand the nuances of individual state statutes" under which a noncitizen might have a previous conviction; thus the records received under FOIA are crucial to defending against removal.<sup>99</sup> One lawyer even said that immigration judges typically ask him if he filed a FOIA request.<sup>100</sup>

Clients in removal proceedings are not the only ones for whom lawyers avail themselves of FOIA. Other clients may seek some sort of affirmative benefit, such as adjustment of status (typically a person already present changing from a nonimmigrant visa — such as a student visa — to an immigrant visa),<sup>101</sup> an affirmative claim for asylum,<sup>102</sup> or a petition for an immigrant visa from abroad.<sup>103</sup> In these instances, FOIA requests can serve two different purposes.

First, FOIA requests can provide details about the applicant's immigration history to ensure consistency in the new application and confirm that there are no unexpected problems in their immigration history that would prevent the client from obtaining the benefit sought. For example, one interviewee explained that if he is representing a client who is seeking to change a visa status from one non-immigrant visa to another, "you want to make sure your declarations are correct [in that application] and in subsequent visa applications[, s]o you need a record of what was submitted . . . ."<sup>104</sup> That same attorney explained that his law firm has a policy not to "submit an [application to become a naturalized citizen] without the FBI and FOIA results unless the client signs a waiver" because

---

96. Heeren, *supra* note 94, at 1622-24.

97. *Id.* at 1622.

98. Telephone Interview with Robert Blackshear, *supra* note 95; Telephone Interview with Russell Flores, *supra* note 95; Telephone Interview with Gloria Glen, *supra* note 95.

99. Telephone Interview with Robert Blackshear, *supra* note 95.

100. Telephone Interview with Russell Flores, *supra* note 95.

101. Immigration and Nationality Act § 245(a), 8 U.S.C. § 1255(a) (2012).

102. *Id.* § 208, 8 U.S.C. § 1158.

103. *Id.* §§ 203, 204, 8 U.S.C. §§ 1153, 1154.

104. Telephone Interview with Robert Blackshear, *supra* note 95.

of the risk that there is some undisclosed or overlooked immigration or criminal history that would jeopardize the application.<sup>105</sup>

Another example occurs when someone who is undocumented and who entered the country clandestinely (rather than, say, on a tourist visa) wants to apply for permanent residence (i.e., a green card). In this situation, the individual is required to leave the United States before submitting that application.<sup>106</sup> Multiple interviewees cited the crucial role of FOIA. One said directly that “before they leave the U.S., we prioritize FOIA.”<sup>107</sup> Another explained that many clients seeking such a visa have had a prior apprehension at or near the border in which they were taken back across, but may not be sure what legal process was used; for example, it could have been either a voluntary return<sup>108</sup> or an expedited removal.<sup>109</sup> If the prior encounter resulted in an expedited removal, they would be ineligible to seek a green card even from outside the United States,<sup>110</sup> whereas a client with a prior voluntary return would still be eligible. Because of the severity of the consequences—leaving the country and potentially not having a way to return to the United States—“it’s very important for me to decide whether to put them in the limelight of immigration . . . .”<sup>111</sup>

Second, FOIA requests can be used to obtain documentation the client needs to submit with the application but which is no longer in their possession. For example, someone who is applying for a green card from within the United States must produce proof of lawful entry with their application, but they may no longer possess the documentation.<sup>112</sup> Lawyers will use FOIA to get the record from the agency to include in the application.<sup>113</sup> Similarly, a previous family-based petition that was filed years ago may be needed to support an application

105. *Id.*

106. Immigration and Nationality Act §§ 203, 204, 8 U.S.C. §§ 1153, 1154 (2012); *see also id.* § 245, 8 U.S.C. § 1255 (allowing persons to apply from within the United States if admitted at entry).

107. Telephone Interview with Peggy Brewer, *supra* note 95.

108. *Voluntary Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/tools/glossary/voluntary-departure> [<http://perma.cc/S8HR-NXSZ>] (describing a less formal process that is not enumerated in the INA).

109. Immigration and Nationality Act § 235(b)(1), 8 U.S.C. § 1225(b).

110. *See id.* § 212(a)(9)(C)(i), 8 U.S.C. § 1182(a)(9)(C)(i) (barring permanently from obtaining admission to the United States, including on a green card, anyone who has previously been removed after being unlawfully present for more than one year).

111. Telephone Interview with Russell Flores, *supra* note 95.

112. *Official Site for Travelers Visiting the United States: Apply for or Retrieve Form I-94, Request Travel History and Check Travel Compliance*, U.S. CUSTOMS & BORDER PROTECTION (2017), <http://i94.cbp.dhs.gov/I94> [<http://perma.cc/79F4-NXWF>].

113. Telephone Interview with Peggy Brewer, *supra* note 95.

to adjust status,<sup>114</sup> and FOIA may be the only way to obtain the original petition.<sup>115</sup>

While the public data do not allow for identification of all news media requesters, and as such, no aggregate number can be reported, the number is necessarily small given the volume of first-person requests. A survey of major media outlets that cover immigration matters corroborates as much. For example, in the ICE FOIA logs for FY 2015, the *New York Times*, the *Nation*, the *Washington Post*, the *Marshall Project* (an investigative journalism organization focused on criminal justice), *Fusion* (associated with Univision), *BuzzFeed*, and *ProPublica* each made precisely one request. The *Boston Globe* and *LA Times* each made two. And the *Houston Chronicle* hit five requests that year, with *Associated Press* ringing in at eight. These numbers, of course, are minuscule in comparison to the more than 100,000 requests ICE received during that time period.

### B. Department of Veterans Affairs

While the volumes of requests at all other agencies pale in comparison with DHS, the Department of Veterans Affairs (VA) is still a large FOIA agency, receiving the fifth highest volume of requests in the federal government. In FY 2015, those requests totaled 29,716, of which 86% were attributed to the Veterans Health Administration (VHA). That makes the VHA itself a comparatively large FOIA office, and it is the only component of the VA from which I obtained detailed FOIA data.

VHA's FOIA logs for FY 2015 reflect 26,395 requests.<sup>116</sup> The VHA separately designates requests that are processed both under FOIA and under the Privacy Act, which by their nature must be first-person requests. These jointly designated requests account for 20,325 of the VHA's total that year, amounting to 77% of VHA requests.<sup>117</sup> Moreover, because all Privacy Act requests are first-person

---

114. *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/i-130> [<http://perma.cc/D723-XDRN>].

115. Telephone Interview with Peggy Brewer, *supra* note 95; Telephone Interview with John Rivera, Att'y, Law Firm 5 (June 1, 2017) (explaining that "a lot of people lose paperwork over the course of the twenty years that they're waiting for their petition to become current").

116. See Veterans Health Admin., Dep't of Veterans Affairs, Response to Apr. 14, 2016 FOIA Request by Margaret B. Kwoka (on file with author) [hereinafter VHA Data]. The Department of Veterans Affairs' annual FOIA report for 2015 shows a similar number, reporting 25,525 requests received by VHA. DEP'T OF VETERANS AFFAIRS, FREEDOM OF INFORMATION ACT (FOIA) REPORT FOR FISCAL YEAR 2015 at 7, <http://www.oprm.va.gov/docs/foia/VA-FY15-FOIA-Report.pdf> [<http://perma.cc/PZX9-SJAM>].

117. *Id.*

FOIA requests but not all first-person FOIA requests are Privacy Act requests, depending on the Privacy Act's threshold applicability, first-person requests may well represent significantly more than 77% of VHA's overall requests.

VHA's FOIA logs also reveal the nature of these requests. VHA uses nine categories to designate the subject matter of each request, two of which dominate the request landscape: Deceased Veterans' Medical Records account for 11,000 requests in FY 2015 and Veterans' Medical Records account for 6,753 requests.<sup>118</sup> Another twenty-two requests had one of those categories listed along with other categories of records.<sup>119</sup> Together, medical records thus are the subject of 17,775 out of 26,395 requests, or 67% of all VHA requests.<sup>120</sup> And the vast majority of requests for medical records were made under both FOIA and the Privacy Act, thus demonstrating the volume of first-person requests that are driven by the need to access medical records.<sup>121</sup>

The identity of the requesters at VHA is also telling. To begin, records retrieval services are prevalent. For example, EMSI made 627 requests in FY 2015, making it the highest-volume requester that year.<sup>122</sup> EMSI is a medical record retrieval service that, among other things, provides records to insurance companies for underwriting.<sup>123</sup> Source Access, Inc.,<sup>124</sup> which made 158 requests that year, and PDC Retrievals,<sup>125</sup> which made 107 requests, among others, appear to do the same. While I believe it is accurate to categorize these requesters as representatives making first-person requests on behalf of an individual (here, an individual seeking an insurance policy who has authorized this request to be made on their behalf), this group of requesters could also be considered an information reseller. Information resellers are a type of commercial requester I

---

118. *Id.* The full list of VHA categories of requests are: 1. Veterans' Claims Files; 2. Deceased Veterans' Claims Files; 3. Civil War Pension Records; 4. Deceased Veterans' Medical Records; 5. Contracts or Business Information; 6. Personnel-Related Records; 7. Police/Uniform Offense Reports (UORs); 8. Veterans' Medical Records; and 9. All Others. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* Specifically, 10,209 of the 11,000 requests for deceased veterans' medical records were made under both statutes, and 6,406 of the 6,753 requests for veterans' medical records were made under both statutes.

122. *Id.*

123. See *EMSI Medical Record Retrieval*, EMSI INS., <http://www.emsinet.com/EMSI-Insurance/Life-Health-Carriers/Medical-Information-Retrieval> [<http://perma.cc/7XQX-QGA4>].

124. See *Company Overview of Source Access, Inc.*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=38728706> [<http://perma.cc/24YF-4TEM>].

125. See *APS Retrievals and Summaries*, PARAMEDS.COM, <http://www.parameds.com/aps.html> [<http://perma.cc/B5HB-RVMY>].

have previously documented, and consist of businesses that request records under FOIA and resell them at a profit.<sup>126</sup> Despite the crossover issues that these businesses present, they do represent a significant source of first-person requesting as well.

Lawyers also play a significant role here. Binder and Binder, which made 139 requests in FY 2015,<sup>127</sup> is a law firm specializing in Social Security Disability practice.<sup>128</sup> The Archuleta Law Firm, which specializes in military medical malpractice,<sup>129</sup> made thirty-four requests.<sup>130</sup> Similarly, the Madeksho Law Firm filed twenty-two requests,<sup>131</sup> and specializes in toxic exposure, drug injury, and defective product injury claims.<sup>132</sup> Though one lawyer described other, non-first-person uses of FOIA that regularly arise in his practice,<sup>133</sup> the majority of requests from these sorts of firms focus on medical records,<sup>134</sup> presumably concerning their clients.

Government benefits other than Social Security Disability are also at issue in some requests. For example, 367 requests concerned a DD-214,<sup>135</sup> or Report of Separation, which is an official record that proves the conditions of a service-member's discharge.<sup>136</sup> These requests typically come from a funeral home, because a discharge characterization other than dishonorable is required for the family to access military funeral benefits.<sup>137</sup>

One notable category of requesters is not making first-party requests: coroners, medical examiners, and law enforcement. Coroners and medical examiners

---

126. Kwoka, *supra* note 6.

127. VHA Data, *supra* note 116.

128. See BINDER AND BINDER, <http://www.binderandbinder.com> [<http://perma.cc/A9JZ-M6ZE>].

129. See ARCHULETA L. FIRM, <http://www.militarymedicalmalpractice.net> [<http://perma.cc/JTQ8-4RKZ>].

130. VHA Data, *supra* note 116.

131. *Id.*

132. See MADEKSHO L. FIRM, <http://madeksholaw.com> [<http://perma.cc/GZR7-ATRK>].

133. Telephone Interview with Evan Hamer, Att'y, Law Firm 9 (Aug. 1, 2017).

134. VHA Data, *supra* note 116.

135. *Id.* (tallying all requests with a subject matter containing "DD214", "DD 214", or "DD-214").

136. *DD Form 214, Discharge Papers and Separation Documents*, NAT'L ARCHIVES (Aug. 15, 2016), <http://www.archives.gov/st-louis/military-personnel/dd-214.html> [<http://perma.cc/JK2W-228G>].

137. *DD214 and Taps, a Veteran's Final Funeral Benefit, a Tribute from a Grateful Nation*, DD214 (2007), <http://www.dd214.us/funeral.html> [<http://perma.cc/HQ6T-857J>].

alone accounted for 1,667 requests in FY 2015.<sup>138</sup> These three categories of requesters can receive deceased individuals' health records without a privacy waiver or violating HIPAA, and thus their requests are not made on anyone's behalf.<sup>139</sup>

Other than medical records, the next largest category of requested records at the VHA is for Police/Uniform Offense Reports (UORs), numbering 3,787 in FY 2015.<sup>140</sup> Of those requests, 2,465 or 65% were made under both FOIA and the Privacy Act, connoting first-person requests.<sup>141</sup> These reports are typically made by VA police officers authorized to conduct investigations into alleged violations of law that occur on VA property.<sup>142</sup> Entries in the logs are illustrative, as they indicate requests for records such as "a copy of the VA police report on the April 23, 2015 incident involving VA employee [redacted] and me,"<sup>143</sup> or "a copy of the statement I made to the VA Police,"<sup>144</sup> or "UOR Report of September 10, 2015 involving requester."<sup>145</sup>

By contrast, the news media requests are comparatively few, numbering a total of 352 requests, or 1.3% of all requests submitted to the VHA that year.<sup>146</sup> The top news media requester was *Federal Practitioner*, a peer-reviewed clinical journal for health care professionals of the VA, Department of Defense, and Public Health Service,<sup>147</sup> which made twenty-eight requests.<sup>148</sup> Second was *Armo Press*, a news outlet that provides benefits strategies to veterans,<sup>149</sup> which made twenty-one requests.<sup>150</sup> A series of local media outlets follow: *Kare 11* (a Twin

138. VHA Data, *supra* note 116 (counting the number of requesters with names that include "ex-ami" or "coron").

139. *Health Information of Deceased Individuals*, U.S. DEP'T HEALTH & HUM. SERVS. (Sept. 19, 2013), <http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/health-information-of-deceased-individuals> [<http://perma.cc/6AAF-7CHE>].

140. VHA Data, *supra* note 116.

141. *Id.*

142. U.S. DEP'T OF VETERANS AFFAIRS, VA HANDBOOK 0730/3, at 8 (2014).

143. VHA Data, *supra* note 116, at 15-13382-FP.

144. *Id.* at 15-16355-FP.

145. *Id.* at 15-21905-FP.

146. *Id.*

147. *Federal Practitioner*, FRONTLINE MED. COMMS., <http://www.frontlinemedcom.com/brands-posts/federal-practitioner> [<http://perma.cc/U7PT-BBDM>].

148. VHA Data, *supra* note 116.

149. Armo Press, LLC, DISABLEDVETERANS.ORG (2017), <http://www.disabledveterans.org> [<http://perma.cc/GXC3-Q7YF>].

150. VHA Data, *supra* note 116.

Cities station) at fifteen requests, the *Tampa Tribune* at twelve requests, the *Pittsburgh Post-Gazette* at eleven requests, and *WSLS Channel 10* (a Roanoke, VA station) at eleven requests.<sup>151</sup> All other news media requesters submitted fewer than ten requests, including some major national media outlets such as *NBC* (nine requests), the *Wall Street Journal* (five requests), and *Bloomberg* (two requests).<sup>152</sup>

### C. Social Security Administration

The SSA's FOIA logs reflect 22,365 requests in FY 2015,<sup>153</sup> ranking it as one of the largest FOIA operations. The SSA's FOIA website identifies the most frequently requested records as records concerning an individual. Specifically, these requests include requests for copies of original applications for a social security card (Form SS-5), requests for computer extracts of social security number applications (also known as Numident), and requests for information about the death of an individual with or without the social security number provided.<sup>154</sup>

The FOIA logs make clear these records do in fact drive the majority of requests. In FY 2015, 11,080 requests were for the SS-5 form for an original social security card application, constituting nearly 50% of requests.<sup>155</sup> Numident requests, or requests for the extracted data from those SS-5 forms, comprised another 4,448 requests, or just shy of 20%.<sup>156</sup> Moreover, the SS-5 and Numident records are made available to any requester at all so long as the subject matter of the request is deceased, thereby obviating any privacy concerns. To ensure this

---

151. *Id.*

152. *Id.*

153. Soc. Sec. Admin., Responses to April 15, 2016 FOIA Request and March 17, 2017 Administrative Appeal by Margaret B. Kwoka (on file with author) [hereinafter SSA Data]. The SSA's Annual 2015 FOIA report cites the number of requests received as 23,208. *Freedom of Information Act Annual Report Fiscal Year 2015*, SOC. SECURITY ADMIN. tbl. V.A (2015), <http://www.ssa.gov/foia/html/SSA%20FY%2015%20Final.pdf> [<http://perma.cc/2NQX-Y5X7>].

154. *FOIA Request Methods and Fees*, SOC. SECURITY ADMIN., <http://www.ssa.gov/foia/request.html> [<http://perma.cc/Ry6W-GR99>].

155. The SS-5 requests are broken into two categories in the SSA FOIA logs: 9,308 requests are designated as concerning SS-5 forms, and another 1,772 are labeled as requests for SS-5 forms without providing a social security number. This designation is made because SSA charges different fees depending on the provision of a social security number (SSN) with the request, presumably because it increases the difficulty of locating the records without it. SSA Data, *supra* note 153.

156. Again, Numident requests are broken into two categories, those requests with and without a SSN provided. Those with an SSN comprise 3,272 and those without 1,176. *Id.*

is true, SSA requires proof of death or that the birth date of the individual be more than 120 years ago.<sup>157</sup>

The SSA's logs, unfortunately, do not capture all the data that would help shed light on the nature of the requesters. In particular, the SSA logs do not have a field for the organizational affiliation of the requester, thereby making it impossible to find, for example, law firms that are frequently making requests to the SSA.<sup>158</sup> Among the individual requesters who are named, there is much less concentration than at other agencies. Only one requester made more than one hundred requests, and only two more made between fifty and one hundred.<sup>159</sup> I could not conclusively determine the identities of the requesters because, although their names were provided, the names were too common to be certain of identification.<sup>160</sup>

Nonetheless, other indicia provide evidence of the motivating force behind these requests, which appears to be genealogy research. The SSA's own website answers the frequently asked question "Can you provide a copy of a deceased person's Social Security number application for genealogical research?" and describes the process for obtaining an SS-5.<sup>161</sup> Moreover, SS-5 and Numident information is prominently featured as a research tool on major genealogy sites.<sup>162</sup> Indeed, many commercial genealogy research websites refer customers to the SSA website to make a request directly for the SS-5. For example, Ancestry.com specifies that the SS-5 "contains some additional information not found in the computer extracts in our database (such as the individual's employer when he or she first applied for a Social Security number)," and thus directs customers to

---

157. *FOIA Request Methods and Fees*, *supra* note 154.

158. SSA Data, *supra* note 153.

159. *Id.* Rosalie Farina made 122 requests, Launcelot Brown made 96 requests, and Steven Adair made 60 requests. *Id.*

160. *Id.*

161. *Can You Provide a Copy of a Deceased Person's Social Security Number Application for Genealogical Research?*, SOC. SECURITY ADMIN. (Aug. 24, 2017), <http://faq.ssa.gov/link/portal/34011/34019/Article/3850/Can-you-provide-a-copy-of-a-deceased-person-s-Social-Security-number-application-for-genealogical-research> [<http://perma.cc/YL5T-9XKY>].

162. *See, e.g.*, Judy G. Russell, *Ordering the SS-5*, LEGAL GENEALOGIST (May 31, 2013), <http://www.legalgenealogist.com/2013/05/31/ordering-the-ss-5> [<http://perma.cc/B3ZD-LKDD>] ("Getting a copy of this form is almost always worth it. The information on the SS-5 form was usually provided by the applicant, and so is often the best source of information about what the applicant knew about his or her own birth and parentage."); *U.S. Social Security Records for Genealogists*, FAMILYSEARCH (Dec. 25, 2015, 1:54 AM), [http://familysearch.org/wiki/en/U.S.\\_Social\\_Security\\_Records\\_for\\_Genealogists](http://familysearch.org/wiki/en/U.S._Social_Security_Records_for_Genealogists) [<http://perma.cc/L9EX-KPAP>] ("The SS-5 application is important to a family history researcher because of the detail it provides.").



the SSA's website by providing a link to the online request form for an SS-5.<sup>163</sup> Genealogy.com similarly instructs users to “[b]e sure to request the SS-5 form,” and links to the SSA's website.<sup>164</sup>

Another subset of FOIA users at the SSA appear to be even more closely related to traditional first-person requesters. The SSA's FOIA website details how to make a request “[i]f you need your records regarding your claim for Social Security benefits.”<sup>165</sup> From an informal conversation with a FOIA officer at SSA, it appears FOIA is typically used when a minor child needs their deceased parent's social security number (SSN) or other personal information to apply for benefits. SSA reports that every month, approximately 4.3 million children receive benefits derivative of their parents' eligibility, and that parents' social security information is necessary to apply for those benefits.<sup>166</sup> But this group of requests is harder to quantify because there is no separate designation for them on the FOIA logs. Given that seventy percent of requests are for SS-5 or Numident records, however, any other group of requests necessarily is smaller.

To be sure, the vast majority of SSA requests are not first-person requesters in the literal sense. After all, someone engaged in genealogy research is requesting records about a third party, namely, a relative or ancestor. From a more generalized point of view, however, these requests share many of the properties of first-person requests. Individuals seeking ancestral records *are* looking for information about themselves—that is, information about their own families. Requests for deceased parents' information likewise involve information about the requester's own eligibility for benefits, even if technically about another person. Like first-person requests, these records are of interest precisely because they concern the requester, and they largely serve private interests, not the public's interest in understanding government operations.

---

163. *U.S. Social Security Applications and Claims Index, 1936-2007*, ANCESTRY (2015), <http://search.ancestry.com/search/db.aspx?dbid=60901> [<http://perma.cc/8K68-6PZ7>].

164. Rhonda R. McClure, *SSDI SS-5 Applications*, GENEALOGY.COM (Jan. 11, 2001), <http://www.genealogy.com/articles/over/heardo11101.html> [<http://perma.cc/5EXS-W6WF>].

165. *Guide to FOIA at SSA*, SOC. SECURITY ADMIN., <http://www.ssa.gov/foia> [<http://perma.cc/KB9S-W373>].

166. *Benefits for Children*, SOC. SECURITY ADMIN. (July 2017), <http://www.ssa.gov/pubs/EN-05-10085.pdf> [<http://perma.cc/UX38-QW9T>]; *Form SSA-4: Information You Need To Apply for Child's Benefits*, SOC. SECURITY ADMIN., <http://www.ssa.gov/forms/ssa-4.html> [<http://perma.cc/93HT-ZADS>].

*D. Equal Employment Opportunity Commission*

The Equal Employment Opportunity Commission's (EEOC) FOIA logs show a total of 17,025 requests in FY 2015.<sup>167</sup> That number has held relatively steady over recent years.<sup>168</sup> As the agency described in its annual report, “[t]he majority of fiscal year 2015 FOIA requests received by the Commission were for materials contained in the Commission’s investigative case files that involved charges of discrimination”<sup>169</sup> filed under Title VII of the Civil Rights Act,<sup>170</sup> the Age Discrimination in Employment Act,<sup>171</sup> the Americans with Disabilities Act,<sup>172</sup> the Equal Pay Act,<sup>173</sup> and the Genetic Information Nondiscrimination Act.<sup>174</sup>

In fact, the EEOC’s FOIA logs make clear that even the agency’s characterization vastly understates the proportion of requests for this category of records. The EEOC designates a request for discrimination charge materials with the subject “Charge File.” In the 2015 logs, 16,264 out of 17,025 requests for were for a charge file, amounting to more than 95% of the EEOC’s total requests that year.<sup>175</sup>

To understand why individuals would request these records, it is necessary to have a basic understanding of the EEOC process. Before an employee can bring a suit under one of these discrimination laws (with the sole exception of the Equal Pay Act), the employee must first file a charge of discrimination with

---

<sup>167.</sup> Equal Emp’t Opportunity Comm’n, Responses to Apr. 14, 2016 FOIA Request and Nov. 15, 2016 Administrative Appeal by Margaret B. Kwoka [hereinafter EEOC Data] (on file with author). The FY 2015 EEOC Annual FOIA Report’s number is not too far off, citing 17,863 requests received. EQUAL EMP’T OPPORTUNITY COMM’N, FISCAL YEAR 2015 REPORT OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON ITS ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT (FOIA), 5 U.S.C. § 552 [hereinafter EEOC 2015 REPORT], <http://www.eeoc.gov/eeoc/foia/reports/annrep2015.cfm> [<http://perma.cc/UL9M-2CKD>].

<sup>168.</sup> EEOC Data, *supra* note 167.

<sup>169.</sup> EEOC 2015 REPORT, *supra* note 167.

<sup>170.</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2012).

<sup>171.</sup> 29 U.S.C. §§ 621-634 (2012).

<sup>172.</sup> 42 U.S.C. §§ 12101-12213 (2012).

<sup>173.</sup> 29 U.S.C. § 206(d) (2012).

<sup>174.</sup> 42 U.S.C. § 2000ff to 2000ff-11(2012).

<sup>175.</sup> EEOC Data, *supra* note 167.

the EEOC.<sup>176</sup> The EEOC may first attempt mediation, but if mediation is unsuccessful, a full EEOC investigation is undertaken.<sup>177</sup> If an investigator finds no violation of law, a Notice of Right to Sue is issued to the employee who then may bring a lawsuit in federal court.<sup>178</sup> If the investigator concludes there was a violation, then the EEOC first attempts settlement and, if unsuccessful, may consult with DOJ about whether to file a lawsuit.<sup>179</sup> If the agency decides not to file a lawsuit, it issues a Notice of Right to Sue to the employee who may then do so individually within ninety days.<sup>180</sup>

During the investigation, the agency can require a statement from the charging party and may subpoena witnesses and records to aid its investigation. The investigator may also visit the workplace.<sup>181</sup> Despite the potentially voluminous material gathered during the investigation, when the EEOC concludes its investigation it provides only a summary of the investigation along with the final determination to the charging party.<sup>182</sup> Thus, access to the full set of releasable materials contained in the charge file can only be obtained under FOIA.

For statutory reasons, almost all charge file requests are necessarily going to qualify as first-person requests. Each of the discrimination statutes the EEOC administers prohibits the Agency “from making . . . charges, conciliation materials, case file information and required reports public.”<sup>183</sup> The EEOC explains on its FOIA webpage that “[y]ou can only request a charge file if you are the person who filed the charge . . . , or the employer who was accused of discrimination . . . , and the EEOC has completed its investigation of the charge of employment discrimination.”<sup>184</sup> Moreover, the charging party has only ninety days

---

176. *Filing a Charge of Discrimination*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/charge.cfm> [<http://perma.cc/W2US-PP8M>].

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *The EEOC Claims Handling Process: What Happens Next?*, SIDNEY L. GOLD & ASSOCIATES, P.C., <http://www.discrimlaw.net/practice-areas/philadelphia-proceedings-before-eeoc/claims-handling-process> [<http://perma.cc/AL58-UPLB>].

182. *What You Can Expect After You File a Charge*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employees/process.cfm> [<http://perma.cc/XM7P-4FDM>].

183. EQUAL EMP'T OPPORTUNITY COMM'N, FISCAL YEAR 2016 REPORT OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON ITS ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT (FOIA), 5 U.S.C. § 552, <http://www.eeoc.gov/eeoc/foia/reports/annrep2016.cfm> [<http://perma.cc/BVP9-66EQ>].

184. *Freedom of Information Act*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/foia> [<http://perma.cc/7TQT-LGF7>].

after the conclusion of the EEOC process to request the charge file, and the employer can only do so if the charging party decides to file an employment discrimination lawsuit under federal law.<sup>185</sup> Given that such lawsuits are comparatively rare, the vast majority of these requests will necessarily be made by the charging party (or their attorney) for their own charge file.

The most frequent requesters listed in the EEOC FOIA logs confirm this account: they are uniformly law firms with large employment law practices.<sup>186</sup> Ogletree, Deakins, Nash, Smoak & Stewart, P.C.<sup>187</sup> made 762 requests in FY 2015; Littler Mendelson, P.C.<sup>188</sup> made 661; Jackson & Associates Law Firm<sup>189</sup> made 532; Fisher & Phillips<sup>190</sup> made 240; and Seyfarth Shaw Law Firm<sup>191</sup> made 189.<sup>192</sup> In fact, all of the top requesters appear to be employment law firms, with the only exception being those requesters whose names were withheld based on privacy, who would normally be first-party requesters' names when submitted on their own.<sup>193</sup>

Attorneys who specialize in this field explained that they file a FOIA request in every single case in which a client has gone through the EEOC process and then decides to file a lawsuit.<sup>194</sup> In those requests, the attorneys seek everything

---

185. *Id.*

186. The firms listed in this paragraph, with the exception of the Jackson & Associates Law Firm, appeared in *Vault's Labor and Employment Law* rankings for 2018. See *2018 Best Law Firms for Labor and Employment Law*, VAULT, <http://www.vault.com/company-rankings/law/best-law-firms-in-each-practice-area/?sRankID=22&pg=2> [<http://perma.cc/Z8NL-7DVP>].

187. *Employment Law*, OGLETREE DEAKINS, <http://ogletree.com/practices/employment-law> [<http://perma.cc/TAQ4-6YDK>].

188. *Discrimination and Harassment*, LITTLER MENDELSON, <http://www.littler.com/practice-areas/discrimination-and-harassment> [<http://perma.cc/6D6Q-XQ22>].

189. *Employment Law Experience*, JACKSON & ASSOCIATES LAW FIRM, <http://www.jacksonassociateslawfirm.com/Employment-Law.shtml> [<http://perma.cc/VC62-DXBX>].

190. *Employment Discrimination and Harassment*, FISHER PHILLIPS, <http://www.fisherphillips.com/services-employment-discrimination-and-harassment> [<http://perma.cc/7HTG-UJFU>].

191. *Labor and Employment Law*, SEYFARTH SHAW, <http://www.seyfarth.com/labor-employment> [<http://perma.cc/4MCM-ZAA8>].

192. EEOC Data, *supra* note 167.

193. *Id.*

194. Telephone Interview with Gerald Prada, Att'y, Law Firm 12 (Nov. 15, 2017); Telephone Interview with Stephanie Romo, Att'y, Law Firm 10 (Aug. 3, 2017); Telephone Interview with Carl Sapp, Att'y, Law Firm 13 (Nov. 15, 2017); Telephone Interview with Tony Schaver, Att'y, Law Firm 11 (Sept. 27, 2017).

in the EEOC's charge file as to that particular charge of discrimination.<sup>195</sup> One attorney described how she was most interested in the position statement—comparable to a legal brief—that the employer files in response to the charge.<sup>196</sup> Two attorneys highlighted the particular need for any exhibits attached to that statement, because they sometimes contain documentation of the employer's equal employment policies or documentation regarding the employee's performance or discipline, or in one lawyer's words, "[a]ll the evidence."<sup>197</sup> These are, of course, crucial to the plaintiff's ability to mount a case of discrimination against the employer, and may well help vindicate important interests. They do not, however, serve the purpose of educating the public about government activities.

### *E. Other Agencies*

Smaller FOIA operations show sporadic examples of first-person FOIA requests as well.<sup>198</sup> While first-person uses do not play a dominant role in their FOIA requests, these more limited examples nonetheless demonstrate that first-person FOIA requests are present in various parts of the government, and that similar dynamics are at play in these contexts as in the larger FOIA agencies.

To begin, the Administration for Children and Families (ACF), a division of HHS, received 851 requests in FY 2015.<sup>199</sup> Most of the requesters who submitted five or more requests are law firms, and there is significant overlap between the law firms listed here and those that appear as frequent requesters in the FOIA logs of immigration agencies.<sup>200</sup> Interestingly, in 104 of the 173 requests from individuals who listed no organization affiliation, the subject matter of the request was "Certain Immigration Records."<sup>201</sup> Thus, a significant portion of ACF's FOIA requests concern first-person requests for immigration records.

---

195. Telephone Interview with Gerald Prada, *supra* note 194; Telephone Interview with Stephanie Romo, *supra* note 194; Telephone Interview with Carl Sapp, *supra* note 194; Telephone Interview with Tony Schaver, *supra* note 194.

196. Telephone Interview with Stephanie Romo, *supra* note 194.

197. Telephone Interview with Gerald Prada, *supra* note 194; *accord* Telephone Interview with Stephanie Romo, *supra* note 194.

198. While these agencies process fewer requests, they all process more than one thousand and were included in the original group of twenty-six agencies to whom FOIA requests were directed for this study.

199. Admin. for Children & Families, Response to Apr. 14, 2016 FOIA Request by Margaret B. Kwoka (on file with author) [hereinafter ACF Data].

200. For example, Catholic Charities made thirty-nine requests, The Law Offices of Jonathan M. Kaufman made thirty-eight, and the Law Office of Robert B. Jobe made five. *Id.*

201. *Id.*

ACF's connection to immigration is through the Office of Refugee Resettlement (ORR), a division of ACF that is responsible for caring for unaccompanied immigrant minors found in the United States.<sup>202</sup> ORR houses not only records that may bear on the child's immigration status, but also records about sponsors to whom children have been released, often a relative of the child.<sup>203</sup> At ACF, news media accounted for thirty-six requests that year, or just 4%.<sup>204</sup>

In another example, the Occupational Safety and Health Administration (OSHA), the division of the Department of Labor that receives the highest volume of FOIA requests per year,<sup>205</sup> reports a total of 8,724 requests in its FY 2015 FOIA logs.<sup>206</sup> Again, apparent uses of FOIA at this agency are varied, but first-person uses make an appearance. The top requester, which was responsible for 191 requests, was the Hubble Foundation.<sup>207</sup> It is a nonprofit organization that provides financial assistance to families of workers at heights who died on the job,<sup>208</sup> and makes requests for certain workplace inspections. It seems very likely that the Hubble Foundation is requesting records about incidents involving the workers whose families Hubble is helping, perhaps even on their behalf, placing its use within the range of possible first-person uses of FOIA. The next highest is the Metropolitan Reporting Bureau,<sup>209</sup> at 56 requests, which researches various types of public reports, including OSHA reports, in service to the claims industry.<sup>210</sup> Similarly, Travelers Insurance appears as the third highest volume requester, at 52 requests.<sup>211</sup>

---

202. *Unaccompanied Alien Children*, OFF. REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/orr/programs/ucs> [<http://perma.cc/P7T2-333X>].

203. *Children Entering the United States Unaccompanied: Section 2: Safe and Timely Release from ORR Care*, OFF. REFUGEE RESETTLEMENT (Jan. 30, 2015), <http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2> [<http://perma.cc/N6XA-SFLP>] (“2.2.1 Identification of Qualified Sponsors.”).

204. ACF Data, *supra* note 199.

205. See *U.S. Department of Labor Freedom of Information Act Annual Report for Fiscal Year 2015*, U.S. DEP'T LAB. (2015), [http://www.dol.gov/sol/foia/2015anrpt\\_final.htm](http://www.dol.gov/sol/foia/2015anrpt_final.htm) [<http://perma.cc/78PN-W9TF>].

206. Occupational Safety & Health Admin., Response to Apr. 14, 2016 FOIA Request by Margaret B. Kwoka (on file with author) [hereinafter OSHA Data].

207. *Id.*

208. HUBBLE FOUND., <http://www.hubblefoundation.org> [<http://perma.cc/KUJ6-5KQ3>].

209. OSHA Data, *supra* note 206.

210. See METROPOLITAN REPORTING BUREAU (2017), <http://www.metroreporting.com> [<http://perma.cc/B88U-6C7H>].

211. OSHA Data, *supra* note 206.

The next five requesters are the Service Employees International Union, which made 42 requests, and then four law firms: Ogletree Deakins at 37, Foley & Mansfield at 36, Saltz Mongeluzzi Barrett & Bendesky at 35, and Hawkins Parnell Thackston & Young LLP at 32.<sup>212</sup> At least some of these requesters are most likely making requests for information about individuals they represent. For example, one attorney who makes many of Ogletree Deakins' requests represents employers in OSHA enforcement matters.<sup>213</sup> Of course, these would be first-person requests in the sense that the request would be about that attorney's client, but in another sense they differ from previous first-person requesting examples in that the client is a business entity, not an individual. Nonetheless, to the extent that, for example, a business is being investigated by OSHA, using FOIA as a discovery workaround to obtain information the government has about the client serves the same due-process values in ensuring fairness and accuracy in that agency proceeding. Other attorneys making requests from these law firms appear to engage in private litigation over personal injury claims.<sup>214</sup>

The Wage and Hour Division (WHD), another division in the Department of Labor, similarly evidences significant first-person requesting. It received 2,569 requests in FY 2015.<sup>215</sup> Among those requesters, law firms specializing in employment matters play an outsized role. The top requester, Morgan & Morgan, is a national plaintiffs' firm that lists among its practice areas overtime and wage

---

212. *Id.*

213. *Shontell Powell*, OGLETREE DEAKINS (2017), <http://www.ogletreedeakins.com/people/shontell-powell> [<http://perma.cc/UVS7-WTZA>].

214. *See, e.g., Ana T. Portillo*, HAWKINS PARNELL THACKSTON & YOUNG LLP (2018), <http://www.hptylaw.com/attorneys-ana-portillo.html> [<http://perma.cc/GEX3-2CCT>] (specializing in toxic tort product liability defense and making OSHA requests concerning asbestos); *David J. Langsam*, SALTZ MONGELUZZI BARRETT & BENDESKY PC (2017), <http://www.smbb.com/attorneys/david-langsam> [<http://perma.cc/YL3T-GLLX>] (practicing personal injury law and specializing in construction and worksite accidents); *Jennifer A. Cecil*, FOLEY & MANSFIELD (2017), <http://www.foleymansfield.com/professionals/jcecil> [<http://perma.cc/8RKA-5NAD>] (practicing toxic tort law and making OSHA requests concerning asbestos). Certainly not all requests are necessarily first-person requests. For example, asbestos litigation defense lawyers explained that requests about other worksites and employers where the plaintiff may have been employed can be used to find evidence of alternative sources of asbestos exposure. *See, e.g., Telephone Interview with Theresa Queen, Att'y, Law Firm 7* (July 21, 2017); *Telephone Interview with Laura Davis, Att'y, Law Firm 8* (July 25, 2017). Thus, that set of requests would not be about the lawyer's own client, but about other entities and properties.

215. Dep't of Labor, Wage & Hour Div., Response to Apr. 14, 2016 FOIA Request by Margaret B. Kwoka (on file with author) [hereinafter WHD Data].

and hour law.<sup>216</sup> It made 210 requests that year, each for records concerning a particular employer,<sup>217</sup> presumably to aid in its representation of individuals with claims against those employers. In fact, among the 131 requesters that made three or more requests, 88% of the requests came from law firms.<sup>218</sup>

One plaintiff-side wage and hour lawyer explained that he built his client's case by filing FOIA requests on the client's *employer*, in an attempt to gather information the government had on the employer's wage and hour practices.<sup>219</sup> These types of requests appear to directly concern the lawyer's clients, or at least their workplaces, and thus could constitute a variation of first-person requests. One outlier in the list of top requesters is *BuzzFeed News*, which made 64 requests, most of which concerned WHD investigations of particular employers.<sup>220</sup> News media overall, however, were only responsible for 84 requests, or 7% of WHD's total in FY 2015.<sup>221</sup>

\*\*\*

First-person requests are therefore made at a wide variety of agencies and are particularly prevalent at certain law enforcement and benefits agencies. First-person FOIA can be grouped into four broad categories. First, some requesters are using FOIA as a stand-in for administrative discovery relating to a pending agency proceeding. A second group of requesters is trying to retrieve documents they need to apply for a government benefit. A third group uses FOIA for discovery relating to private benefits: they use it to obtain information useful for private litigation (such as workplace litigation) or for obtaining products on the private market (such as insurance policies). A final group of first-person requesters wants historical files for personal use or personal interest. Understanding the motivations behind first-person requesting is important to uncovering the landscape of FOIA practice.

### III. THE FOIA MISMATCH

First-person FOIA, as the previous Part documented, is prevalent. This Part analyzes the ways in which FOIA is badly mismatched with individuals' needs for first-person government-held information. First-person FOIA often serves

---

<sup>216</sup>. *Overtime Wage & Hour Law*, MORGAN & MORGAN (2018), <http://www.forthethepeople.com/overtime-attorneys> [<http://perma.cc/T2TV-ER2Q>].

<sup>217</sup>. WHD Data, *supra* note 215.

<sup>218</sup>. *Id.*

<sup>219</sup>. Telephone Interview with James Rodriguez, Att'y, Law Firm 6 (July 21, 2017).

<sup>220</sup>. WHD Data, *supra* note 215.

<sup>221</sup>. *Id.*



these needs poorly, makes little administrative sense for the agency, and likely hampers FOIA's overall efficacy in promoting democratic accountability.

*A. FOIA Is Not Due Process*

A significant amount of first-person FOIA requesting serves as a means for private individuals to arm themselves when they are subject to governmental enforcement actions or seek to make their best case for a government benefit. Access to information in these instances, where no other mechanism for discovery exists, can promote fairness and accuracy in the proceedings. Professor David Pozen has aptly explained that these uses of FOIA essentially confer “due process benefits.”<sup>222</sup> But as Professor Pozen noted, “FOIA itself is ill-suited to the task”<sup>223</sup> of affording due-process-like protections. The evidence assembled in this study shows why: FOIA is often too slow to provide the relevant documents in time for the individual to use them to protect their own interests; it may not provide all of the documents to which the individual is entitled under the law; and some individuals have been stripped of their rights under FOIA.

First, information typically only promotes fairness and accuracy insofar as it is timely. The process of requesting records under FOIA is not tied to whatever process the agency uses to determine the underlying matter, and as previously discussed, responses to FOIA requests can take months, sometimes years. Thus, records may not arrive in time to be used in the underlying agency process or may delay—sometimes greatly—a person's access to a government benefit to which they are entitled.<sup>224</sup>

Nowhere is this failure more evident than in immigration proceedings. Every immigration lawyer interviewed said they had been in situations where the response to their FOIA request came too late to help in the client's case.<sup>225</sup> In fact, lawyers representing individuals in removal proceedings who are detained pending the resolution of their case almost never get a response to their FOIA requests

---

222. Pozen, *supra* note 25, at 1137.

223. *Id.* at 1138.

224. *See id.*

225. Telephone Interview with Robert Blackshear, *supra* note 95; Telephone Interview with Peggy Brewer, *supra* note 95; Telephone Interview with Russell Flores, *supra* note 95; Telephone Interview with Gloria Glen, *supra* note 95; Telephone Interview with Elizabeth Hilton, *supra* note 95; Telephone Interview with John Rivera, *supra* note 115; Telephone Interview with William Yates, Att'y, Law Firm 4 (May 24, 2017).

before their clients' cases are over, because the cases are on an expedited schedule.<sup>226</sup> One lawyer explained that "there . . . [have] been times where guys have been removed and then a FOIA result comes back and my strategy would have been different."<sup>227</sup> In fact, this lawyer regularly has clients who decide not to fight their removal cases because they do not want to wait in detention, even though there may be relief available – but that relief cannot be ascertained without the response to the FOIA request.<sup>228</sup>

Timing is an issue not only in removal cases, but also for noncitizens seeking to adjust their status to become permanent residents or to become naturalized citizens. One lawyer cited an example where an undocumented client believed she was eligible for a U visa, a special visa available for victims of crime, and the client did not want to wait for the response to a FOIA request before applying for the visa. When the results did come back, it showed that the client had previously been deported.<sup>229</sup> Had the lawyer known, she would have asked for a waiver of the consequences of that prior deportation in conjunction with the initial visa application.<sup>230</sup> Another lawyer explained that his clients have to remain "without papers" just to wait for the response to their FOIA request, because the response will include documents they need for an application to regularize their status.<sup>231</sup> A third lawyer cited naturalization as an area of frustration, because clients want to naturalize as soon as possible and do not want to wait for responses to FOIA requests.<sup>232</sup> The intervening time is obviously risky for the clients in any of these situations. In fact, a class-action lawsuit was brought to systematically challenge CBP's FOIA response times precisely for this reason: "Individuals and attorneys desperately need responses to these FOIA requests. They are essential to determining whether a person is eligible to remain

---

226. Telephone Interview with Robert Blackshear, *supra* note 95; Telephone Interview with Gloria Glen, *supra* note 95; Telephone Interview with John Rivera, *supra* note 115; Telephone Interview with William Yates, *supra* note 225.

227. Telephone Interview with Robert Blackshear, *supra* note 95.

228. *Id.* One attorney explained how the records that he gets in response to a FOIA request would be useful right away for detained clients in their bond hearing, because a judge often wants to know if there is any possible meritorious defense before deciding if a detainee is a flight risk, or because the FOIA response may provide a way to dispute the accuracy of the criminal history of the client. Telephone Interview with William Yates, *supra* note 225.

229. Telephone Interview with Peggy Brewer, *supra* note 95.

230. *Id.*

231. Telephone Interview with Russell Flores, *supra* note 95.

232. Telephone Interview with Robert Blackshear, *supra* note 95.

in the country with family or to apply for a visa to reunite with their family . . . .”<sup>233</sup>

While perhaps less stark, the timing of a FOIA response at the EEOC sometimes can be severely prejudicial to a private party as well. One attorney described how “at least once a week,” a potential client will call asking for legal assistance, but the attorney will not take the case because there is no longer sufficient time to file a FOIA request.<sup>234</sup> As he described, “I won’t consider it unless I can review the EEOC’s file.”<sup>235</sup> Another attorney recounted a recent case “where everybody agreed that there was this mysterious memo floating around” that was relevant to the claim, but the attorney was unable to get it until the EEOC process was complete, and it was provided by the EEOC “literally . . . a day before the statute of limitations . . . .”<sup>236</sup> A third lawyer explained that sometimes the response to the FOIA request arrives so close to the statute of limitations that, if the lawyer then decides the case is not strong enough to take, “the client doesn’t have much time to find a new lawyer” and often ends up filing pro se.<sup>237</sup>

Other aspects of the FOIA process also hinder the full potential of information to improve accuracy and fairness, largely because features of FOIA processing result in incomplete information. To begin, the FOIA process is generally unlikely to result in the release of all information that could or should be released. Overwithholding under FOIA is pervasive across the federal government,<sup>238</sup> and there is no reason to believe this context is any different. One lawyer reported routinely getting no records in response to requests, only to later find out that his clients had previous interactions with immigration enforcement, which resulted in their removal from the country.<sup>239</sup> More than one lawyer

---

233. *Groups File Lawsuit Challenging Failures of CBP To Respond to FOIA Requests*, AM. IMMIGR. COUNCIL (Mar. 13, 2015), <http://www.americanimmigrationcouncil.org/news/groups-file-lawsuit-challenging-failures-cbp-respond-foia-requests> [http://perma.cc/XXM9-ZSJ8] (quoting Trina Realmuto, litigation director at the National Immigration Project of the National Lawyers Guild).

234. Telephone Interview with Tony Schaver, *supra* note 194.

235. *Id.*

236. Telephone Interview with Gerald Prada, *supra* note 194.

237. Telephone Interview with Carl Sapp, *supra* note 194.

238. These problems are well documented in administrations of both parties. See, e.g., Ted Bridis, *Obama Administration Sets New Record for Withholding FOIA Requests*, PBS (Mar. 18, 2015), <http://www.pbs.org/newshour/rundown/obama-administration-sets-new-record-withholding-foia-requests> [http://perma.cc/TRF5-H9TB].

239. Telephone Interview with Russell Flores, *supra* note 95 (“I’d say almost half the time I get nothing even though they’ve [had previous contact with] CBP and USCIS.”).

asserted that their clients' previous statements to immigration officials were "always" or routinely redacted, making it impossible for lawyers to adequately prepare their clients.<sup>240</sup> One lawyer explained that the names of immigration officials who interacted with his client are almost always redacted.<sup>241</sup> He finds this frustrating because on the few occasions when he was able to learn the officer's identity, he was able to subpoena the officer about the interaction and attempt to impeach him, just like a criminal defendant can cross-examine an arresting law enforcement officer.<sup>242</sup>

Whether or not these particular withholdings are proper under FOIA, every lawyer interviewed agreed that it was either never or hardly ever worth fighting the denial of information under FOIA by administratively appealing or filing a FOIA lawsuit.<sup>243</sup> The clients or the law firms simply didn't have the resources for a collateral proceeding about information access.<sup>244</sup> One lawyer explained that she could not justify charging her hourly fee to file and manage FOIA requests, and thus she directed clients to manage the process on their own and return when they had the results.<sup>245</sup> Another lawyer lamented, "In seven years, I've never filed an administrative appeal or gone to federal court on a FOIA case . . . . [T]here's technically a remedy, but the reality is most people can't access it because lawyers can't afford to take the time and energy to litigate those issues."<sup>246</sup> Thus, when information is withheld, those withholdings will likely go unchallenged.

---

240. Telephone Interview with Robert Blackshear, *supra* note 95 ("So how can I properly represent them if the only thing I have that they've said was now redacted? How do I properly prepare them for a direct and cross examination?"); Telephone Interview with Russell Flores, *supra* note 95 (asserting that "they don't give you the interview").

241. Telephone Interview with William Yates, *supra* note 225.

242. *Id.*

243. Telephone Interview with Robert Blackshear, *supra* note 95; Telephone Interview with Peggy Brewer, *supra* note 95; Telephone Interview with Russell Flores, *supra* note 95; Telephone Interview with Gloria Glen, *supra* note 95; Telephone Interview with Elizabeth Hilton, *supra* note 95; Telephone Interview with John Rivera, *supra* note 115; Telephone Interview with William Yates, *supra* note 225.

244. See Telephone Interview with Robert Blackshear, *supra* note 95 (explaining that the firm "[r]arely" appeals a FOIA denial because "[t]he problem is time and money"); Telephone Interview with Russell Flores, *supra* note 95 ("[M]y clients, quite frankly, can't even pay me for an appeal to the FOIA, let alone going to [court]."); Telephone Interview with Gloria Glen, *supra* note 95 ("We haven't [appealed a FOIA denial] because A, we don't have the time, and B, I've never been paid to do that."). *But see* Telephone Interview with William Yates, *supra* note 225 ("We've done some [FOIA appeals], but . . . they're not too successful.").

245. Telephone Interview with Peggy Brewer, *supra* note 95.

246. Telephone Interview with John Rivera, *supra* note 115.

Finally, certain subsets of requesters may have limited rights under FOIA. For example, the fugitive disentitlement doctrine is an equitable doctrine originally crafted to allow courts of appeals to dismiss the appeal of someone convicted of a crime so long as that person remained a “fugitive.”<sup>247</sup> DHS has adopted this doctrine and applied it to reject FOIA requests because of its determination that the requester is a “fugitive.” For example, in FY 2015, ICE denied requests based on the fugitive disentitlement doctrine 4,053 times.<sup>248</sup> Very few cases address the question of whether such a use is appropriate,<sup>249</sup> but because responses are so seldom challenged, DHS’s interpretation acts as a practical barrier for a nontrivial number of requesters. Moreover, the Privacy Act, by its own terms, applies only to “a citizen of the United States or an alien lawfully admitted for permanent residence.”<sup>250</sup> And the Privacy Act does not allow an individual to request information about himself that is contained in the file of another individual (such as a relative).<sup>251</sup> Thus, certain groups of individuals have limited access under either or both statutes.

While DHS encompasses the largest number of requests, it is not the only agency where due-process-like concerns are at issue. At the EEOC, parties who have filed a charge of discrimination are invoking an agency process to attempt to resolve their disputes. The result of the EEOC process is “a determination on the merits of the charge,” which consists of either a finding of “cause,” indicating there is cause to believe discrimination occurred, or a “no cause” finding.<sup>252</sup> While the EEOC process certainly does not end the matter—parties have a right

---

247. See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239–40 (1993).

248. *DHS 2015 FOIA Report*, *supra* note 72, at 7.

249. See *Maydak v. U.S. Dep’t of Educ.*, 150 F. App’x 136, 137 (3d Cir. 2005) (affirming a decision to dismiss a FOIA complaint under the doctrine); *Doyle v. U.S. Dep’t of Justice*, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (affirming the dismissal of a FOIA complaint under the doctrine), *abrogated by Ortega-Rodriguez*, 507 U.S. 234; *Meddah v. Reno*, No. 98-1444, 1998 U.S. Dist. LEXIS 23620, at \*2 n.1 (E.D. Pa. Dec. 8, 1998) (applying the doctrine to dismiss a FOIA complaint). See generally Emily Creighton, *The Fugitive Disentitlement Doctrine: FOIA and Petitions for Review*, AM. IMMIG. COUNCIL (Apr. 29, 2013), [http://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/fugitive\\_disentitlement\\_doctrine\\_-\\_foia\\_and\\_petitions\\_for\\_review\\_4-29-13\\_fin.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/fugitive_disentitlement_doctrine_-_foia_and_petitions_for_review_4-29-13_fin.pdf) [<http://perma.cc/KX5V-QNQN>] (surveying cases applying the doctrine).

250. 5 U.S.C. § 552a(a)(2) (2012). Next of kin also cannot make a Privacy Act request about a deceased individual. Privacy Act Implementation, 40 Fed. Reg. 28,948, 28,951 (July 9, 1975).

251. *Warren v. Colvin*, 744 F.3d 841, 843–44 (2d Cir. 2014).

252. *What You Should Know: The EEOC, Conciliation, and Litigation*, EQUAL EMP. OPPORTUNITY COMMISSION [hereinafter *What You Should Know*], [http://www.eeoc.gov/eeoc/newsroom/wysk/conciliation\\_litigation.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm) [<http://perma.cc/C9E3-LFSQ>].

to go to court and mount private litigation against their employer once the administrative process is complete<sup>253</sup>—it decides important rights. For example, if the EEOC finds cause, then the parties are referred to a mediation process known as conciliation, which can seriously alter the employer’s willingness to address the merits of the charge.<sup>254</sup> If conciliation fails, the EEOC can decide to bring the case itself against the employer on behalf of the employees, thereby providing additional benefits to the charging party.<sup>255</sup>

While the investigator will sometimes provide some documents, one attorney described how, more often, “the investigator will paraphrase [the employer’s position statement] and then ask for a rebuttal, or there are situations where . . . you don’t see anything until after the notice of right to sue is issued.”<sup>256</sup> One plaintiff-side employment discrimination attorney explained that “the EEOC’s failure to provide [charging parties] with exhibits . . . [leads attorneys to] continue to use FOIA to work around it.”<sup>257</sup> She recounted a time when the position statement provided by the investigator contained only three of eleven pages and no attachments. As she put it, “How in God’s name are we supposed to substantively respond to something that we’ve only gotten a percentage of?”<sup>258</sup> But by the EEOC’s own special rules, a charging party cannot gain access to its own file under FOIA until after the administrative process is over.<sup>259</sup> Thus, by definition, FOIA comes too late to enable charging parties to gather information and mount their cases at the agency level, and it poorly serves those charging parties’ interest in fair adjudications.

### B. Duplicative Work for Agencies

Even from the agency perspective, many kinds of first-person FOIA requests are likely to present significant inefficiencies. When individuals have no other way to access government-held information about themselves, they will turn to FOIA. But a FOIA officer may not be the most natural person in the agency to

---

253. *Id.*

254. *Id.*; see also Telephone Interview with Stephanie Romo, *supra* note 194 (“[I]f you happen to be in the class of the very limited number of people who actually get cause findings, then you certainly want to let the EEOC go through that process because it can sometimes have some sway with an employer.”).

255. *What You Should Know*, *supra* note 252.

256. Telephone Interview with Tony Schaver, *supra* note 194.

257. Telephone Interview with Stephanie Romo, *supra* note 194.

258. *Id.*

259. *Freedom of Information Act*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/foia> [<http://perma.cc/YRX7-ZN3E>] (“EEOC WILL NOT RELEASE: Employment discrimination charge file records before EEOC completes its investigation . . .”).

review records about an individual. In fact, in many cases, an individual already has an agency contact about the underlying matter, and the agency contact is in the best position to review records and make disclosures. In many cases, even when the government has been forced to consolidate information about a requester across agencies – for example, when prosecuting an enforcement action against the requester – the requester has to duplicate that effort by requesting information from each agency. Finally, the need to use FOIA, detached from any underlying agency matter, may require the agency to delay its primary proceedings to allow the individual to wait for the response to the FOIA request.

Again, this is an area in which FOIA requests to immigration agencies, which now constitute the overwhelming plurality of FOIA requests government-wide, present an obvious example. Because immigration lawyers have no other way to obtain government-held information about their clients, immigration lawyers file FOIA requests in every case or nearly all cases they handle.<sup>260</sup> This is a huge volume of FOIA practice.

In addition, these attorneys regularly file FOIA requests at two, three, or sometimes more agencies to increase their chances of obtaining the relevant information.<sup>261</sup> Immigration-related documents pertaining to their clients could

---

260. One lawyer files a FOIA request “[f]or each client, we file one for every client.” Telephone Interview with Robert Blackshear, *supra* note 95. Another reported filing FOIA requests for “all clients.” Telephone Interview with Gloria Glen, *supra* note 95. A third said she used FOIA “[m]ost of the time.” Telephone Interview with Elizabeth Hilton, *supra* note 95. A fourth said he used FOIA “70 to 80 percent of the time.” Telephone Interview with John Rivera, *supra* note 115. Of the interviewees, only Brewer reported much less use of FOIA, noting that she files a FOIA request only about 25% of the time. This difference appears to be attributable to two different factors. One is that Brewer does a wider variety of immigration work, including business immigration, in which clients have often had less previous interaction with immigration authorities. In addition, even among family-based petitions, it appears Brewer is more judicious about her use of FOIA, only filing a request when she has a reason to believe records exist. See Telephone Interview with Peggy Brewer, *supra* note 95.

261. For example, Flores said he “automatically do[es] CBP, and USCIS.” Telephone Interview with Russell Flores, *supra* note 95; see also Telephone Interview with Gloria Glen, *supra* note 95 (explaining that she typically files multiple FOIA requests, usually at CBP and ICE); Telephone Interview with Elizabeth Hilton, *supra* note 95 (explaining that she files a request with USCIS if the client has ever submitted a previous application for any immigration benefit, a request with ICE if they have ever been removed, and a request with CBP if they have ever had any interaction at a port of entry); Telephone Interview with John Rivera, *supra* note 115 (saying that he typically files a USCIS FOIA request and an OBIM request with fingerprints); Telephone Interview with William Yates, *supra* note 225 (explaining that he typically files FOIA requests at USCIS, ICE, CBP, and the Department of State, because “I’m looking for anything or any hit that I can get on my client”). *But see* Telephone Interview with Robert Blackshear, *supra* note 95 (asserting that now that OBIM processes requests with fingerprints, better results come from that one request and multiple requests are needed less often).

be located not only at USCIS, ICE, and CBP, as discussed above, but also at DHS's Office of Biometric Identity Management;<sup>262</sup> DOJ's Executive Office for Immigration Review,<sup>263</sup> which runs the administrative immigration courts; the FBI,<sup>264</sup> which houses criminal background information; the Department of State,<sup>265</sup> which processes visas; DOL's Employment and Training Administration,<sup>266</sup> which issues labor certifications required for certain visa applications; and HHS's Administration for Children and Families, also discussed above. Certainly, not every agency will be implicated in any one case, but attorneys routinely file a handful of requests to ensure they have uncovered all the relevant documents.

Yet, in many immigration cases, the government will have gone through the same effort behind the scenes to cull the information necessary to make a determination about either a removal case or an application for an immigration benefit. The FOIA process invokes an entire second set of actors – FOIA officers at each agency – to duplicate that effort to produce a record for public consumption. Moreover, the FOIA officer is unfamiliar with the records at issue, and thus may not be equally well positioned to make determinations about releasing records as the official in charge of the underlying case.

For example, the trial attorney who prosecutes a removal case is the person most familiar with the case and with whom the collected documents reside in immigration court.<sup>267</sup> Similarly, a USCIS official is responsible for processing applications for adjustments of status or naturalization and interviewing each applicant, and will have gathered the documents necessary for each determination.<sup>268</sup> Thus, the FOIA process duplicates the agency's effort, and the person with the most personal knowledge of the records does not make decisions about the release of documents to the requester, presenting inefficiencies for the agency.

---

<sup>262</sup>. *Office of Biometric Identity Management*, DEP'T HOMELAND SECURITY (Oct. 4, 2016), <http://www.dhs.gov/obim> [<http://perma.cc/L6E4-MK9K>].

<sup>263</sup>. *Executive Office for Immigration Review: Freedom of Information Act*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/freedom-of-information-act> [<http://perma.cc/S6SH-ZVBL>].

<sup>264</sup>. *Freedom of Information/Privacy Act*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/services/records-management/foipa> [<http://perma.cc/AV6Y-LUY5>].

<sup>265</sup>. *About Us*, U.S. DEP'T ST., <http://travel.state.gov/content/visas/en/about.html> [<http://perma.cc/4M7Z-FSYX>].

<sup>266</sup>. *Emp't & Training Admin., Office of Foreign Labor Certification*, U.S. DEP'T LAB., <http://www.foreignlaborcert.doleta.gov> [<http://perma.cc/2F6Y-7ZRN>].

<sup>267</sup>. See Telephone Interview with John Rivera, *supra* note 115; Telephone Interview with William Yates, *supra* note 225.

<sup>268</sup>. See Telephone Interview with Elizabeth Hilton, *supra* note 95.



Finally, as to removal cases that are pending in immigration court, many attorneys noted that when they have not received the response to a FOIA request, they will use that as the basis to request a continuance, thereby potentially holding up the proceedings and using greater agency resources in that regard as well.<sup>269</sup> Each appearance at which attorneys must seek a continuance costs the court and the agency attorney time and effort. Moreover, courts sometimes hold an inquiry about the need for a continuance,<sup>270</sup> thus necessitating arguments from the parties and the further investment of agency resources.

In the isolated instances when FOIA denials are challenged, the duplicative nature of the proceedings is only exacerbated. For example, in *Martins v. United States Citizenship & Immigration Services*, an attorney for noncitizens in removal proceedings who were seeking asylum brought a separate lawsuit under FOIA for access to agency officials' notes on his clients' asylum interviews.<sup>271</sup> Then, because pending removal proceedings were at stake, the immigration court issued a preliminary injunction to expedite the FOIA case on the basis that the attorney's clients would suffer irreparable injury in moving forward with the removal cases without the disputed documents.<sup>272</sup> Thus, an entirely separate judicial proceeding was required, and in fact expedited, to facilitate the resolution of underlying administrative processes.

The EEOC is another agency where FOIA is likely to be an inefficient information-delivery vehicle for the agency when it comes to first-party requesters. When a charge of discrimination is filed, an EEOC investigator is assigned to the case. Charging parties may even have substantial contact with the investigator over the course of the investigation.<sup>273</sup> As at DHS, the investigator working on the underlying agency proceeding is likely to be the person most familiar with the records, not a FOIA officer later assigned to handle a request that comes from the charging party.

---

269. See, e.g., Telephone Interview with Peggy Brewer, *supra* note 95; Telephone Interview with Russell Flores, *supra* note 95.

270. Telephone Interview with Russell Flores, *supra* note 95 (explaining that now they are “not accepting continuances” unless the attorney can show that there is relief available); Telephone Interview with John Rivera, *supra* note 115 (asserting that immigration judges are requiring the client to show prejudice from not having received the response to their FOIA request before granting a continuance).

271. 962 F. Supp. 2d 1106, 1110 (N.D. Cal. 2013).

272. *Id.* at 1126, 1128-30.

273. *What You Can Expect After a Charge Is Filed*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employers/process.cfm> [<http://perma.cc/8LYL-8PBW>].

C. *Flooding FOIA*

If the news media were intended to be the principal beneficiaries of FOIA, they are also now among its harshest critics. And delay is among the most prominent critiques journalists and legislators offer of the law. A 2016 U.S. House Committee on Oversight and Government Reform report entitled “FOIA Is Broken” features a section that is headed: “The Biggest Barrier of All: Delay, Delay, Delay.”<sup>274</sup> One journalist lamenting his four-year wait for records regarding FEMA’s response to Hurricane Sandy wrote, “Incredibly, it took my ProPublica colleague Michael Grabell more than seven years to get records about air marshal misconduct from the Transportation Security Administration. As he pointed out, his latest contact in the FOIA office was still in high school when Grabell filed his initial request.”<sup>275</sup>

Delay is such a problem that a team of developers created an algorithm for predicting whether a FOIA request will be successful based on its brevity, specificity, and other factors.<sup>276</sup> As the developers explain, “[w]riting a Freedom of Information Act (FOIA) request can be frustrating, largely because it’s hard to know what the government agency receiving the request will do: respond, delay, ignore.”<sup>277</sup>

These are not just anecdotes. Though FOIA requires agencies to respond to requests within twenty business days,<sup>278</sup> in the last reported fiscal year the average processing time across all government agencies even for requests designated as “simple” exceeded that timeframe (28.04 days), and for those requests designated as “complex,” the average processing time was 128.47 days.<sup>279</sup> These are, of course, averages across all government agencies, which means that particular agencies’ averages and particular requests can greatly exceed these timeframes. For example, the longest time it took to answer a simple request at DHS was

---

274. STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT (2016).

275. Justin Elliott, *Trying (and Trying) To Get Records From the ‘Most Transparent Administration’ Ever*, PROPUBLICA (Mar. 11, 2016, 8:00 AM), <http://www.propublica.org/article/trying-to-get-records-from-most-transparent-administration-ever> [<http://perma.cc/L3Q2-QTDP>].

276. *Predict Your FOIA Request Success*, DATA.WORLD, [http://datadotworld.shinyapps.io/foia\\_shiny\\_app](http://datadotworld.shinyapps.io/foia_shiny_app) [<http://perma.cc/984W-LJY2>]; see also data.world, *Predict if Your FOIA Request Will Succeed*, JOURNALIST’S RESOURCE (July 10, 2017), <http://journalistsresource.org/tip-sheets/predict-foia-request-will-succeed> [<http://perma.cc/H9CG-VTZ3>] (describing the motivations behind the project).

277. data.world, *supra* note 276.

278. 5 U.S.C. § 552(a)(6)(A)(i) (2012).

279. *FOIA Summary 2016*, *supra* note 66, at 13.

1,202 days, and a complex request 1,770.<sup>280</sup> Meanwhile, examples abound of agencies battling substantial backlogs, including some of the agencies studied here.<sup>281</sup>

Alongside this backdrop, as documented here, some agencies are receiving thousands – sometimes tens of thousands and sometimes more than a hundred thousand – first-person FOIA requests. These requests may serve many valuable functions but do not serve FOIA’s primary goal of informing the public about matters of concern for democratic oversight. Comparatively, news media, non-profit watchdog groups, and other public interest requesters whose requests are much more likely to advance the primary objective of FOIA are few and far between.

Elsewhere I have made the case that at some agencies, a glut of commercial requesters has, in effect, “crowded out” the news media and other public-interest requesters.<sup>282</sup> In other words, the deluge of requests that advance private interests necessarily drains agency resources, increases response times, and reduces agency attention to public-interest requesters. Of course, no definitive causal link can be tested.

But the same logical inference can be drawn here as to first-person requesters, who likewise largely advance private interests. First-person FOIA requests, which constitute three-quarters, four-fifths, or even ninety-eight percent of requests at various agencies, necessarily tax the system and leave fewer resources for FOIA activities that advance public, rather than private, interests. One way in which this is likely to happen is FOIA officer specialization. When FOIA officers are tasked with fulfilling routine first-person requests day in and day out, they are likely to become quite skilled at searching for, reviewing, and redacting those records. They know what systems of records to search, how to contact the program offices responsible for those systems, and what kinds of exempt information is likely to be contained in those records. When the odd media

---

280. Privacy Office, *2016 Freedom of Information Act Report to the Attorney General of the United States*, DEP’T HOMELAND SECURITY 11 (Feb. 2017), <http://www.dhs.gov/sites/default/files/publications/FY%202016%20DHS%20FOIA%20Annual%20Report.pdf> [http://perma.cc/LAP3-QCEG].

281. See, e.g., *FOIA Backlog Skyrockets at U.S. Citizenship and Immigration Services*, FOIA PROJECT (May 8, 2017), <http://foiaproject.org/2017/05/08/uscis-backlog-skyrockets> [http://perma.cc/D64W-DWBQ] (noting that “the backlog of unanswered FOIA requests has tripled, climbing from 17,998 at the end of December 2014 to 46,550 at the end of December 2016”).

282. Kwoka, *supra* note 6, at 1422-24.

request comes in, typically for something newsworthy,<sup>283</sup> a FOIA officer is much less likely to have the skillset to handle it adeptly, because it is not the bulk of work that they perform. As a result, media requesters may in fact even get lower-quality service than first-person requesters at some agencies. At the very least, responses to their requests, even if substantively the same, are likely to be hugely delayed by the glut of first-person requesters.

#### IV. EXPAND ACCESS, SHRINK FOIA

For private parties who want their own files that are stashed in government agencies, FOIA undoubtedly serves a valuable purpose. For many requesters without other options, FOIA serves as stopgap that allows at least some way to obtain information that may be critical to securing a government benefit, preventing a wrongful enforcement action, or accessing a product in the private marketplace. But as the previous Part demonstrated, FOIA often serves these purposes poorly, and the overwhelming number of first-person requests likely hinders the realization of FOIA's primary goal. In fact, this mismatch has led some observers to question the overall value of FOIA. As Professor Pozen has described, "FOIA's structure . . . attenuates the link between the exercise of private right and vindication of the public good."<sup>284</sup>

To be sure, FOIA's value would be more apparent, and the resources spent on it more justifiable, if its dominant uses were more closely aligned with its statutory purpose. That is to say, if we could reduce the number of FOIA requests that do not serve a democracy-enhancing oversight purpose, shrink the size of FOIA offices and concomitant FOIA budgets, and hold up the remaining FOIA activities as mostly serving FOIA's statutory purpose, this valuable tool for transparency would be easier to justify and defend.

We have had, however, relatively little past success trying to limit or condition access to records based on motivations or likely public interest. For example, prior to FOIA's enactment in 1966, the Administrative Procedure Act (APA) had

---

283. For example, at the VHA, where the majority of requests are for individual medical records, news media requesters seek records that are widely varied and bear on apparent policy matters, such as "Access to and copies of the Suicide Prevention Applications Network (SPAN) or the database that now contains the same information," "VA Inspector General Reports that haven't been published online yet on Huntington Hospital, but already completed, especially if they involve any patient deaths," and "Total dollar amount worth of all medication reported lost/stolen by mail involving VA patients for each of the following years." VHA Data, *supra* note 116, at 15-02654-F, 15-14914-FP, 15-07479-F.

284. Pozen, *supra* note 25, at 1100.

a records access provision that supposedly restricted access to government records to “persons properly and directly concerned” with the information.<sup>285</sup> FOIA was enacted expressly to disavow any restriction based on identity or purpose, precisely because this limitation operated so poorly that agencies used it as an excuse to deny access arbitrarily.<sup>286</sup>

Indeed, we should not endeavor to curtail FOIA rights available to the public. Rather, an examination of first-person FOIA reveals opportunities for agencies to better tailor the provision of information to individuals whom the files concern, obviating the need to file a first-person FOIA request without limiting anyone’s right to do so. Alternative mechanisms would both remove the pressure on FOIA to fill the void where no other access is provided and better meet the needs of the persons seeking access to their own files. While such strategies would not eliminate all first-person FOIA requesting, they would drastically reduce the number of such FOIA requests, thereby freeing up resources that could be used to better and more quickly fulfill requests that serve democratic oversight purposes.

In fact, the time is ripe to consider alternative mechanisms for individuals to access government-held information about themselves. As others have described, government collection and retention of data about individuals has exploded, particularly in the face of perceived needs for antiterrorism intelligence gathering, and occurs largely “without legal guarantees for the accuracy or appropriateness of the data or the searches, redress for people injured by being falsely identified as posing a threat, or judicial or legislative oversight.”<sup>287</sup> Given the stakes for individuals seeking their own government-held information and the relatively hands-off approach of the courts in reviewing agency determinations of what process is due under the Constitution,<sup>288</sup> legislators and policymakers should consider more robust first-person access to information.

#### A. *Administrative Discovery*

If eliminating the need for such a substantial volume of first-person FOIA requests is a laudable goal, as I think it is, one of the most apparent opportunities arises when requesters seek information relating to a pending administrative proceeding. In these cases, expanded administrative discovery may prevent the

---

285. 5 U.S.C. § 1002(c) (1964).

286. See Kwoka, *supra* note 30, at 197 (detailing FOIA’s break from the previous APA so-called disclosure regime).

287. Cate, *supra* note 55, at 436.

288. Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1891 (2016).

need for the flood of FOIA requests and better serve the litigants, the proceeding, and even the agency.

To be clear, courts have never found a categorical constitutional right to pre-hearing discovery in administrative proceedings.<sup>289</sup> Moreover, the APA, which provides a baseline set of procedures that apply to all agency proceedings, enumerates procedures for subpoenas only to the extent the subpoenas are “authorized by law,” meaning they would have to be provided for in a particular context by statute or agency regulation.<sup>290</sup>

Nonetheless, discovery in administrative proceedings has long been favored. Early in the history of the APA, the Administrative Conference of the United States (ACUS) recommended “that agencies adopt rules providing for discovery against the parties and against the agency to the extent and in the manner appropriate to their respective proceedings.”<sup>291</sup> In 1993, ACUS issued model adjudication rules which adopted extensive discovery procedures akin to those available under the Federal Rules of Civil Procedure.<sup>292</sup> In fact, agencies like the Securities and Exchange Commission that have not adopted broad discovery rights in administrative proceedings have come under heavy attack.<sup>293</sup> As a result, many agencies have adopted broad discovery rights, including those that adopt the ACUS-recommended model of following federal court discovery practices.<sup>294</sup>

But in other proceedings, discovery rights are all but nonexistent, and first-person FOIA requesting serves as a stand-in. Removal proceedings are a prime

**289.** See *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 741 (8th Cir. 1999); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857–58 (2d Cir. 1970); *Chafian v. Ala. Bd. of Chiropractic Exam'rs*, 647 So. 2d 759, 762 (Ala. Civ. App. 1994); *Pet v. Dep't of Health Servs.*, 542 A.2d 672, 677 (Conn. 1988); *In re Herndon*, 596 A.2d 592, 595 (D.C. 1991); *In re Tobin*, 628 N.E.2d 1268, 1271 (Mass. 1994); *State ex rel. Hoover v. Smith*, 482 S.E.2d 124, 129 (W. Va. 1997).

**290.** 5 U.S.C. § 555(d) (2012) (“Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.”).

**291.** SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 88-24, at 12 (1963).

**292.** See Model Adjudication Rules Working Grp., *Project Report: Model Adjudication Rules*, ADMIN. CONF. U.S. (Dec. 1993), <http://www.acus.gov/sites/default/files/documents/1993-model-adjudication-rules.pdf> [<http://perma.cc/2G7D-EYK3>].

**293.** See, e.g., David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1169 (2016) (noting that limited SEC administrative discovery leads litigants to choose actions in federal court over actions before an agency administrative law judge).

**294.** For example, in 2009, the FTC adopted administrative procedures for ALJ proceedings with broad, federal-court-style discovery rights. See 16 C.F.R. § 3.31 (2016).

example. In immigration court—an administrative adjudicatory body run by the Executive Office of Immigration Review—the only discovery available is by applying for a subpoena, which requires a motion and various justifications.<sup>295</sup> Geoffrey Heeren has documented that requests for subpoenas and related depositions were routinely denied early on, and litigants apparently stopped even trying to use them after some time because attempts were futile.<sup>296</sup> In a 2010 decision, the Court of Appeals for the Ninth Circuit ruled that the government has an obligation to provide helpful information from a noncitizen's file in the course of removal proceedings, at least in circumstances in which the file would demonstrate nonremovability, such as when those records would prove the individual is actually a citizen.<sup>297</sup> But because a showing of prejudice is required to make out such a claim,<sup>298</sup> the government has read the decision narrowly and, even in the Ninth Circuit, has not followed its mandate strictly.<sup>299</sup>

Interviews with immigration attorneys confirm that, in practice, formal discovery as of right is not available in immigration court and that trial attorneys prosecuting immigration cases on behalf of DHS, even those located within the Ninth Circuit, are not providing access to discovery materials through immigration court proceedings.<sup>300</sup> Attorneys also largely agreed that when documents were provided by the trial attorney to immigration defense counsel, it was typically through the informal practice of a particular trial attorney or office or as a result of a relationship with the particular attorney.<sup>301</sup>

---

295. Office of the Chief Immigration Judge, *Immigration Court Practice Manual*, U.S. DEP'T JUST. 93 (May 15, 2017), [http://www.justice.gov/sites/default/files/pages/attachments/2017/05/26/practice\\_manual1.pdf](http://www.justice.gov/sites/default/files/pages/attachments/2017/05/26/practice_manual1.pdf) [<http://perma.cc/9K67-JU4D>].

296. Heeren, *supra* note 94, at 1583.

297. *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2010).

298. *Id.* at 373-74; *DaSilva v. U.S. Att'y Gen.*, No. 13-13, 2013 U.S. Dist. LEXIS 56507, at \*5-6 (E.D. La. Apr. 19, 2013) (requiring a robust showing of prejudice to make out a due process claim based on withheld records).

299. Heeren, *supra* note 94, at 1586.

300. Telephone Interview with Robert Blackshear, *supra* note 95; Telephone Interview with Peggy Brewer, *supra* note 95; Telephone Interview with Russell Flores, *supra* note 95; Telephone Interview with Gloria Glen, *supra* note 95; Telephone Interview with Elizabeth Hilton, *supra* note 95; Telephone Interview with John Rivera, *supra* note 115; Telephone Interview with William Yates, *supra* note 225.

301. *See, e.g.*, Telephone Interview with Robert Blackshear, *supra* note 95 (“It varies widely between the field offices . . . Sometimes some offices will provide you with the I-213, the NTA, anything you need. Especially ones that you're cool with, that you work with all the time. They'll give you what you want and what you need in order to properly represent the guy. Other field offices are like, ‘No file FOIA.’”); Telephone Interview with Peggy Brewer, *supra* note 95 (noting that while sometimes a court will order a document to be produced, most of the time as to the most important documents, the attorney will provide them voluntarily); Telephone

Discovery in immigration court could improve efficiency at the administrative level. To begin, attorneys are nearly always seeking the very records in the possession of the trial attorney in the proceeding.<sup>302</sup> Making a FOIA request, however, requires the individual or their attorney to file with the main FOIA office, which then has to assign the request to a FOIA officer to process. That FOIA officer will almost inevitably come back around to looking at the same file that the trial attorney has on his desk. Involving another person in the process who has no local or personal connection with the proceeding seems inevitably inefficient for the agency. To be fair, at USCIS, the only agency that separately tracks FOIA requests related to a pending removal proceeding, only 3% of requests fall in that category.<sup>303</sup> But because of the volume of requests at that agency, that still translates to over five thousand requests a year at USCIS alone.<sup>304</sup>

Beyond mere resources, however, proceedings would become fairer. If the government attempts to inappropriately withhold or redact certain records in the course of a discovery process, the immigration judge would be empowered to adjudicate the rights of the individual to access the records and ensure the government does not overwithhold. This would reduce the chances that barriers to information foil a valid defense or claim the individual might otherwise make. It would also ensure that individuals do not give up their otherwise potentially meritorious claims or defenses simply because they are unwilling to wait for the FOIA process to run its course. In this way, both individuals and the agency might be better served.

Discovery would also improve a potentially much larger group of noncitizens' matters before DHS: applications by noncitizens for affirmative benefits,

---

Interview with William Yates, *supra* note 225 (“Some [trial attorneys] that I [ ] have some kind of relationship with [ ], they’ll tell me like ‘Hey, you know what? We have this,’ and they’ll give [the documents] to me.”). *But see* Telephone Interview with Gloria Glen, *supra* note 95 (“[Y]ou can contact government counsel and ask them for whatever specific document you’re looking for, but you’re almost never going to get it.”); Telephone Interview with John Rivera, *supra* note 115 (“[V]ery rarely have I had anybody be cooperative [about discovery].”).

302. *See, e.g.*, Telephone Interview with John Rivera, *supra* note 115 (“It’s . . . absurd that the government will run fingerprints and not provide the respondent and their attorney with the results. It doesn’t make any sense from anybody’s perspective. They’re already doing it anyway. They’re already getting that information. They already have that and that would dispose of a lot of things like are you eligible for cancellation? Are you eligible for a bond?”).

303. *See* USCIS Data, *supra* note 80. In fiscal year 2015, USCIS started tracking those requests related to pending removal proceedings as “track 3” in April of that year. Thus, only five months of data are included for these purposes, which show 2,599 track 3 requests out of 82,402, or 3%. Extrapolating that percentage to the full 165,233 requests that year, that would be the equivalent of approximately 5,211 requests. *Id.*

304. *Id.*



such as an adjustment of status from a non-immigrant visa to an immigrant visa (green card holder) or naturalization. There, once a facially adequate application is submitted, there is typically an interview with a USCIS official if the government has any doubt about the merits.<sup>305</sup> However, those interviews can end in surprise revelations about evidence relied on by the government, which may or may not be accurate.<sup>306</sup> One attorney I spoke to suggested that it would be easy for the government to disclose, in advance of the interview, evidence on which it planned to rely in making its decision, so that the noncitizen could bring any additional evidence that might bear on its authenticity or relevance.<sup>307</sup>

The EEOC provides another prime opportunity. In fact, on January 1, 2016, the EEOC announced a new disclosure policy that provides “for the release of Respondent position statements and non-confidential attachments to a Charging Party or her representative upon request during the investigation of her charge of discrimination.”<sup>308</sup> However, in practice, “[t]he unfortunate issue seems to be that they’re frankly not following their own policy” in that regard.<sup>309</sup> One could imagine a robust EEOC procedure for requesting these documents – and any other non-exempt records from the file – directly from the investigator during the administrative process, thereby eliminating a second procedure and allowing charging parties to access information “at the time of the case when we would like the information.”<sup>310</sup> In fact, the IRS appears to do something along

---

305. Telephone Interview with Elizabeth Hilton, *supra* note 95.

306. *Id.* (“I’ll go to an interview – just recently an officer will say, oh, well – to the client, you made a false claim of citizenship at the port of entry in 2006, and the client will say, ‘no, I didn’t do that.’ ‘Well, we have a record that you did,’ and they’ll deny the case. But what are they talking about? Is it the right person? Because a lot of our clients have the same names as their siblings or, you know, is there a – based on those facts, would there be an exception to the false claim of citizenship? Well, I don’t know because I don’t have the facts, the officer does and this happens all the time. And when I say can I get a copy of that . . . a lot of times they’ll say, ‘no, you could see it through a FOIA request.’”).

307. *Id.*

308. *EEOC Implements Nationwide Procedures for Releasing Respondent Position Statements and Obtaining Responses from Charging Parties*, EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/newsroom/release/position\\_statement\\_procedures.cfm](http://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm) [<http://perma.cc/K4ZJ-ZRR8>].

309. Telephone Interview with Stephanie Romo, *supra* note 194; *see also* Telephone Interview with Tony Schaver, *supra* note 194 (noting that “generally speaking, every EEOC office operates differently” with respect to providing the position statement); Telephone Interview with Carl Sapp, *supra* note 194 (describing how it is “hit or miss” whether the agency provides any attachments or exhibits to the position statement); Telephone Interview with Gerald Prada, *supra* note 194 (“We get very little during the investigative process.”).

310. Telephone Interview with Gerald Prada, *supra* note 194.

these lines already. On its FOIA page, it explains that “[i]f you are working directly with an IRS employee on an open tax case, you can request information from the file directly from them.”<sup>311</sup>

Thus, enforcement proceedings are not the only types of agency proceedings ripe for reforms promoting administrative discovery. Agency procedures to adjudicate certain benefits or complaints also present opportunities in this regard. Administrative discovery could have a threefold benefit: individuals could obtain more timely and complete information, agencies could consolidate processes and save resources, and the public could gain a more efficient FOIA system, unclogged with requests that do not serve its core oversight purpose.

### *B. Eliminate Request-and-Return*

Another group of first-person FOIA requesters uses FOIA to obtain documents needed to demonstrate entitlement to a government benefit. That is, a requester receives a document under FOIA from the government only to return it to the government with an application or submission connected with another agency proceeding. At some agencies, there may be opportunities to eliminate this practice of requesting and returning the record.

Many applicants for benefits are confident that a government record demonstrating the necessary qualification exists, but they do not have a copy of the document. The agency could provide a mechanism for an applicant to designate reliance on the government’s records as a method for establishing that qualification. This option could be as simple as a check box on an application form, designating which document is believed to exist in government files and what it is believed to demonstrate.

For example, at the VHA, families of recently deceased veterans requesting DD-214 forms often use them to demonstrate other-than-dishonorable discharge, entitling the veteran to a military funeral benefit. Rather than request this form under FOIA, only to return it to the government with an application for the military funeral benefit, the agency could allow families to check a box requesting that the agency verify the discharge status internally when requesting the funeral benefit. At the very least, this process would not be any more burdensome for the agency, and it may well be more efficient. After all, the same agency personnel handling the benefit, who would be most familiar with the circumstances of the case, could be responsible for verifying the necessary conditions within the government’s own records. Moreover, the requesters could

---

311. *IRS Freedom of Information*, INTERNAL REVENUE SERV. (Jan. 25, 2018), <http://www.irs.gov/uac/irs-freedom-of-information> [<http://perma.cc/WHP3-NRHU>].

receive the benefits to which they are entitled without the need to wait for records.

Immigration is another area where request-and-return is prevalent. In many cases where noncitizens apply for affirmative immigration benefits, they are required to submit proof of certain past immigration actions, such as lawful entry into the country on a visa, or a prior petition for benefits that was filed on their behalf. If long periods of time have passed, applicants may have lost these documents, but the government retains copies. One attorney explained:

[O]ne example is if someone enters lawfully but they have no proof of it, right, you're required to get — they request an I-94 [a form documenting arrivals to the United States]. Oftentimes USCIS has that record, so why do we have to do a FOIA to produce that record? . . . Can you provide us with this proof of entry if we know it exists?<sup>312</sup>

Accordingly, eliminating request-and-return may realize significant benefits for both the individual and the government. The process can delay the requester's application for a benefit for which they qualify, and it requires the agency to engage in two separate processes — one under FOIA and one to determine the benefit.

### C. Online Access

Another promising avenue for meeting the needs of first-person FOIA requesters is the use of online platforms for access. Online access may seem like an odd suggestion given that first-person requesting is typically targeted at information that poses privacy concerns. Yet we all routinely access our private information through logins or other verification mechanisms, and we typically accept the host's best efforts at protecting data privacy. For example, anyone who uses a web-based email client like Gmail or a cloud-based document storage company like Dropbox already subjects their private data to some risk.<sup>313</sup> Indeed, the government already stores much information electronically, which subjects it to risks

---

312. Telephone Interview with Peggy Brewer, *supra* note 95.

313. For example, Gmail was recently the target of a massive phishing attack that could allow scammers to “harvest any personal data you’ve ever sent or received in an email” which in turn could let hackers “take over, for example, your Amazon, Facebook or online bank accounts.” Alex Johnson, *Massive Phishing Attack Targets Gmail Users*, NBC NEWS (May 4, 2017, 1:19 PM), <http://www.nbcnews.com/tech/security/massive-phishing-attack-targets-millions-gmail-users-1754501> [<http://perma.cc/E65Q-X9TX>]. The risks associated with Dropbox have been warned of in popular media, particularly for business users. See, e.g., Mike Batters, *Security Comment: Why Are People Still Using Dropbox for Business?*, LEGAL IT INSIDER (Apr. 14,

from hackers or leakers, regardless of whether there is a public portal for access. Of course, whenever the government considers online access, it should consider those risks, the sensitivity of the information, and the necessary measures to guard against any risk. But these risks should not prevent consideration of online access as an overall positive move in some cases.

Indeed, some agencies have tried online access initiatives to obviate the need for categories of FOIA requests, even when individual information was at issue. For example, in 2014, CBP launched a website that would allow noncitizen visitors to the United States who are not green card holders to access their arrival and departure records for the past five years.<sup>314</sup> As the agency explained at the time, “[t]his electronic travel-history function means that travelers may no longer need to file Freedom of Information Act requests to receive their arrival/departure history, greatly speeding their process.”<sup>315</sup> CBP simply required the individual to enter their name, date of birth, and passport information to retrieve the records from its database.<sup>316</sup> Basic verification may well be sufficient for access to these records, since the underlying data is, although personal, not the most sensitive.

In another example, the IRS provides tax return “transcripts,” which are summaries of tax returns that have basic information about the return.<sup>317</sup> To get a copy of the transcript online, which can simply be downloaded or printed at no cost, a user need only provide his or her SSN, date of birth, filing status, mailing address, a personal account number from a financial institution, and a

---

2016, 11:55 AM), <http://www.legaltechnology.com/latest-news/security-comment-why-are-people-still-using-dropbox-for-business> [<http://perma.cc/3ZAX-BK5V>].

314. *Arrival/Departure History Now Available on I-94 Webpage*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 30, 2014), <http://www.cbp.gov/newsroom/spotlights/arrivaldeparture-history-now-available-i-94-webpage> [<http://perma.cc/C9B3-R2BH>].

315. *Id.*

316. *Id.*; see also *View Travel History*, U.S. CUSTOMS & BORDER PROTECTION, <http://i94.cbp.dhs.gov/I94/#/history-search> [<http://perma.cc/HX95-3F85>] (providing form for nonresident visitors to access their records). For reasons that have not been publicly explained, the agency has asserted that “the I-94 search tool has not eliminated FOIA requests for the records.” *Compliance Review of Customs and Border Protection Freedom of Information Act Program*, OFF. GOV’T INFO. SERVS. 16, <http://www.archives.gov/files/ogis/assets/cbp-foia-compliance-report.pdf> [<http://perma.cc/UEU8-F77A>].

317. *Transcript Types and Ways To Order Them*, INTERNAL REVENUE SERV. (Dec. 6, 2017), <http://www.irs.gov/individuals/tax-return-transcript-types-and-ways-to-order-them> [<http://perma.cc/CC57-JG9E>].

mobile phone number with his or her name on the account.<sup>318</sup> These basic pieces of verification are sufficient to safeguard access to this sensitive information.

This study reveals additional opportunities to implement this strategy. For example, the records most frequently requested from the VHA may present an opportunity for an online access system. While the majority of requested records are medical records,<sup>319</sup> which may at first blush appear to present some of the most important privacy concerns, the federal government has expressly endorsed electronic health records. In 2009, Congress enacted legislation that allocated bonus funding for health care providers that demonstrate “meaningful use” of electronic health records.<sup>320</sup> Moreover, beginning in 2015, the legislation provided penalties for physicians who are not using electronic health records by cutting one percent of Medicare funding, increasing to three percent in 2017.<sup>321</sup> Given the forceful use of the federal government’s purse strings to shift the medical field in this direction, it would be consistent for the VHA to move to electronic health records that veterans could access through a login. Indeed, even the VHA has articulated this vision, though implementation has yet to arrive.<sup>322</sup> Moreover, to the extent that such records are sought as part of a third-party transaction, such as qualifying for an insurance policy, there is precedent for government agencies providing authentication of certain records for third-party use.<sup>323</sup> The VHA could certainly consider such a system, and this may prevent the need for thousands of requests.

---

318. *Welcome to Get Transcript*, INTERNAL REVENUE SERV. (Jan. 8, 2018), <http://www.irs.gov/individuals/get-transcript> [<http://perma.cc/29ZB-JCX7>].

319. VHA Data, *supra* note 116.

320. American Recovery and Reinvestment Act of 2009 § 4101, Pub. L. No. 111-5, 123 Stat. 115, 467 (codified at 42 U.S.C. § 1395w-4 (2012)).

321. *Id.*, 123 Stat. at 472.

322. On June 5, 2017, the Secretary of Veterans Affairs announced a decision to move the Department’s current health records system over to a platform already used by the DOD so that servicemembers will have one integrated electronic health record. The new integrated system should have a “Patient Portal” that is a secure website allowing patients to access their health information. It has already been launched at one military base and is being implemented at other sites on an ongoing basis. Military Health Sys., *DoD Healthcare Management System Modernization MHS GENESIS Patient Portal*, U.S. DEP’T DEF. (Feb. 23, 2018), <http://health.mil/Reference-Center/Fact-Sheets/2018/02/23/MHS-GENESIS> [<http://perma.cc/2KN3-EMQR>].

323. EPA, for example, has adopted a records delivery system called MyProperty which allows users to access site-specific environmental records for particular pieces of property, and provides a certificate of authenticity to ensure adequacy for commercial use. See *MyProperty*, U.S. ENVTL. PROTECTION AGENCY (July 29, 2016), <http://www3.epa.gov/enviro/html/fii/myproperty/index.html> [<http://perma.cc/WU8Y-DZ4W>]. The Social Security Administration also provides an option to receive a certified copy of an SS-5 or Numident record. See

Another example from this study that may be ripe for online access is one that does not implicate any privacy concerns at all, such as the SS-5 and Numident records for deceased individuals requested by the thousands from the Social Security Administration.<sup>324</sup> Admittedly, the SSA has issued over 450 million social security numbers to date,<sup>325</sup> so retroactively posting an online database of original application forms likely does not make economic sense. The SSA is, however, typically notified through a variety of mechanisms about the death of a number holder, and thus could implement a forward-looking strategy of posting the record upon the verified death of the applicant. This public-facing database could, over time, reduce reliance on FOIA.

Other agencies may well be able to take up similar strategies. This Section is not meant to definitively conclude that online disclosure policies should be implemented, only that they are worth serious consideration. Online access may be particularly attainable where agencies already have online platforms or where their information does not present stringent privacy concerns.

#### *D. Not Everything Is FOIA*

It would be valuable to separate FOIA operations from other information services provided by government agencies. This strategy for alleviating the glut of first-person requesters may sound merely semantic, and in a sense, it is. But it would be worth encouraging agencies to create alternative services and entirely remove those requests from the ambit of FOIA.

An example may elucidate the benefits. The SSA's FOIA statistics include two entirely separate categories of requests. Individuals looking for SS-5 forms and Numident records submit a simple, non-FOIA form on the agency's website.<sup>326</sup> By contrast, the agency directs those who "would like to make an online FOIA request for records other than a photocopy of an SS-5 or a Numident, [to] please

---

*Request for Deceased Individual's Social Security Record*, SOC. SECURITY ONLINE, <http://secure.ssa.gov/apps9/eFOIA-FEWeb/internet/main.jsp> [<http://perma.cc/9V2M-C6TZ>] (listing an additional \$10 fee for certified copies).

324. As the SSA's FOIA regulations specify: "We do not consider the disclosure of information about a deceased person to be a clearly unwarranted invasion of that person's privacy. However, in disclosing information about a deceased person, we follow the principles in § 401.115 to insure that the privacy rights of a living person are not violated." 20 C.F.R. § 401.190 (2017).

325. Carolyn Puckett, *The Story of the Social Security Number*, 69 SOC. SECURITY BULL. 55 (2009), <http://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html> [<http://perma.cc/3WAQ-G58D>].

326. *Request for Deceased Individual's Social Security Record*, SOC. SECURITY ADMIN., <http://secure.ssa.gov/apps9/eFOIA-FEWeb/internet/main.jsp> [<http://perma.cc/X5KA-XXLP>].

make your request online using the FOIAonline,<sup>327</sup> which is a centralized FOIA portal used by many agencies for receiving, tracking, and responding to requests. Not only are the processes distinct, but their fee structures are entirely different. For requests through FOIAonline, the agency announces a typical FOIA fee structure, charging ten cents per page for photocopying and an hourly search and review fee based on the payscale of the employee working on the matter.<sup>328</sup> This is consistent with the statutory structure, which requires fee schedules to “provide for the recovery of only the direct costs of search, duplication, or review.”<sup>329</sup> But for SS-5 and Numident records, the SSA has established a flat fee per record,<sup>330</sup> which is nowhere listed in its FOIA regulations nor justified by any explanation of direct costs of copying, search, or review. In fact, there is no differentiation in cost based on the identity of the requester as news media, commercial, or other, as the FOIA fee structure provides.<sup>331</sup> Indeed, these fees are not rooted in FOIA at all.

That is not to say that the process used or the fees charged are objectionable. In fact, it may well be a very sensible system for SSA to use. One could imagine that the fees SSA calculated on average cover the agency’s costs in providing records, that those costs are reasonable, and that those interested in the records are well served by a tailor-made system for this one type of record for which there is high demand. But these requests are not made pursuant to SSA’s established process for requests under FOIA, nor are the fees calculated pursuant to FOIA’s fee structure. So why is the SSA counting them as FOIA requests?

There are many plausible and rational reasons for an agency to count these sorts of records transactions as FOIA requests and responses. For one, agencies are advised to resolve any ambiguity, including requests for records that do not name the statute or specify any particular process, in favor of treating it as a FOIA request.<sup>332</sup> Such an approach makes sense because FOIA provides rights and

---

327. *Freedom of Information Act (FOIA): Make a FOIA Request*, SOC. SECURITY ADMIN., <http://www.ssa.gov/foia/request.html> [<http://perma.cc/BP5T-Q774>].

328. *Id.*

329. 5 U.S.C. § 552(a)(4)(A)(iv) (2012).

330. The SSA charges a flat \$21 fee for a copy of an SS-5 and \$27 for Numident records. *Freedom of Information Act – Fees for Frequently Requested Records*, SOC. SECURITY ADMIN., <http://www.ssa.gov/foia/request.html> [<http://perma.cc/Z22P-W29V>].

331. 5 U.S.C. § 552(a)(4)(A)(ii) (2012).

332. *Cf.* FOIA UPDATE: OIP GUIDANCE: DETERMINING THE SCOPE OF A FOIA REQUEST, DEP’T JUST. (Jan. 1, 1995), <http://www.justice.gov/oip/blog/foia-update-oip-guidance-determining-scope-foia-request> [<http://perma.cc/8S9N-GXR5>] (informing agencies that “FOIA requesters should not be held to the strict letter of their requests when an agency has good reason to conclude that a broader interpretation is more appropriate”).

protections that benefit the public and is designed to be used by laypeople, who should not be required to formulate their requests in a particular way.

In addition, agencies have FOIA reporting obligations that may incentivize counting as many matters as possible as FOIA requests. Agencies are required to provide an annual report on FOIA activities to DOJ, providing data such as the number of requests received; the number of requests processed; the average and median number of days to process requests; how many responses provided records in full, denied records in full, or denied records in part; and other metrics indicating the volume of information release.<sup>333</sup> Thus, if an agency is processing a high volume of records transactions that are relatively quick and typically provides those records in full, it would have an incentive to count those transactions as FOIA requests. After all, those transactions will increase the volume of their FOIA activities, increase the percentage of requests for which information was released in full, and drive down average processing times. I am not suggesting that agencies are deliberately manipulating their FOIA numbers, only that the current reporting structure provides such an incentive and may even create an unconscious bias toward labeling things as FOIA that are not.

Yet some agencies appear to have created FOIA alternatives and to have kept them separate from their FOIA processing and reporting, and successful examples therefore can be found. For example, by order of the Attorney General, the FBI created a regulatory structure for requesting and receiving criminal histories, also known as criminal background checks or rap sheets.<sup>334</sup> This service is identified as a separate process on its FOIA page and requesters are directed to an entirely separate section of the FBI's website for information.<sup>335</sup> This separate procedure requires a separate application, a set of fingerprints on a designated form, and a standard \$18 payment for each request regardless of whether any records are found at all, thereby distinguishing both the process and the fee structure from a typical FOIA request.<sup>336</sup> And the FBI appears to make the distinction. On its FOIA website, the FBI announces, in bold: "Please do not submit a Freedom of Information Act/Privacy Request" for criminal history reports, and instead refers requesters to the separate website for that process.<sup>337</sup>

---

333. See 5 U.S.C. § 552(e) (2012).

334. Production of FBI Identification Records in Response to Written Requests by Subjects Thereof, 28 C.F.R. §§ 16.30-16.34 (2017).

335. *Requesting FBI Records*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/services/records-management/foipa/requesting-fbi-records> [<http://perma.cc/L5AN-7RTF>].

336. *Id.*

337. *Id.*



As another example, the IRS has a separate request process for copies of tax returns (when the transcript summaries discussed above are insufficient). Indeed, the IRS is explicit about this strategy on its FOIA website: “Many types of IRS records are available through routine procedures designed to make access quick and easy. No Freedom of Information Act (FOIA) request is required for these records. Please see the table below for ways to access these frequently requested records.”<sup>338</sup> Rather than a FOIA request, the IRS processes requests for copies of tax returns with a specialized form and a standard \$50 fee.<sup>339</sup> These requests for tax returns are accordingly not logged as, counted as, or processed as FOIA requests.

More agencies should follow their lead. Counting all information transactions as FOIA requests may be understandable but has several deleterious effects. First, it may tend to discourage agencies from making specialized processes that are more sensible for a particular context of high volume records sets. If agencies believe that everything has to fall under FOIA, they may feel constrained in designing an alternative. The alternative should not preclude someone from filing a FOIA request for the same information; it is just clear that if an alternative specific method exists, people will take advantage of it because that system is designed to process that type of record reliably.

There is also a more intangible harm that can be alleviated by disentangling non-FOIA records transactions from FOIA requests. Counting as FOIA requests only those things that truly are FOIA requests may help quell fears that FOIA has become a behemoth, the costs of which are spiraling out of control. It would also shrink what we think of as FOIA to be more targeted at the goals Congress had in mind when it enacted the statute. After all, the provision of information in various forms is part of agencies’ core functions, and they should do so in a variety of ways. If less information is provided through FOIA because more alternative, tailored mechanisms exist, users and the agency are better off. So is FOIA.

## CONCLUSION

Congress’s lofty goal in enacting FOIA was to enhance democracy, increase public accountability over government actors, and inform the public about government operations. The lived reality at FOIA offices throughout the federal government, however, is that FOIA largely serves other interests. As documented in

---

338. *Routine Access to IRS Records*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/routine-access-to-irs-records> [<http://perma.cc/6S54-29AJ>].

339. *Form 4506: Request for Copy of Tax Return*, INTERNAL REVENUE SERV., <http://www.irs.gov/pub/irs-pdf/f4506.pdf> [<http://perma.cc/Z9A6-8S92>].

## FIRST-PERSON FOIA

this Article, first-person requests dominate the landscape at some agencies, including some of the agencies with the highest volumes of requests across the federal government. While these requests represent legitimate efforts by private individuals to obtain information about themselves, they serve largely private, not public interests.

Moreover, FOIA often serves these private interests poorly, and the glut of first-person FOIA requests likely makes FOIA less effective for the news media and other public-interest requesters and invites a harsh critique of whether FOIA is worth the trouble. Effective reforms are possible and begin with agencies' close examination of alternatives to FOIA that might preempt the need for such a volume of first-person requests. While no one's FOIA rights should or need be curtailed, better procedures would make FOIA unnecessary for those who can access their own files in other, more effective ways. Agencies' FOIA resources could then be redirected to best serve the vital public interests in transparency and accountability, as originally envisioned.