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The "Freedom From Information" Act: A Look Back at Nader, FOIA, and What Went Wrong

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Not long after the Freedom of Information Act ("FOIA") went into effect, consumer advocate Ralph Nader sent one hundred students out to test whether the statute was working. The students made FOIA requests to more than a dozen federal agencies on a range of consumer topics, from highway safety and airline accidents to environmental pollution and the regulation of pharmaceutical products. Nader, never known for his subtlety, captured the results in the title of the article that followed: *Freedom from Information: The Act and the Agencies*.[1] As Nader put it early in the piece, "I have reached a disturbing conclusion: government officials at all levels in many of these agencies have systematically and routinely violated both the purpose and specific provisions of the law."[2]

FOIA was signed into law on July 4, 1966 and went into effect on July 4, 1967. Nader reported out his research in August 1969. Now, fifty years after the statute's enactment, Nader's critique is worth revisiting. It is a fascinating FOIA artifact, a look at how FOIA worked before thousands of court decisions shaped its contours. As things have turned out, the problems Nader highlighted were not just inevitable issues that any new system encounters initially. They are, instead, practices that have persisted through time. Moreover, five decades of litigation, which agencies have regularly won, have legitimized these practices as proper and legal, and constricted FOIA's scope and efficacy. Congress at various times has stepped in to fine-tune the statute in the face of agen-

1. Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

2. *Id.* at 2.

cy recalcitrance and the court decisions that enabled it, but in the end the legislative fixes have fixed very little. That result reflects both the modest goals of the remedial legislation and the powerful hand of the courts in shaping FOIA.

Curiously, even as history has shown much of Nader's critique from 1969 to be prescient, Nader himself has moved decidedly in the other direction in the intervening years. On the forty-fifth anniversary of FOIA, he wrote:

> Each time you see a great segment on '60 Minutes,' or read exposés in the newspapers and magazines, chances are that they were made possible in part, if not in whole, by reporters using the FOIA. Americans learned about how far up the George W. Bush chain of command the torture policy in Iraq reached from an ACLU request under FOIA. To be sure, federal agencies are known to delay or redact far more than they should. These agencies take more advantage of the specific exemptions in the FOIA than they should. But compared to the pre-FOIA laws, our ability to find out what the government is or is not doing is almost like night and day.[3]

Of course, the 2011 Nader was looking at a different question. Few would doubt that FOIA played an important role in what scholar Michael Schudson has called the "rise of the right to know" in the United States in the middle of the twentieth century.[4] The cultural impact of FOIA (and state FOI laws) on the behavior of government agencies, the expectations of citizens, and the information-gathering of the professional press, has been extraordinary. Without resorting to the formal processes of FOI statutes, agencies routinely release, and citizens and reporters routinely receive, governmental budgets, police reports, information on taxation and spending, and agency studies. FOIA did not mark the first time that such rudimentary governmental information was released, but it did shift the transparency paradigm. The United States went from a system in which governments typically enjoyed largely unregulated latitude in deciding what information to release and when to release it, and privileged actors (whether industry heavyweights or the press) had far greater access rights than other citizens, to one in which average citizens had legal authority on their side and the unchallenged norm of disclosure for many cate-

3. Ralph Nader, *Fighting for FOIA*, FACEBOOK (June 14, 2011, 1:15 PM) http://www.facebook.com/notes/the-sound-strike/fighting-for-foia-by-ralph-nader/173837906009101 [http://perma.cc/M5JT-R93R].

4. MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY 1945-1975, at 28-63 (2015).

gories of basic governmental information.[5] Recent research by James Hamilton at Stanford demonstrates that investigative journalists continue to make productive and good use of FOIA.[6] Hamilton studied use of government record requests by entrants in a competition sponsored by Investigative Reporters and Editors. He found, among other things, that forty percent of the stories that prompted policy reviews by governmental agencies were based at least in part on documents obtained through records requests.[7]

But none of this progress takes away from the central point of Nader's earlier article: FOIA itself is deeply flawed—so deeply flawed, in fact, that its terms have allowed agencies to defeat the very purpose of the act. From the beginning, FOIA contained broadly worded exemptions that gave the agencies wide latitude to shield records of internal deliberations, declare investigative files confidential, and withhold the identities of citizens, even when these citizens had voluntarily sought governmental favors or otherwise inserted themselves into public controversies. FOIA should have been fertile ground for restorative judicial intervention, with courts giving meaning to the statute's core purpose despite its flawed drafting. Quite the opposite has happened. While paying lip service to happy FOIA platitudes about the presumption of openness and the narrowness of FOIA exceptions, the courts have crafted a line of precedents that exacerbate the precise concerns flagged by Nader in 1979.

Nader's 1979 article chastised agencies for resorting to "primitive responses"—losing documents, lying about the existence of records, showing favoritism to corporate requesters—but his main focus was on the agencies' misuse of the law.[8] Some fifty years later, what is striking is that a vigilant judiciary has not rooted out the misuse; instead the courts have effectively institutionalized it as legal and proper. The bad agency behavior identified by Nader has become the law.

Consider delay. Nader wrote his article at a time when FOIA had no specific deadlines for a response, and he complained about agency delays (albeit delays of "several weeks").[9] Thanks to the work of Nader and others, Congress subsequently changed FOIA in 1974 and added a specific timetable.[10]

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5. *See id.* at 56-63.

6. *See* JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 153-60 (2016).

7. *Id.* at 160.

8. Nader, *supra* note 1, at 10, Part II.

9. *Id.* at 8.

10. The FOIA timetable was initially ten business days for a response and twenty days for determination of an appeal. Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 609 (D.C. Cir. 1974).

Those 1974 timeline amendments, designed to rein in delay, enjoyed a short legal life. Just two years after they were passed, the D.C. Circuit essentially vitiated the timetable in a decision ironically named *Open America*.[11] The opinion is an elaborate apologia to agency delay. The court found that:

> [W]hen an agency . . . is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A) . . . the time limits prescribed by Congress in subsection (6)(A) become not mandatory but directory.[12] 2

An agency meets its obligations, the court said, merely by "assigning all requests on a first-in, first-out basis, except those where exceptional need or urgency is shown."[13]

Lost in that decision is the idea that Congress may have meant what it said when it imposed tight deadlines or that Congress might have an obligation to provide agencies with the resources needed to make sure citizens' FOIA rights are vindicated. Bizarrely, in the battle of equities between citizens eager to learn what their government was up to and the entrenched federal bureaucrat being "deluged" by the American public, the latter managed to capture the sympathies of the courts. It may well be that one of the great democratic strengths of FOIA—anyone can make a request at any time to any agency for any reason and is entitled to the same consideration as every other requester—strikes judges as giving birth to an inherently unworkable system, and they choose not to further burden the system by insisting on meaningful deadlines.

Under current law, most requests are to be processed within twenty business days.[14] Last year, the government reported that "simple" FOIA requests were processed in an average time of twenty-three days.[15] But that statistic is misleading. A different experience awaits those who make meaningful FOIA requests aimed at documents for use in investigative journalism or in-depth re-

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11. *Id.* at 616.

12. *Id.*

13. *Id.*

14. 5 U.S.C. § 552(a)(6)(A)(i) (2012).

15. OFF. OF INFO. POL'Y, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2015, DEP'T OF JUSTICE 13 (2015), http://www.justice.gov/oip/reports/fy_2015_annual_foia_report_summary/download [http://perma.cc/ER5Q-Q6QT] [hereinafter 2015 DOJ FOIA REPORT].

search. A request deemed "complex" took, on average, more than 120 days.[16] The backlog of requests still exceeds 100,000 across the federal government.[17] And responses stretching into the years remain a staple of FOIA. In a 2004 case, the *New York Times* was told by the Department of Labor that it would need 30,290 hours—15 work years—to respond to *The Times*'s request for data on workplace injuries and death.[18] None of the averages provided by the government takes into account what happens when the request ends in a denial—and 78% of requests were denied in full or in part in 2015.[19] At that point, the requester faces the further delay of administrative appeals and litigation, which itself will often take years.

Delay aside, Nader noted that the deep failure of FOIA is found in its set of nine statutory exemptions, which agencies can cite as a basis for withholding documents from requesters. The exemptions range from national security secrecy (Exemption 1)[20] to "geological and geophysical information and data" (Exemption 9).[21] But the consistent bane of many requesters, including journalists, is Exemption 5, which permits agencies to withhold "inter-agency and intra-agency memoranda or letters which would not be available by law to a private party other than an agency in litigation with the agency."[22] Two years into FOIA, it was already a problem for requesters, Nader reported. The exemption is designed to encourage candid discussions within agencies.[23] Nader pointed out that the legislative history made plain that the exemption was intended to reach only those documents that were being used in ongoing deliberations to prevent "premature disclosure."[24] Instead, he found, "several agencies have illegally broadened this exemption to deny access to matters relating to *past* decisions."[25]

In the time since, "several agencies" has become "every agency." Typical of the judicial approach is a case from the Eastern District of New York where the requester sought documents that were three decades old and pertained to a

16. *Id.* at 14.

17. *Id.* at 8.

18. N.Y. Times Co. v. Dep't of Labor, 340 F. Supp. 2d. 394, 399 (S.D.N.Y. 2004). The court ruled for The Times, and the requested data was produced without further delay after the court's decision.

19. 2015 DOJ FOIA REPORT, *supra* note 15, at 6.

20. 5 U.S.C. § 552(b)(1) (2012).

21. 5 U.S.C. § 552(b)(9) (2012).

22. 5 U.S.C. § 552(b)(5) (2012).

23. Nat'l Sec. Archive v. CIA, 752 F.3d 460, 462 (D.C. Cir. 2014).

24. Nader, *supra* note 1, at 7.

25. *Id.*

dispute over Native Americans' land ownership.[26] As the court noted, "it is clear, as a matter of logic, that the predecisional character of a document is not lost simply . . . because of the passage of time."[27]

The D.C. Circuit has been even blunter: "Exemption 5 of FOIA does not contain a time limit. We must adhere to the text of FOIA and cannot judicially invent a new time limit for Exemption 5."[28] At issue in the case was a request seeking a forty-year-old internal CIA history of the 1961 Bay of Pigs invasion. It is hard to imagine a case where the concern for a chilling effect on future deliberations was more attenuated. Do bureaucrats really worry about what will be said about them four decades from now? Would disclosure of a single historian's study of a unique historic event really chill routine agency deliberations going forward?

The answer, according to the court, was apparently "yes": "[P]rivileges that are intended to facilitate candid communication, such as the deliberative process privilege, generally do not have an expiration date."[29] Curiously enough, this year, Congress begged to differ. In its latest amendments to FOIA, Congress decided an expiration date was needed. Exemption 5 is now limited to 25 years.[30] Congress found that a time limit allowed adequate protection of governmental deliberations while recognizing the "public benefits derived from access to historical records."[31] That response from Congress was typical of much of the remedial FOIA litigation: well-intentioned but exceedingly modest. Nader, like most contemporary requesters, thought the secrecy should end at the time an agency decision was made, not two and half decades later, when the news value is gone and the public interest in a particular topic has waned.

But the problem with Exemption 5 is not just its historical reach-back. Few things are more revealing about how government is working than documents showing how an agency came to a decision, what evidence it considered, what influences came to bear, and what compromises were struck. Yet the courts have done little to give Exemption 5 boundaries, and agencies routinely take the view that any document that touched on the decision-making process

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26. Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345 (E.D.N.Y. 2009).

27. *Id.* at 359-60 (internal quotation and citation omitted).

28. *Nat'l Sec. Archive*, 752 F.3d at 464.

29. *Id.*

30. Electronic Frontier Foundation, *FOIA Reform Passes Congress in Time for 50th Anniversary*, GOV'T SECRETS, http://www.governmentsecrets.com/foia-reform-passes-congress-time-50th-anniversary [http://perma.cc/6VL8-N2CJ].

31. S. REP. NO. 114-4, at 4 (2015).

should fall within Exemption 5. As one FOIA advocate has put it, Exemption 5 has become the "withhold it because you want to" exemption.[32]

Nader's work also foreshadowed the extraordinary lengths to which the agencies and the courts would go to broaden FOIA's privacy exemptions. When Nader's research team approached the Civil Aeronautics Board ("CAB") seeking complaints from citizens about the airlines, CAB refused to provide the citizens' contact information, preventing the team from following up to determine how CAB had handled their complaints.[33] Nearly fifty years later, privacy has become the exemption of choice for FOIA officers. Nearly sixty percent of FOIA requests involve denials based on the two privacy exemptions: Exemption 6 and 7(C).[34] The explosion of FOIA privacy began with a seemingly innocuous observation by the Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*: that FOIA was intended to help citizens learn "what their government is up to."[35] From there it was a short jump to finding that records that disclosed information about private citizens cast no light on government and therefore lay beyond FOIA's reach. *Reporters Committee* shows the strange and troubling sweep of the privacy exemptions. The requesters had sought "rap sheets"—the FBI's compilation of individuals' criminal records, which are quintessentially public documents. But while the Supreme Court conceded that most of the information had been publicly disclosed by local law enforcement agencies or courts before being transmitted to the FBI,[36] it held that the rap sheets could not be obtained through FOIA because their disclosure would reveal nothing about the workings of the government. Whatever balance must be struck between privacy and the public interest tilted decisively in favor of privacy in such circumstances.[37]

What followed was not surprising. Not only was legitimately private information protected—say, a citizen's tax return—but information about government policies and practices also was when it touched upon the treatment of individual citizens. The Second Circuit found that the privacy exemptions pre-

32. Lauren Harper, *Exemption 5 Would Not Have Chilling Effect on Agency Deliberations, MDR Fees Should Be Comparable to FOIA Fees, and More: FRINFORMSUM 4/28/2016* (Apr. 28, 2016), http://nsarchive.wordpress.com/2016/04/28/exemption-5-foia-reform-would-not-have-chilling-effect-on-agency-deliberations-mdr-fees-should-be-comparable-to-foia-fees-and-more-frinformsum-4282016/ [http://perma.cc/48XY-FGSW].

33. The tale then took a particularly pernicious turn. Nader found out that CAB was disclosing the complaints—with names included—to the airlines.

34. 2015 DOJ FOIA REPORT, *supra* note 15, at 7.

35. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

36. *Id.* at 765.

37. *Id.* at 780.

vented the release of the commutation petition filed by John Walker Lindh, the American found to be fighting with the Taliban in Afghanistan shortly after 9/11.[38] The government also prevailed in withholding the names of Guantanamo detainees in records documenting abuse and mistreatment.[39] The *New York Times* in 2010 sought what seemed like standard public information: the names of persons who had obtained licenses from the Treasury Department to transact business with sanctioned countries.[40] Though the *Times* prevailed, the decision—with its in-depth discussion of the potential for "stigmatization" and fine distinctions about the level of voluntariness involved in a mandatory license application—reveals the extent to which FOIA jurisprudence has tilted toward privacy.[41]

Much the same story can be told about the exemption for law enforcement records.

Nader complained that the exemption, designed to protect the confidentiality of ongoing law enforcement investigations, was being used to hide information about past regulatory violations and documents only tangentially related to any investigation. In the years since, Congress has tried to rein in overuse of the exemption with amendments, but few traces of that intended restraint are found in the FOIA jurisprudence.[42] The Department of Justice's *Guide to the Freedom of Information Act* catalogs one decision after another in which the application of Exemption 7 has spun free of both the statutory language and the exemption's rationale.[43] Courts have applied the exemption, for example, to audits, records revealing filing systems used by investigators, records about the

38. Associated Press v. U.S. Dep't of Justice, 549 F.3d 62 (2d Cir. 2008).

39. Associated Press v. U.S. Dep't of Def., 554 F.3d 274 (2d Cir. 2009).

40. New York Times Co. v. U.S. Dep't of the Treasury, No. 09 Civ. 10437 (FM), 2010 U.S. Dist. LEXIS 109933 (S.D.N.Y. Oct. 13, 2010).

41. *Id.* at *13, *16.

42. FOIA initially provided an exemption for "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party other than an agency." *See* Nader, *supra* note 1, at 6. Congress later sought to limit the amount of withholding, and, in its current iteration, Exemption 7 applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [or] (D) could reasonably be expected to disclose the identity of a confidential source . . . ." 5 U.S.C. § 552(b)(7) (2012).

43. U.S. DEP'T OF JUSTICE, *Exemption 7,* GUIDE TO THE FREEDOM OF INFORMATION ACT (2014), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption7.pdf [http://perma.cc/MWX5-URF8].

monitoring of inmate phone calls, records from administrative proceedings, records involving national security, documents from personnel investigations by government employees, and records from proceedings that do not end in civil, criminal, or administrative enforcement.[44] Even the statutory thresholds have been eroded. The exemption as currently written applies to documents "compiled for law enforcement purposes."[45] But documents that were written for other purposes and may have been publicly available previously get swept into the exemption if they are being used by law enforcement at the time of the FOIA request.[46]

With FOIA in its infancy, Nader naturally focused on the bad behavior of agencies, but implicit in his article was the notion that the courts could come to the aid of FOIA requesters. His research showed that in the first twenty-two months of the statute, there had been forty FOIA suits brought in the courts. Of those, thirty-seven had been brought by corporations or private parties seeking materials pertaining to a private grievance.[47] Only three appeared to aim at the broader social good. No suits had been brought by news media. Still, Nader wrote, he looked to news organizations to be "the prime public guardians and litigators under the FOIA."[48]

Over the years, advocacy groups like the ACLU, the National Security Archive, and Nader's own Public Citizen have filled the void by bringing important public-interest FOIA litigation.[49] Though they have had some notable successes, it is hard not to conclude that the courts have failed FOIA and, indeed, have been a bigger disappointment than the agencies themselves. People accept that bureaucracies will be bureaucracies, and their capacity for reform, creativity, and courage is always institutionally constrained. Not so for the courts. Courts could have advanced a revolution of openness by construing FOIA's reach broadly, bringing its flawed provisions in line with its purpose, reining in unwarranted expansion of the exemptions, and combating the culture of agency delay. They largely chose another course, and fifty years later the public continues to await FOIA's promise.

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44. *Id.*

45. 5 U.S.C. § 552(b)(7) (2012).

46. John Doe Agency v. John Doe Corp., 493 U.S. 146, 154-55 (1989).

47. Nader, *supra* note 1, at 13.

48. *Id.* at 13-14.

49. *See, e.g.*, ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013) (challenging government secrecy about drone strikes); Public Citizen, Inc. v. Office of Mgmt. and Budget, 598 F.3d 865 (D.C. Cir. 2009) (challenging the agency's withholding of a legal memo that had become the "working law" of the agency); Nat'l Sec. Archive v. U.S. Dep't. of the Air Force, No. 05-CV-571 (RMC), 2006 U.S. Dist. LEXIS 21037 (D.D.C. Apr. 19, 2006) (challenging a "pattern and practice" of agency delay).

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