

## Is FOIA Actually Hurting Democracy?

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David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 **U. Pa. L. Rev.** 1097 (2017), available at [SSRN](#).

The literature on the Freedom of Information Act is replete with familiar claims about FOIA's shortcomings. It takes too long to get a response. Agencies over-withhold records. The exemptions to mandatory disclosure are too broad. Congress fails to adequately fund FOIA offices. Judicial remedies are difficult to pursue and often unavailing. And as I have argued, FOIA is overtaken by [commercial](#) and [individual uses](#) that do not promote democratic accountability. But rarely does scholarship in this area provide a compelling critique of the underlying premise of FOIA: that the Act, if functioning as envisioned, promotes the ideal of democratic accountability.

[David Pozen's](#) *Freedom of Information Beyond the Freedom of Information Act* has compellingly questioned this fundamental assumption, giving me more pause than anything else I have read in quite some time. In essence, Pozen argues that FOIA acts as a regressive, not a progressive, tool, hobbling the administrative state in its missions to protect the public's health, safety, and opportunities, all while rubber stamping the excess of secrecy that characterizes the national security state where transparency may be most needed.

The work begins by situating FOIA within a suite of disclosure mechanisms, honing the point that FOIA is not the only transparency tool that might achieve oversight goals. For example, affirmative disclosure regimes provide ex ante requirements that agencies publish certain categories of records. In other instances, the legal effect of agency documents can be conditioned on prior publication. Whistleblowing and leaking promote transparency by acting as institutional safety valves. Meanwhile, in carrying out its agency oversight activities, Congress often requires agencies to publicly share information. Yet, as the article details, among these various methods of forcing disclosure of government activities, FOIA stands alone in being divorced from any public policy goal other than disclosure for disclosure's sake.

Because FOIA places control over the objective of disclosure in the hands of any member of the public who wants to avail themselves of the right to request records, without regard to motive, the right to records is decoupled from any vindication of a normative public good. Indeed, my own work documents how FOIA is largely used to advance private, not public, interests, including commercial uses of FOIA (see [FOIA, Inc.](#)) and individuals seeking their own records (see [First-Person FOIA](#)). Taking this insight one step further, the most interesting and central claim of Pozen's article is that "FOIA ultimately serves to legitimate the lion's share of government secrecy while delegitimizing and debilitating government itself." (P. 1100.)

As to legitimating secrecy, national security is the area where transparency and public oversight is arguably most needed, but FOIA is doing little to combat the problem. Well-documented overuse of authority to classify records in the interests of national security and the near complete judicial deference granted to agency's decisions to withhold on the basis that records are classified combine to blanket the national security state with exemptions to the law's requirements. Despite occasional wins under FOIA by watchdog groups seeking national security information, FOIA has done markedly little to curb ever growing national security secrecy norms.

On the other side of the ledger, FOIA imposes significant costs on agencies. Some of those which Pozen lists are familiar. Agencies not only expend real dollars complying with the law (in sums that are not trivial), but also divert a substantial amount of program staff's time to comply with FOIA, thereby presenting an opportunity cost. Moreover,

FOIA frequently interjects procedural barriers to internal deliberation and cooperation with private entities, because government officials and the private parties with whom they interact are reticent to freely communicate in writing where the possibility of public disclosure looms large.

But the most interesting piece to me was the reputational costs to agencies. With FOIA used as a tool to embarrass agencies and make them appear incompetent, the legitimacy of government suffers in the eyes of the public. Worse yet, the fact that insufficient resources are dedicated to FOIA offices sets agencies up to fail at adequately responding to FOIA requests, thereby further harming the reputation of the agency in the eyes of the public when it avails itself of the law. Given that, for the reasons described above, national security agencies largely get a FOIA pass, these costs end up being borne most heavily by non-security agencies—that is, those agencies serving the welfare side of the state to protect health, environmental, safety, and public benefits. Seen this way, FOIA may operate as a regressive, not progressive, tool for democratic accountability.

The article ends by deftly acknowledging other possible benefits of FOIA not accounted for by an analysis strictly focused on what documents FOIA pries loose. And it suggests various ways in which alternatives to a reactive, privately driven transparency model might look like, including greater reliance on the other mechanisms originally set out as part of the transparency landscape.

If FOIA is potentially increasing our complacency about national security secrecy all while undermining the important work of government agencies concerned with public welfare missions, then the costs are far greater than monetary, and reforms all the more urgent. While I am not yet ready to abandon the idea of a request-and-response model of government transparency writ large, after Pozen's article I will have to radically rethink my overall defense of FOIA. I suspect anyone else who writes and practices in the area will be doing the same.

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