

THE MERCIFUL DEATH OF THE FREEDOM OF INFORMATION ACT AND THE BIRTH OF TRUE GOVERNMENT TRANSPARENCY: A SHORT HISTORY

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Looking back, maybe it was inevitable. Perhaps the well-intentioned yet fatally compromised Freedom of Information Act (FOIA) was doomed from the start, well before it died this year, in 2015. And yet, while FOIA was dying, true government openness was emerging to take its place.

In the 1950s and early 1960s, the passage of a Freedom of Information law requiring government to provide information to citizens upon request was championed by newspaper editors and other journalists, and by a California congressman by the name of John Moss. (Brief historic and ironic aside: A young Republican congressman from Illinois named Donald Rumsfeld was a champion of government openness,

and signed on as a leading co-sponsor of Moss' bill. Less than 10 years later, as President Gerald Ford's chief of staff, Rumsfeld convinced his boss to veto FOIA amendments meant to strengthen the law.) In 1966, with trepidation on the part of the press-wary Lyndon Johnson but great fanfare from others, FOIA was born.⁸

FOIA was meant to be "democracy's X-ray," as Anthony D. Romero, executive director of the American Civil Liberties Union, wrote in 2007, allowing journalists and other citizens to ferret out waste, fraud, abuse and corruption. As early as 1991, FOIA was being criticized as an oxymoron and was fading into obsolescence.⁹ FOIA had some victories. NASA was found to have covered up damning details of the 1986 Challenger disaster; historian David Garrow used FOIA to uncover records of the FBI's surveillance of Martin Luther King, Jr.; the Associated Press discovered that researchers at the National Institutes of Health were collecting royalties from drug companies for tests they conducted on unwitting patients; and the world learned of the torture of detainees at Guantanamo Bay and other detention facilities after 9/11—all as a result of FOIA.

Despite these and other high-profile successes, government information was never easily or willingly released. Federal agencies failed to answer most requests, and took years to answer others. An executive order issued by the Reagan-Bush Administration in 1982 instructed the federal government to classify documents whenever in doubt, and to reclassify already released material. FOIA was doomed. The *FOIA Advocate*¹⁰, a publication of the National Freedom of Information Coalition, reported in 2007 that:

8 <http://www.gwu.edu/%7EEnsarchiv/NSAEBB/NSAEBB194/index.html>

9 "FOIA IS AN OXYMORON," Downloaded at Project Censored: The News That Did Not Make the News, <http://www.projectcensored.org/static/1991/1991-story7.htm>, downloaded on April 4, 2008.

10 http://www.nfoic.org/advocate/advocate_090707.html

- Two of every five FOIA requests filed in 2006 were not processed
- The number of exemptions cited to support the withholding of information had increased 83% since 1998
- The number of FOIA denials increased 10% in 2006
- The cost of processing FOIA requests had gone up 40% since 1998, even though agencies were processing 20% fewer requests
- Most people were waiting much longer for FOIA information

In its fourth decade FOIA faced off and lost to the secrecy obsessed administration of President George W. Bush.¹¹ Bush used executive privilege, hyper classification under the aegis of national security, and stonewalling to further secrecy. The administration tightened the government's grasp on information like a boa constrictor suffocating a rabbit. For instance, the 2007 study found that the Bush Administration's Justice Department granted only 4% of the FOIA requests it received in 2006, a 70% drop from the previous administration. Vice President Dick Cheney even argued that he was not part of the executive branch, and thus was not covered by the act.

Bush signed the Open Government Act of 2007, the first reform of FOIA in over a decade.¹² It included the significant provision of establishing a FOI ombudsman to provide independent oversight and settle disputes over FOIA requests. However, Bush "neutered" the provision by shifting the funding for the office from the National Archives to the Department of Justice, where it died.

While FOIA was dying, other efforts within the Congress and elsewhere were laying the groundwork for true government transparency. In 2008, Jeff Jarvis, a blogger, journalist and journalism school

11 <http://www.bushsecrecy.org/>

12 http://www.sunlightfoundation.com/so_much_for_the_new_foia_laws

professor, wrote that the act be turned inside-out. “Why should we be asking for information about and from our government?” he wrote. “The government should have to ask to keep things from us... Government information—every act of government on our behalf—should be free by default.”¹³ Digital technology and web-based tools allow business transactions to be digitally captured, stored, and opened to search and analysis, he argued. This was not possible when the information was stored on paper in file cabinets.

Congress began to see the potential of these new online tools. The Coburn-Obama Act of 2006 was the first of a handful of laws passed over the next five years, exposing the workings of Congress to the light of day. This law established USA Spending.gov, a website that allows citizens to research federal government spending.¹⁴ The success of the website led to the formation of the Transparency Caucus Advisory Committee in 2009 that pushed more reforms on Capitol Hill and into law. This era later became known as the “Government Transparency Revolution.”

In 2009, Congress passed the Government Transparency Act requiring lobbyists to register and disclose all legislative contacts, all legislation and regulation discussed within 24 hours. The Act also required lobbyists to disclose any relationship to a current member of Congress, staff member, or executive branch employee.

Later that year, Congress passed the Government for All Act that became the gold standard for government transparency of personal and financial relationships. The law required that all public reports be filed electronically and shared within 24 hours of their filing. It forced the Senate to follow the House’s lead and make Personal Financial Disclosure reports available online. It also required Senators to file, and make public within 24 hours, campaign finance reports. It increased the filing frequency, requiring monthly reports. Personal Financial Dis-

13 <http://www.davosconversation.org/?p=3422>

14 <http://www.usaspending.gov/>

closure reports were amended to require disclosure of the affiliations of Members (and their spouses and their adult children) with political action committees, “Leadership” PACs, and any 501(c)(3) or 501(c)(4) organizations. Other mandated disclosures included the employment of immediate family members and their economic relationships with for profit and not-for-profit entities.

In 2010, Congress passed the Information for Everyone Act that ended the practice of secret legislation once and for all. Specifically, the act required that all non-emergency legislation be posted online, in its final form, at least 72 hours before a vote. The act also required disclosure of the purpose and identification of the beneficiaries of legislative earmarks 72 hours before a vote on them.

The Information for Everyone Act opened up all congressional information to the public in free, easy-to-use online formats. This included Congressional Research Service reports, Legislative Information System documents, and all other non-classified research and information available to members of Congress and their staff.

These cascading reforms whetted the appetite of the public for open and transparent government. Suddenly, citizens were participating directly in the writing of legislation and regulations. The federal government stopped fearing transparency and embraced openness. Ultimately, FOIA’s demise was necessary to allow transparency and information to flow freely.

About the Author

Ellen Miller is the co-founder and executive director of the Sunlight Foundation. She previously served as deputy director of Campaign for America’s Future. She is the founder of two prominent Washington-based organizations in the field of money and politics—the Center for Responsive Politics and Public Campaign.