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A Secret Police: The Lasting Impact of the 1986 FOIA Amendments

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Abstract

The 1986 Freedom of Information Act amendments were passed as a last-minute rider to Reagan-era War on Drugs legislation. The three pieces – a broad restructuring of Exemption 7, the law enforcement exemption; the addition of exclusions for law enforcement and intelligence requests; and introduction of a new fee structure – have had a lasting impact on FOIA implementation and contribute to the contemporary inability to affect police transparency. Review of the 1986 FOIA amendments' legislative history documents the White House's determination to loosen law enforcement oversight and congressional appeals to exaggerated fears of illicit drug users. The study considers the effect on judicial interpretation of Exemption 7, exploring decisions before and after the amendments, while also analyzing FOIA use and implementation patterns through a dataset of annual reports from 1975 until present. The analysis reveals a sharp increase in Exemption 7 claims and "no records" responses, both attributable to the 1986 FOIA amendments.

On October 20, 2014, 17-year-old Laquan McDonald was shot and killed by a city police officer on the southwest side of Chicago. The initial police report documented McDonald lunging at police with a knife causing the officer to open fire on the teen.¹ A police spokesperson said officers were forced to defend themselves.² Thirteen months later, public release of dashcam video of the events would demonstrate Officer Jason Van Dyke was on the scene for less than thirty seconds before exiting his cruiser and firing sixteen rounds, and McDonald was, contrary to official reports, walking away from police at the time of the shooting.³

The dashcam footage was only released after multiple denials, a drawn-out appeal and a court order. The Chicago Police Department fought dissemination of the recording, having received and rejected fifteen Illinois Freedom of Information Act⁴ requests.⁵ The department relied on three common law enforcement exemptions to justify the denials.⁶ The *Chicago Tribune* reported that city officials exchanged emails shortly after McDonald's death, acknowledging the existence of the video and how best to proceed.⁷ Chicago officials reached a \$5 million settlement with McDonald's family, and the emails show the city asked the McDonald family not to release the video until criminal charges were resolved.⁸ In a public address, Mayor Rahm Emanuel discouraged release of the video, suggesting the dashcam footage would come out at an appropriate time.⁹ Despite the coordinated efforts of city hall, the video would be made public through an appeal of a denied Illinois FOIA request. The release of the video would prove pivotal in revealing the nature of McDonald's death and result in a black eye for the city and its police.¹⁰

While the outcome of the Laquan McDonald video case can be construed as a successful application of freedom of information law and a victory for police accountability, the result was unusual.¹¹ The law enforcement exemptions used in the case by the Chicago Police Department exist in nearly all federal and state freedom of information laws and are consistently upheld in courtrooms. These law enforcement exemptions are the product of a calculated federal effort to shrink access to law enforcement records. As one piece of omnibus War on Drugs legislation, Congress inserted pivotal language in the 1986 amendments to strengthen the hand of police by reducing access to law enforcement records.¹²

In a time when society is reevaluating police authority and use of force, the primary law for public oversight of law enforcement is tilted in favor of police. The passage of the 1986 amendments to the FOIA has proved to be a crucial event in providing law enforcement agencies leverage in limiting the release of police records. The additional deference to law enforcement exemption claims has resulted in a flawed FOIA process and soaring Exemption 7 claims.¹³

This article will evaluate the FOIA and its exemptions and exclusions dedicated to law enforcement purposes with a particular focus on the 1986 FOIA amendments, Reagan-era alterations passed while the country was enthralled by the War on Drugs campaign and insistent on strengthening the hand of police. The study will focus exclusively on federal open records law, as most state laws are closely patterned on the federal statute and fall in line with new legislative changes and judicial interpretations.¹⁴ First, the article explores the state of exception theory and the climate of War on Drugs policy in affecting amendments to the FOIA, before tracing federal rhetoric in the lead-up to passage of the amendments. The study will explore court opinions on the FOIA and Exemption 7 before and after the 1986 alterations and then analyze a dataset of cabinet-level FOIA annual reports documenting use and implementation of the access mechanism from 1975 to 2016 to determine the impact of the change in the law enforcement exemption's rhetoric. The discussion and conclusion consider the motives and implications of the amendments.

The War on Drugs

The 1986 FOIA amendments are one front in the United States' War on Drugs, the long-running federal initiative aimed at eradicating illicit drug use and sales. The War on Drugs – called “one of the defining discourses of the

20th century”¹⁵ – unofficially commenced in 1969 when President Richard Nixon appointed Stephen Hess to head a task force responsible for “listen[ing] well to the voices of young Americans – in the universities, on the farms, the assembly lines, the street corners”¹⁶ in an effort to better understand the American psyche during a time of social upheaval that included sustained civil rights protests and the arrival of the counterculture movement. The resulting report “forcefully argued for addressing the root causes of drug abuse.”¹⁷ President Nixon responded less than two months later with marching orders for Congress to address a drug abuse problem that had reached “national emergency” status.¹⁸ Nixon’s request resulted in legislation, which, among other achievements, authorized \$1.7 billion toward the drug abuse initiative.¹⁹ Notably, Nixon’s new policy framed drug abusers as criminals, and it advanced a theory that diminished social welfare spending would “attack the root cause of drug abuse.”²⁰ The Nixon White House’s position and efforts regarding illicit drug use were hardly novel, but Emily Dufton has suggested President Nixon and company were responsible for a powerful paradigm shift that positioned drug users as the locus of many social ills and as a particularly recalcitrant motivator of violent crimes.²¹ Dan Baum suggested that this was not necessarily an unusual notion, but one Nixon was responsible for hardwiring into the Republican consciousness.²² The advent of the War on Drugs marks a watershed social policy where drug users were framed as a feral threat to society, a threat not only necessitating incarceration but exonerating the white middle class from responsibility for urban drug crises. The drug epidemic ramped up the imperative of strong police forces and made drug users culpable and disposable.

President Jimmy Carter’s term in office slackened some of the more strident rhetoric and focused federal drug efforts on increased treatment options, research of effects, and a turn away from the villainization of marijuana.²³ However, President Ronald Reagan’s 1980 election would again swing the War on Drugs back to Nixon’s original vision for total eradication of illicit drug abuse through aggressive policing efforts and heavy punishment. President Reagan’s election was seen as a public mandate, trouncing incumbent Jimmy Carter ten-to-one in electoral votes. As part of that mandate, President Reagan saw fit to reify his campaign trail credo: Government is not the solution; it is the problem.²⁴

In an early debate among Reagan advisers, a disagreement emerged over the federal government’s role in law enforcement with Attorney General William French Smith calling the Justice Department not a domestic agency, but, “[T]he internal arm of national defense.”²⁵ Reagan agreed with the expansive interpretation of the Justice Department’s objectives, telling his aides, “Law enforcement is something we have always believed was a legitimate function of the government.”²⁶ Attorney General Smith believed America to be too soft on criminal activity, a sentiment shared by Reagan confidante and Smith’s successor as attorney general, Edwin Meese. According to Baum, Meese would declare a solution: “We must increase the power of the prosecutor.”²⁷ Myriad strategies were pursued in an effort to strengthen the hand of law enforcement,²⁸ one being a major amendment of the FOIA.

The climate resulting from a front of swirling paranoia surrounding drug use and a federal government committed to empowering law enforcement produced FOIA amendments that generally eased agency ability to use exemptions, expanded the breadth of the national security and law enforcement exemptions, and codified dishonesty as a legitimate response to a FOIA request. Each of these amendments remains on the books, diminishing one of the very few avenues for civilian oversight, sapping civic trust with every denied FOIA request and every police scandal. The FOIA amendments – simmering since Reagan’s 1980 election, but never popular in the House of Representatives – were quickly and quietly tucked into Reagan’s signature War on Drugs legislation. The product is one of the most substantial statutory changes to the FOIA since the 1974 amendments²⁹ inaugurated the contemporary conception of access mechanism. It resulted in dramatic changes in the function of the FOIA. The wider social effects of significantly diminished police oversight are incalculable.

State of Exception

The dramatic shift in the government's approach to illegal drugs and the branding of the effort as a kind of domestic war is essential to understanding not only the support for and language of the FOIA amendments but in the larger project of augmenting law enforcement power and demonstrating a societal need for increased law and order. In emphatically pitching and widely distributing the message of the drug crisis, government grew public concern and established a rationale for a more robust law enforcement presence. By amplifying a public safety concern, the government cleared a runway for more power. The scenario can be viewed as an instantiation of the term "state of exception," where government temporarily exceeds conventional rule of law and typical or constitutional powers in a moment of emergency. In instances of states of exception, the expansion of authority will meet the perceived threat; thus creating incentive for government to broadly define any threat or crisis.

Carl Schmitt is credited with developing "state of exception," a legal theory most commonly cited for recognizing the locus of power in legal circumventions. He succinctly captured the premise in acknowledging the "sovereign is he who decides on the exception."³⁰ Schmitt's turn was in arguing everyday law and order to be little more than veneer on an unsteady legal system founded on raw power. When threatened, the legal system ruptures and exposes the true nature of the political order.³¹ Schmitt was interested in Max Weber's theories of bureaucratization, though ultimately rejecting the rational-legal basis of objective hierarchy. Weber recognized that despite insistence on systematic neutrality our contemporary social order always bends toward the favor of those in power. In the words of Martti Koskenniemi, Weber diagnosed "the failure of legal formality in the conditions of complex modernity, and highlight[ed] the way bureaucratisation focuses on the decision-maker's preferences or alliances."³² This is where Schmitt suggests real power and its interests are witnessed.

Schmitt's theory lay largely dormant for an extended period of time, at least partially due to his significant role in the Nazi regime. State of exception received a hearty revival in the 1990s,³³ and use continued to spike after publication of Giorgio Agamben's "State of Exception," a post-9/11 exploration of human rights.³⁴ In galvanizing the theory, Agamben looked at the ways social crises have resulted in diminished rights in democratic nations throughout history. He documented war as a common catalyst for instantiation of states of exception. In particular, World War I witnessed a number of countries forgoing standard rights in favor of order and preparedness.³⁵ While World War I is a conspicuous and large scale state of exception, Agamben traced the roots of the legal circumvention in the United States to the Constitution.³⁶ He identified the events surrounding the French Revolution as the first modern instance of a state of exception,³⁷ and it is in the United States' own internecine fighting that it is first witnessed domestically.

A principal point in the book is the obstinate nature of the legal exception and the successful grafting of a succession of exceptions onto the legal code. David Cole cataloged the number of statutes that allowed for curtailment of typical rights: "The United States has been under one state of emergency or another since 1933; by the end of the mid-1970s, there were more than 470 'emergency' laws on the books."³⁸ Agamben judged this to be no accident: "The modern state of exception is instead an attempt to include the exception itself within the juridical order by creating a zone of indistinction in which fact and law coincide."³⁹

Jules Lobel has documented the perpetual state of emergency and its ameliorating force on civil liberties. He has labelled government efforts to create a pervasive anxiety as manipulative, suggesting exaggeration of threats to be deliberate.⁴⁰ Lobel wrote, "The effect of both the ideology and reality of permanent crisis has dramatically transformed the constitutional boundaries between emergency and non-emergency powers. First, the premise that emergency was a short, temporary departure from the normal rule of law is no longer operative. Emergency rule has become permanent."⁴¹

The Supreme Court has considered the state of exception on a number of occasions, notably in *Schenck v. United States*,⁴² *Korematsu v. United States*⁴³ and *Dennis v. United States*.⁴⁴ In *Schenck*, Justice Oliver Wendell Holmes, writing for a unanimous Court, acknowledged the infringement of First Amendment rights, but found the war-time conditions necessitated such actions: “We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.”⁴⁵ He then famously compared the abridgement of speech critical of war activities to falsely shouting fire in a crowded theater. Justice Holmes first mentioned “clear and present danger” in the opinion, but also focused on the “substantive evil” that must exist for government to curtail expression.⁴⁶ In *Schenck*, the Court found disparaging the military draft to meet such a threshold; military efforts were sufficient grounds for a state of exception.

Despite questioning the constitutionality of the quarantining of individuals of Japanese heritage,⁴⁷ the *Korematsu* Court found in favor of the government, citing the small hop from an enforced curfew to mandatory detention. Writing for the Court, Justice Hugo Black suggested the temporary restraint on an ethnicity’s free movement compared favorably to clearing the area around a fire.⁴⁸ Justice Black recognized the extreme nature of the detainment but found the action equal to the threat, writing:

Compulsory exclusion of large groups of citizens from their homes except under circumstance of direct emergency and peril, is inconsistent with our basic government institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.⁴⁹

Again, military efforts were justification for a state of exception, and here detention was the equal of the purported Japanese threat.

The Supreme Court decided a case not unlike *Schenck* in 1951, finding another legitimate abridgement of free expression. The secretary of the Communist Party was found in violation of the Smith Act⁵⁰ for the party’s general revolutionary philosophy. It was determined that a non-capitalist ideology justified limitations on civil liberties.⁵¹ Though the Communist Party of the United States held no exigent plans to overthrow the government, its latent interest in revolution was deemed to be a clear and probable danger. The Supreme Court echoed the lower court’s opinion, “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”⁵² In his concurrence, Justice Felix Frankfurter wrote, “Civil liberties draw at best only limited strength from legal guaranties.”⁵³ In *Dennis*, the Court found that rights and liberties may be constrained not only in a time of emergency but in instances where the mere potential for evil is apparent.⁵⁴ Thirty-two years after *Schenck*, a state of exception occurs without military efforts. The pervasive anxiety of the Red Scare was sufficient.

These cases demonstrate the malleability of legal thought when confronted with perceived emergencies, especially of a particular kind of national security threat. That fundamental rights like freedom of expression and movement can be abridged under the right circumstances suggests courts are likely not an effective backstop in the face of ingrained, widespread public fear.⁵⁵

Scholars have traced the state of exception to limitations on access to government information. In an article exploring this phenomenon, Jane Kirtley found the government’s post-9/11 efforts to curtail the public’s right to know manifold.⁵⁶ She highlighted the White House’s duplicitous leverage: “In the aftermath of the September 11 attacks, the Bush administration continued to exploit legitimate concerns about disclosing sensitive information to potential terrorists as a justification for greater secrecy.”⁵⁷ David Pozen found judicial review inadequate in determining rights in the face of a national security threat.⁵⁸ In discussing a rise in the use of the mosaic theory

in short-circuiting the FOIA process, he described the conditions accompanying the increase and the judicial review of the legal claim:

[M]osaic-making and information generally have taken on a new salience in the national security strategy after 9/11, with today's mosaic threats more numerous and speculative than ever before...I conclude that, whatever its risk-reducing potential, [the prevailing judicial review of mosaic theory] is legally unjustified and practically unwise.⁵⁹

Christine Wells highlighted a long history of leveraging moments of national crisis for long-term rollbacks of government transparency:

Secrecy with respect to national security is important, but the natural tendency of bureaucrats to rely on it – understandably exacerbated in times of crisis–threatens to engulf FOIA's purpose. Historically, secrecy has continued well beyond identifiable crises, becoming entrenched in even routine matters. The fact that government officials believe the country has subsisted in a constantly threatened state for much of the last 50 years due to the Cold War and terrorism suggests that executive officials will continue to invoke the national security rationale to justify even greater withholding of government information.⁶⁰

Whatever the intentions of those pursuing policy changes under the auspices of the War on Drugs, the branding of the efforts and the conflation of domestic policy with active military operations bears significance in ensuring a wider authority in diminishing or transferring civilian rights and privileges. The broadest projection of the threat of illicit drugs is likely to return the widest federal authority, thus a war and not new federal guidelines or government program. By defining the efforts as an emergency, the state of exception becomes operative. And while the urgency or even viability of the War on Drugs as a policy effort has faded – as Agamben and Lohel warned – much of the statutory regime remains, including the 1986 FOIA amendments.

Legislation & Executive Guidance

Once the staff and cabinet were in place, the Reagan administration immediately set about making changes to the FOIA. Four months into his term, Attorney General William French Smith released guidance signaling a Department of Justice more inclined to defend agency non-disclosure decisions.⁶¹ In October 1981, Senator Orin Hatch introduced two bills aimed at overhauling the FOIA.⁶² While neither made it out of committee, a startling number of changes were proposed. The 1981 bills would introduce the core of the 1986 FOIA Reform Act, including the law enforcement exemption modifications and new fee structure. There is a clear legislative through-line between the 1981 efforts of Hatch and Smith and the 1986 FOIA amendments. Early in Reagan's first term in office, it became clear that influential forces had dramatic change in mind for the FOIA, and Smith's guidance and Hatch's bills announced a new FOIA regime was afoot.

After five years of foment, these early endeavors would materialize as the Freedom of Information Reform Act of 1986,⁶³ the short form title for the subsection of the Anti-Drug Abuse Act⁶⁴ dedicated to the FOIA. The amendments announced three significant changes to the existing statutory scheme; three alterations that remain in effect to this day. In line with President Reagan's overall aim of the Anti-Drug Abuse Act, the Freedom of Information Reform Act was explicitly focused on increasing law enforcement powers by diluting elements of the FOIA. In his signing statement, President Reagan called the amendments important because statutory changes would "considerably enhance the ability of Federal law enforcement agencies... to combat drug offenders and other criminals," acknowledging he had sought such changes since 1981.⁶⁵ The amendments reconfigure Exemption 7, the law enforcement exception; added "exclusions," information categories where records are lawfully excised from the FOIA process; and further refined the fee structure.

As is custom, the Justice Department released influential guidance for the amendments, providing legal interpretation of the new legal elements, while also explaining the vision and the motives of the 1986 FOIA amendments.⁶⁶ In the introduction, Attorney General Edwin Meese provided two recurring themes espoused by supporters of the amendments. First, he called the 1974 FOIA amendments an overcorrection that “seriously impaired the ability of federal law enforcement agencies to perform their crucial mission of protecting our citizenry.”⁶⁷ Meese stated that “the Freedom of Information Reform Act recognizes and is principally designed to set right” the prior miscalculation.⁶⁸ Second, he pointed to the 1981 congressional testimony of FBI Director William H. Webster, warning of “sophisticated requesters” prying loose sensitive information to the “impairment of vital law enforcement interests” as a catalyst for the amendments.⁶⁹ Similar testimony on the inconvenience of the FOIA from law enforcement officials was commonplace in the build-up to passage of the 1986 amendments.

Notably, the 1986 FOIA Reform Act was a floor amendment at the close of the legislative session, thus leaving behind little immediate legislative history. The FOIA amendments were fairly unpopular, and their arrival as a rider to sweeping so-called “tough on crime” legislation was no accident. Oklahoma Representative Glenn English, an advocate for FOIA reform,⁷⁰ expressed misgivings about the haste of the amendments,⁷¹ as did Representative Tom Kindness, English’s ranking minority member of the Subcommittee on Government Information,⁷² though both would ultimately support the bill. Because of its passage as a floor amendment, there are no committee reports, no conference reports and scant congressional comment. A very similar bill introduced in 1983 would also fail,⁷³ and much of its legislative history is illustrative in interpreting the 1986 amendments. The 1983 bill – also introduced by Hatch – contained similar Exemption 7 changes, establishment of the exclusions and a new fee system that were passed as part of the 1986 amendments, but it also represented wider and more sweeping changes to the FOIA system, including further protections for business confidentiality and personal privacy and would have codified six “unusual circumstances” for a thirty-business day extension.⁷⁴ The Senate would pass the 1983 amendments, but the bill never made it out of committee in the House of Representatives. Concurrently, efforts were made to diminish other aspects of the FOIA, including Senator Barry Goldwater introducing the CIA Information Act⁷⁵ in 1983, a law signed by President Reagan a year later that provides a categorical FOIA exclusion for the procedural files of the CIA, effectively placing the intelligence organization outside of public oversight.

Exemption 7

The changes to Exemption 7 signal one of the more significant alterations in FOIA history, changes with a clear motive – reducing the flow of government records from federal law enforcement agencies. Each piece of the Exemption 7 alterations – new language for the threshold, a diluted harm standard, and altered verbiage in three of the six sub-exemptions – made non-disclosure of law enforcement records more likely. Prior to 1986, the threshold for qualifying for an Exemption 7 claim had required the information to be sufficiently investigatory in character.⁷⁶ The 1986 amendments lowered the mark: records or information need only “be compiled for law enforcement purposes.”⁷⁷ The previous standard allowed for the withholding of information that related to specific policing practices, while the new threshold is considerably more ambiguous in allowing for non-disclosure of any records that relate to law enforcement activities. The harm standard – as applied to Exemptions 7(A) (ongoing proceedings), Exemption 7(C) (personal privacy), 7(D) (law enforcement sources) and 7(F) (physical safety) – was also significantly lowered. In order to accommodate one of the exemptions, past standards required release of the information that would threaten the sought protections.⁷⁸ The new standard only necessitates release of information that “could reasonably be expected to” harm one of the identified sub-exemptions.⁷⁹ In amending Exemption 7(D), the statute adopted a wider range of acceptable source protections, adding an array of “state, local, or foreign or authority or any private institution”⁸⁰ to the list of non-disclosable sources. The changes to Exemption 7(E) included additional language permitting non-disclosure of more internal

law enforcement activities, covering prosecutorial techniques and law enforcement guidelines.⁸¹ Exemption 7(F) was amended to allow for non-disclosure of information that may pose a threat to any individual, law officer or otherwise.⁸²

In his signing statement, President Reagan affirmed that the Exemption 7 amendments were intended to provide law enforcement more control over the release of requested records.⁸³ The attorney general's guidance explained that the excision of "investigatory" from the threshold language was due to judicial difficulty in interpreting investigatory and non-investigatory records.⁸⁴ Meese also made the unusual move of identifying specific record sets that were now to be considered exempt according to the new statutory language.⁸⁵ Congress explained the purpose of the statutory change as expanding Exemption 7 to a wider range of societal threats, not merely the events of daily policing. In introducing the amendment to Exemption 7, Senator Patrick Leahy, a long-time member of the Senate Judiciary Committee, warned of the specter of "sophisticated criminal enterprises" utilizing the FOIA for nefarious ends.⁸⁶ Hatch said the law enforcement exemption amendments were "added protection for foreign counterintelligence and terrorism records."⁸⁷ In accord with the larger motive of the bill, Hatch observed, "This section will directly improve drug enforcement," before citing the Drug Enforcement Agency's dissatisfaction with the FOIA.⁸⁸ Hatch suggested the harm of the FOIA on law enforcement to be incalculable, as "many investigations are aborted, compromised, or reduced in scope because of FOIA exposure."⁸⁹ Hatch also produced his 1983 law review article, in support of a bill of his own sponsorship, aimed at further refining the balance between transparency and confidentiality in law enforcement.⁹⁰ He expressed the common refrain among those interested in altering Exemption 7:

The end product of these problems is an unfortunate overemphasis upon disclosure at the expense of confidentiality necessary to law enforcement investigations and informants. In fact, (b)(7) provides a reminder that disclosure may endanger the life of an informant or a suspected informant whose identity may be revealed by piecing together released FBI documents.⁹¹

In the article, Hatch again referenced the FBI's disagreement with the presiding FOIA standards, providing an anecdote about Gary Bowdach, a convicted murder seeking information on a possible informant.⁹² Hatch highlighted enterprises with the incentive and resources to systematically reconstruct disparate information to devastating effect, warning, "There is much evidence of the existence of sophisticated networks of organized FOIA requesters."⁹³ Leahy said the public would lose little in the way of transparency, while interpretation would be improved.⁹⁴ Members of the House were significantly less alarmed. English, while ultimately in agreement with the Exemption 7 alterations, found, "[T]he broad complaints of the law enforcement community about the negative effects of the FOIA were greatly exaggerated."⁹⁵

Exclusions

In codifying exclusions, the 1986 amendments introduced a new practice to the FOIA system. Exclusions provide "any agency possessing records [of three defined record categories] to treat them as not subject to the requirements of the FOIA."⁹⁶ In effectively removing classes of information from public review or recourse, this power allows agencies to return a "no records" reply to a requester despite the existence of responsive records. The three classes of information are of a similar caste, each applying to federal policing or surveillance powers. Exclusion (c)(1) provides exclusion powers to records involved in an on-going criminal investigation, identical to Exemption 7(A), but with the additional provision that the agency must have reason to believe that "the subject of the investigation or proceeding is not aware of its pendency"⁹⁷ and thought to represent "a possible violation of criminal law."⁹⁸ Exclusion (c)(2) allows for exclusion when a third party requests informant records held by a criminal law enforcement agency.⁹⁹ The third exclusion, (c)(3), removes from the FOIA process FBI records "pertaining to foreign intelligence or counterintelligence, or international terrorism," or information that exists as classified.¹⁰⁰

In his published guidance for the amendments, Attorney General Meese acknowledged sensitive information necessitated the creation of “an entirely new mechanism.”¹⁰¹ Again, the motive is sophisticated entities crafting clever records requests querying law enforcement about potential investigations. Meese stated that exclusion was the last resort: “This is the only effective way to avoid the ‘tip off’ problem.”¹⁰² Hatch identified a similar motive for amendment of exclusions as for expansion of Exemption 7, suggesting exclusions as a method for sewing up some “massive loopholes,” acknowledging that “drugs and organized crime constitutes a special problem under the FOIA.”¹⁰³ In supporting (c)(2), Senator Jeremiah Denton again recalled FBI Director William H. Webster’s 1981 testimony, where he stated there were 125 cases in which individuals refused to cooperate for fear of being outed by a FOIA release.¹⁰⁴ Denton warned that enemy states and interests were using the FOIA against the United States.¹⁰⁵

Judicial Interpretation

Exemption 7 has been one of the most heavily adjudicated of the FOIA exemptions, including multiple Supreme Court cases focusing on the law enforcement exemption. The significant changes in the policing provision are partially due to frequent change in the statutory language. After the 1986 amendments, federal courts established a new “central purpose” for the FOIA and reconsidered fundamental elements of Exemption 7. In the twenty years prior to the War on Drugs-influenced amendments, courts were especially interested in deliberating the legitimacy of actions in creation of federal police records, whether there was a lawful investigatory motive to police action that produced the records. Courts were concerned with protecting the integrity of investigations and those implicated in their actions but sought to allow for transparency when investigations and their parties were not vulnerable. The 1986 amendments excised this concern, and the courts explicitly identified this as carving out a wider legal berth for nondisclosure of police records.

Pre-Amendment

*National Labor Relations Board v. Robbins Tire & Rubber Co.*¹⁰⁶ is perhaps the most illustrative of cases on the pre-1986 amendments. The Court marked “investigatory” as a term of particular interest in adjudication. The decision capped a series of lower court cases exploring the breadth of the law enforcement exemption. Ultimately, the Court reversed the circuit court decision and provided an expansive reading of “investigatory,” determining that release of witness statements given to the National Labor Relations Board would interfere with enforcement proceedings and were appropriately withheld under Exemption 7(A).¹⁰⁷ In *Robbins*, the Supreme Court also offered an interpretation of the 1974 FOIA amendments to Exemption 7, circumscribing the limits of “investigatory.”¹⁰⁸ The Court found the amendments were to help clarify Exemption 7, not alter the original intent of the statute, nor tilt the law enforcement exemption in favor of disclosure or secrecy. The Court broadened Exemption 7 in *Robbins*, finding any general interference with enforcement proceedings – of any kind – legitimized an Exemption 7(A) claim. In a dissent, Justices Lewis Powell and William Brennan suggested too much discretion was given to the term “investigatory,” and they drew a finer definition around enforcement proceedings, requiring them to be both imminent and adjudicatory.¹⁰⁹

In 1982, the Supreme Court decided *FBI v. Abramson*,¹¹⁰ another influential Exemption 7 case. Journalist Howard Abramson had sought records transmitted from the FBI to the White House. *Abramson* primarily focused on one memorandum and sixty-three accompanying pages of material.¹¹¹ The memo and additional files were from FBI Director J. Edgar Hoover to John D. Erlichman, a Nixon aide, and were transmitted by Hoover in response to a White House request for information on eleven political opponents. The records were denied under Exemptions 6 and 7(C), and the district court upheld the Exemption 7(C) claim despite acknowledging, “[T]he FBI had failed to show the information was compiled for law enforcement rather than political purposes.”¹¹² The D.C. Circuit reversed, determining the FBI failed to demonstrate the motive for original compilation of the material was investigatory and Exemption 7(C) could not be invoked regardless of the personal privacy at stake.¹¹³

In deciding *Abramson*, the Supreme Court outlined the prevailing Exemption 7 interpretation, then established a two-part test for law enforcement claims: “First, a requested document must be shown to have been an investigatory record ‘compiled for the law enforcement purpose.’ If so, the agency must demonstrate that release of the material would have one of the six results specified by the Act.”¹¹⁴ The Court decided the records were, in fact, compiled for law enforcement purposes, and intra-government requests for the records did not change their original status. There were four dissenters. Justices Harry Blackmun and William Brennan explicitly addressed the “investigatory” element of the statute, questioning the majority opinion’s broad reading of “records.”¹¹⁵ Justices Felix Frankfurter and Thurgood Marshall filed a dissenting opinion questioning the majority opinion’s expansive interpretation of the statutory language.¹¹⁶ The case turned on the availability of derivative records, but the opinion emphasized the necessity of an investigation, a significant distinction in Exemption 7 jurisprudence.¹¹⁷ There was disagreement between the justices about the disclosure status of records transmitted for political purposes, but a consensus formed on the necessity of a legitimate investigation.¹¹⁸

The same year the Supreme Court decided *Abramson*, the D.C. Circuit decided a similar case. The court further refined the interpretation of Exemption 7 in *Pratt v. Webster*,¹¹⁹ calling the case “a logical sequel to” *Abramson*.¹²⁰ In *Pratt* – which was heard neigh concurrently to the Supreme Court’s hearing of *Abramson* - the D.C. Circuit took the opportunity to establish its own test for “investigatory records compiled for law enforcement purposes.”¹²¹

Pratt involved the eponymous appellant, Elmer G. Pratt, a former officer of the Black Panther Party, seeking all FBI records referencing or related to his own name. He received the bulk of responsive documents, but twenty were withheld under Exemptions 7(C) and 7(D). The undisclosed documents were generated as part of FBI Counter-Intelligence Program investigations of the Black Panther Party. The district court determined the twenty records should be disclosed as they were created without a “legitimate law enforcement purpose.”¹²² The government boldly contended that the FBI, due to its investigatory mission, was wholly absolved from demonstrating withheld records satisfied the Exemption 7 threshold. In *Pratt*, the FBI advanced a belief that all FBI records *per se* qualified for the law enforcement exemption.¹²³ The D.C. Circuit called the suggestion “untenable,” referencing the political purpose of the FBI’s transmission of records in *Abramson* and setting out a three-part threshold test for Exemption 7.¹²⁴ Highlighting the statutory language, to reach that threshold a record must (1) be an investigatory record, (2) have been compiled for law enforcement purposes, and (3) satisfy the requirements of one of the six law enforcement sub-exemptions.¹²⁵ The D.C. Circuit ruled against the release of the COINTELPRO documents – suggesting better remedies for such malfeasance – but the decision’s discussion of a “rational nexus” would prove enlightening.¹²⁶ To demonstrate a rational nexus, an agency must, “[E]stablish that its investigatory activities are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached.”¹²⁷ The decision further expanded the interpretation of Exemption 7, a move acknowledged by the court, calling the interpretation “necessarily deferential.”¹²⁸

In examining the trajectory of *Robbins*, *Abramson* and *Pratt*, the federal courts grapple with the appropriate interpretation of “investigatory.” In *Abramson*, they determine having “investigation” in the agency title is not sufficient. They develop a two-prong test, then a three-part test and conclude with the necessity of a rational nexus, a bar requiring substantial proof of a legitimate investigation. It is a careful, decades-long refinement of the law enforcement exemption, and it is terminated with the 1986 amendments.

Department of Justice v. Reporters Committee

In one of the most influential and frequently cited cases in all of FOIA adjudication, *Department of Justice v. Reporters Committee for Freedom of the Press*,¹²⁹ the Supreme Court confronted the law enforcement exemption post-1986 amendments. Most famous for Justice John Paul Stevens dictating the purpose of the

FOIA,¹³⁰ detailing “practical obscurity,”¹³¹ and as a key decision in the building momentum for recognizing expansive privacy rights in open records laws, the decision also stands as a clear interpretation of the new Exemption 7 language. Justice Stevens’s opinion would not only provide unequivocal direction for future law enforcement exemption implementation but also acknowledged the amendments as deliberately less favorable to disclosure. *Reporters Committee* marks a turn in Exemption 7 administration, and the opinion addressed the 1986 amendments as a clear signal for change.

The case centered on a FOIA request submitted to the FBI seeking criminal records on members of a known organized crime family.¹³² The request was spurred by interest in the family’s numerous state contracts. After an initial denial and appeal, the FBI provided records on three dead members of the family, but withheld information on the fourth, living, individual under Exemption 7(C). The appeal argued that the living member’s criminal past had already individually been made public. A rap sheet – a summary of previous crimes – presented nothing that was not already publicly known.¹³³

The crux of the decision hinged on whether privacy rights outweighed the public interest in knowing his criminal past. Ultimately, the Court found in favor of privacy, largely due to an inchoate fear of easily accessible digital information. Notably absent in the opinion’s considerable discussion on the nature of privacy and whether the FBI’s claim met the Exemption 7 threshold is any debate on the investigatory status of the records. In fact, in outlining the parameters of the statute early in the opinion, two footnotes hold conversations on the impact of the 1986 amendments, characterizing the Exemption 7 alterations to “represent a considerable congressional effort to ‘ease considerably a Federal law enforcement agency’s burden in invoking [Exemption 7]’”¹³⁴ and its aims “to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information.”¹³⁵ More directly, the majority recognized Congress’s intent to provide law enforcement agencies more latitude in withholding requested records, observing that the privacy protections in Exemption 7 outstripped the protections in the personal privacy exemption, Exemption 6.¹³⁶ The opinion explicitly addressed the 1986 amendments and changing “would constitute” to the more liberal “could reasonably be expected to constitute,” which Stevens called a more favorable standard than other nondisclosure categories.¹³⁷ The D.C. Circuit found that the minor rhetorical switch “relieves the agency of the burden of proving to a certainty” any potential harms.¹³⁸

Reporters Committee stands as judicial confirmation of the 1986 amendments and the impact it wrought on law enforcement secrecy. In plain language, the Court acknowledged the wider legal space for police nondisclosure. The decision stands as recognition of Senator Hatch’s intent to strengthen the hand of law enforcement *via* limiting law enforcement transparency. *Reporters Committee* produced dramatic new directions for the FOIA – a “central purpose” is determined and a categorical balancing of privacy over public interest is adopted – but these outcomes are unlikely if they do not arrive in concert with the political orchestration of an illicit drug crisis and legislative signal to ease nondisclosure measures.

Post-Amendment

Four years after *Reporters Committee*, the Supreme Court considered another Exemption 7 case and again made direct reference to the impact of the 1986 FOIA amendments. In *Department of Justice v. Landano*,¹³⁹ the Court decided the applicability of another of the six sub-exemptions, Exemption 7(D). Writing for a unanimous Court, Justice Sandra Day O’Connor cited the amendments and the *Reporters Committee* opinion on the subtle language alteration, calling the statutory change and subsequent judicial interpretation an effort “to ease the Government’s burden of invoking Exemption 7.”¹⁴⁰ The Supreme Court continued to identify the broader, more liberal language of the 1986 amendments as a primary purpose of the legislation. In *National Archives and Records Administration v. Favish*,¹⁴¹ Justice Anthony Kennedy called the difference between privacy protections

in Exemption 6 and 7 “no mere accident in drafting. We knew Congress gave special consideration to the language in Exemption 7(C) because it was the result of specific amendments to an existing statute.”¹⁴²

During the 1990s, the D.C. Circuit would decide a series of Exemption 7 cases that interpreted the 1986 amendments as a signal to expand law enforcement’s rein in using Exemption 7. In *SafeCard Services v. SEC*,¹⁴³ the court considered a case where the SEC investigated suspicions of illegal stock transactions. The opinion cited *Reporters Committee* in determining whether the privacy of the subjects of the investigation outweighed the value of transparency. The D.C. Circuit ruled emphatically in favor of privacy and nondisclosure.¹⁴⁴ The decision established Exemption 7(C) as an especially strong denial measure, not to be overruled unless an individual can demonstrate strong suspicions of agency misconduct, significantly extending the *Reporters Committee* balancing of privacy over public interest.¹⁴⁵

A year later, the D.C. Circuit again found in favor of law enforcement nondisclosure.¹⁴⁶ The case involved FBI recordings that were once played in a public court setting. Information revealed to the public cannot be withheld according to a FOIA exemption, but there was no documentation of what parts of the recordings were played during the hearing. The D.C. Circuit decided the informant tapes were to be withheld according to Exemption 7(D) unless it could be demonstrated exactly what information had been previously disclosed.¹⁴⁷ Citing both *Reporters Committee* and *SafeCard*, the opinion doubled down, stating were Exemption 7(D) to become inapplicable, Exemption 7(C) would suit the purpose. Despite acknowledging “some of the asserted privacy concerns admittedly appear relatively insignificant,”¹⁴⁸ the court empathized with the individuals identified on the tapes: “We can easily imagine the embarrassment and reputational harm that would be caused from disclosure of conversations that...describe ‘a former federal cabinet member’s drinking and dating while on a business trip’ and that refer to ‘numerous politicians...as being subject to influence.’”¹⁴⁹ The court found next to no public interest in the mafia figure’s political connections.¹⁵⁰

Shortly after the 1992 presidential election, *The Nation* magazine sought records on presidential candidate H. Ross Perot and his involvement with U.S. Customs Service’s drug interdiction efforts.¹⁵¹ The agency supplied a Glomar response – “neither confirm nor deny the existence of any records”¹⁵² – substantiated by Exemption 7(C). Prior to entering politics, Perot was an anti-drug zealot in Texas.¹⁵³ *The Nation* claimed its request was motivated by reporting on the privatization of federal policing and Perot’s own public comments and campaigns. The court took the unusual step of addressing the *SafeCard* decision, walking back the categorical exemption of names, addresses and other identifiers, especially in cases where individuals had disclosed a connection with an agency, effectively waiving certain privacies. The D.C. Circuit ordered the district court to reconsider the appropriateness of Exemption 7(C) according to the *Reporters Committee* balancing test. Ultimately, the district court found a refined Glomar response was satisfactory and in line with the purpose of the law enforcement exemption.¹⁵⁴ Not only did the federal courts find Exemption 7(C) as valid grounds for nondisclosure, it was determined sufficient to withhold even confirming the existence of records related to a subject a presidential candidate frequently and openly discussed and which was documented in the agency’s own memo.

The Supreme Court would also cite the 1986 amendments in deciding *Milner v. Navy*,¹⁵⁵ the case where the Court struck down High 2.¹⁵⁶ The Court considered the possible redundancy of High 2 and Exemption 7(E),¹⁵⁷ before Justice Elena Kagan observed the 1986 amendments amended Exemption 7, not Exemption 2, and such alterations “codified *Crooker’s*¹⁵⁸ ‘circumvention of the law’ standard.”¹⁵⁹ The Court found High 2 and Exemption 7(E) to be largely redundant and removed High 2 from the exemption spectrum and implicitly directed all circumvention of law concerns to Exemption 7(E). Justice Samuel Alito’s concurrence called the 1986 amendments an intentional broadcasting and clear effort to increase application after “investigation” was removed from the statute.¹⁶⁰

The post-1986 Exemption 7 judicial trajectory unmistakably documented the continued widening of Exemption 7 with opinions using *Reporters Committee* as a refraction point for new vectors in law enforcement secrecy. *Favish*, *SafeCard*, *Davis* and *Nation Magazine*, and other cases,¹⁶¹ demonstrate an interpretation increasingly tipping toward law enforcement secrecy and personal privacy, establishing new areas of nondisclosure and a stronger position on previous views.

Privacy

The interpretation and administration of Exemption 7 cannot be properly considered without recognizing the balance between the right to know and the right to be left alone. In contemplating privacy *vis-a-vis* the FOIA, the two provisions for privacy, Exemptions 6 and 7(C), are considered in tandem, as the history of privacy and the two provisions are inextricably intertwined. Perhaps no one has analyzed this issue of privacy and the FOIA more closely than Martin Halstuk, who has produced a series of articles exploring privacy and democratic values, many focused on the intersection of privacy and the right to know,¹⁶² culminating in a co-authored 2006 survey of the subject.¹⁶³ Halstuk and Bill Chamberlin highlighted three Supreme Court cases as responsible for shaping the FOIA-related privacy framework.¹⁶⁴ They posit the decisions in *Department of State v. Washington Post Co.*,¹⁶⁵ *Department of Justice v. Reporters Committee for Freedom of the Press*¹⁶⁶ and *National Archives and Records Administration v. Favish*¹⁶⁷ as principally responsible for the ever-expanding privacy rationale for exclusions to FOIA.

In *Washington Post*, Chief Justice William Rehnquist, writing for a unanimous Court, determined that passport and citizenship documentation was to be included in the “similar file” clause of Exemption 6.¹⁶⁸ Chief Justice Rehnquist provided an inclusive interpretation of the clause,¹⁶⁹ marking an early, pre-1986 amendments, decision in the path toward recognizing increased privacy rights. Halstuk and Chamberlin highlight *Reporters Committee* as a dramatic swing in establishing privacy rights over transparency concerns.¹⁷⁰ *Favish* built on the foundation of *Washington Post* and *Reporters Committee*, extending privacy interests to relatives. Justice Anthony Kennedy developed a “sufficient reason” threshold, requiring a requester to provide evidence of ample public interest when personal privacy was at stake. The “sufficient reason” threshold alone is a noteworthy blow to FOIA’s foundational principle of a presumption of openness, but Justice Kennedy went further in demanding requesters provide evidence of potential government misconduct prior to receiving government records branded with Exemption 7(C).¹⁷¹

Halstuk and Chamberlin concluded that despite Congress’s effort to balance privacy rights with transparency, the Supreme Court had reset the balance significantly in favor of privacy over disclosure.¹⁷² There is no doubt that the growing societal concern for personal privacy affected the growth of Exemption 7 claims, but it is the author’s contention that the ascent of privacy rights in FOIA is primarily opportunism grafted onto the legislative changes driven by War on Drugs rhetoric and efforts to shield law enforcement from transparency.

Data Analysis

The analysis herein is premised on a database created by acquiring cabinet-level department FOIA annual reports from enactment of the reporting requirement in 1975 to 2016. The 1974 FOIA amendment initiated an annual reporting obligation where all agencies subject to the law would be required to submit annual reports documenting the prior year’s administration of the FOIA.¹⁷³ Prior to the 1974 amendment, the FOIA was considered weak and grievously flawed,¹⁷⁴ and the annual reports were intended to allow for “adequate Congressional oversight of freedom of information activities.”¹⁷⁵ The categories comprising the annual report have shifted over time but have consistently tracked a wide range of information on requests processed, requests denied, administrative closures, exemption claims, appeals, costs, fees collected and temporal components. This use and implementation data present a relatively consistent series of snapshots of incoming FOIA requests and how cabinet-level departments have administered to the requests. The fifteen cabinet-level

departments (and their preceding agencies) – as the primary administrators of the FOIA, receiving about 80% of all requests – were selected as the sample. The study gathered the annual reports using three methods. The FOIA statute requires annual reports be posted on agency websites after 1998. Agencies are also required to submit the annual reports to committees of the Senate and House of Representatives (and these congressional records are held by the National Archives & Records Administration). Some departments have retained the annual reports in their own archives and are subject to FOIA requests. The search – between online postings, a two-week visit to the National Archives and individual FOIA requests – returned 557 of the 599 annual, or a 93% capture rate.¹⁷⁶

For the purposes of FOIA annual report analysis, there are generally three eras, each prompted by a statutory amendment changing the FOIA annual report: 1975-1997, with the 1974 FOIA amendments¹⁷⁷ commencing the annual report obligation; 1998-2007, initiated by the 1996 EFOIA amendment,¹⁷⁸ and 2008-2016, a response to the 2007 OPEN Government Act.¹⁷⁹ This study, most interested in the 1986 FOIA Reform Act, further refined the first era of analysis to pre-enactment (1975-1986) and post-enactment (1987-1997), allowing for consideration of the immediate effects of the amendment, while retaining the same character of the first analytical period. Exploring the sub-exemptions to Exemption 7 also posed a challenge, as agencies were not required to provide specific usage figures on the six sub-exemptions until 1998. However, the Departments of Justice and Labor provide divided data for the entirety of the study period, and, thus are analyzed as the only consistent source of sub-exemption data. There has been a significant amount of research, both domestic and international, that has explored similar data.¹⁸⁰

Exemption 7

Since the introduction of the annual reporting requirement, the law enforcement exemption has accounted for a sizeable number of exemption claims. From 1975 onward, the exemption never totaled less than 30% of aggregate exemptions in any year. As the threshold for all Exemption 7 use was broadened, total law enforcement exemptions claims demonstrate an increase after the 1986 amendments. It comprised 38% of all exemption claims in the dozen years of data prior to enactment of the 1986 amendment. From 1987 until 2016, Exemption 7 has accounted for 45% of aggregate exemption use. In comparing the twelve-year period prior to enactment, 1975 to 1986, and the eleven years period prior the next amendment, 1987 to 1997, Exemption 7 claims climb 275%, amounting to 41% of all exemptions over the period. The era marks a generally more permissive climate for exemption claims and overall FOIA use continues to rise, with total FOIA requests rising 106% over the same time period. The three percentage-point increase does not seem especially noteworthy, but given the rising use and exemption figures, the increase is significant and marks the beginning of a sustained climb in Exemption 7 claims.

Table 1. Exemption 7 Claims

| Time Period | Ex. 7 Claims | % of Total Ex. Claims |
|-------------|--------------|-----------------------|
| 1975 - 1986 | 170,471 | 38.2 |
| 1987 - 1997 | 586,206 | 41.4 |
| 1987 - 2016 | 3,774,422 | 45.1 |

Table 2 No Records Closures

| Year | No Records Closures |
|------|---------------------|
| 1983 | 9837 |
| 1984 | 10,218 |
| 1985 | 11,675 |
| 1986 | 14,851 |

| | |
|------|--------|
| 1987 | 20,014 |
| 1988 | 26,267 |
| 1989 | 26,325 |
| 1990 | 31,811 |

After the 1986 amendments, the percentage of law enforcement exemption claims relative to total claims has grown steadily, if not linearly. In the most recent period of analysis, 2008-2016, Exemption 7 accounted for 49% of all exemption claims. That figure for the years 2015 and 2016 was even higher, at 57%. Succinctly, Exemption 7 was approximately one-third of all exemption claims in the first years of data analysis. Most recently, it has been closer to two-thirds. There are many contributing factors to the precipitous increase in Exemption 7 claims, but the 1986 amendments stand as a major factor in that sharp incline.

In analyzing the internal effects on Exemption 7, the changes are less readily distinguishable. When focusing on the Departments of Justice and Labor – the two departments to consistently track sub-exemptions from 1975 forward – there are some notable fluctuations in administrative patterns, though not necessarily in the direction expected. The sub-exemptions altered by the reduced harm standard (that is, 7(A), 7(C), 7(D) and 7(F)) already provided the vast majority of Exemption 7 claims, totaling 90% in the twelve-year period prior to enactment. After enactment, and before the 1996 amendment, the four sub-exemptions are proportionally less likely to be used, comprising 88% of Exemption 7 claims. The 1986 amendments altered the language of three law enforcement sub-exemptions (that is, 7(D), 7(E) and 7(F)). Although the language appears to favor wider grounds for claims, the three sub-exemptions drop from 43% of all Exemption 7 claims to 33% after amendment. While all of the sub-exemptions find increased use after amendment, Exemption 7(C) experienced the largest jump in claims, from 41% of Exemption 7 claims pre-amendment to 46% after. In 2015 and 2016, Exemption 7(C) accounted for 48% of all law enforcement exemption claims. Remarkably, in the two most recent years of data, 28% of all FOIA exemptions are the law enforcement’s personal privacy sub-exemption. Exemption 7(E) has witnessed surging numbers of claims as well. After the *Milner* Court abolished High 2 in 2011, the Department of Homeland Security issued hundreds of thousands of Exemption 7(E) claims, raising the percentage of claims from the low teens prior to the decision to 26% of all exemption claims in 2015 and 2016.

Exclusions

There is no definitive method for tabulating the exclusions codified in the 1986 amendment. These responses would manifest themselves in annual reporting as “no records” closures, indistinguishable from all other legitimate “no records” responses. However, there is evidence suggesting the exclusions have made a substantial impact in “no records” data. In the years before the amendment, there were 10,218 “no records” closures among cabinet-level departments in 1984. Three years later, that number was 20,014, a 95% increase in “no records” response claims. In 1990, there were 31,811 “no records” response claims, amounting to a nearly three-fold increase in the number of “no records” responses since 1984.

While there is no accounting, internally or publicly, for exclusions use, the trends suggest a highly plausible connection between the introduction of the exclusions and a considerable spike in “no records” closures. While the impact is very difficult to estimate, it does not appear to be a temporary phenomenon. Before the Clause C amendment, 5% of requests processed received a “no records” response; after the 1986 amendment, the figure is double, 10%. From 2008 until 2016, it is higher still at 12% of all requests processed. In the year 2016, 15% of requests processed concluded with a “no records” response.

Discussion

Analysis of the annual report data documents the immediate and lasting impact on access to law enforcement records. The data show the amendments to have been successful in realizing the stated objectives,

demonstrating both a sustained increase in Exemption 7 claims and the establishment of an administrative procedure that quietly discards requests. The overstated threat of sophisticated requesters, along with federal alarmism over illicit drug use, produced statutory changes that have crippled the public's ability to oversee law enforcement.

Exemption 7

Writing from the vantage of the early 1990s, James T. O'Reilly called the 1986 amendments, while not inappropriate in their objective, the nadir of federal law enforcement transparency:

After the effort to expand public accountability for the law enforcement agencies, in counterpoint to the abuses of Watergate, a sweeping revision of exemption (b)(7) was undertaken. Today, after the 1986 amendments to the exemption and the Supreme Court decisions... the FOIA, in its wisdom and majesty, permits futile and expensive requests to be made for records that may or may not be there at the agency but will be withheld nonetheless. From a security-oriented standpoint, that is how it should be. From an accountability standpoint, the rights of open government advocates in the law enforcement arena are at their lowest ebb in history as the FOIA reaches its quarter-century mark.¹⁸¹

Whether law enforcement accountability has further declined since O'Reilly's observation is up for debate, but the statutory changes remain, and annual report figures suggest the decreased access to law enforcement records continues unabated. Expansive categories of law enforcement records are simply out of reach. Whole policing functions are entirely unknowable. Exemption 7 is of such a magnitude, broader FOIA concerns are pulled into its gravitational field. Personal privacy, a social concern so pervasive that it has nearly swallowed FOIA, accounts for 30% of all FOIA exemptions via Exemption 6 alone. Exemption 7(C) accounts for 28% of all exemption claims, meaning nearly three of five exemption claims are privacy-oriented. Exemption 7 contains its own rendition of deliberative process¹⁸² with on-going investigation (that is, Exemption 7(A)), requiring appellants to challenge when a decision has been made or an investigation closed, respectively. Justice Elena Kagan's interpretation of the 1986 amendments effectively usurped High 2, bringing the vast majority of Exemption 2 claims under the umbrella of Exemption 7. And these extensions were found welcome under the law enforcement exemption due to the permissive statutory language, inflated congressional justification and a deferential court.

Exemption 7 exists at the nexus of two critical elements of governance, the public's right to know and the authority and latitude to ably police the public. As the literal and figurative point of impact between the government and the governed, law enforcement duties are inherently controversial. Naturally, the public has been suspicious of such powers and has demanded accountability and transparency in policing. Certainly, law enforcement information is a prevalent subject of requests, but the volume of Exemption 7 claims, the breadth of Exemption 7 rationales and the deference shown by federal courts demonstrate an exemption that has exceeded its purpose, undermining the entirety of the FOIA mechanism. The study's data demonstrate the 1986 amendment to have been a pivotal point for present-day law enforcement secrecy. The federal record suggests the motives behind the amendment were fear-based and grounded in a public policy rapidly losing support.

In 1989, Lotte Feinberg produced a retrospective of FOIA during the Reagan years and arrived at conclusions as grim as O'Reilly, documenting an impact on police and intelligence transparency just three years after the amendments.¹⁸³ Feinberg called the amendments and influence on law enforcement transparency a savvy, coordinated attack by the Reagan White House,¹⁸⁴ an effort not above exploiting less than credible evidence. Not unlike congressional testimony where the senators regularly referenced a self-interested FBI in making their case, Feinberg cited Senator Hatch's chief counsel in suggesting some evidence mustered in support of amendment may have been less than scientifically valid or exaggerated, particularly in overstating the threat of

sophisticated or malicious requesters.¹⁸⁵ Feinberg's well-connected observations continue to hold credibility and the growth of Exemption 7 has also shown no signs of slackening.

Exclusions

There is no knowing the degree of impact made by the amendment of exclusions, and this is perhaps the most troublesome aspect of their use. It allows for no recourse and no understanding on the part of the requester. It is an overt exploitation of an existing loophole, creating not only a relatively simple circumvention of the original statutory intent, and one that affords little chance of purposeful appeal, but one that goes unnoticed, buried under the clerical details of implementation.

Christine Walz and Charles Tobin described the exclusions this way: "The Reagan-era addition to the FOIA, on its face, provides the government with a license to lie. The exclusions were intended to be narrow, yet the precise parameters of the exclusions remain undefined."¹⁸⁶ Walz and Tobin's concerns are grounded in the fundamental problem of recourse. What makes the false "no records" responses especially troublesome is the practice's ability to leech civic trust from the FOIA process. Adequacy of search represents an essential element of the access to government records procedure, one that requires faith, inherently resists oversight and cannot be substantially appealed. Without detailed knowledge of storage, both physical and digital (including different databases and file systems), it is exceptionally difficult to determine whether a good faith effort has been conducted, much less whether the reported effort matches the true effort. There is no substantial method for challenging such a response. "No records" responses are a dead-end in the process and challenging them amounts to little more than a shot in the dark. Such responses are inherently problematic,¹⁸⁷ but to append an already difficult aspect of the FOIA to agency ability to flatly lie is wildly inappropriate. Providing statutory cover for a broad range of requests with no internal accountability turns a civic right into meaningless sport. O'Reilly compared the amendment of exclusions to just that: "So, like the child's card game, 'go, fish,'" the process of seeking documents now becomes a more blind groping process for requesters."¹⁸⁸

Judicial Interpretation

Perhaps the most notable outcome of the amendments though was the change in the court's tenor regarding law enforcement secrecy. In the years leading up to the amendments, federal courts were committed to refining the threshold, proposing different tests and requiring a "rational nexus." After the amendments, courts continued parsing and interpreting the statutory changes but a generally more permissive approach to law enforcement secrecy materialized. And it was inaugurated by *Reporters Committee*, a decision that was striking largely due to the audacity of its conclusions. The decision was clearly influenced by the 1986 amendments, directly identifying the legislature's purpose as providing law enforcement more flexibility and margin in withholding records. Justice Stevens's justification for "practical obscurity" drew from the same playbook as the Reagan administration's "database campaign"¹⁸⁹ and early efforts to enshrine the Mosaic theory. Both trafficked in a fear of requesters abusing new digital technology and proposed regressive reactions that removed records from the FOIA's reach. The *Reporters Committee* Court set a new direction for the FOIA after acknowledging the legislative history of the 1986 amendments.

Of course, growing public concern over privacy is a significant factor to changes in Exemption 7 interpretation and the bold precedents of *Reporters Committee* are privacy-centric, but in taking into consideration Halstuk and Chamberlin's trio of FOIA privacy cases, there is an observable difference in the Court's approach in *Washington Post* than the post-1986 amendments cases, *Reporters Committee* and *Favish*. And while *Washington Post* was solely an Exemption 6 case, Justice Rehnquist turned to the legislative history prior to original enactment, citing the intensely personal nature of the records in question. The Court determined the case rather narrowly, suggesting personal records remained personal no matter the location of their filing.

The *Reporters Committee* and *Favish Courts* were much bolder, staking out new FOIA ground and establishing derivative privacy rights.

Reporters Committee is rightly recognized as a landmark case in FOIA adjudication, but the decision was made possible by a nearly decade of fears sewed by the White House and Congress, fears that law enforcement had been neutered by excessive transparency. In order to fix the drug problem, law enforcement needed a freer hand, and part and parcel with increased liberty to go after the bad guys was a corresponding revision of transparency. The 1986 FOIA amendments were a statutory product of the War of Drugs, as was the *Reporters Committee* decision. Both are the result of the exaggeration of a social problem, one that has largely been debunked, yet Exemption 7 claims remain staggeringly high and exclusions exist as an unseen warren of law enforcement secrecy.

Conclusion

Ben Montgomery, of the *Tampa Bay Times*, compiled a database on police discharge of weapons in Florida.¹⁹⁰ Surprisingly, analysis showed weapons were not being used more frequently. Instead, it was learned that technology, *via* more pervasive lapel and dash cams, had increased public awareness of police violence. Through Florida's relatively strong freedom of information law,¹⁹¹ Montgomery was able to demonstrate that police discharge of weapons was no more common in 2009 than in 2014. His reporting showed police discharge of weapons to be an enduring issue, not a recent evolution brought to light by the accumulation of national, heavily discussed police violence episodes. The essential takeaway from such a journalistic endeavor – aside from the empirical insight provided by access to government records – was the acknowledgement of a pre-existing police issue spurred by a general lack of transparency. Police discharge of guns had not changed over the short period of analysis, but the public was unaware due to the difficulty in acquiring law enforcement records. Transparency worked in this case due to Montgomery's dogged efforts, the resources of the *Times*, and Florida's strong access laws, but a federal duplication of the dataset would be markedly more difficult, if not impossible.

The effort to dismantle law enforcement scrutiny began the year President Reagan entered the White House. The widely discredited War on Drugs had direct and clearly legible influence on the origins and the language of the 1986 amendments. The White House and Senator Hatch had unmistakable designs on expanding the power of law enforcement and shrinking police transparency and built and marketed a fear-based justification that used exaggerated reports on the threat of drug users and hobbled police. Hatch mounted a steady campaign of bills, hearings and scholarship aimed singularly at diminishing oversight and scrutiny of federal law enforcement. The early bills would have amounted to an overhaul of the FOIA structure on par with the 1974 amendments' realization of modern FOIA function. But after a succession of the Hatch-sponsored bills failed, Congress pared away a number of provisions to realize the core – a significant broadening of Exemption 7 and the establishment of exclusions – which were included as a rider on the last day of a congressional session.¹⁹² The fee waivers were seen as compensation to the pro-transparency crowd and media rights organizations.¹⁹³ The 1986 amendments' realization represent cynical, agenda-first politics, and federal courts quickly grasped the new legislation's intent, reading the changes as a clear signal for more deference to law enforcement secrecy. The unpopular amendments have resulted in demonstrably crippling results for law enforcement transparency, observable both anecdotally and in FOIA use and implementation data.

FOIA is both a simple ability and a grand right; a tool for providing citizens access to government records and a public position signaling government commitment to transparency. On both fronts, the 1986 FOIA Reform Act stands as a rebuke to citizens' ability and right to know about their government. The data demonstrate clear evidence of diminished access to one of society's most powerful entities. There is no valid evidence able to connect such general and complex concepts as transparency and police behavior, but the present crisis in law

enforcement seems at least tangentially tied to decades of opacity. In exploring the legislative commentary and executive messaging, a clear and cynical turn away from transparency occurred in the 1980s, motivated by a fear of the production, sale and use of illicit drugs, and as a result the public's right to know has been irreparably damaged.

Notes

- 1 See Quincy Ford, *Boy, 17, Fatally Shot by Officer After Refusing to Drop Knife*, Chicago Tribune, Oct. 21, 2014, available at <http://www.chicagotribune.com/news/local/breaking/chi-chicago-shootings-violence-20141021-story.html>.
- 2 See *id.*
- 3 See Jason Meisner, Jeremy Gorner & Steve Schmadeke, *Chicago Releases Dash-Cam Video of Fatal Shooting after Cop Charted with Murder*, Chicago Tribune, Nov. 24, 2015, available at <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-laquan-mcdonald-charges-20151124-story.html>.
- 4 5 Ill. Comp. Stat. 140 (2010).
- 5 See Brandon Smith, *Why I'm Suing the Chicago Police Dep't*, Chicago Reader, Aug. 7, 2015, available at <https://www.chicagoreader.com/Bleader/archives/2015/08/07/why-im-suing-the-chicago-police-department>.
- 6 5 Ill. Comp. Stat. 140/7(1)(d)(i) ("interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request"); 5 Ill. Comp. Stat. 140/7(1)(d)(vii) ("obstruct an ongoing criminal investigation by the agency that is the recipient of the request"); 5 Ill. Comp. Stat. 140/7(1)(d)(ii) ("interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request").
- 7 See Bill Ruthhart, Stacy St. Clair & John Chase, *New Emails Show Emanuel City Hall Scramble on Laquan McDonald Shooting*, Chicago Tribune, Dec. 31, 2015, available at <http://www.chicagotribune.com/ct-laquan-mcdonald-emails-met-0101-20151231-story.html>.
- 8 See *id.*
- 9 See John Byrne, *Emanuel: Video of Laquan McDonald Shooting by Police Shouldn't Be Released Now*, Chicago Tribune, Nov. 13, 2015, available at <http://www.chicagotribune.com/news/ct-emanuel-laquan-mcdonald-video-met-20151113-story.html>.
- 10 See Monica Davey & Mitch Smith, *Justice Officials to Investigate Chicago Police Department After Laquan McDonald Case*, N.Y. Times, Dec. 6, 2015, available at <https://www.nytimes.com/2015/12/07/us/justice-dept-expected-to-investigate-chicago-police-after-laquan-mcdonald-case.html>.
- 11 See *Smith v. Chicago Police Dep't*, No. 2015 CH 11,780 (Cir. Ct. Cook Co.) (The court order to release the footage was heavily influenced by the legal novelty of dashboard cameras and the independence of the department conducting a review of the shooting.).
- 12 Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986).
- 13 In 2015 and 2016, only 21% of federal department requests were granted in full. In considering the nine federal exemptions to disclosure, a staggering 57% of records requests were denied under to the law enforcement exemption.
- 14 3 James T. O'Reilly, *Federal Information Disclosure § 27:17 (2017)* (acknowledging the influence of the federal FOIA on state freedom of information laws with particular note of the federal FOIA's impact on state law enforcement exemptions); Matthew D. Bunker, Sigman L. Spilchal, Bill Chamberlin & Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to*

- Emerging Technology*, 20 Fla. St. U. L. Rev. 543, 556 (1993) (suggesting the federal FOIA was the inspiration for codification of most state freedom of information laws); Burt A. Braverman & Wesley R. Heppler, *Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 721 (1981) (documenting state freedom of information laws mirror the federal statute and federal judicial decisions regarding the FOIA bear importance in state freedom of information administration).
- 15 Ross Coomber, Karen McElrath, Fiona Measham & Karenza Moore, *Drugs and Society* 178 (2013).
- 16 Stephen Hess, Report of the White House Conference on Youth 7 (1971)
- 17 Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, *The Atlantic*, Mar. 26, 2012, available at <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>.
- 18 Richard Nixon, Special Message to the Cong. on Drug Abuse Prevention and Control (June 17, 1971), <http://www.presidency.ucsb.edu/ws/?pid=3048>.
- 19 Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, 86 Stat. 66.
- 20 Dufton, *supra* note 17.
- 21 *Id.*
- 22 Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* 137 (1996) (Baum writes that previous scholars have also “shown how, through the ages, the specter of drug abuse has been presented as a cause (or a whipping boy) for the ills of the era. It was Nixon’s drug war in the early 1970s, however, where the drug-user-as-culpable-source-of-crime exploded into view. [T]his image has come to underscore the drug policies” of the Republican Party “and informs much of our current era of drug law confusion.”).
- 23 See President Jimmy Carter, Drug Abuse Message to Congress (Aug. 2, 1977), <http://www.presidency.ucsb.edu/ws/?pid=7908>
- 24 President Ronald Reagan’s Inaugural Address (Jan. 20, 1981), <http://www.presidency.ucsb.edu/ws/?pid=43130>.
- 25 Peter G. Bourne, *“Just Say No”: Drug Abuse Policy in the Reagan Administration*, in Ronald Reagan and the 1980s: Perceptions, Policies, and Legacies 46 (Cheryl Hudson & Gareth Davies eds., 2008)
- 26 Baum, *supra* note 22, at 138.
- 27 *Id.*
- 28 See *id.* at 139 (“To further strengthen the prosecutor’s hand, Smith and Meese wanted police released completely from the *Miranda* burden of reading suspects their rights. They wanted more authority to hold defendants without bail. They wanted tax law and the Freedom of Information Act rewritten make it easier for police to gain access to Social Security and other files federal agencies keep on citizens.”).
- 29 Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564 (1974).
- 30 Carl Schmitt: Political Theology: Four Chapters on the Concept of Sovereignty 5 (George Schwab trans., U. of Chicago Press, 2006) (1922).
- 31 *Id.* at 31-32.
- 32 Martti Koskeniemi, *“The Lady Doth Protest Too Much” Kosovo, and the Turn to Ethics in International Law*, 65 *Modern L. Rev.* 159, 170 (2002).
- 33 See Mary L Duziak, *Schmitt and Post-9/11 Legal Thought*, *Legal History Blog* (Feb. 22, 2011), <http://legalhistoryblog.blogspot.com/2011/02/schmitt-and-post-911-legal-thought.html>.
- 34 Giorgio Agamben, *State of Exception* (Kevin Attell trans., U. of Chicago ed. 2005) (2003).
- 35 *Id.* at 11-12 (“World War One coincided with a permanent state of exception in the majority of the warring countries. President Poincare issued a decree that put the entire country in a state of siege, and this decree was converted into law by parliament two days later. The state of siege remained in force until October 12, 1919. Although the activity of parliament, which was suspended during the first six months of the war, recommended in January 1915, many of the laws passed were, in truth, pure and simple

delegations of legislative power to the executive...which granted the government an all but absolute power to regulate by decree.”).

36 U.S. Const. art. I (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

37 Agamben, *supra* note 34, at 33.

38 David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 Mich. L. Rev. 2565, 2588 (2003).

39 Agamben, *supra* note 34, at 32.

40 Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1402 (1989).

41 *Id.* at 1404.

42 249 U.S. 47 (1919).

43 323 U.S. 214 (1944).

44 341 U.S. 494 (1951).

45 249 U.S. at 52.

46 *Id.* (“The question in every case is whether the words used are in such circumstances and are of such nature as to create a clear and present danger that will bring about the substantive evil that Congress has a right to prevent.”).

47 *Korematsu*, 323 U.S. at 216 (“It should be noted, to begin with, that all restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).

48 *Id.* at 231 (“The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature – and a temporary expedient made necessary by a sudden emergency. . . . The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples.”).

49 *Id.* at 219-20.

50 18 U.S.C. § 2385 (2016).

51 *Dennis*, 341 U.S. at 510.

52 *Id.* at 510.

53 *Id.* at 555 (Frankfurter, J., dissenting).

54 *Id.* at 516 (“Whether there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution.”).

55 See David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 Yale L.J. 1753, 1761 (2004) (“[C]ourts are largely ineffectual on matters of national security. There is substantial and familiar evidence to support that charge. The Supreme Court did not question Lincoln’s suspension of habeas corpus and reliance on martial law until after the Civil War had ended. It upheld criminal convictions for antiwar speech during World War I and the Japanese internment in World War II. And it permitted the harassment of communists in the Cold War until years after Senator Joe McCarthy had been censured.”) (internal citations omitted).

56 Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration’s Assault on Freedom of Information*, 11 Comm. L. & Pol’y 479 (2006).

57 *Id.* at 495.

- 58 David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 Yale L.J. 628, (2005).
- 59 *Id.* at 663-64.
- 60 Christina E. Wells, “*National Security*” *Information and the Freedom of Information Act*, 56, Admin. L. Rev. 1195, 1197 (2004).
- 61 Memorandum from Attorney General William French Smith on FOIA Policy Guidance (Jan. 1, 1981), <https://www.justice.gov/oip/blog/foia-update-policy-guidance-attorney-generals-memo-foia> (in which Smith stated, “Department’s current policy is to defend all suits challenging an agency’s decision to deny a request.”).
- 62 The Freedom of Information Reform Act, S. 1730 97th Cong.; Freedom of Information Improvement Acts of 1981, S. 1751 97th Cong.
- 63 Pub. L. No. 99-570, 100 Stat. 3207, § 1802 (1986).
- 64 Pub. L. No. 99-570, 100 Stat. 3207 (1986).
- 65 Signing Statement by President Reagan Upon Signing Pub. L. No. 99-570 (Oct. 27, 1986).
- 66 Attorney generals have a statutory responsibility to encourage agency compliance with the FOIA. See 5 U.S.C. § 552(e) (2018).
- 67 Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act, <https://www.justice.gov/archive/oip/86agmemo.htm>.
- 68 *Id.*
- 69 *Id.*
- 70 Rep. English sponsored seven FOIA bills between 1981 and 1986: Freedom of Info. Act Amendments of 1986, H.R. 4862, 99th Cong.; Freedom of Info. Act Amendments of 1985, H.R. 1882, 99th Cong.; A bill to clarify the relationship of the Privacy Act of 1974 to the Freedom of Info. Act, and other purposes, H.R. 4696, 98th Cong (1984); Freedom of Info. Act Amendments of 1984, H.R. 6414, 98th Cong.; Reverse Freedom of Info. Proc. Act, H.R. 1247, 98th Cong. (1983); Freedom of Info. Improvements Act of 1981, H.R. 4805, 97th Cong.; Reverse Freedom of Info. Proc. Act, H.R. 2021, 97th Cong. (1981).
- 71 132 Cong. Rec. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. English).
- 72 132 Cong. Rec. H9465 (daily ed. Oct. 8, 1986) (statement of Rep. English) (offering that he was “suspicious – but not surprised” in learning of the Senate Judiciary Committee’s FOIA amendments to Anti-Drug Abuse Act).
- 73 S. 774 98th Cong. (1984).
- 74 S. 774 98th Cong. (1984).
- 75 Pub. L. 98-477, 98 Stat. 2209 (1984).
- 76 Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564 § (b)(7) (1974).
- 77 5 U.S.C. 552 § (b)(7) (2018).
- 78 Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564 § (b)(7) (1974).
- 79 5 U.S.C. 552 § (b)(7) (2018).
- 80 *Id.*
- 81 *Id.*
- 82 *Id.*
- 83 Signing Statement by President Reagan Upon Signing Pub. L. No. 99-570 (Oct. 27, 1986) (The president identified the purpose of the new “substantially broaden[ed] law enforcement exemptions” as “increasing substantially the authority of Federal agencies to withhold sensitive law enforcement documents in their files.”).
- 84 Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act, <https://www.justice.gov/archive/oip/86agmemo.htm> (writing that courts “often struggled” with the “distinction between ‘investigatory’ and ‘noninvestigatory’ law enforcement records. . . . By eliminating

the 'investigatory' requirement under Exemption 7, the FOIA Reform Act should put an end to such troublesome distinctions and broaden the potential sweep of the exemption's coverage.").

85 *Id.* (Attorney General Meese explicitly directed attention to administrative records – “law enforcement manuals, background investigation documents and program oversight reports can be prime candidates” – previously considered outside the purview of the law enforcement exemption.).

86 132 Cong. Rec. S26,763 (1986) (statement of Sen. Leahy).

87 132 Cong. Rec. S26,768 (1986) (statement of Sen. Hatch).

88 *Id.*

89 *Id.*

90 Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. Contemp. L. 1 (1983).

91 *Id.* at 13.

92 *Id.* at 16-17, 23-24.

93 *Id.* at 31.

94 132 Cong. Rec. S14,297 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (The Exemption 7 changes “would not appreciably alter the meaning of the affected provisions in their practical application. What the amendment does is to give the agencies and courts some commonsense direction in applying the provisions of the exemptions.”).

95 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986) (statement of Rep. English).

96 5 U.S.C. 552 § (c) (2018).

97 *Id.* at (c)(1)(B).

98 *Id.* at (c)(1) (“Whenever a request is made which involves access to records described in subsection (b)(7)(A) and – (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.”).

99 *Id.* at (c)(2) (“Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.”).

100 *Id.* at (c)(3) (“Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection ((b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.”).

101 Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act, <https://www.justice.gov/archive/oip/86agmemo.htm>

102 *Id.*

103 132 Cong. Rec. S13,965-02 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch).

104 132 Cong. Rec. S14,252 (daily ed. Sept. 30, 1986) (statement of Sen. Denton).

105 *Id.* (“The time has come to stop what amounts to giving help to foreign intelligence services of hostile government and international terrorism through provisions in a law that we never intended to be used for the purpose.”) (statement of Sen. Denton).

106 437 U.S. 214 (1978).

107 5 U.S.C. 552 § (b)(7)(a) (2018) (“[I]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records . . . would interfere with enforcement proceedings.”).

108 437 U.S. at 230-32 (Reading the amendments as intended “...to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file....The tenor of the description of the statutory language clearly suggests that the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against.”).

109 *Id.* at 243-49 (Powell, J., dissenting).

110 456 U.S. 615 (1982).

111 *Id.* at 620-21.

112 *Id.* at 620.

113 *Abramson v. FBI*, 658 F.2d 806 (D.C. Cir. 1980).

114 456 U.S. at 622.

115 *Id.* at 633 (Blackmun, J. dissenting) (“The Court’s unwillingness to give the statutory language its plain meaning requires judges who are evaluating Exemption 7(C) claims to parse agency records and determine whether any piece of information contained in those records was originally compiled for a law enforcement purpose. Because the Court presents no reason, convincing to me, why its deviation from the statutory language is necessary or desirable, I respectfully dissent.”).

116 *Id.* at 635-38 (Frankfurter, J., dissenting) (criticizing the Opinion of the Court “for overriding the usual interpretation that the plain language of the statute controls its construction. . . . Under these circumstances, the Court’s rejection of the plain language of the Exemption must be viewed as an effort to perfect the FOIA by judicial alteration.” The dissent also argued, “The records at issue were not ‘compiled for law enforcement purposes.’”).

117 *Id.* at 632 (“We are not persuaded that Congress’ undeniable concern with possible misuse of governmental information for partisan political activity is the equivalent of a mandate to release any information which might document such activity...Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms, the information is exempt. Congress thus created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.”).

118 *Id.*

119 673 F.2d 408 (D.C. Cir. 1982).

120 *Id.* at 409.

121 *Id.* at 410 (“Because the Government did not challenge the finding in *Abramson* that the records at issue were no compiled for law enforcement purposes, we had no occasion to pass upon the appropriate judicial test for determining whether documents held by the FBI are indeed ‘investigatory records compiled for law enforcement purposes.’ This case, however, requires us to express and apply such a test.”).

122 *Pratt v. Webster*, 508 F. Supp. 751, 761 (D.D.C. 1981).

123 673 F.2d at 414.

124 *Id.* at 416.

125 *Id.* at 413.

126 *Id.* at 424 (“FOIA is thus a useful supplement to, but not a substitute for, private damage actions by aggrieved individuals and political action by concerned citizen and their representatives.”).

127 *Id.* at 421.

128 *Id.*

129 489 U.S. 749 (1989).

130 *Id.* at 780 (writing that the FOIA was intended to allow individuals to learn “what the Government is up to”).

131 *Id.* at 762.

132 *Id.* at 757.

- 133 *Id.* at 762-63.
- 134 *Id.* at 756 n.9.
- 135 *Id.* at 777 n.22.
- 136 *Id.* at 756 (“Exemption 7(C)’s privacy language is broader than the comparable language in Exemption 6 in two respects.”).
- 137 *Id.* (“Thus, the standard for evaluating a threatened invasion of privacy interests resulting from disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.”)
- 138 Reporters Comm. for Freedom of the Press v. Dep’t of Justice, 816 F.2d 730, 738 (D.C. Cir. 1987).
- 139 508 U.S. 165 (1993).
- 140 *Id.* at 177-78.
- 141 541 U.S. 157 (2004).
- 142 *Id.* at 169.
- 143 926 F.2d 1197 (D.C. Cir. 1991).
- 144 *Id.* at 1205-06 (“The public interest is not just less substantial [than potential harm to privacy], it is insubstantial...Indeed, unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency’s law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.”).
- 145 *Id.* at 1206 (“We now hold categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence the agency is engaged in illegal activity, such information is exempt from disclosure.”).
- 146 Davis v. Dep’t of Justice, 968 F.2d 1276 (D.C. Cir. 1992).
- 147 *Id.* at 1281 (“[T]he government is entitled to withhold the tapes obtained through the informant’s assistance unless it is specifically shown that those tapes, or portions of them, were played during the informant’s testimony.”).
- 148 *Id.* at 1281-82.
- 149 *Id.* at 1281.
- 150 *Id.* (“But even if a particular privacy interest is minor, nondisclosure remains justified where, as here, the public interest in disclosure is virtually nonexistent. . . . Although Marcello’s alleged involvement in organized crime and racketeering activities, as well as his possible role in the Kennedy assassination, are undoubtedly of considerable interest, they ‘revel little or nothing about an agency’s own conduct.”).
- 151 Nation Magazine v. U.S. Customs Serv., 71 F.3d 885 (D.C. Cir. 1995).
- 152 See A. Jay Wagner, *Controlling Discourse, Foreclosing Recourse: The Creep of the Glomar Response*, 21 Comm. L. & Pol’y 539 (2016); Nathan F. Wessler, “[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request”: *Reforming the Glomar Response Under FOIA*, 85 *Nyu I. Rev.* 1381 (2010).
- 153 See, e.g., Michael Isikoff, *Perot Championed Unorthodox War on Drugs*, Wash. Post, June 10, 1992, available at https://www.washingtonpost.com/archive/politics/1992/06/10/perot-championed-unorthodox-war-on-drugs/c8094304-bbf1-490e-9471-6c86dc9e8e2b/?utm_term=.c51b04f4c8f9 (Perot had “offered to help U.S. Customs Services finance private commandos and engineered a 1988 campaign by Dallas’s police association to weaken a civilian police review board set up to investigate complaints of police brutality.” In 1981, he hired an ex-Green Beret to work with the U.S. Customs Service and bizarrely offered to buy a Caribbean island – as outlined in a U.S. Customs Service memo – in an effort to gather drug trafficking intelligence.).
- 154 Nation Magazine v. U.S. Customs Serv., 937 F. Supp 39 (D.D.C. 1996).

- 155 131 S.Ct. 1259 (2011).
- 156 *Id.* at 566 (High 2 extended Exemption 2 from its original interpretation – or Low 2 – as covering records such as “pay, pensions, vacations, hours of work, lunch hours, parking etc.” to include any records that would “significantly ris[k] circumvention of agency regulations or statutes.”).
- 157 *Id.* at 575 (“We cannot think of any document eligible for withholding under Exemption 7(E) that the High 2 reading does not capture.”).
- 158 Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981).
- 159 *Milner*, 131 S.Ct. at 574.
- 160 *Id.* at 1272-73 (Alito, J., concurring).
- 161 *See, e.g.*, Karantalis v. Dep’t of Justice, 635 F.3d 497, 501 (11th Cir 2011) (finding photos of a convicted individual held by the U.S. Marshals Service were properly exempted under 7(C) “on the basis that they were gathered for law enforcement purposes and releasing them would constitute an unwarranted invasion of [the convicted individual’s] personal privacy”); Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002) (the “legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like”).
- 162 Martin E. Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent*, 4 Comm. L. & Pol’y. 111 (1999); Martin E. Halstuk, *Policy of Secrecy-Pattern of Deception: What Federalist Leaders Thought about a Public Right to Know, 1794-98*, 7 Comm. L. & Pol’y 51 (2002); Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 CommLaw Conspectus 71 (2003); Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 U. Fla. J.L. & Pub. Pol’y 361 (2005); Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 Admin. L. Rev. 983 (2002); Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights versus FOIA Disclosure Policy: The Uses and Effects Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 Wm. & Mary Bill Rts. J. 1 (2003).
- 163 Martin Halstuk & Bill Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 Comm. L. & Pol’y 511, 513 (2006).
- 164 *Id.* at 541.
- 165 456 U.S. 595 (1982).
- 166 489 U.S. 749 (1989).
- 167 541 U.S. 157 (2004).
- 168 456 U.S., at 600-01.
- 169 *Id.* at 600 (concluding that Exemption 6 was not to be limited to “a narrow class of files containing only a discrete kind of personal information”).
- 170 Halstuk & Chamberlin, *supra* note 163, at 546 (“Under the combined impact of the *Washington Post* and *Reporters Committee* opinions, an FOIA request for disclosure that may implicate even a minimal privacy interest is almost automatically rejected.”).
- 171 *Favish*, 541 U.S. at 173-74.
- 172 Halstuk & Chamberlin, *supra* note 163, at 564-65.
- 173 Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564; §§ 1-3 (1974).
- 174 *See, e.g.*, 120 Cong. Rec. S9310-9343, 286 (daily ed. May 30, 1974) (citing “extensive hearings on the operations of the Freedom of Info. Act” which “concluded that there were major gaps in the law which agencies were able to justify unnecessary delays, to place unreasonable obstacles in the way of public access, and to obtain undue withholding of information. The final report of the House Gov’t Op. Comm.

Described the failure to act to realize fully its lofty goals because of agency antagonism to its objectives.”).

175 H.R. Rep. No. 93-876, at 128 (1974).

176 The Congressional Research Service produced three summaries of FOIA annual reports from 1975-1977 that mirror the data sought for this project. The summaries were referenced in verifying existing figures and used to supplement missing data points.

177 Privacy Act, Pub. L. 93-502, 88 Stat. 1561-1564 §§ 1-3 (1974).

178 Electronic Freedom of Information Act Amendments, Pub. L. 104-231, 110 Stat. 3049-3054 §§ 3-11 (1996).

179 OPEN Government Act, Pub. L. 110-175, 121 Stat. 2525-2530 §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a) (2007).

180 See Lotte E. Feinberg, *Managing the Freedom of Information Act and Federal Information Policy*, 46 Pub. Admin. Rev. 615 (1986); Lotte E. Feinberg, *Managing the Freedom of Information Act and Federal Information Policy: The Reagan Years*, 6 Gov't Info. Q. 345 (1989); Minjeong Kim, *Numbers Tell Part of the Story: A Comparison of FOIA Implementation under the Clinton and Bush Administrations*, 12 Comm. L. & Pol'y 313 (2007); Ben Wasike, *FoIA in the Age of "Open.Gov."; An Analysis of the Performance of the Freedom of Information Act under the Obama and Bush Administrations*, 33 Gov. Info. Q. 417 (2016); Alasdair S. Roberts, *Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada*, 83 Pub. Admin. 1 (2005); Alasdair S. Roberts, *Less Gov't, More Secrecy: Reinvention and the Weakening of Freedom of Information Law*, 60 Pub. Admin. Rev. 308 (2000); Robert Hazell, *Freedom of Information in Australia, Canada and New Zealand*, 67 Pub. Admin. 189 (1989); Ben Worthy, *More Open but not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Gov't*, 23 Governance 561 (2010); Robert Hazell & Ben Worthy, *Assessing the Performance of Freedom of Information*, 27 Gov't Info. Q. 352 (2010); *DOJ Compilation Shows Requests and Costs Up*, Access Rep., Feb. 27, 2002, at 3; *OIP, Reporters Committee Assess Annual FOIA Reports*, Access Rep., Sept. 10, 2003, at 3; *Requests, Costs an Backlogs All Up in FY2003 Annual Reports*, Access Rep., Aug. 11, 2004, at 3. *Report Analyzes Increased Use of Exemptions*, Access Rep., Nov. 30, 2005, at 1; *DOJ Issues FOIA Progress Report and Annual Report Guidance*, Access Rep., May 28, 2008, at 1; Harold C. Relyea, Cong. Research Serv., JC660 76-166G, *The Administration of the Freedom of Information Act: A Brief Overview of the Executive Branch Annual Reports for 1975* (1976); Harold C. Relyea, Cong. Research Serv., JC660 77-228G, *The Administration of the Freedom of Information Act: A Brief Overview of the Executive Branch Annual Reports for 1976* (1977); Harold C. Relyea, Cong. Research Serv., JC660 78-195G, *The Administration of the Freedom of Information Act: A Brief Overview of the Executive Branch Annual Reports for 1977* (1978).

181 2 James T. O'Reilly, *Federal Information Disclosure; Law Enforcement Records* § 17:204, 502-03 (2016).

182 See Michael R. Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 St. Louis. U. L.J. 349, 416 (2009) (“[T]he Executive Branch, the courts, and Congress have tussled over placing proper checks on administrative authority. And amid this fight, the deliberative process privilege has almost stealthily come to be one of the Executive Branch’s most effective weapons.”).

183 Feinberg, *supra* note 180, at 359 (Before discussing dwindling access to FBI records, Feinberg wrote, “Among scholars and journalists, there are also more reports of difficulties in obtaining records. In some cases, such records sought from intelligence files, the restrictions are directly attributable to the 1986 amendment.”).

184 *Id.* at 349-50 (“The Reagan administration, like previous administrations, was never comfortable with open public access to government information but, better than most, it understood the potential power of bureaucracy in managing information. . . . As far back as 1982, a Pentagon official, who had served in Democratic and Republican administrations, noted that ‘Reagan began by wanting to withhold

everything.’ A senior Republican staffer at the Office of Management and Budget credited former Attorney General Edwin Meese with being one of the architects of this policy, noting that the ‘attack started when Meese was still in the White House.’ One of the Administration’s goals, according to this official, was ‘to effect a major reconstruction of the FOIA.”).

185 *Id.* at 351 (“Someone in Hatch’s office had the bright idea, if the drug bill was going through, to drag out a study done by the Drug Enforcement Agency which showed that 85 percent of all FOIA requests from DEA were from known drug dealers or convicted.’ While the study was anecdotal and counsel was somewhat critical of the methodology, it, nonetheless, ‘made the convincing point that there was some law enforcement impact because of FOIA and [showed] that drug barons had become sophisticated in using the Act.”).

186 Christine N. Walz & Charles D. Tobin, *The FOIA “Exclusions” Statute: The Government’s License to Lie*, 30 *Comm. Law*, 10, 10 (2014).

187 *See, e.g.*, Rosalind S. Helderman & Tom Hamburger, *State Dept. Inspector General Report Sharply Criticizes Clinton’s Email Practices*, *Wash. Post*, May 25, 2016, available at https://www.washingtonpost.com/politics/state-dept-inspector-general-report-sharply-criticizes-clintons-email-practices/2016/05/25/fc6f8ebc-2275-11e6aa84-42391ba52c91_story.html?utm_term=.761b74bf2a3b.

188 O’Reilly, *supra* note 181, at § 17:5, 27.

189 *See* David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *Yale L. J.* 628, 641-45 (2005).

190 *Shots Fired: Part I*, Radiolab, Mar. 17, 2017, <http://www.radiolab.org/story/shots-fired-part-1/>.

191 Florida Public Records Law, Fla. Stat. § 119.01 et. seq. (1995).

192 *See* 2 James T. O’Reilly, *Federal Information Disclosure; Law Enforcement Records* § 17:4-5, 24-25 (2016) (“Since this was the last day of the 99th Congress and was well into the election campaign season, sponsors clipped the FOIA amendments onto drug legislation which could not be opposed by legislators seeking reelection...In fact, it would have been remarkable if more than a dozen senators and representatives had actually read and understood the words of the amendment which they passed, as a rider on an omnibus and complex drug enforcement law.”).

193 *Id.* at § 3:9, 56 (“A rare cooperation between lobbying groups for the FBI and the news media produced a thin package of amendments. The press received almost automatic guarantees that it would not have to pay access and copying charges.”).