ARTICLE

FAST FIXES FOR FOIA

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The effectiveness of the Freedom of Information Act has been hindered throughout its history by delays in processing requests, questionable denials of information, and a dominance of commercial requests. Using an economic approach, this Article argues that cost asymmetries drive these difficulties: agencies incur high costs compared to entities that file requests ("requesters") at the processing stage, whereas requesters have high costs relative to agencies at the judicial review stage. To mitigate these asymmetries, this Article proposes three relatively simple changes that would markedly improve its implementation: allowing agencies to retain processing fees, increasing these fees, especially for commercial and expedited requests, and strengthening FOIA's attorney fee-shifting provisions. This Article contends that these "fast fixes" for FOIA would more effectively strengthen government transparency than the significantly more complex legislation that Congress has recently considered.

I. Introduction

The U.S. Freedom of Information Act ("FOIA"), enacted in 1966,[1] requires executive branch agencies to provide records to any person upon request unless the records fall under one of the statute's nine exemptions, which generally deal with countervailing considerations like national security, trade secrets, individual privacy, and law enforcement.[2] The Supreme Court has consistently extolled the benefits of the Act in enhancing access to government information,[3] which helps combat corruption, foster accountability,[4] and promote democracy more generally.[5] In a memorandum calling on the executive branch "to adopt a presumption in favor of disclosure," President Obama noted that FOIA, "which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government."[6] Even his predeces-

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[1] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (2012)).

[2] *See* 5 U.S.C. §§ 552(a)(3), (b) (2012).

[3] *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989).

[4] *See* Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[5] *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

[6] Barack Obama, Memorandum of January 21, 2009: Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009).

sor, known to be more protective of government documents, was politically pressured to sign legislation that strengthened the Act.[7]

Numerous countries have followed the United States' example in adopting freedom of information legislation, suggesting that there is widespread international recognition of the value of transparency implied in the Act.[8] Given that FOIA has allowed citizens to uncover information about government wrongdoing, environmental and health hazards, and unsafe products in the past,[9] support for the statute is well-grounded.

Despite these widespread beliefs in the Act's benefits, its success in implementation has fallen far short of the statute's goals, with processing delays well beyond statutory time limits and questionable denials of records.[10] Also, there is a prevalence of commercial requests, which are requests made purely for business purposes and without any intention of ever publicizing the information in the documents that an agency releases in response to those requests.[11] Since the public does not benefit from the information, large numbers of these requests arguably distract agencies from fulfilling other requests that would more likely lead to better public knowledge about the government.

These shortcomings in FOIA's implementation have persisted despite various amendments to the statute. Originally an amendment to the public records section of the Administrative Procedure Act ("APA"),[12] Congress has substantively amended FOIA seven times since it was first passed, most recently in 2009.[13] No other section in the original APA has been amended more than twice substantively, or three times if technical revisions are included.[14] In the aggregate, amendments to FOIA have been far more exten-

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[7] Elizabeth Williamson, *White House Secrecy Starts to Give*, WASH. POST, Jan. 13, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/12/AR2008011202308.html, *archived at* http://perma.cc/J5RL-LB99 ("Bush bowed to lawmakers in his own party and signed a bill speeding the release of millions of government documents requested by Americans under the Freedom of Information Act.").

[8] *See* ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 14–15 (Cambridge University Press 2006).

[9] *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, sec. 2(a)(3)–(4), 110 Stat. 3048 (listing congressional findings of FOIA's effectiveness); JACQUELINE KLOSEK, THE RIGHT TO KNOW: YOUR GUIDE TO USING AND DEFENDING FREEDOM OF INFORMATION LAW IN THE UNITED STATES 43–116 (ABC-CLIO, LLC 2009) (cataloguing various instances in which FOIA yielded information on public issues).

[10] *See infra* Part II.B.1 and 2.

[11] *See infra* Part II.B.3.

[12] *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 250 (1966).

[13] *See* Freedom of Information Act, 5 U.S.C. § 552 (2012) (listing history of amendments after main text).

[14] *See id.* §§ 551, 553–59, 701–06 (listing history of amendments after the text of each section). The Privacy Act of 1974 has been amended thirteen times (including technical revisions), *see* 5 U.S.C. § 552a (2012) (listing history of amendments after main text); however, it is an addition to the APA, which means that these privacy provisions were not part of the original APA, *see* Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896.

sive than all the amendments to the other APA sections combined, and the Act has become much longer than any other section of the original APA.[15]

With these seemingly intractable difficulties still persisting after nearly fifty years since the enactment of FOIA, this Article proposes three amendments to the Act that will significantly improve its functioning. First, it calls for increasing the fees that requesters pay to have agencies search, review, and reproduce records.[16] Second, it recommends allowing agencies to retain these fees. These first two measures provide agencies more resources in order to promote the processing of more requests, and they would also make it so that requesters' willingness to pay is a better signal of which requests are likely to be of greatest public importance. Third, this article proposes making the Act's current attorney fee-shifting provisions more favorable to plaintiffs to incentivize agencies to produce records in a timely fashion.[17]

The proposed amendments are beneficial for reasons of public awareness and practicality. Specifically, this article will show that they align incentives between agencies and requesters according to the following twofold principle: encouraging information seekers to acquire and disseminate the most publicly beneficial information and motivating agencies to fulfill requests as fast and favorably as feasible.

Additionally, the amendments are important for two practical reasons. First, these amendments will likely reduce net costs to the government. Although some have cited the high costs of the Act,[18] the total processing costs for all agencies in Fiscal Year ("FY") 2013, approximately $420 million,[19] represented just over 0.01% of the total federal budget of $3.45 trillion,[20] a miniscule portion. Though the benefits are difficult to quantify,[21] the proposal to increase processing fees should allay any concerns about agency resources since it would shift cost from the government to private actors.[22]

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[15] *Compare* 5 U.S.C. § 552 (2012), *with id.* §§ 551, 553–59, 701–06. However, FOIA is somewhat shorter than the Privacy Act. *Compare id.* § 552, *with id.* § 552a.

[16] *See* 5 U.S.C. § 552(a)(4)(A) (2012) (describing the Act's system of fees).

[17] *See id.* § 552(a)(4)(E).

[18] *See* Antonin Scalia, *The Freedom of Information Act Has No Clothes*, Regulation, Mar.–Apr. 1982, at 16–17.

[19] *See infra* app. tbl. 4.

[20] *See* 2015 Office of Mgmt. & Budget, Executive Office of the President, Hist. Tables, Budget of the U.S. Gov't 25 tbl.1.1 (2014); *see also* Charles Wichmann III, Note, *Ridding FOIA of Those "Unanticipated Consequences": Repaving A Necessary Road To Freedom*, 47 Duke L.J. 1213, 1255 (1998) (making this comparison and noting the cost at the time was similar to "federal spending on military bands").

[21] *Cf. Costs and Benefits—FOIA*, FOIA Update (U.S. Dep't of Justice, Washington D.C.), Winter 1980, at 2, 7, *available at* http://www.justice.gov/oip/foia_updates/Vol_I_3/page3.htm, *archived at* https://perma.cc/3Q6W-W9SF?type=source (noting that agencies found it difficult to measure benefits of the statute).

[22] There remains the possibility that increased information releases under FOIA could directly have an adverse impact. *Cf.* Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 Governance 529, 536 (citing adverse consequences of less candid deliberation and less information provided to government). However, the Act's exemptions already reflect a need to weigh the negative impacts of disclosure against

Second, although the proposals are realistically grounded and have precedent in prior amendments to FOIA,[23] their approach differs from that of recent legislation to change the operation of the Act. To begin with, there are two bills to amend FOIA: the House FOIA Oversight and Implementation Act of 2015, or "FOIA Act,"[24] and the Senate FOIA Improvement Act of 2015.[25] Earlier versions of these bills passed their respective chambers, though not the full Congress,[26] so they are especially relevant. Although these bills are somewhat different,[27] they both seek to strengthen disclosure by making it harder for agencies to invoke the exemptions in the Act.[28] The other recent legislation consists of parallel bills in the House and Senate known as the Public Online Information Act ("POIA").[29] Versions of it have appeared consistently since the 111th Congress and are thus likely to reappear in the current one.[30] This Act would require agencies to post online publicly available information, free of charge.[31] This information includes records previously released through FOIA and newly requested documents.[32] Overall, each of these bills would have imposed additional obligations on agencies rather than changing agency and requester incentives.

The cost-based proposals in this Article are not only substantively different from these bills' provisions, but also "faster" fixes in two senses. First, to take effect, each of the FOIA bills would require executive branch

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its benefits. In any case, such concerns are better addressed by changing the substance of the exemptions. In contrast, this paper's proposals are procedural.

[23] *See infra* Part III.C.1.

[24] FOIA Oversight and Implementation Act of 2015 [hereinafter FOIA Act], H.R. 653, 114th Cong. (2015).

[25] FOIA Improvement Act of 2015, S. 337, 114th Cong. (2015).

[26] *See* Josh Hicks, *How a Popular Government-Transparency Bill Suddenly Died in Congress*, Wash. Post, Dec. 18, 2014, http://www.washingtonpost.com/blogs/federal-eye/wp/2014/12/16/how-a-popular-government-transparency-bill-suddenly-died-in-congress, *archived at* http://perma.cc/VN2F-NJBX.

[27] The two bills use different legislative language to achieve many similar changes to FOIA. *See* FOIA Act, H.R. 653, 114th Cong., sec. 2, § 552 (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2, § 552 (2015). The FOIA Act also contains a more strongly-worded change to FOIA's exemption for intra- and inter-agency memoranda, *compare* FOIA Act, H.R. 653, 114th Cong., sec. 2(b)(1), § 552(b)(5) (2015), *with* FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(2), § 552(b)(5) (2015), as well as a compliance role for agencies' Inspectors General, *see* FOIA Act, H.R. 653, 114th Cong., sec. 3 (2015).

[28] *See* FOIA Act, H.R. 653, 114th Cong., sec. 2(b), § 552(b) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(1)(D), § 552(a)(8)(A) (2015).

[29] Public Online Information Act of 2014, [hereinafter POIA], H.R. 4312, 113th Cong. (2014), Public Online Information Act of 2013, S. 549, 113th Cong. (2013). Since the two bills have only subtle differences, references to the legislative text will be made only to the later-introduced House bill.

[30] *See* sources cited *supra* note 29; Public Online Information Act of 2011, H.R. 1349, 112th Cong. (2011); Public Online Information Act of 2011, S. 717, 112th Cong. (2011); Public Online Information Act of 2010, H.R. 4858, 111th Cong. (2010); Public Online Information Act of 2010, S. 3321, 111th Cong. (2010). As of this writing, POIA has not yet been reintroduced in either chamber.

[31] *See* POIA, H.R. 4312, 113th Cong., § 7(a)(1)(A) (2014).

[32] *See id.* § 7(e)(1); *infra* notes 308–09 and accompanying text.

officials to promulgate regulations.[33] In contrast, this Article's proposals require no discretionary action on the part of agencies and could take effect immediately on a date of Congress' choosing. Second, in a more colloquial sense, the cost-based proposals are "faster" because they are significantly less complex than the pending bills. Each of the FOIA bills would make the Act substantially longer,[34] and POIA's instructions for having agencies post public records online are also rather lengthy.[35] In contrast, Congress could enact this Article's solutions such that only a few pages of legislative language are added to FOIA. Thus, these proposals suggest that relatively small changes in language to the statute can be equally or more effective in improving FOIA's functioning than the more complicated bills on FOIA.

The rest of this Article proceeds as follows: Part II shows how FOIA's request-based structure provides some of the incentives according to the above principle and is thereby partially effective in informing citizens. Part III explains how cost asymmetries at the processing and judicial review stages of a request keep the Act from being more effective. Part IV describes policy proposals to remedy these cost asymmetries and contrasts them with the current and recent legislative proposals. Part V concludes.

II. Partial Effectiveness of FOIA's Request-Based Structure

At the heart of FOIA is the command that "each agency, upon any *request* for records . . . shall make the records promptly available to any person."[36] While this statement might suggest that an agency must make such records available to the general public, another section requires this action only for records that an "agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."[37] Otherwise, the agency need only release the record to the requester. This element of the Act partially fulfills the first part of the incentives principle of motivating information seekers to obtain the most publicly valuable records in two ways. First, although Congress can identify some documents that are important enough for proactive publishing,[38] it cannot identify all of them. Thus, FOIA requests serve as a rough signal of what information is likely to be significant. Second, by not instructing agencies to publish all documents they have released, FOIA provides information seek-

[33] FOIA Act, H.R. 653, 114th Cong., sec. 2(k)(1) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 3 (2015); POIA, H.R. 4312, 113th Cong., §§ 7(a)(2)–(3) (2014).

[34] *See*, *e.g.*, FOIA Act, H.R. 653, 114th Cong., sec. 2(j), §§ 552(j)–(k) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(6), §§ 552(j)–(k) (2015).

[35] *See* POIA, H.R. 4312, 113th Cong., § 7 (2014).

[36] 5 U.S.C. § 552(a)(3)(A) (2012) (emphasis added).

[37] *See id.* § 552(a)(2)(D).

[38] *See*, *e.g.*, §§ 552(a)(1)–(2).

ers with an additional incentive to file requests in the first place by allowing requesters to decide when to publish.

The fact that there are hundreds of thousands of requests each year, as Table 1 shows,[39] suggests that the Act's request-based structure works to some degree. Some might perceive this circumstance as remarkable, given that the theory of collective action predicts serious underinvestment in public goods.[40] Because government information is a public good,[41] the theory would suggest that almost no one would pay the costs of a request to obtain records and disseminate them or the information they contain. However, empirical observations of groups forming to solve collective action problems for even large, diffuse interests undermine the pure form of the theory.[42] This general observation applies to FOIA, with many media and nongovernmental organizations striving to exercise their rights under the Act.[43] Thus, despite well-known problems in implementation, individuals and entities seem to have some motivation to seek government information, and the Act's reliance on requests arguably provides additional incentives for them to do so.

A. Advantages over Other Information Release Methods

This method for releasing records contrasts with two alternative methods of transparency: proactively disclosing as many records as possible and immediately publishing all records released in response to FOIA requests.[44] Although these methods are appealing, they arguably are not as effective at improving public knowledge about the government.

1. Maximal Proactive Disclosure

At first glance, proactive disclosure of as much information as possible might seem to improve citizens' knowledge about government activity and

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[39] *See* Appendix.

[40] *See*, *e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 12–15 (1998).

[41] *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 555 (1991) ("[B]ecause information is a public good, it is likely to be undervalued by both the market and the political system"). *But see* James Love, *Pricing Government Information*, 22 Gov't Info. Q. 363, 364–65 (1995) (describing how government information is and is not a public good).

[42] *See* Croley, *supra* note 40, at 19.

[43] *See* Shannon E. Martin, Freedom of Information: The News the Media Use 151 (Peter Lang Publishing, Inc. 2008). Admittedly, a large number of requests are commercial in nature. *See infra* Part II.B.3. However, there are also many noncommercial requests, which the collective action theory predicts would not occur with such frequency.

[44] *See* Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 Geo. Wash. L. Rev. 925, 936–37 (2009).

issues by making more documents available.[45] However, there are several practical constraints that prevent agencies from posting as much information as they can while they generate records. First, even though technology has made it possible to publish large volumes of documents in a digital format,[46] it has also generated more documents than in the paper age. On net, it is not necessarily easier to post all electronic documents online than it would have been to make all physical records available in reading rooms. Second, whatever the costs are for posting electronic documents, processing documents not originally in digital form for public consumption is even more expensive.[47]

Moreover, agencies cannot release all documents—there are documents and portions of documents that agencies have the right and even responsibility to withhold. FOIA provides for nine exemptions by which the government may choose to withhold all or part of a record.[48] These exemptions reflect a common understanding that society needs to strike a balance between increased transparency and potential adverse consequences of disclosure apart from financial cost, such as risks to national security.[49] Thus, a policy of maximal proactive disclosure could force agencies to determine which documents and portions of documents to release, regardless of whether anyone requested them, at the agency's expense.[50] The redactions,[51] in particular, would be highly labor-intensive. An illustration of this difficulty is that, although courts may review contested documents in camera,[52] agencies more commonly submit a document that enumerates, describes, and cites the exemption(s) being claimed for each document in dispute. Courts rely on these so-called "*Vaughn* indexes," named after the case in which they were introduced,[53] because reviewing this summary document is much less burdensome than examining each document individually.[54]

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[45] *Cf. id.* at 936 (arguing for maximal proactive disclosure on the grounds that "[t]he timely release of information is essential to meaningful public participation in agency rulemaking . . .").

[46] *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, sec. 2(a)(5)–(6), 110 Stat. 3048, 3048 (1996); POIA, S. 549, 113th Cong., § 5(2)–(3) (2013).

[47] *See* Patrice McDermott, Who Needs to Know? The State of Public Access to Federal Government Information 32 (Bernan Press 2007).

[48] *See* 5 U.S.C. § 552(b) (2012).

[49] *See* Patricia M. Wald, *Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 Emory L.J. 649, 656–657 (1984) (noting that the exemptions contain "every . . . delicate balance that a modern democratic government faces").

[50] *See* Coglianese et al., *supra* note 44, at 937. Another possibility is that agency officials would at least preliminarily classify too many documents as exempt from disclosure. *See id.*

[51] *Cf.* 5 U.S.C. § 552(b) (2012) (instructing agencies to provide "[a]ny reasonably segregable portion of a record" to requesters after removing what is exempt).

[52] *See id.* § 552(a)(4)(B) (2012).

[53] *See* Vaughn v. Rosen, 484 F.2d 820, 826–28 (D.C. Cir. 1973) (setting out how to describe documents to allow a determination without in camera review).

[54] *See id.* at 825 (describing the burdens for trial and appellate courts in conducting in camera review).

Given the infeasibility of posting everything, the executive branch could thwart legislative attempts to impose mandatory proactive disclosure if it were inclined to do so. Evidence for this likely consequence comes from the implementation of a previous legislative attempt to induce agencies to post more information online, the E-Government Act of 2002.[55] One of its sections called on the executive branch "to improve the methods by which Government information, including information on the Internet, is organized, preserved, and made accessible to the public."[56] However, the Office of Management and Budget ("OMB"), which played a primary role in execution, merely encouraged agencies to post information to the general public without any special efforts to make it accessible,[57] and it allegedly excluded public access advocates and other public interest organizations from the consultation phase.[58] Given the resistance to this modest step,[59] a broader directive to post information would likely meet even greater difficulties.

Overall, while a statutory command to disclose as much information as possible should theoretically lead to greater public awareness, it is unclear whether agencies are able and willing to meet this ideal. Since agencies cannot post everything at once, they will have to disclose some documents earlier than others based on which documents they think are more important. Their prioritization is not likely to be more accurate than the prioritization implicit in FOIA requests, which are a rough indicator of which documents are more important to the public. There is also the challenge of making such a large collection of released documents easy to search, described more in the next model of disclosure. Instead, transparency would be better served with more focused improvements on the Act's request-based structure.

2. *Immediate Publication of Released Records*

A more moderate option, requiring agencies to post online all records that they have released in response to FOIA requests,[60] might seem to promote meaningful transparency by focusing disclosure on what information seekers have requested. Agencies can already take this measure voluntarily,[61] and they must do so for commonly requested documents.[62] However,

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[55] E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in 5 U.S.C. §§ 3701–07; 44 U.S.C. §§ 3541–49, 3601–06 (2012)).

[56] *Id.* sec. 207(a), 116 Stat. 2916.

[57] *See* McDermott, *supra* note 47, at 58.

[58] *See id.* at 53.

[59] Since agencies were included in OMB's consultation, *see id.*, it is reasonable to conclude that, as a whole, they at least did not support greater accessibility strongly enough to change OMB's recommendations.

[60] *See* Coglianese et al., *supra* note 44, at 937 (proposing this measure as a "more modest alternative").

[61] FOIA does not prevent agencies from proactively posting information online, since it does not authorize withholding apart from the exemptions, *see* 5 U.S.C. § 552(d) (2012), and does not require withholding even when information qualifies for an exemption, *see id.* § 552(b) (stating only that FOIA "does not apply" to such records).

this measure comes with its own challenges. First, at least some agencies would find it burdensome to post all these documents, albeit less so than posting as many documents as possible. Next, there is a large gap between merely making documents available online and organizing them so that citizens are able to gain useful information from them. Instead, users of online collections of documents need effective search capabilities to help find relevant documents.[63] Three websites with databases of FOIA documents suggest that creating easily searchable databases would be a challenging task: FOIAonline, where a small number of government agencies post requests and records;[64] DocumentCloud, where journalists upload government documents gathered via FOIA and other methods;[65] and MuckRock, which assists customers in filing FOIA requests in exchange for posting documents they receive online.[66] All have limited search capabilities,[67] especially compared to commercial databases like Westlaw and LexisNexis. Since the operators of these websites are perhaps among those most enthusiastic about access to public records, these sites' arguably inadequate interfaces imply that making the complete set of FOIA documents available and informative to citizens would require more resources than people inside and outside of government have been willing to devote.

In addition, publishing released documents, at least right away, could paradoxically have an adverse effect on transparency. Citizens typically gain knowledge about the government through FOIA not because they have read documents that have been released, but because someone else filed a FOIA request and has decided to reveal at least the information embedded in the documents she received. Some requesters will only find it worth requesting documents if they can retain exclusive possession of them, at least for a time. Many journalists undoubtedly have this motivation,[68] and nongovernmental organizations hoping to show their relevance also have a plausible

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[62] *See id.* § 552(a)(2)(D).

[63] *See* McDermott, *supra* note 47, at 17 (claiming that a mere "keyword search" yields mostly "irrelevant" results and is "a good way to hide information"); *cf.* Coglianese et al., *supra* note 44, at 941 (describing document libraries that agencies could create and that would be "easily searchable").

[64] FOIAonline, http://foiaonline.regulations.gov, *archived at* http://perma.cc/ZZ3S-G85M (last visited Aug. 15, 2014).

[65] DocumentCloud, http://www.documentcloud.org, *archived at* http://perma.cc/4NUA-DBQC (last visited Aug. 15, 2014).

[66] MuckRock, http://www.muckrock.com, *archived at* http://perma.cc/BW8D-6WAD (last visited Aug. 15, 2014).

[67] DocumentCloud does allow some searching with metadata fields. *See DocumentCloud Help: Searching Documents and Data*, DocumentCloud, http://www.documentcloud.org/help?page=searching, *archived at* http://perma.cc/YM24-6DML (last visited Aug. 15, 2014). Nonetheless, finding the most relevant documents remains a challenge even on this site.

[68] *See FOIA the FOIAs*, National Freedom of Information Coalition, http://www.nfoic.org/foia-foias, *archived at* http://perma.cc/WWR5-ZY4Z (last visited Aug. 15, 2014) (claiming that "[j]ournalists . . . tend to think that a record of their FOIA request should be shielded from prying eyes").

incentive to keep the documents they receive private.[69] Additionally, DocumentCloud and MuckRock implicitly acknowledge this incentive for requesters in general by allowing users to keep documents they receive from public view until they choose to release them.[70] Even if others attempt independently to acquire the same information, FOIA's request-based structure still allows at least temporary exclusive possession of information.[71]

Evidence that many journalists prefer exclusive possession of documents they request appears in their opposition to two local public records policies. First, in 2010, the City of Chicago decided to post on its website freedom of information requests so that everyone would know which journalist was requesting which documents.[72] Second, also in 2010, journalists filed a complaint that a British Columbia agency was choosing to disclose documents simultaneously to the public and the requester.[73] In both cases, journalists opined that these policies would have a "chilling effect" and make journalists less willing to request documents.[74] Many other agencies and jurisdictions could have opportunistically adopted these kinds of practices to discourage requests. The fact that they have not suggests that many, if not most, public records offices make a good faith effort to comply with freedom of information statutes but are resource constrained.

Overall, while requiring agencies to post all released documents online would make a greater proportion of requested records freely available, it would also likely have the countervailing effect of reducing the amount of information sought. Much of public awareness is not from direct transparency but from transparency mediated through requesters like journalists and NGOs. Thus, restructuring FOIA to require agencies to post all released documents would not necessarily increase transparency in a way that is useful. Instead, by allowing requesters to decide when to publish records, FOIA incentivizes requests by increasing the benefits they derive from disseminat-

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[69] One other class of requesters that would not want records they have obtained to be posted online is commercial requesters seeking competitive advantage. They are discussed *infra* Part II.B.3.

[70] *See Frequently Asked Questions*, DOCUMENTCLOUD, http://www.documentcloud.org/faq, *archived at* http://perma.cc/5L52-M2CY (last visited Aug. 15, 2014); *Account Info*, MUCKROCK, https://www.muckrock.com/accounts/register, *archived at* https://perma.cc/2UTL-V2BD (last visited Aug. 15, 2014) (allowing users of the professional edition of the site to keep requests hidden).

[71] Requesters can try to duplicate previous requests by requesting an agency's "FOIA log," which typically provide information on who requested what information and what she received. *See* NATIONAL FREEDOM OF INFORMATION COALITION, *supra* note 68. However, entities can cloak their identities by working through an intermediary corporation. *See* HERBERT M. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 137 (1999) (describing "FOIA service companies").

[72] *See* Fran Spielman, *Daley Sticks It to Investigative Reporters*, CHI. SUN-TIMES, May 14, 2010, at 11.

[73] OFFICE OF THE INFO. & PRIVACY COMM'R FOR B.C., INVESTIGATION REP. F11–02, INVESTIGATION INTO THE SIMULTANEOUS DISCLOSURE PRACTICE OF BC FERRIES 3 (2011).

[74] *Daley Comes out Swinging at Press*, CHI. SUN-TIMES, May 14, 2010, at 22; OFFICE OF THE INFO. & PRIVACY COMM'R FOR B.C., *supra* note 73, at 14.

ing information from documents. The Act's current reliance on citizen requests and dissemination is useful, and amendments should focus on other aspects of requester and agency incentives.

B. Current Implementation Difficulties

FOIA's request-based structure causes citizens to seek and obtain the most valuable information, which is the first part of the twofold principle laid out in the Introduction. However, as agencies currently implement the Act, they do not complete requests as fast and favorably as possible. Admittedly, some agencies fulfill their obligations quite well; twenty-five agencies, for example, had no backlog of requests at the end of FY 2013.[75] However, the agencies with the smallest backlogs are also likely to be the ones with the fewest requests.[76] In contrast, none of the cabinet-level departments, like the Department of Justice ("DOJ") or Department of Homeland Security ("DHS"), have small backlogs.[77] In the aggregate, the prevalence of delays, questionable denials, and commercial requests, strongly suggests that many agencies have significant problems in their implementation of the Act.

1. Delays in Processing Requests

As a general rule, FOIA calls upon an agency to complete a request for records within twenty business days,[78] although under "unusual circumstances," it may take another ten days to complete the request.[79] However, it is common knowledge that agencies frequently fail to fulfill these statutory deadlines.[80] These difficulties have persisted throughout the Act's history,[81] and such difficulties in recent years are evident from any recent summary

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[75] OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2013 9 (2014), http://www.justice.gov/oip/docs/fy2013-annual-report-summary.pdf, *archived at* http://perma.cc/F82P-MQSC [hereinafter OIP 2013 FOIA SUMMARY].

[76] *See*, *e.g.*, ADMIN. CONFERENCE OF THE U.S., FREEDOM OF INFO. ACT ANNUAL REPORT FISCAL YEAR 2013, at 7 (2014) (showing a backlog of zero, but also only nineteen requests during the fiscal year).

[77] *See* OIP 2013 FOIA SUMMARY, *supra* note 75, (not listing any departments, as opposed to agencies, with backlogs of fewer than 100 requests).

[78] *See* 5 U.S.C. § 552(a)(6)(A)(i) (2012).

[79] *See id.* §552 (a)(6)(B)(i).

[80] *See* KLOSEK, *supra* note 9, at 22; Mark H. Grunewald, *E-FOIA and the "Mother of All Complaints:" Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345, 346 (1998); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 79 (1997).

[81] *See*, *e.g.*, Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 330-33 (1994) (cataloguing the history of delay from the inception of FOIA).

report of FOIA from the Office of Information Policy ("OIP") at the Department of Justice.[82]

One way to measure delays is in terms of median and mean processing times. Table 1a is a compilation of summary data on processing times for "simple" requests,[83] which agencies typically place on a separate track for faster processing than "complex" requests.[84] One statistic is an agency's median processing time, which means that half of its requests take less than that time. In general, a majority of departments and a larger majority of agencies outside of departments have had a median processing time of twenty days or less; for example, in FY 2010 eight of fifteen departments and 67 of 80 non-agency departments fulfilled at least half of their simple requests within the standard statutory deadline.[85] The average processing time, however, exceeded twenty days for the years OIP tracked this figure.[86] Also, substantially fewer units of both types had averages of less than twenty days: in FY 2010, only four department and fifty-five non-department agencies averaged less than the standard timeframe for simple requests.[87] Thus, a significant number of agencies struggled even with requests that they defined as simple. Table 1b shows the same statistics for complex requests, which, unsurprisingly, show longer averages and medians.[88] For example, in FY 2010, only four departments and nine non-department agencies had median processing times of twenty days or less, and only two departments and four non-department agencies had averages of twenty days or less.[89]

Table 1c displays these statistics for what agencies define as "expedited" requests according to regulations that FOIA instructs them to promulgate.[90] These figures are generally better than those for complex requests, but not as good as those for simple requests.[91] For example, in FY 2010, eight departments and twenty non-department agencies had median processing times of twenty days or less, while five departments and eighteen non-de-

[82] *See*, *e.g.*, OIP 2013 FOIA Summary, *supra* note 75, at 8–15 (describing FOIA backlogs and processing times that indicate agency failure to meet statutory deadlines).

[83] *Infra* app. tbl.1a.

[84] *See* 5 U.S.C. § 552(a)(6)(D)(i) (2012) (allowing agencies to place requests on multiple tracks based on "the amount of work or time (or both) involved in processing requests"); OIP 2013 FOIA Summary, *supra* note 75, at 13–14 (discussing simple and complex requests).

[85] *Infra* app. tbl. 1a. FOIA requires agencies to report the number of requests completed within twenty days and within longer ranges of times. *See* 5 U.S.C. § 552(e)(1)(G) (2012). However, OIP has not summarized this data.

[86] Since the minimum processing time is one day, but the maximum processing time is much longer than twenty days, one would expect, assuming a fairly standard distribution, that agencies' performance would look less impressive when measured in terms of average processing times than in terms of median times. *Cf.* Paul T. von Hippel, *Mean, Median, and Skew: Correcting a Textbook Rule*, J. Stat. Educ. (July 2005), http://www.amstat.org/publications/jse/v13n2/vonhippel.html, *archived at* http://perma.cc/4D4X-UCXP.

[87] *See infra* app. tbl. 1a.

[88] *Infra* app. tbl. 1b.

[89] *Id.*

[90] *See infra* app. tbl. 1c; 5 U.S.C. § 552(a)(6)(E) (2012).

[91] *See infra* app. tbl. 1a.

partment agencies had averages of twenty days or less.[92] Thus, agencies do not usually fulfill even expedited requests within the statutory deadline. This result could be due to a large proportion of requests in this track that agencies would otherwise deem complex.[93] However, it is not due to a large number of such requests. As Table 2 indicates, grants for expedited processing are quite infrequent: since FY 2009, agencies granted between one and two thousand requests among hundreds of thousands.[94] Overall, many agencies are not close to complying with all the deadlines that the Act sets, even for the subsets of requests that they attempt to process more quickly.

Delays can also be measured in absolute terms by counting agencies' backlogs, or their total numbers of requests pending beyond the statutory deadline at the end of the fiscal year.[95] Table 2 lists recent summary data from OIP along with the number of requests received and processed.[96] Agencies received approximately 600,000 to 700,000 requests in each of the last six years.[97] Usually, they processed more requests than they received because some were previously in agencies' backlogs.[98] Since FY 2009, the backlog has ranged from around 70,000 to 95,000 requests, or a bit above ten percent of the received requests.[99]

One seemingly hopeful sign is that the size of the backlog decreased dramatically from FY 2008 to FY 2009 and has not approached previous levels since. However, this reduction is not due to improvements in processing requests across the executive branch. Instead, this reduction in backlog is entirely attributable to the Department of Homeland Security.[100] Furthermore, over ninety percent of DHS's reduction is attributable to improvements by one component within DHS, the U.S. Citizenship and Immigration Service ("USCIS"),[101] which "in July 2008 . . . awarded a backlog contract . . . to provide 74 staff . . . tasked to process the oldest requests."[102] Though

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[92] *See infra* app. tbl. 1c.

[93] *Cf.* OIP 2013 FOIA SUMMARY, *supra* note 75, at 14 (noting that "expedited track requests . . . can either be simple or complex in their scope").

[94] *Infra* app. tbl. 2.

[95] *See* U.S. DEP'T OF JUSTICE, DEP'T HANDBOOK FOR AGENCY ANNUAL FREEDOM OF INFO. ACT REPORTS, at 22 (2013), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/doj-handbook-for-agency-annual-freedom-of-information-act-reports.pdf, *archived at* http://perma.cc/YD5C-3C3F.

[96] *Infra* app. tbl. 2

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See* U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: 2009 ANNUAL FREEDOM OF INFO. ACT REPORT TO THE ATTORNEY GEN. OF THE U.S. at 20 tbl.XII.D (2010) (noting a decrease in DHS's backlog from 74,879 requests to 18,918 requests between FY 2008 and FY 2009). This decrease of 55,961 requests slightly exceeds the federal government's overall backlog reduction of 55,918 requests. *Compare id. with infra*. app. tbl. 2.

[101] *See* U.S. DEP'T OF HOMELAND SEC. *supra* note 100, at 20 tbl.XII.D (cataloging a decrease in that component's backlog from 67,545 to 16,801 requests, a reduction of 50,744).

[102] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–09–260, FREEDOM OF INFORMATION ACT: DHS HAS TAKEN STEPS TO ENHANCE ITS PROGRAM, BUT OPPORTUNITIES EXIST TO IMPROVE EFFICIENCY AND COST-EFFECTIVENESS, at 13 (2009).

progress in any agency is welcome,[103] this explanation of the FY 2009 backlog reduction implies that there has been no government-wide improvement. Table 2 shows that the backlog has not consistently fallen since FY 2009; instead, it has alternately decreased and increased, with the FY 2013 backlog of 95,564 requests substantially greater than the FY 2009 backlog of 77,377 requests.[104] Thus, the Obama Administration's memorandum to improve FOIA implementation has not obviously reduced processing times.[105] Whether measured in terms of processing times or backlogs, and regardless of the types of requests, agencies as a whole fall significantly short of statutory requirements.

2. *Questionable Withholding of Information*

FOIA's legislative history states a purpose of "establishing a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[106] Given the tension embedded in this philosophy, determining the extent to which information withholding is a problem is a challenge because only denials that contravene the statute are wrong. However, data on the disposition of FOIA requests can provide suggestive evidence on the degree of FOIA withholding over time, and data on FOIA lawsuits supports the claim that at least some denials are wrong.

Table 3 displays the disposition of requests since FY 2008 that agencies have substantively processed,[107] rather than closing "for administrative or procedural reasons, such as when no records are located."[108] It shows that agencies have fully denied between six and eight percent of requests each year, so these denials have been approximately steady in percentage terms.[109] However, partial grants, which are also partial denials, have increased substantially at the expense of full grants.[110] In FY 2013, slightly less than half of the 482,357 substantively processed requests yielded full grants, whereas

[103] Part of USCIS's backlog reduction entailed "the elimination of 23,179 requests whose requesters did not have continued interest in obtaining the information" (over an unclear time frame), rather than the provision of information. *Id.*

[104] *Infra* app. tbl. 2.

[105] *Cf.* Office of Info. Policy, Summary of Annual FOIA Reports for Fiscal Year 2012, at 7 (2013), http://www.justice.gov/oip/docs/fy2012-annual-report-summary.pdf, *archived at* http://perma.cc/44EC-4FT8 (suggesting an association between the backlog reduction after FY 2008 and the President's FOIA memorandum).

[106] S. Rep. No. 89-913, at 3 (1965). The corresponding House report may have been less supportive of FOIA than the Senate report. *See* Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 763 (1967) ("The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure."). Still, the House report acknowledges that "[t]he right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government." H.R. Rep. No. 89-1497, at 6 (1966).

[107] *Infra* app. tbl. 3.

[108] OIP 2013 FOIA Summary, *supra* note 75, at 4.

[109] *See infra* app. tbl. 3.

[110] *See id.*

42.1 percent yielded only a partial grant, compared to 29.0 percent in FY 2008.[111] In absolute terms, the number of full grants has also decreased, whereas partial grants and full denials have both increased since FY 2008, even though the total number of substantively processed requests increased during this time.[112] These data are consistent with observations that the federal government used exemptions more times in FY 2009 than in FY 2008[113] and invoked these exemptions more often in FY 2013 than during any other year of the current administration.[114] Even though President Obama declared in his memorandum on FOIA that "[t]he Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears," agencies continue to invoke exemptions as frequently as in the past, if not more often.

Table 4 provides recent data from DOJ's reports on FOIA litigation.[115] Withholding of information is not always improper. However, if a requester contests a denial and prevails in court, then one can infer that the agency was legally wrong in denying the information. The summary data show that plaintiffs receive at least partially favorable judgments to compel the release of records in a small but sizeable proportion of cases.[116] At a minimum, plaintiffs are clearly successful when they receive attorney fee awards. FY 2013 was a particularly good year for plaintiffs, who received these awards in 30 cases out of 361 decided.[117] As described further below, plaintiffs are also victorious in cases with other types of outcomes.[118] Although an agency may end up disclosing additional documents because the law interpreting FOIA exemptions changes,[119] at least some cases reflect improper denials, especially those that yield an award of attorney fees to the plaintiff.[120] A comparison of Tables 3 and 4 shows that only a very small percentage of denials are challenged in court: full denials range from 25,000 to 40,000, whereas cases filed are on the order of 300.[121] It seems quite likely that

[111] *See id.*

[112] *See id.*

[113] *See* Faster FOIA Act of 2011, S. 1466, 112th Cong. § 1(d)(3)(A) (2011) (instructing the commission it creates to investigate why the use of exemptions increased in FY 2009).

[114] *See* Josh Hicks, *Transparency Criticisms Linger for Administration*, WASH. POST, Mar. 18, 2014, at A15 (citing Associated Press study of FOIA requests under President Obama).

[115] *Infra* app. tbl. 4.

[116] *See id.*

[117] *Id.*

[118] *See infra* notes 198–200 and accompanying text.

[119] *See* Milner v. U.S. Dep't of Navy, 131 S. Ct. 1259, 1264 (2011) (resolving a circuit split on the interpretation of FOIA's second exemption).

[120] *See*, *e.g.*, Rosenfeld v. U.S. Dep't of Justice, 904 F. Supp. 2d 988, 1000 (N.D. Cal. 2012) (finding that the defendant agency lacked a reasonable basis in law for its withholding of information).

[121] *Infra* app. tbl. 3, tbl. 4.

agencies withhold other information improperly, but that requestors seldom challenge them.[122]

3. *Prevalence of Commercial Requests*

FOIA does not instruct agencies to report on what sort of entities submit requests.[123] Independent studies are not comprehensive but show consistently that commercial entities submit a large majority of requests under the Act.[124] Enough firms are sufficiently attracted to obtaining information under the statute that intermediary companies have formed for the sole purpose of submitting requests on behalf of corporate clients,[125] in part to cloak the requesters' identities.[126] The prominence of corporate requests recently garnered attention in *Wall Street Journal* reporting on hedge funds' profits from using the Act.[127]

From pure social welfare considerations, this phenomenon is not automatically a problem since corporations' gains from the use of FOIA information would count as economic benefits. However, a preponderance of commercial requests is a concern when viewed in terms of the Act's public awareness purpose. In theory, the statute places the least priority on record requests "for commercial use" by charging them the highest fees,[128] though such fees apparently do not deter firms from making requests. In practice, as commercial requesters are likely to be seeking information about their competitors,[129] they are likely never to share the information, and the public will not benefit from the knowledge derived from the released documents. A focus on the transparency purposes of the Act also yields the argument that corporate requests are crowding out requests from individuals, journalists, and nongovernmental organizations that are more likely to publish released records. Even if requesters in the other categories sometimes keep the documents they receive to themselves, they at least have an incentive to publicize their information that commercial requesters do not.

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[122] *Cf.* Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 Va. L. Rev. 2039, 2058 (1993) (theorizing in general that "the political process inadequately deters government actors from misconduct").

[123] *See* 5 U.S.C. § 552(e)(1) (2012).

[124] *See* Foerstel, *supra* note 71, at 137 (citing studies pointing to this phenomenon); Peter L. Strauss et al., Gellhorn and Byse's Administrative Law: Cases and Comments 503 (11th ed. 2011) (same).

[125] *See* Foerstel, *supra* note 71, at 137.

[126] *See* Brody Mullins & Christopher Weaver, *Open-Government Laws Fuel Hedge-Fund Profits*, Wall St. J. (Online), Sept. 23, 2013, http://online.wsj.com/news/articles/SB1000142412788732420230457905303344411 2314, *archived at* http://perma.cc/F2GP-5MTX.

[127] *Id.*

[128] 5 U.S.C. § 552(a)(4)(A)(ii) (2012).

[129] *See* Strauss et al., *supra* note 124, at 475–76; Scalia, *supra* note 18, at 16 (contending that FOIA has served "largely as a means of obtaining data in the government's hands concerning *private* institutions" (emphasis added)).

III. The Importance of Cost Asymmetries

The delays, denials, and dominance of corporate requests derive from a misalignment of monetary incentives between agencies and requesters due to cost asymmetries. The cost asymmetries arise when agencies process requests and when requesters contemplate judicial review of a denial or delay. Specifically, requesters face low processing costs compared to agencies at the processing stage, whereas the reverse occurs at the judicial review stage. Because of these cost asymmetries, the principle stated in the introduction of this article is not fully followed: information seekers do not collectively request the most publicly beneficial information, and agencies are not motivated to fulfill requests as fast and favorably as the law commands. As a result, the public is not as well-informed through FOIA as it could be. Though the current structure is better than not having FOIA, the present allocation of processing and judicial review costs makes requests only a very imperfect signal of what information would be most publicly beneficial.

A. *Cost Asymmetries at the Processing Stage*

By design, FOIA does not compensate agencies fully for the costs they incur in fulfilling requests. The statute dictates that "[f]ee schedules shall provide for the recovery of *only* the *direct* costs of search, duplication, or review."[130] Also, an agency cannot charge review costs if the request is noncommercial in nature. Nor can they charge for search costs if the requesting entity is "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media" (a "sub-clause II entity").[131] In addition, agencies must waive fees for noncommercial requests "if disclosure . . . is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,"[132] and if the request requires no more than "one hundred pages of duplication," or, for entities not exempt from search costs, no more than "two hours of search time."[133] Thus, even if FOIA functioned perfectly in its current form, it would still yield some cost asymmetry at the processing stage.

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[130] 5 U.S.C. § 552(a)(4)(A)(iv) (2012) (emphases added). For example, agencies cannot charge "costs incurred in resolving issues of law or policy that may be raised in the course of processing a request." *Id.*

[131] *Id.* § 552(a)(4)(A)(ii)(I)–(III). The entities exempt from search and review fees are defined in sub-clause II, while commercial requests and other requests are defined respectively in sub-clauses I and III.

[132] *Id.* § 552(a)(4)(A)(iii).

[133] *Id.* § 552(a)(4)(A)(iv)(II).

1. *Low Costs for Requesters*

However, Table 5, which lists data on costs and fees related to processing, reveals a vast cost asymmetry that is almost certainly greater than Congress intended.[134] From FY 2008 to FY 2013, the fees that requesters have paid have trended downward from $11.6 million to $4.34 million.[135] The cost per request has also steadily declined from $18.62 in FY 2008 to $6.40 in FY 2013.[136] This downward trend probably results from a provision in the OPEN Government Act of 2007 that prohibits an agency from collecting duplication fees from sub-clause II entities and search fees from other requesters if it fails to follow the Act's deadlines.[137] Because this amendment took effect on December 31, 2008,[138] the data for FY 2008 reflect the fees that requesters paid before the OPEN Government Act of 2007. Thus, even at its highest, $18.62 per request in FY 2008 can be perceived as a bargain, although this characterization needs to be tempered by the possibility of a delay or denial.[139]

More importantly, there is substantial evidence that requesters respond to the price of a request. In other countries, increases in fees have caused significant decreases in requests.[140] As for the U.S. law, the original FOIA was vague about what sorts of fees agencies could charge and asked them only to publish a schedule of "fees to the extent authorized by statute."[141] Several years later, House and Senate reports expressed concern that some agencies were deterring potential FOIA requests with high processing fees.[142] As a result, Congress amended the Act in 1974 to limit fees to "direct costs of . . . search and duplication" and to require an agency to eliminate or further reduce the cost to the requester "where the agency determines that waiver or reduction of the fee is in the public interest."[143] What followed was an increase in requests beyond what Congress expected,[144] particularly in requests by corporate actors.[145] These low prices arguably break the first part of the incentive principle because they serve only as a rough indication

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[134] *Infra* app. tbl. 5.

[135] *Id.*

[136] *Id.*

[137] *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 6(b)(1)(A), § 552(a)(4)(A)(viii), 121 Stat. 2524, 2526.

[138] *See id.* § 6(b)(2), 121 Stat. 2526 (stating that the fee provision would take effect a year after the enactment date of December 31, 2007).

[139] *Cf.* Strauss et al., *supra* note 124, at 476 (arguing that "commercial entities . . . are happy to pick up some intelligence at not much cost").

[140] *See* Roberts, *supra* note 8, at 86, 97, and 114 n.34 (noting this phenomenon in Ireland, Ontario, and Australia).

[141] 5 U.S.C. § 552(a)(3) (Supp. III 1968) (current version at *id.* § 552(a)(4)(A) (2012)).

[142] *See* H.R. Rep. No. 92-1419, at 8, 10 (1972); S. Rep. No. 93-854, at 10-12 (1974).

[143] Freedom of Information Act Amendments, Pub. L. No. 93-502, sec. 1(b)(2), § 552(a)(4)(A), 88 Stat. 1561 (1974).

[144] *See* Cohen v. U.S. Fed. Bureau of Investigation, 831 F. Supp. 850, 854 (S.D. Fla. 1993).

[145] *See* Scalia, *supra* note 18, at 14, 16.

of what records are likely to be most publicly beneficial if disclosed. Undoubtedly, there are individuals and organizations that would be willing to pay more for faster processing of requests for information that would have greater public impact; however, they may have their requests placed in a queue behind earlier requests by individuals who place less value on the information they seek.[146]

The Act's fee structure changed again in 1986 so that commercial purposes would incur charges for review in addition to document search and duplication.[147] In spite of this upward cost adjustment, the fact that corporations continued to file most FOIA requests indicates that they found these requests worth the cost.[148] Thus, the current fee structure still contributes to the prevalence of commercial requests that leads to less public awareness about the government. Meanwhile, the 1986 amendments also exempted sub-clause II entities from search fees,[149] and provided waivers for small requests to all noncommercial requests.[150] Because of this lower price, one might even argue that there are low-benefit noncommercial requests that crowd out more publicly valuable requests and contribute to FOIA delays.[151]

2. *High Costs for Agencies*

Compared to the amount that information seekers pay to have their requests processed, agencies incur much greater costs: Table 5 shows that processing costs rose from $321 million in FY 2008 to $420 million in FY 2013.[152] Even accounting for inflation over time, these costs exceed congressional expectations of $50,000 to $100,000 across *all* agencies in the first ten years after the 1974 amendments.[153] In general, the agencies fully absorb these costs:[154] they do not receive any appropriations to fulfill requests,[155]

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[146] *See* Open Am. v. Watergate Spec. Prosecution Force, 547 F.2d 605, 614 (D.C. Cir. 1976) (sanctioning "first-in, first-out" processing of requests); Grunewald, *supra* note 80, at 353 (discussing the common practice of processing requests in the order received).

[147] *See* Freedom of Info. Reform Act of 1986, Pub. L. No. 99-570, § 1803, § 552(a)(4)(A)(ii)(I), 100 Stat. 3207-48, at -49 (1986).

[148] *See* sources cited *supra* note 124.

[149] Freedom of Info. Reform Act of 1986, Pub. L. No. 99-570, § 1803, § 552(a)(4)(A)(ii)(II), 100 Stat. 3207-48, at -49 (1986), *with* 5 U.S.C. § 552(a)(4)(A) (1982).

[150] *Cf.* Freedom of Info. Reform Act of 1986, Pub. L. No. 99-570, § 1803, § 552(a)(4)(A)(iv) (2012), 100 Stat. 3207-48, at -50, *with* 5 U.S.C. § 552(a)(4)(A) (1982).

[151] *Cf.* Scalia, *supra* note 18, at 17 (alleging the presence of "requests that are not really important enough to be there, crowding the genuinely desirable ones to the end of the line").

[152] *Infra* app. tbl. 5.

[153] *See* H.R. Rep. No. 93-876, at 10 (1974); *see also* Open Am. v. Watergate Spec. Prosecution Force, 547 F.2d 605, 612 (D.C. Cir. 1976) (noting that, compared to Congress' estimates, FBI's costs alone were $160,000 in FY 1974, $462,000 in FY 1975, and an expected $2,675,000 in FY 1976).

[154] Exceptions exist for "statute[s] specifically providing for setting the level of fees for particular types of records," 5 U.S.C. § 552(a)(4)(A)(vi) (2012).

[155] *See* U.S. Dep't of Justice, *FOIA Affected by Budget Constraints*, FOIA Update, at 1-2 (Winter 1990), http://www.justice.gov/oip/foia_updates/Vol_XI_1/page1.html, *archived at* http://perma.cc/87PF-QY4K.

and, other than the Food and Drug Administration ("FDA"), which has a statutory exception to retain its fees,[156] they must remit the fees they collect to the U.S. Treasury.[157] Even if they could keep the fees, however, their net costs would remain very high: Table 5 shows that fees that fell from 3.61 percent in FY 2008 to just 1.04 percent in FY 2013, most probably due to the OPEN Government Act, whose provision limiting fee collections after the FOIA deadlines took effect at the end of 2008.[158] Though agencies might conceivably be able to recoup more of their costs by processing requests more efficiently, the overwhelming ratio of processing costs to fee collections implies that agencies face real resource constraints. The causal link between these constraints and processing delays is almost indisputable.[159]

Even if one supposes that agency delays are a matter of officials' lack of desire rather than inability to fulfill requests, the high costs contribute to backlogs at least in the sense that they provide agencies with a justification for missing statutory deadlines that courts have generally accepted.[160] The leading case on agency delays is *Open America v. Watergate Special Prosecution Force*,[161] which remarked that commanding timely disclosure would result in "a reallocation of resources" to the request in question and away from other requests.[162] It found a textual basis for denying the plaintiff relief by interpreting the defendant FBI's volume of requests as "exceptional circumstances" that allow a court to grant an agency additional time to fulfill a request.[163] The 1996 Amendments to FOIA tried to eliminate request volume stemming from a "predictable agency workload" as an exceptional circumstance,[164] although they continued to allow an agency to invoke this factor when it "demonstrates reasonable progress in reducing its backlog of pending requests."[165] Although courts have become at least somewhat stricter about FOIA's statutory deadlines as a result,[166] Tables 1 and 2 show that

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[156] *See* 21 U.S.C. § 379f (2012).

[157] *See* U.S. Dep't of Justice, Dep't of Justice Guide to the Freedom of Info. Act: Fees and Fee Waivers 20-21, (last updated Aug. 23, 2013) http:// www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf, *archived at* http://perma.cc/5TBT-QRAY.

[158] *Infra* app. tbl. 5.

[159] *Cf.* Sinrod, *supra* note 81, at 334 (asserting connection between Congress' decision not to provide agencies with additional funds for processing FOIA requests in the 1974 amendments and resulting backlogs).

[160] *See* Pierce, *supra* note 80, at 78–81 (discussing how courts have dealt with agency claims that they lack resources for FOIA).

[161] 547 F.2d 605 (D.C. Cir. 1976).

[162] *Id.* at 614; *see also* Grunewald, *supra* note 80, at 349 (arguing that "*Open America* . . . enshrined . . . the view that delay is essentially a function of resource shortage in processing").

[163] *See* 5 U.S.C. § 552(a)(6)(C) (1994) (amended 1996); *Open Am.*, 547 F.2d at 610–12.

[164] *See* Elec. Freedom of Info. Act Amendments of 1996, Pub. L. No. 104-231, §§ 7(c), 552(a)(6)(c)(ii), 110 Stat. 3048, 3051 (1996).

[165] *See id.*

[166] *See* Appleton v. U.S. Food & Drug Admin., 254 F. Supp. 2d 6, 10 (D.D.C. 2003) (examining agency's backlog effort and finding them reasonable); Donham v. U.S. Dep't of Educ., 192 F. Supp. 2d 877, 882 (N.D. Ill. 2002) (noting that "[t]he *Open America* approach is inconsistent with the plan [sic] language of FOIA, especially in light of the 1996 Amend-

significant backlogs and delays persist.[167] Thus, whether agency resource constraints are an objective or merely court-facilitated cause of delays, the connection between these two is clear.

High processing costs may also provide a means for strategically withholding information that agency officials would prefer not to release. On the theory that "information is often useful only if it is timely," a House report produced early in the Act's history stated that "excessive delay by the agency in its response is often tantamount to denial."[168] Since courts consider agencies to be acting with "due diligence"[169] when they process requests on a "first-in, first-out" basis in each track,[170] an agency cannot go so far as to delay a particular request to avoid the release of some specific information. However, an agency could limit resource allocations as a way of slowing disclosures in general, including those that its officials might consider damaging.

Additionally, since agencies, rather than requesters, are the ones to decide whether a request should receive expected processing,[171] high costs may also discourage them from choosing to complete a request faster. The criteria for expediting requests—"cases in which the person requesting the records demonstrate a compelling need" and "other cases determined by the agency"[172]—are in the agency's discretion. Given the likelihood of some bureaucratic resistance to FOIA implementation,[173] it is unlikely that the agency's decisions about which requests they should expedite correspond to those requests that are likely to contribute the most to public knowledge about the government.

Before proceeding to discuss judicial review costs, it is worth acknowledging that how well agencies implement FOIA is not only a matter of financial cost. The presence of the law itself does encourage partial fulfillment. Also, agencies or individuals within an agency may take initiative to increase efficiency and reduce backlogs.[174] In addition, rather than a conscious concern about FOIA's cost, agencies may simply focus on more policy-related tasks and either ignore FOIA or become generally less effec-

ments"); Grunewald, *supra* note 80, at 359–62 (discussing the challenges courts would be expected to face in interpreting this provision).

[167] *See infra* app. tbl. 1, tbl. 2.

[168] H.R. Rep. No. 93-876, at 6 (1974).

[169] 5 U.S.C. § 552(a)(6)(C)(i) (2012).

[170] Open Am. v. Watergate Spec. Prosecution Force, 547 F.2d 605, 614 (D.C. Cir. 1976).

[171] *See id.* § 552 (a)(6)(E)(iii).

[172] *Id.* § 552(a)(6)(E)(i)(I)–(II).

[173] *See* Alasdair Roberts, *Dashed Expectations: Government Adaptation to Transparency Rules*, in Transparency: The Key to Better Governance? 109–19 (Christopher Hood & David Heald ed., 2006) (describing various modes of bureaucratic resistance to freedom of information laws in the US and other countries).

[174] *See*, *e.g.*, U.S. Gov't Accountability Office, *supra* note 102, at 3; Laurence Tai, *A Tale of Two Transparency Attempts at FDA*, 68 Food & Drug L. J. 423, 437–39 (2013).

tive, including in FOIA processing.[175] On the other hand, it is possible to overstate other agency motivations. First, general resistance to disclosure, while present, seems to be mostly limited to high-level officials and is not constant across agencies.[176] Second, despite President Obama's memorandum on FOIA, the limited progress in completing requests or disclosures shown in Tables 1 through 3 suggests that presidential pressure to disclose is not that effective.[177] Instead, the evidence supports at least a more modest claim that agency processing costs are a significant driver of delays and possibly denials and that, contrary to the second part of the incentives principle, they do not encourage agencies to process requests as quickly and favorably as possible.

B. Cost Asymmetries at the Judicial Review Stage

One of the key features of FOIA since 1966 is the right to appeal in federal court any request that an agency has denied in full or in part or has delayed in completing.[178] In the original public records section of the APA, seekers of information lacked this recourse,[179] so they were unable to appeal a denial beyond the agency. Though the availability of judicial review is better than not having any judicial recourse, it may be only marginally better if the burden of filing a lawsuit is too high for a plaintiff. The House Committee Report for the original FOIA predicted that "[t]he court review procedure would be expected to persuade against the initial improper withholding."[180] However, the problems with delays and denials identified above[181] suggest that judicial review, in its current form, has not had the desired effect of incentivizing agencies to process requests properly. The policies and evidence below are designed to show that the ineffectiveness of the threat of judicial intervention arises from a cost asymmetry that is the reverse of the one present at the processing stage.

1. High Costs for Requesters

Observers have noted the high costs to requesters appealing an adverse outcome throughout the Act's history. In considering the first set of amendments in 1974, the Senate Judiciary Committee found that, "[e]ven the sim-

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[175] David E. Lewis & Abby K. Wood, *The Paradox of Agency Responsiveness: A Federal FOIA Experiment* 3 (Ctr. for the Study of Dem. Inst., Working Paper No. 06-2012, 2013), *available at* http://ssrn.com/abstract=1884392, *archived at* http://perma.cc/7JZQ-XS5Z.

[176] *See* Foerstel, *supra* note 71, at 71–72.

[177] *See infra* app. tbls. 1–3.

[178] *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) (current version at 5 U.S.C. § 552(a)(4)(B) (2012)).

[179] *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250, 251 (1966).

[180] *See* H.R. Rep. No. 89-1497, at 2 (1966).

[181] *See supra* Part II.B.1 and 2.

plest FOIA case . . . involves legal expenses of over $1,000,"[182] an amount that would be equivalent to a much larger value today. It found that even media organizations had difficulty paying litigation expenses.[183] It affirmed a House subcommittee's conclusion that the cost of FOIA suits "makes litigation under the act less than feasible in many situations."[184] In addition, it connected the cost of these lawsuits to ineffective implementation, saying that the cost was "allowing the government to escape compliance with the law."[185] Thus, for many would-be plaintiffs, the judicial review process could be almost as much of a hindrance to receiving records as an absolute right for agencies to deny information.

The current costs of judicial review to plaintiffs seem only higher. Summary data on the cost of lawsuits for plaintiffs are hard to find because data for costs are typically not reported. However, FOIA requires DOJ to report on the results of cases under FOIA, including any attorney fees,[186] so the amounts that plaintiffs spent on cases in which the court ordered the agency to reimburse their legal expenses are available. Table 6a provides summary statistics for awards of attorney fees and costs to plaintiffs in 2013, a year that had many cases with fee-shifting.[187] The award amounts range from $350 to $181,579.99.[188] The distribution of legal expenses in this small sample clearly is not necessarily representative of the general distribution of attorney fees, but it is reasonable to believe that legal expenses are often quite high.

In addition to large legal fees and costs, the delay that accompanies a lawsuit may discourage challenges by requesters since information will often become less valuable with time.[189] In the case of mere delay, courts resist quick decisions because such decisions provide an advantage to those who litigate over those who do not.[190] Looking only at the set of cases in 2013 in which attorney fees were awarded, cases were filed in each year from 2009 to 2013, and one case was filed as early as 2006.[191] As the listed dispositions in Table 6b indicate, courts sometimes rendered judgment before deciding on attorney fees, so the actual time to receive documents is somewhat less

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[182] *See* S. Rep. No. 93-854, at 18 (1974).

[183] *See id.* at 17–18.

[184] *See id.* at 3 (citing H.R. Rep. No. 92-1419, at 8 (1972)).

[185] *See id.* at 17.

[186] *See* 5 U.S.C. § 552(e)(6) (2012).

[187] *Infra* app. tbl. 6a. This year appears to have by far the highest number of attorney fee awards in recent years. *See infra* app. tbl. 4. However, it is possible that this result is due to incomplete information collection by DOJ. *See infra* note 201.

[188] *See infra* app. tbl. 6a.

[189] *See* Strauss et al., *supra* note 124, at 475.

[190] *See* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976).

[191] *See* U.S. Dep't of Justice, List of Freedom of Information Act Cases in Which a Decision was Rendered in 2013 (2014), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/cases-decision-cy2013.pdf, *archived at* http://perma.cc/57W9-QU5J.

than these special cases indicate.[192] Nonetheless, cases in which a plaintiff has to sue indicate greatly delayed disclosure, especially compared to FOIA's standard twenty day deadline.[193]

High costs and delays may be more a deterrent to a lawsuit than the likelihood of an adverse outcome. Admittedly, an intrinsic property of FOIA cases is that only the agency knows what is contained in a document.[194] With this information disadvantage, plaintiffs cannot expect to win as often as defendants. Perhaps unsurprisingly, Table 4 indicates that the number of judgments at least partially favorable to a plaintiff is small compared to the number of cases decided.[195] However, Table 6b indicates that other case outcomes may be associated with document release since such cases yielded fee-shifting.[196] The most common such result is a "stipulation of dismissal," which was the disposition listed for twenty-two of the thirty cases in 2013.[197] Since a stipulated dismissal requires all parties to sign,[198] it indicates an agreement. In this case, the defendant agency is compromising from its initial position by releasing some documents, either in the first place or faster. In addition, it is even possible for a plaintiff to lose in court but still obtain attorney fees, as one case described in Table 6b indicates.[199] Furthermore, in *Electronic Privacy Information Center v. U.S. Dep't of Homeland Security ("EPIC v. DHS")*, a 2012 case, the plaintiff lost in summary judgment on the documents still in dispute but won these fees on the basis of other documents released earlier in the case.[200]

Thus, calculating the win percentage for plaintiffs is quite a challenge. Plaintiffs have clearly achieved some sort of victory if they receive attorney fees, otherwise receive a judgment in their favor, or reach a stipulated dismissal. As Table 6b and *EPIC v. DHS* show, lack of victory or even a loss at court does not indicate a total loss for a plaintiff. Thus, the total percentage of cases with attorney fees, at least a partial judgment for the plaintiff or a stipulated dismissal serves as a floor for requesters' success rate in court. In the years with the most reliable data, Table 4 shows that this floor ranged

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[192] *Infra* app. tbl. 6b; *Cf.* Krent, *supra* note 122, at 2065 (noting that, in general, inquiries over attorney fees can extend time spent on litigation against the government).

[193] *Cf. id.* (observing that, "[e]ven in the absence of remands, litigation over several years is not unusual").

[194] *See* Litigation Under the Federal Open Government Laws 368 (Henry A. Hammitt et al eds., 24th ed. 2008) [hereinafter Litigation].

[195] *See infra* app. tbl. 4.

[196] *See infra* app. tbl. 6b.

[197] *Id.*

[198] *See* Fed. R. Civ. P. 41(a)(1)(A)(ii).

[199] *See infra* app. tbl. 6b.

[200] *See* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 892 F. Supp. 2d 28, 49–50, 53 (D.D.C. 2012).

from 26.0% in 2006 to 38.2% in 2012.[201] Thus, these data suggest that more requesters would be willing to sue if the costs were lower.

However, FOIA's attorney fee provision does not seem to reduce litigation costs significantly for plaintiffs because it states only that "[t]he court *may* assess . . . reasonable attorney fees and other litigation costs" (emphasis added),[202] thereby leaving the final decision for an award in the judge's discretion. Expanding the opportunities for fee-shifting somewhat is that, in addition to a court judgment, FOIA deems a plaintiff to have "substantially prevailed" if her complaint induces "a voluntary or unilateral change in position by the agency."[203] However, substantially prevailing only makes her "eligible" for a fee award, and a court still has to decide whether she is "entitled" to them.[204] Thus, even when a plaintiff is successful, her chance for an attorney fee award may be slim.

FOIA has yielded a common four-factor test to determine entitlement: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents."[205] As one case has noted, "the first three factors assist a court in distinguishing between requesters who seek documents for public informational purposes and those who seek documents for private advantage."[206] Depending on how courts apply them, these factors may help mitigate the problem of commercial requesters seeking solely their own benefit, although courts have also used them to deny fee-shifting to nonprofit organizations.[207] However, the fourth factor, which considers "whether the agency's opposition to disclosure 'had a reasonable basis in law,' "[208] poses difficulties for all plaintiffs because it implies that the close cases will not yield a fee award. This last factor combines with the plaintiff's information disadvantage to increase the risk that she bears when she challenges a delay or denial. Thus, although observers have recognized the importance of fee-shifting in incen-

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[201] The years 2009 to 2011 are excluded in the figures cited because DOJ reported no stipulated dismissals in these years. *See infra* app. tbl. 4. Thus, DOJ's reporting is probably incomplete, and the overall percentage of plaintiff successes is likely higher.

[202] *See* 5 U.S.C. § 552(a)(4)(E)(i) (2012).

[203] *See id.* § 552(a)(4)(E)(ii).

[204] *See* U.S. Dep't of Justice, Department of Justice Guide to the Freedom of Information Act: Attorney Fees 1, http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/attorney-fees.pdf, *archived at* http://perma.cc/V9VF-4EPL; Litigation, *supra* note 194, at 322.

[205] Davy v. U.S. Cent. Intelligence Agency, 550 F.3d 1155, 1159 (D.C. Cir. 2008); *see* Litigation, *supra* note 194, at 323 (noting that all circuit courts that have considered entitlement for attorney fees use the same criteria).

[206] *Davy*, 550 F.3d at 1160.

[207] *See generally* Litigation, *supra* note 194, at 323–26 (discussing the case law on the first three entitlement factors).

[208] *Davy*, 550 F.3d at 1162 (quoting Tax Analysts v. U.S. Dep't of Justice, 965 F.2d 1092, 1096 (D.C. Cir. 1992)).

tivizing public interest litigation,[209] FOIA's current provision is arguably not very robust, as evidenced by the low frequency of fee awards after a successful outcome given in Table 4, never reaching thirty percent in the last eight years.[210]

Overall, the data seem to confirm the theoretical expectation that high litigation costs, delays, and difficulties with fee-shifting discourage legal challenges. Specifically, Table 4 shows that only about 300 cases were filed each year between 2006 and 2012, which is tiny, compared even to the approximately 25,000 to 30,000 total denials that agencies issued. Though the filing of a case may indicate that the government's delay or denial is unjustified for a given request compared to others, it also seems that litigation is driven significantly by plaintiff resource considerations. In that case, the high costs for judicial review break the first part of the incentives principle: they do not motivate citizens, as a whole, to acquire and disseminate the most publicly beneficial information. The reason is that willingness to pay for a lawsuit is only a rough signal of what information releases are likely to be valuable.

2. *Low Costs for Agencies*

For individual cases agency costs for litigation might seem quite high. The estimated average cost of each case received, reported in Table 4,[211] showed no general trend from 2006 to 2012, but ranged from $52,906 in 2008 to $95,238 in 2009. Also, agencies do directly pay any attorney fee awards.[212] However, as already noted, information seekers file relatively few cases each year compared to the number of information denials. The total litigation cost for agencies ranged from $16 million in FY 2007 to $28 million in FY 2009, and the percentage, as a total of FOIA costs, ranged from 4.3% to 7.3% in the same two years.[213] Thus, litigation costs are not a major factor for agencies, compared to processing costs, which make up the remainder.

In addition, most agencies do not bear the full cost of defending against lawsuits because they receive legal assistance from DOJ.[214] Attorney General

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[209] *See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 241 (1984).

[210] *See infra* app. tbl. 4.

[211] These costs are estimated because the litigation and total costs are counted in fiscal years, whereas the number of cases is counted for calendar years.

[212] *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(b), 121 Stat. 2524, 2525 (stating that attorney fees "shall be paid only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered"); *see also* Krent, *supra* note 122, at 2066 (noting that, "if fee awards come out of the implementing agency's budget, . . . the possibility of deterrence increases").

[213] *See infra* app. tbl. 4.

[214] A few agencies, by statute or agreement with the Attorney General, defend cases without DOJ assistance. *See* U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE 2012 FREEDOM OF INFORMATION ACT LITIGATION AND COMPLIANCE REPORT 21 (2013), http://www.justice

Holder's memo, reversing the previous administration's policy, states that DOJ "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[215] However, observers of FOIA lawsuits have been unable to find cases that DOJ has chosen not to defend.[216] It is worth acknowledging that that DOJ's vigorous defense of agency delays and denials is legitimate since it is sanctioned by law.[217] Nonetheless, its participation does make judicial review less of a concern for agencies by reducing the financial cost and burden of legal justification for them.

Furthermore, there exists consensus for and evidence of a causal link between a low rate of judicial review and delays and denials. The consensus comes in the form of the "catalyst theory," by which a plaintiff is judged to have substantially prevailed "if the lawsuit substantially caused the agency to release the requested records."[218] Courts applied this theory in FOIA cases until a 2001 Supreme Court case rejected it more generally, and they started applying it again after Congress clarified the definition of substantially prevailing in the OPEN Government Act to include the theory.[219] Evidence exists in courts' factual findings which lead to conclusions that the lawsuit was the catalyst for disclosure,[220] as well as in the substantial number of cases that lead to stipulated dismissals, counted in Table 4.[221] Because it is unlikely that these cases represent the only requests that agencies have wrongfully denied or delayed, there are almost certainly other requests that remain insufficiently processed because the requester does not file a legal challenge. Thus, like high costs at the processing stage, low costs for agencies at the judicial review stage reduce their incentives to complete requests expeditiously and with the amount of disclosure required by the Act.

.gov/sites/default/files/oip/legacy/2014/07/23/2012-liti-comp-rpt.pdf, *archived at* http://perma.cc/5BG3-Y8UA.

[215] Eric Holder, Memorandum for Heads of Executive Departments and Agencies: The Freedom of Information Act 2 (Mar. 19, 2009), http://www.justice.gov/ag/foia-memo-march2009.pdf, *archived at* http://perma.cc/BKT8-JL82.

[216] *See Defensive Standards Hinder FOIA Openness*, FOIA Project (Mar. 1, 2012), http://foiaproject.org/2012/03/01/defensive-standards-hinder-foia-openness, *archived at* http://perma.cc/F79P-Z3WY.

[217] *See* 28 U.S.C. § 516 (2012) (generally designating DOJ as the agency to conduct lawsuits involving the federal government).

[218] *See* Davis v. U.S. Dep't of Justice, 610 F.3d. 750, 752 (D.C. Cir. 2010).

[219] *See id.*; U.S. Dep't of Justice, *supra* note 204, at 7–8; Litigation, *supra* note 194, at 321.

[220] *See*, *e.g.*, Rosenfeld v. U.S. Dep't of Justice, 904 F. Supp. 2d 988, 995–98 (N.D. Cal. 2012) (describing the court's reasoning in determining that the plaintiff's lawsuit caused agency disclosures).

[221] *See infra* app. tbl. 4.

IV. Proposals for Fixing FOIA

Since economic logic and evidence suggest that cost asymmetries misalign requester and agency incentives, thereby contributing to FOIA's implementation problems, amendments to the Act should aim to correct these asymmetries. This section presents a set of fairly simple cost-focused policy proposals to reallocate costs and suggest that they would substantially improve FOIA's implementation. Given the advantage of FOIA's request logic described in Part I-A, these proposals are more likely to enhance public awareness of executive branch activity than bills that Congress has recently considered, which mainly add to agencies' duties. Furthermore, these cost-focused fixes are intended to be proposed together as a package, and should be able to attract the support of both legislators and public interest groups.

A. Design of Cost-Focused Proposals

This Article's three basic suggestions are to allow agencies to keep their processing fees, to increase processing fees for requests, and to make the Act's attorney fee-shifting provision more favorable to plaintiffs. The first two policies lower the costs to agencies for fulfilling requests and increase them for information seekers, while the third raises the costs to agencies and lowers them for requestors at the litigation stage. In addition to addressing both sets of cost asymmetries, this package of proposals is "fast" in the sense that Congress can enact it with relatively little legislative language and because it can take effect quickly after passage without additional regulations. These "fast fixes" are discussed below.

1. Retention of Processing Fees

Under current law, most agencies must remit their fees to the Treasury.[222] Thus, the first proposal is to instruct all agencies to retain the fees they collect in processing FOIA requests.[223] This measure would be fairly simple to legislate and could largely be modeled after the FDA fee retention provision, which encompasses only a few paragraphs and does not state the need for any regulations.[224] In particular, this proposal, like the FDA provision, would stipulate agencies use the money they collect only to fulfill requests, rather than for general purposes.[225] The key difference for this proposal would be that fee collection would be mandatory, rather than op-

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[222] *See supra* notes 156–157 and accompanying text.

[223] *Cf.* Sinrod, *supra* note 81, at 361; Wichmann, *supra* note 20, at 1254 (both suggesting that FOIA should "allow," rather than require, agencies to retain the fees they collect).

[224] *See* 21 U.S.C. § 379f (2012).

[225] *See id.* §§ 379f(a)(1), (b); *see also* Sinrod, *supra* note 81, at 361; Wichmann, *supra* note 20, at 1254 (noting that collected fees should be used to improve FOIA processing).

tional, as in the FDA provision.[226] Though most agencies would probably choose to keep their fees if given the choice, instructing them to do so sends a message that they are to fund their FOIA operations in part by fulfilling requests.

Fee retention presents the potential to incentivize agencies to fulfill requests more adequately. For example, it would make more effective the provision that limits fee collections when they miss deadlines for requests[227] since the agencies, rather than the Treasury, would be losing the money. However, this step is insufficient on its own. Although a prior study has argued that this measure would provide resources for helping agencies overcome their backlogs,[228] the vast discrepancy between fee collections and processing costs[229] implies that fee retention at current rates would not have more than a minimal effect. One sign is the collection of fees compared to processing costs at FDA, which Table 7 shows are about as small as at other agencies, consistently under three percent since FY 2008.[230] Furthermore, FDA has not even taken full advantage of its ability to charge fees: it charges public interest groups only for duplication fees,[231] even though these groups are not sub-clause II entities and could also be charged for search fees.[232]

2. *Increasing Processing Fees*

For fee retention to motivate agencies to reduce delays, agencies need to be able to collect a greater amount in the first place.[233] Thus, the fee structure needs to change so that information seekers pay more in aggregate for their requests. Since the law already induces agencies to complete requests without compensation, it is not necessary to bridge the entire gap between fee collections and processing costs and make FOIA revenue-neutral. Still, these fee increases should reduce net financial losses for the agencies. Such a change would undercut whatever remains of *Open America*'s resource-

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[226] *See* 21 U.S.C. § 379f(a) (2012).

[227] *See* 5 U.S.C. § 552(a)(4)(A)(viii) (2012).

[228] *See* Sinrod, *supra* note 81 at 361–63.

[229] *See infra* app. tbl. 5.

[230] *See infra* app. tbl. 7.

[231] *See FOIA Fees*, U.S. Food & Drug Admin. (last updated November 3, 2014), http://www.fda.gov/RegulatoryInformation/FOI/FOIAFees/default.htm, *archived at* http://perma.cc/WU7J-XPDA.

[232] *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2012). Although agencies are instructed to provide fee waivers for requests for which the information release "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," *see id.* § 552(a)(4)(A)(iii), it does not follow that all nonprofit organizations' requests qualify. Instead, they must qualify for an exemption for each request. *See* Coglianese et al., *supra* note 44, at 942. Such organizations apparently are not always granted a fee waiver, as courts have affirmed some denials in the past. *See* Litigation, *supra* note 194, at 304.

[233] Conversely, collecting more fees is useful only if agencies can keep them. Otherwise, agencies are merely collecting money for the Treasury, which provides no direct benefit to their operations.

based rationale for allowing delays. Since the current definition of "exceptional circumstances" excludes "a predictable agency workload of requests" but is qualified by allowing an agency to "demonstrate[ ] reasonable progress in reducing its backlog,"[234] Congress could amend FOIA to reflect this expectation of minimal backlogs and delays by removing the qualifier.[235]

Since FOIA fees depend on the nature of the request and the requester, the size of a request, and the timeliness of agency action on a request,[236] there are a variety of ways to increase the revenue that agencies receive from the Act. Thus, amendments to the fee structure could become quite complex. However, one straightforward way of increasing fees is through the use of multiplying factors. For example, the statement that "fees shall be limited to reasonable standard charges"[237] for various cost components in commercial requests could be changed to read that "fees shall be limited to *five times* reasonable standard charges." Combined with the ability to retain fees, agencies would have a strong incentive to promulgate regulations relatively quickly. A bill could effectuate even quicker action by stipulating that, until agencies amend their fee schedules, they shall charge the relevant multiples of fees based on their current fee schedules. Like the amendment to allow agencies to retain these fees, multiplying factors could be incorporated into FOIA with relatively simple legislation.

Three simple amendments to the fee structure are as follows. First, to multiply fees assessed for commercial requests by a factor large enough for agencies to make a profit on them; second, to multiply fees assessed for expedited requests by a significant, though not necessarily as large, factor while allowing anyone willing to pay these fees to request faster processing; and, third, to multiply the fees for noncommercial, non-expedited requests by the same or a smaller factor than for expedited requests. The logic behind these factors is that agencies should not lose money on commercial requests, but they only need to lose less money on other requests while still preserving some incentive to file noncommercial requests. Though Congress is free to increase fees in additional ways,[238] these three changes provide a useful ex-

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[234] *See* 5 U.S.C. § 552(a)(6)(C)(ii) (2012).

[235] Since an agency may not turn down a request for workload reasons, *see id.* § 552(a)(3)(A), any agency with a large volume of requests probably cannot eliminate backlogs and delays entirely. However, a requester's willingness to use FOIA depends on the delay she expects. Thus, if an agency seemed to have met all deadlines within the statute, entities that previously would not have submitted requests would be inclined to do so.

[236] *See id.* §§ 552(a)(4)(A)(ii), (iv), (viii).

[237] *Id.* § 552(a)(4)(A)(ii)(I).

[238] Three other types of fee increases could enhance this package, but they would come at the cost of greater complexity. First, since costs for document review in commercial requests are limited to "the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section," *see id.* § 552(a)(4)(A)(iv), Congress might eliminate this restriction. Second, the exemption from fees for "the first two hours of search time or for the first one hundred pages of duplication," *see id.* § 552(a)(4)(A)(iv)(II), might also be removed. Third, the provision preventing agencies from assessing search fees (or duplication fees for sub-clause II entities) after the deadline for a request, absent special cir-

ample of how to encourage information seekers as a whole to request the most publicly beneficial information as well as to encourage agencies to process requests more quickly. Also, while there remains the challenge of selecting the right factors, Congress could adjust these factors through further amendments.

To begin, increasing the fees for commercial requests is justified because the entities making these requests are least likely to share the contents of any records they receive with the general public. Such a provision would expand the distinction made for commercial requests in the 1986 amendments.[239] As noted above, commercial requests constitute a very large proportion of requests.[240] Given that agencies' recovery of processing costs has only fallen from 3.6% since FY 2008,[241] it is almost certainly the case that agencies are currently recouping only a small fraction of costs even for commercial requests. Because commercial requesters generally do not share the information they receive through FOIA, any benefit from these requests accrues mostly to them.[242] Thus, fees should be multiplied so that, on average, the entities making commercial requests pay agencies their full costs, and then some.[243] This measure would have one of two effects, either of which would be desirable. First, commercial requests might decrease, but remain a substantial part of agencies' workload, in which case the fees collected for them would contribute substantially to FOIA operations. Second, a high factor might largely discourage commercial requests, in which case agencies would have more resources available to deal with noncommercial requests.

Next, allowing anyone to expedite their request by paying a multiple of what she would otherwise pay would provide another potential source of revenue and means for faster information dissemination.[244] As Table 2 indicates, expedited requests are infrequent, and the reason, as discussed above, is that decisions to expedite on the agency's judgment as to what constitutes

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cumstances, *see id.* § 552(a)(4)(A)(viii), could either be removed or modified with a more gradual decrease in the amount collected over time.

[239] *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1803, §552(a)(4)(A)(ii)(I), 100 Stat. 3207-49.

[240] *See supra* notes 124, 148, and accompanying text.

[241] *See infra* app. tbl. 5.

[242] There might be an argument that the public benefits indirectly from these requesters' use of the information that they obtain. The general idea is that information generates positive externalities, and its production should be subsidized. However, individuals and businesses generally pay the production costs for the information they seek. Thus, restructuring FOIA so that agencies make a small profit from commercial requests merely places those requesters in the same position they would be in for other types of information they seek.

[243] In theory, the fee structure could make commercial requesters pay the full costs by no longer exempting them from costs beyond the initial examination of documents. *See* 5 U.S.C. § 552(a)(4)(A)(iv) (2012). However, such a change could perversely incentivize an agency to add costs for commercial requesters. Having commercial requesters pay a multiplying factor compensates agencies without affecting their willingness to fulfill commercial requests promptly.

[244] As formulated here, this measure would preserve the fee distinctions among various types of requests, such as between commercial and noncommercial requests.

a "compelling need."[245] Conditioning expedited requests on higher charges instead would tend to ensure that requests of greater importance are processed more quickly since willingness to pay more would be a rough proxy of the information's probable importance. Doing so would also provide agencies with the resources they need to process these and other requests faster and prevent them from delaying requests they would rather have processed on the standard timeframe. The extra fees from expedited processing would be conditioned on meeting the statutory deadlines or justifying any delay in court. Unlike commercial requests, the goal for the multiplying factor for expedited requests is not to achieve a profit. Instead, the goal is for the factor to be high enough to motivate agencies to fulfill them promptly and to prevent information seekers with less pressing requests from asking for expedited processing, and low enough for entities with more pressing requests to be willing to pay for faster fulfillment.

Finally, in order to increase incentives to complete requests by or close to the deadline, it may still be necessary to increase fees on the remaining requests, albeit not to the same degree as commercial or expedited requests. One important reason is that, based on the small absolute drop in percentage of fees recouped between FY 2008 and FY 2009,[246] when the OPEN Government Act of 2007 restrict fee collections after FOIA deadlines took effect,[247] agencies seem to lose little financially from missing FOIA deadlines.[248] Thus, agencies should be incentivized at least a bit more to fulfill noncommercial requests with higher fees. Even if the same factor is applied to noncommercial requests as to commercial requests, the overall increase will not be as large, since the former are not subject to as many types of fees as the latter.[249] Overall, the fee increase would be more modest: the goal is only to reduce losses from these requests enough for courts to become comfortable with abandoning the *Open America* rule on delays and deciding that agencies should fulfill requests promptly and enforce FOIA deadlines more strictly.

Still, even more modest fee increases for noncommercial requests may raise the risk of discouraging some meritorious requests.[250] However, with a reduction in delays, the effect would not be a direct disincentive to submit requests. First, many of those who are currently willing to pay for their requests with their attendant delays would be willing to pay more as delays decrease, although perhaps not as much as the expedited rate. Second, there are likely others with somewhat more pressing desires for information (but not quite at the expedited level) who would file requests because FOIA is more efficient. Instead, the requesters whom the fee increases would dis-

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[245] *See infra* app. tbl. 2; *supra* notes 171–172 and accompanying text.
[246] *See infra* app. tbl. 5.
[247] *See supra* notes 137–138 and accompanying text.
[248] *See* 5 U.S.C. § 552(a)(4)(A)(viii) (2012).
[249] *See id.* § 552(2)(4)(A)(ii).
[250] *See* Roberts, *supra* note 8, at 114.

courage are those not willing to incur higher fees even with much faster processing. Such a revealed lack of willingness to pay suggests that these requests would be relatively unimportant for the public.

There remains the issue of those who would like to pay but lack the resources to do so. However, media and nonprofit organizations have organized to facilitate not only their own use, but other citizens' use of FOIA and state freedom of information laws.[251] Individuals unfamiliar with the FOIA process would likely rely on these resources, anyway. Since support in the network for FOIA advocates includes grant funding,[252] these organizations could also conceivably file these requests on behalf of individuals or provide financial support for their requests. Thus, if an individual information seeker is daunted by the cost and cannot convince any organization to undertake or subsidize her request, then her request is likely to be less important than other individuals' requests that do attract a nonprofit organization's support.[253]

Overall, increases in processing fees that are focused on commercial and expedited requests but that also apply to noncommercial requests, and that agencies can keep, would yield price signals that more accurately reflect processing costs. They would effectively change the proxy for the benefits of released records from a limited number of requesters' "willingness to sue" to a broader set of requesters' "willingness to pay." Though willingness to pay is not identical to a requests' public importance, the correlation between costs for requests and their expected public benefit would nonetheless increase substantially compared to the current system with its backlogs. On the agency side, since these first two proposals would provide agencies with more resources for FOIA operations, courts could strictly enforce FOIA deadlines on the belief that agencies can handle their requests. Their strict enforcement would incentivize not only compliance with particular requests, but also technological improvements to reduce processing costs. Together, these increases directly resolve the issues of delay and commercial requests, and indirectly reduce denials that come in the form of delay.

Increases in processing fees are quite different from budget appropriations, the other way to add to agency resources for implementing FOIA.[254] Besides the fact that Congress is unlikely to provide additional resources[255] and the uncertain availability of additional resources for government activity

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[251] *See* Martin, *supra* note 43, at 153–54.

[252] *See id.* at 156–59.

[253] *Cf.* Scalia, *supra* note 18, at 17 (referring to requests that "may be motivated by no more than idle curiosity" and "that are not really important enough to be there").

[254] *See* Wichmann, *supra* note 20, at 1255 (endorsing additional spending on FOIA).

[255] *See* FOIA Act, H.R. 653, 114th Cong. § 4 (2015) (authorizing no additional funds); FOIA Improvement Act of 2015, S. 337, 114th Cong. § 5 (2015) (same); Sinrod, *supra* note 81, at 363 ("[r]ecognizing that such a commitment of resources is highly unlikely in the foreseeable future").

in general,[256] budget allocations have two other disadvantages. First, based on the data that agencies have collected on processing costs and fee collections, it is much easier to devise fee increases for all agencies than to set appropriation levels for each agency.[257] Second, unconditional funding does not incentivize expeditious fulfillment of any single request. Instead, agencies may waste funds,[258] and they might still be able to convince courts that they are resource constrained.

3. *Strengthening Attorney Fee-Shifting*

The first two fixes promise to improve FOIA's implementation by reducing delays due to resource constraints. The final one, making attorney fee-shifting under the Act more favorable, is designed mainly to discourage wrongful denials of information while also mitigating delays. The changes in this area would be to award attorney fees and litigation costs automatically[259] to a plaintiff if she has "substantially prevailed" and her request was noncommercial and to have costs assessed directly against an agency. In terms of the court's analysis, eligibility for fees and costs would remain the same; meanwhile, a plaintiff for a noncommercial request would always be entitled to reimbursement, whereas the entitlement analysis would not change for commercial requests. This change would be very simple to enact: the section on fee-shifting is two sentences,[260] and a net addition of a sentence would be sufficient to indicate that successful noncommercial plaintiffs should automatically awarded attorney fees.[261] Also, this change eliminates discretion from judges about whether to award fees.

Awarding fees and costs to a noncommercial requester simply because she has substantially prevailed would yield reimbursements for plaintiffs more often than the current case law's four-factor test. While the result

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[256] *Cf.* Pierce, *supra* note 80, at 64 (predicting in the late 1990s that, "[f]or the foreseeable future, agencies will have access to constantly diminishing resources").

[257] Since the argument for appropriations is founded on the idea the current resources devoted to FOIA implementation are not enough, *see* Sinrod, *supra* note 81, at 326, agencies' processing costs serve only as a floor for allocation levels. It is unclear how much more funding is needed for each agency.

[258] *See*, *e.g.*, Michael M. Ting, *The "Power of the Purse" and Its Implications for Bureaucratic Policy-making*, 106 Pub. Choice 243, 243–44 (2001).

[259] The inclusion of costs is important for plaintiffs who act pro se. Since *pro se* litigants cannot recover attorney fees under FOIA, *see* Carter v. U.S. Veterans Admin., 780 F.2d 1479, 1481 (9th Cir. 1986) (adopting the rule and observing that seven other circuits adhere to it), costs are the most they can recover. Though FOIA could be amended to include some compensation for pro se litigants, such a step would be less rooted in the history of the statute than the measure proposed here.

[260] 5 U.S.C. § 552(a)(4)(E) (2012). The longer sentence deals with the definition of a plaintiff's "substantially prevail[ing]". *See id.* § 552(a)(4)(E)(ii).

[261] A second additional sentence in the legislation might indicate that courts should not construe the amendment to allow a more restrictive definition of substantially prevailing in a complaint.

would be a rule stronger than those in most or all other federal statutes,[262] the information asymmetries and delays associated with lawsuits under the Act, as highlighted above,[263] make the case for generous fee-shifting especially strong for FOIA plaintiffs.

This amendment is not only attractive to plaintiffs in theory but also should make fee-shifting determinations easier in practice, because it is embedded in the distinction between commercial and noncommercial requesters in the fee structure.[264] This distinction is similar to the distinction that the Senate expected courts to draw in applying most of the four-factor test in its conference report for the 1974 amendments.[265] Of the four factors that courts use in FOIA cases, the first three—the public benefit, the plaintiff's commercial benefit, and the plaintiff's personal interest—largely track the issue of whether the request is commercial in nature.[266] The fourth factor dealing with the agency's reasonableness is the only one that extends beyond commercial requests.[267] The difficulties of this factor due to the agency's information advantage have been discussed above,[268] so the new fee-shifting provision would effectively always resolve the fourth factor in a noncommercial plaintiff's favor. Thus, instead of having separate inquiries on the fee category of the requester and entitlement to attorney fees, only the first inquiry would be relevant for noncommercial requesters.

Admittedly, this change would increase the stakes for an agency's determination of the kind of requester. Agencies might attempt to reclassify some noncommercial requests as commercial, and some commercial entities might either strive to qualify as noncommercial or form new entities for the purpose of avoiding designation of their requests as commercial. However, since Congress made the distinction between commercial and noncommercial requests in the 1986 amendments,[269] agencies have had nearly three decades of experience with fee categorizations. Congress can prevent arbitrary reclassifications and gaming by commercial requesters with a stipulation that agencies shall maintain the same definition of commercial requests as before. Though there might be somewhat more legal challenges in the area

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[262] *See* Henry Cohen, Cong. Research Serv., RL94-970 Awards of Attorneys' Fees by Federal Courts and Federal Agencies 64–114 (updated June 20, 2008) (quoting various federal statutes under which attorney fee-shifting is allowed).

[263] *See supra* notes 189–194 and accompanying text.

[264] *See* 5 U.S.C. § 552(a)(4)(A)(ii) (2012).

[265] *See* S. Rep. No. 93-854, 19 (1974).

[266] *See supra* note 205 and accompanying text. A recent case notes that "the first three factors assist a court in distinguishing between requesters who seek documents for public informational purposes and those who seek documents for private advantage." Davy v. U.S. Cent. Intelligence Agency, 550 F.3d 1155, 1160 (D.C. Cir. 2008).

[267] *See* S. Rep. No. 93-854, 19 (1974).

[268] *See* Litigation, *supra* note 194 and accompanying text.

[269] *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1803, § 552(a)(4)(A)(ii)(I), 100 Stat. 3207-49.

of fee categories than before,[270] these would outweighed by a much larger reduction of cases to determine entitlement for attorney fees.

Changing FOIA's fee-shifting rule to noncommercial plaintiffs' benefits would improve agency incentives to fulfill requests favorably, based on two effects. First, agencies would have to pay more in attorney fees if the number of cases filed remained the same. Because commercial requests do not apparently dominate the FOIA caseload,[271] the increase in litigation costs would be significant, given the infrequency of attorney fees in Table 4.[272] Second, noncommercial, organizational requesters would be willing and able to file more lawsuits since they are receiving reimbursements for their fees when they substantially prevail.[273] It is an open question how many more individual requesters would challenge adverse determinations in court,[274] but removing the entitlement inquiry for them should make cases simpler and thereby substantially reduce their cost.

B. Comparison to Recent Legislation

This Article's three cost-shifting proposals for reform are quite different from Congress's three recent bills: the FOIA Act, the FOIA Improvement Act, and POIA. Analysis of the methods of information disclosure above[275] will be useful in evaluating many of their provisions. Overall, most provisions would not make FOIA implementation worse, but they are generally also unlikely to have as much of an effect on information disclosure as the cost-based proposals.[276] Instead of restructuring costs, the bills would mainly impose new duties without providing agencies additional resources and create new institutions, following the pattern of previous amendments to FOIA.

1. FOIA Act and FOIA Improvement Act

The House FOIA Act and Senate FOIA Improvement Act are important to discuss not only because their content differs from the proposals above, but also because versions of these bills in the previous Congress came close

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[270] *Cf.* LITIGATION, *supra* note 194, at 297–99 (describing the relatively small case law on commercial fee categorizations).

[271] *See* STRAUSS ET AL., *supra* note 124, at 475 (remarking that "[p]laintiffs in litigated cases are disproportionately news organizations or NGOs").

[272] *See infra* app. tbl. 4.

[273] *Cf.* Percival & Miller, *supra* note 209, at 247 (noting that "court-awarded fees are a useful supplement to the budgets of public interest groups, but not a massive subsidy of these activities"). A more robust fee-shifting provision would clearly increase this subsidy.

[274] *See* STRAUSS ET AL., *supra* note 124, at 476 (conjecturing that "the promise that attorneys' fees and other litigation costs of substantially prevailing plaintiffs will be reimbursed . . . is not enough to make litigation by the general public attractive"). However, the current four-factor test implies that attorney fees are currently far from a "promise."

[275] *See supra* Part II.A.

[276] The one provision that is likely to have a major impact is the provision for requests that entities can make under POIA. *See infra* notes 312–313 and accompanying text.

to becoming law. The House passed its version on a unanimously supported motion to suspend the rules,[277] and the Senate similarly passed its version via a unanimous consent agreement.[278] The House bill did not receive a Senate vote because of "cost concerns," while the House did not place the Senate bill on its legislative calendar following the Senate's passage in December.[279] Following this impasse, legislators and transparency advocates alike stated their intention for action in the new Congress,[280] which has begun with these bills' reintroduction.

Despite this excitement, it is doubtful whether the FOIA Act or the FOIA Improvement Act would have the desired effect of significantly increasing government transparency. Though these bills are not identical,[281] they have the same key features.[282] First, these bills seek to make it more difficult for agencies to withhold documents under the FOIA exemptions by allowing them to do so only when it "reasonably foresees" a harm to an interest protected by the relevant exemption.[283] The FOIA Improvement Act particularly emphasizes that agencies would no longer have the right to withhold records merely because "as a technical matter . . . the records fall within the scope of an exemption."[284] The focus of this provision is making more information releasable, rather than reducing delays based on resource limitations.

However, the likely effectiveness of a command to release more records is uncertain. To begin with, this legislative language draws inspiration from the "presumption of disclosure" from President Obama's memorandum on FOIA.[285] As shown above, agencies' implementation of FOIA

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[277] *See* 160 Cong. Rec. H1921-22 (daily ed. Feb. 25, 2014) (roll call vote for FOIA Oversight and Implementation Act of 2014).

[278] *See* 160 Cong. Rec. S6375, S6377 (daily ed. Dec. 8, 2014) (unanimous consent agreement for FOIA Improvement Act of 2014).

[279] *See* Hicks, *supra* note 26.

[280] *See id.*

[281] *See supra* note 27.

[282] Omitted from the following list of features is the amendment in each bill to FOIA's exemption 5 for intra- and inter-agency memoranda. Both bills deny the exemption to documents that have existed for 25 years or longer at the time of a request. *See* FOIA Act, H.R. 653, 114th Cong., sec. 2(b)(1), § 552(b)(5)(B) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(2), § 552(b)(5) (2015). The impact of releasing these older documents is likely to be marginal. The FOIA Act further omits "records that embody the working law, effective policy, or the final decision of the agency." *See* FOIA Act, H.R. 653, 114th Cong., sec. 2(b)(1), § 552(b)(5)(A) (2015). However, this language seems merely to codify longstanding case law stating that documents under the exemption must precede a final decision. *See* Nat'l Labor Relations Bd. v. Sears, Roebuck, & Co., 421 U.S. 132, 153–54 (1975) (affirming that the "working law" of an agency does not qualify for the exemption).

[283] FOIA Act, H.R. 653, 114th Cong., sec. 2(b), § 552(b) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(1)(D), § 552(a)(8)(A)(i)(I) (2015).

[284] FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(1)(D), § 552(a)(8) (2014).

[285] Barack Obama, Memorandum of January 21, 2009: Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009); *see* 160 Cong. Rec. H1890 (daily ed. Feb. 25, 2014) (statement of Rep. Issa); 160 Cong. Rec. S6375 (daily ed. Dec. 8, 2014) (statement of Sen. Leahy).

provides no clear sign that this presumption has reduced either backlogs or instances of questionable withholding.[286] Admittedly, a statutory presumption of openness, unlike the executive one, would provide plaintiffs with a stronger right to disclosure,[287] so its inclusion in FOIA could not harm requesters. However, most of the exemptions relate to some sort of foreseeable harm, such as the advantage that terrorist groups would gain from information, a company's loss of trade secrets, or increased difficulties in law enforcement.[288] Thus, an agency might find it relatively easy to overcome the presumption, especially with help from the Department of Justice, which continues to help defend agencies despite having claimed to require a foreseeable harm.[289] In alluding to such a harm, a defendant agency could likely justify some imprecision in the foreseeable harm: just as agencies provide limited information about documents in *Vaughn* indices to avoid revealing the information they contain,[290] they could plausibly argue that more extensive description of a specific harm (such as to a preliminary criminal investigation) would result in effective information disclosure or contribute to that harm.

Second, both the FOIA Act and the FOIA Improvement Act contain provisions to increase online posting of documents. Both Acts would require agencies to post records that have been the subject of FOIA requests three times.[291] This provision would codify the meaning of commonly requested documents that agencies were already supposed to make publicly available.[292] In light of the importance of preserving incentives for individual to request information in the first place,[293] this provision has struck an acceptable balance between making information publicly available while preserving some benefits of exclusive or nearly-exclusive possession for the first one or two requestors.

More problematic are provisions in these bills encouraging agencies to do the same proactively for additional documents even before anyone has requested them. The FOIA Act calls for agencies to "review [their] records . . . to determine whether the release of the records . . . is likely to signifi-

[286] *See supra* Parts II.B.1 and 2.

[287] *See* Barack Obama, Memorandum of January 21, 2009: Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009) (making the standard statement that "[t]his memorandum does not create any right . . . enforceable . . . against the United States").

[288] *See supra* note 49; *cf.* 5 U.S.C. § 552(b)(1), (4), (7) (2012).

[289] *See supra* notes 214–216 and accompanying text.

[290] *See* Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973) ("An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information. . ..").

[291] FOIA Act, H.R. 653, 114th Cong., sec. 2(a)(1)(A), § 552(a)(2)(E) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(1)(A)(ii), § 552(a)(D)(ii)(II) (2015).

[292] *See* 5 U.S.C. § 552(a)(2)(D) (2012); U.S. Dep't of Justice, *FOIA Counselor Q&A: "Frequently Requested" Records*, FOIA Post, Sept. 27, 2002, http://www.justice.gov/oip/blog/foia-post-2003-foia-counselor-qa-frequently-requested-records (explaining DOJ's guidance that the threshold for "frequently requested" is three requests), *archived at* http://perma.cc/N4F9-8C3V.

[293] *See supra* Part II.A.2.

cantly contribute to public understanding of the operations or activities of the government" and to release qualifying records online after redacting them.[294] Meanwhile, the FOIA Improvement Act would instruct agencies to develop "procedures for identifying records of general interest of use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format."[295] Interpreted liberally, these proactive posting provisions follow the model of maximal proactive disclosure described above and are thus subject to the same pitfalls. Specifically, agencies would not be able to post all releasable documents, and they would likely incorrectly prioritize which documents to post and draw resources away from FOIA requests.[296] More likely, however, agencies would make only very limited efforts to post additional documents beyond those they have already voluntarily made available online. Agencies would not receive any additional appropriations to carry out these or any other provisions,[297] and neither bill provides any timetables for posting these additional records.[298] Even small attempts to increase proactive posting would not necessarily lead to better prioritization than that induced by FOIA requests. In addition, the texts of these provisions leave agencies with enough discretion to make them extremely difficult, if not impossible, to enforce them judicially.

Third, the two bills include some organizational changes. Each proposes to expand the functions of the Office of Government Information Services ("OGIS")[299] and each agency's Chief FOIA Officer.[300] Also, both bills would create a Chief FOIA Officers Council and task it with encouraging agency compliance with FOIA in various ways.[301] This form of inter-agency coordination may increase implementation efficiency, but it probably cannot overcome the delays that stem from resource constraints or the incentive problems that agencies have in disclosing information promptly. Evidence for their likely limited impact comes from that fact that OGIS and Chief FOIA Officers have existed and have had FOIA implementation responsibilities since the OPEN Government Act of 2007.[302] Individuals in these roles

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[294] FOIA Act, H.R. 653, 114th Cong., sec. 2(e), § 552(a)(8) (2015).

[295] FOIA Improvement Act of 2015 S. 337, 114th Cong., sec. 4 (2015). This provision amends a different part of the U.S. Code dealing with agency records management, 44 U.S.C. § 3102 (2012).

[296] *See supra* Part II.A.1.

[297] FOIA Act, H.R. 653, 114th Cong., sec. 4 (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 5 (2015).

[298] FOIA Act, H.R. 653, 114th Cong., sec. 2(e), §§ 552(a)(8)–(9) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., § 4 (2015).

[299] *See* FOIA Act, H.R. 653, 114th Cong., sec. 2(c), § 552(h) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(5), § 552(h) (2015).

[300] *See* FOIA Act, H.R. 653, 114th Cong., sec. 2(j), § 552(j) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(6), § 552(j) (2015).

[301] *See* FOIA Act, H.R. 653, 114th Cong., sec. 2(j), § 552(k)(6) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(6), § 552(k)(5)(A) (2015).

[302] *See* OPEN Government Act of 2007, Pub. L. No. 110-175, sec. 10, § 552(h), (j)–(k), 121 Stat. 2524, 2529–30.

have had sufficient time to demonstrate their influence, but the available data on processing times, backlogs, and delays in Tables 1 through 3 suggest that these actors have not achieved a dramatic reduction.[303] This result is not surprising for OGIS, which is external to agencies, since agencies are the entities that incur costs to process requests without any reimbursement. Even Chief FOIA Officers, who work within agencies, may favor robust FOIA implementation but accept delays as normal or inevitable, often facing challenges as they compete with other agency units for resources. In contrast, measures that reduce net costs of timely processing and increase net costs of wrongful withholding would attract the attention of whichever agency officials are in charge of priority-setting. This article's proposals adopt such measures and can be expected to have more impact than these bills.

2. *Public Online Information Act*

Unlike the bills dealing with FOIA, no version of POIA ever received even a committee vote.[304] However, POIA could have a greater effect on records disclosure than the bills to amend FOIA.[305] The main substantive section of POIA is Section 7, the "Executive Branch Internet Publication Mandate."[306] Its key provision is to "make public records available on the Internet."[307] It defines a "public record" as "any record, regardless of form or format that an agency discloses, publishes, disseminates, or makes available to the public."[308] FOIA uses the same language, with requests as a way in which "each agency shall make [information] available to the public."[309] Thus, a textual implication of POIA is that any document that an agency has released per a FOIA request would be posted online. More generally, POIA implies that any document that is currently available to the public but not on the Internet (such as in a government depository or an agency reading room) must be posted online.

The mechanisms for POIA's implementation are similar to those for FOIA. First, agencies would fulfill the online publication requirement from their own operating budgets: they are to post documents "at no charge (in-

[303] *See infra* app. tbls. 1–3.

[304] *See* POIA, H.R. 4312, 113th Cong (2014); Public Online Information Act of 2013, S. 549, 113th Cong. (2013); Public Online Information Act of 2011, H.R. 1349, 112th Cong. (2011); Public Online Information Act of 2011, S. 717, 112th Cong. (2011); Public Online Information Act of 2010, H.R. 4858, 111th Cong. (2010); Public Online Information Act of 2010, S. 3321, 111th Cong. (2010).

[305] The statement assumes limited implementation of the FOIA bills' provisions for proactive disclosure. *See supra* notes 294–298 and accompanying text.

[306] POIA, H.R. 4312, 113th Cong., § 7 (2014). Other substantive sections, which encourage legislative and judicial agencies to post more online information, *id.* § 8, and recommend that the Government Printing Office post all of its publications online, *id.* § 9, are not binding.

[307] *Id.* § 7(a)(1)(A).

[308] *Id.* § 3(5).

[309] 5 U.S.C. § 552(a) (2012).

cluding a charge for recovery of costs) to the public,"[310] and the section dealing with the Internet publication mandate contains no appropriations provision.[311] Second, individuals and organizations could request that an agency post specific records online, and they could file a complaint in federal court after a denial.[312] As in a FOIA lawsuit, if a plaintiff were substantially to prevail in a challenge under POIA, the court could reimburse her attorney fees and litigation costs.[313]

Because POIA would require both proactive posting and posting in response to requests, this Act's operation would face a mix of the problems associated with the maximal proactive disclosure and immediate online publication models of information release described above.[314] The proactive disclosure issues would be similar to those in the FOIA bills, so only the difficulties unique to POIA require further discussion. First, POIA's posting requirements would discourage some entities that value exclusive possession of information requesting documents. In that case, some valuable information would never be revealed to anyone, much less the public. Second, for documents that entities would still be willing to request, POIA's implementation would likely be more problematic than that of FOIA. Specifically, POIA would exacerbate the cost asymmetries embedded in FOIA because POIA requests would cost information seekers nothing at the processing stage. Even more so than before, requests for information would reflect a willingness to sue rather than a willingness to pay, so that the documents released to the public would not necessarily be the most important ones. Overall, the POIA request provision would achieve the opposite of the cost-based proposals in this Article: instead of providing agencies with resources and incentives to process requests quickly and differentially pricing requests, POIA would leave agencies resource-constrained, instill no urgency to process requests, and offer no reason to prioritize among different types of requests.

The other main substantive provision in POIA is the formation of a Public Online Information Advisory Committee to encourage more online posting of government information, such as by issuing recommendations to agencies and Congress.[315] Though having such a committee might be better than not having one, the Committee would lack power to impose obligations on agencies to improve their compliance under POIA.[316] Moreover, just as previous organizational innovations in FOIA have not fundamentally improved how it operates, recommendations from this Committee would likely yield only marginal improvements in government transparency. Given the

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[310] POIA, H.R. 4312, 113th Cong., § 7(a)(1)(A) (2014).
[311] *Cf. id.* § 6(g) (authorizing appropriations for a different section of POIA).
[312] *Id.* § 7(e)(1).
[313] *Id.* § 7(e)(3).
[314] *See supra* Part II.A.
[315] POIA, H.R. 4312, 113th Cong., § 6 (2014).
[316] *Id.* § 6(d)(2).

challenges from POIA's proactive disclosure and request provisions and the limited usefulness of the Public Online Information Advisory Committee,[317] perhaps its failure in the past to have a committee vote is acceptable.

C. Political Feasibility of the Cost-Focused Proposals

Whatever the drawbacks of these pieces of legislation, they are at least evidently palatable since legislators actually produced these bills. For the cost-based policies to be useful, they also need to be politically acceptable. The key questions are whether members of Congress could reasonably offer the present proposals as legislation and whether transparency advocacy organizations, which have supported these bills, might also be willing to endorse these cost-based proposals. The past history of FOIA amendments[318] and the overall benefit that would accrue to transparency groups provide the respective reasons to believe that addressing the Act's cost asymmetries is realistic.

1. Members of Congress

In general, Congress has amended FOIA substantively seven times since 1966, much more often than other parts of the original APA; at the same time, the most recent amendment was in 2009, which suggests that the time is ripe for some set of new amendments.[319] For the specific cost-based proposals offered here, references to previous FOIA amendments or to other statutes in the initial discussion already begin to suggest their plausibility as potential legislation.[320] Each proposal has additional precedential support that indicates that it is within the general context of what Congress has done in the past. For agency retention of processing fees, besides the fact that the FDA has been able to keep its fees since 1990,[321] an earlier version of the 1996 amendments to FOIA that passed the Senate would have permitted agencies to keep half their fees if they were "substantial compliance" with the Act's deadlines.[322] Why this provision did not make it to the final version of these amendments is unclear, but it suggests that fee retention remains within the realm of political possibility. At a minimum, it remains more attractive than allocating budgets to the agencies, which Congress at least

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[317] *See* POIA, H.R. 4312 113th Cong. (2014).

[318] *See*, *e.g.*, U.S. Dep't of Justice, Department of Justice Guide to the Freedom of Information Act: Introduction 5–10, http://www.justice.gov/oip/foia-guide13/intro-july-19-2013.pdf (posted July 24, 2013), *archived at* http://perma.cc/67VY-FSTF.

[319] *See supra* notes 13–14 and accompanying text.

[320] *See supra* notes 224–226, 239, 265, 269 and accompanying text.

[321] *See* Food and Drug Administration Revitalization Act, Pub. L. No. 101-635, sec. 201, 104 Stat. 4583, 4584 (1990) (codified at 21 U.S.C. § 379f (2012)).

[322] *See* S. 1090, 104th Cong. sec. 6(a) (as passed by Senate, Sept. 17, 1996); Wichmann, *supra* note 20, at 1253–54 (evaluating this proposal).

once has pointedly refused to do in the past,[323] and which the FOIA bills also explicitly reject.[324]

Next, provisions to change processing fees have appeared in the 1974 and 2007, as well as the 1986, amendments to FOIA,[325] making further changes in this area of the Act quite reasonable. In particular, the 1986 amendments' addition of review fees for commercial requests[326] was motivated by a report by the Administrative Conference of the United States observing that FOIA implementation was "much more costly than originally expected" and recommending fees for review, albeit for all requests.[327] Beyond FOIA, fees for services appear in at least one other context: the FDA's charges user fees to pharmaceutical companies for review of new drug applications.[328]

Increasing fees for expedited requests and for noncommercial requests is admittedly novel; however, any concern that lawmakers might have for individuals making these requests can be overcome with the benefits that accrue to them through the attorney fee-shifting changes. Congress allowed plaintiffs to collect attorney fees through FOIA's first set of amendments in 1974[329] and reaffirmed this right in the OPEN Government Act,[330] so strengthening fee-shifting further would continue this trend of empowering plaintiffs involved in noncommercial requests. The proposal is also consistent with the legislative history of the 1974 amendments: the Senate report expressed concern that "[t]oo often the barriers presented by court costs and attorney fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law."[331] In addition, this amendment would align FOIA with the House's seemingly

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[323] *See* Sinrod, *supra* note 81, at 334 (describing Congress' rejection of appropriations for the 1974 amendments).

[324] *See* FOIA Act, H.R. 653, 114th Cong., sec. 4 (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 5 (2015).

[325] *See* Act of Nov. 21, 1974, Pub. L. No. 93-502, sec. 1(b)(2), § 552(a)(4)(A), 88 Stat. 1561, 1561; Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, sec. 1803, § 552(a)(4)(A)(ii), 100 Stat. 3207-48, at -49 to -50; *See* OPEN Government Act of 2007, Pub. L. No. 110-175, sec. 6(b)(1)(A), § 552(a)(4)(A)(viii), 121 Stat. 2524, 2526.

[326] *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, sec. 1803, §552(a)(4)(A)(ii), 100 Stat. 3207, at -49 to -50.

[327] *See* Admin. Conf. of the U.S., ACUS Recommendation 81-1, Procedures for Assessing and Collecting Freedom of Information Act Fees 1-2 (1981).

[328] *See* Prescription Drug User Fee Amendments of 2012, tit. I, 21 U.S.C. §§ 379g–379h.

[329] *See* Act of Nov. 21, 1974, Pub. L. No. 93-502, sec. 1(b)(2), § 552(a)(4)(E), 88 Stat. 1561, 1562 (codified as amended at 5 U.S.C. § 552(a)(4)(E) (2012)).

[330] *See* OPEN Government Act of 2007, Pub. L. No. 110-175, sec. 4(a), § 552(a)(4)(E)(ii), 121 Stat. 2524, 2525; Davis v. U.S. Dep't of Justice, 610 F.3d. 750, 752 (D.C. Cir. 2010) (confirming the availability of attorneys fees under the OPEN Government Act, but denying their retroactive application).

[331] S. Rep. No. 93-854, at 17 (1974). Admittedly, the conference report remarked that its members did "not intend to make the award of attorney fees automatic . . . ." *See* H.R. Rep. No. 93-1380, at 10 (1974) (Conf. Rep.). However, this statement can be understood as trying to exclude awards for plaintiffs making commercial requests, which were not separately defined until the 1986 Amendments. The attorney fee-shifting proposal in this article similarly does not reimburse *all* plaintiffs.

unfulfilled intention that judicial review deter wrongful denials of information.[332]

Overall, connections between these cost-based proposals and prior legislation imply that the proposals would not be foreign to FOIA. This plausibility, combined with the expected improvements from these measures, suggests that legislators could propose these measures with sufficient outside support.

2. *Transparency Advocacy Organizations*

The key source of outside support would come from transparency organizations such as Project on Government Oversight and OpenTheGovernment.org,[333] representatives of each of which gave comment to *The Washington Post* on the failure of the Senate FOIA Improvement Act to receive a vote in the House.[334] Notably, Representative Darrell Issa, who cosponsored the House FOIA Act, cited the support of "29 nonpartisan transparency groups,"[335] while Senator Patrick Leahy, who sponsored the Senate bill, claimed that it was "supported by 70 public interest groups that advocate for government transparency."[336] For FOIA legislation, it seems that transparency advocacy groups are more powerful as stakeholders than firms making requests for their commercial interest.[337] Thus, if these groups are persuaded to support this package of cost-focused proposals, it would stand a good chance of passage.

Of these fixes, these groups should have no objection to having agencies keep their processing fees, and they would presumably strongly approve of a fee-shifting amendment in their favor. Among the fee increases, those applying to commercial requests would not affect these groups or the individual requesters they support, and those applying to expedited requests might elicit a neutral response, because they are currently uncommon,[338] or perhaps a positive response, since they might well take advantage of the revamped expedited track. The key difficulty would be with higher fees for noncommercial requests, since they would have to pay more for what appears to be the same service. If anything, reform efforts have suggested that

[332] H.R. Rep. No. 89-1497, at 2 (1966).

[333] *See* Project on Government Oversight, Our Work, http://www.pogo.org/our-work (last visited April 4, 2015) (stating that the organization "believes in transparency"), *archived at* http://perma.cc/5M4Z-9ZU9; *We Believe*, OpenTheGovernment.org, http://www.opengovernment.org/we_believe (last visited April 4, 2015) (indicating that its members "believe that transparency is essential to ensuring integrity and accountability in the operation of our governing institutions"), *archived at* http://perma.cc/MYY5-65U9.

[334] *See* Hicks, *supra* note 26.

[335] *See* 160 Cong. Rec. H1890 (daily ed. Feb. 25, 2014).

[336] *See* 160 Cong. Rec. S6375, S6377 (daily ed. Dec. 8, 2014).

[337] Further evidence comes in the fee structure of the current Act, which imposes the most kinds of fees on commercial requests. *See* 5 U.S.C. § 552(a)(4)(A)(ii) (2012).

[338] *See supra* notes 90–94 and accompanying text.

nonprofit organizations should be able to apply for an exemption from all FOIA fees.[339]

To the extent that this criticism stems from a perception that noncommercial requesters will lose from this measure, counterarguments showing how they would benefit are available. To begin with, higher fees, even without stronger fee-shifting, would not necessarily leave noncommercial requesters worse off in aggregate, as discussed above.[340] When higher fees are combined with the other proposals as a package, the cost asymmetry logic developed earlier[341] implies that transparency advocacy groups and the requesters they strive to represent would be better off overall, especially with fewer problems of crowding out from commercial requests. Furthermore, the fee increase provision, as stated, allows for a smaller multiplying factor for noncommercial than commercial requests. Since the attorney fee-shifting and processing fee increases for commercial requests are clearly favorable to individuals who make noncommercial requests, there must be some level for a fee increase that leaves them better off than before.

However, this criticism may also stem in part from a sense that transparency is a right.[342] These organizations may argue that agencies have a responsibility to provide all the material they can disclose without monetary compensation, since they are not generally paid for fulfilling other responsibilities, like promulgating regulation. One general response to this argument is that Congress has consistently decided that information seekers should generally pay for their records requests. FOIA has allowed agencies to assess fees since its original passage in 1966.[343] Furthermore, Congress has never been willing to appropriate funds to agencies for fulfilling requests, despite the knowledge that FOIA fees are utterly insufficient to cover expenses. In contrast, Congress has been willing to amend the fee structure, even in an upward direction.[344] Though Congress does not necessarily represent the preferences of American society,[345] the generally large majority (even unanimous) votes with which FOIA and its amendments have passed[346] suggest that a fee-based records request law is what this society has settled on.

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[339] *See* Coglianese et al., *supra* note 44, at 942–43.

[340] *See supra* notes 246–253 and accompanying text.

[341] *See supra* Part III.

[342] *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006).

[343] *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (current version at 5 U.S.C. § 552 (2012)).

[344] *See supra* notes 325–327 and accompanying text.

[345] *See*, *e.g.*, Kenneth A. Shepsle, *Congress is a "They," not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON 239 (1992).

[346] *See e.g.*, 111 CONG. REC. 26,821 (1965) (indicating Senate passage of the original FOIA without a dissenting vote); 112 CONG. REC. 13,661 (1966) (showing a 308-0 vote in the House for the original FOIA); 142 CONG. REC. 23,482-83 (1996) (listing a 402-0 House vote in favor of the Electronic FOIA Amendments); *id.* at 23,790 (noting passage of the same bill in the Senate by a unanimous consent motion).

A second response is that, though it might be ideal for agencies to meet the requirements of the Act as a matter of responsibility, resource constraints prevent most agencies from doing so. Each agency must set priorities in allocating resources,[347] so it might reasonably consider information provision ancillary compared to its substantive responsibilities. No agency exists only to fulfill FOIA requests.[348] This second-order nature of transparency might also be inferred from the lack of appropriations. Though it might be odd to adopt fee-based funding for primary functions, it is less odd for secondary tasks as a next-best (or perhaps as an even better) alternative to budget-based funding. Resource constraints can even be understood as a motivation for FOIA, since they prevent agencies from proactively disclosing everything they can online and instead rely on requests to prioritize information that is of interest.[349]

V. Conclusion

We have come full circle. Although publishing all releasable government records online would be valuable for public understanding of government activity, Congress has not been willing to provide the financial resources for this maximal form of document transparency; as a result, agencies can afford to release only some documents. Given this constraint, this Article has put forward and provided evidence for the importance of the principle that FOIA should encourage information seekers to acquire and disseminate the most publicly beneficial information and agencies to fulfill requests as fast and favorably as feasible. By allowing requesters to keep documents to themselves, FOIA incentivizes to some degree the acquisition and publicizing of the most important information. Still, resource limitations, combined with a fee structure with cost asymmetries, have led to inadequate implementation of the Act, with delays, denials, and a dominance of commercial requests.

Compared to recent legislation that provides a fairly complex package of additional duties and administrative oversight, this Article suggests simpler changes to the cost structure of FOIA so that agencies release more of the most important documents more in line with the Act's timetables. Amendments allowing agencies to retain processing fees, raising processing fees, and making fee-shifting automatic for noncommercial plaintiffs who substantially prevail could be legislated easily and could take effect very quickly, without the need for further regulatory action. These statutory

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[347] *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 17 (2008).

[348] Perhaps the agency that comes closest to just producing documents is the National Archives and Records Administration, which, incidentally, has the third largest FOIA backlogs as well as the ten oldest pending requests. *See* OIP 2013 FOIA Summary, *supra* note 75, at 10–11.

[349] *See supra* notes 45–54 and accompanying text.

changes would provide agencies with stronger incentives and more resources to comply with FOIA than the bills that Congress has considered while screening the pool of potential requesters so that, as a whole, agencies end up fulfilling the most socially beneficial requests.

By no means is this combination of cost-based proposals the most comprehensive way to restructure FOIA based on the incentives of requesters and agencies. Future research could explore additional ways to resolve various tensions in government transparency. These include the tradeoff between making more information available and making available information more accessible given limited resources, the conflict between the value of publicizing information and of encouraging requests with at least temporary exclusive possession of records, and the codependency of agencies' processing efforts and entities' willingness to file requests. However, the fast fixes presented in this Article are fairly small changes that can make a big difference in FOIA's operation. Furthermore, Congress' general pattern has been simply to command additional disclosure without providing additional appropriations, rather than systemically analyzing how to improve transparency. Therefore, these cost-based proposals, which draw inspiration from previous FOIA amendments, are incremental changes that Congress can more easily pass until legislators are ready for more fundamental reform.

APPENDIX: TABLES

General Note: For Tables 1 through 3 and 5, data are gathered or derived from recent Summaries of Agency Annual FOIA Reports of OIP.[350] These tables start from FY 2008 due to changes in the definition of reported request that year.[351]

TABLE 1A: PROCESSING TIMES FOR SIMPLE REQUESTS

Fiscal Year	2008	2009	2010	2011	2012	2013
Number of Departments with a Median Processing Time of Twenty Days or Less	8	10	8	n/a	n/a	n/a
Number of Agencies with a Median Processing Time of Twenty Days or Less	57	62	67	n/a	n/a	n/a
Average Processing Time for Simple Requests (days)	n/a	n/a	28.34	23.65	22.66	21.44
Number of Departments with an Average Processing Time of Twenty Days or Less	n/a	n/a	4	5	6	7
Number of Agencies with an Average Processing Time of Twenty Days or Less	n/a	n/a	55	53	58	54

Note: As a baseline, there were fifteen departments and eighty outside agencies producing Annual FOIA reports in FY 2010.[352] Missing entries in this table and Tables 1b and 1c reflect changes in how the OIP has summarized agencies' annual reports over time.

[350] U.S. DEP'T OF JUSTICE, ANNUAL FOIA REPORTS, *available at* http://www.justice.gov/oip/reports-1 (last visited Aug. 15, 2014), *archived at* http://perma.cc/3YYP-35AA.

[351] Specifically, it was only in 2008 that agencies limited the count of requests to those "that involve use of the FOIA." *See* OFFICE OF INFO. POLICY, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2008 (2009), http://www.justice.gov/oip/foiapost/2009foiapost16.htm, *archived at* http://perma.cc/E6T4-WBF5. The result was a decline from 21,758,651 reported requests in FY 2007 to 605,491 in FY 2008. *Id.* Thus, data related to requests starting from FY 2008 cannot readily be compared to data before that fiscal year.

[352] *See* OFFICE OF INFO. POLICY, ANNUAL FOIA REPORTS–FY10 , http://www.justice.gov/oip/annual-foia-reports-fy10 (last visited Aug. 15, 2014), *archived at* http://perma.cc/V6ZU-6625.

TABLE 1B: PROCESSING TIMES FOR COMPLEX REQUESTS

Fiscal Year	2008	2009	2010	2011	2012	2013
Number of Departments with a Median Processing Time of Twenty Days or Less	2	3	4	n/a	n/a	n/a
Number of Agencies with a Median Processing Time of Twenty Days or Less	11	5	9	n/a	n/a	n/a
Average Processing Time for Complex Requests (days)	n/a	n/a	118.93	103.74	82.35	123.17
Number of Departments with an Average Processing Time of Twenty Days or Less	n/a	n/a	2	1	0	0
Number of Agencies with an Average Processing Time of Twenty Days or Less	n/a	n/a	4	5	4	7

TABLE 1C: PROCESSING TIMES FOR EXPEDITED REQUESTS

Fiscal Year	2008	2009	2010	2011	2012	2013
Number of Departments with a Median Processing Time of Twenty Days or Less	9	7	8	n/a	n/a	n/a
Number of Agencies with a Median Processing Time of Twenty Days or Less	14	21	20	n/a	n/a	n/a
Average Processing Time for Expedited Requests (days)	n/a	n/a	38.76	55.22	40.2	91.03
Number of Departments with an Average Processing Time of Twenty Days or Less	n/a	n/a	5	6	4	3
Number of Agencies with an Average Processing Time of Twenty Days or Less	n/a	n/a	18	25	25	19

TABLE 2: FOIA REQUESTS AND BACKLOGS

Fiscal Year	2008	2009	2010	2011	2012	2013
Number of Requests Received	605,491	557,825	597,415	644,165	651,254	704,394
Number of Requests Processed	623,186	612,893	600,849	631,424	665,924	678,391
Backlog	133,295	77,377	69,526	83,490	71,790	95,564
Backlog as a Percentage of Received Requests	22%	14%	12%	13%	11%	14%
Requests for Expedited Processing	8659	5658	6072	7706	7313	7819
Expedited Requests	4159	1801	1336	1951	1398	1129

TABLE 3: DISPOSITIONS OF REQUESTS FOR SUBSTANTIVELY PROCESSED REQUESTS

Fiscal Year	2008	2009	2010	2011	2012	2013
Substantively Processed Requests	403,175	407,650	407,283	438,638	464,985	482,357
Full grants	260,594	228,284	227,227	236,474	234,049	237,682
Percentage of Total	64.6%	56%	55.8%	53.9%	50.3%	49.3%
Partial grants	117,032	154,907	150,184	171,795	200,209	203,072
Percentage of Total	29.0%	38%	36.9%	39.2%	43.1%	42.1%
Full denials	25,549	24,459	29,872	30,369	30,727	41,483
Percentage of Total	6.3%	6%	7.3%	6.9%	6.6%	8.6%
Number of Times Agencies Used FOIA's Exemptions			448,409	424,309	523,290	546,574

Note: Substantively processed requests are those in which an agency finds documents and decides what portions of them to release; in contrast, other requests are closed for procedural reasons, such as a finding that there are no documents responsive to the request.[353] The total use of FOIA exemptions was not provided in OIP's 2008 or 2009 Summaries.

[353] *See* OIP 2013 FOIA SUMMARY, *supra* note 75, at 4.

TABLE 4: DATA ON FOIA LITIGATION

Calendar Year (or FY)	2006	2007	2008	2009	2010	2011	2012	2013
Total Costs in Millions (FY)	$399	$369	$338	$382	$416	$436	$430	$446
Litigation Costs in Millions (FY)	$20	$16	$17	$28	$22.2	$23.4	$24.2	$27.2
As Percentage of Total	5.0%	4.3%	5.0%	7.3%	5.3%	5.4%	5.6%	6.1%
Cases Received	290	285	321	294	282	284	333	371
Cost per Case Received	$68,966	$56,140	$52,960	$95,238	$78,655	$82,250	$72,553	$73,266
Cases Decided	468	391	231	298	161	244	442	361
Cases with Attorney Fee Awards	33	6	5	4	1	2	14	30
Other Cases with Plaintiff Judgments	33	31	15	64	28	44	21	28
Other Cases with Stipulated Dismissals	67	83	40	0	0	0	134	54
"Successful" Outcomes	133	120	60	68	29	46	169	112
Success Rate	28.4%	30.7%	26.0%	22.8%	18.0%	18.9%	38.2%	30.1%
Frequency of Fee Awards Given Success	24.8%	5.0%	8.3%	5.9%	3.4%	4.3%	8.3%	26.8%

Note: Other than the first three rows, data are gathered or derived from various years of the Justice Department's Annual Report on FOIA Litigation and Compliance Report.[354] These reports, unlike the OIP's Summaries, are kept by the calendar year. The less clear terms in the first column are defined as follows: "Cases Received" reflects the Department's count of the number of FOIA cases filed in federal court; "Cases Decided" are those in which a Court has reached a final disposition on some part of the case (not necessarily a judgment); "Other Cases with Plaintiff Judgments" are cases without attorney fee awards, but in which the plaintiff received a judgment in her favor for at least (and typically only) part of her case; "Other Cases with Stipulated Dismissals" do not include cases with plaintiff judgments or with attorney fee awards, but are often cases in which the agency provides the requested information before a verdict is reached; "Successful Outcomes" are defined as the sum of these three categories of cases.

[354] U.S. DEP'T OF JUSTICE, U.S. DEP'T OF JUSTICE FOIA LITIGATION AND COMPLIANCE REPORTS, *available at* http://www.justice.gov/oip/reports-1 (last visited Aug. 15, 2014), *archived at* http://perma.cc/3YYP-35AA.

TABLE 5: AGENCY PROCESSING COSTS AND FEE COLLECTIONS FOR FOIA

Fiscal Year	2008	2009	2010	2011	2012	2013
Total Costs in Millions	$338	$382	$416	$436	$430	$447
Processing Costs in Millions	$321	$354	$394	$413	$405	$420
Processed Requests	623,186	612,893	600,849	631,424	665,924	678,391
Cost per Request	$515.74	$577.99	$656.11	$653.52	$608.87	$618.54
Total Fees Collected in Millions	$11.6	$9.07	$5.94	$6.19	$4.79	$4.34
Fees Collected per Request	$18.62	$14.79	$9.88	$9.81	$7.19	$6.40
Percent Collected	3.61%	2.56%	1.51%	1.50%	1.18%	1.04%

TABLE 6A: SUMMARY STATISTICS ATTORNEY FEE AND COST AWARDS IN FOIA CASES IN 2013

Award Statistic	Amount
Mean	$19,900.55
Median	$6,000.00
Standard Deviation	$34,775.07
Minimum	$350.00
Maximum	$181,579.99

Table 6b: Dispositions of FOIA Cases with Attorney Fee and Cost Awards in 2013

Disposition	Number of Cases
Stipulation of Dismissal	22
Partial Grant of Summary Judgment for Plaintiff	3
Full Grant of Summary Judgment for Plaintiff	1
Attorney Fee Grant Only	3
Defendant's Motion to Dismiss Granted in Part, Denied in Part	1
Total	30

Note: Data for this table were gathered and derived from the DOJ's 2013 FOIA Litigation and Compliance Report.[355]

Table 7: FDA Processing Costs and Fees Collected

Fiscal Year	Processing Costs	Fees Collected	Percentage
2008	$18,724,236.00	$434,892.00	2.32%
2009	$21,106,261.00	$388,084.00	1.84%
2010	$24,459,583.93	$289,402.60	1.18%
2011	$33,003,128.22	$452,246.57	1.37%
2012	$33,524,931.54	$505,467.28	1.51%
2013	$33,570,981.00	$577,039.00	1.72%

Note: Data for this table are derived from recent Annual FOIA reports of FDA.[356]

[355] U.S. Dep't of Justice, *supra* note 191.

[356] *FOIA Annual Reports*, U.S. Food & Drug Admin., http://www.fda.gov/RegulatoryInformation/FOI/FOIAAnnualReports (last updated Mar. 22, 2011) (providing links to various reports), *archived at* http://perma.cc/JWW7-J4FF.