Government Information Quarterly xxx (xxxx) xxx–xxx

Contents lists available at ScienceDirect

Government Information Quarterly

journal homepage: www.elsevier.com/locate/govinf

Essential or extravagant: Considering FOIA budgets, costs and fees

A.J. Wagner

Bradley University, Global Communication Center, Room 332, 1501 W. Bradley Ave., Peoria, IL 61625, United States

ARTICLE INFO

Keywords:
Freedom of Information Act
Freedom of information
Budgets
Funding
Costs
Fees
Access to government information
Public records
Access to information

ABSTRACT

This study seeks to square the competing arguments of the Freedom of Information Act's necessity versus its financial burden by analyzing more than 500 FOIA annual reports, representing 93% of all cabinet- level data from 1975 until 2015.

FOIA expenses account for less than 1% of agency budgets, and while costs per request have increased over time, the small proportion of FOIA expense versus general budgets has remained stagnant.

1. Introduction

Despite any private compunction, President Lyndon B. Johnson might have had in endorsing the Freedom of Information Act (Archibald, 1993, p. 726), he issued an enthusiastic signing statement:

> This legislation springs from one of our most essential principles: A democracy works best when people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest…I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded (Johnson, 1966).

Repeated and clear rhetoric in favor of a strong FOIA from presidents, the Supreme Court and Congress has nonetheless left implementation short of Johnson's rhetorical flourishes (Kirtley, 2006; Pozen, 2017; Stewart & Davis, 2016). One of the most enduring complaints, though, has little to do with agency compliance with the law but the expense of FOIA administration. The cost of access mechanism has been a subject of consternation since shortly after Johnson signed it into law.

A prominent critic of FOIA expense was the late Justice Antonin Scalia, who cast a definitive argument against FOIA, making an early case that while transparency may be an element of democracy, FOIA was scarcely a primary federal concern and certainly did not justify the financial burden. Just before President Ronald Reagan nominated Scalia for a seat on the D.C. Circuit Court, Scalia composed a 1982 essay noting the ineffectiveness, inefficiency and expense of the FOIA. He wrote:

> [FOIA] is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored….The question, of course, is whether this public expense is worth it, bearing in mind that the FOIA requester is not required to have any particular 'need to know.' The inquiry that creates this expense…may be motivated by nothing more than idle curiosity. The 'free lunch' aspect of the FOIA is significant not only because it takes money from the Treasury that could be better spent elsewhere, but also because it brings into the system requests that are not really important enough to be there (Scalia, 1982, pp. 15–17).

Scalia, then a professor at the University of Chicago Law School and a former assistant attorney general in the Justice Department, observed that granting citizens unfettered access to public records to be a noble goal but in practice little more than a romantic notion. FOIA had severely confused federal priorities and as a statute was likely unsalvageable. He concluded by branding the FOIA an "unthinking extravagance" (p. 19).

Scalia was not alone in his concern for the expense of FOIA implementation. Cost has been an issue raised by government figures during the discussion of all amendments to the FOIA. One of President Ford's reservations in vetoing the 1974 FOIA amendment (a veto ultimately overridden by the Congress) was the "unworkable" nature of the proposed alterations. He believed the more requester-friendly statute would prove excessively costly and generally onerous to agency administration (H.R. Rep. No. 93-876, 1974). In writing for the federal court, the assistant attorney general opposed the amendment under a

E-mail address: awagner@bradley.edu.

http://dx.doi.org/10.1016/j.giq.2017.09.001
Received 17 January 2017; Received in revised form 1 September 2017; Accepted 2 September 2017

belief that implementation "would be unduly expensive and essentially unnecessary" (Hawk, 1974). In a hearing prior to the EFOIA amendment, a co-sponsor of the bill expressed reticence in modernizing the law largely due to perceived cost increases (Brown, 1992, p. 6). Even Sen. Daniel Patrick Moynihan's pro- transparency Senate report cautioned against the financial excesses of the FOIA (Commission on Protecting and Reducing Government Secrecy, 1997, p. 16). In the aftermath of the Hillary Clinton email fiasco, the Department of State produced an internal investigation of FOIA practices where they blamed their unsatisfactory FOIA performance on a failure to sufficiently staff the FOIA office. The report claimed the State Department had regularly requested additional funding for more personnel but each time was denied due to the expense (Evaluation of the Email Records Management, 2016, pp. 8–9).

Despite the federal support of the law generally and the sustained disquiet regarding the cost and funding of the FOIA, there is next to no statutory requirement in governing the finances of agency FOIA administration. This paper seeks to consider whether the FOIA is an undue burden - an excessively expensive one - on federal agencies, as contended by FOIA critics.

2. Literature review

There exists a significant amount of scholarship exploring both the civic use and federal administration of the FOIA. Two studies have applied similar research methods to those in the present study by exploring the use and implementation of the U.S. FOIA. Wasike (2016) built a similar database across an abbreviated time period in considering the FOIA records of presidents George W. Bush and Obama. Notable observations include a decrease in information over both administrations with the rate of denial growing worse during the Obama administration and little discrepancy in the type or frequency of exemption claims between the two presidencies, before concluding, "the study returned mixed results for FOIA performance" (pp. 424–425). Kim (2007) conducted a very similar study a decade earlier comparing FOIA use and implementation data under the Clinton and George W. Bush administrations. Kim documented initial requests with a special focus on department and agencies' ability to process the request, finding that, over the period of study (1998–2005), the Department of State was especially bad at processing requests (a trend the continues today). She made a notable observation in the decline of full grants over the life of the Bush presidency. During three years of analysis during Clinton's term, full grants were provided at least 55% of the time (p. 327). In the first year of the Bush presidency, it drops to 54%, then progressively sinks until reaching 40% in the final year of the analysis. Kim's analysis further considered exemption use and administrative appeal, determining that Bush's "changes in FOIA implementation supports the prevailing perception among scholars and public access advocacy groups that the Bush administration has sought to limit the scope of the FOIA and has impaired the effectiveness of the FOIA as an instrument of access" (p. 337).

Other scholars have considered the costs of freedom of information, perhaps none more directly than Roberts (2012). His study assesses the application of access to public records laws in Canada during periods of austerity measures in the 1990s and post-recession 2000s. He found the international community turning its back on transparency, with officials in the Netherlands and Australia calling for more efficient use of time and money and U.K. government agencies actively seeking higher fees in "consideration of the financial impact of FOIA" (p. 16). Roberts reported the United States witnessed heavy cuts in spending on transparency measures (2012, p. 17). He suggested the financial meltdown of 2007 was at least partially due to the lack of transparency in financial practices, and the result of the recession was even less federal support for transparency measures. Roberts concluded that the present government climate around the globe regarding freedom of information laws is that they are treated as a luxury, when in fact such access mechanisms are some of "the most important tools for restoring political and economic stability" (p. 30).

Colquhoun (2010) produced a report comparing the costs and functions of freedom of information laws in the U.K., Scotland, Ireland, Canada, Australia and the United States. When compiling the average government cost for processing a freedom of information request, Colquhoun found that Scotland and the United States were able to administer their access laws at the least expense, while Canada and Australia were two, nearly three, times as expensive on a per request basis. Colquhoun also demonstrated the difficulty in accounting for the costs of freedom of information laws.

While few match Scalia's vitriol for the FOIA, he is not alone in sentiment in expressing concern for the cost of FOIA administration (Cate, Fields, & McBain, 1994; Sinrod, 1994; Wald, 1984). Cate et al. conclude, "[T]he importance of public access to government information cannot be overstressed" before warning that unnecessary FOIA requests and their exponential increase "pose an enormous burden on private individuals and organizations, administrative agencies, and the courts" (p. 73) Sinrod acknowledged the Clinton administration's rhetorical support of the FOIA, calling for tangible support if these wishes were to become reality: "These well-intentioned statements will not solve the FOIA backlog problem without a serious commitment of further government personnel, equipment and monetary resources" (p. 363). Sinrod said the requisite funding would be of such a significant sum that securing it from Congress would be "highly unlikely in the foreseeable future" (p. 363).

When considering the new FOIA fee structure in 1986, Feinberg (1986) quoted staffers in the Reagan administration as viewing the "fees as barriers" and the autonomy in each department and agency as a low-profile way of enforcing fees as impediments to disclosure (p. 619). Fees collected from requesters were originally thought to be a method for funding, if not all of FOIA administration, at least a substantial portion of it (Beesley & Newman Glover, 1987), yet Wald concurred Feinberg, demonstrating that the CIA, among many other agencies, use cost not only as a requester deterrent but as an excuse for not fully fulfilling the legislative mandate, and that these costs could be tremendous (p. 673). Not surprisingly, tales of exorbitant fees are legion (Brown, 2016; Maas & Mackey, 2016; Schick, 2012). In 2015, the FOIA ombudsman stated that agencies are prone to using fee estimates as discouragement to requesters (Jones, 2015).

2.1. Congressional comment on FOIA costs

Despite enduring concern about the expense in implementing the FOIA and the lack of resources in meeting statutory expectation there is little in the way legislative control or guidance in FOIA funding and spending. Congress has identified a lack of resources as a primary problem in meeting the statutory mandate of the FOIA. A 1986 House review of the first 20 years of FOIA use and implementation cited a lack of resources as a primary cause of the dissatisfactory performance (H.R. Rep. No. 99-832, 1986). A 1996 House report observed, ""Lack of sufficient resources has constrained the effectiveness of the FOIA. At some agencies failure to allocate sufficient staff to comply with the Act has resulted in lengthy backlogs measures in years. Efforts at improving FOIA response time have centered on better prioritization of requests and more efficient administrative practices" (H.R. Rep. No. 104-795, 1996, pp. 6–7). And in 2007 testimony before the House, a representative said, "An insufficient level of resources available for FOIA processing is one reason requesters are being forced to wait long periods of time for responses from agency FOIA offices" (153 Cong. Rec. H2502, 2007).

At present, the law makes one mention, providing the chief FOIA officer:

> subject to the authority of the head of the agency – (A) have agency wide responsibility for efficient and appropriate compliance with