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2018]

Norman J. Shachoy Symposium:

FIFTY YEARS OF OPERATION UNDER THE FREEDOM OF INFORMATION
ACT, 1967 – 2017.

FIFTY YEARS OF FOIA IN OPERATION, 1967–2017

TUAN N. SAMAHON*

ON Independence Day, July 4, 1966, President Lyndon Baines Johnson (LBJ) signed the Freedom of Information Act (FOIA) into law.¹ Announcing the occasion from his “Texas White House” outside San Antonio, LBJ explained: “[t]his legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits.”² Unfortunately, the press release’s pro-transparency sentiment was mostly atmospheric window dressing. The foul-mouthed LBJ privately despised FOIA and signed “the f—— thing,” as he called it, only with much cajoling and at the last moment possible, narrowly avoiding its pocket veto.³ That LBJ signed the bill at all overshadowed his qualified embrace of it. Congress exempted only nine categories of agency records from FOIA disclosure and limited withholding to these grounds,⁴ but LBJ’s bill signing statement claimed a tenth ground—a presidential, *constitutional* power to “provide for confidentiality” and resist FOIA whenever “national interest so requires,” as de-

* Professor of Law, Villanova University Charles Widger School of Law. The *Villanova Law Review’s* 2017 FOIA symposium was made possible by the generosity of Norman J. Shachoy and the Charles Koch Foundation. I thank Peter Herrick and Jacqueline Kramer for their research assistance in preparing this essay, which is based on introductory remarks I gave during the symposium. My special thanks go to Valerie Caras, Jason Kurtyka, Jourdan Simko, and their editorial team for their execution of the symposium, as well as to their successors for their work preparing the symposium for publication.

1. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2018)).

2. Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 WEEKLY COMP. PRES. DOC. 895, 896 (July 11, 1966) [hereinafter *Statement by the President*].

3. See MICHAEL R. LEMOV, PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMERS RIGHTS 67-68 (2011) (quoting LBJ press secretary Bill Moyers, *Address to the Society of Professional Journalists*, JOURNALISM UNDER FIRE (Sept. 11, 2004), <https://www.commondreams.org/views/2004/09/17/journalism-under-fire> [<https://perma.cc/C7G6-QSBH>]).

4. § 3(f), 80 Stat. at 251.

(855)

fined by the President.⁵ Nonetheless, even so qualified, the President signed the bill.

Commentators often credit 1966 as FOIA's debut,⁶ but 1967 better suits the occasion. First, Congress postponed the original FOIA's effective date for one year from its enactment to enable agency implementation of (and compliance with) the new law.⁷ Second, shortly before the originally enacted FOIA's July 4, 1967 effective date, Congress and LBJ *repealed* the earlier statute and enacted a *substitute* FOIA statute on June 5, 1967, replacing the 1966 enactment but with a law taking effect on the same date.⁸ The changes supposedly were stylistic only,⁹ but at least one was substantive.¹⁰ Still, a freedom of information law did take effect in 1967 and commenced an American experiment in governmental transparency and compliance.

In retrospect, it can fairly be said that LBJ's reluctant embrace of FOIA foreshadowed how the executive branch would come to implement the law during its first five decades. Congress, which predictably excluded itself from FOIA's terms, has repeatedly amended the law to strengthen it as a cattle prod to secure *executive* branch compliance. Perhaps this congressional hypocrisy—call it “transparency for thee, but not for me”—was not lost on the judiciary. Illiberal judicial interpretations of the remedial statute, particularly from the pro-executive D.C. Circuit,¹¹ have necessi-

5. *Statement by the President*, *supra* note 2, at 895. Echoes of this tenth ground may be heard in contemporary presidential administrations' claims that agencies should attend to “White House equities” and allow White House review of agency records prior to release. *See, e.g.*, Memorandum from Gregory Craig, Counsel to the President to all Executive Department and Agency General Counsels, *Reminder Regarding Document Requests* (Apr. 15, 2009) (“[E]xecutive agencies should consult with the White House Counsel's Office on all document requests that may involve documents with White House equities . . . including . . . FOIA requests.”).

6. *See, e.g.*, Steve Zansberg, *July 4, 1966: Birth of the FOIA - A Look Back*, 32 COMM. LAW. 34 (2016) (celebrating 1966 as birth of modern FOIA).

7. H.R. REP. NO. 89-1497, at 12 (1966).

8. Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54 (1967) (codifying Pub. L. 89-487 at 5 U.S.C. § 552 with minor amendments).

9. “The purpose of this bill is to incorporate into title 5 of the United States Code, *without substantive change*, the provisions of Public Law 89-487.” S. REP. NO. 90-248, at 1196 (1967) (emphasis added).

10. For example, the 1967 bill exploited the classic distinction between “officers” and low-level “employees” to limit supervisory officer liability for disobeying a court's order in a FOIA case. *See, e.g.*, *United States v. Germaine*, 99 U.S. 508 (1878) (interpreting federal criminal statute to extend criminal liability only to “officers,” but not “employees”). The 1966 bill extended contempt sanctions to “the responsible officers,” 80 Stat. at 251, suggesting sanction power could reach malfeasant supervisors, not just line employees. In the 1967 bill, however, Congress authorized contempt power only for “the responsible *employee*,” 81 Stat. at 55 (emphasis added), limiting liability to low-level line employees, excluding supervisory officers.

11. Professor Cass Sunstein characterized the D.C. Circuit's jurisprudence as embodying a pro-executive, “national security fundamentalism” that infects its FOIA jurisprudence. Cass Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 697 (2005).

tated multiple abrogating amendments over time.¹² Executive branch gaming of FOIA has also animated Congress as it has checked executive efforts to minimize, evade, or outright defeat FOIA's pro-disclosure objective.¹³

As amended, today's FOIA is easily the most robust of the American federal transparency statutes,¹⁴ but its actual operation is far more involved than its name—"freedom of information"—suggests. The "Federal Agency Open Records Act" might have better captured the law's actual function, i.e. if requesters know what federal executive agency records to look for and request them with sufficient specificity, then they might just have a shot at accessing them, assuming the records still exist and no exclusion or exemption applies. Thus, the law does not oblige a FOIA officer to "free" information from specific records, for example, by creating a new record that answers inquiries in FOIA requests.¹⁵ And, FOIA is in-

12. *See, e.g.*, FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, 539-40 (2016) (codified as amended at 5 U.S.C. § 552 (2016)) (sunsetting Exemption 5 deliberative process privilege claims following Judge Brett Kavanaugh's opinion in *National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014)); Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, § 4(a)(2), 121 Stat. 2524, 2525 (2007) (codified as amended at 5 U.S.C. § 552) (abrogating narrow view of "prevailing party" adopted in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001)); Electronic FOIA Amendments of 1996, Pub. L. No. 104-231, § 7(c), 110 Stat. 3048, 3051 (codified as amended at 5 U.S.C. § 552(a)(6)(C)) (narrowing *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), definition of "exceptional circumstances" that excused agency delay in processing FOIA requests).

13. A high-profile example of an obstructionist tactic includes federal personnel using private email accounts and servers to defeat searches of agency email accounts and servers for records potentially responsive to requests. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Department of State*, 285 F.Supp.3d 249, 251 (D.D.C. 2018) (seeking Secretary of State Hillary Clinton's emails concerning use of private digital devices). In 2014, Congress amended the Federal Records Act to close this loophole. *Presidential and Federal Records Act Amendments of 2014*, Pub. L. No. 113-187, 128 Stat. 2003, 2006 (2014) (codifying amendment at 44 U.S.C. § 2209); *see also* 5 U.S.C. § 552(b) (requiring release of "reasonably segregable portion of a record" in response to agency practice of withholding entire records where only portion warranted withholding).

14. Beyond FOIA, there are many federal statutes designed to promote transparency and accountability. *See, e.g.*, *Digital Accountability and Transparency Act of 2014*, Pub. L. No. 113-101, 128 Stat. 1146 (2014) (establishing data standards for agency reported information); *Government in the Sunshine Act*, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (requiring agency meetings to be open for public observation and imposing procedural requirements to ensure advance notice before they occur); *Federal Advisory Committee Act*, Pub. L. No. 92-463, 86 Stat. 770 (1972) (opening operation of presidential advisory committees to public).

15. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975) ("The Act does not compel agencies to write opinions in cases in which they would not otherwise be required to do so."); *Hudgins v. I.R.S.*, 620 F. Supp. 19, 21 (D.D.C. 1985) ("FOIA neither requires an agency to answer questions disguised as a FOIA request . . . or to create documents or opinions in response to an individual's request for information." (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975))).

applicable to legislative or judicial records, except for those records that the executive branch comes to obtain.¹⁶ Further, FOIA does not even cover all records within the executive branch. It provides requesters with judicial relief only for “agency records,”¹⁷ not presidential records.¹⁸

This request-based FOIA regime has enabled requesters—American and foreign—to attempt to learn what agencies of the U.S. executive branch have been “up to,”¹⁹ at least insofar as these activities happen to be memorialized in “agency records.”²⁰ Of course, what agencies release is subject to three exceptions²¹ and nine exemptions²² that represent finely-tuned, congressional policy judgments about the proper balance between transparency and competing considerations, such as national security,²³ personal privacy,²⁴ and promoting candor in deliberative records.²⁵

After 50 years of operation, 1967–2017, the 2017 Norman J. Shachoy Symposium reviewed years of hard-earned experience—a vast body of requests and their resulting treatment—to consider how FOIA in the wild may depart from the regime described on cold pages found within a law library. The operations questions include: (1) what unforeseen developments have changed the law’s operation-in-fact, including the rise of commercial requesters,²⁶ the first-person requester,²⁷ ideologically-motivated requesters,²⁸ and the press plaintiff,²⁹ even at a time of declining funding

16. U.S. Department of Justice v. Tax Analysts, 492 U.S. 136, 146 (1989).

17. 5 U.S.C. § 552(a)(4)(B) (2018). Congress has defined “agency” and “record” for FOIA purposes. 5 U.S.C. § 552(f)(1)–(2) (2018).

18. A separate statute governs the handling and release of presidential records. Presidential Records Act of 1978, 44 U.S.C. §§ 2201-09.

19. U.S. Dept. of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 750, 780 (1989).

20. 5 U.S.C. § 552(a)(1)(A)–(E) (2018).

21. 5 U.S.C. § 552(a)(8)(A)(i)–(ii).

22. 5 U.S.C. § 552(b).

23. 5 U.S.C. § 552(b)(1).

24. 5 U.S.C. §§ 552(b)(6)–(7)(C).

25. 5 U.S.C. § 552(b)(5).

26. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1379–1414 (2016) (detailing heavy use of FOIA by commercial requesters, such as information resellers).

27. Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2220–43 (2018) (detailing that FOIA requests from individuals seeking records about themselves dominate FOIA logs at seven agencies that deal with benefits and immigration enforcement).

28. The conservative non-profit Judicial Watch dominates the FOIA docket of the U.S. District Court for the District of Columbia, appearing so frequently as plaintiff that its name has become an almost useless search delimiter. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 293 F. Supp. 3d 124, 126 (D.D.C. 2018) (seeking FBI records regarding intelligence operative who prepared dossier on Trump); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 271 F. Supp. 3d 264, 266 (D.D.C. 2017) (seeking records related to settlement discussions in suit brought by House committee to enforce subpoena for documents related to the “Fast and Furious” operation); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 282 F. Supp. 3d 242, 246 (D.D.C. 2017) (seeking FBI records relating to interviews with high-level officials concerning former governor convicted for corruption).

for investigative journalism; (2) what tactics requesters and agency personnel deploy to navigate the regime and how the law might be shaped to respond; (3) how the courts narrowly or liberally implement FOIA; (4) how innovations like administrative alternative dispute resolution might spare agencies and requesters lengthy delays and expense; and (5) how do regimes, beyond the American federal one, promote transparency?

More fundamental than these operations questions is the first principles inquiry and its presumed response: “Why does the public really need a freedom of information law?” and the answer that transparency promotes “hold[ing] the governors accountable to the governed.”³⁰ To test this oft-repeated accountability rationale, consider the handling of two sets of records touching on the powers of war and peace—whether FOIA adequately achieves its purpose, at least in light of the law’s narrow scope, extensively asserted exemptions, and the potent defense of delay:

1. In 1998, the U.S. Department of Defense (DOD) released the notorious March 1962 Operation Northwoods memorandum together with the accompanying Operation Mongoose memorandum.³¹ These ghastly memoranda reveal that DOD aimed to deceive the American public and trick it into supporting a “defensive” war against Cuba by staging terrorist attacks in Washington, D.C. and Miami, Florida.³² What would these memoranda, released 36 years too late for any public accountability, have meant for the professional future of General Lyman Lemnitzer, the Chairman of the Joint Chiefs of Staff, who signed the recommendations, and who absent public disclosure, was subsequently appointed to be Supreme Allied Commander in Europe in November 1962?³³ The records, which pre-dated FOIA, but could

29. See Susan B. Long & Harry Hammitt, *Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media So Long*, 63 VILL. L. REV. 895, 897 (2018).

30. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (invoking grandiose purpose of FOIA in case rejecting use of FOIA as “private discovery tool” seeking witness statements).

31. Memorandum from Chairman Joint Chiefs of Staff L.L. Lemnitzer for the Secretary of Defense, Justification for US Military Intervention in Cuba 1 (Mar. 13, 1962) (forwarding “pretexts” that “would provide justification for US military intervention in Cuba”) (on file with Villanova Law Review); Report by the Department of Defense and Joint Chiefs of Staff Representative on the Caribbean Survey Group to the Joint Chiefs of Staff on Cuba Project 2 (Mar. 9, 1962) (“It is recognized that any action which becomes pretext for US military intervention in Cuba will lead to a political decision which then would lead to military action.”) (on file with Villanova Law Review) [hereinafter *Operation Mongoose*]. The Assassination Records Review Board released these records under special statutory authority, not FOIA. See President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (1992) (codified at 44 U.S.C. § 2107 (2014)).

32. *Operation Mongoose*, *supra* note 31, at 8–9.

33. *Lemnitzer, Lyman L. (Lyman Louis), 1899 – 1988 Person Authority Record*, NAT’L ARCHIVES CATALOG, <https://catalog.archives.gov/id/10572177> [Permalink unavailable] (last visited Aug. 5, 2018).

have been requested on July 4, 1967, would have been subject to, *inter alia*, the national security exemption and deliberative process privilege. They were released only decades after the events with special supplemental statutory authority. Might earlier disclosure of the proposed warmongering deceit have promoted a more probing and skeptical inquiry of America's escalating involvement in Vietnam? After all, it was not long after, in August 1964, that LBJ asked Congress to vote for the Gulf of Tonkin Resolution,³⁴ a blank check authorizing military force, precipitated by dubious DOD reports of an alleged North Vietnamese attack against the USS Maddox.³⁵

2. Multiple classified FBI records detailed Saudi royal family involvement in the funding and execution of the September 11, 2001 terrorist attacks.³⁶ What if these records, covered by national security Exemption 1, among other exemptions, were released when completed in January 2003, two months in advance of the Iraq war, rather than over 13 years later in July 2016?³⁷ These records suggested a state actor sponsored and supported al-Qaeda in an act of war. Under the Bush doctrine, where "any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime,"³⁸ Saudi Arabia, much more than Saddam Hussein's Iraq, was connected to the 9/11 attacks and would have been deemed a "hostile regime."

In both cases, delay in disclosure, together with the operation of exemptions, blunted accountability. Acknowledged release of authenticated

34. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971).

35. See, e.g., Lieutenant Commander Pat Paterson, *The Truth About Tonkin*, 22 NAVAL HIST. MAG., Feb. 2008, <https://www.usni.org/magazines/navalhistory/2008-02/truth-about-tonkin> [<https://perma.cc/2X5R-EU6E>] (concluding Secretary of Defense McNamara distorted facts to mislead Congress into believing there had been a second attack); Robert J. Hanyok, Center for Cryptologic History, National Security Agency, *Skunks, Bogies, Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery 2-4 August 1964*, CRYPTOLOGICAL Q. 1, 49 (2001), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB132/relea00012.pdf> [<https://perma.cc/HG4E-TZ67>] (concluding, based on signals intelligence records, August 4, 1964 attack on the USS Maddox never occurred and was part of deliberate effort to mislead).

36. U.S. S. Select Comm. Intelligence & U.S. H. Permanent Select Comm. Intelligence, J. Inquiry Intelligence Community Activities and Terrorist Attacks of September 11, 2001 H.R. REP. NO. 107-792, pt. 4 (2002), <https://intelligence.house.gov/uploadedfiles/declasspart4.pdf> [<https://perma.cc/FZ7Q-PWUA>] (summarizing FBI findings of Saudi involvement).

37. See Press Release, U.S. H. Permanent Select Comm. Intelligence, *Intel Committee publishes declassified "28 pages"* (July 15, 2016), <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=676> [Permalink unavailable].

38. George W. Bush, *Address to a Joint Session of Congress and the American People*, THE WHITE HOUSE (Sept. 20, 2001, 9:00 PM), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> [<https://perma.cc/ND8L-P5FG>].

federal records might have precipitated very different public reactions, prompted deeper inquiries about proposed courses of agency action, and undermined what have now become accepted narratives. In fact, untimely release encourages the public to favor the critically unexamined, first-in-time, “well-known-fact” and to reject or minimize the later-in-time inconvenient, or even unsavory, disclosure as part of a dissonance reducing rationalization.³⁹

Nonetheless, we must also recognize that transparency entails its own particular set of risks, including the unintended consequence of promoting the darkest portions of our country’s history. What gets publicized from FOIA disclosure is usually bad news—malfeasance, inefficiency, neglect of duty, misdemeanors low and high—more than occasionally sought to “harass and embarrass” agencies.⁴⁰ Further, the theory-ladenness that informs press FOIA requests—“if it bleeds, it leads”⁴¹—motivates FOIA requesters to dog pile an agency in seeking records about already publicized or suggested controversy.⁴² On the one hand, these disclosures may well damage governmental legitimacy.⁴³ On the other hand, FOIA may provide Americans with a helpful tool for appraising our government’s function, not just a muck rake for sowing doubt and insurrection. Regardless and regrettably, what is lost in this digging is what should be clear on the surface: many good men and women labor tirelessly in the service of the country to promote the general welfare. Their good work goes relatively unreported in the *unrequested*, quotidian agency record.

Our 2017 Norman J. Shachoy FOIA Symposium aimed to explore different aspects of the landmark transparency law through five thematic panels. During our first panel, Professors Susan Long and Margaret Kwoka provided empirical context for the FOIA’s function in a discussion

39. Cf. AMERICAN PSYCHOLOGICAL ASSOCIATION, COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 4-5 (Eddie Harmon-Jones & Judson Mills eds. 1999).

40. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1127–28 (2017).

41. Eric Pooley, *Grins, Gore, and Videotape - The Trouble with Local TV News*, N.Y. MAG., Oct. 9, 1989, at 36; Pozen, *supra* note 40, at 1132 (noting study of period October 1999-September 2000 revealed that 25% of stories referencing FOIA “deal[t] with wrongdoing, embarrassing information, and administrative incompetence” (quoting Bruce E. Cain et al., *Towards More Open Democracies: The Expansion of Freedom of Information Laws*, in DEMOCRACY TRANSFORMED? EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES 115, 135 (Bruce E. Cain et al. eds., 2003)).

42. FOIA Project Staff, *FOIA Lawsuits Mirror News Headlines in FY 2016*, FOIA PROJECT (Dec. 9, 2016), <http://foiaproject.org/2016/12/09/foia-lawsuits-make-news-headlines-in-fy-2016/> [<https://perma.cc/VY24-AMN3>] (reporting that “[r]eporters and news organizations sought records about government policies and practices to probe further behind the headlines, and to create new headlines of their own”).

43. Pozen, *supra* note 40, at 1131 (characterizing press reporting based on FOIA as communicating “relentless, and distorted, narrative of bureaucratic failure”).

moderated by Professor Suzanne Piotrowski. Professor Long's article with co-author Harry Hammitt, *Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media So Long*, provides a data-driven examination of FOIA's use by the media.⁴⁴ Long and Hammitt document record-setting levels of litigation brought by press litigants, which represents a dramatic increase from the Press's historically conspicuous absence from the list of top FOIA requesters and litigants.⁴⁵ Why the change? Long and Hammitt explain that congressional amendments have favored news organizations as requesters by providing explicit fee exemptions.⁴⁶ Taken together with political developments such as aggressive government assertions of secrecy and journalists increasingly suing in their individual capacities, media FOIA litigation has exploded.⁴⁷ Professor Kwoka's presentation, sounding themes in her scholarship,⁴⁸ described the unintended requesters who have come to dominate FOIA's operation—commercial and first person requesters. These requesters do not advance the core purpose of FOIA—advancing the public's interest.

During our second panel on “The Press, the Academy, and FOIA,” the *Villanova Law Review* was privileged to hear from David McCraw, Deputy General Counsel, New York Times; Jason Leopold, Senior Investigative Reporter, BuzzFeed News; and David Barrett, Professor of Political Science, Villanova University. Their discussion canvassed a variety of major new headlines involving FOIA records, including former Secretary of State Hillary Clinton's e-mail server, Iraq war reporting, and Trump tweets inadvertently acknowledging classified records. McCraw discussed his work handling FOIA litigation for the *New York Times*. He particularly noted the advantages of suing under the FOIA, including getting to the front of the line to address agency delay and the concomitant advantage of getting one's requests handled by a Justice Department attorney acting as a concierge in securing agency compliance with FOIA. Leopold shared his experiences as a new media government records journalist with a lengthy list of FOIA lawsuits to his name. The lawsuits, he explained, are necessary to get his record requests addressed, particularly in the face of agency FOIA processes that characterize his requests as “complex.” Barrett, a historian by practice, offered his perspective as a recent academic plaintiff in *Barrett v. CIA*, where he successfully sued the Agency for release of volume 5 of the history of the Bay of Pigs operation.⁴⁹ He advised that if you want to

44. 63 VILL. L. REV. 895 (2018).

45. *Id.* at 897.

46. *Id.* at 900–04.

47. *Id.* at 897, 903.

48. See Kwoka, *supra* notes 26–27.

49. *Barrett v. CIA*, Order Pl.'s Mot. Att'y Fees, No. 2:16-cv-04279 (E.D. Pa. July 28, 2017) (recognizing Barrett as prevailing party that catalyzed CIA's release of draft Volume 5 and awarding him fees).

get the CIA to release records, “get a lawyer.” A transcript of the lively panel discussion, moderated by myself, is included in this issue.⁵⁰

Our third panel turned to the federal system of checks and balances and the use of FOIA to effect congressional oversight of the executive branch.⁵¹ Professor Catherine Lanctot, Villanova Law, moderated a discussion between Aram Gavoor, Visiting Associate Professor of Law, George Washington University Law School, and Katy Rother, Senior Counsel, U.S. House of Representatives. Gavoor characterized FOIA as an important force multiplier for the public interest with the general public as deputized requesters that aid the House and Senate oversight committees. For her part, Katy Rother noted the inadequate staffing on the Oversight, Government, Reform (OGR) committee to cover the entirety of the federal government. She observed the important role news media and FOIA advocacy groups play in ferreting out information that allows the House OGR to investigate flagged concerns more deeply with its own constitutional tools, including subpoena authority.

In Volume 63, Issue 5, the *Villanova Law Review* has published a transcript of our Shachoy Symposium’s fourth panel on “Resolving FOIA disputes.” That panel featured a distinguished cross-section of the FOIA bar: Alina Semo, Director of the Office of Government Information Services (OGIS), who mediates requester disputes with agencies and assures agency compliance; Michael Bekesha, an experienced staff attorney with conservative FOIA requester Judicial Watch; Marcia Berman, Assistant Director, Federal Programs Branch, Civil Division, U.S. Department of Justice, who coordinates the defense of the most important and sensitive FOIA actions litigated in the U.S. district courts; and panel moderator Margaret Kwoka, now law professor at the University of Denver and former FOIA litigator for the progressive advocacy organization Public Citizen. The panel began with Director Semo discussing the OGIS alternative dispute resolution mechanism and its voluntary, facilitative mediation. In 2016, that part of OGIS’s portfolio was dramatically expanded to FOIA disputes arising at any point during the FOIA administrative process.⁵² Director Semo’s article elaborates on her live presentation of the past, present, and future of the “federal FOIA Ombudsman” and discusses OGIS’s mediation, compliance, and advisory opinion functions.⁵³ For his part,

50. A video recording of this second panel is available at https://www.youtube.com/watch?v=sFZUHHBYcXM&list=PL_Z9mt0HJeskbWI0npsM6pWaf_5cVPYqV&index=3&t=0s [<https://perma.cc/9HS4-XHAX>].

51. A video recording of the third panel is available at https://www.youtube.com/watch?v=l3loJL16Njk&list=PL_Z9mt0HJeskbWI0npsM6pWaf_5cVPYqV&index=4&t=0s [<https://perma.cc/8WJZ-BC59>].

52. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, 539-40 (2016). The new law authorizes OGIS involvement in mediation as soon as there is an adverse determination, even prior to exhaustion of agency remedies. 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb).

53. Alina M. Semo & Sheela Portonovo, *OGIS—Creating a FOIA Process That Works for All*, 63 VILL. L. REV. 959 (2018).

Michael Bekesha offered a perspective from the requester bar. FOIA litigation prompts agencies to comply, effectively providing litigants with “court supervised production” when agencies fail to respond to calls or inquiries.⁵⁴ Assistant Director Berman noted that FOIA litigation now accounts for 40% of the D.C. district court’s civil docket where advocacy groups on “both sides of the political aisle” use it as “a political weapon.”⁵⁵ The panelists and moderator engaged a number of litigation-reform-related topics, including agency delay, unreasonably short statutorily mandated response times, inadequate agency resources, information asymmetry in FOIA litigation, and FOIA procedural exceptionalism.

Our fifth and final panel considered the future of FOIA specifically and transparency generally. Congress was an innovator and leader in the transparency field at the time of FOIA’s enactment but now many jurisdictions have transparency laws, from the fifty states and their little FOIAs to different countries from around the world. What can we learn from others’ experiments and experiences? What innovations have others pioneered that might be transplanted into the American context? Fran Burns, Professor of Practice, in Villanova University’s Department of Public Administration moderated a wide-ranging discussion of the approaches different jurisdictions are taking to transparency. Croatian Commissioner of Information and law professor Anamarija Musa provided a European and European Union perspective on promoting transparency. Panelist Professor Suzanne Piotrowski addressed the impact that the open government agenda, such as the Open Government Partnership espouses, is having on traditional freedom of information regimes. Freedom of information regimes, focused on transparency and accountability, contrast with open government regimes and their emphasis not only on these goals, but also public participation and the use of technology to promote data analysis and efficient government. Piotrowski’s observations about the two transparency tools and their relative merits are elaborated in her article published in this issue.⁵⁶ Also in this issue, Professor Richard Peltz-Steele questions the assumption that access to information should be limited to access to government information.⁵⁷ Instead, he observes that the accretion of power in private hands, often with private institutions fulfilling public functions, casts doubt on attempted line drawing between public and private.⁵⁸ Invoking South Africa’s example, Peltz-Steele proposes a right to access information maintained by *non-governmental actors*.⁵⁹ These

54. *Resolving FOIA Disputes*, 63 VILL. L. REV. 995, 1001 (2018).

55. *Id.* at 1003.

56. Daniel Berliner, Alex Ingrams & Suzanne J. Piotrowski, *The Future of FOIA in an Open Government World: Implications of the Open Government Agenda for Freedom of Information Policy and Implementation*, 63 VILL. L. REV. 867 (2018).

57. Richard Peltz-Steele, *Access to Information in the Private Sector: African Inspiration for U.S. FOIA Reform*, 63 VILL. L. REV. 907 (2018).

58. *Id.* at 955.

59. *Id.* at 951–52.

insights suggest new avenues for FOIA reformers to consider as the law enters its next fifty years of operation.

Our five symposium panels canvass a variety of issues raised about FOIA's operation in its first fifty years. The panelists have demonstrated how FOIA can effectively operate as a transparency tool when motivated requesters employ the powerful tools it provides. Like most legislative enactments, however, FOIA has its limitations, oversights, and unanticipated uses, which become apparent in discussing its operation. Our hope is that our symposium issue may contribute to a good government dialogue to improve FOIA, so it may function effectively for another fifty years.