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Tuan N. Samahon

David McCraw

Jason Leopold

David Barrett

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THE PRESS, THE ACADEMY, AND FOIA

Transcript of the Second Panel of the 2017
Norman J. Shachoy Symposium*

MODERATOR:

TUAN SAMAHON¹

PANELISTS:

DAVID McCRAW²

JASON LEOPOLD³

DAVID BARRETT⁴

David McCraw: Thank you very much, and thanks everybody for coming out and to the organizers. I guess I should try to explain the craziness of my position, which is that Susan Long and her colleague . . . showed the *New York Times* is some distant star out lying there in FOIA world that in the sixteen-year period of the Bush and Obama presidency, the *New York Times* filed thirty-six FOIA lawsuits, all by me. The next mainstream media organization was at eight. We ended up filing more FOIA suits than the

* This is an edited transcript of a panel presentation given at the Villanova University Charles Widger School of Law on October 20, 2017 as part of the 2017 Norman J. Shachoy Symposium - Fifty Years of Operation Under the Freedom of Information Act, 1967 – 2017.

1. Professor of Law, Villanova University Charles Widger School of Law. Professor Tuan Samahon began THE PRESS, THE ACADEMY, AND FOIA panel by disclosing two potential conflicts of interests on the panel. Tuan Samahon stated:

Thank you for the introduction, Jordan. As she mentioned, I'm Tuan Samahon, not Terry Mutchler. I'll be filling in, pinch-hitting here. Because of this unique situation, I do need to disclose a couple conflicts of interests. The best way, of course, to do that is through transparency. I was originally not to be moderating this panel, but David Barrett, who is on our panel, was my client. I was his attorney representing him in the very first successful lawsuit under the 2016 FOIA Improvement Act. So David was a successful plaintiff in *Barrett v. Central Intelligence Agency*, here in federal court in Philadelphia, and David will be speaking about that litigation. I should also probably disclose, though we didn't ultimately collaborate, that David McCraw and I, also with the *New York Times*, had talked together about some litigation against the office of legal counsel in the justice department. So with those disclaimers having been made, keeping my academic nose clean, let's go forward here with our distinguished panel and let's begin with David McCraw, who I am delighted to have, our deputy general counsel of the *New York Times*.

2. Deputy General Counsel, *The New York Times*.

3. Senior Investigative Reporter, *Buzzfeed News*.

4. Professor of Political Science, Villanova University.

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entire industry, as it turned out, over that period, which is either a sign that we're really special or really insane. So I'm going to try to explain why it happened that way and what I think of its use here. One thing that Professor Kwoka's research showed there, which I thought was interesting, is that there is a difference between requests and lawsuits. The fact that mainstream media may not be filing lawsuits is not really indicative of how much FOIA use there is. There's a lot of requests being filed as you saw from the Bloomberg slide. I think that was probably from their news site, rather than commercial, but it's hard to tell with them. But in any event, for most reporters the process, whether it's the request process or going to court, is too slow, it's too public. You want to get an exclusive, you're much better off working from leaks. You're much better off talking to a public information officer, at least in the first instance, as opposed to litigating. So that explains part of what's going on here and part of it, of course, too, is some institutional constraints.

The fact is, other than myself and the lawyers that Jason works with, most lawyers really don't like doing FOIA cases. I think they're great, but they lack the sex appeal of defending a libel suit or fending off a subpoena to a reporter. They're hard work—you have to be persistent—so I think there's a certain amount of professional reluctance. The second thing is the idea that a lot of media companies don't want to hire outside counsel and spend money to do FOIA, even though there is fee shifting if you succeed. And so what we have done is simply moved it all in house so we don't have to worry about that. The great thing about FOIA is that as an in-house lawyer, if I win, I get to pretend that I'm an outside lawyer and can charge the government at market rates. I think of myself as a really, really high-powered, big-time, big-firm lawyer when I am in that pose. And so in the last fourteen months we have generated in three cases \$220,000 in fees. That's just found money. We went out and hired somebody with that money, another lawyer. I think most companies are a little reluctant to get there and take that risk, but my company, fortunately, has done that.

Let me just very quickly highlight what I think are sort of the lessons that I've learned from doing these cases. And one is much of the blame for what's wrong with FOIA I think lies at the feet of the courts. Fifty years ago Ralph Nader, the consumer advocate, wrote a piece called the Freedom from Information Act,⁵ just after FOIA was passed. He went out and his group went out and researched, working terribly. Last year in the Yale Law Journal I wrote an article about that article.⁶ For those of you starting your legal career, parasitic behavior is always rewarded, and if somebody great has done something you know just hang onto it, which I did. So I wrote about the Nader article. What was fascinating were the things that

5. Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L.L. REV. 1 (1970).

6. David E. McCraw, *The "Freedom From Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. FORUM 232 (2016).

he thought were bureaucratic problems: the bureaucrats were delaying, the bureaucrats were using exemptions, completely out of line with what congress intended, that privacy was being treated as some sort of overarching goal that the government was supposed to protect, rather than to actually balance with the public interest. All of those things are now the law. Everything he saw as bad bureaucratic behavior has now been adopted by the courts and are the law of the land. Congress keeps amending, they keep trying to make the statute better, and the courts keep taking away from it. And I find that very discouraging. When I was doing the article for Yale, law students being law students and therefore annoying, kept saying, in a good way, “well why is that” and I’m going, “I don’t know why that is.” But I think part of it is so many cases in FOIA have been brought by pro ses or incarcerated individuals. I think the court gets exasperated. I think it requires them to do some dull work sometimes, to look at documents, they get exasperated. I think they’ve bought into the sympathy for the agencies and I think that’s unfortunate.

The second thing I’d point out is when I first started this, I brought FOIA cases in essentially and tried to be sort of thinking about and conscientious about why we’re doing this. Two things: one is in the information evergreen, because it’s going to take a long time if that information is not going to be helpful, then in six months from now, a year from now, eighteen months from now, we’re not going to go after it. Or I thought I wanted to change laws, so I took cases where I thought that we could establish good law. Now, we’re not that discriminating, because what I’ve found was that litigation becomes the way to move to the head of the FOIA line. I was on a panel at Harvard last year where a bunch of people who do these cases were talking about it, and our ideas, it was like this bizarre litigation experience. Because most litigators turn around and say, “then I won that case and then I won this case . . .” We’re all saying, “and then we settled and then we got . . .” because a lot of time what we’re doing is we’re bringing the suit, the government attorney comes in, the government attorney becomes kind of the concierge for FOIA, because providing services moves us to the front of the line. The four-hundred dollar filing fee essentially gets us out of that long queue at the agency. We now have a court breathing down the neck of the AUSA, the AUSA is now breathing down the neck of the agency, we get the documents, we call it quits. That’s not how it should work but that’s the truth of how it goes.

The last thing I would just say is I think that one of the great frontiers here has been attacking exemption five, which is the deliberative process exemption, which takes out most of everything you’d ever want to see from the government where they have said its deliberative, it’s advisory. And we have been fighting that fight over and over again and I think it’s the one place where we’ve made a little progress but I think we need to make a whole lot more. I think that you’re going to find that the instinct to secrecy is great in the agencies.

The last thing I'd underscore and end with is that I was representing pro se a writer in a case that's called *Florez v. CIA*,⁷ which the Second Circuit wrote a great decision about, and we won the right to have the CIA do a further search to see where they had documents. The case came out and I received an email from a professor who said, "I was reading your case and I don't know what you were talking about," which is not unusual, and then he said, "all those documents were released in 1974." The CIA had told use they were secret, many of them were in the congressional record, that's just how that frustration goes.

Tuan Samahon: Thank you, David. We'll move now from David McCraw to Jason Leopold.

Jason Leopold: Well again thanks for the invitation to be here today and I'll introduce myself. Jason Leopold, I'm an investigative reporter at *Buzzfeed News*, I use the Freedom of Information Act a lot in order to pry loose documents mainly, at least over the past five years, from highly secretive agencies, like the CIA, the FBI, the NSA. I realize this is not a contest, but I have forty-one lawsuits against the government, mostly filed as an individual requester.

David McCraw: He pulled this at me in front of Congress one day, and I stipulate.

Tuan Samahon: I believe Susan Long's list of the top FOIA disputants puts you at number one.

Jason Leopold: And you know, as David said, this is not the way it should be and largely what I have found is that agencies are just reluctant to release records. If I could just take a step back and explain how FOIA became an incredibly powerful tool for me and why I use it the way I do. I think it was about six or seven years ago I had reported a story⁸ on Air Force nuclear missile officers, the officers who are actually responsible for turning the key in the event if they are called upon to launch nuclear weapons. There was an ethical—ethics training—that they were given. And this ethics training was amazing, and somebody that I knew obtained documents, and it was a PowerPoint presentation instructing these nuclear missile officers on the ethics and morals of launching nuclear weapons. And this ethics training contained pictures of Jesus on a horse holding a nuclear missile, and it essentially explained that Jesus would launch a nuclear weapon if he was called upon to do so. And there was also a presen-

7. *Florez v. Central Intelligence Agency*, 829 F.3d 178 (2d Cir. 2016).

8. Jason Leopold, "Jesus Loves Nukes": Air Force Cites New Testament, Ex-Nazi, to Train Officers on Ethics of Launching Nuclear Weapons, TRUTHOUT (July 27, 2011), <https://truthout.org/articles/jesus-loves-nukes-air-force-cites-new-testament-ex-nazi-to-train-officers-on-ethics-of-launching-nuclear-weapons/> [<https://perma.cc/YSS9-KW8N>].

tation in there from Wernher Von Braun who was considered the father of the modern-day space program but who is also a former Nazi SS soldier. And these are the two moral and ethical guiding lights for launching nuclear weapons. I looked at these documents and I was just blown away by frankly what it said and that this was an ethical course that was taught for twenty years. So I thought that this was a really great story, and I called the Air Force, and I called some people to get some comment, and they told me, “yes, in fact we’ve been doing this for twenty years.” I wrote the story, attached the documents, and was amazed by how it took off.

The story itself was picked up around the world. In twenty-four hours the Air Force suspended the training and within a week they ended it outright. And I just saw that the power of having documents and how powerful it was that the documents speak for itself. I didn’t have any anonymous sources. There was no one speaking on background. The documents were the primary source material. So that really started for me this—certainly a bit of an obsession on—trying to gain access to government records. And as a national security reporter, we rely upon anonymous sources and in this climate right now obviously people are reluctant to immediately believe what anonymous sources are saying because everyone has an agenda. So I’ve found that by trying to gain access to these records whether it’s about the CIA’s torture program, whether it’s about Guantanamo and their force feeding procedures, the FBI’s documents on Occupy Wall Street, which by the way they originally told us that they had none, until we sued them and they realized “oh yeah we have several thousand records.”

One, for me as a reporter, what it did was once I was able to get some of these documents declassified, it helped me gain access to individuals who felt a bit more comfortable speaking on the record. And what has happened, however, is in the course of litigation the government sees me as a nuisance. They’ve called me a FOIA terrorist and that’s actually what the FBI has referred to me as. As recently as a few months ago, the NSA in an extraordinary open America filing in court says I have weaponized FOIA and essentially is using it to try and take down the government, that my news organization, *Buzzfeed News*, hired me to essentially deluge the government with FOIA requests, and they simply saw it as I am trying to get ahead of the line. Ultimately we prevailed against the NSA and forced them now to release all their FOIA stats every month in regards to this lawsuit⁹ but it’s just been incredibly difficult, still difficult right now, to try to gain access to these records. And like David, I go to court often times to get to the top of the pile. To get records released in order to provide the public, provide all of you, with timely information about what’s taking place behind the scenes.

9. *Leopold v. National Security Agency*, 196 F. Supp. 3d 67 (D.D.C. 2016).

Tuan Samahon: Thank you, Jason, very interesting. We're going to move now to David Barrett, our own colleague in the department of political science.

David Barrett: Thank you, Tuan, and I'm delighted to be here with Jason and David and all of you. Again, my name is David Barrett, I'm a member of the political science faculty at Villanova University. So I'm a political scientist by training but really I'm a historian. I do presidents, congress, wars, the CIA, national security, and the Vietnam War and President Johnson is a real topic of mine. To the extent that I've had success as a scholar, it's because I'm really into archival research. That's what I do and I think I'm pretty good at it. My success is not based particularly on lawsuits, so you've done dozens of these lawsuits, I've done one. I do like the name of the lawsuit. It's David Barrett versus the CIA.¹⁰ I take great satisfaction in that name. And my friends, when with Tuan the lawsuit was filed, I loved being kidded by friends that "watch out for those strange cars that are creeping through your neighborhood," and weird phone sounds on my cell phone.

So most of you know what Bay of Pigs was. In 1961, President Kennedy authorized the CIA to do what was supposed to be a secret intervention in Cuba to overthrow the government of Fidel Castro. Planning for this event had been seriously underway in the last year, especially of the Eisenhower presidency. The event failed spectacularly. It was a covert action that wasn't very covert. The *New York Times* had some reporting on it in advance of the event, other journalists had even more. It wasn't very covert. It failed. CIA basically used Cuban exiles to go and try to overthrow Castro. Some—I think dozens—died. Hundreds were imprisoned in Castro's, they were imprisoned in his prisons. So a big event and then Kennedy himself privately said how could I have been so stupid. Publicly he took responsibility for the failure. There was a lot of finger pointing in the aftermath of the Bay of Pigs. The last thing Kennedy wanted was to be blamed too much for this event. There was a lot of leaking going on the CIA is to blame, the military is to blame, the State Department is to blame.

Well anyway in the 1970s and 80s, a CIA staff historian named Jack Pfeiffer took on the task of writing a five-volume history of Bay of Pigs.¹¹ Federal government agencies, I didn't know this until about a decade ago, I guess all federal government agencies have staff historians who write histories of what those agencies do, so Pfeiffer was at the CIA. Now the thing about these histories is at CIA and NSA, and some other places I'm sure, well after they're written they are stamped top secret and they're just sort of put away. By the time Pfeiffer had completed his work, and now we're into the sort of early 80s, he wanted to have these things declassified. He

10. *Barrett v. Central Intelligence Agency*, 2:16-CV-04279 (E.D. Pa. July 28, 2017).

11. Jack Pfeiffer, *Official History of the Bay of Pigs Operation*, C01254908 (Approved for Release August 9, 2016).

actually went to court to get the declassification of the very volumes he had written. Of these five volumes, one deals with transition period Eisenhower to Kennedy that's strangely enough labeled volume three. There are a couple other volumes that are more about the event itself. And a couple of the volumes including volume five—subject of our lawsuit—which are really about Pfeiffer's analysis of other groups' analyses of Bay of Pigs and who was to blame and all of that. And so this was a fiercely fought over question. Pfeiffer was unsuccessful in getting the histories he had written declassified.

Across the decades, National Security Archive, affiliated with George Washington University, pursued through Freedom of Information Act, and eventually lawsuits, the declassification of these volumes. It turns out because of the job that the JFK Assassination Records Collection Act, one of the volumes actually was declassified by the CIA. They put it in the national archives and they didn't tell anybody it was there. I was doing research, there are a couple hundred boxes, I forget how many hundreds of boxes in the JFK Assassination Records Collection, but I went through them all and one box was marked "CIA miscellaneous." I open it up and here's this like 350-page history, this volume three transition period, Eisenhower into very early Kennedy. And I had a book that was just about to come out in a couple of months called the CIA in Congress: from Truman to Kennedy up through Bay of Pigs, and I was so annoyed at myself that I didn't know this declassified history even existed. And then I thought about it and I thought well yeah but I've never seen anyone cite it. It finally occurred to me that nobody knows—oh some people knew it existed—but no one knew that it was declassified. So I was able to, I couldn't use it in my book, a bit frustrating, but I was able to publicize it, some newspapers wrote about it.

National Security Archive pursued the declassification of the other volumes. They succeeded in getting three of the other four declassified. Volume five is the one that the CIA was hanging on to. Through FOIA, through lawsuit, actually in a National Security Archive suit about that volume five had success at the district court level but lost, if I believe this is correct, at the circuit court level. So CIA was prevailing. As best I could understand CIA's position, they were claiming this was a draft volume. Pfeiffer had not quite finished it. Historians working for government agencies would experience a chilling effect if they knew that some draft history they wrote was later made available. And there's the whole section five deliberative process which I won't go into.

Well anyway, so along the way I met Tuan Samahon. Now I'm not a person who sues people. I've never had a lawyer in my life. I've never sued anyone. I've never really thought about even suing anyone. Never. But you know, Tuan and I talk about these things and he tells me that you know there's a potential for Congress to pass a new law which President Obama would likely sign amending the FOIA law and so we made plans in

2014; along the way I filed a FOIA request that was rejected. [In] 2015 I requested a clarification of CIA's denial. I requested an administrative appeal. CIA deemed that a new FOIA request, which I think meant the cancellation of the old request. Anyway, so Tuan had a strategy that after the new law was passed and signed we would file a new FOIA request, which we did. CIA rejected that. Let's see they cited what they said was a still pending previous FOIA request.

Tuan Samahon: No they cancelled it is what they told us. We're cancelling it. We don't like it, we're cancelling it.

David Barrett: So we went to court. Philadelphia federal court. So we did that. After a month or so it became clear that the CIA was going to make the document available. We would settle out of court. They said—now this is the thing that irks me—they said in writing we're going to do this because of Barrett's FOIA request and the lawsuit. So weeks go by then they did make it available. I give them credit they made it available you can find it online with very, very few redactions. But they said nothing about the lawsuit. Now meanwhile we're also pursuing reimbursement of the legal costs. The CIA did not want to pay the legal costs they say in writing I'll just sort of quote the federal judge sort of summarizes what the CIA argues.

The CIA argued that the plaintiff, I'm quoting the judge that's me, "the plaintiff did not confer a public benefit because his actions did not result in the release of volume five. And the CIA argues that the CIA had a reasonable basis for withholding the requested record. The Court disagrees." Unquote. That's the sentence I like. The court disagrees. Thank you Judge Cynthia Rufe, who by the way is an appointee of President George W. Bush. So we did get the document. We got substantial court costs from them. So in some ways this is a success and I am within a minute of being done, I promise. So is this a success? Well you could say sure, but again I'm not a person who sues people. I haven't really had an attorney I've gone through life not having a lawyer. I find it depressing and I mean I've listened to what you two have said. I mean it takes going to court to get these things. And you know most people don't do that. I mean you know *BuzzFeed* and the *New York Times*, I mean great that you're doing that but most sort of regular people don't do that, and I've heard from a panelist who will speak later today that FOIA has been very successful in a lot of ways especially because of domestic policy results, but I'll just give you the sentence, one last sentence that I wrote for a brief article I wrote about this lawsuit. It reads, "very sadly, I have concluded that if you want to get the CIA, the CIA, to declassify something that it wishes to keep secret, get a lawyer." Thank you.

Tuan Samahon: Thank you, David. So now we're going to move to our discussion on our panel and then we'll open this up later then to ques-

tions. So the first question I have for our journalists on the panel is you're the favored class of requesters really the Freedom of Information Act, as Margret put it, was perhaps written by journalists and also was for the benefit of journalists.

However, we know that the reality of the Freedom of Information Act is that both under requests and the subsequent litigation you can experience enormous delay, which may limit its utility for a business that is driven by timetables, deadlines, and the press cycle. What sort of recommendations might you have, given years now of experience with the Freedom of Information Act, what could be done to sort of change this? Do we need some sort of prioritization in the statute? Some sort of front-of-the-line and relative to other types of civil litigation? Do we need to have a FOIA court?

Jason Leopold: Probably yes, yes, yes, and yes. But the reality is that the journalists are not treated any differently than anyone else. Except when it comes to the fees. Because we are serving the public interest, we can ask for a waiver of fees. But I think there are several things when it comes to journalists filing FOIAs and trying to inform the public. One, the requests should be written well in order to get a timely release of records. Depending on the agency, you should really perfect your request. Understand the system of record, where these records are located. If you file a request with the State Department for example, the State Department is a massive, massive bureaucracy with offices all over the world and if you are going to file it to the Office of the Secretary and say you want things on Russia for example. Perhaps, that may go to the Bureau of Eastern European Affairs or Eurasia Bureau, or Bureau of Intelligence and Research. So it is really important for the requester to understand how the agency works, where records are stored. Because that could actually result—you could end up saving months and months by perfecting the request; know what to essentially ask for.

The other thing that can be done, depending on the agency, certainly with the intelligence agencies, the NSA, the CIA, Defense Intelligence Agency. I hate to say it but if you are looking, if I am looking for a document out of the CIA, I am not waiting for the CIA to get around to it. I am filing my request and suing after twenty days. Because the reality is that they are not going—unless you somehow miraculously end up in the, what they call the simple queue. They have three different queues: simple, complex, and I think there is a medium. I have never been in either, other than the complex queue. No matter what the request is or how well I know how the system works. This is the backlog. They have a backlog right now.

I will note that a couple of days ago I was floored by this letter that Secretary Tillerson, I am going to say, *apparently* wrote because I have not confirmed it yet. But it is a letter on FOIA and he essentially said that the State Department has 13,000 outstanding FOIA requests and that they are

hiring additional staff and they are going to try to push through these records as quickly as they can and if anyone has any questions or suggestions, send an email to foiasurge@state.gov. That is actually what the letters says. There are two things. One, it is really important for the requester right now to understand how backlogged the agencies and how difficult it is to still get the records despite the passage of the amendments last year. With that noted, try to see what you could do to help speed up that process.

David McCraw: Jason hit all the points that I would as well. He is absolutely right. But let me make three points quickly if the courts put real pressure on the agencies, they would have a great change, especially about delay. Delay is the number one problem with FOIA. One of the first FOIA cases I had dealt with the Department of Labor and access to this database. They have a list of the thirteen thousand worst places to work if you do not want to get killed at work. And they would release the list of the names, but they would not release who was first and who was thirteenthousandth. So we sued over that. They came back the agency had come—before we sued, we had put in a request and the agency came back and said that it would take roughly eleven and a half years to review the data and decide whether they could be released, and, you know, we are the failing *New York Times* so I was not sure we were going to be around that long. I thought it was kind of preposterous. And the judge just pulls out FOIA during our first conference and says, “It says twenty working days here. I can understand if you said maybe it was going to take forty, but really? It is going to take years?” If there were more judges who are willing to kind of put that kind of pressure, I think it would change.

The second thing is that, as Jason said, and this is one of those things that he is a master of and that makes him so good at this and that other wish they had, is that when I do a presentation for reporters, they always say it is not a vending machine, you do not put in your FOIA request and the thing falls out. It is like the vending machines at the *New York Times*, you have to shake them, it takes your money, you have to do all these things. And the people who are really good at it, like David Barstow, who is an investigative reporter at the *Times* and who has won the Pulitzer prize multiple times. I was working with David on one of these for the Department of Defense and I said, “Well, you know, David, I do not think we are going to get a response soon.” And he said, “Well, Judy’s sick.” And I said, “Who is Judy?” Judy is the FOIA officer. He is on the phone with Judy every day. He knows how her kids are doing in school, when she’s on vacation. He treats it like reporting. He is cajoling. He is threatening. He is charming. He’s doing all that stuff. It is just reporting. It is just a tool of reporting. It is a thing you would do if you were working a source, same with officers.

The final thing I would say is that many of the FOIA officers that I meet privately that are really well meaning and well intentioned, they need

to be set free. They get locked in. If they release something inadvertently, they are in trouble. So the instinct is not to do that. Because they don't really have power within the organization. The example I would use is, there is a case, I think it was called *Taylor v. NSA*,¹² out of Georgia, where a guy wrote in and said he wanted all documents pertaining to the implant of electronic monitors in his brain by the NSA. The NSA responded by saying we can neither confirm nor deny that we have any documents. The guy is paranoid. Why are you doing this to him? Why do you not just say we don't have them? But you know the book is that we do not reveal our surveillance techniques.

Tuan Samahon: Maybe he is not paranoid.

David McCaw: I know where he is right now.

Tuan Samahon: So now, speaking to our distinguished panel, especially the press representatives here, you have made it. So at one point Jason, it must have been very difficult to find pro bono counsel, but now I am sure that you have got many a lawyer willing to line up to represent the great Jason Leopold. And of course, David McCaw, the best thing that ever happened to the *New York Times*, as far as I can tell, was the election of Donald Trump and so you are going to have lot more supporters and subscribers and more resources, but what was it like at the beginning, Jason, when you tried to find pro bono counsel? How hard or easy was it? Because this is sort of an access to justice issue.

Jason Leopold: Sure. It was very difficult because what I noticed was when I would read lawsuits, when I would read FOIA lawsuits, and it's not the majority, but there were many people who are filing as individuals, whether they were filing as individual reporters or even some news organizations that hired outside counsel, they would hire big firms like Jones Day, for example, or I don't know any other—

Tuan Samahon: Ropes & Gray.

Jason Leopold: Yeah. Where the attorneys were not necessarily specialized in the Freedom of Information Act. It did not mean if you spent lots and lots of money with a big firm that it automatically scared the government and suddenly you would see a large volume of records released. In some cases, I saw very little was released. So I tried to find attorneys who specialized in FOIA. That was difficult because there were very few who did so. I was very fortunate to find a lawyer that I have been working with for about seven or eight years now, whose name is Jeffrey Light in D.C., and, in fact, on the track list, he may represent like a third of all the lawsuits that are on there. But it was difficult and it was interesting over the

12. 618 Fed. Appx. 478 (11th Cir. 2015).

years as—and this goes certainly for Charlie Savage at the *New York Times* and many of the other great reporters there—as others in the news media started to see the success that reporters would have with freeing up records, famously the drone memo case that the *New York Times* had¹³ and some of the Guantanamo documents that I was able to release, I think that it opened it up more. More news organizations wanted to get involved in it. Reporters wanted to get involved and so attorneys who did specialize, stepped up and they were being accessed quite a bit more. It was very difficult and now I see many people offering up pro bono work. There is an attorney in DC who specializes in national security work. After this administration came into office, he sent out a tweet saying, “Journalists come to me. I will help you sue pro bono.” That was not happening seven years ago. It is just a different time now.

Tuan Samahon: So we have been talking mostly about the high profile and maybe somewhat sensational documents. And you know there is a whole body of work out there which is sort of the quotidian slaving of the federal government and there is a sense in which when something begins to bleed somewhere, that it draws more attention. So the press, the journalists are sharks and that is what you go to but it may be the case that there are other stories yet to be discovered. I don’t recall many stories about these exotic financial instruments prior to 2008, which would lead to the end of the financial world there. Is there a sense in which let me—let me put this in a different way. How do your journalists get the idea that a particular agency would have records that they should care about? There is a certain theory laden in these requests. It is not an affirmative system with disclosure.

David McCraw: Yeah. You are right that there are sexier cases, which people are attracted to, and it is one of the things that I fight internally. For instance, there were twenty-three Hillary Clinton FOIA email cases—we were not on any of those—and people are saying, “Why are we not in this?” Because if they win, everybody is going to get them. That is how it works; released to one, released to all. Why don’t we focus on what people are not doing, so we can use our resource wisely? So that is what we have attempted to do. But you are absolutely right, Tuan, that one of the things that I look for is what kind of reporting has the person done. What has the person really done to get at this document? Through sources, through public information, if you come on behind that, then as Jason was saying, the FOIA request is going to work. Let me give you an example.

We were seeking the documents on the chemical weapons that were found in Iraq after the war. U.S. personnel were sent out to clean up the old Saddam Hussein ammunition dumps. There were chemical weapons in there, crude, but people were getting gassed, people were getting in-

13. *New York Times Co. v. U.S. Dep’t. of Justice*, 758 F.3d 436 (2d Cir. 2014).

jured from coming across them. And that was all classified. Our reporter, Chris Shivers, the great war correspondent, he said, “Request these documents.” And he named three classified documents by name, which we requested and of course the government had to respond, “We refuse to confirm or deny those documents.” Even though it was obvious we had seen them. That puts them in a very awkward position going forward and we were able to also in that case show how many disclosures there were around that. We went and we found every possible public reference to these documents or at least the subject matter of the documents. Ultimately, we won on that case after it became clear we were going to win on summary judgment. But a lot of that is just having the reporter partner with us to do the homework on these things. What do you know about the documents? Where are they? What has been said publicly about them? If you can get those things, you are going to have a very powerful FOIA argument.

Jason Leopold: Can I just add also? Just on the note of getting ideas. In November of 2014, it became clear to me that Hillary Clinton was going to run for president on the Democratic ticket. At that time, I put in a FOIA request. I actually do not know why. But, I know I said to my editor, “I think Hillary Clinton is going to run, clearly she is going to run for president. Why don’t we ask for all of her emails?” And I put in that request. And you know what I wanted to do with that was simply inform the public about, the nation’s top diplomat, how this person would serve—how a Clinton presidency may look like based on these communications. That was just an idea knowing that we would have a steady stream of stories throughout the campaign. We sued in January of 2015, without having any idea that two months the *New York Times* would break a story about Hillary Clinton had a private email server. So the lawsuit that I filed became the vehicle by which to release all of those emails monthly to the detriment Hillary Clinton. Unfortunately, the idea of these news stories just never happened the way that I envisioned because the scandal itself about the server took over. Because the volumes of emails that were released were very informative.

Also, getting to a point that David made about the classified disclosures, I had filed requests for years and years with the CIA about arming Syrian rebels. This was a top-secret program that clearly President Obama discussed many, many times. And the CIA continued to issue me a “they can neither confirm nor deny it” and comments that Obama made were not specific as to the actual program. But Donald Trump tweeted about this program recently and essentially declassified it. Or at least, that is the argument I made yesterday when I sued the CIA for—

Tuan Samahon: This is what you filed yesterday?

Jason Leopold: Yes. For all those records. That is what we are arguing is an official disclosure and he is an original classification authority, and yes, there you go. Hopefully we get those records.

David McCraw: It does really show where we have been. I have the same suit in New York that Jason has over the tweet. We were actually at a preliminary conference with the judge and it was one of the few times where I have seen the lawyer for the government, the lawyer for the *Times*, and the lawyer for the judge trying not to laugh. The argument made is that the New York Times doesn't understand the syntax of Trump's tweet that he is not really saying what he is saying. I have to stipulate to that. I am an officer of the court. I cannot lie. I do not understand his syntax. I have to agree with Jason that he has declassified that program by tweet.

Jason Leopold: The feed here, right?

David McCraw: Right. And it is such a change—because I have been in cases where there has been what we consider either an official acknowledgement of various documents—and usually you are doing deep dives into archives and congressional records and so forth, the idea that we are now talking about 140 characters as official acknowledgement is really delicious.

Jason Leopold: Yeah, I am excited about it.

Tuan Samahon: Maybe we could turn for a moment now to talk a little bit to talk about some of the abuses that you have experienced at the hands of agencies, both with exemptions and other dirty tricks. We have mentioned one of them already, which was the idea of trying to use a nongovernmental email server as a way to circumvent searches so that a FOIA officer will come back, “no such records.” David Barrett? Can you tell us—so what were the indicia that draft volume five was actually a draft? They originally said, “This is deliberative process materials.” How obvious was it that this was just a draft as was claimed, so it was delivered to process.

David Barrett: You know, it is not a draft. It is just not. I mean again, you can look at it online. It is a couple of hundred pages. That one volume is couple of hundred pages of history. It is, as it seems to me, carefully footnoted as to sources. I know what bad writing, rough writing—I know what an unfinished draft looks like. I am trying to finish a chapter right now. I could send it to you. You could see. It is badly written. It is a rough draft. I know what they look like. This looks—and I thought well I should see if anyone else addressed that question. And I literally did it this morning. John Pradas, who is with the National Security Archive, spoke to that very thing. He said he read it and he quotes it—again, this can be found online—he quotes the current chief historian at the CIA, in whom I am very disappointed. For even as the thing after we succeeded, he said, “Well,

you know, it is bad scholarship, it is not really finished. It's sort of—what is the word—is it too fighting in its whole tone.” But that does not make it—it is not an unfinished draft. It is just not. It is not.

Tuan Samahon: Yes, but that is what was represented to a court.

David Barrett: Yes.

Tuan Samahon: That this could be withheld under exemption 5. Let me just—I will take the opportunity as a moderator to mention here that in a case that my students, former students from Villanova litigated on my behalf, *Samahon v. FBI*¹⁴, here in federal court in Philadelphia. This was for a discussion between the sitting Supreme Court Justice and a high-ranking FBI official about a case concerning the FBI and the FBI's practices. The discussion was ex parte. It was by a Justice that should have been recused from the case. The Supreme Court Justice was disclosing the resolution of the case and the probable timeline in which the case would be disclosed. So what I wanted to know was the rest of the story and the rest of the story would have required my knowing something about some redacted information, which was asserted under personal privacy.

So as it turns out, this assertion of personal privacy was, on the one hand, effectively skullduggery by the J. Edgar Hoover FBI in which they were trying to research someone for the purpose of destroying them. But then when it came time for me to request the record, they said, “Oh, it would constitute an unwarranted invasion of personal privacy for us to give you the document where we were invading unwarrantedly his personal privacy.” This sounds a little bit like John Oliver but that was an assertion of the personal privacy exemption. Can you tell me what are some of the worst violations of FOIA you have seen by agencies? And if you could, you can name names here. Agency names. In terms of agencies that are the most difficult with regard to the searches. Well, Marcy, we will give you your turn and you can speak on the government's defense, your clients here.

David McCraw: The part where we are driven by where there is this FOIA request. Where all these security agencies are rolling out claiming everything is classified whether it needs to be or not. I find that the FBI is particularly difficult and erratic at the same time. We did a FOIA request and a FOIA lawsuit over the documents from the FBI concerning the underwear bomber. Remember Abdulmutallab, who is flying into Detroit and trying to blow up the airplanes but instead gets his underwear on fire and now is in federal prison forever. We wanted those documents and if you read our brief in that case, it is just this incredibly misleading, like we going to get the documents, we are going to get the documents. “No. We can't yet.” Then we file an appeal. We win the appeal. It goes back. They

14. 40 F.Supp.3d 498 (E.D. Pa. 2014).

come up with new exemptions and so forth. Then they finally released a document. They released a series of documents. There was one that I use in my PowerPoint, which shows they have redacted the entire page except for the word propaganda, which I think was like performance art. A self-referential beacon. Whatever. We ultimately won the release of almost all the rest of that page. Completely, completely unacceptable stuff about Abdulmutallab growing up, how he came to meet people, and so forth. It is frustrating that the other one that I use is a case I mentioned earlier, *Florez v. CIA*,¹⁵ where Sergio Flores is trying to find documents about his father, who was the first and last ambassador of Cuba for the Fidel Castro government before he was thrown out of the country. The CIA gave us a “Glomar” response: “We cannot confirm or deny.” We were working with the Yale Law School FOIA clinic and they went to the FOIA reading room and some of the documents were there. They had not even bothered to even begin to search.

Tuan Samahon: Jason, you shared with us, yesterday at dinner, some of the tactics that were used by one agency in particular. I am thinking the FBI.

Jason Leopold: Yeah, I cannot say—let me say this right—I cannot say enough bad things about the FBI. The way that they respond to FOIA, the way they—

Tuan Samahon: They feel the same way about you, Jason.

Jason Leopold: Yeah. Oh, I know they do. And the way that they simply really just tried to thwart the release of records. They come up with new and novel ways each and every time. And I will name names. There is the head of the records information division, David Hardy, who has been there for quite some time. He is largely the one responsible for coming up with new and different ways to deny requests. The newest one, and this started actually—of the hundreds and hundreds of requests I have with the FBI—this was the first time I ever saw this and this was crazy. This was last September, we had asked the FBI for certain documents about whether they had any documents about Donald Trump’s comments regarding Second Amendment people. I do not know if anyone recalls out on the campaign trail. Without getting into it, you can certainly Google it. Then another one where he asked for, “Russia, if you are listening, maybe you can help you get those thirty-thousand missing Hillary Clinton emails.” So we filed a request to see if the FBI had any documents about that and the FBI issued us a Glomar. Which I have never really seen a Glomar from the FBI. They will either say we do not have anything, it is part of an active investigation, but this was a Glomar, and on top of it, a couple of FOIA exemptions to go along with the Glomar. So it was essen-

15. 829 F.3d 178 (2d Cir. 2016).

tially the FBI saying that, at least the way that I interpreted it at the time, “We are more or less exempt from FOIA.” The way the NSA has the NSA Act and the CIA Act. But as I started filing more and more requests after this, that is the response that the FBI has been giving: “We can neither confirm nor deny that we have any records.” I asked for records recently on Kaspersky Labs, which is this firm, this cyber-type firm that the government has been doing business with and has been in the news quite a bit lately and the FBI said “Yeah we can’t confirm or deny that we’ve ever communicated with this firm,” and then they threw in B1 and B3 exemptions to go along with it to like really lock it down and so that to me represents a new policy in practice in which the FBI is not just denying records, but anything that smells of Russia, it could even be borscht or something you know it’s just completely—which I’m not saying it’s Russian—but it’s just completely exempt, everything, they are withholding.

David McCraw: Just to put a point on that is that I think many of the FOIA officers are really, really dedicated civil servants locked into really terrible jobs without enough resources. One of the things that’s interesting, and Professor Kwoka’s presentation got into this, is that those agencies that have a lot of corporate requesters are actually pretty good. I was at a similar conference at Columbia and this FOIA officer came up to me and said “Nice to meet you in person.” I didn’t recognize him at all. So while he was speaking, I got on my phone, and searched and he’d written me twenty-three emails about a request. I didn’t remember this at all. And then I saw what agencies he was with is the Food and Drug Administration. They’re used to demanding lawyers and demanding corporate requests and so forth, and they have a pretty good unit. But if you look at the state units we have, the states have powerful freedom of information laws like Florida, it can be done.

There are many states, Florida has backtracked a little bit, but Florida in particular, many states are just first-rate at figuring out how to be transparent and how to be in government. Part of that is that in Florida, the move was fueled not by liberals, but by conservatives. They knew that you had to have a transparent government or those guys are going to steal your money. And that coalition between liberals and conservatives really drove a first-rate public records act in Florida. To tell you how far it got along, we actually at one point got into a fight about whether an official at a government agency had the right to open his mail before we saw it. Our reporter was there and saying “They won’t give me this letter,” and they’re saying “Well because he’s out of the office for lunch and you’d like to open the letter before it’s given to you.” We finally relented; we thought that was probably too extreme. But that was kind of the whole ethos in the agency was you’ve got to turn stuff over; that’s just how it works.

Tuan Samahon: So I think most requesters will observe they’ve had the experience where there is a document and there are probable duplicates

of that document and you'll request it from one agency, get it redacted one way, request it from another agency, and get it entirely withheld. I've certainly found that some agencies are friendlier and more helpful to work with, so, maybe this is an issue of culture. Let's maybe open it up because I know we have some government lawyers who might like to ask some pointed questions of our requesters here, and also offer some sort of questions that could help guide us a little bit. So do we have questions for our distinguished panelists?

Jason Leopold: From government lawyers first, please. Joking.

Tuan Samahon: So we'll take it from whomever, so, yes?

Question: Hi, first of all thank you for being here today. So you touched a little bit on what agencies find it difficult to work with, but obviously your entire panel, has seen, their fair share of time in court. Have you found that any circuits are particularly easier on FOIA plaintiffs or if there are circuits that are say more favorable on government defendants in FOIA actions? I know as Mr. McCraw has said, Florida who has strong state action would you say that the Eleventh Circuit is more sensitive to your cause?

David McCraw: My sense is that it's hard to say because FOIA requests tend to pool in three places, the D.C. Circuit, the Second Circuit, and the Ninth Circuit, because of California, and there's less law out there in other places. I prefer the Second Circuit. I think the D.C. Circuit has seen too many cases that are brought by individuals who, and nothing against individual litigants, nothing against pro se litigants, but they tend to get short sighted and they don't make great arguments sometimes and you get bad decisions. The Second Circuit tends to be more publications, the public interest groups in large numbers, and so forth, and I prefer that. I do have one case in D.C. but that's for strategic reasons. The Ninth Circuit, you get some good results, but you get results all over the place as you always do in the Ninth Circuit.

Question: I'm a government attorney. I will say that outright, but I will play devil's advocate here a little bit because one of the comments Mr. Leopold made, in regard to the Hillary Clinton emails, you really had no idea why you might be making the requests but you made it anyway? And as to an earlier graphic that one of the presenters put up on the screen, there was a screen full of requests that just automatically come, so I'd just like to hear perhaps, if you could, just out of your own professional respect just for a moment, and take it from the receiving body's standpoint and say, these requests are coming for no concrete reason, no immediate reason, and what deference or acknowledgement of that would you offer or acknowledge.

Jason Leopold: Well first, with regard to Hillary Clinton's email, as I said, I asked for all of the emails. When I asked for it I wasn't thinking like well you know is there a specific reason that I want all of the emails versus some of the emails? But I tend to ask for everything whenever I file a FOIA request. It's not the job of the agency to say, "Why are you asking for it?" if your question is that they're being bombarded with requests. I mean, the law simply says you have to adequately describe the records that you're seeking. Doesn't say give us a reason why you want it, what story are you going to write. That's the way the Freedom of Information Act works. And I am absolutely very sympathetic to the FOIA officers who I too have a good relationship with and try to communicate with regularly because they're bombarded and because the Amendments that were passed last year under the FOIA Improvement Act did not open up any additional funds to assist them with processing these requests. I know that when I initially file my request, that there isn't a FOIA officer there who's looking at it there and saying, "This needs to be denied. We have to try not give Jason records." There are times when there are certain agencies, if a request has what is referred to as significant media interest, it gets kicked up to the top and then it becomes politicized. That's not the way FOIA is supposed to work. It's supposed to be you describe the records you're seeking and they're supposed to release it. And so even if I didn't know why I was asking for all of the emails, that's not an issue for the government. The fact is that I can do it. You can do it. Anyone can ask for anything that they want. They certainly don't have to turn it over. You don't seem satisfied with my answer.

David Barrett: Could I speak to that briefly?

Tuan Samahon: Sure.

David Barrett: It seems to me, I'm not in the government and I'm not a lawyer, but if there are agencies that have backlogs, it would be good if Congress would give more funding to the agencies to deal with those backlogs. As to the legitimacy of requests, I just want to talk about my own case. I've been seeking thirty-five documents from the CIA for over a decade now, and I've talked on the phone to an information officer at the CIA and he's very nice and he's very polite but even he sounds embarrassed. I'm seeking documents that are over half-a-century old and has to do with interactions between leaders of the CIA and certain congressional leaders and leaders of CIA and the Kennedy White House and I'm trying to get at whether or not the CIA was responsive to direction from the President and members of Congress. This is important stuff, and I can think of no reason to keep these things secret beyond a half-a-century. I mean it is beyond a half-a-century and it would be nice to know whether CIA was following the law or not.

Question: The journalists on this panel, you all are exceptional. In the sense that most journalists are not using the law at this volume as each of you mentioned or certainly fighting in court at this volume. I was wondering if either of you would be willing to speak to, in particular, David, working with lots of reporters at the *New York Times*, I'm sure some of them are using the law a lot and some of them aren't. What's making some journalists most effective at using the law and what are their strategies and what convinces them to go down that path rather than journalists who say that this is not useful?

David McCraw: Yeah, I mean the thing that makes people successful is persistence. You can't just throw in the FOIA request and wait for something to happen. You have to treat it like reporting. I think that much of this is that those people who are using it a lot are going after documents that should be public and there's not going to be a real fight over exemptions, they should be public. Many of them are dealing with regulatory, the people using have a lot of people doing regulatory change as opposed to covering defense or national security where you expect there to be some pushback. I just, to respond to the earlier question because I think it's a good one, is that there's no question that the agencies sometimes get swamped with these requests and I guess, two things I'd say to that is you know we live in a time when it's you can make materials available so easily and so you see in some cities around the U.S. that they are using these in a post-FOIA world they're pushing out the records, they're putting them online without a request and they would do themselves such a favor if they would do that. Not wait for the request. I understand it's not for everything, but there's so much they can put out online. And the other thing is that I do find it troubling that whether you think that twenty days is enough time or not for an agency to respond, that's what Congress said. Congress said it. When Congress said I have to file my taxes by April 15th. I think that's unreasonable. They do not give me the opportunity to say, "I'll get to it someday." But that's what the agencies are doing. If courts would have said, "Congress said twenty days, they meant it. Either the agencies get the resources to do that or somebody convinces Congress to change the law."

Jason Leopold: If I could just also add I mean within terms of making records available, yes certainly agencies can do that. Right now, or at least through the course of this year, there have been agencies pulling down records that have been available in their FOIA reading rooms for whatever reason, which only leads to more FOIA requests to find out why they've been pulling down those records. I mean there's many steps that are being taken again to conceal information.

Comment¹⁶: So I feel the obligation to not just play devil's advocate but just share my experiences, because I'm in a unique position. Having been at the FBI for almost fifteen years, I was the Director of the FOIA Litigation Unit, so I'm not going to sound defensive, I'm just going to give a little bit of the other side of the story, if you will. I just feel like it's a little more balanced that way. So I came to the FBI in 1999 after having been at Maine Justice for eight and a half years, and what I quickly learned is that the FBI is in the business of gathering information and keeping it. And so that's the mentality that all FBI agents operate under and that's a really important thing to keep in mind. When I teach to FBI agents I always used to say, it's a constant. FOIA is a disclosure statute; you're in the business of gathering information and protecting it and not releasing it until the end of time. It's a constant tension, I just want you to understand, that goes on within the FBI about being responsive and statutorily obligated to respond to FOIA requests and agents being very protective about the information they've gathered. So, there is that obviously. And I also want to point that out.

The other point is that what I think I can share from the inside, having been there. I can't begin to tell you how many times I sat down with an FBI agent and asked him, "Is there really a need to protect that information? Because we're now getting sued. We're going to have to tell the judge. Tell me what the harm is in withholding the information, and don't just make it up and tell me it's not speculative. Tell me what's actually going to happen immediately or within a reasonable amount of time as opposed to 'I think that this might hurt my investigation down the road.'" I just want you to know, I want everyone to know, that kind of discussion goes on daily within the FBI in terms of evaluating information and making decisions about what gets released and what gets withheld. Again, I'm not trying to be defensive, just being very candid about what goes on.

And then of course we have the Department of Justice who ultimately makes decisions about what happens once we are sued. We don't have independent litigating authority. We have to be represented by the Department of Justice, and, ultimately, we rely on them to defend us. Sometimes they'll say we can't defend you on that exemption, you've got to drop it. Sometimes it's nicer to hear that from DOJ by the FBI agents; makes me not the bad guy because if I told them, they wouldn't listen. There are a lot of checks and balances in the process. It's not sort of "We hate Jason Leopold, he's a FOIA terrorist." I can tell you and this is my own perspective—off the record. This is my own perspective. I will tell you that one of the frustrations that people do feel with frequent requesters is that they feel frequent requesters monopolize the agency's re-

16. This comment was made by Alina Semo, the Director of the Office of Government Information Services, National Archives & Records Administration. She served on the panel entitled "Resolving FOIA Disputes" at the Symposium.

sources to such a large extent that it takes away from the ability of other requesters who are standing in line and waiting their turn very patiently not to get access to their information. And I think that's one of the frustrations a lot of the agencies face because they're dealing with a large backlog and they're trying to serve as many people as possible. People who are filing a lot of requests are just getting an unfair amount of resources devoted to them. I think that that's a very shared perspective among many agencies. So, anyway, that's all I have to say for now.

Tuan Samahon: Thank you. Director Semo will be joining us on a later panel. She is just for identification, the Director of the Office of Government Information Services and is an important figure.

David McCraw: You know, you make some really important points. What I think one of the worst things that happened to reporters is when they started talking to lawyers, because so many FOIA requests I see now read like discovery requests: "including but not limited to." People in the real world don't talk that way. I know all of you who will be civil litigators do, but it's a terrible way to write a FOIA request. It may be a great way to write a discovery request, unless you're on the receiving end of it. It's a terrible way to write a FOIA request. I think to some extent there should be a better dialogue with the people on the other side about how it looks from the government side. We at one point in a case had used the term, trying to help the government out, we had requested "documents sufficient to show" certain expenditures. In other words, don't send us every document about that expenditure, just something to show that it happened. We ended up suing, and the AUSA said that that term actually created more problems than saying "all documents showing the expenditures" because it required discretion and the concern on the agency's side was that they would be criticized for choosing this document as opposed to those, which was not our intention. Our intention was to say just give us one document that shows how much money was spent on this.

Jason Leopold: Can I just add one point to that? I appreciate the comments as well. But again, I just want to note that again, this is the language that Congress put in. An agency like the FBI, which I do file a lot of requests with, they will often issue responses "We're withholding everything under B7A." But the law says that you actually have to look at all those records and decide what can be segregated, what's segregable, and they don't do that. And that's a violation. And they continuously, no matter how many times I appeal, quoting to the court the legal language for them, it just doesn't happen. So there is not a very good relationship between the media and an agency like the FBI largely because they're just, if I'm telling them this, they're just not listening, and so it's even very difficult to get a FOIA officer at the FBI on the phone and to kind of hash this out.

Tuan Samahon: So if I could be devil's advocate for a moment. There's a sense in which, suppose for the sake of argument here that the press isn't always interested in transparency itself. So there's a sense in which you go to the trouble, either academics or the press, to sue for a record and, say, the agency decides since it's going to have to turn it over to you anyway, it's going to go directly to its website and post the record, which is what they did to David Barrett with Volume 5. And so they made it available to all and so there's almost an issue of creating a free-rider problem. So you mentioned earlier that you were going to sue for Hillary Clinton's emails because Mike Bakesha and Jason Leopold were already doing it for you, and you were going to get those records. Is this a good proposal or is this release-to-one-release-to-all provision, is this going to dissuade the Fourth Estate from making necessary requests because there's a sense in which you want a certain amount of secrecy, give me three weeks lead time on the competitors?

David McCraw: I think we're out of time.

Jason Leopold: Great panel.

David McCraw: This is a very awkward thing, and I think there are some major news organization whose names will go unspoken here that have suggested to various government agencies that there should be lead time and I can justify that. We invested in the request, we invested in the litigation and so forth, and after these documents have been held illegally for seven years, is it really going to make a difference whether the government gets it in two days or five days or ten days at this point? Why not reward the requester and encourage the requesters to make the request, but it's a very difficult argument, you really look like you're on the wrong side of transparency when you're saying, "They're mine and I will release them." You're essentially just mimicking the government.

Jason Leopold: If I could just add to that. I mean certainly as a journalist, I love having scoops, and I've looked at this whole idea of release-to-one-release-to-all. I personally think that the proposal of that was essentially a way to thwart the many lawsuits, but maybe that's just my conspiratorial mind working, but I also happen to use FOIA Online. FOIA Online is the online portal where you can file requests, and documents are released there. For example, if I wanted to see things about documents that are released by the EPA or other government agencies that aren't the CIA or the FBI, documents have already been released there. In fact, if you filed a request, they're made available immediately. So the thing is that if they are made available release-to-one-release-to-all, many people won't even know about it. Many other journalists won't even know about it. You literally have to go to these portals, these websites, to find it. And the CIA posts documents on their website. They don't put out a press release say-

ing, “Hey, everyone, look what we did,” nor does the Justice Department. The FBI has their Vault Twitter account that they will tweet about but again, you’re talking to a very, very small audience so I actually don’t feel that release-to-one-release-to-all will lose anything other than maybe you can say on your stories “scoop” or “exclusive.” You could still say that your request was the vehicle that perhaps released the records, but I actually don’t feel that it would have any real impact at all. And I also should note that I don’t think it will ever happen because it’s the government that’s working on it, and it’s just never going to happen.

Tuan Samahon: Alright, well I’d like to thank our panelists. I appreciate their coming to Villanova [University Charles Widger School of Law]. We’re pleased to have you today. Thank you so much.