Fast Fixes for FOIA

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Laurence Tai  
February 13, 2015

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FAST FIXES FOR FOIA

Laurence Tai†
February 13, 2015

Abstract

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

Introduction

The U.S. Freedom of Information Act (FOIA), enacted in 1966,1 requires executive branch agencies to provide records to any person upon request except for records that fall under one of the statute’s nine exemptions.2 The Supreme Court has consistently extolled the virtues of the Act, declaring that it serves to “to check against corruption and to hold the governors accountable to the

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governed,” referring to its “fundamental principle of public access to Government documents,” and remarking that knowledge from this access “defines a structural necessity in a real democracy.” In a memorandum calling on the executive branch “to adopt a presumption in favor of disclosure,” President Obama noted that FOIA, “which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.” Even his predecessor, known to be more inclined toward secrecy, was politically pressured to sign legislation that strengthened the Act. Many other countries have followed the U.S. in adopting freedom of information legislation, suggesting international recognition of the value of transparency that such laws foster. Given that FOIA has allowed citizens to uncover information about government wrongdoing, environmental and health hazards, and unsafe products in the past, support for the statute, while not universal, is well-grounded.

Despite these widespread beliefs in the Act’s benefits, its implementation has fallen far short of the statutory text, with processing delays well beyond statutory time limits, questionable denials of records, and a prevalence of commercial requests. These shortcomings in FOIA’s implementation have persisted despite various amendments to the statute. The Act has been substantively amended seven times since it was first passed, most recently in 2009. No other section in the original Administrative Procedure Act (APA) has been amended more than twice substanz-
tively, or even three times if technical revisions are included. In the aggregate, amendments to FOIA have been far more extensive than all the amendments to the other APA sections combined, and the Act has become much longer than any other section of the original APA. Thus, while Congress has repeatedly evinced a willingness to improve FOIA’s effectiveness, the desired results have not followed.

In the face of these seemingly intractable difficulties after nearly fifty years since the enactment of FOIA, this Article proposes a few fixes to significantly improve its functioning. On one hand, it calls for increasing the fees that requesters pay to have agencies search, review, and reproduce records and allowing agencies to keep these fees so that these agencies will have more resources and motivation to process these requests. On the other hand, since this change may seem to benefit agencies at the expense of information seekers, it also recommends making the Act’s current attorney fee-shifting provisions more favorable to plaintiffs to stimulate agencies to produce records in a timely fashion rather than relying on a requester’s decision not to challenge a delay or denial in court. These amendments are perhaps the most effective ways of increasing public awareness about the government because they align incentives according to the following twofold principle: encouraging information seekers to acquire and disseminate the most publicly beneficial information and motivating agencies to fulfill requests as fast and favorably as feasible.

The proposals and analysis that this Article provides are important for two practical reasons. First, improved access to government records would likely increase the public benefit of FOIA, and reduce net costs to the government. Although some have cited the high costs of the

\[13 \text{ See id. §§ } 551, 553-59, 701-06 \text{ (listing history of amendments after the text of each section). Since FOIA is itself a revision of section } 3 \text{ of the APA, see Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250, 250 (1966), it can be said that the law on public information has been substantively amended eight times. The Privacy Act of 1974 has been amended thirteen times (including technical revisions), see 5 U.S.C. § 552a (2012) (listing history of amendments after main text); however, it is an addition to the APA, which means that these privacy provisions were not part of the original APA, see Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1896.}

\[14 \text{ Compare 5 U.S.C. § 552 (2012) with id. §§ } 551, 553-59, 701-06. \text{ However, FOIA is somewhat shorter than the Privacy Act. Compare id. § 552 with id. § 552a.}


\[16 \text{ Id. § 552(a)(4)(E).} \]
Act,\(^{17}\) the total processing costs for all agencies in Fiscal Year (FY) 2013, approximately $420 million,\(^{18}\) represented just over 0.01% of estimated total federal outlays of $3.45 trillion.\(^{19}\) Though the benefits are difficult to quantify,\(^{20}\) the proposal to increase processing fees should allay any concerns about agency resources since costs would be shifted from the government to private actors.\(^{21}\)

Second, although the proposals are realistically grounded and have precedent in prior amendments to FOIA,\(^{22}\) their approach differs from that of recent legislation to change the operation of the Act. To begin with, there are two bills to amend FOIA: the House FOIA Oversight and Implementation Act of 2015, or “FOIA Act,”\(^{23}\) and the Senate FOIA Improvement Act of 2015.\(^{24}\) Earlier versions of these bills passed their respective chambers, though not the full Congress,\(^ {25}\) so they are especially relevant. Though these bills are somewhat different,\(^{26}\) they both seek to strengthen disclosure by making it harder for agencies to invoke the exemptions in the Act.\(^{27}\)

\(^{17}\) See, e.g., Scalia, supra note 10, at 16-17.

\(^{18}\) See infra app. tbl.4.

\(^{19}\) See 2015 Office of Mgmt. & Budget, Executive Office of the President, Hist. Tables, Budget of the U.S. Gov’t tbl.1.1 (2014); see also Charles Wichmann III, Note, Ridding FOIA of Those “Unanticipated Consequences”: Repaving A Necessary Road To Freedom, 47 Duke L.J. 1213, 1255 (1998) (making this comparison and noting that the cost at the time was similar to “federal spending on military bands”).


\(^{21}\) There remains the possibility that increased information releases under FOIA could directly have an adverse impact. Cf. Cary Coglianese, The Transparency President? The Obama Administration and Open Government, 22 GOVERNANCE 529, 536 (citing adverse consequences of less candid deliberation and less information provided to government). However, the Act’s exemptions already reflect a need to weigh the negative impacts of disclosure against its benefits. In any case, such concerns are better addressed by changing the substance of the exemptions. In contrast, this Article’s proposals are procedural.

\(^{22}\) See infra Part III-C-1.


\(^{27}\) See FOIA Act, H.R. 653, 114th Cong., sec. 2(b), § 552(b) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(1)(D), § 552(a)(8)(A) (2015).
other recent legislation consists of parallel bills in the House and Senate known as the Public Online Information Act (POIA).\textsuperscript{28} Versions of it have appeared since the 111th Congress and are thus likely to reappear in the current one.\textsuperscript{29} This Act would require agencies to post online publicly available information, free of charge.\textsuperscript{30} This information includes records previously released through FOIA and newly requested documents.\textsuperscript{31} Overall, each of these bills would impose additional obligations on agencies rather than changing the features of FOIA’s cost structure that make agencies unable or unwilling to fulfill their current obligations.

Not only are the cost-based proposals in this Article substantively different from these bills’ provisions, they are also “faster” fixes in two senses. First, to take effect, each of the bills would require executive branch officials to promulgate regulations.\textsuperscript{32} In contrast, the proposals here require no discretionary action on the part of agencies and could take effect immediately on a date of Congress’ choosing. Second, in a more colloquial sense, the cost-based proposals are “faster” because they are significantly less complex than these bills. Each of the FOIA bills would make the Act substantially longer,\textsuperscript{33} and POIA’s instructions for having agencies post public records online are also rather lengthy.\textsuperscript{34} In contrast, this Article’s solutions could be enacted in a way that adds only somewhat to the length of FOIA, with only a few pages of legislative language. Thus, these proposals suggest that relatively small changes in language to the statute can be equally or more effective in improving FOIA’s functioning.

\textsuperscript{28} Public Online Information Act of 2014, [hereinafter POIA], H.R. 4312, 113th Cong. (2014), Public Online Information Act of 2013, S. 549, 113th Cong. (2013). Since the two bills have only subtle differences, references to the legislative text will be made only to the later introduced House bill.
\textsuperscript{31} See id. § 7(e)(1); infra notes 280-281 and accompanying text.
\textsuperscript{34} POIA, H.R. 4312, 113th Cong., § 7 (2014).
The rest of this Article proceeds as follows: Part I shows how FOIA’s request-based structure provides some of the incentives according to the above principle and is thereby partially effective in informing citizens. Part II explains how cost asymmetries at the processing and judicial review stages of a request keep the Act from being more effective. Part III describes policy proposals to remedy these cost asymmetries and contrasts them with the current and recent legislative proposals.

I. Partial Effectiveness of FOIA’s Request-Based Structure

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

The fact that there are hundreds of thousands of requests each year, as Table 1 shows, suggests that the Act’s request-based structure works to some degree. This circumstance might be

36 See id. § 552(a)(2)(D).
37 See, e.g., § 552(a)(2)-(2).
perceived as remarkable, given the theory of collective action, which predicts serious underinvestment in public goods. Since government information can be conceived of as a public good, the theory would suggest that almost no one would pay the costs of a request to obtain records and disseminate them or the information they contain. However, empirical observations of groups forming to solve collective action problems for even large, diffuse interests undermine the pure form of the theory. This general observation applies in the FOIA context, in which many media and nongovernmental organizations actively participate. Thus, despite well-known problems in implementation, individuals and entities seem to have some motivation to seek government information, and the Act's reliance on requests arguably provides additional incentives for them to do so.

A. Advantages over Other Information Release Methods

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

40 See Croley, supra note 38, at 19.
41 See SHANNON E. MARTIN, FREEDOM OF INFORMATION: THE NEWS THE MEDIA USE 151 (2008). Admittedly, a large number of requests are commercial in nature. See infra Part I-B-3. However, there are also many noncommercial requests, which the collective action theory predicts would not occur with such frequency.
1. Maximal Proactive Disclosure

At first glance, proactive disclosure of as much information as possible might seem to improve citizens’ knowledge about government activity and issues by making more documents available. However, there are severe practical constraints that prevent agencies from posting as much information as they can, as they produce it. First, even though technology has made it possible to publish large volumes of documents in a digital format, it has also generated more documents than in the paper age. On net, it is unclear whether it is easier to post all electronic information online or to make all available physical records accessible in a reading room. Next, processing documents not originally in digital form for public consumption is very expensive.

Moreover, there are documents and portions of documents that agencies have the right and even responsibility to withhold. FOIA provides for nine exemptions by which the government may choose to withhold all or part of a record. These exemptions reflect a common understanding that a balance that needs to be struck between increased transparency and potential adverse consequences of disclosure apart from financial cost, such as risks to national security. Thus, a policy of maximal proactive disclosure could force agencies to determine which documents and portions of documents to release, regardless of whether anyone requested them, at the agency’s expense. The redactions, in particular, would be highly labor-intensive. An illustration of this

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43 Cf. id. at 936 (arguing for maximal proactive disclosure on the grounds that “[t]he timely release of information is essential to meaningful public participation in agency rulemaking”).
45 See PATRICE MCDERMOTT, WHO NEEDS TO KNOW? THE STATE OF PUBLIC ACCESS TO FEDERAL GOVERNMENT INFORMATION 32 (2007).
48 See Coglianese et al., supra note 42, at 937. Another possibility is that agency officials would at least preliminarily classify too many documents as exempt from disclosure. See id.
49 Cf. 5 U.S.C. § 552(b) (2012) (instructing agencies to provide “[a]ny reasonably segregable portion of a record” to requesters after removing what is exempt).
difficulty is that, though courts may review contested documents in camera, agencies more commonly submit a *Vaughn* index, which describes each document and the exemption(s) they are claiming for it. The reason for this technique is that it is much less burdensome for courts.

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

Overall, while a statutory command to disclose as much information as possible should theoretically lead to greater public awareness, it is unclear whether agencies are able and willing to meet this ideal. Agencies would not necessarily prioritize disclosures according to importance, as indicated by FOIA requests, and resources devoted to these releases would not be available for fulfilling requests. There is also the challenge of making such a large collection of released docu-

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50 See id. § 552(a)(4)(B) (2012).
51 See *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973) (setting out how to describe documents to allow a determination without in camera review).
52 See id. at 825 (describing the burdens for trial and appellate courts in conducting in camera review).
54 Id. sec. 207(a), 116 Stat. 2916.
55 See McDermott, supra note 45, at 58.
56 See id. at 53.
57 Since agencies were included in the Office of Management and Budget's consultation, see id., it is reasonable to conclude that, as a whole, they at least did not support greater accessibility strongly enough to change its recommendations.
ments easy to search, described more in the next model of disclosure. Instead, transparency would be better served with more focused improvements on the Act’s request-based structure.

2. Immediate Publication of Released Records

A more moderate option, requiring agencies to posting all records that they have released in response to FOIA requests online, might seem to promote meaningful transparency by focusing disclosure on what has been requested. Agencies can already take this measure voluntarily, and they must do so for commonly requested documents. However, this measure comes with its own challenges. First, at least some agencies would find it burdensome to post all these documents, albeit less so than posting as many documents as possible. Next, merely making documents available online is insufficient to make them accessible in the sense that citizens are able to gain useful information from them. Instead, effective search capabilities are needed to help them find relevant documents. Three websites with databases of FOIA documents suggest that creating easily searchable databases would be a challenging task: FOIAonline, where a small number of government agencies post requests and records; DocumentCloud, where journalists upload government documents gathered via FOIA and other methods; and MuckRock, which assists customers in filing FOIA requests in exchange for posting documents they receive online. All have limited search capabilities, especially compared to commercial databases like Westlaw and Lex-

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58 See Coglianese et al., supra note 42, at 937 (proposing this measure as a “more modest alternative”).
59 FOIA does not prevent agencies from proactively posting any information online, since it does not authorize withholding apart from the exemptions, see 5 U.S.C. § 552(d) (2012), and does not require withholding even when information qualifies for an exemption, see id. § 552(b) (stating only that FOIA “does not apply” to such records).
60 See id. § 552(a)(2)(D).
61 See McDermott, supra note 45, at 17 (claiming that a mere “keyword search” yields mostly “irrelevant” results and is “a good way to hide information”); cf. Coglianese et al., supra note 42, at 941 (describing document libraries that agencies could create and that would be “easily searchable”).
isNexis. Since the operators of these websites are perhaps among those most enthusiastic about access to public records, these sites’ arguably inadequate interfaces imply that making the complete set of FOIA documents available and informative to citizens would require more resources than people have been willing to devote.

In addition, publishing released documents, at least right away, would reduce some information seekers’ willingness to file FOIA requests in the first place. The value of government records to a requester may depend significantly on her exclusive possession of it, at least to the extent that others must attempt independently to acquire the same information. An important class of requesters comprises journalists who would like to keep their documents private, since they hope to break a story first. Nongovernmental organizations, hoping to show their relevance, also plausibly have this incentive. Additionally, DocumentCloud and MuckRock implicitly acknowledge this incentive for requesters in general by allowing users to keep documents they receive from public view until they choose to release them.

Evidence that many journalists prefer exclusive possession of documents they request can be found in their opposition to two local public records policies. First, in 2010, the City of Chicago decided to post on its website freedom of information requests so that everyone would know who was requesting which documents. Second, also in 2010, journalists filed a complaint that a British Columbia agency was choosing to disclose documents simultaneously to the public and the

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66 Requesters can try to duplicate previous requests by requesting an agency’s “FOIA log,” which typically provide information on who requested what information and what she received. See National Freedom of Information Coalition [hereinafter NFOIC], FOIA the FOIAs, http://www.nfoic.org/foia-foias (last visited Aug. 15, 2014). However, entities can cloak their identities by working through an intermediary corporation. See HERBERT M. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 137 (1999) (describing “FOIA service companies”).

67 See NFOIC, supra note 66 (claiming that “[j]ournalists . . . tend to think that a record of their FOIA request should be shielded from prying eyes”).

68 One other class of requesters that would not want records they have obtained to be posted online is commercial requesters seeking competitive advantage. They are discussed infra Part I-B-3.


requester.\textsuperscript{71} In both cases, journalists opined that these policies would have a “chilling effect” and make journalists less willing to request documents.\textsuperscript{72} The fact that more agencies and jurisdictions have not adopted these kinds of practices suggests that many, if not most, public records offices make a good faith effort to comply with freedom of information statutes but are resource constrained.

Thus, while requiring agencies to post all released documents online would make a greater proportion of requested records freely available, it would also likely have the countervailing effect of reducing the amount of information sought. Since public awareness is likely to be mediated through requesters like journalists and NGOs, restructuring FOIA to require such posting would not necessarily increase transparency in a way that is useful. Instead, by allowing requesters to decide when to publish records, FOIA incentivizes requests by increasing the benefits they derive from disseminating information from documents that agencies have not independently chosen to post. The Act’s current reliance on citizen requests and dissemination is useful, and amendments should focus on other aspects of requester and agency incentives.

\textbf{B. Current Implementation Difficulties}

FOIA’s request-based structure causes citizens to seek and obtain the most valuable information, which is the first part of the twofold principle laid out in the Introduction. However, poorly aligned incentives within FOIA’s request-based structure mean that many agencies do not satisfy the second part: completing requests as fast and favorably as possible. Admittedly, some agencies fulfill their obligations quite well, with twenty-five having no backlog of requests at the end of FY 2013.\textsuperscript{73} However, the agencies with the smallest backlogs are also likely to be the ones


\textsuperscript{72} See id. at 14; Daley Comes out Swinging at Press, Chi. Sun-Times, May 14, 2010, at 22.

with the fewest requests; in contrast, none of the full departments have small backlogs. In the aggregate, the prevalence of delays, questionable denials, and commercial requests, strongly suggests that many agencies have significant problems in their implementation of the Act.

1. Delays in Processing Requests

As a general rule, FOIA calls upon an agency to complete a request for records within twenty business days, although under “unusual circumstances,” it may take another ten days to complete the request. However, it has commonly been observed that agencies frequently fail to fulfill these statutory deadlines. These difficulties have persisted throughout the Act’s history, and recent data on delays can be found in summary reports by the Office of Information Policy (OIP) at the Department of Justice (DOJ).

One way to measure delays is in terms of median and mean processing times. Table 1a is a compilation of summary data on processing times for “simple” requests, which agencies typically place on a separate track for faster processing than “complex” requests. One statistic is an agency’s median processing time, which means that half of its requests take less than that time. In general, a majority of departments and a larger majority of agencies outside of departments have had a median processing time of twenty days or less; for example, in FY 2010 eight of fifteen departments and 67 of 80 non-agency departments fulfilled at least half of their simple requests.

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74 See, e.g., ADMIN. CONF. OF THE U.S., FREEDOM OF INFORMATION ACT ANNUAL REPORT FISCAL YEAR 2013 7 (2014) (showing a backlog of zero, but also only nineteen requests during the fiscal year).
75 See OIP, supra note 73, at 9 (not listing any departments, as opposed to agencies, as having backlogs of fewer than 100 requests).
77 See id. §552 (a)(6)(B)(i).
81 See 5 U.S.C. § 552(a)(6)(D)(i) (2012) (allowing agencies to place requests on multiple tracks based on “based on the amount of work or time (or both) involved in processing requests); OIP, supra note 73, at 13-14 (discussing simple and complex requests).
within the standard statutory deadline.\textsuperscript{82} The average processing time, however, exceeded twenty days for the years OIP tracked this figure, and substantially fewer units of both types had averages of less than twenty days.\textsuperscript{83} In FY 2010, only four departments and fifty-five non-department agencies averaged less than the standard timeframe for simple requests.\textsuperscript{84} Thus, a significant number of agencies struggled even with requests that they defined as simple. Table 1b shows the same statistics for complex requests, which, unsurprisingly, show longer averages and medians. For example, in FY 2010, only four departments and nine non-department agencies had median processing times of twenty days or less, and only two departments and four non-department agencies had averages of twenty days or less.\textsuperscript{85}

Table 1c displays these statistics for what agencies define as “expedited” requests according to regulations that FOIA instructs them to promulgate.\textsuperscript{86} These figures are generally better than those for complex requests, but not as good as those for simple requests. For example, in FY 2010, eight departments and twenty non-department agencies had median processing times of twenty days or less, while five departments and eighteen non-department agencies had averages of twenty days or less.\textsuperscript{87} Thus, even expedited requests will not usually be fulfilled within the statutory deadline. This result could be due to a large proportion of requests in this track that agencies would otherwise deem complex.\textsuperscript{88} However, it is not due to a large number of such requests, as Table 2 indicates that grants for expedited processing are quite infrequent, ranging between one

\textsuperscript{82} See infra app. tbl.1a. FOIA requires agencies to report the number of requests completed within twenty days and within longer ranges of times. See 5 U.S.C. § 552(e)(1)(G) (2012). However, OIP has not summarized this data.

\textsuperscript{83} Since the minimum processing time is one day, but the maximum processing time is much longer than twenty days, one would expect, assuming a fairly standard distribution, that agencies’ performance would look less impressive when measured in terms of average processing times than in terms of median times. Cf. Paul T. von Hippel, \textit{Mean, Median, and Skew: Correcting a Textbook Rule}, \textit{J. Stat. Educ.} July 2005, http://www.amstat.org/publications/jse/v13n2/vonhippel.html.

\textsuperscript{84} See infra app. tbl.1a.

\textsuperscript{85} See infra app. tbl.1b.


\textsuperscript{87} See infra app. tbl.1c.

\textsuperscript{88} Cf. OIP, \textit{supra} note 73, at 14 (noting that “expedited track requests . . . can either be simple or complex in their scope”).
and two thousand since FY 2009 among hundreds of thousands of requests. Following the first part of the incentives principle, expedited processing is a way for more publicly beneficial requests to be processed more quickly. The correct number of expedited requests is not obvious; however, further discussion below will suggest that requests for information most likely to be important are not being prioritized. Overall, many agencies are not close to complying with the deadlines that the Act sets, even for the subsets of requests that they attempt to process more quickly.

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

One seemingly hopeful sign is that the size of the backlog decreased dramatically from FY 2008 to FY 2009 and has not approached previous levels since then. Unfortunately, this reduction in backlog is entirely attributable to the Department of Homeland Security (DHS). Furthermore, over ninety percent of DHS’s reduction is attributable to improvements by one component within

\[^{89}\text{See infra notes 155-157 and accompanying text.}\]


\[^{91}\text{See infra app. tbl.2.}\]

\[^{92}\text{See id.}\]

\[^{93}\text{See id.}\]

\[^{94}\text{See U.S. DEP’T OF HOMELAND SEC., ANNUAL REPORT: 2009 ANNUAL FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 20 tbl.XII.D (2010) (noting a decrease in DHS’s backlog from 74,879 requests to 18,918 requests between Fiscal Year (FY) 2008 and FY 2009). This decrease of 55,961 requests slightly exceeds the government’s overall backlog reduction of 55,918 requests. Compare id. with infra. app. tbl.2.}\]

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DHS, the US Citizenship and Immigration Service (USCIS),95 which “in July 2008 . . . awarded a backlog contract . . . to provide 74 staff . . . tasked to process the oldest requests.”96 Though progress in any agency is welcome,97 this explanation of the FY 2009 backlog reduction implies that there has been no government-wide improvement. Table 2 shows that the backlog has not consistently fallen since FY 2009; instead, it has alternately decreased and increased, with the FY 2013 backlog of 95,564 requests substantially greater than the FY 2009 backlog of 77,377 requests. Thus, the Obama Administrations’ memorandum to improve FOIA implementation has not obviously reduced processing times.98

2. Questionable Withholding of Information

FOIA’s legislative history states a purpose of “establishing a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.”99 Given the tension embedded in this philosophy, determining the extent to which information withholding is a problem is a challenge because only denials that contravene the statute are wrong. However, data on the disposition of FOIA requests can provide suggestive evidence on the degree of FOIA withholding over time, and data on FOIA lawsuits can be used to support the claim that at least some denials are wrong.

95 See U.S. DEP’T OF HOMELAND SEC. supra note 94, at 20 tbl.XII.D (cataloging a decrease in that component’s backlog from 67,545 to 16,801 requests, a reduction of 50,744).
97 Part of USCIS’s backlog reduction entailed “the elimination of 23,179 requests whose requesters did not have continued interest in obtaining the information” (over an unclear time frame), rather than the provision of information. See id.
99 S. REP. NO. 89-913, at 3 (1965). The corresponding House report may have been less supportive of FOIA than the Senate report. See Kenneth Culp Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 763 (1967) (“The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure.”). Still, the House report acknowledges that “[t]he right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government.” H.R. REP. NO. 89-1497, at 6 (1966).
Table 3 displays the disposition of requests since FY 2008 that agencies have substantively processed, rather than closing them “for administrative or procedural reasons, such as when no records are located.” It shows that agencies have fully denied from six to over eight percent of requests each year, so these denials have been approximately steady in percentage terms. However, partial grants, which are also partial denials, have increased substantially at the expense of full grants. In FY 2013, slightly less than half of the 482,357 substantively processed requests yielded full grants, whereas 42.1 percent yielded only a partial grant, compared to 29.0 percent in FY 2008. In absolute terms, the number of full grants has also decreased, whereas partial grants and full denials have both increased since FY 2008, even though the total number of substantively processed requests increased during this time. These data are consistent with observations that the federal government used exemptions more times in FY 2009 than in FY 2008 and invoked these exemptions more often in FY 2013 than during any other year of the current administration. Moreover, they suggest that President Obama’s memorandum on FOIA has had little practical effect on agencies’ implementation of the Act.

Table 4 provides recent data from DOJ’s reports on FOIA litigation. Withholding of information is not always improper. However, if a requester contests a denial and prevails in court, then one can infer that the agency was legally wrong in denying the information. The summary data show that plaintiffs receive at least partially favorable judgments to compel the release of records in a small but sizeable proportion of cases. At a minimum, plaintiffs are clearly successful when they receive attorney fee awards. FY 2013 was a particularly good year for plaintiffs, who

100 OIP, supra note 73, at 4.
101 See infra app. tbl.3.
102 See id.
103 See id.
104 See id.
105 See Faster FOIA Act of 2011, S. 1466, 112th Cong. § 1(d)(3)(A) (as passed by Senate, Aug. 1, 2011) (instructing the commission it sought to create to investigate why the use of exemptions increased in FY 2009).
106 See Josh Hicks, Transparency Criticisms Linger for Administration, WASH. POST, Mar. 18, 2014, at A15 (citing Associated Press study of FOIA requests under President Obama).
107 See infra app. tbl.4
received these awards in 30 cases out of 361 decided.\textsuperscript{108} As described further below, plaintiffs are also victorious in cases with other types of outcomes.\textsuperscript{109} Although an agency may end up disclosing additional documents because the law interpreting FOIA exemptions changes,\textsuperscript{110} at least some cases reflect improper denials, especially those that yield an award of attorney fees to the plaintiff.\textsuperscript{111} A comparison of Tables 3 and 4 shows that only a very small percentage of denials are challenged in court: full denials are in the range of about 25,000 to 40,000, whereas cases filed are on the order of around three hundred. It seems quite likely that agencies withhold other information improperly, but that requesters seldom challenge them.\textsuperscript{112}

3. Prevalence of Commercial Requests

FOIA does not instruct agencies to report on what sort of entities submit requests.\textsuperscript{113} Independent studies are not comprehensive but show consistently that commercial entities submit a large majority of requests under the Act.\textsuperscript{114} Enough firms are sufficiently attracted to obtaining information under the statute that intermediary companies have arisen to submit requests on behalf of corporate clients,\textsuperscript{115} in part to cloak the requesters’ identities.\textsuperscript{116} The prominence of corporate requests recently garnered attention in \textit{Wall Street Journal} reporting on hedge funds’ profits from using the Act.\textsuperscript{117}

\textsuperscript{108} See id.
\textsuperscript{109} See infra notes 179-180 and accompanying text.
\textsuperscript{110} See Milner v. Dep’t of Navy, 131 S. Ct. 1259, 1263 (2011) (resolving a circuit split on the interpretation of FOIA’s second exemption).
\textsuperscript{111} See, e.g., Rosenfeld v. DOJ, 904 F. Supp. 2d 988, 1000 (N.D. Cal. 2012) (finding that the defendant agency lacked a reasonable basis in law for its withholding of information).
\textsuperscript{112} Cf. Harold J. Krent, Explaining One-way Fee Shifting, 79 VA. L. REV. 2039, 2058 (1993) (theorizing in general that “the political process inadequately deters government actors from misconduct”).
\textsuperscript{114} See \textit{Foerstel}, supra note 66, at 137 (citing studies pointing to this phenomenon); Peter L. Strauss \textit{et al.}, Gellhorn and Byse’s Administrative Law: Cases and Comments 503 (11th ed. 2011) (same).
\textsuperscript{115} See \textit{Foerstel}, supra note 66, at 137.
\textsuperscript{117} See id.
From pure social welfare considerations, this phenomenon is not automatically a problem since corporations’ gains from the use of FOIA information would count as economic benefits. However, a preponderance of commercial requests is a concern when viewed in terms of the Act’s public awareness purpose. In theory, the statute places the least priority on records requests “for commercial use” by charging them the highest fees,\textsuperscript{118} though such fees apparently do not seem deter firms from making requests. In practice, as commercial requesters are likely to be seeking information about their competitors,\textsuperscript{119} they are likely never to share the information, and the public will not benefit from the knowledge derived from the released documents. A focus on the transparency purposes of the Act also yields the argument that corporate requests are crowding out requests from individuals, journalists, and nongovernmental organizations that are more likely to publish released records.

II. The Importance of Cost Asymmetries

The delays, denials, and dominance of corporate requests can be traced to a misalignment of monetary incentives due to cost asymmetries when agencies are to process requests and when a plaintiff contemplates judicial review of a denial or delay. Specifically, requesters face low processing costs compared to agencies at the processing stage, whereas the reverse is true at the judicial review stage. Because of these cost asymmetries, the principle provided in the introduction is not fully followed: information seekers do not collectively request the most publicly beneficial information, and agencies are not motivated to fulfill requests as fast and favorably as the law commands. Though the current structure is better than not having FOIA, the present allocation of processing and judicial review costs makes requests only a very imperfect signal of what information disclosure would be most publicly beneficial.

\textsuperscript{119} See STRAUSS ET AL., supra note 114, at 475-76; Scalia, supra note 10, at 16 (contending that FOIA has served “largely as a means of obtaining data in the government’s hands concerning private institutions (emphasis added)).
A. Cost Asymmetries at the Request Processing Stage

By design, FOIA does not compensate agencies fully for the costs they incur in fulfilling requests. The statute dictates that “[f]ee schedules shall provide for the recovery of only the direct costs of search, duplication, or review” (emphases added).\(^\text{120}\) Also, an agency cannot charge review costs if the request is noncommercial in nature; furthermore, if a noncommercial entity is “an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media” (hereinafter, a “subclause II entity”), then the agency also may not charge for search costs.\(^\text{121}\) In addition, fees are to be waived for noncommercial requests for one of two reasons: first, “if disclosure . . . is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,”\(^\text{122}\) and second, if the request requires no more than “one hundred pages of duplication,” or, for entities not exempt from search costs, no more than “two hours of search time.”\(^\text{123}\) Thus, even a perfectly functioning FOIA in its current form would yield some cost asymmetry at the processing stage.

1. Low Costs for Requesters

However, Table 5, which lists data on costs and fees related to processing, reveals a vast cost asymmetry that is almost certainly greater than Congress intended. From FY 2008 to FY 2013, the fees that requesters have paid have trended downward from $11.6 million to $4.34 million. The cost per request has also steadily declined from $18.62 in FY 2008 to $6.40 in FY 2013. This downward trend can be attributed to a provision from the OPEN Government Act of 2007 that prohib-

\(^{120}\) See 5 U.S.C. § 552(a)(4)(A)(iv) (2012). For example, agencies cannot charge “costs incurred in resolving issues of law or policy that may be raised in the course of processing a request.” See id.

\(^{121}\) See id. § 552(a)(4)(A)(ii)(I)-(III). The entities exempt from search and review fees are defined in subclause II, while commercial requests and other requests are defined respectively in subclauses I and III.

\(^{122}\) See id. § 552(a)(4)(A)(iii).

\(^{123}\) See id. § 552(a)(4)(A)(iv)(II).
its an agency from collecting duplication fees from subclause II entities and search fees from other requesters if it fails to follow the Act’s deadlines.\textsuperscript{124} Because this amendment took effect on December 31, 2008,\textsuperscript{125} the data for FY 2008 reflect the fees that requesters paid before the OPEN Government Act. Thus, even at its highest, $18.62 per request in FY 2008 can be perceived as a bargain, although this characterization needs to be tempered by the possibility of a delay or denial.\textsuperscript{126}

More importantly, there is substantial evidence that requesters respond to the price of a request. In other countries, increases in fees have caused significant decreases in requests.\textsuperscript{127} As for the U.S. law, the original FOIA was vague about what sorts of fees agencies could charge and asked them only to publish a schedule of “fees to the extent authorized by statute.”\textsuperscript{128} Several years later, House and Senate reports expressed concern that some agencies were deterring FOIA requests with high processing fees.\textsuperscript{129} As a result, Congress amended the Act in 1974 to limit fees to “direct costs of . . . search and duplication” and to require an agency to eliminate or further reduce the cost to the requester “where the agency determines that waiver or reduction of the fee is in the public interest.”\textsuperscript{130} What followed was an increase in requests beyond what Congress expected,\textsuperscript{131} particularly in corporate requests.\textsuperscript{132} These low prices arguably break the first part of the incentives principle because they serve as only a rough indication of what records are likely to be most publicly beneficial if disclosed. Undoubtedly, there are individuals and organizations that would be willing to pay more for faster processing of requests for information that would have

\textsuperscript{125} See id. sec. 6(b)(2), 121 Stat. 2526 (stating that the fee provision would take effect a year after the enactment date of December 31, 2007).
\textsuperscript{126} Cf. STRAUSS ET AL., supra note 114, at 476 (arguing that “commercial entities . . . are happy to pick up some intelligence at not much cost”).
\textsuperscript{127} See ROBERTS, supra note 8, at 86, 97, and 114 n.34 (noting this phenomenon in Ireland, Ontario, and Australia).
\textsuperscript{132} Scalia, supra note 10, at 14, 16.
greater public impact; however, they may be placed in a queue behind earlier requests by individuals who place less value on the information they seek.\footnote{See Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 614 (D.C. Cir. 1976) (sanctioning “first-in, first-out” processing of requests); Grunewald, supra note 78, at 353 (discussing the common practice of processing requests in the order received).}

The Act’s fee structure changed again in 1986 so that commercial purposes would incur charges for review in addition to document search and duplication.\footnote{See Freedom of Information Reform Act of 1986, Pub. L. 99-570, sec. 1803, §552(a)(4)(A)(ii)(I), 100 Stat. 3207-48, at -49.} In spite of this upward adjustment in cost, corporations continued to file most FOIA requests, indicating that they found these requests worth the cost.\footnote{See sources cited supra note 114.} Thus, the current fee structure still contributes to the prevalence of commercial requests that lead to less public awareness about the government. Meanwhile, the 1986 amendments also exempted subclause II entities from search fees,\footnote{Compare id. Freedom of Information Reform Act of 1986, Pub. L. 99-570, sec. 1803, §552(a)(4)(A)(ii)(II), 100 Stat. 3207-48, at -49, with 5 U.S.C. § 552(a)(4)(A) (1982).} and provided waivers for small requests to all noncommercial requests.\footnote{Compare Freedom of Information Reform Act of 1986, Pub. L. 99-570, sec. 1803, § 552(a)(4)(A)(iv) (2012), 100 Stat. 3207-48, at -50, with 5 U.S.C. § 552(a)(4)(A) (1982).} Because of this lowered price, one might even argue that there are low-benefit noncommercial requests that crowd out more publicly valuable requests and contribute to FOIA delays.\footnote{Cf. Scalia, supra note 10, at 17 (alleging the presence of “requests that are not really important enough to be there, crowding the genuinely desirable ones to the end of the line”).}

2. High Costs for Agencies

Compared to the amount that information seekers pay to have their requests processed, agencies incur much greater costs: Table 5 shows that processing costs rose from $321 million in FY 2008 to $420 million in FY 2013. Even accounting for inflation over time, these costs exceed congressional expectations of $50,000 to $100,000 across all agencies in the first ten years after the
In general, the agencies fully absorb these costs: they do not receive any appropriations to fulfill requests, and, other than the Food and Drug Administration (FDA), which has a statutory exception to retain its fees, they must remit the fees they collect to the U.S. Treasury. Even if they could keep the fees, however, their net costs would remain very high: Table 5 shows that fees that fell from 3.61 percent in FY 2008 to just 1.04 percent in FY 2013, most probably due to the OPEN Government Act. Though agencies might conceivably be able to recoup more of their costs by processing requests more efficiently, the overwhelming ratio of processing costs to fee collections implies that agencies face real resource constraints. The causal link between these constraints and processing delays is almost indisputable as a logical matter.

Even if one supposes that agency delays are a matter of officials’ lack of desire rather than inability to fulfill requests, the high costs contribute to backlogs at least in the sense that they provide agencies with a justification for missing statutory deadlines that courts have generally accepted. The leading case on agency delays is Open America v. Watergate Special Prosecution Force, which remarked that commanding timely disclosure would result in “a reallocation of resources” to the request in question and away from other requests. It found a textual basis for denying the plaintiff relief by interpreting the defendant FBI’s volume of requests as “exceptional

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139 See H.R. REP. NO. 93-876, at 10 (1974); see also Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 612 (D.C. Cir. 1976) (noting that, compared to Congress’ estimates, FBI’s costs alone were $160,000 in FY 1974, $462,000 in FY 1975, and an expected $2,675,000 in FY 1976).
144 Cf. Sinrod, supra note 79, at 334 (asserting connection between Congress’ decision not to provide agencies with additional funds for processing FOIA requests in the 1974 amendments and resulting backlogs).
145 See Pierce, supra note 78, at 78-81 (discussing how courts have dealt with agency claims that they lack resources for FOIA).
146 547 F.2d 605 (D.C. Cir. 1976).
147 See id. at 614; see also Grunewald, supra note 78, at 349 (arguing that “Open America . . . enshrined . . . the view that delay is essentially a function of resource shortage in processing”).
circumstances” that allow a court to grant an agency additional time to fulfill a request. The 1996 Amendments to FOIA tried to eliminate request volume stemming from a “predictable agency workload” as an exceptional circumstance, although they continued to allow an agency to invoke this factor when it “demonstrates reasonable progress in reducing its backlog of pending requests.” Although courts have become at least somewhat stricter about FOIA’s statutory deadlines as a result, Tables 1 and 2 show that significant backlogs and delays persist. Thus, whether agency resource constraints are an objective or merely court-facilitated cause of delays, the connection between these two is clear.

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

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150 See Appleton v. FDA, 254 F. Supp. 2d 6, 10 (D.D.C. 2003) (examining agency’s backlog effort and finding them reasonable); Donham v. DOE, 192 F. Supp. 2d 877, 882 (N.D. Ill. 2002) (noting that “[t]he Open America approach is inconsistent with the plan [sic] language of FOIA, especially in light of the 1996 Amendments”); Grunewald, supra note 78, at 359-62 (discussing the challenges courts would be expected to face in interpreting this provision).
153 See Open America, 547 F.2d at 614.
154 Cf. Alasdair Roberts, Dashed Expectations: Governmental Adaptation to Transparency Rules, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 107, 116-17 (Christopher Hood & David Heald ed., 2006) (stating that agencies in other countries have adopted this technique).
Additionally, since agencies, rather than requesters, are the ones to decide whether a request should receive expected processing,\(^{155}\) high costs may also discourage them from choosing to complete a request faster. The criteria for expediting requests—“cases in which the person requesting the records demonstrate as compelling need” and “other cases determined by the agency”\(^{156}\)—are in the agency’s discretion. Given the likelihood of some bureaucratic resistance to FOIA implementation,\(^{157}\) it is unlikely that the agency’s decisions about which requests should be expedited correspond to those requests that are likely to contribute the most to public knowledge about the government.

Before proceeding to discuss judicial review costs, it is worth acknowledging that how well agencies implement FOIA is not only a matter of financial cost. The presence of the law itself does encourage partial fulfillment. Also, agencies or individuals within an agency may take initiative to increase efficiency and reduce backlogs.\(^ {158}\) In addition, rather than a conscious concern about FOIA’s cost, agencies may simply focus on more policy-related tasks and either ignore FOIA or become generally less effective, including in FOIA processing.\(^ {159}\) On the other hand, it is possible to overstate other agency motivations. First, general resistance to disclosure, while present, seems to be mostly limited to high-level officials and is not constant across agencies.\(^ {160}\) Second, despite Obama’s memorandum on FOIA, the limited progress in completing requests or disclosures shown in Tables 1-3 suggests that presidential pressure to disclose is not that effective. Instead, the evidence supports at least a claim that agency processing costs are a significant driver of de-


\(^{156}\) Id. § 552(a)(6)(E)(i)-(II).


\(^{160}\) See FOERSTEL, supra note 66, at 71-72.
lays and possibly denials and that, contrary to the second part of the incentives principle, they do not encourage agencies to process requests as quickly and favorably as possible.

B. Cost Asymmetries at the Judicial Review Stage

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

1. High Costs for Requesters

The high costs to requesters appealing an adverse outcome have been observed throughout the Act’s history. In considering the first set of amendments in 1974, the Senate Judiciary Committee found that, “even the simplest FOIA case . . . involves legal expenses of over $1,000,” an amount that would be equivalent to a much larger value today. It found that even media or-

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164 See supra Part I-B-1 and -2.
ganizations had difficulty paying litigation expenses. It affirmed a House subcommittee’s conclusion that the cost of FOIA suits “makes litigation under the act less than feasible in many situations.” In addition, it connected the cost of these lawsuits to ineffective implementation, saying that they were “allowing the government to escape compliance with the law.” Thus, for many would-be plaintiffs, then, the judicial review process could be almost as much of a hindrance to receiving records as an absolute right for agencies to deny information.

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

In addition to large legal fees and costs, the delay that accompanies a lawsuit may discourage challenges by requesters since information can often be expected to become less valuable with time. In the case of mere delay, courts resist quick decisions because such decisions provide an advantage to those who litigate over those who do not. Looking only at the set of cases in 2013 in which attorney fees were awarded, cases were filed in each year from 2009 to 2013, and

\[\begin{align*}
166 & \text{See id. at 17.} \\
167 & \text{See id. at 3 (citing H.R. REP. NO. 92-1419, at 8 (1972)).} \\
168 & \text{See id. at 17.} \\
169 & \text{See 5 U.S.C. § 552(e)(6) (2012).} \\
170 & \text{This year appears to have by far the highest number of attorney fee awards in recent years. See infra app. tbl.4. However, it is possible that this result is due to incomplete information collection by DOJ. See infra note 181.} \\
171 & \text{See infra app. tbl.6.} \\
172 & \text{See STRAUSS ET AL., supra note 114, at 475.} \\
173 & \text{See Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976).}
\end{align*}\]
one case was filed as early as 2006.\textsuperscript{174} As the listed dispositions in Table 6b indicate, courts sometimes rendered judgment before deciding on attorney fees, so the actual time to receiving documents is somewhat less than these special cases indicate.\textsuperscript{175} Nonetheless, cases in which a plaintiff has to sue indicate greatly delayed disclosure, especially compared to FOIA’s standard twenty-day deadline.\textsuperscript{176}

High costs and delays may be more a deterrent to a lawsuit than the likelihood of an adverse outcome. Admittedly, since an intrinsic property of FOIA cases is that only the agency knows what is contained in a document,\textsuperscript{177} plaintiffs cannot expect to win as often as defendants. Perhaps unsurprisingly, Table 4 indicates that the number of judgments at least partially favorable to a plaintiff is small compared to the number of cases decided. However, Table 6b indicates that other case outcomes may be associated with document release since such cases yielded fee-shifting. The most common such result is a “stipulation of dismissal,” which was the disposition listed for twenty-two of the thirty cases in 2013.\textsuperscript{178} Since a stipulated dismissal requires all parties to sign,\textsuperscript{179} it indicates an agreement, in which case the defendant agency is compromising from its initial position by releasing some documents, either in the first place or faster. In addition, it is even possible for a plaintiff to lose in court but still obtain attorney fees, as one case described in Table 6b indicates. Furthermore, in \textit{Electronic Privacy Information Center (EPIC) v. DHS}, a 2012 case, the plaintiff lost in summary judgment on the documents still in dispute but won these fees on the basis of other documents released earlier in the case.\textsuperscript{180}


\textsuperscript{175} Cf. Krent, supra note 112, at 2065 (noting that in general, inquiries over attorney fees can extend time spent on litigation against the government).

\textsuperscript{176} Cf. id. (observing that, “[e]ven in the absence of remands, litigation over several years is not unusual”).

\textsuperscript{177} See \textit{Litigation Under the Federal Open Government Laws} 368 (Henry A. Hammitt et al eds., 24th ed. 2008) [hereinafter \textit{Litigation}].

\textsuperscript{178} See infra app. tbl.6b.


Thus, calculating the win percentage for plaintiffs is quite a challenge. Plaintiffs have clearly achieved some sort of victory if they receive attorney fees, otherwise receive a judgment in their favor, or reach a stipulated dismissal. As Table 6b and *EPIC v. DHS* show, lack of victory or even a loss at court does not indicate a total loss for a plaintiff. Thus, the total percentage of cases with attorney fees, at least a partial judgment for the plaintiff or a stipulated dismissal serves as a floor for requesters’ success rate in court. In the years with the most reliable data, Table 4 shows that this floor ranged from 26.0% in 2006 to 38.2% in 2012. Thus, these data suggest that more requesters would be willing to sue if the costs were lower.

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

FOIA has yielded a common four-factor test to determine entitlement: “(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff’s interest in the records; and (4) the reasonableness of the agency’s withholding of the re-

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181 The years 2009 to 2011 are excluded in the statement because DOJ reported no stipulated dismissals in these years, see infra app. tbl.4. Thus, DOJ’s reporting is probably incomplete, and the overall percentage of plaintiff successes is likely higher.
183 See id. at § 552(a)(4)(E)(ii).
quested documents.”185 As one case has noted, “the first three factors assist a court in distinguishing between requesters who seek documents for public informational purposes and those who seek documents for private advantage.”186 Depending on how courts apply them, these factors may help mitigate the problem of commercial requesters seeking solely their own benefit, although they have also been used to deny fee-shifting to nonprofit organizations.187 However, the fourth factor, which considers “whether the agency’s opposition to disclosure ‘had a reasonable basis in law,’”188 poses difficulties to all plaintiffs because it implies that the close cases will not yield a fee award. This last factor combines with the plaintiff’s information disadvantage to increase the risk that she bears when challenging a delay or denial. Thus, though fee-shifting has been understood as important in incentivizing public interest litigation,189 FOIA’s current provision is arguably not very robust, as is evidenced by the low frequencies of fee awards after a successful outcome given in Table 4, never reaching thirty percent in the last eight years.

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

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185 See Davy v. CIA, 550 F.3d 1155, 1159 (D.C. Cir. 2008); Litigation, supra note 177, at 323 (noting that all circuit courts that have considered entitlement for attorney fees use the same criteria).
186 Davy, 550 F.3d at 1160.
187 See generally Litigation, supra note 177, at 323-326 (discussing the case law on the first three factors).
188 Davy, 550 F.3d at 1162 (quoting Tax Analysts v. DOJ, 965 F.2d 1092, 1096 (D.C. Cir. 1992)).
information because willingness to pay for a lawsuit only roughly signals what information releases are likely to be valuable.

2. Low Costs for Agencies

At the level of the individual case, agency costs for litigation might seem quite high. The estimated average cost of each case, reported in Table 4, showed no general trend from 2006 to 2012, but ranged from $52,906 in 2008 to $95,238 in 2009. Also, agencies do directly pay any attorney fee awards. However, as already noted, relatively few cases are filed each year compared to the number of information denials. The total cost for agencies ranged from $17 million in FY 2007 to $28 million in FY 2009, and the percentage, as a total of FOIA costs, ranged from 4.3% to 7.3% in the same two years. Thus, litigation costs are not a major factor for agencies, compared to processing costs, which make up the remainder.

In addition, most agencies do not bear the full cost of defending against lawsuits because they receive legal assistance from DOJ. Attorney General Eric Holder’s memo, reversing the previous administration’s policy, states that DOJ “will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” However, observers of FOIA lawsuits have been unable to find cases that DOJ has chosen not to defend. It is worth acknowledg-

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190 These costs are estimated because the litigation and total costs are counted in fiscal years, whereas the number of cases is counted for calendar years.
191 See OPEN Government Act of 2007, Pub. L. 110-175, sec. 4(b), 121 Stat. 2524, 2525 (stating that attorney fees “shall be paid only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered”); cf. Krent, supra note 112, at 2066 (noting that, “if fee awards come out of the implementing agency’s budget, . . . the possibility of deterrence increases”).
192 See infra app. tbl.4.
ing that that DOJ’s vigorous defense of agency delays and denials is legitimate since it is sanctioned by law. Nonetheless, its participation does make judicial review less of a concern for agencies.

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

III. Proposals for Fixing FOIA

Since economic logic and evidence suggest that cost asymmetries at the processing and judicial review stages misalign requester and agency incentives and constitute a key factor underlying problems with delays, denials, and commercial requests under FOIA, correcting these

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197 See Davis v. DOJ, 610 F.3d. 750, 752 (D.C. Cir. 2010).
198 See id.; DOJ, supra note 184, at 7; Litigation, supra note 177, at 321.
199 See, e.g., Rosenfeld v. DOJ, 904 F. Supp. 2d 995-98 (N.D. Cal. 2012) (describing the court’s reasoning in determining that the plaintiff’s lawsuit caused agency disclosures).
asymmetries shows much promise for mitigating these problems. This section presents a set of fairly simple cost-focused policy proposals to reallocate costs and shows that they would likely improve FOIA’s implementation substantially. Given the advantage of FOIA’s request-based logic described in Part I-A, these proposals are more likely to enhance public awareness of executive branch activity than bills that Congress has recently considered, which mainly add to agencies’ duties. Furthermore, these cost-focused fixes, which are intended to be proposed together as a package, should be able to attract the support of both legislators and public interest groups.

A. Design of Cost-focused Proposals

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

1. Retention of Processing Fees

Since, under the current law, most agencies must remit their fees to the Treasury, the first proposal, which has been suggested elsewhere, is to have all agencies retain the fees they collect in processing FOIA requests. This measure would be fairly simple to legislate and could largely be modeled after the FDA fee retention provision, which encompasses only a few paragraphs and does not state the need for any regulations. In particular, this proposal, like the FDA

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200 See supra notes 142-143 and accompanying text.
201 See Sinrod, supra note 79, at 361; Wichmann, supra note 19, at 1254.
provision, would stipulate that the money it collects be used only to fulfill requests, rather than for general purposes. The key difference for this proposal would be that fee collection would be mandatory, rather than optional, as in the FDA provision. Though most agencies would probably keep their fees if given the choice, instructing them to do so sends a message that they are to fund their FOIA operations in part by fulfilling requests.

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

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203 See id. §§ 379f(a)(1), (b); see also Sinrod, supra note 79, at 361; Wichmann, supra note 19, at 1254 (noting that collected fees should be used to improve FOIA processing).
206 See Sinrod, supra note 79 at 361-63.
207 See infra app. tbl.5.
209 See 5 U.S.C. § 552(a)(4)(A)(ii) (2012). Although agencies are instructed to provide fee waivers for requests for which the information release “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” see id. § 552(a)(4)(A)(iii), it does not follow that all nonprofit organizations’ requests qualify. Instead, they must qualify for an exemption for each request. See Coglianese et al., supra note 42, at 942. Such organizations apparently are not always granted a fee waiver, as courts have affirmed some denials in the past. See LITIGATION, supra note 177, at 304-05.
2. Increasing Processing Fees

For fee retention to motivate agencies to reduce delays, they need to be able to collect a greater amount in the first place. Thus, the fee structure needs to be amended so that information seekers pay more in aggregate for their requests. Since the law already induces agencies to complete requests without compensation, it is not necessary to bridge the entire gap between fee collections and processing costs and make FOIA revenue-neutral. Still, the fee structure should be redesigned to reduce net financial losses for the agencies. Such a change would undercut whatever remains of Open America’s resource-based rationale for allowing delays. Since the current definition of “exceptional circumstances” excludes “a predictable workload of requests” but is qualified by allowing an agency to “demonstrate[] reasonable progress in reducing its backlog,” FOIA could be amended to reflect this expectation of minimal backlogs and delays by removing the qualifier.

Since FOIA fees depend on the nature of the request and of the requester, the size of a request, and the timeliness of agency action on a request, there are a variety of ways to increase the revenue that agencies receive from the act. Thus, amendments to the fee structure could become quite complex. However, one straightforward way of increasing fees is through the use of multiplying factors. For example, the statement that “fees shall be limited to reasonable standard charges” for various cost components in commercial requests could be changed to read that “fees shall be limited to five times reasonable standard charges.” Combined with the ability to retain fees, agencies would be incentivized to promulgate new fee regulations relatively quickly. A

\[\text{\footnotesize{200 Conversely, collecting more fees is useful only if agencies can keep them. Otherwise, agencies are merely collecting money for the U.S. Treasury, which provides no direct benefit to their operations.}}\]


\[\text{\footnotesize{202 Since an agency may not turn down a request for workload reasons, see id. § 552(a)(3)(A), any agency with a large volume of requests probably cannot eliminate backlogs and delays entirely. The reason is that a requester’s willingness to use FOIA depends on the delay she expects. Thus, if an agency seemed to be meeting all deadlines within the statute, entities that previously would not have submitted requests would be inclined to do so.}}\]


\[\text{\footnotesize{204 Id. § 552(a)(4)(A)(ii)(I).}}\]
bill could effectuate even quicker action by stipulating that, until agencies amend their fee schedules, they shall charge the relevant multiples of fees based on their current fee schedules. Like the legislative language for fee retention, the language for multiplying factors need not be long.

Three simple amendments to the fee structure are as follows: first, to multiply the fees assessed for commercial requests by a large factor, second, to multiply the fees assessed for expedited requests by a large factor while allowing anyone willing to pay these fees to request faster processing, and third, to multiply the fees for noncommercial, non-expedited requests by the same or a smaller factor. Though Congress is free to increase fees in additional ways, these three changes provide a useful example of how to encourage information seekers as a whole to request the most publicly beneficial information, as well as to encourage agencies to process requests more quickly. Also, while there remains the challenge of selecting the right factors, adjusting these three numbers would be a simple task for further amendments to the act.

To begin with, increasing the fees for commercial requests is justified because the records released in response to them are least likely to be shared with the general public. Such a provision would expand the distinction made for commercial requests in the 1986 amendments. As noted above, commercial requests constitute a very large proportion of requests. Given that agencies have recouped a percentage of processing costs that has only fallen from 3.6% since FY 2008, it is almost certainly the case that agencies are currently recouping only a small fraction of costs even for commercial requests. Thus, the fees for this category of requests would probably need to

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215 Three other types of fee increases could enhance this package, but at the cost of greater complexity. First, since costs for document review in commercial requests are limited to “the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section, see id. § 552(a)(4)(A)(iv), Congress might eliminate this restriction. Second, the exemption from fees for “the first two hours of search time or for the first one hundred pages of duplication,” see id., might also be removed. Third, the provision preventing agencies from assessing search fees (or duplication fees for subclause II entities) after the deadline for a request, absent special circumstances, see id. § 552(a)(4)(A)(viii), could either be removed or modified with a more gradual decrease in the amount collected over time.


217 See supra notes 114, 135, and accompanying text.

218 See infra app. tbl.5.
be multiplied several-fold for agencies to come close to breaking even on them. This measure
would have one of two effects, either of which would be desirable. First, commercial requests
might decrease, but remain a substantial part of agencies’ workload, in which case the fees col-
lected for them would contribute substantially to FOIA operations. Second, a high factor might
largely discourage commercial requests, in which case agencies would have more resources avail-
able to deal with noncommercial requests.

Next, allowing anyone to expedite their request by paying a multiple of what she would
otherwise pay would provide another potential source of revenue and means for faster infor-
mation dissemination.219 As Table 2 indicates, expedited requests are infrequent, and the reason,
as discussed above, is that decisions to expedite depend on the agency’s judgment as to what con-
stitutes a “compelling need.”220 Conditioning expedited requests on higher charges would tend to
ensure that requests of greater importance are processed more quickly since willingness to pay
more would be a rough proxy of the information’s probable importance. Doing so would also pro-
vide agencies with the resources they need to process these and other requests faster and prevent
them from delaying requests they would rather have processed on the standard timeframe.

Finally, to increase incentives to complete requests by or close to the deadline, it may still
be necessary to increase fees on the remaining requests, albeit not to the same degree as com-
mercial or expedited requests. One important reason is that, based on the small absolute drop in per-
centage of fees recouped between FY 2008 and FY 2009,221 when the restrictions on fee collections
after FOIA deadlines in the OPEN Government Act of 2007 took effect,222 agencies seem to lose
little financially from missing FOIA deadlines.223 Thus, agencies should be incentivized at least a

219 As formulated here, this measure would preserve the fee distinctions among various types of requests, such as be-
tween commercial and noncommercial requests.
220 See supra notes 155-156 and accompanying text.
221 See infra app. tbl.5.
222 See supra notes 124-125 and accompanying text.
bit more to fulfill noncommercial requests with higher fees. Even if the same factor is applied to noncommercial requests as to commercial requests, the overall increase will not be as large, since the former are not subject to as many types of fees as the latter.224

Still, even more modest fee increases for noncommercial requests may raise the risk that some meritorious requests will be discouraged.225 However, with a reduction in delays, the effect would not be a direct disincentive to submit requests. First, many of those who are currently willing to pay for their requests with their attendant delays would be willing to pay more as delays decrease, although perhaps not as much as the expedited rate. Second, there are likely others with somewhat more pressing desires for information (but not quite at the expedited level) who would file requests because FOIA is more efficient. Instead, the requests that would be discouraged are those not willing to incur higher fees even with much faster processing. Such a revealed lack of willingness to pay suggests that these requests would be relatively unimportant for the public.

There remains the issue of people who would like to pay but lack the resources to do so. However, media and nonprofit organizations have organized to facilitate not only their own use, but also other citizens’ use of FOIA and state freedom of information laws.226 Individuals unfamiliar with the FOIA process would likely rely on these resources, anyway. Since support in the network for FOIA advocates includes grant funding,227 these organizations could also conceivably file these requests on behalf of individuals or provide financial support for their requests. Thus, if an individual information seeker is daunted by the cost and cannot convince any organization to undertake or subsidize her request, then her request is likely not worth filing in the first place.228

224 See id. § 552(2)(4)(A)(ii).
225 See ROBERTS, supra note 8, at 114.
226 See MARTIN, supra note 41, at 153-54.
227 See id. at 156-159.
228 Cf. Scalia, supra note 10, at 17 (referring to requests that “may be motivated by no more than idle curiosity” and “that are not really important enough to be there”).

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

Increases in processing fees can be contrasted against budget appropriations, which are the other way to add to agency resources for implementing FOIA.\(^{229}\) Besides the fact that Congress is unlikely to provide additional resources\(^ {230}\) and the uncertain availability of additional resources for government activity in general,\(^ {231}\) budget allocations have two other disadvantages. First, based on the data that agencies have collected on processing costs and fee collections, it is much easier to devise fee increases for all agencies than to set the right appropriation levels for

\(^{229}\) See Wichmann, supra note 19, at 1255 (endorsing additional spending on FOIA).

\(^{230}\) See FOIA Act, H.R. 653, 114th Cong., sec. 4 (2015) (authorizing no additional funds); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 5 (2015) (same); Sinrod, supra note 79, at 363 (“[r]ecognizing that such a commitment of resources is highly unlikely in the foreseeable future”).

\(^{231}\) Cf. Pierce, supra note 78, at 64 (predicting in the late 1990s that, “[f]or the foreseeable future, agencies will have access to constantly diminishing resources”).
each agency.\textsuperscript{232} Second, unconditional funding does not incentivize expeditious fulfillment of any single request. Instead, agencies may waste funds,\textsuperscript{233} and they might still be able to convince courts that they are resource-constrained.

3. Strengthening Attorney Fee-shifting

The first two fixes promise to improve FOIA’s implementation by reducing delays due to resource constraints. The final one, making attorney fee-shifting under the Act more favorable, is designed mainly to discourage wrongful denials of information while also mitigating delays. The changes in this area are to automatically award attorney fees and litigation costs\textsuperscript{234} to a plaintiff if she has “substantially prevailed” and her request was noncommercial. In terms of the court’s analysis, eligibility for fees and costs would remain the same; meanwhile, a plaintiff for a noncommercial request would always be entitled to reimbursement, whereas the entitlement analysis would not change for commercial requests. This change would be very simple to enact: the section on fee-shifting is fairly short,\textsuperscript{235} and a net addition of an additional sentence would be sufficient to indicate that successful noncommercial plaintiffs should automatically awarded attorney fees.\textsuperscript{236}

Also, this change eliminates discretion from judges about whether to award fees.

Awarding fees and costs to a noncommercial requester simply because she has substantially prevailed would unambiguously yield reimbursements for plaintiffs more often than the current case law’s four-factor test. While the result would be a rule stronger than those in most

\textsuperscript{232} Since the argument for appropriations is founded on the idea that the current resources devoted to FOIA implementation are not enough, see Sinrod, supra note 79, at 326, agencies’ processing costs serve only as a floor for allocation levels. It is unclear how much more funding is needed for each agency.


\textsuperscript{234} The inclusion of costs is important for plaintiffs who act pro se. Since pro se litigants cannot recover attorney fees under FOIA, see Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986) (adopting the rule and observing that seven other circuits adhere to it), costs are the most they can recover. Though FOIA could be amended to include some compensation for pro se litigants, such a step would be less rooted in the history of the statute than the measure proposed here.


\textsuperscript{236} A second additional sentence in the legislation might indicate that courts should not construe the amendment to allow a more restrictive definition of substantially prevailing in a complaint.
other federal statutes, the information asymmetries and delays associated with lawsuits under the Act, discussed above, make the case for generous fee-shifting especially strong for FOIA plaintiffs.

This amendment is not only attractive to plaintiffs in theory, but it also should make fee-shifting determinations easier in practice because it is embedded in the distinction between commercial and noncommercial requesters in the fee structure. This distinction is rather similar to the distinction that the Senate expected courts to draw in applying most of the four-factor test in its conference report for the 1974 amendments. The fourth factor dealing with the agency’s reasonableness is the only one that extends beyond commercial requests. The difficulties of this factor due to the agency’s information advantage have been discussed above, so the new fee-shifting provision would effectively always resolve the fourth factor in a noncommercial plaintiff’s favor. Thus, instead of having separate inquiries on the fee category of the requester and entitlement to attorney fees, only the first inquiry would be relevant for noncommercial requesters.

Admittedly, this change would increase the stakes for an agency’s determination of the kind of requester. Agencies might attempt to reclassify some noncommercial requests as commercial, and some commercial entities might either strive to qualify as noncommercial or form new entities for the purpose of avoiding designation of their requests as commercial. However, since Congress made the distinction between commercial and noncommercial requests in the 1986 amendments, agencies have had nearly three decades of experience with fee categorizations. Congress can prevent arbitrary reclassifications and gaming by commercial requesters with

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237 See Henry Cohen, Cong. Research Serv., RL94-970 Awards of Attorneys’ Fees by Federal Courts and Federal Agencies 64-114 (updated June 20, 2008) (quoting various federal statutes under which attorney fee-shifting is allowed).
238 See supra notes 172-177 and accompanying text.
241 See id.
242 See supra notes 147-148 and accompanying text.
a stipulation that agencies shall maintain the same definition of commercial requests as before. Though there might be somewhat more legal challenges in the area of fee categories than before, these would outweighed by a much larger reduction of cases to determine entitlement for attorney fees.

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

B. Comparison to Recent Legislation

The three cost-shifting proposals for reform are quite different from the three recent bills: the FOIA Act, the FOIA Improvement Act, and POIA. The foundation of analysis of approaches to information disclosure laid above will be useful in evaluating many of their provisions. Overall, most provisions are not harmful, but they are generally also unlikely to have as much of an effect

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244 Cf. Litigation, supra note 177, at 297-99 (describing the relatively small case law on commercial fee categorizations).
245 See Strauss et al., supra note 114, at 475 (remarking that “[p]laintiffs in litigated cases are disproportionately news organizations or NGOs”).
246 Cf. Percival & Miller, supra note 189, at 247 (noting that “court-awarded fees are a useful supplement to the budgets of public interest groups but not a massive subsidy of these activities”). A more robust fee-shifting provision would clearly increase this subsidy.
247 See Strauss et al., supra note 114, at 476 (conjecturing that “the promise that attorneys’ fees and other litigation costs of substantially prevailing plaintiffs will be reimbursed... is not enough to make litigation by the general public attractive”). However, the current four-factor test implies that attorney fees are currently far from a “promise.”
248 See supra Part I-A.
on information disclosure as the cost-based proposals. Instead of restructuring costs, the bills would mainly impose new duties without providing agencies additional resources and create new institutions, following the pattern of previous amendments to FOIA.

1. FOIA Act and FOIA Improvement Act

The House FOIA Act and Senate FOIA Improvement Act are important to discuss not only because their content differs from the proposals above, but also because versions of these bills in the previous Congress came close to becoming law. The House passed its version on a unanimously supported motion to suspend the rules, and the Senate similarly passed its version via a unanimous consent agreement. The House bill did not receive a Senate vote because of “cost concerns,” while the House did not place the Senate bill on its legislative calendar following the Senate’s passage in December 2014. Following this impasse, legislators and transparency advocates alike stated their intention for action in the new Congress, which has begun with these bills’ reintroduction.

Despite this excitement it is doubtful whether the FOIA Act or the FOIA Improvement Act would have the desired effect of significantly increasing government transparency. Though these bills are not identical, they have the same key features. First, these bills seek to make it

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249 The one provision that is likely to have a major impact is the requests that entities can make under FOIA. See infra notes 284-285 and accompanying text.
252 See Hicks, supra note 25.
253 See id.
254 See supra note 26.
255 Omitted from the following list of features is the amendment in each bill to FOIA’s exemption 5 for intra- and inter-agency memoranda. Both bills deny the exemption to documents that have existed for 25 years or longer at the time of a request. See FOIA Act, H.R. 653, 114th Cong., sec. 2(b)(1), § 552(b)(5)(B) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(2), § 552(b)(5) (2015). The impact of releasing these older documents is likely to be marginal. The FOIA Act further omits “records that embody the working law, effective policy, or the final decision of the agency.” See FOIA Act, H.R. 653, 114th Cong., sec. 2(b)(1), § 552(b)(5)(A) (2015). However, this language seems merely to codify longstanding case law stating that documents under the exemption must precede a final decision. See NLRB v. Sears,
generally more difficult for agencies to withhold documents under the FOIA exemptions by allowing them to do so only when it “reasonably foresees” a harm to an interest protected by the relevant exemption. The FOIA Improvement Act particularly emphasizes that agencies may no longer withhold records merely because “as a technical matter . . . the records fall within the scope of an exemption.” The focus of this provision is making more information releasable, rather than reducing delays based on resource limitations.

However, the likely effectiveness of a command to release more records is uncertain. To begin with, the legislative language draws inspiration from the “presumption of disclosure” from President Obama’s memorandum on FOIA. As shown above, agencies’ implementation of FOIA provides no clear sign that this presumption has reduced either backlogs or instances of questionable withholding. Admittedly, a statutory presumption of openness, unlike the executive one, would provide plaintiffs with a stronger right to disclosure, so its inclusion in FOIA could not harm requesters. However, most of the exemptions are rooted in some sort of foreseeable harm, such as the advantage that terrorist groups would gain from information, a company’s loss of trade secrets, or increased difficulties in law enforcement. Thus, an agency might find it relatively easy to overcome the presumption, especially with help from the Justice Department, which continues to help defend agencies despite having claimed to require a foreseeable harm. In alluding to such a harm, a defendant agency could likely justify some imprecision in the foreseeable

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259 See supra Parts I-B-1 and -2.
262 See supra notes 193-195 and accompanying text.
harm: just as agencies provide limited information about documents in *Vaughn* indexes to avoid revealing the information they contain, they could plausibly argue that more extensive description of a specific harm (such as to a preliminary criminal investigation) would result in effective information disclosure or contribute to that harm.

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

More problematic are provisions in these bills encouraging agencies to do the same proactively for additional documents even before they have been requested. The FOIA Act calls for agencies to “review [their] records . . . to determine whether the release of the records . . . is likely to contribute to public understanding of the operations or activities of the government” and to release qualifying records online after redacting them. Meanwhile, the FOIA Improvement Act would instruct agencies to develop “procedures for identifying records of general interest of use to the public that are appropriate for public disclosure, and for posting such records in a publicly

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


accessibility electronic format.\textsuperscript{268} Interpreted liberally, these proactive posting provisions follow the model of maximal proactive disclosure described above and are thus subject to the same pitfalls: agencies would not be able to post all releasable documents, and they would likely incorrectly prioritize which documents to post and draw resources away from FOIA requests.\textsuperscript{269} More likely, however, agencies would make only very limited efforts to post additional documents beyond those they have already voluntarily made available online. Agencies would not receive any additional appropriations to carry out these or any other provisions,\textsuperscript{270} and neither bill provides any timetables for posting these additional records.\textsuperscript{271} Even small attempts to increase proactive posting would not necessarily lead to better prioritization than that induced by FOIA requests. In addition, the texts of these provisions leave agencies with enough discretion to make them extremely difficult, if not impossible, to enforce judicially.

Third, the two bills include some organizational changes. Each proposes to expand the functions of the Office of Government Information Services (OGIS)\textsuperscript{272} and each agency’s Chief FOIA Officer.\textsuperscript{273} Also, both bills would create a Chief FOIA Officers Council and task it with encouraging agency compliance with FOIA in various ways.\textsuperscript{274} This form of interagency coordination may increase implementation efficiency, but it probably cannot overcome the delays that stem from resource constraints or the incentive problems that agencies have in disclosing information promptly. Evidence for their likely limited impact comes from that fact that OGIS and Chief FOIA Officers have existed and have had FOIA implementation responsibilities since the OPEN Gov-

\textsuperscript{269} See supra Part I-A-1.
\textsuperscript{272} See supra Act, H.R. 653, 114th Cong., sec. 2(c), § 552(h) (2015); FOIA Improvement Act of 2015, S. 337, 114th Cong., sec. 2(5), § 552(h) (2015).
government Act of 2007.\textsuperscript{275} Individuals in these roles have had sufficient time to demonstrate their influence, but the available data on processing times, backlogs, and delays in Tables 1-3 suggest that these actors have not achieved a dramatic reduction. This result is not surprising for OGIS, which is external to agencies, since agencies are the entities that incur costs to process requests without any reimbursement. Even Chief FOIA Officers, who work within agencies, may favor robust FOIA implementation but accept delays as normal or inevitable and will face challenges as they compete with other agency units for resources. In contrast, measures that reduce net costs of timely processing and increase net costs of wrongful withholding would attract the attention of whichever agency officials are in charge of priority-setting.

2. Public Online Information Act

Unlike the bills dealing with FOIA, no version of POIA has ever received even a committee vote.\textsuperscript{276} However, POIA could have a greater effect on records disclosure than the bills to amend FOIA.\textsuperscript{277} The main substantive section of POIA is Section 7, the “Executive Branch Internet Publication Mandate.”\textsuperscript{278} Its key provision is to “make public records available on the Internet.”\textsuperscript{279} It defines a “public record” as “any record, regardless of form or format, that an agency discloses, publishes, disseminates, or makes available to the public.”\textsuperscript{280} FOIA uses the same language, with requests as a way in which “each agency shall make [information] available to the public.”\textsuperscript{281} Thus, a textual implication of POIA is that any document that an agency has released per a FOIA re-


\textsuperscript{277} The statement assumes limited implementation of the FOIA bills’ provisions for proactive disclosure. See supra notes 267-271 and accompanying text.

\textsuperscript{278} POIA, H.R. 4312, 113th Cong., § 7 (2014). Other substantive sections, which encourage legislative and judicial agencies to post more online information, id. § 8, and recommend that the Government Printing Office post all of its publications online, id. § 9, are not binding.

\textsuperscript{279} Id. § 7(a)(1)(A) (2014).

\textsuperscript{280} Id. § 3(5).

\textsuperscript{281} 5 U.S.C. § 552(a) (2012).
quest would be posted online. More generally, POIA implies that any document that is currently available to the public but not on the Internet (such as in a government depository or an agency reading room) would have to be posted online.

The mechanisms for POIA’s implementation are similar to those for FOIA. First, agencies would fulfill the online publication requirement from their own operating budgets: they are to post documents “at no charge (including a charge for recovery of costs) to the public,” and the section dealing with the Internet publication mandate contains no appropriations provision. Second, individuals and organizations could request that an agency post specific records online, and they could file a complaint in federal court after a denial. As in a FOIA lawsuit, if a plaintiff substantially were to prevail in a challenge under POIA, she could be reimbursed her attorney fees and litigation costs.

Because POIA would require both proactive posting and posting in response to requests, this Act’s operation would face a mix of the problems associated with the maximal proactive disclosure and immediate online publication models of information release described above. The proactive disclosure issues would be similar to those in the FOIA bills, so only the difficulties unique to POIA require further discussion. First, some requesters who value exclusive possession of information would likely be discouraged from requesting documents, in which case some valuable information would never be revealed to anyone, much less the public. Second, for documents that entities would still be willing to request, POIA’s implementation would likely be more problematic than FOIA’s. Specifically, POIA would exacerbate the cost asymmetries embedded in FOIA because POIA requests would cost information seekers nothing at the processing stage. Even more so than before, requests for information would reflect a willingness to sue rather than...

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283 Cf. id. § 6(g) (authorizing appropriations for a different section of POIA).
284 Id. § 7(c)(1).
285 Id. § 7(c)(3).
286 See supra Part I-A.
a willingness to pay, so that the documents released to the public would not necessarily be the most important ones. Overall, the POIA request provision would achieve the opposite of the cost-based proposals in this Article: instead of providing them with resources and incentives to process requests quickly and differentially pricing requests, POIA would leave agencies resource-constrained, instill no urgency to process requests, and offer no reason to prioritize among different types of requests.

The other main substantive provision in POIA is the formation of a Public Online Information Advisory Committee to encourage more online posting of government information, such as by issuing recommendations to agencies and Congress.\textsuperscript{287} Though having such a committee might be better than not having one, the Committee would lack power to impose obligations on agencies to improve their compliance under POIA.\textsuperscript{288} Moreover, just as previous organizational innovations in FOIA have not fundamentally improved how it operates, recommendations from this Committee would likely yield only marginal improvements in government transparency. Given the challenges from POIA’s proactive disclosure and request provisions and the limited usefulness of the Public Online Information Advisory Committee, perhaps its failure in the past to have a committee vote is acceptable.

C. Evaluation of the Cost-focused Proposals’ Political Feasibility

Whatever the drawbacks of these pieces of legislation, they are at least known to be palatable since legislators have actually produced these bills. For the cost-based policies to be useful, they also need to be politically acceptable. The key questions are whether members of Congress could reasonably offer the present proposals as legislation and whether transparency advocacy organizations, which have supported these bills, might also be willing to endorse these cost-based

\textsuperscript{287} POIA, H.R. 4312, 113th Cong., § 6 (2014).
\textsuperscript{288} Id. § 6(d)(2).
proposals. For these groups, the past history of FOIA amendments and the overall benefit that would accrue to transparency groups provide the respective reasons to believe that addressing the Act’s cost asymmetries is realistic.

1. Members of Congress

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

290 See supra notes 12-13 and accompanying text.
291 See supra notes 202-204, 216, 240, 243 and accompanying text.
293 See S. 1090, 104th Cong. sec. 6(a) (as passed by Senate, Sept. 17, 1996); Wichmann, supra note 19, at 1253-54 (evaluating this proposal).
Next, provisions to change processing fees have appeared in the 1974 and 2007, as well as the 1986, amendments to FOIA, making further changes in this area of the Act quite reasonable. In particular, the 1986 amendments’ addition of review fees for commercial requests was motivated by a report by the Administrative Conference of the United States observing that FOIA implementation was “much more costly than originally expected” and recommending fees for review, albeit for all requests. Beyond FOIA, fees for services appear in at least one other context: the FDA’s charges user fees to pharmaceutical companies for review of new drug applications.

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

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compliance with the law.” 302 In addition, this amendment would align FOIA with the House’s seemingly unfulfilled intention for judicial review to deter wrongful denials of information. 303

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

2. Transparency Advocacy Organizations

The key source of outside support would come from transparency organizations, such as Project on Government Oversight and OpenTheGovernment.org, representatives of each of which gave comment to the Washington Post on the failure of the Senate FOIA Improvement Act of 2014 to receive a vote in the House. 304 Notably, Representative Darrell Issa, who cosponsored the 2014 House FOIA Act, cited the support of “29 nonpartisan transparency groups,” 305 while Senator Patrick Leahy, who sponsored the Senate bill, claimed that it was “supported by 70 public interest groups that advocate for government transparency.” 306 For FOIA legislation, it seems, transparency advocacy groups are more powerful as stakeholders than firms making requests for their commercial interest. 307 Thus, if these groups are persuaded to support this package of cost-focused proposals, it would stand a good chance of passage.

Of these fixes, these groups should have no objection to having agencies keep their processing fees, and they would presumably strongly approve of a fee-shifting amendment in their

302 S. REP. NO. 93-854, 17 (1974). Admittedly, the conference report remarked that its members did “not intend to make the award of attorney fees automatic.” See H.R. REP. NO. 93-1380, at 10 (1974) (Conf. Rep.). However, this statement can be understood as trying to exclude awards for plaintiffs making commercial requests, which were not separately defined until the 1986 Amendments. The attorney fee-shifting proposal similarly does not reimburse all plaintiffs.
304 See Hicks, supra note 25.
favor. Among the fee increases, those applying to commercial requests would not affect these groups or the individual requesters they support, and those applying to expedited requests might elicit a neutral response, because they are currently uncommon,\textsuperscript{308} or perhaps a positive response, since they might well take advantage of the revamped expedited track. The key difficulty would be with higher fees for noncommercial requests, since they would have to pay more for what appears to be the same service. If anything, reform efforts have suggested that nonprofit organizations should be able to apply for an exemption from all FOIA fees.\textsuperscript{309}

To the extent that this criticism stems from a perception that noncommercial requesters will be harmed by this measure, it can be addressed with counterarguments showing how they would benefit. To begin with, higher fees, even without stronger fee-shifting, would not necessarily leave noncommercial requesters worse off in aggregate, as discussed above.\textsuperscript{310} When higher fees are combined with the other proposals as a package, the cost asymmetry logic developed earlier\textsuperscript{311} implies that transparency advocacy groups and the requesters they strive to represent would be better off overall, especially with fewer problems of crowding out from commercial requests. Furthermore, the fee increase provision, as stated, allows for a smaller multiplying factor for noncommercial than commercial requests. Since the attorney fee-shifting and processing fee increases for commercial requests are clearly favorable to individuals who make noncommercial requests, there must be some level for a fee increase that leaves them better off than before.

However, this criticism may also stem in part from a sense that transparency is a right.\textsuperscript{312} These organizations may argue that agencies have a responsibility to provide all the material they can disclose without monetary compensation, since they are not generally paid for fulfilling other

\textsuperscript{308} See supra notes 86-89 and accompanying text.

\textsuperscript{309} See Coglianese et al., supra note 42, at 942-43.

\textsuperscript{310} See supra notes 221-228 and accompanying text.

\textsuperscript{311} See supra Part II.

\textsuperscript{312} See Mark Fenster, The Opacity of Transparency, 91 IOWA L. REV. 885, 888 (2006).
One general response to this argument is that Congress has consistently decided that information seekers should generally pay for their records requests. Agencies have been allowed to assess fees since the original passage of FOIA in 1966. Furthermore, Congress has never been willing to appropriate funds to agencies for fulfilling requests, despite the knowledge that FOIA fees are utterly insufficient to cover expenses. In contrast, Congress has been willing to amend the fee structure, even in an upward direction. Though Congress cannot generally be assumed to represent the preferences of American society, the generally large majority (even unanimous) votes with which FOIA and its amendments have passed suggest that a fee-based records request law is what this society has settled on.

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

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313 I thank Cary Coglianese for this competing consideration.
315 See supra notes 296-298 and accompanying text.
316 See, e.g., Kenneth A. Shepsle, Congress is a “They,” not an “It”: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON 239 (1992).
317 See e.g., 111 CONG. REC. 26,821 (1965) (indicating Senate passage of the original FOIA without a dissenting vote); 112 CONG. REC. 13,661 (1966) (showing a 308-0 vote in the House for the original FOIA); 142 CONG. REC. 23,482-83 (1996) (listing a 402-0 House vote in favor of the Electronic FOIA Amendments); id. at 23,790 (noting passage of the same bill in the Senate by a unanimous consent motion).
319 Perhaps the agency that comes closest to just producing documents for the is the National Archives and Records Administration, which, incidentally, has the third largest FOIA backlog as well as the ten oldest pending requests across all agencies. See OIP, supra note 73, at 10-11.
prevent agencies from proactively disclosing everything they can online and instead force reliance on requests to prioritize information that is of interest.320

Conclusion

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

Compared to recent legislation, which provides a fairly complex package of additional duties and administrative oversight, this Article suggests simpler changes to the cost structure of FOIA so that more of the most important documents are released more in line with the Act’s timetables. Amendments allowing agencies to retain processing fees, raising processing fees, and making fee-shifting automatic for noncommercial plaintiffs who substantially prevail could be legislated easily and could take effect very quickly, without the need for further regulatory action. These statutory changes would provide agencies with stronger incentives and more resources to comply with FOIA than the bills that Congress has considered while screening the pool of potential requesters so that, as a whole, agencies end up fulfilling the most socially beneficial requests.

320 See supra notes 43-52 and accompanying text.
By no means is this combination of cost-based proposals the most comprehensive way to restructure FOIA based on the incentives of requesters and agencies. Future research could explore additional ways to resolve various tensions in government transparency. These include the tradeoff between making more information available and making available information more accessible given limited resources, the conflict between the value of publicizing information and of encouraging requests with at least temporary exclusive possession of records, and the codependency of agency’s processing efforts and entities’ willingness to file requests. However, the fast fixes presented in this Article are fairly small changes that can make a big difference in FOIA’s operation. Furthermore, Congress’ general pattern has been simply to command additional disclosure without providing additional appropriations, rather than systemically analyzing how to improve transparency. Therefore, these cost-based proposals, which draw inspiration from previous FOIA amendments, are incremental changes that Congress can more easily pass until it is ready for more fundamental reform.
Appendix: Tables

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

Table 1a: Processing Times for Simple Requests

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

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

Table 1b: Processing Times for Complex Requests

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Departments with a Median Processing Time of Twenty Days or Less</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Number of Agencies with a Median Processing Time of Twenty Days or Less</td>
<td>11</td>
<td>5</td>
<td>9</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Average Processing Time for Complex Requests</td>
<td>n/a</td>
<td>n/a</td>
<td>118.93</td>
<td>103.74</td>
<td>82.35</td>
<td>123.17</td>
</tr>
<tr>
<td>Number of Departments with an Average Processing Time of Twenty Days or Less</td>
<td>n/a</td>
<td>n/a</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Number of Agencies with an Average Processing Time of Twenty Days or Less</td>
<td>n/a</td>
<td>n/a</td>
<td>4</td>
<td>5</td>
<td>4</td>
<td>7</td>
</tr>
</tbody>
</table>

321 See OIP, supra note 80.
322 Specifically, it was only in 2008 that agencies limited the count of requests to those “that involve use of the FOIA.” See OIP, Summary of Annual FOIA Reports for Fiscal Year 2008 (2009), http://www.justice.gov/oip/foiapost/2009foiapost6.htm. The result was a decline from 21,758,651 reported requests in FY 2007 to 605,491 in FY 2008. Id. Thus, data related to requests starting from FY 2008 cannot readily be compared to data before that fiscal year.
Table 1c: Processing Times for Expedited Requests

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

Table 2: FOIA Requests and Backlogs

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

Table 3: Dispositions of Requests for Substantively Processed Requests

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

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

324 OIP, supra note 73, at 4.
Table 4: Data on FOIA Litigation

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

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

Table 5: Agency Processing Costs and Fee Collections for FOIA

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total costs</td>
<td>$338 million</td>
<td>$382 million</td>
<td>$416 million</td>
<td>$436 million</td>
<td>$430 million</td>
<td>$447 million</td>
</tr>
<tr>
<td>Processing costs</td>
<td>$321 million</td>
<td>$354 million</td>
<td>$394 million</td>
<td>$413 million</td>
<td>$405 million</td>
<td>$420 million</td>
</tr>
<tr>
<td>Processed Requests</td>
<td>623,186</td>
<td>612,893</td>
<td>600,849</td>
<td>631,424</td>
<td>665,924</td>
<td>678,391</td>
</tr>
<tr>
<td>Cost per Request</td>
<td>$515.74</td>
<td>$577.99</td>
<td>$656.11</td>
<td>$653.52</td>
<td>$608.87</td>
<td>$618.54</td>
</tr>
<tr>
<td>Total Fees collected</td>
<td>$11.6 million</td>
<td>$9.07 million</td>
<td>$5.94 million</td>
<td>$6.19 million</td>
<td>$4.79 million</td>
<td>$4.34 million</td>
</tr>
<tr>
<td>Percent Collected</td>
<td>3.61%</td>
<td>2.56%</td>
<td>1.51%</td>
<td>1.50%</td>
<td>1.18%</td>
<td>1.04%</td>
</tr>
</tbody>
</table>

Table 6a: Summary Statistics Attorney Fee and Cost Awards in FOIA Cases in 2013

<table>
<thead>
<tr>
<th>Award Statistic</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>$19,900.55</td>
</tr>
<tr>
<td>Median</td>
<td>$6,000.00</td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>$34,775.07</td>
</tr>
<tr>
<td>Minimum</td>
<td>$350.00</td>
</tr>
<tr>
<td>Maximum</td>
<td>$181,579.99</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stipulation of Dismissal</td>
<td>22</td>
</tr>
<tr>
<td>Partial Grant of Summary Judgment for Plaintiff</td>
<td>3</td>
</tr>
<tr>
<td>Full Grant of Summary Judgment for Plaintiff</td>
<td>1</td>
</tr>
<tr>
<td>Attorney fee grant only</td>
<td>3</td>
</tr>
<tr>
<td>Defendant’s Motion to Dismiss Granted in Part, Denied in Part</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>30</td>
</tr>
</tbody>
</table>

Note: Data for this table were gathered and derived from the DOJ’s 2013 FOIA Litigation and Compliance Report.\(^{326}\)

\(^{326}\) DOJ, *supra* note 174.
Table 7: FDA Processing Costs and Fees Collected

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Processing Costs</th>
<th>Fees Collected</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>$18,724,236</td>
<td>$434,892.00</td>
<td>2.32%</td>
</tr>
<tr>
<td>2009</td>
<td>$21,106,261</td>
<td>$388,084</td>
<td>1.84%</td>
</tr>
<tr>
<td>2010</td>
<td>$24,459,583.93</td>
<td>$289,402.60</td>
<td>1.18%</td>
</tr>
<tr>
<td>2011</td>
<td>$33,003,128.22</td>
<td>$452,246.57</td>
<td>1.37%</td>
</tr>
<tr>
<td>2012</td>
<td>$33,524,931.54</td>
<td>$505,467.28</td>
<td>1.51%</td>
</tr>
<tr>
<td>2013</td>
<td>$33,570,981.00</td>
<td>$577,039.00</td>
<td>1.72%</td>
</tr>
</tbody>
</table>

Note: Data for this table are derived from recent Annual FOIA reports of the FDA.327