

THE ANTI-MANAGERIAL INFORMATION COMMISSION

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I

INTRODUCTION

The Freedom of Information Act (FOIA) is designed to provide a broad right of access to government information for any person who makes a request. The law's ability to successfully further democratic accountability relies on the collective effect of individual enforcement of transparency rights. This article will describe how, despite the strong rights-based framework that was imagined, FOIA has fallen victim to the greater regulatory managerialism trends that have undermined other aspects of the administrative state. The evolution of a managerialist transparency regime, in turn, has undermined FOIA's efficacy. Situating FOIA within a second external force—the once unimaginable reality of the information economy—the article will proceed to argue that a new independent government body, styled as an information commission, can be designed to take on the modern challenges of government transparency in an information age using anti- or post-managerial tools. Finally, it will describe the broad scope of authority an information commission should properly wield to accomplish an anti-managerialist transparency mission.

II

TRANSPARENCY AND REGULATORY MANAGERIALISM

FOIA is the cornerstone government transparency law in the United States. Enacted in 1966—during the heyday of interest group advocacy, the rise of the consumer movement, and the pinnacle of progressive rights-granting legislation—FOIA adopted a liberal view of access to information founded on granting the right to know to anyone who sent a letter and asked.¹ This part will explain how FOIA fit into the dominant legislative framework of the time, which was to create individual rights on the theory that the exercise of those rights would collectively act as a mechanism to achieve a particular social goal. It will

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1. See 5 U.S.C. § 552(a)(3)(A) (“[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”).

go on, however, to document how the individual rights framework set up in FOIA's written provisions has not been realized in practice; rather, FOIA's implementation has taken a sharply managerialist turn. Finally, it will highlight how the features of managerialism that have come to characterize FOIA operations on the ground are the very features that have given rise to the sharpest and growing criticisms of the law. In short, FOIA's managerial turn has undermined its transparency, accountability, and democratic goals.

In the 1960s, American institutions and organizations were particularly focused on the creation of individual rights as a mechanism for social progress.² In the era FOIA was enacted, Congress passed the Civil Rights Act of 1964,³ the Warren Court vastly expanded the constitutional rights of criminal defendants,⁴ and women took to the streets demanding equal pay, access to educational opportunities, and health care.⁵ The dominant frame for understanding progress was to expand individual rights and judicial remedies for violations thereof as a means to achieving particular larger social aims.

In fact, the creation of new individual rights was not only thought to further the social goals of creating a more equal, just society, but also to be the mechanism best suited to ensure that government was accountable, accessible, and participatory.⁶ FOIA's principal mechanism for government information transparency allows any person to file a request for government records—for any reason—and requires the government to promptly provide those records unless they fall under one of nine enumerated exemptions.⁷ This provision is a paradigmatic individual right: it requires initiative on the part of a private individual to seek government information and to enforce transparency rights they have under the statute.⁸

2. Cass Sunstein explained that “[t]his period marked a revolution in the category of legally protected rights—a revolution that built on and materially expanded the New Deal.” CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24 (1990).

3. Pub. L. No. 88-352, 78 Stat. 241 (1964).

4. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the states); *Massiah v. U.S.*, 377 U.S. 201 (1964) (holding that the Sixth Amendment protects criminal defendants from interrogation without a lawyer after indictment); *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring warnings to suspects before custodial interrogations under the Fifth Amendment).

5. Linda Napikoski, *The Women's Movement and Feminist Activism in the 1960s*, THOUGHTCO., <https://www.thoughtco.com/1960s-feminist-activities-3529000> [https://perma.cc/K8AU-2LY5] (last updated Mar. 13, 2019).

6. Richard B. Stewart describes this administrative law era as based on the “interest representation model” that responded to three phenomena: (1) acceptance of the Ralph Nader critique that agencies were captured by regulated industries, (2) the rise of public interest law advocacy, and (3) the new wave of legislation as part of the “rights revolution.” Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441–42 (2003).

7. 5 U.S.C. § 552(b).

8. This frame continued when FOIA was paired with other information-related laws such as the Privacy Act of 1974, which gives individuals certain rights to access their own records and correct mistakes in their official files, and the Fair Credit Reporting Act, which gives individuals similar rights as to their credit histories. See 5 U.S.C. § 552(a) (codifying the Privacy Act); 15 U.S.C. §§ 1681–1681x (codifying the FCRA).

FOIA was not, however, the only individual right designed to further democratic participation and accountability. The framework of the Administrative Procedure Act is premised on the notion that creating a right to individual participation will improve governance. This phenomenon manifests notably in rulemaking, where the APA's notice-and-comment procedures were designed to facilitate such participation,⁹ and in judicial review, where allowing individuals to sue agencies over their actions was thought to ensure compliance with both procedural and substantive requirements alike.¹⁰

A rights-based framework protecting the public vis-à-vis the administrative state is inherently imagined to be a somewhat adversarial one, and transparency over government actions is in many ways at the core of the theory. Indeed, the theory of access is one intimately linked to democratic accountability. The animating reason for granting such sweeping rights of access is to ensure that the public is able to inform themselves about the activities and decisions of government actors so as to hold them accountable in representing their best interests. The theory goes that once unpopular, ineffective, unwise, or corrupt activities are revealed, the electorate can vote those officials ultimately responsible out of office, petition the agency for further corrective action, or sue agencies over violations of the law.

But since the time of FOIA's enactment, the regulatory state is no longer primarily enforcing rights and protecting individuals through robust, transparent, and contestatory processes, but rather, as is the topic of this symposium, overseeing economic production through a process of regulatory managerialism. In the introduction to this symposium, Ari Waldman and Julie Cohen describe regulatory managerialism as government regulatory practices characterized by (1) procedurally informal decision-making, (2) public-private partnership oversight, (3) technocratic regimes guided by efficiency and cost-benefits analysis, and (4) reliance on compliance professionals and intermediaries whose technocratic operations are opaque.¹¹ Opacity is a hallmark of regulatory managerialism—in sharp contrast to the transparency centered vision of the administrative state in the rights era of the 1960s—and FOIA's administration has *also* taken on every one of the additional features identified with regulatory managerialism. And it is precisely the managerial features of FOIA's current reality that have caused the law to come under increasingly stringent criticism.

First, and perhaps most importantly, FOIA is now dominated by procedural informality, despite the fact that the law was designed with a host of specific procedural rights. For example, the statute designates required response times

9. 5 U.S.C. § 553(b)–(c) (detailing notice and comments procedures).

10. 5 U.S.C. § 706 (providing a cause of action under the APA).

11. See Julie E. Cohen & Ari Ezra Waldman, *Introduction: Framing Regulatory Managerialism as an Object of Study and Strategic Displacement*, 86 LAW & CONTEMP. PROBS. no. 3, 2023, at i, i, v, ix–x.

from the agency to a requester,¹² the right to administratively appeal a denial to a higher authority within the agency,¹³ rights to fee waivers¹⁴ expedited processing, and even strengthened rights in federal court on judicial review, such as shortened deadlines for government responses.¹⁵ That is to say, the procedural formalities seem replete.

But the reality of FOIA practice could not be further from the land of procedural protections and formal processes. To begin, at the administrative level, agency compliance with deadlines is so poor that they can easily appear merely advisory. Despite a twenty-business-day deadline for an agency to respond to a FOIA request, even simple requests in fiscal year 2021 took an average of thirty-three days.¹⁶ Moreover, the various procedural mechanisms designed to enforce FOIA are rarely invoked. Although the government received a whopping 838,164 requests in fiscal year 2021, only 19.8% were granted in full, with dissatisfied requesters filing only 15,468 appeals¹⁷ and a meager 650 lawsuits over that same period of time.¹⁸ Meanwhile, litigation is taking longer and longer, with litigants waiting years for resolution in many instances.¹⁹

As these data suggest, then, these kinds of procedural “rights” are failing to deliver, leaving requesters with a variety of informal procedures as their only fallback. The informal options available are not particularly satisfactory, but they are common and have even become the focus of reform efforts. Requesters negotiate to narrow the scope of their request, they call, nag, and develop relationships with FOIA offices, and they skirt the FOIA process by trying to get information through other sources or leaks.²⁰

Even more telling, Congress’s more modern reform attempts have aimed to

12. 5 U.S.C. § 552(a)(6)(A)(i) (“Each agency, upon any request for records . . . shall determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request . . .”).

13. 5 U.S.C. § 552(a)(6)(A)(iii) (“[I]n the case of an adverse determination – (aa) the right of such person to appeal to the head of the agency . . .”).

14. 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if the disclosure of the information is in the public interest . . .”).

15. See 5 U.S.C. § 552(a)(4)(C) (providing for thirty days for the government to file an answer in a FOIA case, as opposed to the sixty days typically provided for under Federal Rule of Civil Procedure 12(a)(2)).

16. OFF. OF INFO. POL’Y, U.S. DEP’T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2021 12 (2021), <https://www.justice.gov/oip/page/file/1521211/download> [<https://perma.cc/J3RM-X9Y2>].

17. *Id.* at 15.

18. *September 2021 FOIA Litigation with Five-Year Monthly Trends*, FOIA PROJECT (Oct. 15, 2021), <https://foiaproject.org/2021/10/15/september-2021-foia-litigation-with-five-year-monthly-trends/> [<https://perma.cc/R2KE-PQO9>].

19. *Justice Delayed is Justice Denied: Judges Fail to Rule in a Timely Manner on FOIA Cases*, FOIA PROJECT (Feb. 3, 2021), <https://foiaproject.org/2021/02/03/justice-delayed-is-justice-denied/> [<https://perma.cc/M684-6PQ2>].

20. See Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1442–55 (2015) (arguing that some kinds of information leaks are due, at least in part, to a lack of efficacy and thus legitimacy in oversight laws like FOIA).

provide more recourse for requesters by focusing on what can only be characterized as informal, cooperative, and managerial oriented solutions. In 2007, Congress passed the OPEN Government Act, which made two key changes to the statute that move toward more informal, seemingly cooperative FOIA processes. First, it created the role of a “FOIA Public Liaison” to be designated in every agency, whose role is to “serve as a supervisory official[] to whom a requester under this section can raise concerns about the service the requester has received” and “shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of the requests, and assisting in the resolution of disputes.”²¹ Second are the 2007 amendments created the Office of Government Information Services (OGIS), housed in the National Archives and Records Administration. Congress instructed that OGIS shall offer “mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.”²²

But this new informal turn has not proven effective in enforcing FOIA’s mandates for a variety of reasons. First, it relies on voluntary cooperation; as one Administrative Conference of the United States study described, OGIS mediation suffers from a “structural problem” that agencies have no “duty to participate” in mediation, thereby leading to breakdown in resolutions.²³ Moreover, in all of its existence OGIS has issued exactly two advisory opinions, thereby essentially never invoking its slightly more formalized set of powers.²⁴ In general, OGIS’s use of its mediation power has not proved to alleviate the hurdles of effective FOIA requesting. And more generally, the informality of FOIA procedures as not inured to the benefit of requesters or FOIA’s transparency aims.

Beyond procedural informality, FOIA’s evolution represents a managerial shift in other ways as well. While oversight of transparency obligations is not exactly a public–private partnership model, significant shifts in FOIA doctrine have given vastly greater control to private entities over government decisions about the release of broad swaths of information. This shift has appeared, first and foremost, in the context of disputes over access to the vast troves of information submitted by and originating from private businesses that

21. Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. 110-175, § 10, 121 Stat. 2524, 2529–30 (codified at 5 U.S.C. 552(l)).

22. *Id.* at 2529.

23. MARK H. GRUNEWALD, ADMIN. CONF. OF THE U.S., REDUCING FOIA LITIGATION THROUGH TARGETED ADR STRATEGIES 51 (2014).

24. *See Advisory Opinions*, NAT’L ARCHIVES, <https://www.archives.gov/ogis/advisory-opinions> [<https://perma.cc/9R3T-2P3N>] (last updated Aug. 2, 2021). Congress in 2016 broadened OGIS’s authority to expressly include issuing advisory opinions. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 541 (codified at 5 U.S.C. 552(h)(3)). Prior to that time, OGIS had not issued a single one. *See Advisory Opinions*, *supra*.

government holds.²⁵ To be sure, FOIA has always recognized that some of that information should be protected from public disclosure, specifically by exempting from mandatory disclosure “trade secrets and confidential commercial and financial information” submitted by a private entity.²⁶ Such an exemption seems wholly appropriate on its face.

Recently, however, the Supreme Court vastly widened this exemption to disclosure, creating an enormous black hole for commercial information.²⁷ Historically, decisions to release information submitted by private business was governed by a two part test articulated by the D.C. Circuit, one prong of which held that for information businesses were required to submit to government, the trade secrecy exemption only applied if disclosure was likely to “cause substantial harm to the competitive position of the person from whom the information was obtained.”²⁸ But in 2019, the Supreme Court overruled the “substantial competitive harm” test for mandatory submissions, holding instead that any commercial information is exempt that “is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.”²⁹ The Supreme Court stepped beyond the statute’s plain meaning and relied partially on a managerialist rationale, that “providing private parties with sufficient assurances about the treatment of their proprietary information [ensures] they will cooperate in federal programs and supply the government with information vital to its work.”³⁰ Moreover, the decision clearly gives more control to the hands of private entities to claim their business practices entail confidentiality.³¹

The private influence over government decision making to release information to the public is therefore on the rise. The Department of Justice’s Office of Information Policy, responsible for issuing guidance on FOIA compliance to agencies government wide, instructed agencies that they should consult with the private parties who submitted information to “seek the submitter’s views on whether the two conditions” announced in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), are met before releasing

25. See Hannah Bloch-Wehba, *A Public Technology Option*, 86 LAW & CONTEMP. PROBS. no. 3, 2023, at 223, 231–32 (describing the increased secrecy that results from outsourcing).

26. 5 U.S.C. § 552(b)(4).

27. Mark Fenster, *Court Gives Broad Meaning to “Confidential” in FOIA Exemption for Commercial and Financial Information*, SCOTUSBLOG (June 24, 2019), <https://www.scotusblog.com/2019/06/opinion-analysis-court-gives-broad-meaning-to-confidential-in-foia-exemption-for-commercial-and-financial-information/> [<https://perma.cc/K94E-QSP4>].

28. Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

29. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

30. *Id.* at 2366.

31. See Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. REV. 462, 500 (2021) (“Thus, the available data points so far suggest that Food Marketing will expand the private sector’s ability to shield information provided to the government—and frustrate the ability of journalists and government watchdog groups to exercise their crucial oversight function.”).

any submitted information in response to a request.³² While acknowledging that agencies have a “long history of conducting predislosure notification” to submitters, the prior practice solicited input on the question of whether release would cause “substantial competitive harm,” a much more objective and verifiable test.³³ Now, submitters are being asked whether they themselves treat the information as confidential, a factor that is entirely within the control of the business entity.³⁴ Because the Supreme Court left open the possibility that government assurances of confidentiality might not even be necessary for Exemption 4 to apply,³⁵ the submitter’s response to consultation may not only be important, but in fact definitive.

Technocratic outsourcing, another feature of managerialism, has also crept into the administration of FOIA. At many agencies, FOIA offices use software or programs for tracking and processing requests that are purchased from private vendors and over which the agencies may not have complete control or customization.³⁶ I was once told that data I had requested under FOIA could not be released in the format I had requested because the software they used to maintain FOIA data was proprietary and licensed to the agency, and as such, the agency could not run certain types of custom reports *on their own data*. If I wanted the data, I would have had to pay thousands of dollars for the software company to run the report, as that company would charge the agency for the service.³⁷

More systematically, privately developed software can render records noncompliant with disability laws—which require machine-readability of online government documents—leading some to cite the software as a barrier to some proactive disclosure initiatives. As the FOIA Advisory Committee found, “[a]gency redaction software often converts the documents to flat images (such

32. *Exemption 4 After the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media*, U.S. DEP’T OF JUST., <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media> [<https://perma.cc/69UW-GKTH>] (last updated Oct. 4, 2019).

33. *Id.*

34. *Id.*

35. *Food Mktg. Inst.*, 139 S. Ct. at 2365.

36. See, e.g., *FOIAXpress*, OPEXUS, <https://www.ains.com/foiaxpress/> [<https://perma.cc/B4ZE-S39D>] (last visited Feb. 16, 2023) (describing itself as “The Industry Leader in FOIA Request Tracking and Management Solutions”); *Freedom of Information Act (FOIA)*, HYLAND, <https://www.hyland.com/en/government/federal-government/citizen-engagement/foia> [<https://perma.cc/2VLU-C3QT>] (last visited Feb. 16, 2023) (“Hyland’s leading content services platform simplifies FOIA request managements—from submission to fulfillment—with a complete digital solution that enables agencies to speed responses and enhance constituent engagement while ensuring compliance with all requirements.”); Azam Qureshi, *FOIA Management Software*, INTRADYN, <https://www.intradyn.com/foia-software/> [<https://perma.cc/QM76-N2H2>] (last visited Feb. 16, 2023) (“Designed with government agencies in mind, Intradyn’s solution makes it easy for state and federal organizations to remain FOIA-compliant.”).

37. Eventually, the data I sought was released after several rounds of requests and appeals, and it formed part of the basis for a book. See MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT 122–23* (2021) (reporting EPA’s data).

as some PDFs or TIFFs) thereby rendering the document's content inaccessible to [] assistive technology."³⁸ A subcommittee investigating the topic specifically cited processing software purchased from private vendors as contributing to the problem and noted that once documents are out of compliance with disability laws, agencies are reticent to post them online and thus hindered in expanding proactive disclosure initiatives.³⁹ This small example is but one way in which agencies lose control over their FOIA operations through outsourcing to privately developed management software.

Beyond purchasing private software, FOIA offices also hire contractors to assist in their operations. A few years back, I toured the U.S. Citizenship and Immigration Service's centralized FOIA processing center—the National Records Center—affectionately known as The Cave for its physical location inside a limestone cave in Lee's Summit, Missouri. There, I witnessed contractors working side by side with FOIA processors. Those contractors served ancillary but important functions of cataloging, sorting, documenting, scanning, shelving, searching, and otherwise managing the vast trove of immigration records housed at that facility.⁴⁰ Other times, contractors are actually processing requests—including exemptions—or to help with particularly egregious backlogs.⁴¹ The Office of Information Policy reported almost two decades ago on the increasingly significant “rise” in the use of contractors to process requests and that the practice had become “relatively commonplace.”⁴²

The notion that private entities would be engaged in the process of deciding what government information will be released to the public illuminates the deeply intertwined relationship between public and private entities in this area. While there are no data available comparing performance of contractors against that of federal employees in processing requests, one former federal official with over a decade of experience in the area reflected that contractors “don't really

38. *OGIS Issue Assessment: Methods Agencies Use to Prepare Documents for Posting on Agency Freedom of Information Act (FOIA) Websites*, NAT'L ARCHIVES (Dec. 16, 2020), <https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/posting-docs-assessment-2020-dec-16> [<https://perma.cc/W9CN-AFUR>].

39. Subcomm. on Freedom of Information Act (FOIA) Proactive Disclosure for the FOIA Advisory Comm., Recommendations to the FOIA Advisory Committee on Proactive Disclosure and the Rehabilitation Act Section 508, (Jan. 16, 2018), <https://www.archives.gov/files/proactive-disclosure-subcommittee-accessibility-recommendations-passed.pdf> [<https://perma.cc/34SG-8VZA>].

40. Interview with Jill Eggleston, Assistant Ctr. Dir., Freedom of Info. & Privacy Act Unit, Nat'l Records Ctr., U.S. Citizenship & Immigr. Servs., U.S. Dep't of Homeland Sec., in Lee's Summit, Mo. (June 12, 2019) (on file with author).

41. See, e.g., *Freedom of Information Act Services*, DELOITTE, <https://www2.deloitte.com/us/en/pages/advisory/solutions/discovery-foia-services.html> [<https://perma.cc/W84T-AC8U>] (last visited Feb. 16, 2023) (offering a variety of consultative services, including “surge staffing,” described as “just-in-time staffing-experienced professionals who specialize in various aspects of FOIA requests including exemptions”).

42. *FOIA Post (2004): The Use of Contractors in FOIA Administration*, U.S. DEP'T OF JUST. (July 29, 2004), <https://www.justice.gov/oip/blog/foia-post-2004-use-contractors-foia-administration> [<https://perma.cc/MQC7-XF84>].

work for the agency, [and] so [] don't have that pride of ownership because [they are] not there for the long haul."⁴³ Moreover, he observed that agencies do not adequately oversee the work of contractors, despite saying that final approval rests with the agency.⁴⁴ And in fact, when private software or private contractors are taking the reins, the administration of transparency obligations itself becomes ironically more opaque. With respect to contractors, one transparency advocate remarked, "I wish there were more transparency on the use of contractors and what they are doing."⁴⁵

Regulatory managerialism may pose serious problems in other realms, but there is reason to be perhaps particularly concerned when its frameworks impinge on government transparency. FOIA and other transparency safeguards are designed to ensure public accountability for government actions in all manner of activity. If FOIA serves as a guardrail against other kinds of managerialist failings of government, but itself falls victim to managerialism's lack of accountability, then the backstop against which managerialism otherwise operates has weakened.

III

THE ANTI-MANAGERIALIST INFORMATION COMMISSION

Access to government information under FOIA is a foundational, structural necessity in our democracy, but it does not operate in a vacuum. As the previous part demonstrated, the larger managerial trends in modern governance have unsurprisingly also taken hold in FOIA administration and have worked to the detriment of transparency and government accountability. But it is not just governance that has changed. FOIA is centrally concerned with access to information, but the information environment in which FOIA now finds itself could hardly have been imagined at the time the law was first enacted. Any response to the current failures in FOIA administration has to take account not just of managerialism's reality, but the new framework of the information economy in which FOIA operates. An information commission—models of which can be seen around the world—is an institution that can take on both challenges. This part begins by describing the information landscape in which FOIA must operate and proceeds to document the need for a new authority to respond to these new challenges. It concludes by arguing how, in the context of FOIA oversight, this new authority would operate as an anti-managerial counterweight.

It is no secret that we live in a data-driven world. The commodification of

43. *The Outsourcing of Federal FOIA Services*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/outsourcing-federal-foia-servic/> [<https://perma.cc/V6YQ-5QVS>] (last visited Feb. 16, 2023).

44. *Id.*

45. *Id.*

information has been explored deeply as a theoretical matter,⁴⁶ and Julie Cohen's recent book looking at legal responses to "informational capitalism" makes clear that legal institutions have no neutral way to respond⁴⁷—they are indeed co-creators of the information value on which economic systems now rest.⁴⁸ And the information economy is not contained to simply big tech or platforms. Instead, data is now a primary driver of value across a wide range of industries. Car companies are now also computer companies, toy companies are now data driven advertising companies, and Amazon is a bookstore and a streaming service and a comment platform and a trucking company and a discount grocery warehouse. Our current regulatory framework was designed to address social harms arising from industrial capitalism, but our economy is no longer primarily organized around industrial activities, but rather informational ones.

Moreover, information—and all of the various ways it can be gathered, used, hidden, accessed, and abused—is not the core subject of any single expert body in the federal government. Rather, there are pockets of expertise based on industry, policing practices, or scientific tie-ins. To compound the problem, the relationship between the polity and the data collectors is multifaceted and not limited to a single regulatory model. As Sari Marcuzzo has documented with respect to platform companies, we have yet to understand what role we, as a society, think that platforms should play.⁴⁹ Are we consumers, and they are producing products we use? Are we citizens, and they are mouthpieces for our democratic speech, subject to their content moderation? Are we being mined for our information of value, and thus subject to some more exploitative power dynamic, akin to destruction of environmental commons or other public goods? That is one good reason to move beyond a narrow data protection model embodied in recent Federal Trade Commission (FTC) efforts; such a model limits the scope of harms acknowledged to traditional understandings of consumer protection or competition policy.

The information commission I envision would fill this void. It would be resourced to be a true locus for technological and data expertise, serving to understand the crosscutting nature of information practices in today's environment. Reimagining the common thread of value being produced as informational value and data value across a wide variety of types of businesses allows for the possibility of a regulating body that focuses on the value of

46. *See generally, e.g.*, DAN SCHILLER, *HOW TO THINK ABOUT INFORMATION* (2007) (documenting the commodification of information and the democratic deficit it has produced); KLAUS SCHWAB, *THE FOURTH INDUSTRIAL REVOLUTION* (2017) (describing fundamental economic shifts in which value is extracted through new digital technologies and information); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2007) (arguing that we have shifted to a networked information economy).

47. JULIE COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 5 (2019).

48. *Id.* at 3–5.

49. Sari Marcuzzo, *Content Moderation Regulation as Legal Role-Scripting* 18–25 (2023) (unpublished manuscript) (on file with author).

information, not the old industrial methods of organizing production. While this suggests challenges in scoping and limiting an information commission's responsibilities, at its core the body would be responsible for ensuring information access and regulation necessary for a functioning democracy. When viewed in that light, its FOIA responsibilities would constitute a central aspect of its work, while capitalizing on the opportunity to bring within its fold regulating information practices that are necessary to protecting other fundamental rights.

To begin, policymakers are no strangers to the idea of creating a new agency to regulate a new kind of industry or new kinds of social problems. Most recently, of course, Congress created the Consumer Financial Protection Bureau,⁵⁰ at least partly responding to Elizabeth Warren's scholarly cry for more attention paid to consumer harms by dangerous financial products, harms that had gone previously unaddressed in the federal regulatory landscape.⁵¹

The "create a new agency approach" to newly identified problems is also alive and well among those concerned with information law, though typically that focus has been on regulating in the space of data privacy. There has been a robust case made for federal data privacy legislation,⁵² typically involving the creation of a data privacy agency or the vesting of such powers in an existing agency, such as the FTC. California's recent privacy legislation—the only domestic example of comprehensive privacy legislation akin to the European Union's General Data Protection Act—is an example of just such an approach. The California Consumer Privacy Act of 2018, as amended by the California Privacy Rights Act of 2020, established the California Privacy Protection Agency, headed by a five-member board, to implement and enforce the new law by public outreach, regulations, and administrative enforcement.⁵³ Similar proposals have been made at the federal level to create, for example a "Data Protection Agency," that would administer a comprehensive federal privacy law.⁵⁴

50. The Consumer Financial Protection Bureau (CFPB) was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, § 1011, 124 Stat. 1376, 1964 (codified at 12 U.S.C. § 5491).

51. For what is widely credited as the origin of the CFPB, see Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/V5D3-JXQ5>] ("It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street . . .").

52. For one chronology of failed legislative efforts at the federal level in this regard, see generally Justin Brookman, *Protecting Privacy in an Era of Weakening Regulation*, 9 HARV. L. & POL'Y REV. 355, 360–61 (2015).

53. *Frequently Asked Questions*, CAL. PRIV. PROT. AGENCY, <https://cppa.ca.gov/faq.html> [<https://perma.cc/DN7B-ZRRS>] (last visited Feb. 16, 2023).

54. See Data Protection Act of 2021, S. 2134, 117th Cong. § 3 (2021) (proposing to establish a "Data Protection Agency," which would regulate high-risk data practices and the collection, processing, and sharing of personal data). Academic proposals are also kicking around. See, e.g., Suzanne C. Bernstein, *Consumer Data Protection and Privacy: A Proposal for a New Law and an Independent Agency*, 83 U. PITT. L. REV. ONLINE 1 (2022) (arguing for the creation of a Consumer Data Privacy and Protection Bureau).

While the information commission model I envision is certainly in the vein of other create a new agency proposals, there is reason to believe that an information commission has the potential to break out of the mold of previous such models and indeed that it should aim to do so. Its very name—information commission—would not limit its activities to transparency enforcement, on the one hand, or privacy protection, on the other. It would not suggest a narrow role in a particular substantive area or particular types of data collection, information distribution, or technological regulation. Rather, it suggests a trans-substantive expertise in the information, both its values and its harms.

To realize its potential, though, an information commission also has to break out of the managerialist trap to which so many regulatory and rights-based reform efforts have succumbed, including FOIA. Elsewhere, I have suggested that creating an information commission or an independent oversight agency would go a long way to providing the kind of accountability necessary to ensure FOIA's obligations are met.⁵⁵ Such institutions are not at all uncommon around the world. Indeed, it is actually much more common to have a strong information commission in countries with newer right to information laws, which are typically newer or emerging democracies.⁵⁶ And while there are now dozens of countries that have successfully implemented such a system of oversight,⁵⁷ there are also some who have had such systems in place for decades.⁵⁸ The United States had one of the first right to know laws, but has now fallen behind modern legal structures.⁵⁹

Part IV of this article will attempt to scope the potential responsibilities of an information commission to allow it to fully realize its role as a post-managerial institution in an information age. However, the irreducible minimum role, or core obligations of an information commission, would be to enforce FOIA's disclosure

55. See generally Margaret B. Kwoka, *Delegating Information Oversight*, 112 GEO. L. J. (forthcoming Spring 2023); Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 533 (2022) (arguing for the need of an information commission in the US, and situating the importance of such a function in the current accountability deficit and the growing international trend toward independent agency oversight of transparency obligations).

56. See *Country Data: By Country*, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data> [<https://perma.cc/KGH7-MADU>] (last visited Mar. 19, 2022) (listing as top scoring countries on the Right to Information Rating relatively new democracies).

57. See generally OECD, CASE STUDIES OF REGWATCH EUROPE REGULATORY OVERSIGHT BODIES AND THE EUROPEAN UNION REGULATORY SCRUTINY BOARD (2018), <https://www.oecd.org/gov/regulatory-policy/Oversight-bodies-web.pdf> [<https://perma.cc/4R8G-H5UZ>].

58. See, e.g., Access to Information Act, R.S.C. 1985, c. A-1, § 54 (Can.) (operating in Canada since 1983); Official Information Act 1982, pt. 5, s 28(1) (N.Z.) (operating in New Zealand since 1982).

59. FOIA was originally passed in 1966 and recognized as the third right to information law globally. See *By Country*, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/> [<https://perma.cc/P9ND-E9CK>] (last visited Feb. 17, 2023) (sort by date). It was significantly strengthened in 1974 with the passage of a set of reforms in the wake of the Nixon-era Watergate scandal. See *FOIA Legislative History*, NAT'L SEC. ARCHIVE, <https://nsarchive2.gwu.edu/nsa/foialeghistory/legistfoia.htm> [<https://perma.cc/VBV6-6P4Q>] (last visited Feb. 17, 2023).

obligations by providing independent review of decisions to withhold information from the public. The rest of this part will focus on that core function to demonstrate how the commission should operate as an anti-managerial institution.

Michael Karanicolas and I have argued that for an information commission to be effective at enforcing agency disclosure obligations, it should possess two fundamental characteristics.⁶⁰ First, an information commission should have design elements to protect it from political interference and interference from the executive branch agencies it is meant to police. These features can include budgetary independence, qualifications for appointment, and protections from removal from office during a set term.⁶¹ And second, an information commission should have the power to order compliance with transparency laws; that is, it has authority to make binding decisions about the obligations of agencies to disclose information to the public.⁶²

Independence has the potential to avoid the entanglement of public and private interests in decision-making about public release of government held information. As a reviewer of initial decisions, the commission would engage in adjudicating contested cases of information access. Its procedures would stand apart from the agencies' own cooperative decision-making exercise—with private industry giving input on the exempt status of confidential commercial information—and would preclude the use of outsourcing, as adjudicatory roles would be inherently governmental functions under current guidelines.⁶³ The independence of the agency and its supervisory role would remove it from the ambit of close collaboration with business interests or public-private decision-making that might undermine public accountability.

Independence would also protect transparency decisions from political interference, a documented problem with agency FOIA offices. Indeed, some agencies have even incorporated into agency FOIA policies a requirement that political appointees review certain FOIA decisions before the records are released.⁶⁴ Having independent review of transparency obligations would

60. Karanicolas & Kwoka, *supra* note 55, at 688–97 (arguing that these two features are of critical importance to an information commission).

61. *See id.* at 679–88 (describing other countries' models). I recognize the current uncertainty of the continuing constitutionality of certain types of independent agency structures, though given the variety of possible mechanisms to promote independence, I believe that some flexibility is likely to remain. Regardless, I take up questions of institutional design in much more detail in a forthcoming article entitled *Delegating Information Oversight*, *supra* note 55.

62. *See* Karanicolas & Kwoka, *supra* note 55, at 688–97 (arguing that the power to issue binding orders is essential to a successful commission model).

63. Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11–01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56228 (Sept. 12, 2011).

64. Coral Davenport, *Ethics Office Examines Allegations That Interior Dept. Officials Violated Transparency Laws*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/climate/interior->

separate the decisionmakers and decision-making process regarding the release of public information from those regulators and their regulated entities about whom the records are concerned.

Of course, independence and anti-managerialism are two different features of agencies. While independence is critical for an information commission and does do some work to counteract the private influence over public administration, independent agencies can also become technocratic, efficiency-driven managers of governmental functions as well. A commission must be thoughtfully designed to also avoid those additional pitfalls. To avoid the technocratic, efficiency-minded trap, the mission of the agency and its personnel are key. Congress could bolster an anti-managerialist commission by requiring commissioners to have a background in transparency work, library or archival sciences, information accessibility, or privacy laws. It could also enact legislation that enables the public interest mission of the agency, fostering a culture that aligns the commission with the citizenry and not with special interests.

Personnel tend to adopt their agencies' primary mission, and an information commission would be no exception. For example, at the Department of Homeland Security, personnel may strongly identify with protecting the country from terrorist attacks, whereas at the Environmental Protection Agency, officials are likely to view their mission as stalwarts against environmental degradation. Any agency activity that does not directly contribute to those missions will not be adequately valued.⁶⁵ No one, however, currently works for an agency with a transparency mission. There is no locus for a mission driven FOIA administration. An information commission would change that organizational dynamic. By empowering the commission to meaningfully review and rectify incorrect secrecy decisions—rather than merely enforce deadlines or report annually on FOIA activities—a commission would be mission-oriented.

Beyond private influence, efficiency orientation, and cost-benefit technocratic traps, informality is another feature of managerialism that an information commission would be well suited to counteract. As to FOIA decisions, an information commission would increase procedural formality as a practical matter. Since few requesters can go to court to vindicate their rights under the statute, the vast majority of requesters are left with an unpalatable set of informal options to fight a denial under FOIA. An information commission would be able to handle a much higher volume of complaints than the courts currently can, give requesters the opportunity to be heard before a neutral

department-freedom-of-information.html [https://perma.cc/W9MW-KVHN] (describing an “awareness review” policy at the Department of Interior giving notice to political appointees when records about them were about to be released and a FOIA regulation at the Environmental Protection Agency that authorized political appointees to make final determinations about the release or withholding of records under FOIA).

65. Telephone Interview with Helen Foster, Former Chief Priv. & FOIA Officer, Chief Admin. Officer, U.S. Dep't of Hous. & Urb. Dev. (May 14, 2019) (citing the culture of agencies as identifying their top priorities with the agency's primary statutory mission).

decisionmaker, and investigate possible violations of the law with a full set of tools, such as rights to inspect agency records systems. The procedural formalities may not be as formal as judicial proceedings, but they vastly out-formalize what is available on a practical level to most requesters.

The core benefits of such a system are realized through the provision of an efficient, accessible, and affordable set of remedies for dissatisfied requesters of public information and, with that, an actual method to enforce agency transparency obligations. With greater access to more effective recourse, a higher percentage of agency denials of access to information would be challenged. Agencies would face a true disincentive to over-withholding and over-claiming exemptions, a documented problem that is rampant throughout agencies. And the public would be far better informed about the operations of government and able to hold government officials accountable.

Yet, an information commission should avoid merely aspiring to a return to the heyday of individualized adjudication of rights-based claims. As Judith Resnik has documented, the court system itself—the most formal of our procedural institutions—long ago took a sharply managerial turn in the face of vast numbers of diffuse harms making their way into the legal arena.⁶⁶ And Julie Cohen has described the modern trends in litigation as managerial ones, including the management oriented Multi-District Litigation procedures, consent-decree style structural injunction settlements in routinized mass tort litigation, informalized court proceedings more generally, and involved supervisory judges.⁶⁷ As Cohen asked, in posing questions about what a new framework might look like, “[h]ow, for example, might one design processes for alternative dispute resolution to flag and escalate systemic questions about harm and responsibility for judicial attention?”⁶⁸

An information commission would be perfectly situated for flagging the systematic, analyzing the patterns of problematic behavior, and escalating that which can be remedied beyond the individual. It would be empowered to use systematic tools, such as randomized review of agency disclosure compliance by examining samples of responses to requests for accuracy in application of exemptions. It would be able to analyze its own data on complaints to find patterns of noncompliance. It would audit proactive disclosure regimes, compliance with which is currently dismal,⁶⁹ and enforcement of these paradigmatically diffuse harms all but nonexistent.⁷⁰ And it would be able to

66. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

67. Cohen, *supra* note 48, at 162–63.

68. *Id.* at 168.

69. *Most Agencies Falling Short on Mandate for Online Records*, NAT'L SEC. ARCHIVE (Mar. 13, 2015), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB505/> [<https://perma.cc/N4XV-2J36>].

70. Indeed, there is currently a circuit split on the very question of whether a private party has the right to enforce proactive disclosure obligations at all. See *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (holding that FOIA does not authorize a district court

escalate claims for penalties brought in court or administratively against systematically noncompliant agencies. These structural solutions go beyond managerialism, and they go far beyond individual rights frameworks. They would harness this commission's enforcement authority and information expertise—perhaps even its data prowess—to leverage the public benefit to its fullest.

IV

GOVERNMENT TRANSPARENCY 2.0

Investing in an information commission for transparency compliance furthers a new governance model based on a new center of expertise that cuts across government agencies and industry sectors. Unlike the technocratic, public-private partnership model of regulatory managerialism, the information commission would be a trans-substantive body not tied to one industry, empowered to stay ahead of information developments and ensure their use for progress, and address systematic and collective harms.

In other contexts, there have been calls to ensure that once an office is established, it is given the full range of powers commensurate with its expertise. For example, in the financial regulatory context, Hillary Allen has argued for consolidating expertise to ensure understanding of systemic risks to financial stability, using as a vehicle the extant Office of Financial Research (OFR) housed in the Department of the Treasury.⁷¹ The OFR was created in reaction to the financial crisis in 2008 in an attempt to develop systemic expertise and break down silos of regulation within government.⁷² Indeed, many of Allen's recommendations would apply with equal force in the context of an information commission, where there is likewise a need for expertise building, independence, and interdisciplinary approaches.⁷³

To harness the full power of an information commission, it would focus on moving transparency from a primarily reactive regime in which government must respond to requests for information from the public to a primarily proactive regime in which government works to affirmatively provide information to the general public. This would not by any means negate the right to file a request, but would give the government a comprehensive, meaningful role in the provision of a valuable shared resource—information—to the public.

FOIA's current affirmative disclosure requirements are minimal,⁷⁴ poorly

to order agencies to post records on their websites as required by the law); *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 874 (9th Cir. 2019) (holding that FOIA does authorize such a remedy); *N.Y.L. Assistance Grp. v. Bd. Immigr. Appeals*, 987 F.3d 207, 224 (2d Cir. 2021) (agreeing with the Ninth Circuit).

71. See generally Hillary J. Allen, *Resurrecting the OFR*, 47 J. CORP. L. 1 (2021).

72. *Id.* at 6.

73. See *id.* at 46 (summarizing her conclusions).

74. See generally 5 U.S.C. § 552(a)–(b) (listing discrete categories of records agencies must publish);

complied with,⁷⁵ and ambiguously enforceable. While they should be strengthened, an anti-managerialist information commission would go far beyond FOIA's current vision and work to affirmatively publish information that the public needs for accountability purposes. Tasking an expert and independent body with identifying information the public needs and balancing various competing policy considerations frees the current regime from a managerialist logjam of objections and inertia.

FOIA's existing affirmative disclosure mandates cover essentially the publication of "the law," so as to avoid the pernicious "secret law" problem.⁷⁶ It first requires publication in the Federal Register of certain kinds of binding documents, like substantive regulations, rules of procedure, or particularly important legal advice and guidance issued by agencies.⁷⁷ And second, it requires publication on agency websites various other categories of records largely concerning agency working law, such as final opinions in the adjudications of cases, lesser policy and guidance statements, and administrative staff manuals and instructions that affect the public.⁷⁸ The only exception is the provision added in 1996, and updated in 2016, requiring publication of "frequently requested records," defined as those requested three or more times.⁷⁹ Of course, these provisions would benefit from substantial improvement, clarification, and expansion.⁸⁰

But an information commission would have the ability and ideally the power to go far beyond simply administering or enforcing more categorical requirements for agencies to post their records. Rather, it would be tasked with identifying the kinds of information, records, categories of documents, and data or compilations that the public would most benefit from. That is, the information

Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577 (2009) (describing how narrow the existing requirements are and the vast troves of government information as to which the public would benefit from affirmative disclosure).

75. See *Most Agencies Falling Short on Mandate for Online Records*, *supra* note 69 (reporting on an audit of agency compliance with 5 U.S.C. § 552(a)(2) and discovering only sixty-seven of 165 federal agencies released significant numbers of records affirmatively and regularly updated them).

76. Herz, *supra* note 74, at 586 ("[T]hese provisions do not require affirmative disclosure of government information. Rather they provide for disclosure of law. The idea, as frequently stated, was to avoid the existence of 'secret law.'").

77. 5 U.S.C. § 552(a)(1).

78. *Id.* § 552(a)(2).

79. *Id.* § 552(a)(2)(D); see also Electronic Freedom of Information Amendments of 1996, Pub. L. 104-231, § 4, 110 Stat. 3048, 3049 (adding to (a)(2) a provision requiring publication of "copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records"); FOIA Improvement Act of 2016, Pub. L. 114-185, § 2, 130 Stat. 538, 538 (defining frequently as, at a minimum, three requests).

80. For example, there is a current Administrative Conference of the United States project on the disclosure of agency legal materials tasked with recommending statutory changes to clarify and improve agency obligations to publish their legal materials, on which I am the lead consultant. See *Disclosure of Agency Legal Materials*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/disclosure-agency-legal-materials> [<https://perma.cc/7UDU-MBLG>] (last visited Mar. 28, 2023).

commission would be the mouthpiece for the government, but one whose objective is to determine what the public—including those representing public interests such as the press and watchdog groups—most needs. This would operate far above the basic floor set by existing or even improved obligations on agencies.

Of course, effective affirmative disclosure that promotes government accountability requires government actors themselves to publish useful information. It is the inherent conflict of interest that arises within government agencies that demonstrates the unique benefit of having an information commission to administer proactive disclosure obligations, rather than simply imposing new disclosure obligations on agencies directly. As described above, an information commission would be designed to be as fully independent an agency model as possible, standing apart from its executive branch counterparts and empowered to facilitate their oversight.⁸¹ Moreover, it would help separate the decisions about publishing government information that might implicate the interests of regulated businesses from the relationship between regulated businesses and their regulators, which is often too close, precisely because of the regulatory managerialist state. The public interest-oriented information commission would be designed to create structural changes for government openness that avoid some of the pitfalls of individual decisions to release records.

Government is uniquely positioned to curate a public commons of open access, publicly held information. In 1996, James Boyle called for the protection of the public domain for the “raw material from which information products are constructed.”⁸² His call, and others like it, spurred private efforts, with digital information experts and librarians curating public archives of open access sources freely available to call, such as the Creative Commons,⁸³ Wikimedia,⁸⁴ and the Internet Archive.⁸⁵ To supplement the efforts of private organizations, foundations, or philanthropic efforts, an information commission would create an effective information commons of government-held information. Indeed, a publicly managed commons may be able to avoid some of the pitfalls identified in extant information commons. For example, Anupam Chander and Madhavi Sunder have rightly pointed out that despite the “romance” of the commons as a metaphor, public domain resources are not equally exploited by all and may in

81. See *supra* notes 60–64 and accompanying text.

82. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY xiv (1996); see also David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. no. 4, 1981, at 147, 147 (1981) (using a public domain framework to critique expansions of intellectual property protections); Larry Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1788 (2002) (defining a commons as a resource that is free, and explaining its application to the internet).

83. CREATIVE COMMONS, <https://creativecommons.org> [<https://perma.cc/U5D5-AH5W>] (last visited Mar. 28, 2023).

84. WIKIMEDIA, <https://www.wikimedia.org/> [<https://perma.cc/86HU-7VYW>] (last visited Mar. 28, 2023).

85. INTERNET ARCHIVE, <https://archive.org/> [<https://perma.cc/A6PR-NB6H>] (last visited Mar. 28, 2023).

fact reify existing wealth, power, access, and knowledge differentials.⁸⁶ Because a public body has greater democratic accountability than private philanthropic efforts, it may be able to affirmatively work to address those disparities in the design of its open access materials.

Having a locus of expertise tasked with determining what information—and in what form—is valuable to the public is critical and would represent government not reacting, but acting, to ensure transparency. That is, rather than merely managing the disputes others bring to it or brokering solutions private parties can agree to regarding disclosure, the anti-managerialist information commission would be systematically tasked with curating public information necessary to promote democratic aims. As others have documented, accountability is currently hindered by, among other problems, the phenomenon of “infoglut,”⁸⁷ or information overload,⁸⁸ whereby the public is inundated with such a rich information environment that it is nearly impossible to distinguish between valuable information for public oversight and information noise.

When government uses its mouthpiece, it can produce the most valuable information for accountability, ensuring systemic solutions to transparency challenges, including balancing the difficult and competing values of transparency, personal privacy, and commercial secrets.⁸⁹ In this article, I do not attempt to comprehensively list the kinds of affirmative disclosure initiatives an information commission might take on, but some examples of worthy initiatives already explored in the literature represent the kinds of programs that could be considered as part of an information commission’s role.

One substantial role for a government agency would be to address the increasing problem of conflicts between intellectual property claims and the public’s interest in disclosure. In fact, a government agency has unique tools at its disposal for overcoming intellectual property protections and ensuring ongoing public accessibility. One aspect of our current transparency regime that has come under strong critique is that it has an “anti-public sector bias,”⁹⁰ or as

86. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1341 (2004). See generally Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J.L. & TECH. 1 (2011) (documenting, among other things, the social utility of existing medical data commons).

87. See Cohen, *supra* note 48, at 179 (describing the problem of infoglut in the context of regulatory disclosures companies are mandated to make).

88. See generally WENDY WAGNER & WILL WALKER, INCOMPREHENSIBLE! A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT (2019) (disavowing generally the notion that “more information is better,” and demonstrating why our current bias leads us to create more incomprehensible information for consumers and citizens).

89. See, e.g., Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 645–46 (2021) (providing examples of public data management projects around the globe); Mary Fan, *The Right to Benefit from Big Data as a Public Resource*, 96 N.Y.U. L. REV. 1438 (2021); Jennifer Shkabatour, *The Global Commons of Data*, 22 STAN. TECH. L. REV. 354 (2019).

90. Irma Eréndira Sandoval-Ballesteros, *Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico*, in TROUBLING TRANSPARENCY 291, 302–05 (David E. Pozen & Michael Schudson eds., 2018).

Dave Pozen puts it, “[b]oth the ideal of ‘freedom of information’ and the evils of excessive secrecy are associated, legally and symbolically, with the public sector alone.”⁹¹ Because private entities are not subject to FOIA, their flaws, mistakes, corruptions, malfeasance, and neglect are largely shielded from public view.⁹² As such, government is made to look less competent than private industry, and faith in government has eroded over time perhaps as a result.⁹³ This phenomenon contributes to what Pozen describes as “transparency’s ideological drift” over time from a progressive ideal when it was enacted to a regressive, neoliberal, and anti-governmental practice,⁹⁴ something very much in line with greater managerial trends. A more aggressive effort to proactively disclose government held information about corporate activity would go a long way to evening this imbalanced playing field.

Take, for example, the problem of materials generated by private international standard setting bodies that are later incorporated by reference (IBR) into agency regulatory regimes⁹⁵ and treated as if they were published in the Federal Register, although they are not.⁹⁶ Though these are not secret, per se, they are typically maintained behind paywalls, perhaps with one print copy available at a government office. As a result, these materials are not easily accessible to all members of the public, a fact that has been strongly criticized as anti-democratic.⁹⁷ While their authors claim copyright protections, the courts have not settled the question definitively. Circuit courts have divided on whether material incorporated by reference into state law can be subject to copyright protections. The splintering often depends on circumstances such as the nature

91. David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 UNIV. PA. L. REV. 1097, 1114–15 (2017).

92. See 5 U.S.C. § 552 (covering “agencies,” which are public entities).

93. See ONORA O’NEILL, A QUESTION OF TRUST: THE BBC REITH LECTURES 2002 63–79 (2002).

94. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 151 (2018).

95. See Emily Bremer, *Introducing Incorporation by Reference*, REG. REV. (Aug. 24, 2022), <https://www.theregreview.org/2022/08/24/bremer-introducing-incorporation-by-reference/> [<https://perma.cc/7J4Z-MEKQ>] (providing a primer on IBR).

96. See 5 U.S.C. § 552(a) (“For the purposes of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”); 1 C.F.R. § 51 (2019) (setting out the Office of Federal Register regulations on approval of IBR).

97. See, e.g., Nina Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014) (explaining that individuals cannot freely seek access to federal regulations); Peter Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013) (highlighting that digital access to public laws continues to lag behind); see also AM. BAR ASS’N, RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES, item no. 112, at 6 (2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2016_hod_annual_meeting_electronic_report_book1.pdf#page=403 [<https://perma.cc/69CX-5BNV>] (recommending legislative changes requiring free public access to all IBR material).

of the materials, their purpose, the circumstances of their drafting, and their use.⁹⁸ Moreover, federal law incorporating voluntary consensus standards present potentially distinguishing factors that may alter the outcome of a potential copyright claim.⁹⁹ Current approaches recommended by the Administrative Conference of the United States¹⁰⁰ and essentially adopted by OFR and the Office of Management and Budget (OMB)¹⁰¹ are managerialist through and through; they suggest collaborating with private standard setting bodies to find workarounds to allow greater, but not full, public access to IBR standards.

Instead, an information commission might be the kind of institution ready to tackle the hard questions of IBR. Perhaps it could regulate rates by which standard setting bodies would be compensated for releasing IBR material into the public domain. It could also adjudicate fair market values and require the relinquishment of copyright claims. This kind of institution might be positioned to break free of the current partnership paradigm that leaves many deeply distressed about public access to binding legal standards and to craft an affirmative disclosure program to rectify this democratic deficit.

Another area of possible intervention is in tackling commercial secrecy's overbreadth, which shields vast swaths of useful information from public view. Christopher Morten and Amy Kapczynski have argued, for example, that the U.S. Food and Drug Administration (FDA) could make clinical trial data proactively available while protecting patient privacy and addressing drug company confidentiality claims.¹⁰² They propose building in a publicly-releasable version of clinical trial data on the front end submissions by companies and

98. Compare *Veeck v. S. Building Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc) (holding that, in certain circumstances in which privately authored code written for the purpose of incorporation into public law, the privately authored material was disentitled to copyright protection), with *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Repts., Inc.*, 44 F.3d 61 (2d Cir. 1994) (upholding copyright protections for a reference book of used car values that was incorporated by reference into various states' insurance statutes), and *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997) (upholding copyright protections for the American Medical Associations' medical procedure classifications despite being incorporated by reference into federal Medicare regulations). The Supreme Court recently weighed in on a related, but distinct, question of whether annotations to state codes prepared by a private company under a contract with the state government could be subject to copyright and held that they were not. *Ga. v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

99. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 167–69 (2013) (suggesting that because the Fifth Circuit in *Veeck* relied on the fact that the privately authored code was drafted for the purpose of incorporation into state law in denying copyright protections, federal incorporation of voluntary consensus standards adopted by industry for other purposes may well be entitled to copyright protections).

100. Adoption of Recommendations, 77 Fed. Reg. 2257 (Jan. 17, 2012).

101. See Off. of Mgmt. & Budget, Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (Jan. 27, 2016), https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf [<https://perma.cc/3PWA-BHH3>] (citing the ACUS recommendation as a basis for some standards); 1 C.F.R. § 51 (2019) (implementing OFR regulations that are consistent with the ACUS recommendation).

102. Christopher J. Morten & Amy Kapczynski, *The Big Data Regulator Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs and Vaccines*, 109 CAL. L. REV. 493, 497–98 (2021).

requiring would-be data users to make requests and enter into data use agreements before obtaining access to data at the back end.¹⁰³ These protections, they show, would allow the agency to promote public interest and noncommercial use of important public health data.¹⁰⁴ Subsequently, Morten generalized the concept. He documented how the Trade Secrets Act already allows publication of even admittedly trade secret material so long as agencies make rules governing disclosure.¹⁰⁵ He further suggests such disclosures should be made so as to facilitate public oversight and thwart competitive harm.¹⁰⁶ He would do this by creating “bounded gardens” of information—subject to use or user limitations imposed by contract, rule, or technology—such that public oversight and research minded users could access corporate information needed to understand regulatory decisions but competitors could not.¹⁰⁷

This type of initiative, however, is precisely the sort of affirmative disclosure approach that would be ideally implemented by an information commission—a set of independent information experts who could craft these kinds of solutions. Others have documented the feasibility of specific procedures to protect personal privacy while revealing important public data. For example, danah boyd’s account of the U.S. Census Bureau’s approach to disclosure reveals a carefully calculated policy based on mathematical risk of re-identification of individuals based on release statistics that lends itself to a rigorous privacy protection better suited to the modern information environment.¹⁰⁸ This approach, labeled “differential privacy,”¹⁰⁹ is still in progress, but could form the basis for an approach that an information commission could implement more systematically in datasets released by the federal government without each agency having to reinvent the privacy wheel.

The public benefit of increased disclosure, with appropriate protections, is plain. An information commission could address some of the harms others have identified as stemming from an overexpansion of trade secrecy and other intellectual property claims. Kapczynski has bluntly asserted that trade secret law “has come into sharp potential conflict with democracy” on account of its weaponization against public access to information.¹¹⁰ Charles Tait Graves and Sonia Katyal have argued that trade secrecy is shifting “toward open-ended concealment” and ultimately having “a dramatic effect on disclosure of

103. *Id.* at 541.

104. *Id.* at 555–58.

105. Christopher Morten, *Publicizing Corporate Secrets*, 171 UNIV. PA. L. REV. 1, 60–67 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4041556 [<https://perma.cc/N8QF-TY9T>].

106. *Id.* at 52–54.

107. *Id.* at 35–52.

108. See generally danah boyd, *Balancing Data Utility and Confidentiality in the 2020 US Census*, DATA & SOC’Y (2020).

109. *Id.* at 2.

110. Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1377 (2022).

information benefitting the public.”¹¹¹ In a particularly striking example, Jamillah Bowman Williams documents how trade secrecy has been used to conceal gender and race disparities in conflict with advancement of civil rights enforcement.¹¹² An information commission would be empowered to account for the public interest in overriding otherwise applicable trade secrecy protections, while implementing appropriate and effective privacy protections.

Finally, in this same volume, Hannah Bloch-Wehba raises a related but distinct secrecy concern arising from government contracting for technology, artificial intelligence, or other software products.¹¹³ Her astute article for this symposium details a range of options to ameliorate the accountability deficit that results from outsourcing to private companies whose products are shrouded in commercial secrecy claims.¹¹⁴ An information commission, however, may have a role to play in some of her proposals, including managing publication of certain important contractual terms or even implementation of certain public options. Others have raised similar concerns about the secrecy surrounding government procurement,¹¹⁵ and Bloch-Wehba’s vision aligns with the goals of an imagined information commission.

Beyond the realm of rebalancing trade secrecy and the public interest, an information commission could add great value in other proactive disclosure regimes as well. For example, enforcement records across industries are often held across federal agencies but not centralized in any one database. Indeed, while many agencies publish some enforcement records—inspection reports, citations, warning letters, fines, stipulated penalties, et cetera—even those practices are inconsistent across the federal government in this regard.¹¹⁶

111. Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1343 (2021).

112. See generally Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1684 (2019) (discussing how companies conceal race and gender disparities).

113. Bloch-Wehba, *supra* note 25 at 231–34.

114. *Id.*

115. See generally, e.g., Dierdre K. Mulligan & Kenneth A. Bamberger, *Procurement as Policy: Administrative Process for Machine Learning*, 34 BERKLEY TECH. L.J. 773 (2019) (arguing that procurement is essentially outsourcing policymaking roles of agencies to the detriment of government accountability to the public); Cary Coglianese & Erik Lampmann, *Contracting for Algorithmic Accountability*, 6 ADMIN. L. REV. ACCORD 175 (2021) (arguing for transparency around AI in public contracts to ensure accountability in algorithmic decision-making to avoid bias and arbitrary government action).

116. For some examples of agency enforcement records databases, see generally *Enforcement*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/enforcement> [<https://perma.cc/CC9P-JLBF>] (last visited Feb. 17, 2023). See also *Data Enforcement*, U.S. DEP’T OF LAB., <https://enforcedata.dol.gov/homePage.php> [<https://perma.cc/N3TN-PHMM>] (last visited Feb. 17, 2023) (same); *Enforcement and Compliance History Online*, U.S. ENV’T PROT. AGENCY, <https://echo.epa.gov/> [<https://perma.cc/KP96-XB37>] (last visited Feb. 17, 2023) (same); RECALLS, <https://www.recalls.gov/> [<https://perma.cc/K9PF-58Z4>] (last visited Feb. 17, 2023) (same); *Inspection Classification Database*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/inspection-classification-database> [<https://perma.cc/2M74-M94D>] (last visited Feb. 17, 2023) (same).

Moreover, as industries increasingly likely to be regulated in their various aspects by more than one government agency, looking for a company's history of compliance with the law may take searching in multiple locations, each of which is designed to retrieve information in a different way.

Using an information commission to publish government enforcement activities across the wide variety of regulatory regimes, administered from environmental compliance to civil rights to securities regulation, would allow members of the public a holistic look at government enforcement activities. Moreover, these records are voluminous, and sometimes agencies have competing interests that counsel against full release.¹¹⁷ An information commissions' independent perch could craft a disclosure program taking those concerns into account.

These are but some examples of affirmative disclosure programs that might be valuable projects of an information commission. But they provide examples of how a commission adds more value than simply imposing such obligations on agencies. The expertise and independence of a commission, combined with its trans-substantive approach to information policy, is better suited to ensure public access to valuable government records and, to that end, further democratic accountability.

V

CONCLUSION

The creation of an information commission would be well worthwhile even if it served its most narrow function of overseeing extant transparency obligations and enforcing the public's right to access government held information. Yet, it would be a mistake not to consider the possible scope of an information commission beyond this limited role. An information commission designed to encompass systemic solutions, empowered to remedy diffuse transparency harms, and able to proactively set a government information agenda avoids the pitfalls of managerialism and updates government transparency programs for an information age.

While this article sets out a broad transparency mission for the information commission, one could carry the idea further. I leave for future work or to others the possibility that an information commission might be the locus of power to enforce greater transparency obligations on private corporations themselves,¹¹⁸

117. Some agencies cite, for example, the need to redact sensitive information from voluminous enforcement records. Others cite as reasons for nondisclosure the minimal value to the public of repetitive records. And still others cite the preliminary nature of some findings as reasons to keep them secret. These and other interests could be weighed in crafting the scope of affirmative disclosure by an information commission.

118. Many foreign jurisdictions have right to know obligations imposed on private contractors, for example. See *Private Bodies and Public Corporations*, RIGHT2INFO.ORG (Sept. 13, 2013),

to oversee the use of algorithmic decision-making in government or in private industry,¹¹⁹ to regulate the collection and maintenance of data systems by private industry, or more. Perhaps the expertise envisioned could or should lend itself to these even more wide-ranging activities. But at base, an information commission should reinvent transparency for the next, post-managerial phase of government and for the new, interconnected information landscape. Such a body would work to ensure the government's accountability obligations are themselves held to account.

<https://web.archive.org/web/20210802000115/http://www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations> [https://perma.cc/F6AX-8VN7] (documenting how foreign laws increasingly subject private entities to a limited version of open records laws if they contract with the government or perform public functions). *See generally* Sarah Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENV'T L. 1 (2014) (arguing for transparency obligations to be imposed on environmental contractors); Michael Karanicolas, *A FOIA for Facebook: Meaningful Transparency for Online Platforms*, 66 ST. LOUIS UNIV. L.J. 49 (2021) (arguing for transparency obligations to be imposed on platforms).

119. *See, e.g.*, Andrew Tutt, *An FDA for Algorithms*, 69 ADMIN. L. REV. 83 (2017) (arguing for a preclearance mechanism to ensure safety and accuracy in algorithmic decision-making); Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265 (2020) (arguing for greater transparency in algorithmic decision-making).