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## Oversight of Oversight: A Proposal for More Effective FOIA Reform

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# Oversight of Oversight: A Proposal for More Effective FOIA Reform

## **Cover Page Footnote**

Professorial Lecturer of Law, The George Washington University Law School. I was counsel for Plaintiff-Appellant in Cause of Action v. Federal Trade Commission, a D.C. Circuit case that this article examines. To maintain objectivity, my co-author and I cite to the commentary of others when examining potentially subjective conclusions regarding this case. I am grateful to Dick Pierce, Paul Verkuil, Margaret Kwoka, Alan Morrison, Allan Blutstein, David Fischer and James Valvo for their insights and comments throughout the drafting process; J.D., George Mason University Antonin Scalia Law School, B.A., Saint Joseph's University.

# OVERSIGHT OF OVERSIGHT: A PROPOSAL FOR MORE EFFECTIVE FOIA REFORM

*Aram A. Gavoor*<sup>+</sup>

*Daniel Miktus*<sup>++</sup>

I.	THE INEFFICIENCY OF FOIA DELEGATIONS WITH <i>DE NOVO</i> REVIEW	528
A.	<i>Executive Branch Disincentives to Compliance</i>	529
B.	<i>FOIA Reform and Executive Stonewalling</i>	532
C.	<i>De Novo Review</i>	535
D.	<i>Empirical Data</i>	537
II.	COUNTERARGUMENTS AND ALTERNATIVES	540
A.	<i>Courts are Properly Applying De Novo Review in FOIA Cases</i>	540
B.	<i>Courts Should Not Apply De Novo Review for All Exemption Categories</i>	541
III.	CONCLUSION	542

The D.C. Circuit’s 2015 opinion, *Cause of Action v. Federal Trade Commission*, authored by its Chief Judge, Merrick Garland, is a landmark pro-transparency opinion that held an executive branch agency accountable for misreading two Freedom of Information Act (FOIA) fee provisions. In addition to its contribution to the news media and public interest FOIA requester communities, the opinion evidences a pervasive methodological flaw in the congressional approach to FOIA reform. The FOIA statute is inefficient because it invites and requires agency interpretation of key provisions, which is inconsistent with its non-deferential *de novo* standard of review. Given the natural disincentives executive branch agencies have to comply with the oversight and transparency efforts of news media and public interest actors, agencies exploit FOIA in a manner that is contrary to its public policy goals. This statutory problem survives the FOIA Improvement Act of 2016. This Article makes the case that Congress should approach FOIA reform with greater legislative precision to better achieve its public policy goals. FOIA is unique among legislative enactments because it is an omnibus statute of transparency

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and oversight, organic to no agency, and one that creates powerful disincentives for agency compliance with its goals. Its *de novo* standard of review conveys an absence of deference that is in tension with its provisions that delegate agency interpretative authority.

The academy and jurists alike vigorously debate many aspects of administrative law. Notwithstanding the numerous disagreements that exist in the intellectual discourse, there is consensus on the maxim that agency interpretation of a statute that is generally applicable to all executive branch agencies should not vary.<sup>1</sup> Congress consistently ignores this convention by choosing to craft FOIA and its amendments in broad language that invites and requires agency interpretation. This phenomenon recently presented itself in Chief Judge Merrick Garland's 2015 D.C. Circuit opinion in *Cause of Action v. Federal Trade Commission*.<sup>2</sup> In that case, the court held an executive branch agency accountable for misreading two FOIA fee provisions in response to a FOIA request that sought a fee waiver based on public interest factors and recognition of the requester as a representative of the news media.<sup>3</sup> Such statutory misreadings resulted in significant delays that caused harm to the requestor.<sup>4</sup> Improper delays in releasing records and improper withholdings of records frustrate the twin public policy pillars of FOIA, transparency and oversight.<sup>5</sup> Agencies are disinclined to promote transparency and oversight because doing so invites unwanted scrutiny and adverse consequences.

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1. See *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (“[I]t is precisely because FOIA’s terms apply government-wide that we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*.”).

2. *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015). Chief Judge Merrick Garland listed this case first in a list of the ten most significant opinions that he authored while on the D.C. Circuit as part of a Questionnaire for Judicial Nominees that he provided to the United States Senate Committee on the Judiciary in furtherance of his nomination to the U.S. Supreme Court. UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 59-60, <https://www.judiciary.senate.gov/imo/media/doc/Senate%20Judiciary%20Committee%20Questionnaire%205%209%202016.pdf> [hereinafter QUESTIONNAIRE FOR JUDICIAL NOMINEES]; see Emmarie Huetteman, *Merrick Garland Completes Nominee Questionnaire for the Senate*, N.Y. TIMES (May 10, 2016, 5:47 PM), [http://www.nytimes.com/politics/first-draft/2016/05/10/merrick-garland-completes-nominee-questionnaire-for-the-senate/?\\_r=0](http://www.nytimes.com/politics/first-draft/2016/05/10/merrick-garland-completes-nominee-questionnaire-for-the-senate/?_r=0).

3. See *Cause of Action*, 799 F.3d at 1126.

4. See *Related Documents: Cause of Action v. Federal Trade Commission*, CAUSE OF ACTION (Apr. 29, 2014), <http://causeofaction.org/related-documents-cause-action-v-federal-trade-commission/> (describing the time delay between *Cause of Action*'s original FOIA request and the D.C. Circuit's opinion).

5. See Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1363, 1369 (2016).

While Congress permits<sup>6</sup> and requires<sup>7</sup> agency interpretation of numerous FOIA terms and provisions, it imposes a non-deferential *de novo* standard of review to agency rulemakings and adjudications made under the statute.<sup>8</sup> Such standard of review is appropriate for a statute of general agency applicability because it conveys an absence of authoritative delegation. This Article proposes that the *de novo* standard of review provision of FOIA is diminished by the inefficiency and tension created by the statute's interpretive delegations, which are typically reviewed under the more deferential arbitrary and capricious standard contained in the Administrative Procedure Act (APA).<sup>9</sup> The result of the inefficiency is diminished efficacy that survives the latest decennial amendment to the FOIA statute, the FOIA Improvement Act of 2016.<sup>10</sup> To resolve the discrepancy between agency interpretation and *de novo* review, this Article makes the case that Congress should approach FOIA reform with greater legislative precision.<sup>11</sup>

Part I identifies the adverse public policy effects of Congress's choice to confer non-deferential interpretive authority of FOIA upon agencies, coupled with the natural disincentives agencies have to exercise such interpretive authority to promote compliance with the statute. Part II examines the tension and inefficiency of FOIA's judicial review provisions in the context of the broader statutory scheme of agency-delegated interpretation. It suggests that courts may not be reviewing FOIA adjudications and rules *de novo* as a result of this inefficiency. Part III addresses various counterarguments and alternatives to our views.

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6. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa) (2012) (conferring discretion to engage in rulemaking to determine administrative appeal deadline in excess of ninety day statutory minimum); *id.* § 552(a)(6)(B)(iv) (conferring permissive individual authority to aggregate certain classes of requests to reduce duplication of processing efforts); *id.* § 552(a)(6)(D)(i) (conferring permissive individual agency authority to engage in rulemaking to incorporate and interpret multitrack processing).

7. *Id.* § 552(a)(6)(E)(i) (requiring agencies to engage in interpretive rulemaking regarding circumstances that merit expedited processing of requests).

8. *Id.* § 552(a)(4)(B). District courts must also review any action challenging an agency determination regarding fee waivers *de novo*. See *id.* § 552(a)(4)(A)(vii); *Cause of Action*, 799 F.3d at 1115 (citing *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003)) (“FOIA . . . requires the court ‘to determine the matter *de novo*,’ . . . and courts ‘owe no particular deference to [an agency’s] interpretation of FOIA.’”); *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (“[B]ecause FOIA’s terms apply government-wide[,] . . . we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*.”).

9. 5 U.S.C. § 706(2)(A); see also *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (“The ‘scope of review’ provisions of the APA, 5 U.S.C. § 706(2)[(A)–(D)], are cumulative.”).

10. FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538 (2016).

11. This Article does not suggest that Congress engage in *unconstitutionally* precise legislative drafting so as to create irrebuttable presumptions. See, e.g., *U.S. Dep’t of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (finding an irrebuttable presumption unconstitutional as a violation of due process).

## I. THE INEFFICIENCY OF FOIA DELEGATIONS WITH *DE NOVO* REVIEW

Congress enacted FOIA principally as a tool of executive branch agency oversight.<sup>12</sup> While other statutes applicable to administrative agencies contain oversight provisions,<sup>13</sup> FOIA is unique in that its purpose is to facilitate transparency and oversight of agencies.<sup>14</sup> That oversight function creates natural tension with agencies that have disincentives to liberally comply with FOIA's goals and purposes.<sup>15</sup> When agencies do not comply with FOIA's mandates, information is withheld from the public, requesters face long delays from agencies forcing litigation to ensure compliance, and the purpose of the statute is frustrated.<sup>16</sup> The problem is compounded by agency motivation to withhold records that are harmful, embarrassing, or politically inconvenient.<sup>17</sup> FOIA

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12. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”); *see also* Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. RICH. L. REV. 231, 297 (1987) (“[I]t is clear from the legislative history that Congress intended FOIA to serve primarily as an oversight function.”); Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1261 (1970) (“The Freedom of Information Act was passed to ‘pierce the paper curtain of bureaucracy’ that shields federal government operations from public view.” (quoting 112 CONG. REC. 13,647 (1966) (remarks of Congressman Laird))).

13. *See, e.g.*, Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 685 (2002) (“In drafting the Administrative Procedure Act (APA) scope of review provisions Congress sought to bring order to the oversight function.”).

14. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) (“[D]emocracy cannot function unless the people are permitted to know what their government is up to.” (emphasis removed) (internal citations omitted)); *U.S. Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (identifying FOIA’s basic purpose as “to open agency action to the light of public scrutiny”); *see also* Kwoka, *supra* note 5, at 1363 (“[N]o law is more centrally intended to promote transparency as a means of democratic governance than FOIA.”).

15. *Reporters Comm. for Freedom of Press v. U.S. Dep’t of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev’d on other grounds*, 489 U.S. 749 (1989) (“[S]ince the statute’s purpose—disclosure of certain information held by the government—creates tension with the understandable reluctance of government agencies to part with that information, Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with that statutory purpose.”); STAFF OF HOUSE COMM. ON OVERSIGHT & GOV’T REFORM, *FOIA IS BROKEN: A REPORT 2* (Jan. 2016) [hereinafter *FOIA IS BROKEN: A REPORT*] (“Many...[FOIA issues] are engineered into the process by the federal agencies themselves.”); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 186 (2013) (“A FOIA withholding is different from other agency actions in important ways: it is one of the few administrative actions in which the agency’s own illegitimate self-interest is often at stake . . .”).

16. *See* Alan B. Morrison, *The Administrative Conference of the United States and its Work on the Freedom of Information Act: A Look Back and a Look Forward*, 83 GEO. WASH. L. REV. 1540, 1545 (2015) (“[W]riting a law mandating disclosure, with limited exceptions, is only the first step; people who have control over requested records must cooperate or the system will not work as intended.”).

17. *FOIA IS BROKEN: A REPORT*, *supra* note 15, at 9 (“[T]he agencies applying the exemptions have an inherent conflict of interest. The agency making the decision to withhold information is also the agency with the most at stake if embarrassing or controversial information

would be a more effective statute if Congress filled many of its gaps that invite or permit agency interpretation, and filled the space created by its ambiguities.<sup>18</sup>

#### A. Executive Branch Disincentives to Compliance

Executive branch disincentives to comply with the provisions and purposes of FOIA can cause individual agencies to interpret the statute's ambiguities and gaps narrowly and in favor of nondisclosure.<sup>19</sup> Judicial correction of such agency behavior took place in *Cause of Action v. Federal Trade Commission*.<sup>20</sup> In that case, the Cause of Action Institute, a non-profit oversight organization, filed three successive, superseding, FOIA requests with the Federal Trade Commission (“FTC” or “Commission”), seeking information that it intended to use to develop investigative reports that could be critical of the Commission.<sup>21</sup> Cause of Action sought a fee waiver by asserting that the request was seeking information “in the public interest,” and, alternatively, a fee classification that would result in a reduction of fees by asserting that it was a “representative of

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is released.”); see Morrison, *supra* note 16, at 1546 (“But it is precisely those documents whose disclosure is *not* in the interest of at least some officials that FOIA makes available as a matter of law.” (emphasis added)); Kwoka, *supra* note 15, at 202 (“Agencies have often been found to have failed to release records to cover up their mistakes, embarrassing acts, or misconduct.”); see also Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 469 (2015).

Even though President Obama declared in his memorandum on FOIA that ‘the Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears,’ agencies continue to invoke exemptions as frequently as in the past, if not more often.

*Id.*

18. See FOIA IS BROKEN: A REPORT, *supra* note 15, at 39 (“[U]nresponsive agencies lack effective incentives to make improvement . . . [l]egislation is needed to clarify existing requirements and impose additional requirements that will ensure agencies to comply with legal obligations to make government public.”); Morrison, *supra* note 16, at 1549 (“The bureaucracy will never be enthusiastic about FOIA, but it is worth exploring alternatives that will overcome the inevitable resistance without harming significant interests that are protected by FOIA’s legitimate exemptions.”).

19. See, e.g., U.S. Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 6 (2001) (rejecting agency posture that certain documents were exempt from disclosure on the basis that they were “inter-agency or intra-agency memorandums or letters” protected by the work-product and deliberative process privileges); U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 139 (1989) (rejecting the DOJ’s claim that it could deny requests on the basis that the requested tax opinions and final orders were not agency records); FAA v. Robertson, 422 U.S. 255, 258–59 (1975) (agency denying a request for reports on the basis that they were “exempt from public disclosure”); Competitive Enter. Inst. v. Office of Sci. & Tech. Pol’y, 827 F.3d 145, 150 (D.C. Cir. 2016) (rejecting agency posture meant to shield government documents from disclosure due to their storage on a private email server).

20. *Cause of Action v. FTC*, 799 F.3d 1108, 1110–14 (D.C. Cir. 2015). Chief Judge Merrick Garland stated that the court’s opinion in this case represented one of the most significant opinions he authored while on the D.C. Circuit. See QUESTIONNAIRE FOR JUDICIAL NOMINEES, *supra* note 2.

21. *Cause of Action*, 799 F.3d at 1110–14.

the news media.”<sup>22</sup> Relying on its own regulatory interpretations of the respective fee classifications, the second of which parroted the Office of Management and Budget’s (OMB) 1987 Uniform Freedom of Information Act Fee Schedule and Guidelines,<sup>23</sup> the FTC denied Cause of Action’s fee requests.<sup>24</sup> A district judge granted summary judgment in favor of the FTC, relying upon the agency’s regulations and other legal interpretations.<sup>25</sup>

On appeal, the D.C. Circuit Court reversed the lower court’s—and by extension, the agency’s—erroneous interpretations of the fee classifications.<sup>26</sup> With regard to the public interest fee waiver, the Court stated that while “[t]he FTC regulation cited by the district court does require a requester to show that the information it seeks would increase the understanding of the public ‘at large[,]’ . . . FOIA itself does not.”<sup>27</sup> Upon analyzing the FTC’s interpretation of the “representative of the news media” fee classification, the court identified two problems with the FTC’s regulation and the district court’s decision. First, the FTC and district court required that each FOIA *request* be of potential interest to a segment of the public—yet, the D.C. Circuit concluded that the proper test focused on whether the *requester* gathers information of potential interest to a segment of the public.<sup>28</sup> Second, the FTC and the district court employed the FTC’s erroneous and OMB-parroted interpretation of the fee classification, requiring that the requester be “organized especially around dissemination,”<sup>29</sup> an interpretive requirement that was superseded by the OPEN Government Act of 2007.<sup>30</sup> That statute provided a definition of the

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22. *Id.* at 1110–11; see 5 U.S.C. § 552(a)(4)(A)(ii)(II), (iii) (2012).

23. *Cause of Action*, 799 F.3d at 1125; compare 16 C.F.R. § 4.8(b)(2)(iii) (2016) (regarding eligibility for a news media fee classification) with The Freedom of Information Reform Act of 1986: Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987) [hereinafter FOIA of 1986 Fee Schedule and Guidelines] (regarding eligibility for a news media fee classification).

24. *Cause of Action*, 799 F.3d at 1111.

25. *Id.* at 1113–15 (note, however, that the District Court denied the fee classifications for Cause of Action’s first two requests, and held the fee waiver request for its third FOIA request to be moot, because the third FOIA request essentially repeated its first two FOIA requests).

26. See *id.* at 1114–15, 1126; see also Adam Marshall, *Shall I Compare Thee to a Newspaper?*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Summer 2015), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2015/shall-i-compare-thee-newspa>.

27. *Cause of Action*, 799 F.3d at 1115. The Court also noted that, in 2004, it specifically held that “proof of the ability to disseminate the released information to a broad cross-section of the public is not required.” *Id.* at 1116 (quoting *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004)).

28. *Id.* at 1120–21 (“Such a case-by-case approach is correct for the public-interest waiver test, which requires that the ‘disclosure of the [requested] information’ be in the public interest. But the news-media waiver, by contrast, focuses on the nature of the *requester*, not its request.”).

29. *Id.* at 1125 (citing FOIA of 1986 Fee Schedule and Guidelines, *supra* note 23).

30. See OPEN Government Act of 2007, 5 U.S.C. § 552(a)(4)(A)(ii) (2012).



“representative of the news media fee” category that varied from the OMB guidelines and the FTC’s interpretation.<sup>31</sup>

For nearly ten years, FOIA has entitled an individual or organization to a “news media” fee status if the requester: “[1] gathers information of potential interest [(2)] to a segment of the public, [(3)] uses its editorial skills to turn the raw materials into a distinct work, and [(4)] distributes that work [(5)] to an audience.”<sup>32</sup> After the commencement of litigation in *Cause of Action*, the FTC promulgated a new “representative of the news media” fee regulation that conformed to the 2007 FOIA amendment.<sup>33</sup> Nonetheless, it continued to press the validity of its prior regulation in litigation.

The D.C. Circuit concluded that while some of the FTC’s problems could be attributed to FOIA amendments that had not yet been interpreted by the courts, it held the agency accountable for employing erroneous FOIA interpretations.<sup>34</sup> Given the court’s rebuke in *Cause of Action*, it is reasonable to infer that the FTC wrongfully denied advantageous fee classifications to other requesters even though they were entitled to those classifications for quite some time, and in so doing, stifled transparency.<sup>35</sup> Less than one year later, a different D.C. Circuit panel held another agency accountable for misreading another portion of the same FOIA fee provision,<sup>36</sup> one that advantages educational institutions that are engaging in scholarly research.<sup>37</sup> In *Sack v. United States Department of Defense*,<sup>38</sup> the court once more rejected an agency regulation that parroted the OMB’s Reagan-era 1987 guidelines, though the interpretation had not been superseded by statute.<sup>39</sup> The court disagreed with the government’s narrow reading of the term “educational institution” that permitted teachers, but excluded students, from taking advantage of the fee classification provision.<sup>40</sup> These two recently-decided cases aptly demonstrate the inefficiencies and adverse effects on transparency caused by Congress’s FOIA drafting choices.

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31. *See id.*; *see also Cause of Action*, 799 F.3d at 1118–20.

32. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Cause of Action*, 799 F.3d at 1120; Nat’l Sec. Archive v. U.S. Dep’t of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (creating the test that was eventually codified into FOIA).

33. *See* 16 C.F.R. § 4.8(b)(2)(iii) (2016).

34. *Cause of Action*, 799 F.3d at 1115; *see also* Josh Gerstein, *Court Upholds Broad FOIA Fee Exemption For Media & Groups*, POLITICO (Aug. 25, 2015, 11:34 AM), <http://www.politico.com/blogs/under-the-radar/2015/08/court-upholds-broad-foia-fee-exemption-for-media-groups-212930#ixzz4GT52XdMr>.

35. Christopher Mathias, *How Merrick Garland Made It Harder for Obama to Be So Secretive*, THE HUFFINGTON POST (Mar. 18, 2016, 2:07 PM), [http://www.huffingtonpost.com/entry/merrick-garland-government-transparency-foia\\_us\\_56e99318e4b065e2e3d821f3](http://www.huffingtonpost.com/entry/merrick-garland-government-transparency-foia_us_56e99318e4b065e2e3d821f3) (“These fees can be ridiculously, prohibitively expensive—sometimes costing hundreds of thousands of dollars, if not millions.”).

36. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).

37. *Sack v. U.S. Dep’t of Defense*, 823 F.3d 687–88 (D.C. Cir. 2016).

38. *Id.* at 687.

39. *Id.* at 692–93.

40. *Id.* at 688.

### B. FOIA Reform and Executive Stonewalling

Although Congress acted in 2007 to carefully define the “news media” fee waiver category,<sup>41</sup> it failed to define other FOIA provisions with similar clarity.<sup>42</sup> It amended FOIA again on June 30, 2016, by enacting the FOIA Improvement Act of 2016, which (1) requires agencies to automatically make electronically available any records which have been requested (and produced) at least three times, (2) codifies the Department of Justice’s “reasonably foreseeable harm” standard,<sup>43</sup> (3) forbids agencies from assessing search fees if they miss production deadlines,<sup>44</sup> and (4) mandates creation of a consolidated online request portal for all agencies.<sup>45</sup> These provisions undoubtedly contribute to FOIA’s goal of open government. They also fail to address agency interpretive error and interpretive variance with respect to the statute’s<sup>46</sup> gaps and ambiguities.<sup>47</sup> Until Congress enacts much more specific FOIA provisions,

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41. See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

42. See generally FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

43. *Id.* § 2, 130 Stat. at 538-39. In 2009, Attorney General Eric Holder repealed a former DOJ mandate and declared that DOJ would only defend an agency’s FOIA denial 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.” Memorandum from the Attorney General for Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> (stating that DOJ would defend agency withholdings “unless they lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records”).

44. *Id.* § 2, 130 Stat. at 538. This provision also waives duplication fees for educational, noncommercial scientific, scientific research, and representatives of the news media requesters if an agency misses a deadline. See *id.*

45. *Id.* § 2, 130 Stat. at 544; *OIP Summary of the FOIA Improvement Act of 2016*, U.S. DEP’T OF JUSTICE (last updated Aug. 17, 2016), <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>. The amendment also codified a “sunset provision” which makes the deliberative process privilege inapplicable to records created over twenty-five years before they are requested. See § 2, 130 Stat. at 540.

46. See generally § 2, 130 Stat. at 538. The Obama administration also strongly lobbied against more stringent FOIA reform. Jason Leopold, *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform*, VICE NEWS (Mar. 9, 2016, 9:50 AM), <https://news.vice.com/article/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform>; Trevor Timm, *New Documents Show the Obama Administration Aggressively Lobbied to Kill Transparency Reform in Congress*, FREEDOM OF THE PRESS FOUNDATION (Mar. 8, 2016), <https://freedom.press/news-advocacy/new-documents-show-the-obama-admin-aggressively-lobbied-to-kill-transparency-reform-in-congress/> (detailing how the Obama administration lobbied against a 2014 bill that would have given Congress more oversight to ensure agencies were complying with FOIA).

47. For example, FOIA confers discretion to agencies regarding whether to implement the multitrack processing of requests based on the volume of work or time required in responding to a request. 5 U.S.C. § 552(a)(D) (2012) (stating that agencies can “provid[e] for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.”). The idea behind multitrack processing is that “larger numbers of requests for smaller amounts of material will be completed more quickly,” and “[r]equesters will also have an incentive to frame narrower requests.” *Introduction to FOIA*, FOIADVOCATES, <http://www.foiadvocates.com/intro.html> (last visited Jan. 24, 2017). The absence of consistent multitracking

requesters will continue to be wrongfully denied records or improperly assessed fees based on erroneous agency interpretations.

Further illustrating the point that agencies have strong disincentives to comply with FOIA, presidential administrations have vehemently opposed and even lobbied against congressional efforts to enact FOIA reform. President Lyndon Johnson's administration fought hard to stall the statute's original enactment in the 1960s, as did every agency that offered congressional testimony on the legislation that would become FOIA.<sup>48</sup> Despite executive branch resistance, FOIA passed both houses of Congress by a nearly unanimous margin.<sup>49</sup> In his signing statement, President Johnson emphasized the need for government secrecy more so than for open government.<sup>50</sup>

Strong presidential opposition to FOIA and transparency reform measures persists.<sup>51</sup> Presidents George W. Bush and Barack Obama lobbied against FOIA reform.<sup>52</sup> President Bush, while indicating that his administration was "committed to full compliance with" FOIA,<sup>53</sup> issued Executive Order 13233, which limited public access to former presidential administration records under

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of requests across the government can lead some agencies to permit less work-intensive requests to languish while spending countless hours processing a time-consuming request. Congress should mandate multitrack processing to avoid this result. A cost-efficient and simple remedy would be to make multitracking mandatory.

48. *Freedom of Information at 40*, THE NAT'L SEC. ARCHIVE (Jul. 4, 2006), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/>. President Ford also vetoed FOIA amendments in 1974, but Congress overrode his veto. *Id.* ("Less than 10 years later, Rumsfeld as White House chief of staff, and his deputy Richard Cheney, would lead President Ford's effort to veto the strengthening amendments to the FOIA, but they would lose.")

49. *See* 112 CONG. REC. 13,661 (1966) (passing the House of Representatives); 111 CONG. REC. 26,820-23 (1965) (passing the Senate); *see also* 112 CONG. REC. 13,007 (1966). Note that the House of Representatives unanimously voted to enact FOIA.

50. *Freedom of Information at 40*, *supra* note 48. In fact, the signing statement includes more about the need to keep secrets than the urgency of openness.

51. *See History of FOIA*, ELECT. FRONTIER FOUND. TRANSPARENCY PROJECT (last viewed April 27, 2016), <https://www.eff.org/issues/transparency/history-of-foia> ("[H]istory shows that empowering the citizenry as a check on the government has worried many members of the executive branch, including presidents of both parties, and reminds us that citizens must be constantly vigilant to protect hard-earned transparency rights.")

52. Mathias, *supra* note 35 ("[D]ocuments—unearthed, ironically enough, by a FOIA lawsuit—revealed the Obama administration has actively lobbied against reforms to make the FOIA process stronger."); Timm, *supra* note 46 ("New documents . . . reveal that the Obama administration—the self described 'most transparent administration ever'—aggressively lobbied behind the scenes in 2014 to kill modest Freedom of Information Act reform that had virtually unanimous support in Congress."); Elizabeth Williamson, *White House Secrecy Starts to Give*, WASH. POST. (Jan. 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/12/AR2008011202308.html> ("The White House opposed the Open Government Act of 2007 and enlisted allies in Congress to block it.")

53. Memorandum from Attorney General John Ashcroft to Heads of All Federal Departments and Agencies (Oct. 12, 2001), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB84/Ashcroft%20Memorandum.pdf>. [hereinafter Memorandum from Attorney General Ashcroft].

the Presidential Records Act,<sup>54</sup> and his Attorney General, John Ashcroft, directed agencies in 2001 to make all discretionary FOIA disclosures only “after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure.”<sup>55</sup> Under President Obama, who famously committed to create “an unprecedented level of openness in Government,”<sup>56</sup> agencies set records for denying or redacting requests, backlogged requests increased, and the number of full-time FOIA employees decreased.<sup>57</sup> Ironically, documents that were obtained via a journalist’s FOIA request revealed that the Obama administration played a significant role in defeating bipartisan FOIA reform that had widespread support, the FOIA Oversight and Implementation Act of 2014.<sup>58</sup> To his credit, though, President Obama signed the FOIA Improvement Act of 2016 into law.<sup>59</sup>

Though agencies and presidential administrations praise FOIA and open government principles, they also quietly endeavor to undermine FOIA’s purposes.<sup>60</sup> Rather than permit agencies and presidential administrations that

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54. Executive Order 13233 - Further Implementation of the Presidential Records Act, 66 Fed. Reg. 214 (Nov. 1, 2001); *see also Executive Order 13233*, AMERICAN LIBRARY ASS’N (last viewed Feb. 8, 2017), <http://www.ala.org/offices/oif/ifissues/executiveorder>; *History of FOIA*, *supra* note 51; Williamson, *supra* note 52 (“In 2001, Bush issued an executive order giving past presidents and their families the authority to stall release of presidential papers indefinitely.”).

55. Memorandum from Attorney General Ashcroft, *supra* note 53; *see also* Williamson, *supra* note 52 (“Attorney General John D. Ashcroft issued a memo urging government agencies to use whatever legal means necessary to reject requests for public documents allowed by the FOIA.”).

56. Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies (Jan. 21, 2009), <https://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>. [hereinafter Memorandum from President Obama].

57. Ted Bridis, *Obama Administration Sets New Record for Withholding FOIA Requests*, PBS (March 18, 2015, 3:43 PM), <http://www.pbs.org/newshour/rundown/obama-administration-sets-new-record-withholding-foia-requests/>; *see also* Justin Elliott, *The Federal Government No Longer Cares About Disclosing Public Information*, WASH. POST (March 11, 2016), [https://www.washingtonpost.com/opinions/the-federal-government-no-longer-cares-about-disclosing-public-information/2016/03/10/7e0bf1bc-e631-11e5-a6f3-21ccdbc5f74e\\_story.html](https://www.washingtonpost.com/opinions/the-federal-government-no-longer-cares-about-disclosing-public-information/2016/03/10/7e0bf1bc-e631-11e5-a6f3-21ccdbc5f74e_story.html).

58. Leopold, *supra* note 46; *see also* FOIA OVERSIGHT AND IMPLEMENTATION ACT OF 2014, H.R. REP. NO. 113–115 (Mar. 15, 2013); Timm, *supra* note 46.

59. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016); Timm, *supra* note 46; *H.R. 1211 – FOIA Oversight and Implementation Act of 2014: General Comments* (Dep’t of Justice 2014 Opposition to FOIA Reform) (2014), [https://freedom.press/sites/default/files/hr1211\\_memo.pdf](https://freedom.press/sites/default/files/hr1211_memo.pdf) (containing the DOJ’s general comments on the act, which stated, in part, that “the Administration strongly opposes the bill’s addition of a ‘foreseeable harm’ standard,” and that it was “premature” for a consolidated FOIA request portal).

60. *See supra* notes 51–58 & accompanying text. It is possible that presidents do, in fact, desire to ensure that FOIA’s true purposes and benefits are fully realized, but other political issues cause “institutional flip-flopping.” *See* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 485, 491–92 (2016) (arguing that institutional flip-flopping occurs as a result of “‘merits bias,’ a form of motivated reasoning through which short-term political commitments make complex and controversial institutional judgments seem self-evident (thus rendering those judgments vulnerable when short-term political commitments cut the other way)”). Note also that the Federal Bureau of Investigation recently concluded an investigation of the 2016 Democratic

will naturally oppose meaningful FOIA modification to derail such reform efforts, Congress should enact precise FOIA reform measures to ensure that FOIA's main goals and purposes are fully realized.

### C. *De Novo Review*

FOIA's *de novo* review provision is weakened by the remainder of the statute. The concept that an agency's interpretation of a statute that it administered is entitled to deference is a well-tread norm of administrative law.<sup>61</sup> Conversely, *de novo* review is generally reserved for agency decisions and interpretations to which courts owe no deference.<sup>62</sup> However, FOIA's provisions expressly permit and instruct agencies to fill gaps, while also imposing *de novo* review on agencies' exercise of such interpretive authority.<sup>63</sup> Upon Article III review,<sup>64</sup> agency interpretations of FOIA, whether through rulemaking or adjudication,

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candidate for U.S. President, Hillary Clinton, determining that although Secretary Clinton violated no law, she had deleted many government records contained on a private e-mail server. *Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System*, FBI (July 5, 2016), <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system>. See also *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (holding that FOIA applies to agency heads' government records kept on private computer systems). On the campaign trail, neither former Secretary of State Hillary Clinton nor the Republican presidential candidate, Donald Trump, publicly disclosed their FOIA views.

61. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984) (setting forth a test to determine when and how a court should apply deference to an agency's construction of a statute); see also, *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (refining *Chevron* deference for agency implementations of statutory provisions); Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989) (discussing *Chevron* deference in the FOIA context).

62. Richard J. Pierce, *What do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83 (2011) (“[D]e novo review refers to an approach to judicial review in which the court does not confer any deference on the agency . . . .”); Verkuil, *supra* note 13, at 688 (“[U]nder de novo review, there should be no deference at all.”).

63. *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (reasoning that “it is precisely because FOIA's terms apply government-wide that we generally decline to accord deference to agency interpretations of the statute, as we would otherwise do under *Chevron*”); see also Kwoka, *supra* note 15, at 198 (“In prescribing de novo judicial review of agencies' decisions to withhold requested information from the public under [FOIA], Congress deliberately and radically departed from the typical deferential treatment courts are required to give to agencies.”).

64. See 5 U.S.C. § 552(a)(4)(B) (2012). District courts must also review any action challenging an agency determination regarding fee waivers *de novo*. *Id.* § 552(a)(4)(A)(vii); see, e.g., *Cause of Action v. FTC*, 799 F.3d 1108, 1113 (D.C. Cir. 2015). If an agency fails to respond to a FOIA request within the required time frame, a requester has “constructively” exhausted her administrative remedies and may seek immediate judicial review, again under the *de novo* standard. *Id.* § 552(a)(6)(C)(i); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); see also *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 63 (D.C. Cir. 1990) (“[A]n administrative appeal is mandatory if the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed.”).

should not receive deference<sup>65</sup> because FOIA is a statute that is not organic to any agency.<sup>66</sup> Due to the fact that FOIA applies to all government agencies, this system empowers agencies to have varying interpretations of the same provision. Inconsistent FOIA implementation across the executive branch is inefficient and inequitable because FOIA requesters are at the mercy of occasionally arbitrary agency-specific interpretations of the statute, to the detriment of transparency. The fact that over 100 agencies implement varying interpretations of ambiguous FOIA provisions in a manner that leads to administrative inter-decisional inconsistency further suggests that Congress should not employ such uncertain terms in FOIA.<sup>67</sup>

The only practical recourse for such agency behavior is Article III review. Litigation can be a difficult proposition for requesters due to its expense and duration. Only sophisticated and well-financed requesters have the capability to launch multi-year litigation that can involve successive rounds of dispositive motions, only to gain access to documents that have diminished news value due to their untimeliness. News media challenges to FOIA denials are infrequent because most news media, and especially new media outlets, operate on a shoestring budget.<sup>68</sup> Accordingly, non-profit organizations that are replete with expertise in administrative law tend to be the most effective in utilizing litigation to achieve judicial correction of erroneous interpretations of the statute.<sup>69</sup>

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65. *Chevron U.S.A., Inc.*, 467 U.S. at 842 (applying *Chevron* deference only when “a court reviews an agency’s construction of the statute which it administers”); *Judicial Watch*, 326 F.3d at 1313 (“[H]owever, we emphasize that we owe no particular deference to the IRS’s interpretation of FOIA.”); *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (“It is true that we will not defer to an agency’s view of FOIA’s meaning.”). *But see* 5 U.S.C. § 552(a)(4)(B) (directing that “a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to” matters such as technical feasibility, reproducibility, and FOIA exemption determinations).

66. *But see* 5 U.S.C. § 552(a)(4)(A)(i) (requiring the Director of the Office of Management and Budget, a unit within the Executive Office of the President, to provide for a uniform schedule of fees that is binding on all agencies through notice and comment rulemaking).

67. THE OPEN GOVERNMENT PARTNERSHIP, SECOND OPEN GOVERNMENT NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA 3 (Dec. 5, 2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/us\\_national\\_action\\_plan\\_6p.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/us_national_action_plan_6p.pdf) (“More than 100 Federal agencies are subject to FOIA.”).

68. *See generally Media Making Fewer Challenges to Government Secrecy in Federal Court*, THE FOIA PROJECT (Mar. 14, 2013), <http://foiaproject.org/2013/03/14/media-making-fewer-challenges-to-government-secrecy-in-federal-court/> (“Newsroom budgets have been slashed so it is no surprise that there is less time to pursue freedom of information litigation and less willingness to put time into stories where government may delay responding for long beyond the statutory limits.”).

69. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, [www.aclu.org](http://www.aclu.org) (last visited May 12, 2017); CAUSE OF ACTION INSTITUTE, [www.causeofaction.org](http://www.causeofaction.org) (last visited May 12, 2017); CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, [www.citizensforethics.org](http://www.citizensforethics.org) (last visited May 12, 2017); INSTITUTE FOR JUSTICE, [www.ij.org](http://www.ij.org) (last visited May 12, 2017); JUDICIAL WATCH, [www.judicialwatch.org](http://www.judicialwatch.org) (last visited May 12, 2017); PUBLIC CITIZEN, [www.citizen.org](http://www.citizen.org) (last visited May 12, 2017); REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, [www.rcfp.org](http://www.rcfp.org) (last visited May 12, 2017).

By including *de novo* review in FOIA, Congress intended to place primary authority to interpret FOIA's provisions with the courts.<sup>70</sup> A principal congressional concern regarding the precursor to FOIA was that no judicial review was available to challenge request denials.<sup>71</sup> Congress determined that *de novo* review was essential to avoid courts' "meaningless judicial sanctioning of agency discretion."<sup>72</sup> Congress considered *de novo* review so important to FOIA's implementation that it amended the statute to supersede a Supreme Court decision which had ruled that *in camera* review of documents for national security exemptions was not permitted.<sup>73</sup> In *EPA v. Mink*,<sup>74</sup> the Court held that Congress had not intended for *in camera* review of an agency's withholding of documents under the executive security—now the national security—exemption solely by requiring *de novo* review.<sup>75</sup> Congress quickly amended FOIA to provide for *in camera* review in demonstration of its preference for *de novo* review.<sup>76</sup>

#### D. Empirical Data

Empirical data of Article III affirmation rates in FOIA challenges raises the possibility that the congressional desire for *de novo* review, in which courts do

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70. Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989) ("Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with that statutory purpose."); Kwoka, *supra* note 15, at 186 ("The legislative histories of the standards of review articulated in FOIA and the Administrative Procedure Act (APA) demonstrate that Congress acted deliberately.").

71. 112 CONG. REC. 13,007 (1966) ("[M]ost important, by far the most important, is the fact this bill provides for judicial review of the refusal of access and the withholding of information." (statement of Rep. John Moss)); 111 CONG. REC. 26,820-22 (1965) ("And, even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available." (statement of Sen. Mansfield)).

72. 111 CONG. REC. 26,823; *see also* CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H. REP. NO. 89-1497, at 9 (1966) ("The proceedings are to be *de novo* so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion.").

73. *EPA v. Mink*, 410 U.S. 73 (1973).

74. *Id.*

75. *Id.* at 83–84 (1973) (finding it "wholly untenable . . . that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen.").

76. Freedom of Information Act and Amendments of 1974, Pub. L. 93-502, 88 Stat. 1561, 1562 (1974). Congress passed the 1974 FOIA amendments over a presidential veto, in which President Gerald Ford stated "[T]he courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES VETOING H.R. 12471, AN ACT TO AMEND SECTION 552 OF TITLE 5 UNITED STATES CODE, KNOWN AS THE "FREEDOM OF INFORMATION ACT." H.R. DOC. NO. 93-383 (Nov. 18, 1974). It is possible that FOIA reversal rates would increase if Congress mandated that courts engage in some form of *in camera* review for all FOIA cases, rather than simply permitting courts to do so.

not rubber-stamp agency determinations,<sup>77</sup> has yet to be realized. Congress may have assumed that judicial outcome rates depend solely on the mandated standard of judicial review, with *de novo* review likely providing a higher remand and reversal rate than more deferential standards.<sup>78</sup> This does not appear to be the case with FOIA litigation. This Article contends that the structure of FOIA, with its various gaps that it permits or requires agencies to fill, contributes to lower than expected reversal rates because such structure reinforces judicial propensities to associate FOIA challenges to those that are more deferentially reviewed under the APA.<sup>79</sup>

Reversal rates throughout the statute's fifty-year lifespan are significantly lower than congressional expectations. Scholars estimate that between FOIA's enactment and 2002, district courts reversed approximately ten percent of all FOIA challenges, as opposed to the fifty percent hypothesized under a *de novo* standard of review.<sup>80</sup> Professor Paul R. Verkuil determined that between 1990 and 1999, courts reversed just over ten percent of the approximately 3,600 FOIA cases decided.<sup>81</sup> Between FOIA's enactment and 1995, the Supreme Court ruled negatively with respect to the requester in twenty-four out of twenty-nine FOIA cases.<sup>82</sup> This sharply contrasts the forty-four percent reversal rate that Professor William N. Eskridge, Jr. and Lauren E. Baer found when analyzing all Supreme Court opinions employing *de novo* review of agency actions between 1983 and 2005.<sup>83</sup> This suggests a possibility that when courts review FOIA challenges, they may not actually be employing meaningful *de novo* review.<sup>84</sup>

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77. See H. REP. NO. 89-1497; 111 CONG. REC. 26,823 (1965).

78. *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); Verkuil, *supra* note 13, at 682, 699; see also Kwoka, *supra* note 15, at 204 ("As the legislative history reveals, legislators believed that the choice of which standard of review should apply was important, presumably because different standards may lead to different outcomes.").

79. This Article does not provide empirical data as to this point – arguably, this is a hypothesis that may be untestable.

80. Verkuil, *supra* note 13, at 713.

81. *Id.* Verkuil also controlled his experiment by removing the above-average percentage of national security exemption cases that courts routinely affirm, but found that removing these cases only raises the overall reversal rate to approximately eleven percent. *Id.* at 715.

82. *Id.* at 715 n.165.

83. William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 1083, 1100 (2008).

84. See Kwoka, *supra* note 15, at 185, 210 ("[E]mpirical studies demonstrate that the *de novo* review standard on the books in FOIA cases is not the standard used in practice."); Verkuil, *supra* note 13, at 713 ("In maintaining this modest reversal rate over such a long time and for so many cases, one has to ask whether the courts have ignored the *de novo* standard. District courts seem to affirm FOIA cases almost instinctively, and by so doing have produced a real world reversal rate that is closer to the hypothesized arbitrary and capricious standard.").



FOIA reversal rates could be skewed by a number of factors. FOIA litigation is rare,<sup>85</sup> and the cases that reach district court merits determinations are greatly affected by a number of decisions requesters made along the way.<sup>86</sup> Requesters are also at a disadvantage in that the agency is in the unique position of being the only party with knowledge of what the requested records contain.<sup>87</sup> Requesters are seldom allowed access to the traditional tools of civil discovery in FOIA litigation.<sup>88</sup> The government also has a lopsided advantage of having superior institutional knowledge of litigating the statute, with a single agency, the Department of Justice, defending all FOIA challenges. Moreover, the government deploys its federal courts knowledge and subject-matter expertise to render moot some FOIA challenges that could give rise to decisions that are favorable to the requester, while pressing forward with litigation that could provide it with favorable case law.<sup>89</sup> Additionally, FOIA directs courts to give “substantial weight” to an agency affidavit concerning a denial based on technical feasibility, reproducibility, and most notably, exemptions.<sup>90</sup> There is also the possibility that requesters do not take all of these factors into account when deciding to pursue FOIA litigation, and that courts are more likely to affirm agency FOIA determinations than other matters they review *de novo* because requesters are taking poor litigating positions.<sup>91</sup>

The fact that FOIA reversal rates rest at approximately ten percent of decided cases appears to undermine congressional intent for courts not to serially approve agency FOIA determinations.<sup>92</sup> To more fully effectuate the goals and purposes of FOIA, Congress should not only reinforce the notion that all FOIA determinations must be subject to searching *de novo* review, but also mitigate some of the unique factors that could be leading to below-average FOIA reversal rates.

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85. See Tai, *supra* note 17, at 469 (“[O]nly a very small percentage of denials are challenged in court: full denials range from 25,000 to 40,000, whereas cases filed are on the order of 300.”); see also Kwoka, *supra* note 15, at 206, 208 (“For example, in fiscal year 2011, 644,165 FOIA requests were made, with 438,638 final agency decisions, resulting in 202,164 denials in full or in part. By contrast, there are consistently between 300 to 500 lawsuits filed challenging FOIA denials each year.”).

86. Kwoka, *supra* note 15, at 206.

87. See Landmark Legal Found. v. EPA, 959 F. Supp. 2d 175, 183 (D.D.C. 2013).

88. See *id.* (“Discovery is the exception, not the rule, in FOIA cases.”).

89. Kwoka, *supra* note 15, at 209 (“[T]he government’s strategic advantages as a repeat player and long-term goal of procuring favorable precedent over a short-term victory are likely to skew the pre-adjudication selection effect and contribute to the government’s high success rate.”).

90. 5 U.S.C. § 552(a)(4)(B) (2012).

91. See Verkuil, *supra* note 13, at 688–89, 713 (suggesting that one should expect fewer agency decisions to pass the muster of *de novo* review).

92. See CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H. REP. NO. 89-1497, at 9 (1966); see also 111 CONG. REC. 26,823 (1965).

## II. COUNTERARGUMENTS AND ALTERNATIVES

A. Courts are Properly Applying *De Novo* Review in FOIA Cases

While this Article suggests that courts may not actually review FOIA cases *de novo*, some may argue that courts apply this standard properly and that other factors contribute to the unanticipated low reversal rate. First, some argue that the low reversal rate could be an effect of the number of FOIA denials that are actually challenged in court.<sup>93</sup> Between 2001 and 2015, requesters filed between 300 and 500 lawsuits challenging denials per year out of the tens of thousands of requests made per year.<sup>94</sup> A disproportionately small number of FOIA lawsuits should not contribute to the unexpectedly low reversal rate.

Professor Margaret B. Kwoka also suggests that requesters' decisions both pre- and post-filing of FOIA lawsuits skew the reversal rate.<sup>95</sup> For instance, Professor Kwoka notes that many cases are voluntarily dismissed or settled before reaching merits determinations.<sup>96</sup> Professor Verkuil theorizes that the parties take the *de novo* standard of review into account when deciding whether to litigate,<sup>97</sup> which could influence the government's willingness to litigate denials unless it is confident in its decision.<sup>98</sup> Professor Kwoka posits that the government has an additional incentive to obtain favorable FOIA precedent because it is a repeat player in such litigation.<sup>99</sup> These theories suggest the possibility that FOIA denials are only ever fully litigated, generally speaking, when the government is confident in its denial of the request and has a strong interest in defending that denial. This would lead to a reversal rate much lower than the hypothesized rate.

While these theories could explain the low reversal rate to some extent, they lack empirical support to explain or isolate particular causes—to be clear, this theory has not been empirically-tested either. This Article agrees with these factors, but believe that this theory, that judicial misapplication of *de novo*,

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93. See Kwoka, *supra* note 15, at 208.

94. See David Burnham, *FOIA Lawsuits Reach Record High*, THE FOIA PROJECT (Jan. 6, 2016), <http://foiaproject.org/2016/01/06/foia-lawsuits-reach-record-high/>; see also Tai, *supra* note 17, at 469 (“[O]nly a very small percentage of denials are challenged in court: full denials range from 25,000 to 40,000, whereas cases filed are on the order of 300.”); Kwoka, *supra* note 15, at 208.

95. Kwoka, *supra* note 15, at 206 (“Huge numbers of cases are never filed, are voluntarily dismissed before an adjudication, or are settled between the parties, and the outcomes of those cases that are adjudicated are skewed by the decisions the litigants made along the way.”).

96. *Id.*

97. Verkuil, *supra* note 13, at 688–89.

98. The government may also be more confident in defending its FOIA decisions because the statute requires courts to give substantial weight to agency affidavits regarding denials based on FOIA exemptions, technical feasibility, and reproducibility. See 5 U.S.C. § 552(a)(4)(B).

99. Kwoka, *supra* note 15, at 209 (“[T]he government's strategic advantages as a repeat player and long-term goal of procuring favorable precedent over a short-term victory are likely to skew the pre-adjudication selection effect and contribute to the government's high success rate.”).

review also contributes to low reversal rates in FOIA cases. As suggested by Professor Richard Pierce, because it would be irrational for courts to ignore why an agency withheld requested records, courts probably do not ignore such reasons, and therefore, *de novo* review does not truly occur.<sup>100</sup> Under this theory, the court is improperly applying FOIA's *de novo* standard, thereby undermining the efficacy of its judicial review provision.<sup>101</sup>

*B. Courts Should Not Apply De Novo Review for All Exemption Categories*

The plain language of the statute provides that a denial of a request for records based on any of nine exempted classes is subject to *de novo* review.<sup>102</sup> However, Professor Verkuil argues, and aptly so, that all exemptions are not reviewed with the same level of strictness.<sup>103</sup> He notes in particular that for Exemption 1 for national security purposes, courts tend not to review denials *de novo*, but rather under a standard more akin to "committed to agency discretion."<sup>104</sup> He then argues that Exemption 1 should instead be subjected to the arbitrary and capricious standard, which would "conform the review standard to reality."<sup>105</sup> He summarizes that by acknowledging and codifying varying standards of review for the nine exemptions, the exemptions that remain subject to *de novo* review may be given a closer look under an actual non-deferential standard.<sup>106</sup>

While this suggestion may explain why certain denials are reviewed more closely, its converse may also be true; some denials may be reviewed less closely or even not at all. Congress expressly subjected all denials based on exemptions to *de novo* review to avoid "meaningless judicial sanctioning of agency discretion," and it has continued to validate its choice by leaving the judicial review provision of the statute unchanged.<sup>107</sup> Congress also amended FOIA in 1974 to strengthen the *de novo* review standard in response to a Supreme Court case that exempted certain denials from full *de novo* review.<sup>108</sup> It has repeatedly

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100. Pierce, *supra* note 62, at 96 ("The Court should acknowledge that the *de novo* review doctrine does not exist and . . . never has existed. It would make no sense for a court to ignore completely an agency's reasons for acting as it did, and I doubt that any court has actually acted in that irrational matter.").

101. Verkuil, *supra* note 13, at 730 ("Unless the Court becomes interested in invigorating that standard, or even in acknowledging it, there is not much point for it to act.").

102. See 5 U.S.C. § 552(a)(4)(B), (b).

103. Verkuil, *supra* note 13, at 714 ("Although the eight FOIA exemptions are all formally subject to the *de novo* review standard, some exemptions may engender stricter review than others.").

104. *Id.* at 715.

105. *Id.* at 730–31.

106. *Id.* at 731 ("Moreover, by acknowledging distinctions among the exemptions in terms of review standards, the remaining exemptions might achieve invigorated review simply by comparison. The exemptions that retain *de novo* review might well be given a closer look.").

107. 111 CONG. REC. 26,820–23 (1965); see also CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H. REP. NO. 89-1497, at 9 (1966).

108. H. REP. NO. 93-876, at 122 (1974); see also *EPA v. Mink*, 410 U.S. 73, 84 (1973).

expressed the benefits of *de novo* review of all denials, and it should not subject certain exemptions to less stringent standards simply to conform the standard to reality or in an attempt to achieve a higher level of review for other exemptions.

### III. CONCLUSION

Chief Judge Merrick Garland's opinion on behalf of the D.C. Circuit Court of Appeals in *Cause of Action v. Federal Trade Commission* has shone an emblematic light on the consequences of a pervasive methodological problem with FOIA—Congress's failure to enact specific terms and provisions in favor of amending the statute in generally broad language. Congress again missed an opportunity to mitigate this problem when it passed the FOIA Improvement Act of 2016. Agencies have natural disincentives to liberally comply with FOIA's goals and strictures because the statute is omnibus in nature and encourages agency transparency and oversight. The statute's provisions permitting or requiring agency interpretation are inefficient because they are internally inconsistent with its *de novo* standard of review. Enacting more specific terms and provisions, thereby removing the necessity for agency interpretation, will cure this inconsistency and promote greater government transparency and oversight.