

Open Government in the United States

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Professor Miyake deserves great thanks for sticking with the important project of bringing transparency to the Japanese government. I am not surprised it was a long and complex battle: the Freedom of Information Act ("FOIA")¹ became law in the United States in 1966, also after a lengthy battle, with one person leading the fight.² John Moss, a Member of Congress from California, proposed such legislation in 1955, more than a decade before its passage, worried about increased government secrecy accompanying the Cold War. Both President John F. Kennedy and President Lyndon B. Johnson (of Moss's political party) opposed it, along with every single federal agency. His only allies (this surely sounds familiar to those who have fought for parallel laws in Japan) were the press and journalists. *Finally*, FOIA got through Congress and onto President Johnson's desk. He signed it on July 4, 1966, without a public signing statement, and the written one focused on the exemptions for national security. But Johnson did say – in a line surely written by a history-focused speechwriter – “I sign this measure with a deep sense of pride that the United States is an open society...”³

Alas, compliance by federal agencies was not robust or speedy.⁴ The head of the small Washington, D.C., public interest law office started by the

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¹ 5 U.S.C. § 552.

² See, e.g., Robert Mcg. Thomas Jr., *John E. Moss, 84, Is Dead; Father of Anti-Secrecy Law*, NEW YORK TIMES (Dec. 6, 1997), <https://www.nytimes.com/1997/12/06/us/john-e-moss-84-is-dead-father-of-anti-secrecy-law.html> [<https://perma.cc/E6HR-Y6UF>].

³ Statement by the President Upon Signing the "Freedom of Information Act," 316 PUB. PAPERS 699 (July 4, 1966); *Freedom of Information Act*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/1960s/freedom-of-information-act> (discussing the history of FOIA's passage) [<https://perma.cc/Q2V2-D5BC>]; Michael R. Lemov, *John Moss and the battle for freedom of information, 41 years later*, NIEMAN WATCHDOG (July 30, 2007), <https://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00191> [<https://perma.cc/V34A-9JPR>].

⁴ See generally THE FOIA PROJECT, <https://foiaproject.org/> (last visited Feb. 3, 2024) (maintaining databases of FOIA requests, lawsuits, and appeals) [<https://perma.cc/8CKC-ERVL>]; FOIA.GOV, <https://www.foia.gov/> (last visited Feb. 3, 2024) (describing the purposes of the Act, what will and will not be disclosed (under exemptions to disclosure), and information on filing requests and appeals, among other things) [<https://perma.cc/Y6CZ-UDL8>]. A group called the FOIA Project (FOIaproject.org) maintains databases of FOIA requests, lawsuits, and appeals. THE FOIA PROJECT, <https://foiaproject.org/> (last visited Feb. 3, 2024) [<https://perma.cc/8CKC->

publisher of Consumer Reports magazine, where I was one of three new lawyers in the mid-1970's, had us ask our contacts among the magazine's product testers what government information they might want. Then we should ask for it and, he stated, "you will be turned down. Then file suit." In addition to getting information helpful to the magazine's goals and showing agencies they *would* be sued when requests were refused, this would be our introduction to litigation, as FOIA litigation has always been quite straightforward. The agency denies disclosure on the grounds of one or more of the nine statutory exemptions; then the lawsuit challenges that determination, putting the decision in the court's hands.⁵

Some of the improvements over time in how the FOIA has worked have come from the courts. Early on, agencies often were not clear about their *reasons* for denial of disclosure, making it hard to challenge them. A D.C. Circuit case in 1973, *Vaughn v. Rosen*, established the requirement that the agency present a particularized justification for assertion of exemption from disclosure, even demanding that the agency index the documents sought to show which parts fit which justification.⁶ That decision came down just in time for my first FOIA case. When I filed my suit in the district court, I made a "*Vaughn* motion," as I believe I titled it, to get that particularized justification, and the trial court said: "agency, *explain* your decision."

Everything of course is not available: the FOIA has those nine stated exemptions:

(1) Information that is properly classified to protect national security.

(2) Information related solely related to an agency's internal personnel rules and practices.

(3) Information exempted from disclosure by another federal statute.

(4) Trade secrets and commercial or financial information that is confidential or privileged.

(5) Interagency or intra-agency communications otherwise unavailable except to an agency in litigation with it; however, this deliberative process privilege does not apply to records created 25 years or more before the request.

(6) Personnel and medical files and similar files disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Records compiled for law enforcement purposes under stated conditions (such as those whose disclosure could interfere with enforcement

ERV]. The U.S. Department of Justice maintains a website that describes the purposes of the Act, what will and will not be disclosed (under exemptions to disclosure), and information on filing requests and appeals, among other things. FOIA.GOV, <https://www.foia.gov/> (last visited Feb. 3, 2024) [<https://perma.cc/Y6CZ-UDL8>].

⁵ See 5 U.S.C. § 552 (b).

⁶ *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *see, e.g., Vaughn v. Rosen: Toward True Freedom of Information*, 122 U. PA. L. REV. 731 (1974) (detailing the decision in *Vaughn v. Rosen*).

proceedings, deprive someone of a fair trial, disclose a confidential source, invade personal privacy, or endanger the physical safety of an individual).

(8) Information that concerns supervision of financial institutions.

(9) Geological/geophysical information and data, including maps, concerning wells.⁷

As already suggested, there was little interest by bureaucrats in opening their files to nosy people – Japanese lawyers surely find this familiar!⁸ Congress later amended the law significantly in 1974 to improve its operation.⁹ That was after the Watergate scandal had exposed shenanigans that had not seen the light of day. The amendments added a ten-day timeframe (later doubled to 20 days, still not a lengthy response window)¹⁰ for response (although regular compliance within that short timeframe has never really happened), sanctions on employees for wrongfully withholding documents, a uniform fee schedule for requesters to pay for searching for and copying files, and a provision for waiver of fees for journalists and requests deemed in the public interest.¹¹ Very critically, these amendments provided for *de novo* court review of the agency's decision and *in-camera* examination of the records to determine the validity of their withholding.¹² Perhaps most critically, the amendments included a provision for payment of attorneys' fees and court costs to successful litigants.¹³ I banked those once, successfully helping a journalist friend

⁷ 5 U.S.C. § 552 (b).

⁸ Bureaucracies continue to fight public records laws. Legislators in New Jersey are proposing to limit the state's 21-year-old Open Public Records Act - and other states (including Arkansas, Colorado, and Kentucky) are considering restrictions as well. New Jersey local government officials urge change because of the burden the law imposes on them and to protect citizen information, particularly as commercial requests are increasing dramatically. Elise Young, *How Much Access to Government Records Does the Public Deserve?*, N.Y. TIMES, March 11, 2024, <https://www.nytimes.com/2024/03/11/nyregion/nj-opra-bill-public-records.html?searchResultPosition=1> [<https://perma.cc/4T3Y-V2BV>].

⁹ Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

¹⁰ See Electronic Freedom of Information Act Amendments of 1996, H.R.3802, 104th Cong. (1996) (enacted) (amending the Freedom of Information Act by extending the response time for agencies from ten days to twenty days).

¹¹ See *What is the FOIA?*, FOIA.GOV, <https://www.foia.gov/faq.html> (last visited Feb. 3, 2024) (The Department of Justice's official FOIA website explains: "[u]nder the FOIA, fee waivers are limited to situations in which a requester can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester. Requests for fee waivers from individuals who are seeking records on themselves usually do not meet this standard."). The author has had fees waived to obtain agency documents sought for use in law school teaching materials. See *Department of Justice Guide to the Freedom of Information Act*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/oip/page/file/1206606/download> (last visited Feb. 2, 2024) (detailing information about FOIA fees and waivers); see also *Fees and Fee Waivers*, 2020 WL 6491041.

¹² 5 U.S.C. § 552(a)(4)(B).

¹³ See *id.*

wrest from J. Edgar Hoover and the FBI what was in her FBI file.¹⁴ It was actually a bit of a parlor game at that time to ask for your own FBI file. President Ford vetoed the 1974 FOIA amendments legislation, claiming the timeframe was too burdensome (he was right about that, I think – given the number of information requests that would be made) and worrying it risked national security.¹⁵ However, Congress overrode his veto, and the amendments helped to open the floodgates.¹⁶ There have been a number of amendments since – as noted, slightly lengthening the timeframe for response¹⁷ and expanding who is a journalist entitled to fee waivers. Some presidential executive orders and memoranda have made modifications too. After 9/11, President George W. Bush limited access to some former presidential records by executive order.¹⁸ Thereafter, the passage of the Intelligence Authorization Act of 2002 limited foreign government access to some records.¹⁹ Before there were no limitations on who could seek document disclosures. At the beginning of the Obama Administration in 2009, a memorandum to government agencies directed “a presumption in favor of disclosure.”²⁰ As the electronic era came fully into being, laws made changes concerning electronic records as well as providing for public liaisons. There is now a central online portal for documents.²¹

The Department of Justice is home to the Office of Government Information Services and produces FOIA data. Compliance is a massive undertaking (as President Ford likely anticipated). In fiscal year 2022, more than 5200 full-time staff were devoted to FOIA administration across the government, and the estimated cost of all FOIA activities was \$545 million dollars.²² At the beginning of that fiscal year, there were almost 235,000 requests awaiting response (and you can review them by agency).²³ During that fiscal year, 928,000 requests came in and 878,000 were processed,

¹⁴ Nina Totenberg, *DINNERS WITH RUTH: A MEMOIR ON THE POWER OF FRIENDSHIPS* (2022), pp. 27-28.

¹⁵ See Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974). The statute as amended in 1974 is available here: <https://www.justice.gov/oip/freedom-information-act-amended-1974-public-law-93-502> [<https://perma.cc/7H5K-EPLW>].

¹⁶ See *THE FOIA AND PRESIDENT GERALD FORD*, The National Security Archive, <https://nsarchive2.gwu.edu/nsa/foia/ford.html> [<https://perma.cc/TQ7J-NZ6A>].

¹⁷ *Supra* note 10.

¹⁸ Exec. Order No. 13233, 66 Fed. Reg. 56025 (Nov. 1, 2001).

¹⁹ 5 U.S.C. § 552, amended by 5 U.S.C. § 552(a)(3) Supp. 2002).

²⁰ See “President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines, Office of Information Policy, U.S. Department of Justice (<https://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government>) (last visited Apr. 7, 2024) [<https://perma.cc/UA2L-7WP6>].

²¹ See FOIA.GOV, <https://www.foia.gov/wizard.html> (guiding searchers to the right agency and how to request information they are seeking) [<https://perma.cc/Y6CZ-UDL8>].

²² See Summary of Annual FOIA Reports for Fiscal Year of 2022, U.S. Dept. of Justice, <https://www.justice.gov/oip/page/file/1581856/dl?inline> [<https://perma.cc/DVX8-WRQW>].

²³ *Id.*

adding to a prior backlog and leaving a total backlog of almost 285,000.²⁴ Only agencies with very few requests seem to be able to clear them all regularly.²⁵

The State of California has a parallel law and I assume that is true of most states.²⁶ California's Public Records Act passed in 1968.²⁷ Most of its exceptions concern privacy for individuals and recognition of government's need to do work efficiently which often requires confidentiality. Court costs and attorneys' fees are available for prevailing litigants, which is definitely a critical factor in moving agencies to be properly responsive.²⁸

However, the FOIA is not the only open government law. A federal open meetings law (the Government in the Sunshine Act) passed in 1976, requiring multi-member agencies to hold deliberative meetings in public unless there was a statutorily approved reason not to do so.²⁹ California has two parallel laws: one applying to state agencies and another to local legislative bodies, boards and commissions.³⁰

There is also the federal Privacy Act, first passed in 1974.³¹ California has a Consumer Privacy Act, passed in 2018 and amended in

²⁴ *Id.*

²⁵ See Office of Information Policy, U.S. Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2022*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/media/1289846/dl?inline> [<https://perma.cc/464S-GTUV>].

²⁶ See e.g., *State Freedom of Information Laws*, National Freedom of Information Coalition, <https://www.nfoic.org/state-freedom-of-information-laws/> (last visited Mar. 3, 2024) [<https://perma.cc/7TD3-7APQ>].

²⁷ Cal. Gov't Code § 7920.000; The Act, formerly found at Government Code sections 6250 *et seq.*, was recodified as of January 1, 2023, and is now found at Government Code section 7920 *et seq.* Substantively it remains the same; Rob Bonta, *CALIFORNIA DEPARTMENT OF JUSTICE GUIDELINES FOR ACCESS TO PUBLIC RECORDS*, STATE OF CALIFORNIA OFFICE OF THE ATTORNEY GENERAL (Jan. 2023), <https://oag.ca.gov/system/files/media/pr-guidelines.pdf> [<https://perma.cc/K4PA-69D6>]. The Act, formerly found at Government Code sections 6250 *et seq.*, was recodified as of January 1, 2023, and is now found at Government Code section 7920 *et seq.* Substantively it remains the same. A State-provided brief guide to accessing public records is available at <https://oag.ca.gov/system/files/media/pr-guidelines.pdf>. [<https://perma.cc/K4PA-69D6>].

²⁸ The author experienced this "phenomenon" when, decades ago, she sought information from her dean about some faculty salaries (public employee salaries are not deemed private information). When the request was first rejected, and she mentioned the simplicity of the litigation *and the availability of attorney fee awards* the requested information was *quickly* handwritten and provided.

²⁹ 5 U.S.C. § 552(b).

³⁰ See generally Ralph M. Brown Act, Cal. Gov't Code § 54950 (applying to local agencies and legislative bodies); Bagley-Kenne Open Meeting Act (Cal. Gov't Code § 11120) (applying to state agencies); Rob Bonta, *Open Meetings*, STATE OF CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/open-meetings> (last visited Feb. 2, 2024) [<https://perma.cc/XAE4-4NMF>].

³¹ 5 U.S.C. § 552a. See OFFICE OF PRIVACY AND CIVIL LIBERTIES, U.S. DEPARTMENT OF JUSTICE, *OVERVIEW OF THE PRIVACY ACT OF 1974 (2020 EDITION)*,

2020 by a vote of the people; provisions of the 2020 amendments went into effect at the beginning of 2023.³² That law now even gives a right to sue a business that exposes your information through a data breach if it had failed to take reasonable security measures.³³ There is simultaneously great interest in obtaining information *from* the government and, in these times of “big data” and unknowable internet surveillance, keeping one’s personal information *from* being collected and utilized.

Because what is going on *within* the government can be unknown other than to those who work for the government, part of the concern for transparency has extended to protecting those who are *inside* the government who wish to report evidence of wrongdoing. Such persons are generally called “whistleblowers,” and there is now some statutory protection for them. Under the Whistleblower Protection Act, a federal employer can’t retaliate against an employee who makes a protected disclosure (as defined in the statute) based on a reasonable belief that wrongdoing has occurred, as long as the disclosure is to a person or entity authorized to receive it. However, it doesn’t protect whistleblowers who post their information on the internet or hand it to the media, for example.³⁴ California’s whistleblower law prohibits retaliation by *all* employers against those who report suspected violations of law, regulation, or public policy.³⁵

Disclosure has to be to the government, a supervisor, a fellow employee empowered to take action, or to a public body (such as a legislative committee in a hearing or during an investigation).³⁶ No doubt, over the years, some government employees have relied on their whistleblower protection to complain about failures to disclose the existence of information sought under freedom of information laws.

Professor Miyake, Japan’s trajectory on open government started after ours, but I imagine that before too long, you and your colleagues will be able to convince your government to make some changes to your laws that could help ordinary citizens gain access to government files. Most

<https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition> (last visited Feb. 2, 2024) [<https://perma.cc/XN27-YKHJ>] Cal.

³² See Cal. Civ. § 1798.100–1798.199.100 (2018) (amended in 2020).

³³ *Id.*; see also Rob Bonta, *California Consumer Privacy Act (CCPA)*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE (May 10, 2023), <https://www.oag.ca.gov/privacy/ccpa> [<https://perma.cc/XN27-YKHJ>].

³⁴ See 5 U.S.C. § 2302(b)(8)-(9); See OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF THE INSPECTOR GENERAL, WHISTLEBLOWER RIGHTS & PROTECTIONS, <https://oig.opm.gov/report-oig/whistleblower-rights-protections> (last visited Feb. 2, 2024) (describing the rights and protections of whistleblowers under the law) [<https://perma.cc/3F86-NG5V>].

³⁵ Cal. Lab. Code § 1102.5(a).

³⁶ Cal. Lab. Code § 1102.5(a); See STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, <https://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf> (last visited Feb. 2, 2024) (providing an example that satisfies the employer’s requirement to make the employee protections known to its employees).

critically, I hope you can convince the government to provide in camera review and attorneys' fees, for example. Yes, the law will then certainly require more government employees (*like our over 5000!*) whose entire job is open government response. But those costs will be more than overshadowed by the benefits, including financial, of citizen oversight. As stated in the slogan of the *Washington Post* newspaper, "Democracy Dies in Darkness."³⁷ A Freedom of Information Act sheds light.

³⁷ THE WASHINGTON POST, www.washingtonpost.com (last visited Feb. 2, 2024) ("Democracy Dies in Darkness") [<https://perma.cc/VMQ2-6MS8>].