

## THE U.S. FREEDOM OF INFORMATION ACT IN LIGHT OF THE 2016 REFORM: SOME THEORETICAL ISSUES

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### *Abstract*

The purpose of this Article is to analyze the U.S. federal Freedom of Information Act (FOIA) in light of the FOIA Improvement Act of 2016. The Article starts by looking over the FOIA as a model for other legal systems in administrative transparency. After outlining the history of the enactment of the FOIA, the inspection deals with possible reasons for the widespread success of the FOIA abroad. Furthermore, it leads to pinpointing some paradoxes deriving from the implementation of this model in other countries. Subsequently, the Article addresses the FOIA Improvement Act. Firstly, it overviews the amendments. Secondly, it renders an assessment of their implications for the FOIA. However, only the amendments more closely related to the disclosure of records and information are considered. Special attention is devoted to disclosure, meant as a general category encompassing both proactive disclosure – thus, a subcategory – and access upon request. The Article argues that it is incumbent on scholars to make sure that there be no confusion between those concepts. Finally, the codification of the presumption of openness and the amendment brought to Exemption 5 to the FOIA are also addressed. While the former issue appears to be less problematic from a theoretical perspective, the latter raises some issues especially as for the scope of the time limit to applying the exemption.

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## 1. Introduction

In the last few decades, transparency and access to records held by public administrations have gradually emerged as a need deemed essential by the vast majority of countries<sup>1</sup>. Even though this need leads to very different regulations, there is a statute that has been capable of influencing many legal systems all over the world and thus became a model internationally recognized as such: the U.S. federal Freedom of Information Act (FOIA)<sup>2</sup>. On

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<sup>1</sup> See S. Cassese, *Tendenze e problemi del diritto amministrativo*, 54 Riv. trim. dir. pubbl. 906 (2004). See, also, G. Napolitano, *The Transformations of Comparative Administrative Law*, 67 Riv. trim. dir. pubbl. 1019 (2017), identifying transparency as one of the key elements of contemporary administrative law “at every latitude.”

<sup>2</sup> See D.E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1105-1106 (2017), noting that, since most countries of the world

June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016<sup>3</sup> [hereinafter – FOIA Improvement Act]. It bought to completion a reform process that had begun a few years before<sup>4</sup>. This statute affected – with different degrees of intensity – the main elements composing the structure of the FOIA.

The purpose of this Article is to analyze the FOIA in light of the FOIA Improvement Act. The Article starts by inspecting the FOIA as a model for other legal systems in administrative transparency. The inspection is conducted through a two-phase process. First of all, it seeks to find out why the FOIA is capable of having such a widespread influence abroad. Beforehand, this stage requires to stress that the FOIA was enacted as a reaction against the preceding regulation in the matter. Furthermore, the inspection leads to pinpointing some possible paradoxes deriving from the implementation of this model in other countries, most of the times characterized by a different legal tradition. Subsequently, the Article analyzes the FOIA Improvement Act in order to advance some observations concerning its impact on the FOIA. Such assessment requires beginning with an overview of the amendments brought by the 2016 reform. The amendments affected multiple aspects of the FOIA. However, only those closely dealing with disclosure of records and information are taken into account here to ensure consistency with the subject of the Article.

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passed legislation inspired by the FOIA over the past quarter-century, this statute “has become one of the United States’ leading legal exports abroad.” See, also, L. Tai, *Fast Fixes for FOIA*, 52 Harv. J. on Legis. 456 (2015); A. Roberts, *Blacked Out: Government Secrecy in the Information Age* (2006), 15-17, relating this phenomenon to a democratization process that began to unfold after the end of the Cold War era. As for foreign scholars, see, e.g., D.U. Galetta, *Trasparenza e contrasto della corruzione nella pubblica amministrazione: verso un moderno panottico di Bentham?*, Dir. soc. 50 (2017).

<sup>3</sup> Pub. L. No. 114-185, 130 Stat. 538 (2016).

<sup>4</sup> The statute turns into law S. 337, which contained the FOIA Improvement Act of 2015, i.e., the previous version of the reform. In March 2016, Senators Cornyn and Leahy sponsored an amendment, S.A. 3452, which entirely replaced the text of the bill and formally changed the title of the statute. See 162 Cong. Rec. 41, S1508-1510 (Mar. 15, 2016). However, the original S. 337 – in turn – addressed issues that had been already brought up by previous bills. The Senate Report accompanying S. 337, indeed, clarified that it constituted “a continuation of the efforts [made] in the 113th Congress.” S. Rept. No. 114-4, 114th Cong., 1st Sess., Feb. 23, 2015, 7.

Special attention is devoted to disclosure, meant as a general category that encompasses two institutions: proactive disclosure and access upon request. The former – in turn – has publication in the Federal Record as its own subcategory. It is argued that it is incumbent on scholars to make sure that there be no confusion between those concepts. Finally, the codification of the presumption of openness and the amendment brought to Exemption 5 to the FOIA are also addressed. While the former issue appears to be less problematic from a theoretical perspective, the latter raises some issues especially as for the scope of the time limit to which the application of the exemption is now subject.

## **2. The FOIA as a model**

### **2.1. A brief history of enactment of the FOIA**

The FOIA was signed into law by President Johnson on July 4, 1966<sup>5</sup> and has been amended several times over the years<sup>6</sup>. The stated purpose of the FOIA is to strengthen the citizens' right of access to records and information held by federal agencies. Congress deemed that this purpose could be achieved by amending section 3 of the Administrative Procedure Act (APA)<sup>7</sup>, i.e., the section titled "Public Information" and devoted to access to administrative records<sup>8</sup>. Therefore, the FOIA was conceived of as a way to overcome the disappointing experience of the APA as far as administrative transparency was concerned<sup>9</sup>.

Even though section 3 of the APA already implied – at least formally – the basic content of administrative transparency<sup>10</sup>, it

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<sup>5</sup> Pub. L. No. 89-487, 80 Stat. 250 (1966). It entered into force exactly one year later by means of a subsequent statute – Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967) – and has since kept its location at section 552, title 5, U.S. Code.

<sup>6</sup> See P.L. Strauss, T.D. Rakoff, C.R. Farina, G.E. Metzger, *Gellhorn and Byse's Administrative Law*, 11th ed. (2011), 506, underlining the fact that the FOIA has been amended more frequently than the other components of the legislation on the administrative procedure.

<sup>7</sup> Pub. L. No. 79-404, 60 Stat. 237 (Jun. 11, 1946).

<sup>8</sup> It may be detected here an ambiguity that has survived the enactment of the FOIA and still exists: the one concerning the distinction between the concepts of records and information.

<sup>9</sup> See, for instance, *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011).

<sup>10</sup> I am referring to the distinction between access to documents and publicity or – in order to use terms that turn out to be more suited to the U.S. legal tradition

had three major flaws. Firstly, this section consisted of vague, generic clauses agencies and executive departments used to exploit to deny access to records almost freely, as Senate Report No. 813 of 1965 – the report accompanying the FOIA bill (S. 1160) – pointed out<sup>11</sup>. Paradigmatic thereof was subsection (c), which assigned agencies the power to deny access whenever they deemed certain information “confidential for good cause found”. They were conferred wide discretion in responding to access requests and, accordingly, – as administrative practice demonstrated – tended to use section 3 of the APA “more as an excuse for withholding than as a disclosure statute.”<sup>12</sup> Secondly, the same subsection mentioned above provided that only “persons properly and directly concerned” were entitled to gain access to agency records. It means that those persons could claim not a full right but rather a qualified interest<sup>13</sup> and thus found themselves having a weaker position in their relationship with the public authority. As has been correctly observed, this provision granted individuals not a right to know but a mere need to know<sup>14</sup>. Thirdly, individuals could not judicially enforce the access to records recognized by section 3 of the APA<sup>15</sup>.

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– between access upon request and proactive disclosure. In addition to regulating the former, indeed, section 3 established some obligations to publish information, imposed upon federal agencies. For an analysis of those obligations, see K.C. Davis, *Administrative Law Text*, 2nd ed. (1959), §§ 6.09-6.10, pp. 108-110.

<sup>11</sup> According to this report, section 3 of the APA was characterized by “vague standards – or, more precisely, lack of standards – [...]” S. Rept. No. 813, 89th Cong., 1st Sess., in Subcomm. on Adm. Prac. and Proc. of the Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, 93rd Cong., 2nd Sess., Comm. Print, 1974 [hereinafter – *1966 Source Book*], 40. See, also, *EPA v. Mink*, 403 U.S. 73, 79 (1973).

<sup>12</sup> S. Rept. No. 813, *id.*, 38.

<sup>13</sup> See M.E. Halstuck, B.F. Chyamberlin, *The Freedom of Information Act – 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 *Comm. Law & Pol’y* 522 (2006).

<sup>14</sup> See G.L. Waples, *The Freedom of Information Act: A Seven-Year Assessment*, 74 *Colum. L. Rev.* 898 (1974).

<sup>15</sup> As a Senate Report had pointed out in 1964, indeed, citizens seeking information in possession of agencies could not rely on any legislative remedy to challenge a denial, even when the agency decision was manifestly devoid of any piece of soundness. See S. Rept. No. 88-1219, 88th Cong., 2d Sess., in *1966 Source Book*, *cit.* at 11, 95. This critical issue is also detected by H.R. Rept. No. 1497, 89th Cong., 2nd Sess., *id.*, 26.

That the FOIA determined a sort of revolution – at least from a strictly theoretical perspective – in the matter of disclosure of agency records<sup>16</sup> is proved by the key elements of FOIA, as set forth by then Attorney General Ramsey Clark in the foreword to his 1967 memorandum illustrating the (essence of the) statute<sup>17</sup>. Firstly, access to agency records and publicity constitute “the general rule, not the exception”<sup>18</sup>. Consequently, by contrast, all matters and domains wherein access may be limited or excluded are to be considered exceptions to the rule. Secondly, the right of access is conferred upon any person<sup>19</sup>. Thirdly, the burden to prove that, in a specific case, the withholding of information – i.e., the application of an exemption – is legitimate lies on the agency and not on the requester<sup>20</sup>. Fourthly, those who deem a negative response to their request illegitimate are entitled to challenge it

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<sup>16</sup> See A.M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. Rev. 971 (2006), stressing that under the FOIA, access requests have records and not information as their own subject.

<sup>17</sup> See *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), iii-iv.

<sup>18</sup> Lorch, too, puts stress on this aspect. See R.S. Lorch, *Democratic Process and Administrative Law* (1969), 113.

<sup>19</sup> See K.C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 765 (1967), maintaining that from the expression “any person” it must be inferred that the agency decision to release or not the information sought by a requester may not depend – respectively – upon the existence or absence of a specific interest in gaining that information. This argument leads to a further step, expressly identified by the Supreme Court: even if such an interest can be detected, it is irrelevant to the decision. Indeed, as meant by Congress, the FOIA assigns “any member of the public as much right to disclosure as one with a special interest [in a particular document].” *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). To put it differently, an individual may file a FOIA request – as Herz has pointed out – “for any reason or no reason at all.” M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 Cardozo Pub. L. Pol'y & Ethics J. 582 (2009). Consequently, agencies are entrusted with a more limited amount of discretion than occurred under the previous regime in responding to access requests. *Id.*, at 583.

<sup>20</sup> See H. Rept. No. 92-1419, 92d Cong., 2d Sess., Administration of the Freedom of Information Act, Sept. 20, 1972, 10, in Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations and Subcomm. on Adm. Prac. and Proc. of the Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502). Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess., Comm. Print, 1975, 10.

before a court. The FOIA, therefore, establishes a right to judicial protection<sup>21</sup>. By doing so, the statute ensures that access to records be effective<sup>22</sup>. Fifthly, the FOIA called for a drastic change in the mindset and approach of agencies – *rectius*, of their personnel – towards disclosure of records and information<sup>23</sup>.

## 2.2. Reasons for usage of the FOIA as a model for other countries' legislation on transparency

As already noted above, the U.S. FOIA has had a major influence on transparency legislation all over the world. Why has it happened? Firstly, the U.S. Congress came first in establishing a right of access to administrative records endowed with such a wide scope as far as both subjective and objective entitlement are concerned<sup>24</sup>. Congress definitely deserves credit for that<sup>25</sup>. The only national legislation having (partially) similar content and preceding the FOIA is the Swedish one. As early as 1766, indeed, Sweden passed a statute regulating both the freedom of the press and a right of access to administrative records<sup>26</sup>. Despite being

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<sup>21</sup> Waples has highlighted the pivotal role played by this right within the overall statute. See Waples, *The Freedom of Information Act*, cit. at 14, 908.

<sup>22</sup> This feature, which – as already noted – lacked under section 3 of the APA, proves the significant improvement brought in by the new legislation. As a result of the ability to use a judicial action – i.e., to file suit – whenever the right of access is deemed to have been unlawfully violated, the common individual seeking information – it has been emphatically observed – did not act any longer “[as] a mere suppliant” vis-à-vis the federal agency holding that information. B. Schwartz, *Administrative Law* (1976), 128.

<sup>23</sup> The aforementioned House Report No. 1419 of 1972 has characterized the FOIA as “milestone legislation” because of this very element. H. Rept. No. 92-1419, cit. at 20, 9.

<sup>24</sup> By this phrase, I mean to refer to the number of potential requesters, on the one hand, and the types of records requested or domains of administrative activity, to which the sought information may pertain.

<sup>25</sup> See P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, 33 Emory L.J. 657 (1984), according to whom the fact that by simply filing a FOIA request – i.e., by simply submitting an application – to a federal agency an individual acquires the right to access Government records turned out – at the time – “virtually unprecedented” in a legal system. See, also, H.N. Foerstel, *Freedom of Information and the Right to Know* (1999), 44, defining the FOIA “trailblazing legislation.”

<sup>26</sup> Freedom of the Press and the Right of Access to Public Records Act. On this statute, see, e.g., J.M. Ackerman, I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 Admin. L. Rev. 88 (2006), who have also

often described as the first example of FOI legislation<sup>27</sup>, this statute had no significant impact on other national experiences, except for the other Scandinavian countries<sup>28</sup>. Substantially, it stands as proof of an early precursor in public sector transparency<sup>29</sup>.

Secondly, the FOIA is essential to promoting transparency<sup>30</sup>. In order to link this point with the one set out above, it may be stressed that the FOIA came first not only at international level but also within U.S. federal legislation. Indeed, it turned out to be the head of a series of statutes addressing disclosure of records, openness of meetings, and some related

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underlined that the statute attests the close relation between freedom of expression (and of the press) and access to government records. See, also, B. Wennergren, *La libertà d'informazione in Svezia*, in L. Paladin (ed.), *La libertà d'informazione* (1979), 239. On Sweden's current transparency system, see P. Jonason, *The Swedish Legal Framework on the Right of Access to Official Documents*, in H.-J. Blanke-R. Perlingeiro (eds.), *The Right of Access to Public Information* (2018), 235; D.U. Galetta, *La trasparenza, per un nuovo rapporto tra cittadino e amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, 26 Riv. it. dir. pubbl. com. 1032-1035 (2016).

<sup>27</sup> See J.M. Ackerman, I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, *id.*, *ibid.*; D. Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 Comm. Law & Pol'y 439 (2016); H.-J. Blanke-R. Perlingeiro, *Essentials of the Right of Access to Public Information: An Introduction*, in Id. (eds.), *The Right of Access to Public Information*, *id.*, 2.

<sup>28</sup> See G. Paleologo, *Segreto e pubblicità nella pubblica amministrazione*, *Impresa, ambiente e p.a.* 23-29 (1978), describing the gradual enactment of legislation, modeled – more or less strictly – upon the Swedish experience, on public records in all Scandinavian countries. First of all, Sweden itself adopted in 1949 a statute granting to all citizens the right of access to public records. Finland, too, passed a statute on public records two years later. Finally, Denmark and Norway enacted similar legislation in 1970.

<sup>29</sup> See I.F. Caramazza, *Dal principio di segretezza al principio di trasparenza. Profili generali di una riforma*, 45 Riv. trim. dir. pubbl. 945 (1995), defining the Swedish legislation in the matter an “*enfant prodige*”.

<sup>30</sup> The FOIA, indeed, regulates the two main instruments of transparency: access to agency records and proactive disclosure (or publicity/publication). American scholars, however, have focused especially on the former so far. On the fundamental role of access to records – as provided for in the FOIA – to realizing administrative transparency, see, e.g., S.J. Piotrowski, *Governmental Transparency in the Path of Administrative Reform* (2007), 1; A. Fung, M. Graham, D. Weil, *Full Disclosure: The Perils and Promise of Transparency* (2007), 26-27; M. Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 897-898 (2006).

matters<sup>31</sup>. The core of this group is composed of four statutes<sup>32</sup>: other than the FOIA, Federal Advisory Committee Act (FACA)<sup>33</sup>; the Privacy Act<sup>34</sup>; the Government in the Sunshine Act (GITSA)<sup>35</sup>. From an international and comparative perspective, these statutes are the most important, as they had a crucial role in the construction of a universal FOIA regime, i.e. a regime that is eligible for implementation in any legal system<sup>36</sup>. However, larger groups have been identified in literature<sup>37</sup>. Regardless of the option one may choose, all those statutes have in common the purpose to strengthen transparency, to the implementation of which they are – more or less heavily – instrumental. However, U.S. scholars are cognizant that other institutions are essential to implementing transparency, such as the duty to set forth the reasons for a certain decision made by an agency<sup>38</sup>.

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<sup>31</sup> See P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, cit. at 25, 654, pointing out that a FOIA was needed to bring citizens closer to their government and avoid an irreconcilable rift between the former and the latter. On the loss of trust of the American people in their politicians because of some domestic and international events that came about between the 1960s and the 1970s, see, e.g., H.N. Foerstel, *Freedom of Information and the Right to Know*, cit. at 25, 46-48; A.E. Rees, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; Or perhaps Both"*, 44 Duke L.J. 1183 (1995).

<sup>32</sup> Davis, for instance, identifies this group. See K.C. Davis, *Administrative Law Treatise* [hereinafter – *Davis Treatise*] (1978), I, § 5:1, p. 309.

<sup>33</sup> Pub. L. No. 92-463, 86 Stat. 770 (Oct. 6, 1972), codified at 5 U.S.C. app. §§ 1-16 (2012 & Supp. V. 2017).

<sup>34</sup> Pub. L. No. 93-579, 88 Stat. 1896 (Dec. 31, 1974), 5 U.S.C. § 552a.

<sup>35</sup> Pub. L. No. 94-409, 90 Stat. 1241 (Sept. 13, 1976), 5 U.S.C. § 552b.

<sup>36</sup> See T. Mendel, *Freedom of information: A Comparative Legal Survey* (2008), 29-41, setting forth the essential features of a comprehensive FOI regime. The Author enumerates nine criteria every FOI legislation ought to meet. Except for the requirement concerning protection to ensure to whistleblowers, the other eight of them are directly related to the statutes mentioned above.

<sup>37</sup> See D.E. Pozen, *Transparency's Ideological Drift*, 128 Yale L.J. 115-117 (2018). See, also, J.R. Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws* (2014), 2. This Author excludes from the group the version of the FOIA that entered into force, while he encompasses in it the statute as amended in 1974 and 1976. Therefore, according to Arnold, the original FOIA did not reach the minimal threshold to be considered a transparency statute.

<sup>38</sup> See G. Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253 (2009).

Thirdly, the FOIA has a simple structure. The 2007 and 2016 reforms increased the length of the statute quite considerably, thus causing a more complex structure, but it is still possible to tell apart the different parts. The statute is divided into subsections, each of which addresses different issues. Some decades ago, a distinguished scholar argued that subsections (a) and (b) were the most prominent ones<sup>39</sup>. This assessment still holds true. The rationale on which the first two subsections are founded appears to be as plain as it is effective: subsection (a) deals with disclosure and subsection (b) establishes the limits to that disclosure, which are called exemptions. Subsection (a) regulates both proactive disclosure and access upon request, even though the latter prevails. Indeed, subsection (a)(3), which assigns the right of access - i.e., the right to obtain the records and information formally requested to a given agency - to "any person," has traditionally been interpreted as the "heart" of the FOIA<sup>40</sup>. Subsection (b) bears the same importance, since its comprehension is crucial to dealing with the majority of litigation concerning the statute<sup>41</sup>. More generally, the system of exemptions to disclosure is one of the typical feature of the FOIA<sup>42</sup>. Ultimately, it is from this system that the actual level of transparency ensured by the statute can be found out<sup>43</sup>.

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<sup>39</sup> See *Davis Treatise*, cit. at 32, § 5:4, p. 314.

<sup>40</sup> R. Zedalis, *Resurrection of Reynolds: 1974 Amendment to National Defense and Foreign Policy Exemption*, 4 *Pepp. L. Rev.* 92 (1977).

<sup>41</sup> See S.J. Cann, *Administrative Law*, 4th ed. (2006), 212.

<sup>42</sup> According to an entrenched judicial principle, agencies have to give a restrictive interpretation to the statutory provisions establishing the exemptions. See *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), prescribing that the FOIA exemptions be "narrowly construed." See also, more recently, *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

<sup>43</sup> See A. Sandulli, *La trasparenza amministrativa e l'informazione dei cittadini*, in G. Napolitano (ed.), *Diritto amministrativo comparato* (2007), 167, arguing that within the FOIA, to a large number of people entitled to gain access to agency records it corresponds a wide range of records or matters exempted from disclosure.

### 2.3. Some paradoxes deriving from implementation of this model abroad

A close look at the FOIA in its own context leads to pinpoint some paradoxes deriving from its role as model legislation. Firstly, it should never be forgotten that the FOIA fits a political and legal system characterized by a wide notion of federal government. This notion encompasses the three independent and equivalent branches into which the government is divided<sup>44</sup>. The FOIA applies only to the executive branch, which mainly consists of all federal agencies, including executive departments<sup>45</sup>. Even though this solution turns out the more

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<sup>44</sup> See, e.g., K.M. Sullivan, G. Gunther, *Constitutional Law*, 17th ed. (2010), 249; L.H. Tribe, *The Constitutional Structure of American Government: Separation and Division of Powers*, New York, 1978; J.H. Ferguson, D.E. McHenry, *The American System of Government*, 4th ed. (1956). The book by Ferguson and McHenry, of which many editions were published over the years, may be considered deficient in details. See C.L. Berntsen, *The American System of Government, 4th Edition by J. H. Ferguson, Dean E. McHenry* (McGraw-Hill Book Company, 1956) (Book Review), 29 *Aust. Q.* 111 (1957). However, it contains adequate elucidation of the meaning of government in the United States and proves useful especially to foreign readers. For a reference to this book – in its 1953 edition – by an Italian administrative law scholar, see F. Satta, *Principio di legalità e pubblica amministrazione nello stato democratico* (1969), 246 nt. 9. For a traditional description of the U.S. federal government in French literature, see A. Tunc, S. Tunc, *Le système constitutionnel des Etats-Unis d'Amérique, II: Le système constitutionnel actuel* (1954). Separation of powers and federalism – as meant in the United States – may be regarded as two related issues, as Scalia did. See Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 *Notre Dame L. Rev.* 1417 (2008). For an analysis of Scalia's thought on this subject, see *Justice Scalia on Federalism and Separation of Powers*, 30 *Regent U. L. Rev.* 57 (2017).

<sup>45</sup> Section 551(1) establishes a broad definition of "agency," which applies to the whole Subchapter II ("Administrative Procedure") of Part I, Chapter 5, 5 U.S.C. See K.E. Hickman, R.J. Pierce Jr., *Federal Administrative Law* (2010), 7, pointing out that in enacting the FOIA, Congress meant the definition of agency as having a broader scope than that used pursuant to the APA. While this provision appears to be generic in defining an agency, it is specific in identifying what is not included in this definition, especially the other two branches of the federal government: Congress and the U.S. federal courts. 5 U.S.C. § 551(1)(A)-(B). Therefore, the FOIA does not apply to those two branches and their own structure. See *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990), wherein the D.C. Circuit held that documents transmitted by an agency – namely, a letter sent by an executive department: the Department of Justice – to Congress – namely, the House Ethics Committee – are not subject to the FOIA and thus may not fall within exemption 5, for

commonly adopted among countries endowed with a FOI regime<sup>46</sup>, it is not mandatory<sup>47</sup>. Furthermore – and above all – the dynamics ensuing from the structure of the federal government enables the three branches to oversee one another and, by doing so, to contain their respective power<sup>48</sup>. However, that mechanism works regardless of an effective FOIA in the legal system, as indeed happened before the enactment of the statute. In this context, the FOIA is an added value. Therefore, late Justice Scalia’s criticism of the role played by citizens under the FOIA is untenable<sup>49</sup>. It underlies a sort of bias against private individuals’

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Congress is not an agency pursuant to the FOIA. See, also, *Mayo v. U.S. Gov’t Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1994), wherein the Ninth Circuit ruled that the Government Printing Office – now Government Publishing Office – is not subject to the FOIA because it is an agency within the legislative branch. Similarly, in 1993, the Ninth Circuit excluded from application of the FOIA the United States Sentencing Commission, an independent agency within the judicial branch. See *Andrade v. U.S. Sentencing Commission*, 989 F. 2d 308, 309-310 (9th Cir. 1993). Despite not being formally bound by the FOIA, the branches of government other than the executive are committed to ensuring disclosure of their own records also electronically. See R.G. Vaughn, P.J. Messitte, *Access to Information Under the Federal Freedom of Information Act in the United States*, in H.-J. Blanke-R. Perlingeiro (eds.), *The Right of Access to Public Information*, cit. at 26, 193. Accordingly, it may be the case that bodies belonging to either the legislative or the judicial branch adopt a policy on the release of records and information modeled upon the FOIA. For instance, the Government Accountability Office (GAO), formerly General Accounting Office, is included in Congress’s administrative structure and thus may not be considered an agency under the FOIA. However, section 81.1(a) of title 4 of the Code of Federal Regulations (CFR) provides that “GAO’s disclosure policy follows the spirit of the [FOIA] consistent with its duties and functions and responsibility to the Congress.”

<sup>46</sup> For an analysis of the regulation of the right of access to records and information held by public authorities in many countries of the American, European, and Asian continents, see H.-J. Blanke-R. Perlingeiro (eds.), *The Right of Access to Public Information*, cit. at 26, *passim*.

<sup>47</sup> See, for instance, J.M. Ackerman, I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, cit. at 26, 100, noting that the Mexican FOI law formally covers records pertaining to all the branches of government, but substantially it vests the legislative and judicial branches with somewhat considerable margins of discretion in implementing the statute.

<sup>48</sup> See, *infra*, nt. 50.

<sup>49</sup> According to Scalia, indeed, one of the main flaws of the FOIA lied in citizens’ entitlement to exercise an oversight on activities carried out by the government by simply submitting an access request. This oversight – in his view – ended up

ability to monitor the way their government operates<sup>50</sup>. Accordingly, it does not appear proper to refer to Scalia to highlight the difficulties in implementation the FOIA was still facing in the 1980s<sup>51</sup>.

Secondly, the FOIA has become the archetype of a regulation of administrative transparency, even though the concept itself of transparency entered the U.S. scholarship quite recently<sup>52</sup>. Foreign scholars – especially French ones – first applied this term to the American experience<sup>53</sup>. In French and Italian literature, indeed, the term began having a moderate success in the 1980's<sup>54</sup>. The American legal culture, instead, was familiar

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replacing “institutionalized checks and balances.” A. Scalia, *The Freedom of Information Act Has No Clothes*, 6 Regulation 19 (1982).

<sup>50</sup> Scalia rejected the whole idea of – and need for – a FOIA. It is clearly confirmed by the fact that he brought his strongest attacks on the 1974 amendments, which were adopted to increase the achievement of the original purpose of the FOIA. *Id.*, at 15. In conformity with his renowned conservative approach, indeed, Scalia regarded the oversight power mutually exercised by the three branches of government as a more appropriate instrument to ensure transparency in the federal government itself. To support his theory, he mentioned some scandals, such as Watergate, which came to light as a result of the dynamics of the institutional checks and balances and not because of one or more FOIA requests. *Id.*, at 19.

<sup>51</sup> This reference is found in D.U. Galetta, *Trasparenza e contrasto della corruzione nella pubblica amministrazione: verso un moderno panottico di Bentham?*, cit. at 2, 51-52; *Id.*, *La trasparenza, per un nuovo rapporto tra cittadino e amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, cit. at 26, 1025-1032, especially nt. 27, 29, 31, 56.

<sup>52</sup> See D. Metcalfe, *The nature of government secrecy*, 26 Gov't Inform. Quart. 305 nt. 1 (2009), underlining that the term “transparency” gradually migrated from Europe to the United States especially in the early years of the twenty-first century.

<sup>53</sup> See P.F. Divier, *L'administration transparente: l'accès des citoyens américains aux documents officiels*, RDP 59 (1975); J.M. Duffau, *La transparence administrative aux États-Unis*, 12 Annuaire européen d'administration publique 295 (1989) (also in C. Debbasch (ed.), *La Transparence administrative en Europe: actes du colloque tenu à Aix en octobre 1989* (1990), 295). An Italian scholar, Arena, employs instead the term “publicity” in a 1978 article describing the U.S. FOIA to an Italian audience. See G. Arena, *La “Legge sul diritto all'informazione” e la pubblicità degli atti dell'Amministrazione negli Stati Uniti*, 9 Pol. dir. 279 (1978).

<sup>54</sup> As far as France is concerned, see B. Lasserre, N. Lenoir, B. Stirn, *La transparence administrative* (1987); B. Lasserre, *Six ans après le vote de 14 loi du 17 juillet 1978: une “administration plué transparente?”*, E.D.C.E. 99 (1983-1984); A. Roux, *La transparence administrative en France*, 12 Annuaire européen d'administration publique 57 (1989) (also in C. Debbasch (ed.), *La Transparence*

with two terms characterized by a very similar meaning: “sunlight” and “sunshine.” On a theoretical level, however, the differences between those two terms – on the one hand – and transparency – on the other hand – turn out more formal than substantial. When referred to administrative records, indeed, all these terms are capable of acting as a metaphor implying the need to ensure the maximum disclosure possible. A common element to the terms is the image of light, as two famous statements dating back to the early 1900s confirm<sup>55</sup>. The Oxford Dictionary recognizes that whether one refers to the physical or metaphorical meaning of transparency, light is tantamount to visibility<sup>56</sup>.

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*administrative en Europe: actes du colloque tenu à Aix en octobre 1989* (1990), 57). See also G. Scoffoni, *Le droit à l'information administrative aux États-Unis*, Paris (1992), who, by combining a theoretical and a pragmatic approach, conducted a very interesting comparison between the U.S. and the French experiences – with a focus on the former – on access to records and information held by public administrations. For a recent analysis of the French system of transparency and access to records, see C. Chevallier-Govers, *Right of Access to Public Documents in France*, in H.-J. Blanke-R. Perlingeiro (eds.), *The Right of Access to Public Information*, cit. at 26, 265. As for Italian scholars referring to transparency in public administration in the 1980s, see A. Meloncelli, *L'informazione amministrativa* (1983); R. Villata, *La trasparenza dell'azione amministrativa*, 5 Dir. proc. amm. 528 (1987); R. Marrama, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, 7 Dir. proc. amm. 416 (1989).

<sup>55</sup> As far as transparency is concerned, Hon. Filippo Turati suggested that the public administration should be “a glass house”. F. Turati, *Parliamentary Proceedings*, Chamber of Deputies, session 1904-1908, Jun. 17, 1908, 22962. As for sunlight, Justice Brandeis characterized it as “the best of disinfectants.” L.D. Brandeis, *What Publicity Can Do*, 58 Harper's Weekly 10 (1913), reprinted in Id., *Other People's Money and How the Bankers Use It*, 92 (1914 and 1932). See E. Coyle, *Sunlight and Shadows: Louis D. Brandeis on Privacy, Publicity, and Free Expression in American Democracy*, 33 Touro L. Rev. 233-235 (2017), studying Brandeis' statement in light of his whole mindset. But, see, also, D.E. Pozen, *Transparency's Ideological Drift*, cit. at 37, 108-109, pointing out that Brandeis was actually referring to the financial sector rather than the federal government and especially the executive branch. Indeed, by formulating his dictum, later to become so successful, he intended to champion the need for transparency of the bankers' fees charged for investments made by corporations.

<sup>56</sup> See entries “Transparency;” “Transparent;” “Sunlight;” “Sunshine;” in J.A. Simons-E.S.C. Weiner (eds.) *The Oxford English Dictionary*, 2nd ed. (1989) – respectively, XVIII, 419; vol. XVII, 198, 201 (as for the latter, “sunshine law” is considered separately within the list of meanings of the word). See, also, entries “Transparency” and “Sunshine law”, in *Black's Law Dictionary*, 9th ed. (2009) – respectively, 1638 and 1574. On the equation between transparent activity and

Therefore, when it is applied to public authorities, transparency implies a need – *rectius*, a demand – for public scrutiny<sup>57</sup>. From an overview of literature, however, it may be inferred that there appears to be some slight differences in the way U.S. scholars and their European counterparts approach transparency. In the U.S., in particular, scholars tend to focus less frequently on the distinction between the concepts of transparency<sup>58</sup>, openness<sup>59</sup>, and publicity<sup>60</sup>.

Thirdly, the FOIA favors accountability, a concept that is peculiar to the Anglo-Saxon culture – i.e., to the common law tradition – and not easy to implement elsewhere<sup>61</sup>. Especially in

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visible activity on the basis of the etymology of the term “transparency”, see G. Arena, *La trasparenza amministrativa ed il diritto di accesso ai documenti amministrativi*, in Id. (ed.), *L'accesso ai documenti amministrativi* (1991), 18-20, 85 nt. 12; R. Chieppa, *La trasparenza come regola della pubblica amministrazione*, *Dir. econ.* 615 (1994). It is interesting to note that Chieppa has stressed the ability of transparency – meant this way – to bring citizens closer to public institutions, i.e., the very underlying purpose of the U.S. FOIA.

<sup>57</sup> See C. Hood, *Transparency in Historical Perspective*, in C. Hood, D. Heald, *Transparency: The Key to Better Governance?* (2006), 4.

<sup>58</sup> One of the few American scholars who has proved to grasp the deep meaning of transparency is Fenster. Transparency – he argues – requires that information be not only made available, but also clear and “understandable to the public.” M. Fenster, *The Opacity of Transparency*, cit. at 30, 942. For a recent collective work conducting a critical analysis of transparency, see D.E. Pozen, M. Schudson (eds.), *Troubling Transparency* (2018).

<sup>59</sup> As has been pointed out, “transparency” and “openness” are often used as synonyms. See D. Heald, *Varieties of Transparency*, in C. Hood, D. Heald, *Transparency: The Key to Better Governance?*, cit. at 57, 25-26.

<sup>60</sup> See, traditionally, F.E. Rourke, *Secrecy and Publicity* (1961).

<sup>61</sup> On accountability of the public sector in general, see M.J. Dubnick, H.G. Frederickson (eds.), *Accountable Governance: Problems and Promises* (2011); M. Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 *West Eur. Politics* 946 (2010); E.C. Page, *Accountability as a Bureaucratic Minefield: Lessons from a Comparative Study*, *id.*, 1010; M.D. Dowdle (ed.), *Public Accountability: Design, Dilemmas and Experiences* (2006); R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (2003); A. Schedler, L. Diamond, M.F. Plattner (eds.), *The Self-Restraining State* (1999), in particular the papers in Part I (“Conceptual and Normative Issues”). As for the United States in particular, I deem it proper – first of all – to refer to the works by Kitrosser, who mainly analyzed the functioning and implications of accountability and the relation between transparency and accountability itself within the executive branch. See H. Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 *U. St. Thomas J.L. & Pub. Pol’y* 62 (2010); *Id.*, *The Accountable Executive*, 93 *Minn. L. Rev.* 1741 (2009); *Id.*, *Kitrosser*,

continental Europe, the integration of this concept into national legal cultures has proved complicated. In Italy, for instance, accountability enters a legal system characterized by a very different way of addressing the responsibility<sup>62</sup> ascribable to public administrations and their personnel, as has been clearly explained<sup>63</sup>. The very adoption – with plenty of varieties, as noted

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*Accountability and Administrative Structure*, 45 Willamette L. Rev. 607 (2009); Id., *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* (2015). See also M. Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059 (2001), focusing on political accountability of agency rulemaking; B. Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 Yale L.J. 2096, 2101-2120 (2010), arguing that agencies should be accorded a high level of deference by courts even when they make informal decisions, as such decisions, too, are subject to political accountability; D. Markell, “Slack” in the Administrative State and its Implications for Governance: *The Issue of Accountability*, 84 Or. L. Rev. 1 (2005), pinpointing some features of the administrative state – with special attention devoted to the Environmental Protection Agency (EPA) – that seem to hinder, instead of favoring, the increase in transparency and accountability. See, also, most recently, R. Beck, *Promoting Executive Accountability through Qui Tam Legislation*, 21 Chap. L. Rev. 41 (2018), taking into account the use of *qui tam* legislation to strengthen executive branch officials’ accountability; Kevin Bohm, *The President’s Role in the Administrative State: Rejecting the Illusion of Political Accountability*, 46 Hastings Const. L.Q. 191 (2018). Bohm’s article is concerned with a specific aspect of accountability: the ability of the President to implement accountability and thus to conduct effective oversight of agencies. Scholars have often dealt with this topic especially since a 2001 article by Kagan: E. Kagan, *Presidential Authority*, 114 Harv. L. Rev. 2245 (2001). See F.R. Shapiro, M. Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1495 (2012), underlining that Kagan’s article was cited 371 times just in the first year after its publication. Another much-cited article defined the theoretical framework of this issue: P.L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

<sup>62</sup> In Italy, “responsibility” has been traditionally conceived of as capable of including different meanings, which are expressed by different terms in the U.S. – responsibility; liability; accountability. See L. Torchia, *La responsabilità*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo generale*, II (2003), 1649 nt. 1.

<sup>63</sup> Della Cananea has pointed out that not only is there no exact word equating to accountability in the Italian language, but – above all – it is different the way public administration’s responsibility is meant. The core difference lies in the oversight of administration. While the oversight is conducted by people in the U.S. and other countries of similar tradition, it is entrusted to a public office acting instead of people in Italy. See G. della Cananea, *Legittimazione e accountability nell’Organizzazione mondiale del commercio*, 53 Riv. trim. dir. pubbl. 738 (2003).

above – of the FOIA model in most countries is gradually eroding such differences<sup>64</sup>. This phenomenon does not come as a surprise,

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<sup>64</sup> As far as the Italian experience is concerned, for example, Legislative Decree No. 97 of May 25, 2016, by amending Legislative Decree No. 33 of March 14, 2013 (also known as transparency decree), resulted in increasing the degree of public administrations' accountability. See B.G. Mattarella, *The Ongoing Constitutional and Administrative Reforms in Italy*, 66 Riv. trim. dir. pubbl. 434 (2016). This reform doubtless went in the direction of FOI legislation. Nevertheless, it is better to be cautious in concluding that the current regulation of transparency and access to records in the Italian legal system equates to a FOI act, even though a good deal of Italian scholarship seems to be doing so. See B. Ponti, *La trasparenza ed i suoi strumenti: dalla pubblicità all'accesso generalizzato*, in Id. (ed.), *Nuova trasparenza amministrativa e libertà di accesso alle informazioni* (2016), 56-58; M. Savino, *Il FOIA italiano. La fine della trasparenza di Bertoldo*, 22 Giorn. dir. amm. 593 (2016); S. Villamena, *Il c.d. FOIA (o accesso civico 2016) ed il suo coordinamento con istituti consimili*, Federalismi.it (2016); D.U. Galetta, *La trasparenza, per un nuovo rapporto tra cittadino e amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, cit. at 26, 1047-1049, 1053-1054; Id., *Accesso (civico) generalizzato ed esigenze di tutela dei dati personali ad un anno dall'entrata in vigore del Decreto FOIA: la trasparenza de "le vite degli altri"?*, Federalismi.it (2018); A. Corrado, *La "trasparenza" nella legislazione italiana*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa*, 2nd ed. (2017), 1416-1418; S. Foà, *La nuova trasparenza amministrativa*, 25 Dir. amm. 72-73, 78-83 (2017); C. Deodato, *La difficile convivenza dell'accesso civico generalizzato (FOIA) con la tutela della privacy: un conflitto insanabile?*, [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it) (2017). However, at least a few scholars prove to be more skeptical, by pinpointing some critical issues, not solved by the new legislation. See G. Gardini, *Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici*, Federalismi.it 2-6 (2017), highlighting the confusion determined by the 2016 reform even as far as the wording of legislative provisions is concerned. Indeed, Legislative Decree No. 97/2016 provided for a new form of "civic access" (section 5, para. 2, transparency decree), which was added to the form of "civic access" already established by the original version of the transparency decree (currently, section 5, para. 1). As a result, the same section now contains two different types of civic access, to which are entrusted different functions. As for the former, it consists of a right of access to administrative records vested in any person, thus modeled upon the U.S. FOIA. The latter, which is the older one chronologically, is instead aimed at providing any person an instrument to demand that public administrations fulfill their obligations to publish administrative documents, data, or information. Therefore, this type of civic access may be employed in case of inaction by a certain administration. A general oversight power concerning compliance with obligations of publications is vested in the National Anticorruption Authority (ANAC), as transparency is regarded as strictly related to corruption prevention in the transparency decree. See S. Cassese, *Evoluzione della normativa sulla trasparenza*, 8 SINAPPSI 6 (2018). Furthermore, from the fact that the new

since transparency is closely related to accountability. This relation has been underlined not only by scholars<sup>65</sup> but also in presidential documents - namely, in two memoranda issued by President Obama on January 21, 2009<sup>66</sup>. Also because of this almost symbiotic relation with transparency, accountability is now considered as an essential feature to a democratic legal system<sup>67</sup>.

Fourthly, despite the major role played, the FOIA is just a piece of ordinary legislation. In other words, access to agency records does not enjoy constitutional protection, and - in particular - it is not deemed to fall within the scope of the First Amendment of the Constitution. This issue was much discussed in the past<sup>68</sup>, though in reality it is still open for debate<sup>69</sup>. Given the

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civic access was inserted into a set of obligations to publish already existing and still effective it may be inferred that they both should be recognized an equivalent role in the overall system. For such a stance, see E. Carloni, *Il nuovo diritto di accesso generalizzato e la persistente centralità degli obblighi di pubblicazione*, 24 *Dir. amm.* 615-621 (2016). Finally, there is a problem of legislative coordination, for the regulation of the right of access to administrative documents established by the Italian Administrative Procedure Act (Law No. 241 of August 7, 1990) was not repealed. Its coexistence with the new civic access is troublesome, as the former provides for a restrictive type of access, i.e., an access assigned only to concerned persons (or parties). Such aspect is stressed, e.g., in A. Simonati, *L'accesso civico come strumento di trasparenza amministrativa: luci, ombre e prospettive future (anche per gli Enti locali)*, 37 *Ist. fed.* 737-738 (2016).

<sup>65</sup> Scholars have often observed that transparency is a pre-requisite for an effective implementation of accountability. See J. Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 *Yale Law & Pol. Rev.* 83 (2012); A.M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, cit. at 16, 917; M. Fenster, *The Opacity of Transparency*, cit. at 30, 949; S. Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *Yale L. & Pol'y Rev.* 399 (2009).

<sup>66</sup> See *Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies* and *Memorandum from President Barack Obama on Transparency and Open Government to the Heads of Executive Departments and Agencies*, Jan. 21, 2009 - respectively, 74 *Fed. Reg.* 4683, 4683, and 4685, 4686, Jan. 26, 2009.

<sup>67</sup> See E. Chiti, *Le sfide della sicurezza e gli assetti nazionali ed europei delle forze di polizia e di difesa*, 24 *Dir. amm.* 539-540 (2016). See, also, *Memorandum from President Barack Obama on the Freedom of Information Act*, *ibid.*, arguing that both transparency and accountability constitute a requirement for the existence of democracy.

<sup>68</sup> The discussion among scholars, based on a series of Supreme Court and other federal courts decisions, was lively especially under the Burger Court, i.e., when

importance of the FOIA, it has even been advanced the theory that it may be included among “super-statutes”, a class of statutes that would lie at an intermediate level between ordinary statutes and the Constitution<sup>70</sup>. What matters the most, however, is that the FOIA do not end up losing its pivotal features.

### 3. The FOIA Improvement Act of 2016

#### 3.1. Some general considerations

In order to be able to formulate an overall assessment of the FOIA Improvement Act, it is necessary – beforehand – to provide an overview of the amendments it brought to the FOIA<sup>71</sup>. Seemingly, the methods of doing so should be just two: either to follow a textual order – i.e., to mention the amendments as they compare in the reform statute and thus in the FOIA – or to arrange them by relevance. Actually, there is a third option and this is the one that will be adopted: to follow the layout established in Senate Report No. 114-4 of February 23, 2015<sup>72</sup> [hereinafter – 2015 Report or Report], which sets forth the intent of the reform. The Report employs the first of the two methods just proposed, albeit not rigorously.

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Warren E. Burger was Chief Justice of the Supreme Court (1969-1986). For a description of the academic debate and the courts standpoints, see B. Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know”*, 72 Md. L. Rev. 1 (2012).

<sup>69</sup> See R. Peled, Y. Rabin, *The Constitutional Right to Information*, 42 Colum. Hum. Rts. L. Rev. 360-369 (2011) (pinpointing four justifications for the constitutional foundations of the right to know).

<sup>70</sup> See B. Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know”*, cit. at 68, 64-66, referring to W.N. Eskridge Jr., J. Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215 (2001). See also W.N. Eskridge Jr., J. Ferejohn, *A Republic of Statutes: The New American Constitution* (2010). Since the FOIA was conceived of as an amendment to the APA, this theory should also deem the latter to be a super-statute. Indeed, then-professor Scalia pointed out in 1978 that the Supreme Court tended to consider the APA as such, “or [as a] subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.” A. Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 363 (1978). See also K.E. Kovaks, *Superstatute Theory and Administrative Common Law*, 90 Indiana L.J. 1223-1237 (2015), setting forth a series of reasons for encompassing the APA among super-statutes.

<sup>71</sup> Section 2 of the FOIA Improvement Act contains all the amendments.

<sup>72</sup> See, *supra*, nt. 4.

Before describing the different amendments, the 2015 Report lays down not only the purposes of the FOIA Improvement Act but also the key elements of the reform. The former and the latter are not equivalent. The purposes are rather simple: to make disclosure more suited for ITC – therefore, for the Internet – and ensure a higher level of compliance with FOIA provisions by agencies. Ultimately, as the name of the statute suggests, the reform is aimed at improving the implementation of the FOIA. Indeed, it is where all main issues are located, as recent statistical data demonstrate<sup>73</sup>. As far as the pivotal elements of the reform are concerned, the Report pinpoints the following<sup>74</sup>: the foreseeable harm standard as for the degree of disclosure in general; the exemptions, namely, exemption 5, which is the only one subject to amendment; the strengthened role of the Office of Government Information Services (OGIS); the availability of records in electronic format; proactive disclosure; the charging of fees for processing FOIA requests; the creation of a Chief FOIA Officers Council; the establishment of a consolidated online request portal for the submission of all requests; reporting requirements on implementation of the FOIA imposed upon agencies.

### **3.2. Amendments brought by the FOIA Improvement Act: An overview**

The amendments – or set of amendments – just mentioned will now be analyzed, albeit quite concisely. Most of the considerations they are capable of triggering, however, will be left to the following paragraph, devoted to the upsides and downsides of the reform. The first amendment found in the text requires that records that may be freely inspected by the public be made

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<sup>73</sup> According to the most recent data collected by the Office of Information Policy of the Department of Justice, fiscal year 2017 ended with an increase by 3.7% of FOIA requests from the previous year, and only five agencies have received over 70% of all requests. There was a significant growth in the number of requests processed and a positive trend in the reduction of the amount of backlogged requests. Backlog, however, is still quite massive, as it may be inferred by the average time agencies need to respond to simple FOIA requests. See U.S. Dep't of Justice, *Office Of Info. Policy (OIP), Summary of Annual FOIA Reports for FY 2017* (posted Jun. 8, 2018), 2-12, available at <https://www.justice.gov/oip/page/file/1069396/download>.

<sup>74</sup> S. Rept. No. 114-4, cit. at 4, 4-5.

available in an electronic format. Contrary to what might be expected, the electronic format is prescribed as requisite not only for records and information – *rectius*, categories of records and information – subject to publication in the Federal Register or on agencies’ websites – respectively, under § 552(a)(1) and § 552(a)(2) – but also for further material<sup>75</sup>. An amendment is concerned specifically with proactive disclosure, instead, and vested with what may be described as a clarification function. Indeed, its purpose is to explain the meaning of the most important category of the proactive disclosure material – the “frequently requested” records<sup>76</sup>. In doing so, the amendment added some elements to the notion<sup>77</sup>. An amendment pertaining to the charging of fees by agencies for processing FOIA requests has a similar clarification function. It is aimed at clearly identifying the cases in which agencies are prohibited from charging those fees, especially search fees. Such cases refer to the situations in which the agency has failed to conclude a certain FOIA proceeding within the time limit prescribed<sup>78</sup>. Therefore, the prohibition acts as a sanction against

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<sup>75</sup> In particular, the new requirement applies to a report that, under subsection (e)(1), each agency has to submit to the Attorney General of the United States annually by February 1. It is specified that the requirement also applies to the contents of the report, i.e., to “raw statistical data”. 5 U.S.C. § 552(e)(3). Such data are concerned with access requests and FOIA implementation in general in the preceding fiscal year by the submitting agency. The 2016 reform provided that the Director of the OGIS, too, is to receive the report. The same requirement extends to the report that the Attorney General – in turn – has to submit to the Committee on Oversight and Government Reform of the House of Representatives, to the Committee on the Judiciary of the Senate, and to the President of the United States by March 1 of each calendar year. § 552(e)(6)(B)(i).

<sup>76</sup> The Department of Justice has long used this expression in its directives, instructions, and other documents to designate the category at issue. See, e.g., Dep’t of Justice, *FOIA Post: OIP, Guidance on Submitting Certification of Agency Compliance with FOIA’s Reading Room Requirements*, Jun. 27, 2008, available at <https://www.justice.gov/oip/blog/foia-post-2008-guidance-submitting-certification-agency-compliance-foias-reading-room>.

<sup>77</sup> Records now fall within the category when, in addition to having already been released upon an individual’s request, they are deemed by the proceeding agency to have become or be likely to become the subject of subsequent requests or – alternatively – they have been requested three or more times. From this formulation, it may be inferred that the first option entrusts the agency involved with a margin of discretion. 5 U.S.C. § 552(a)(2)(D)(i)-(ii).

<sup>78</sup> 5 U.S.C. § 552(a)(4)(A)(viii)(I).

lack of effectiveness, since it indirectly punishes agencies that prove not quick enough in processing FOIA requests. Some exceptions to this sanction are established<sup>79</sup>. The 2015 Report<sup>80</sup> recalls that the OPEN Government Act of 2007<sup>81</sup> [hereinafter - OPEN Government Act] - i.e., the previous major FOIA reform - had already provided for the sanction<sup>82</sup>, but agencies continued to charge fees regardless of duration of their proceedings. Other than acknowledging a failure to ensuring compliance with a legislative provision, the Report suggests that the amendment aspires to act as a true deterrent.

Then, the 2015 Report devotes special attention to the amendment consisting in the codification - i.e., the formal insertion into the statute -<sup>83</sup> of the so-called "presumption of openness", thereby demonstrating its significance. The presumption was established by President Obama in his 2009 memorandum on the FOIA already mentioned<sup>84</sup> and confirmed by Attorney General Holder in a memorandum issued a couple of months later<sup>85</sup> [hereinafter - Holder FOIA memo]. The latter, in particular, lays down the criteria on which agencies should base their decisions on disclosure of records and information. The release of them may be denied if the proceeding agency "reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or [if] disclosure is prohibited by law."<sup>86</sup> The Report clarifies that the foreseeable harm standard applies only to those FOIA exemptions that confer

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<sup>79</sup> The exceptions relate to the concepts of "unusual" and "exceptional circumstances", expressly defined in the statute, and operate provided that certain notice requirements be met. § 552(a)(4)(A)(viii)(II).

<sup>80</sup> S. Rept. No. 114-4, cit. at 4, 7.

<sup>81</sup> Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Oct. 2, 2007).

<sup>82</sup> § 6(b)(1)(A), OPEN Government Act.

<sup>83</sup> 5 U.S.C. § 552(a)(8).

<sup>84</sup> *Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, cit. at 66, *ibid.*

<sup>85</sup> *Memorandum from Eric Holder, Attorney General, on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, Mar. 19, 2009, 1, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

<sup>86</sup> *Id.*, at 2.

some discretion upon the agency making the decision on disclosure<sup>87</sup>.

While the amendment just mentioned affects all FOIA exemptions, or – at least – those implying an amount of discretion, another one is concerned with a specific exemption – exemption 5. The reform consists here in adding what the 2015 Report expressly defines as a “sunset provision.”<sup>88</sup> As such, it affects one of the statutory components of the exemption – i.e., the period within which the exemption may operate. In particular, an agency is prohibited from applying this exemption if the sought records were created 25 years or more before the submission of the FOIA request<sup>89</sup>.

The subsequent amendment the 2015 Report mentions is concerned with administrative organization. By that, I mean that it pertains to the structure of an agency charged with dealing with FOIA requests. In this regard, an authority to which the 2016 reform assigned a pivotal role is the OGIS, which was established by the OPEN Government Act<sup>90</sup>. The Report highlights that, from the outset, the OGIS was conceived of as “the FOIA ombudsman”<sup>91</sup>. As such, it was assigned the functions to provide FOIA requesters with assistance with all issues they may have and to help resolve disputes between them and federal agencies. Accordingly, agencies are now required to inform FOIA requesters of the right to turn to the OGIS in order for it to carry out the latter function<sup>92</sup>. The FOIA Improvement Act resulted in strengthening OGIS independent role. It determined this effect mainly by vesting the OGIS with the power to submit Congress and the U.S. President a report wherein the OGIS itself essentially sets forth the results of its multiple functions concerning implementation of the FOIA and proposals deriving from those results<sup>93</sup>. It is specified that the exercise of such power needs no

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<sup>87</sup> S. Rept. No. 114-4, cit. at 4, 8.

<sup>88</sup> *Id.*, at 10.

<sup>89</sup> 5 U.S.C. § 552(b)(5).

<sup>90</sup> The 2007 reform inserted into the FOIA subsection (h), devoted to the OGIS.

<sup>91</sup> S. Rept. No. 114-4, cit. at 4, 2.

<sup>92</sup> 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb). This right exists in case of an adverse determination, i.e., when the agency responds to the FOIA request with a denial.

<sup>93</sup> § 552(h)(4)(A)(i).

prior approval whatsoever from agencies or other bodies<sup>94</sup>. Among OGIS functions is the issuance of advisory opinions at its own discretion or upon request<sup>95</sup>.

Another amendment pertaining to organization is the one establishing the Chief FOIA Officers Council<sup>96</sup>. It is a body composed of all Chief FOIA Officers, who operate at each agency. Its main functions<sup>97</sup> are the following: to adopt recommendations aimed at improving implementation of the FOIA; to collect best practices and have them spread among agencies; to ensure the coordination of initiatives in the matter at issue.

Finally, apart from establishing some new reporting requirements on FOIA implementation that are incumbent on agencies and the Attorney General<sup>98</sup>, the 2016 reform also provided for the creation of a consolidated online portal<sup>99</sup>. It is supposed to serve as a single platform – *rectius*, a single website – to use for the submission of FOIA requests directed to any federal agency. In other words, it may be the starting point – technically speaking – of all FOIA requests. However, it is specified that such portal may not replace analogous instruments made available by individual agencies. The former and the latter should rather coexist, and the Director of the Office of Management and Budget has to lay down standards for their “interoperability.”<sup>100</sup>

#### **4. Some major implications for the FOIA**

##### **4.1. Proactive disclosure and access upon request as institutions to be kept apart from a theoretical perspective**

It is not possible here to conduct a detailed critical analysis of each amendment mentioned above. I will limit myself to some observations concerning the impact of the 2016 reform on the FOIA. In order to make them as clear as possible to the reader, they will be arranged into two groups, each of them corresponding to a different matter. The two general matters

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<sup>94</sup> § 552(h)(4)(C).

<sup>95</sup> § 552(h)(3).

<sup>96</sup> § 552(k)(1).

<sup>97</sup> They are enumerated in § 552(k)(5)(A).

<sup>98</sup> Respectively, § 552(e)(1)(P),(Q) and § 552(e)(6)(A),(B). See also, *supra*, nt. 75.

<sup>99</sup> § 552(m)(1).

<sup>100</sup> § 552(m)(2).

acting as the guide to such observations are the following: disclosure and agency organization.

Disclosure is meant here as a general category, the components of which have in common the release of information to the public. It has recently been argued that disclosure, in this sense, equates to transparency<sup>101</sup>. In fact, the latter concept has a broader scope, since it includes – for instance – the duty to give reasons<sup>102</sup>, as noted above<sup>103</sup>. Still, the equation between disclosure and release of information is correct, on condition that the former be not deemed tantamount to access to records. Access is a legal institution that traditionally requires an individual's initiative, while publicity identifies an activity that consists in the publication of records or information<sup>104</sup>. Such activity is unsolicited and thus it takes either an act ascribable to a public office or a material – i.e., actual – operation to start the relevant

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<sup>101</sup> D.E. Pozen, *Transparency's Ideological Drift*, cit. at 37, 102.

<sup>102</sup> For a recent analysis of such duty from a comparative administrative law perspective, see G. della Cananea, *Due Process of Law Beyond the State* (2016), 61-81. The duty to give reasons is so essential that it gradually acquired the status of a global standard of the administrative procedure. See G. della Cananea, *The Giving Reasons Requirement: A Global Standard for Administrative Decisions*, in G. della Cananea-A. Sandulli (eds.), *Global Standards for Public Authorities* (2011), 3.

<sup>103</sup> See, *supra*, para. 2.2.

<sup>104</sup> Even though the concept of publicity meant as dissemination of information is not very widespread among scholars, it is not unknown. See, for instance, E. Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380 (1973). See, also, D.E. Pozen, *Transparency's Ideological Drift*, cit. at 37, 107-115, associating “publicity” – as a synonym to “transparency” – especially with the Progressive Era. However, such a concept, which implies a duty of affirmative action imposed upon public administrations, must not be confused with publicity in its purely commercial meaning. The latter forms the subject of an individual right of citizens, which has raised a certain interest among scholars in recent years. See, e.g., A. Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 Duke L.J. 383 (1999); S.L. Dogan, M. A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161 (2006); J.E. Rothman, *The Inalienable Right of Publicity*, 101 Geo L.J. 185 (2012); A. J. Berger, *Righting the Wrong of Publicity: A Novel Proposal for a Uniform Federal Right of Publicity Statute*, 66 Hastings L.J. 845 (2015). Nevertheless, it was recently argued that the courts should interpret this right as falling within the scope of the First Amendment of the Constitution. See M.H. Redish, K.B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 Wm. & Mary L. Rev. 1422 (2015). Therefore, this theory would lead to conclude that the right of publicity and the right of access to agency records share the same – albeit implicit – constitutional underpinning.

procedure. Disclosure, meant in a general way, is a neutral concept capable of including both access and publicity. Proactive disclosure, instead, has a narrower scope, as it encompasses only the latter. Indeed, “proactive” – or “affirmative,” which constitutes a synonym in this context<sup>105</sup> – is an adjective denoting a public authority’s initiative. Therefore, there is proactive disclosure whenever an agency – whether or not pursuant to a legislative obligation – disseminates records and information without awaiting a request by an individual or – anyway – regardless of it<sup>106</sup>.

The wording of the FOIA is only partly clear in this regard. On the one hand, the distinction between publicity and access upon request is easy to detect, as a specific provision – subsection (a)(3) – is devoted to the latter. Subsection (a)(3), indeed, expressly rules out the provisions of subsection (a)(1) and (a)(2) from its scope of application. On the other hand, subsection (a)(3) seems to suggest that all three provisions – paragraphs (1), (2), and (3) – refer to the concept of availability of records. Yet, subsection (a)(1) regulates a different instrument of publicity: the publication in the Federal Register, i.e., in the executive branch official gazette. Therefore, by relying on FOIA statutory language, Davis distinguished between cases of mandatory publication (paragraph (1)) and cases in which records had to be made “available” (paragraphs (2) and (3))<sup>107</sup>. However, as explained above, access upon request is an autonomous institution, founded on a different

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<sup>105</sup> See D.E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, cit. at 2, 1108, 1117, and 1108 nt. 57. From such passages, it can be inferred that the Author ultimately gives the same meaning to the two adjectives. By contrast, Herz deems affirmative disclosure to be limited to publication imposed by law and proactive disclosure to mean, instead, purely spontaneous publication, i.e., publication made by an agency without it being imposed by a legislative provision. See M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, cit. at 19, 597.

<sup>106</sup> For an analysis – in general terms – of the features of proactive disclosure as a component of the right to know, see H. Darbshire, *Proactive Transparency: The future of the right to information?*, World Bank Institute – Governance Working Paper Series (2010), available at <http://documents.worldbank.org/curated/en/100521468339595607/pdf/565980WP0Box351roactiveTransparency.pdf> and also at [https://www.right2info.org/resources/publications/publications/proactive-transparency-the-future-of-the-right-to-information-darbshire-wb/at\\_download/file](https://www.right2info.org/resources/publications/publications/proactive-transparency-the-future-of-the-right-to-information-darbshire-wb/at_download/file).

<sup>107</sup> *Davis Treatise*, cit. at 32, § 5:4, p. 314.

rationale. Furthermore, the distinction between paragraphs (1) and (2) has a formal significance by now. Indeed, today records and information subject to publication in the Federal Register may also be posted online<sup>108</sup>, and paragraph (2) records, originally stored in physical places called “reading rooms”, are now available in “electronic reading rooms.”<sup>109</sup> Even though its official Guide to the FOIA suggests otherwise<sup>110</sup>, the Department of Justice, too, seems to agree. Indeed, in a 2016 document containing the results of a pilot program aimed at assessing the viability for agencies to routinely post online their records already released, the OIP – a component of the department –<sup>111</sup> defined subsections (a)(1) and (a)(2) jointly as “proactive disclosure provisions.”<sup>112</sup>

How did the FOIA Improvement Act step into the legal framework concerning proactive disclosure? As explained above, the reform focused on the pivotal category of subsection (a)(2) material – the frequently requested records, inserted into the statute by the Electronic Freedom of Information Act Amendments of 1996<sup>113</sup>. It is undeniable that, as the OIP argues, records labeled as “frequently requested” are records deemed to

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<sup>108</sup> On publication in the Federal Register and its evolution due to the Internet, see B. Schwartz, R.L. Corrada, J.R. Brown Jr., *Administrative Law*, 6th ed. (2006), 252-253.

<sup>109</sup> See Dep’t of Justice, *FOIA Update: Congress Enacts FOIA Amendments*, Vol. XVII, No. 4, Autumn 1996, available at <https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments>. As for scholarship, see M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, cit. at 19, 586-591.

<sup>110</sup> See *United States Department of Justice Guide to the Freedom of Information Act*, 2009 ed., *Proactive Disclosures* (posted Aug. 10, 2009), available at [https://www.justice.gov/oip/foia\\_guide09/proactive-disclosures-2009.pdf](https://www.justice.gov/oip/foia_guide09/proactive-disclosures-2009.pdf), at 9.

<sup>111</sup> On the establishment of the OIP, see S.F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 *Jour. Const. L.* 1047-1048 (2008).

<sup>112</sup> Dep’t of Justice, OIP, *Proactive Disclosure Pilot Assessment* (Jun. 30, 2016), 2, available at [https://www.justice.gov/oip/reports/proactive\\_disclosure\\_pilot\\_assessment/download](https://www.justice.gov/oip/reports/proactive_disclosure_pilot_assessment/download).

The same consideration is found in OIP Guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request* (Mar. 16, 2015), available at [https://www.justice.gov/oip/oip-guidance/proactive\\_disclosure\\_of\\_non-exempt\\_information](https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information).

<sup>113</sup> Pub. L. No. 104-231, 110 Stat. 3048 (Oct. 2, 1996). The 1996 reform also added the next category, which imposes the publication of indexes of the frequently requested records posted online. The first three categories, codified at subparagraphs (A), (B), and (C) of paragraph (2), were instead already included in the original FOIA.

be concerned with “a matter of popular interest.”<sup>114</sup> The rationale of this category may appear consistent with the fee waiver to apply to FOIA requests involving a public interest<sup>115</sup>. Furthermore, as – once again – the OIP points out, this category is based on a “pragmatic reason, [consisting in helping] agencies achieve greater efficiencies by reducing the need to respond to numerous requests for the same records.”<sup>116</sup> In addition to that, the online posting of frequently requested records is without a doubt in accordance with former President Obama’s policy of strengthening proactive disclosure<sup>117</sup>. However, the 2016 OIP document on the pilot program already mentioned before went further and envisioned the possibility of full coincidence between what has been requested by an individual and what has to be published online<sup>118</sup>. Apart from the technical and material difficulties in realizing that, such coincidence would affect the theoretical framework concisely described above. Indeed, what would happen to agencies’ initiative in proactive disclosure if agencies themselves had just to certify the records requested and publish them online?

Therefore, it is important to keep access upon request and proactive disclosure distinct and thus consider them as mutually autonomous institutions. On the one hand, they have in common at least two features: the purpose to realize the right to know and

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<sup>114</sup> Dep’t of Justice, OIP, *Proactive Disclosure Pilot Assessment*, cit. at 112, *ibid.*

<sup>115</sup> Under subsection (a)(4)(A)(iii), agencies may not charge fees or may charge just a fee of negligible amount if disclosure of the information contained in the records sought satisfies the public interest “because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

<sup>116</sup> OIP Guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, cit. at 112, *ibid.*

<sup>117</sup> See *Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, cit. at 66, *ibid.*; *Memorandum from Eric Holder, Attorney General, on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, cit. at 85, 3, directing agencies to “readily and systematically post information online in advance of any public request.”

<sup>118</sup> As the OIP clarified, the proposal was founded on the following motto: “Release to One is Release to All.” Dep’t of Justice, OIP, *Proactive Disclosure Pilot Assessment*, cit. at 112, 3.

thus the capacity of meeting the interest in disclosure<sup>119</sup>; the subjection to judicial enforcement. Indeed, the judicial remedy ensured by subsection (a)(4)(B) of the FOIA has to be meant so as to apply to both access upon request and proactive disclosure<sup>120</sup>. On the other hand, the two institutions – or set of institutions – (subsections (a)(1) and (a)(2) and subsection (a)(3)) determine different implications for the overall legal framework of disclosure. Such implications are not only theoretical – as observed above – but also practical. An example of the latter, often pointed out by scholars<sup>121</sup>, is the predominant number of FOIA requests submitted by businesses.

## **4.2. Codification of the presumption of openness and amendment to Exemption 5**

### **4.2.1. Codification of the presumption of openness: the foreseeable harm standard enters the FOIA**

The amendment codifying the presumption of openness was much more important. Its significance can be fully grasped from a historical perspective. The Holder FOIA memo, in establishing the foreseeable harm standard already mentioned, also expressly abolished the “sound legal basis” standard provided for in the 2001 FOIA memo issued by former Attorney General Ashcroft<sup>122</sup>. The former standard resulted in conferring a

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<sup>119</sup> See, recently, *CREW v. Dep't of Justice*, 846 F.3d 1235, 1240 (D.C. Cir. 2017), underscoring that the FOIA “imposes on federal agencies both reactive and affirmative obligations to make information available to the public.”

<sup>120</sup> *Id.*, at 1240-1241, 1245. Davis already reached such a conclusion in the 1970s. See *Davis Treatise*, cit. at 32, § 5:23, pp. 374-376. But see, also, *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996), holding that the only judicial remedy provided for by subsection (a)(4)(B) of the FOIA consists of an order imposed upon a given agency to release the sought records. Therefore, according to this decision, by filing a suit, an individual may not demand the fulfillment of proactive disclosure obligations, namely the publication of information in the Federal Register.

<sup>121</sup> See D.E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, cit. at 2, 1103, 1111, 1113; P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, cit. at 25, 665-666; L. Tai, *Fast Fixes for FOIA*, cit. at 2, 470. For a recent detailed study, based on agency statistical data, aimed at analyzing the nature – and thus the types – of FOIA requesters, see M. Kwoka, *Foia, Inc.*, 65 Duke L. J. 1379-1414 (2016).

<sup>122</sup> Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act to the Heads of all Federal Departments and Agencies, Oct. 12,

broader amount of discretion upon agencies in granting or denying access to records. Therefore, it consisted in a prominent change from the Clinton administration<sup>123</sup>, under which the 1993 Reno FOIA memo<sup>124</sup> had already established a foreseeable harm standard<sup>125</sup>. As it has been observed, this change consisted in a significant setback: The legal nature of the entitlement to accessing agency records essentially shifted from a right to know to a need to know<sup>126</sup>. The Holder FOIA memo reintroduced the degree of disclosure already effective in the 1990s<sup>127</sup>. Given that fluctuation occurred over time, the codification of the presumption of openness provided the matter with a sufficient degree of certainty. Indeed, it would now take not just a presidential memorandum<sup>128</sup>, as was the case in the past, but a legislative provision – and thus the carrying out of a legislative procedure – to cause a further change thereof.

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2001, available at <https://www.justice.gov/archive/oip/011012.htm>. However, it should also be recalled that this memorandum was issued in the aftermath of the September 11 terrorist attacks on U.S. soil. On the implications of this event for the separation of powers, especially in light of the exercise of emergency powers, see A. Fioritto, *L'amministrazione dell'emergenza tra autorità e garanzie* (2008), 79-85. On implementation of the FOIA under the George W. Bush administration, see generally B. Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 *Ariz. L. Rev.* 815 (2004).

<sup>123</sup> See P.M. Schoenhard, *Disclosure of Government Information Online: A New Approach From an Existing Framework*, 15 *Harv. J.L. & Tech.* 503 (2002).

<sup>124</sup> Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act to the Heads of Departments and Agencies, Oct. 4, 1993, available at <http://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>.

<sup>125</sup> See S.J. Piotrowski, *Governmental Transparency in the Path of Administrative Reform*, cit at 30, 98.

<sup>126</sup> See K.E. Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 *Am. U. L. Rev.* 285 (2003).

<sup>127</sup> See D. Metcalfe, *Sunshine Not So Bright: FOIA Implementation Lags Behind*, 34 *Admin & Reg. L. News* 6 (2009).

<sup>128</sup> For an analysis of presidential memoranda, chiefly aimed at distinguish them from executive orders issued by U.S. Presidents, see P.J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action*, Lawrence (2002), 81-116. See, in general terms, J.L. Mashaw, *Gli atti sub-legislativi di indirizzo della pubblica amministrazione nell'esperienza degli Usa*, in P. Caretti, U. De Siervo (eds.), *Potere regolamentare e strumenti di direzione dell'amministrazione. Profili comparatistici* (1991), 111.

#### 4.2.2. The New Exemption 5: A Time Limit for Applying the Exemption

Only one of the amendments brought in by the 2016 reform directly affected the system of exemptions provided for in the FOIA, even though the analysis of the codification of the presumption of openness should have shown that it has had at least an indirect impact on that whole system. Was the reform insufficient in this respect? Should the lawmakers have intervened more intensely? A proper response to these questions would take a deep inspection of such system, which cannot be conducted here. However, it may be observed that the overall exemptions system stands, so limited revisions brought to it are better than massive alterations, which might end up distorting the system itself. This system is an essential element of the FOIA. Even though the primary purpose of the FOIA is to ensure the right of the people to know “what their Government is up to”<sup>129</sup>, Congress also took into adequate account public and private interests opposing the interest in disclosure<sup>130</sup>. Therefore, the statutory provisions containing the nine exemptions<sup>131</sup> constitute the balance Congress had to strike between such diverging interests<sup>132</sup>. The courts are saddled with a burdensome task in

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<sup>129</sup> This phrase is often used by federal courts in their decisions concerning the FOIA. See, e.g., *Mink*, 403 U.S., cit. at 11, 105 (1973) (Douglas, J., dissenting); *Reporters Committee*, 489 U.S., cit. at 19, 772-773; *National Archives And Records Administration v. Favish*, 541 U.S. 157, 171 (2004).

<sup>130</sup> See *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

<sup>131</sup> The interests demanding the protection of agency records and information from public access are concerned with the following matters: national security and foreign affairs (exemption 1); agency personnel rules and practices (exemption 2); non-disclosure provisions contained in statutes other than the FOIA (exemption 3); trade secrets and commercial or financial information revealed by – or otherwise obtained from – private parties (exemption 4); privileges comprehensively related to agency decision-making process (exemption 5); personal privacy, seriously undermined by the release of personnel and medical files, as well as other similar files (exemption 6); law enforcement and the diverse issues that the carrying out of relevant procedures may imply (exemption 7); the oversight function on the banking and financial system (exemption 8); geological and geophysical information and data (exemption 9).

<sup>132</sup> See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989), referring to *Mink*, 403 U.S., cit. at 11, 80.

implementing such balance<sup>133</sup>, but it is inevitable. Indeed, as has been argued, subsection (b) of the FOIA is capable of encompassing “virtually every major dilemma, accommodation, and delicate balance that a modern democratic government faces.”<sup>134</sup> For this reason, every alteration – albeit of apparently minor impact – introduced therein should be considered very carefully.

The FOIA Improvement Act amended exemption 5 by establishing a 25-year limitation of effectiveness. This exemption assigns agencies the power to refuse the release of memoranda or letters exchanged among agencies or within an agency whenever they could not be routinely obtained in court through discovery<sup>135</sup>. The exemption has diverse contents, as it is composed of multiple agency privileges, each of which are founded on their own rationale. The main ones are the following<sup>136</sup>: deliberative process privilege<sup>137</sup>; presidential communications privilege<sup>138</sup>; attorney work-product privilege; attorney-client privilege. The main issue here is whether the sunset provision added in 2016 applies to all those privileges or just to some of them. From the language of the 2015 Report<sup>139</sup>, it should be inferred that the former is the right solution<sup>140</sup>. Especially as far as the deliberative process privilege is

<sup>133</sup> See K.C. Davis, *Administrative Law of the Seventies. Supplementing Administrative Law Treatise* (1976), § 3A.34, p. 113.

<sup>134</sup> P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, cit. at 25, 656.

<sup>135</sup> See *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1050 (1973). On this exemption, see, e.g., R.J. Pierce Jr., *Administrative Law Treatise*, I (2002), § 5.11, pp. 276-281.

<sup>136</sup> The exemption also encompasses situations involving sensitive information, the release of which would cause harm to the proceeding agency. See R.J. Pierce Jr., S.A. Shapiro, P.R. Verkuil, *Administrative Law and Process* (2009), § 8.3.3e, pp. 471-473.

<sup>137</sup> See R.L. Weaver, J.T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279 (1989).

<sup>138</sup> A 1997 decision by the Court of Appeals for the District of Columbia Circuit deeply inspected the respective scope of these two privileges: *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

<sup>139</sup> S. Rept. No. 114-4, cit. at 4, 10.

<sup>140</sup> See F.J. Sadler, *Testimony*, in *Ensuring Government Transparency Through FOIA Reform, Hearing Before the Subcomm. On Government Operations of the House Comm. Oversight and Government Reform*, 114th Cong., 1st Sess., Feb. 27, 2015, 17, maintaining that the 25-year time limit would fit quite well the deliberative process privilege, while it would cause problems with the attorney-work

concerned, a proposal combining the foreseeable harm standard and the sunset provision has been advanced<sup>141</sup>.

## 5. Conclusion

Is the U.S. FOIA still a statute other countries may model upon their transparency legislation? The response to this question should be yes, provided that the theoretical framework emerging from the present Article be not overlooked. The theoretical approach followed has also led to pinpointing some paradoxes in the usage of the FOIA as a model. However, they are not strong enough to thwart this role of the statute. Why is it so? Because the FOIA, already in its original version, had the potential for ensuring the right to know. The foreword to the 1967 Attorney General memorandum mentioned above<sup>142</sup> grasped this potential, and that is why it is still so important.

Nevertheless, the FOIA reforms occurred over the years made some considerable adjustments. One of them was the strengthening of proactive disclosure in 1996. The category of frequently requested records has since played a pivotal role in this regard. The FOIA Improvement Act significantly contributed to clarifying what records fall within the category and this is definitely an upside produced by the reform. The risk to avoid is to get to a point, wherein access upon request and proactive disclosure are deemed interchangeable, as this would cause the entire theoretical framework to collapse. Since a 2016 OIP document has proved that the frequently requested records category possesses the potential for this risk to materialize, it is on

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product and attorney-client privileges. See, also, K. Singhal, *Disclosure, Eventually: A Proposal to Limit the Indefinite Exemption of Federal Agency Memoranda from Release Under the Freedom of Information Act*, 84 *Geo. Wash. L. Rev.* 1404 (2016), critically reading the amendment as applying only to the deliberative process privilege, because it should cover the whole exemption 5.

<sup>141</sup> According to this view, the more the age of an agency record approaches the expiration date for the invocation of exemption 5, the stronger is the need for its release and – accordingly – the rarer are the chances that such release would cause harm to the agency. See Z.D. Reisch, *The FOIA Improvement Act: Using a Requested Record's Age to Restrict Exemption 5's Deliberative Process Privilege*, 97 *Bost. U. L. Rev.* 1928-1929 (2017).

<sup>142</sup> But see *Davis Treatise*, cit. at 32, § 5:1, p. 309, criticizing this memorandum for giving a restrictive interpretation of FOIA provisions.

scholars to prevent this from happen. Since proactive disclosure and access upon request turn out to be both essential to implementing an adequate degree of administrative transparency, scholars should also ensure that these two institutions remain balanced and thus that neither of them prevail over the other.

Finally, as far as the other two amendments considered in the Article are concerned, the codification of the presumption of openness seems to ensure a sufficient degree of legal certainty. The scope of the amendment brought to exemption 5 to the FOIA, instead, is not very clear. This is another issue scholars will have to explore and check up on, also relying on practice and court decisions.