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THE NEWS MEDIA AND THE FOIA

DERIGAN SILVER*

Journalists were at the forefront of the effort to pass the Freedom of Information Act. News organizations were intrinsically involved in crafting the legislation and were a key factor in making sure the law was passed. For many reasons, however, FOIA has frequently failed to meet the news media's needs. One reason the law is failing is because journalists do not use it nearly as much as non-media requesters, a fact that stands in stark contrast to the history and purpose of the law. The purpose of this article is to explore data on who uses FOIA. In addition, it examines reasons journalists are not using the law, offers some practical reforms that could improve FOIA, and suggests advice on how journalists could better craft their FOIA requests. It also concludes, however, that despite its flaws, journalists are still using FOIA to write stories that advance self-government and the watchdog function of the press, and there is reason to believe a new generation of journalists are using FOIA in new and inventive ways.

Journalists were at the forefront of the effort to pass the Freedom of Information Act.¹ The Supreme Court of the United States noted the law was intended to protect the public's right to know² and to help serve as a check on government.³ Not only was the law intended to be used by journalists, journalists were intrinsically involved in crafting the legislation.⁴ As Professors Shannon E. Martin and Kamilla Benko noted, while Congressmen John Moss and others deserve much of the credit for passing FOIA, Moss and his staff "relied heavily on the expertise

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¹5 U.S.C. § 552 (2012).

²U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

³NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (Marshall, J., dissenting).

⁴See *infra* notes 15-49 and accompanying text.

of long-time activists who fought for access to government documents”⁵ including the American Society of Newspaper Editors, the Society of Professional Journalists, and the Associated Press Managing Editors. A review of the legislative history of the act, makes it clear that the law was intended to help the media inform the public about government operations and thus advance democratic participation in government⁶ and facilitate the press’s ability to act as a check on government abuse,⁷ two of the most fundamental theories concerning the role of freedom of expression and the press in a democratic society.⁸ As the 1964 House of Representatives Report on access laws declared, “A democratic society requires an informed, intelligent electorate and the intelligence of the electorate varies as the quantity and quality of its information.”⁹ In addition, journalists believe access laws are important tools, with one study showing that 97% of journalists believe open records laws are important for them to fulfill their duties.¹⁰

It is ironic then, that while FOIA has been criticized for a variety of reasons,¹¹ its most notable disappointment has been its “failure to meet the news media’s information needs.”¹² While FOIA is failing journalists for many reasons — most notably, as discussed below, the long delays and processing inefficiencies associated with access requests — a key reason the law is failing journalists is because journalists simply do not use it nearly as much as corporations and other non-media

⁵Sharon E. Martin & Kamilla Benko, *Forming FOIA: The Influence of Editors and Publishers on the Freedom of Information Act*, 14 MEDIA HIST. MONOGRAPHS 1, 2 (2011).

⁶See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (discussing of freedom of expression as a necessary right so that the electorate may be informed enough to participate in self-government).

⁷See generally Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521 (1977) (discussing of the need for freedom of expression so that the press may serve as a check on government).

⁸See Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 126-30 (2004) (discussing the self-government and watchdog functions of freedom of expression as they relate to freedom of information laws).

⁹S. Rep. No. 88-1219, at 8 (1964).

¹⁰See Charles Davis, *Stacked Deck Favors Government Secrecy*, IRE J., Mar./Apr. 2002, at 14.

¹¹See, e.g., Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013) (providing ample evidence that courts give overwhelming deference to administrative agencies’ decisions to not release information); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG. Mar./Apr. 1982, at 14, 15 (discussing the inefficiency of FOIA and the law’s poor cost-benefit ratio); Statement of Adina Rosenbaum, Staff Attorney, Public Citizen, before the Information Policy, Census, and National Archives Subcommittee, Oversight and Government Reform Committee, United States House of Representatives (Mar. 18, 2010) (documenting the over-withholding of information under FOIA).

¹²Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 1361, 1364 (2016).

individuals and organizations, a fact that stands in stark contrast to the history and purpose of the law.

The purpose of this article is to explore data on who uses FOIA. Although a comprehensive study of FOIA use in every agency governed by the legislation has never been conducted — and conducting such a study would be extremely difficult¹³ — several studies have looked at specific federal agencies to examine who makes requests. The article begins by reviewing the legislative history of FOIA and scholarship that has examined the role of news media organizations in crafting and passing the legislation. It then contrasts the clear purpose of the legislation with the equally clear reality that the law is not being used as intended by analyzing data about FOIA requests. The article concludes that while the exact number of requests made by media organizations is difficult to calculate, it is clear that such requests have historically represented an extremely small minority of overall requests. Finally, the article explores some possible explanations for why journalists represent such a small minority of requesters and offers practical suggestions for both how journalists can improve their FOIA requests and how the government could facilitate access by journalists.

The article also suggests that, even if media requests do not make up the majority of FOIA requests, this is not an appropriate metric for addressing the question, “Do journalists use FOIA *enough*?” The public’s interest in accessing government information remains high. During the last two fiscal years, more than 700,000 FOIA requests were received by federal agencies.¹⁴ The article suggests it is acceptable that journalists are not the primary users of FOIA even if the law was originally intended to be used primarily by journalists. While there are legitimate concerns that the large number of these requests that do not relate to the ability of the press to monitor and report on the government slow down the process and impede journalists from successfully obtaining information via FOIA, the article argues that some journalists are using the law quite successfully to gather information to help the press inform the public and act as a watchdog over government. The article concludes there is reason to believe a new generation of journalists may be using FOIA in new and inventive ways.

¹³See *infra* notes 50-54 and accompanying text. As discussed below, while agencies keep FOIA logs of the FOIA requests they receive, not all of these logs record the identity of a requester.

¹⁴DEPARTMENT OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2014, 2 (2016), https://www.justice.gov/sites/default/files/oip/pages/attachments/2015/05/01/fy_2014_annual_report_summary.pdf.

THE HISTORY AND PURPOSE OF FOIA

Although scholars have argued that access to government information is a constitutional right¹⁵ and at least two international courts have declared access to government information a human right,¹⁶ in the United States and much of the world, access to government information is guaranteed by statutory law.¹⁷ While government transparency has taken hold across the globe,¹⁸ the United States was a leader in the modern movement to pass access laws. When the United States enacted FOIA in 1966, it was the second country to enact a freedom of information law.¹⁹ As in most cases with freedom of information laws, FOIA was brought about by concentrated political activism. As Professor Mark Fenster noted, “Government transparency does not spring naturally from the modern democratic state.”²⁰ In the case of FOIA, much of the lobbying for the law came directly from news media and journalism organizations. Professor Kiyul Uhm wrote that the right to know movement cannot be classified as a public movement, because the general public did not actively participate.²¹ Professor Fenster found the freedom to information movement to be driven by political economy of the international news industry, the Associated Press’s struggle with European news cartels, a post-World War II emergent ideal of press freedom, and the American press’ conception of journalism as “a vocation organized around the objective reporting of news.”²² Against this backdrop, the phrases “freedom of information” and “the right to know” were purposely advanced by members of the press.

¹⁵See, e.g., Thomas I. Emerson, *The Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976).

¹⁶In 2006, the Inter-American Court of Human Rights declared access to government information to be included within the human rights of free thought and freedom of expression. See *Reyes v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006). In 2009, the European Court of Human rights did the same. See *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, ¶ 39 (Apr. 14, 2009).

¹⁷In the United States, the notable exception to this is access to court documents, which is secured *via* the First Amendment. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (finding the First Amendment right of access to criminal trials also extends to judicial documents).

¹⁸*Chronological and Alphabetical List of Countries with FOI Regimes*, FREEDOMOFINFO.ORG, <http://www.freedominfo.org/2016/04/chronological-and-alphabetical-lists-of-countries-with-foi-regimes/>.

¹⁹*Id.* Sweden was far in front of even the United States, enacting its freedom to information law in 1766.

²⁰Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 446 (2012).

²¹Kiyul Uhm, *The Cold War Communication Crisis: The Right to Know Movement*, 82 JOURNALISM & MASS COMM. Q. 131, 132 (2005).

²²Fenster, *supra* note 20, at 458.

The push to enact a federal freedom of information statute began in earnest in the 1940s, although the movement has its roots in the decades following World War I as newspaper editors and journalism associations “actively worked to export abroad the American model of a private, for-profit press insulated from government oversight and censorship.”²³ The roots of the movement came from the twin desires of opening foreign markets to American media corporations and exporting the American ideal of a free press.²⁴ A cartel of major European news agencies, including Reuters, Agence Havas, and Wolff, divided the world into geographic territories for newsgathering, and members of the cartel agreed to only publish information from other cartel members.²⁵ While the AP joined the cartel in 1887, it began to feel constrained by its membership when domestic news consumption increased. Competition from United Press, which was not restrained by membership in the cartel, also increased, and the AP started gathering news internationally.²⁶ Historian Margaret Blanchard noted the AP was also highly concerned with the European news agencies’ close ties to national governments that shaped news content.²⁷ In response to concerns over the control of international news gathering and distribution, European news media’s close ties to national governments, and the lack of objective news values that came from foreign news agencies, the AP launched an international effort to promote press freedom and access to government information and create independent news media around the globe to compete with the cartel.²⁸ After emerging commercially victorious, the American media “turned evangelical”²⁹ about press freedom and the need for access to government information.

In 1944, the American Society of Newspaper Editors announced a campaign to advocate for freedom of information around the world.³⁰ This included a collaboration with the Harry Truman administration to spur development of international news organizations that would be based on the American model of an independent press with professional trained journalists.³¹ In 1947, members of the press played roles on the UN’s Human Rights commission sub-commission on Free-

²³*Id.* at 451.

²⁴*Id.*

²⁵*Id.* at 451-52.

²⁶*Id.* at 452.

²⁷MARGARET BLANCHARD, EXPORTING THE FIRST AMENDMENT 6-7 (1986).

²⁸See Fenster, *supra* note 20, at 453.

²⁹*Id.*

³⁰See *id.*

³¹See BLANCHARD, *supra* note 27, at 52-89.

dom of Information³² and served as delegates to the Conference on Freedom of Information held in Geneva in 1948.³³ There were also efforts to promote press freedom and access to information at home. In 1944, the ASNE formed the Committee on World Freedom of Information to advance international goals related to access to information.³⁴ In 1945, Kent Cooper, the powerful and influential general manager of the AP, authored an article for *Life* magazine titled “Freedom of Information.”³⁵ In 1956, Cooper followed up his article with a book on access to information, which he titled *The Right to Know*, and argued both for the freedom to gather news and that the press was ethically bound to give the public information in order to promote self-government.³⁶

The two most prominent proponents of the right to know movement were James S. Pope, editor of the *Louisville Courier-Journal*, and Harold L. Cross, legal advisor to the ASNE’s Freedom of Information Committee.³⁷ Pope recruited Cross to write *The People’s Right to Know*,³⁸ which was published in 1953. The book both detailed the current state of constitutional and administrative laws governing access to information and government secrecy at the federal, state, and municipal levels³⁹ and advocated for additional freedom of information laws at the federal level.⁴⁰

Shortly after Cross’s book was published, the right to know movement found an ally in Congress when the House of Representatives Government Operations Committee established a Special Subcommittee on Government Information, chaired by California Representative John Moss, as a means to investigate Executive Branch secrecy.⁴¹ The

³²See *id.* at 155-63.

³³*Id.* at 174-97.

³⁴See Uhm, *supra* note 21, at 139. While Professor Uhm noted the term “free flow of information” was a more popular term than “right to know” in the 1940s and 1950s, the term “freedom of information” was in use throughout the 1940s. President Franklin Delano Roosevelt used it as early as 1940 to refer to the free flow of news. See CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 78-79 (2004).

³⁵Kent Cooper, *Freedom of Information: Head of Associated Press Calls for Unhindered Flow of World News*, *LIFE*, Nov. 13, 1944, at 55.

³⁶KENT COOPER, *THE RIGHT TO KNOW: AN EXPOSITION OF THE EVILS OF NEWS SUPPRESSION AND PROPAGANDA* (1956).

³⁷See Uhm, *supra* note 21, at 134.

³⁸HAROLD CROSS, *THE PEOPLE’S RIGHT TO KNOW* (1953).

³⁹*Id.* at 19-37.

⁴⁰*Id.* at 246 (calling on Congress to “legislate freedom of information for itself, the public, and the press”).

⁴¹See MICHAEL R. LEMOV, *PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 49 (2011).

ASNE Freedom of Information Committee was quick to begin working with the subcommittee, with Cross becoming its legal advisor, former journalists making up most of its staff, and prominent members of the media helping to devise its strategy.⁴² Pope testified at the subcommittee's first hearing, again using the rhetoric that access to government information was not a political issue, but a legal right.⁴³ The so-called "Moss Committee" routinely called journalists to testify to both document the difficulties in gaining access to government information and to gain publicity for the committee's work.⁴⁴ Based on the work of Moss, Cross and Pope, the Freedom of Information Act – whose very name was taken from a journalists 1949 book⁴⁵ — finally passed Congress in 1966.

Thus, FOIA was largely designed by journalists. On the floor when FOIA was passed, Moss stated, "The list of editors, broadcasters and newsmen and distinguished members for the corps who have helped develop the legislation over these 10 years is endless."⁴⁶ In addition, FOIA's history supports the concept that its intended purpose was for journalists to use the law to facilitate democratic self-government and act as a government watchdog. Professor Margaret Kwoka noted, "FOIA was . . . designed largely by journalists, for journalists, and with the particular goal in mind that journalists would use access to government information to provide knowledge to the public, which would, in turn, facilitate the public's effective participation in democratic governance."⁴⁷ Professor Fenster wrote that the press worked with the state to create the law under the assumption that "the press, acting as the public's agent, would advance and take advantage of the right to know."⁴⁸ Professor Kwoka also noted that of the 176 complaints about government secrecy collected by the Moss committee, "37 percent were from journalists and 45 percent from Congress itself, suggesting an outsized role for journalists in using any new freedom of information law."⁴⁹ The data, however, suggest that journalists are not the primary requesters of information under the law.

⁴²See Fenster, *supra* note 20, at 464.

⁴³See Uhm, *supra* note 21, at 140.

⁴⁴See Robert O. Blanchard, *Present at the Creation: The Media and the Moss Committee*, 49 JOURNALISM Q. 271, 272-74 (1972).

⁴⁵See *id.* at 276.

⁴⁶112 CONG. REC. 13,642-43 (1966).

⁴⁷Kwoka, *supra* note 12, at 1371.

⁴⁸Fenster, *supra* note 20, at 466.

⁴⁹*Id.*

FOIA REQUESTS BY JOURNALISTS

As one scholar wrote, “Very little is known about who uses the FOIA or how it is used.”⁵⁰ There has never been a comprehensive study of who makes FOIA requests across the federal government.⁵¹ Definitively answering what percent of FOIA requests are filed by journalists or news organizations is difficult because not all agencies report the identity of requesters. Agencies keep FOIA logs or lists of requests for information received that contain information about the requests. In addition, many agencies post their FOIA logs online.⁵² If a log is not available online, one may obtain it by using a Freedom of Information Request, a process sometimes described as “FOIA the FOIAs.” The information in the logs sometimes, but not always, includes a description of the information being requested, the name and/or organization making the request, the date the request was received, and the current status or final outcome of the requests (for example, granted, denied, partially granted). However, not all FOIA logs contain all of this information. For example, the Securities and Exchange Commission FOIA log contains the request identification, the requester’s name and organization, requester category, request description, request date, and final outcome.⁵³ On the other hand, the FOIA logs for the U.S. State Department contain only the requester’s name, making it difficult to determine if the requester is a member of the media.⁵⁴

Another possible tool for researching media use of FOIA is by examining fees. The FOIA fee structure, added in a 1986 amendment, allows for different categories of users to be charged different fees. There are four categories: commercial, media, nonprofit (scientific and edu-

⁵⁰Raymond M. Lee, *Research Uses of the U.S. Freedom of Information Act*, 13 FIELD METHODS 370, 370 (2001).

⁵¹See Kwoka, *supra* note 12, at 1376.

⁵²See, e.g., U.S. DEPARTMENT OF HOMELAND SECURITY COMPONENT FOIA LOGS, <https://www.dhs.gov/dhs-component-foia-logs> (last visited Jun. 28, 2016) (Web site containing links to the last three years of FOIA logs for U.S. Customs and Border Protection, Office of Civil Rights and Civil Liberties, Federal Emergency Management Agency, Federal Law Enforcement Training Center, Office of Intelligence and Analysis, U.S. Immigration and Customs Enforcement, Management Directorate, National Protection and Programs Directorate, Office of Biometric Identity Management, Office of General Counsel, Office of Operations Coordination, office of Policy, Science and Technology Directorate, Transportation and Security Administration, United States Citizenship and Immigration Services, United States Coast Guard, and United States Secret Service.)

⁵³See, e.g., U.S. SECURITY AND EXCHANGE COMMISSION FOIA LOGS, <https://www.sec.gov/foia/docs/foia-logs.htm> (last visited Jun. 28, 2016).

⁵⁴See, e.g., U.S. STATE DEPARTMENT FOIA LOGS (2005-2013), <https://foia.state.gov/Search/Logs.aspx#2014> (last visited Jun. 28, 2016).

ational) and other. For commercial requests, agencies, can charge fees for “reasonable standard charges for document search, duplication, and review.”⁵⁵ Only duplication charges are made for a request by “an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.”⁵⁶ Under FOIA, a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”⁵⁷ FOIA defines “news” as “information that is about current events or that would be of interest to the public.”⁵⁸ Unfortunately, most FOIA logs do not classify requests by fee status.⁵⁹ In addition, if a freelance journalist or citizen journalist were to file a FOIA request and not list an organization with the request or not specifically ask for the non-commercial fee, there would be virtually no way to know the request was a media request. There are additional problems. If an agency has a complete log, and the log is the subject of a FOIA request, a response is often long in coming.⁶⁰ Or, the agency may redact the identity of the requester citing privacy concerns or other FOIA exemptions,⁶¹ or not respond at all.⁶² In addition, agencies may keep incomplete logs that do not include useful information about requesters.⁶³ Agencies also frequently designate non-media entities as news media⁶⁴ or inconsistently categorize an organization.⁶⁵ Therefore, although agencies provide information about the FOIA requests they receive, there are multiple roadblocks to conducting a complete survey of FOIA requests by the media.

All agencies governed by FOIA also are required to file annual reports. While it would be easy for agencies to include information

⁵⁵5 U.S.C. § 552(a)(4)(A)(ii)(I) (2012).

⁵⁶*Id.* § 552(a)(4)(A)(ii)(II).

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹See Lee, *supra* note 50, at 373.

⁶⁰*Frequent Filers: Businesses make FOIA Their Business*, SOCIETY OF PROFESSIONAL JOURNALISTS, Jul. 3, 2006, <http://www.spj.org/rrr.asp?ref=31&t=foia> (noting that 25% of 199 departments who received FOIA requests for their FOIA logs did not respond within the required twenty working days)[hereinafter Frequent Filers].

⁶¹*Id.*

⁶²*Id.*

⁶³See Kwoka, *supra* note 12, at 1380 (discussing the difficulties of getting complete FOIA logs from agencies). Professor Kwoka described a “complete” log as one that contained a request tracking number, the date of the request, the identity of the requester, the subject matter of the request, the requester’s fee category, the actual fee charged to the requester, and the agency’s response. *Id.* at 1380-81.

⁶⁴See *id.* at 1384, 1388.

⁶⁵*Id.* at 1390.

about fee status in these reports, most agencies do not.⁶⁶ When an agency reports this information, it is easy to determine the percentage of requests that come from media organizations. For example, in 1998 and 1999, the Environmental Protection Agency provided information about requesters' fee status in its annual reports. In 1998, 1% of requests were from media organizations, while in 1999 1.2% of requests were from media organizations.⁶⁷ Unfortunately, since at least 2007, the EPA no longer includes this data in its annual reports.⁶⁸ In addition, the EPA currently groups media requesters together with educational requesters in its FOIA logs and it is unclear if they did this in their 1998 and 1999 reports as well.

Despite these obstacles to a complete study of FOIA requests, a number of studies of samples of requests that are based on FOIA logs with information about requesters' categories or identities. Professor Raymond M. Lee analyzed five years of data from the Federal Bureau of Investigation. In 1995, requests from news media made up 3.3% of all FOIA requests to the FBI.⁶⁹ In 1996, the number dropped to 2.6% percent and continued to drop in 1997 when it hit a bottom of 1.6 percent.⁷⁰ Starting in 1998, the number of requests by news media organizations began to increase and continued to increase until 2000. In 1998, 2.3% of requests were made by media organizations, increasing to 4.8 percent in 1999 and 6.5% in 2000.⁷¹ It should be noted that Professor Lee did not explain how he classified the identity of requesters to determine when a request should be attributed to a member of the news media. Current FBI FOIA logs only contain a requester's name, which may or may not include an organization and do not contain fee categories.⁷²

A 2005 review of five years of FOIA logs from the Pentagon concluded journalists from large media organizations made a very small number of requests.⁷³ Of the more than 10,000 requests received by the Pentagon from 2000 to 2005, the Associated Press made seventy-three

⁶⁶See Lee, *supra* note 50, at 373.

⁶⁷See *id.*

⁶⁸See ENVIRONMENTAL PROTECTION AGENCY FOI REPORTS, <https://www.epa.gov/foia/foia-reports#annual> (last visited Jun 28, 2016). Like most agencies, the EPA now only reports the total amount of revenue generated by fees.

⁶⁹Lee, *supra* note 50, at 374.

⁷⁰*Id.*

⁷¹*Id.*

⁷²See, e.g., FEDERAL BUREAU OF INVESTIGATION FREEDOM OF INFORMATION ACT LOG 1/1/2013 TO 3/31/2013, https://d3gn0r3afghep.cloudfront.net/foia_files/FOIA_LOG_1-1-2013_TO_3-31-2013.PDF (last visited June 28, 2016).

⁷³John Byrne, *Freedom of Information Logs Shed Light on Media's Military Curiosity*, THE RAW STORY, Nov. 23, 2005, http://rawstory.com/news/2005/Freedom_of_Information_logs_shed_light_1123.html.

requests, the *Los Angeles Times* made forty-two, the *Washington Post* made thirty-four, the *New York Times* made twenty-one, *USA Today* made nine, and the *Wall Street Journal* made six.⁷⁴ CBS News made thirty-two requests, Fox News made twenty-two requests, NBC News made twenty-one requests, and CNN made eleven.⁷⁵

In 2006, the Coalition of Journalists for Open Government analyzed 6,439 FOIA requests made in September 2005 to eleven Cabinet-level departments and six agencies.⁷⁶ The review found that requests from media organizations made up only 6% percent of all requests. The coalition requested FOIA logs from twelve departments and eight agencies, but did not include the three agencies that receive the most requests — the Department of Veterans Affairs, the Department of Health and Human Services, and the Social Security Administration — because more than 90% of requests to these agencies are also filed under the Privacy Act and are filed by individuals seeking personal information.⁷⁷ The coalition relied upon the logs to classify a requester as a media requester when the logs indicated a fee category for a requester.⁷⁸ The coalition made its own determination when no category was provided, although there is no explanation in the report of how these determinations were made.⁷⁹ While the study found that the top requester to each agency varied greatly by agency because of “special-interest” users,⁸⁰ no agency reported a majority of requests coming from media organizations.

The most recent analysis of FOIA logs was conducted by Professor Kwoka and focused on commercial users of FOIA and used data from fiscal year 2013.⁸¹ Although Professor Kwoka made FOIA requests for FOIA logs from twenty-three federal agencies,⁸² she was only able to get complete FOIA logs that included the fee category of the requester from the Securities and Exchange Commission, Food and Drug Admin-

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Frequent Filers, supra* note 60.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰For example, nearly all requests to the Parole Commission came from prisoners while the Defense Supply Center received “99 percent of their requests from companies seeking records on government contracts.” *Id.*

⁸¹Kwoka, *supra* note 12.

⁸²Professor Kwoka’s research examined the use of FOIA by commercial requesters. Therefore, she only sent FOIA request to agencies that received more than one thousand requests in fiscal year 2013 and collected more than \$10,000 in free from requesters. Because commercial requesters are most often charged fees and charged the largest fees this procedure targeted agencies with high levels of commercial requesting. *Id.* at 1379.

istration, Environmental Protection Agency, Defense Logistics Agency, Federal Trade Commission, and the National Institutes of Health.

The only agency that reported a significant portion of media requests was the FTC. News media requests constituted 14% of the FTC's requests in 2013. In every other agency, however, FOIA requests from news media were even lower than the 6% reported by the Coalition of Journalists for Open Government. Five percent of requests to the NIH were made by news media.⁸³ Less than 1% of requests to the DLA were classified as media requesters.⁸⁴ As noted above, the EPA groups news media and educational requesters together, making it difficult to know exactly how many requests came from the media. However, at least 1.8% of requesters were definitely news media or quasi-media.⁸⁵

According to the FDA's classification of fees, news media filed 12% of the requests to the agency.⁸⁶ However, many of the organizations classified as news media by the FDA were information resellers. Traditional news media organizations only accounted for 2% of the requests.⁸⁷ Similarly, at first glance, the SEC FOIA logs indicated that a much higher percentage of requests come from journalists than suggested by the 2006 coalition study. The SEC classified news media requests as 23% of the total it received in FY 2003.⁸⁸ However, this number is deceptive. Of the 2,807 requests the SEC classified as news media, 2,498 came from SECProbes.com.⁸⁹ As Professor Kwoka details in her research, SECProbes.com is a non-functioning Web site registered to a John Gavin, a "former money manager,"⁹⁰ who founded a company called SEC Insight that specialized in selling information obtained *via*

⁸³*Id.* at 1410.

⁸⁴*Id.* at 1401.

⁸⁵*Id.* Media organizations or quasi-media organizations making at least five requests were MuckRock News, EnergyWire/E&E Publishing, Environmental Integrity Project, The Center for Investigative Reporting, the Associated Press, Reuters, the *Washington Examiner*, *The Hill*, the *Huffington Post*, ProPublica, Junkscience.com, and the *Wall Street Journal*.

⁸⁶*Id.* at 1388

⁸⁷*Id.* at 1397. The FDA either inconsistently categorized commercial requesters or classified information resellers as media organizations. Media organizations or quasi-media organizations making at least five requests were the *Wall Street Journal*, Bloomberg News, The Project on Government Oversight, *USA Today*, ProPublica, the Associated Press, the *New York Times*, WSB-TV in Atlanta, Scripps Howard News Service, CNN, MSNBC.com, and the Natural Resources Defense Council. *Id.*

⁸⁸*Id.* at 1382.

⁸⁹*Id.*

⁹⁰See Gretchen Morgenson, *Deafened by the S.E.C.'s Silence, He Sued*, N.Y. TIMES, May 28, 2006, available at http://www.nytimes.com/2006/05/28/business/yourmoney/28gavin.html?_r=0.

FOIA requests to mutual funds and hedge funds.⁹¹ SEC Insight was categorized as a commercial requester and went out of business in 2012.⁹² SECProbes, now classified as a news media requester, appears to be making requests on behalf of a new company founded by Gavin called “Probes Reporter,” which has a similar business model to SEC Insight.⁹³ In addition, a law firm’s thirty-seven requests were also classified as news media requests.⁹⁴ Without SECProbes.com’s and the law firm’s requests, only 2.2% of the requests came from news media.

There is also evidence media organizations are litigating FOIA denials at a lower rate. A 2009 study by the National Freedom of Information Coalition found that 60% of its membership reported that open government litigation had “fallen dramatically” due to unavailability of funds.⁹⁵ An additional 85% reported they expected litigation would fall even more dramatically in the next three years.⁹⁶ While the FOIA Project found that FOIA lawsuits reached an all-time high in fiscal year 2014 only to increase in fiscal year 2015,⁹⁷ a study by the Project in 2013 found that news organizations filled fewer challenges in federal court for FOIA denials than in years past.⁹⁸ Thus, while there is more FOIA litigation, less of this litigation is being brought by members of the news media.

Commercial requesters are by far the greatest users of FOIA. As Professor Kwoka noted, commercial requesters “dominate the landscape at some agencies.”⁹⁹ The the Coalition of Journalists for Open Government found that more than 60% of the requests their study sampled came from commercial interests, with 20% of those filed by professional data brokers.¹⁰⁰ Professor Kwoka also noted the most common users

⁹¹*Id.*

⁹²Kwoka, *supra* note 12, at 1383.

⁹³*Id.* at 1384 (writing that although Probes Reporter made no SEC FOIA requests, it advertises using FOIA requests to provide information to clients for “\$1,187 per year for access to various FOIA requested records and reports, and [a higher level service] for \$15,000 a year”).

⁹⁴*Id.* at 1388.

⁹⁵*New Knight FOI Fund: Media Companies Involved in Fewer FOI Legal Actions*, NAT’L FREEDOM OF INFO. COALITION, Jan. 4, 2010, <http://www.nfoic.org/new-knight-foi-fund>.

⁹⁶*Id.*

⁹⁷David Burnham, *FOIA Lawsuits Reach Record High*, THE FOIA PROJECT, Jan. 6, 2016, <http://foiaproject.org/2016/01/06/foia-lawsuits-reach-record-high/>.

⁹⁸*Media Making Fewer Challenges to Government Secrecy in Federal Court*, THE FOIA PROJECT, Mar. 14, 2013, <http://foiaproject.org/2013/03/14/media-making-fewer-challenges-to-government-secrecy-in-federal-court/>.

⁹⁹Kowka, *supra* note 12, at 1365.

¹⁰⁰*Frequent Filers*, *supra* note 60.

of FOIA were information resellers¹⁰¹ and that at the SEC these users were filling “literally thousands of request per year.”¹⁰²

JOURNALISTS AND THE FOIA

Thus, while exact percentages are difficult to determine, it is clear that even though journalists were the intended users of FOIA and instrumental in its passage, the news media represent only a tiny fraction of the law’s users. This leads to several questions about FOIA and the media. Why don’t journalists use FOIA more? Even if they are not the top requesters, do journalists use FOIA *enough*? Are commercial requesters bad for FOIA, and do they impede its use by journalists?

The long delays associated with the law are a frequently cited reason for journalists not using FOIA.¹⁰³ As Melissa Davenport, director of the Washington, D.C., Open Government Coalition and Professor Kwoka wrote, “Information is often only as useful as it is timely.”¹⁰⁴ Professor David Cuillier surveyed 445 U.S. journalists in 2010 to examine individual and institutional predictors of public records use.¹⁰⁵ Twelve percent of the journalists surveyed indicated they had used FOIA within the previous month, while 47% reported they had used the law at some point.¹⁰⁶ When journalists who did not use public records were asked why, 35% reported that they didn’t know how to use access laws.¹⁰⁷ When asked specifically about FOIA, however, most journalists who did not use the law indicated it was specifically because of the length of time it took to receive records and that records were often redacted to the point of being useless.¹⁰⁸

¹⁰¹Kowka, *supra* note 12, at 1379-1414 (discussing commercial requests at the SEC, FDA, EPA, DLA, FTC and NIH).

¹⁰²*Id.* at 1423.

¹⁰³*See, e.g.*, Michael Doyle, *Missed Information: The Reporting Tool That Reporters Don’t Use*, WASH. MONTHLY, May 2000, at 38 (contending journalists don’t use FOIA is because agencies take such a long time to respond to requests for information that the information is stale).

¹⁰⁴Melissa Davenport & Margaret B. Kwoka, *Good But Not Great: Improving Access to Public Records Under the D.C. Freedom of Information Act*, 13 D.C. L. REV. 359, 386 (2010).

¹⁰⁵David Cuillier, *Pressed for Time: U.S. Journalists’ Use of Public Records During Economic Crisis*, at 9, paper presented at the Global Conference on Transparency Research, Newark, N.J., May 18-20, 2011.

¹⁰⁶*Id.* at 13.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

Although FOIA contains a twenty-day deadline for an agency to respond to a request,¹⁰⁹ it is well documented that FOIA requesters frequently face long delays. In fiscal year 2015, there were 713,168 FOIA requests,¹¹⁰ down slightly from FY 2014, when there were 714,231 requests.¹¹¹ During FY 2015, the federal government processed 769,903 requests.¹¹² This was a 19% increase from FY 2014.¹¹³ At the end of FY 2015, there was a backlog of 102,828 requests, a 35.6% decrease from FY 2014.¹¹⁴ The Office of Information Policy directly attributed¹¹⁵ this reduction in backlogged requests to a 2012 order that every year that “all agencies should make it a priority to close their ten oldest pending requests and appeals each year.”¹¹⁶

For reporting purposes, agencies are directed to separate requests into three categories or “tracks”: simple, complex and expedited.¹¹⁷ Requests that “seek a high volume of material or require additional steps to process such as the need to search for records in multiple locations”¹¹⁸ are categorized as “complex.” Expedited track requests can be either simple or complex requests.¹¹⁹ In FY 2015, the federal government received 7,353 requests for expedited processing,¹²⁰ granting 1,481 of them.¹²¹ The average processing time for “simple track requests” was twenty-three days.¹²² Although processing time for simple track requests had been decreasing steadily from FY 2010 to FY

¹⁰⁹5 U.S.C. § 552(a)(6)(A) (2012).

¹¹⁰U.S. DEPARTMENT OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2015, at 2 (2015), https://www.justice.gov/oip/reports/fy_2015_annual_foia_report_summary/download (hereinafter ANNUAL FOIA REPORTS FOR FISCAL YEAR 2015)

¹¹¹*Id.* This represents a drop of less than one-tenth of 1%. The Department of Homeland Security received the most requests for the second straight year, although this number was down 3.5% from FY 2014. *Id.*

¹¹²*Id.* at 3.

¹¹³*Id.*

¹¹⁴*Id.* at 8. FY 2014 had an exceptionally high number of backlogged requests. In FY 2012, there were 71,790 backlogged requests. In FY 2013, there were 95,564. In FY 2014, there were 102,828. Rather than a vast improvement over historical numbers, FY 2015 numbers seem to simply be a return to previous levels with a slight increase from FY 2013. *Id.* at 9.

¹¹⁵*Id.* at 11.

¹¹⁶*OIP Guidance for Further Improvement*, U.S. DEPARTMENT OF JUSTICE, Aug. 15, 2014, <https://www.justice.gov/oip/blog/foia-guidance-10>.

¹¹⁷ANNUAL FOIA REPORTS FOR FISCAL YEAR 2015, *supra* note 109, at 13.

¹¹⁸*Id.* at 14.

¹¹⁹*Id.*

¹²⁰*Id.* at 11.

¹²¹*Id.* at 12.

¹²²*Id.* at 14.

2014, FY 2015 was an increase from FY 2014 of 2.5 days.¹²³ The average processing time for “complex requests,” was much longer. In FY 2015, the average processing time for complex requests was 121.8 days,¹²⁴ an increase of 3.06 days from FY 2014.¹²⁵ Only five agencies were able to process complex requests in twenty or fewer days.¹²⁶ In FY 2015, the average processing times for expedited requests was 54.50 days,¹²⁷ a decrease of nearly fifty days from FY 2014 when the average processing time was 104.02 days.¹²⁸ The latest report by the FIOA Project, however, suggests wait times are increasing in 2016.¹²⁹

Some journalists have suggested these delays and failures to find records are deliberate decisions by government bureaucrats.¹³⁰ Another explanation is that FOIA is an underfunded or unfunded mandate or that FOIA offices are simply being flooded with commercial requests and cannot keep up.¹³¹ In FY 2015, the federal government employed 4,121.59¹³² FOIA staff.¹³³ The total estimated cost of all FOIA related activities by the federal government in FY 2015 was \$480.2 million.¹³⁴ In FY 2015, agencies collected a total \$4.4 million dollars in FOIA fees, less than 1% of the total costs of FOIA.¹³⁵

Another problem with journalists using FOIA is the way the law is written. FOIA directs federal agencies to “make records promptly available to any person.”¹³⁶ FOIA does not provide journalists with analysis or answers to general queries, nor will FOIA officials research where information can be found. FOIA does not even require the government to affirmatively disclose information about what records it has. Thus, if

¹²³*Id.* at 13. The average processing time was 28.34 days for FY 2010, 23.65 days for 2011, 22.66 days for FY 2012, 21.44 days for FY 2013, and 20.51 sayd for FY 2014. *Id.*

¹²⁴*Id.* at 14.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Good News and Bad News On FOIA Responsiveness*, THE FOIA PROJECT, Jan. 26, 2016, <http://foiaproject.org/2016/01/26/good-news-and-bad-news-on-foia-responsiveness/>.

¹³⁰*See, e.g.*, John Dyer, *50 Years of FOIA*, NIEMAN REPORTS, Winter 2016, at 40-41 (discussing journalists who have concluded that “FOIA is broken” because of the arbitrariness inherent in FOIA requests).

¹³¹*See* Kwoka, *supra* note 12, at 1422-24.

¹³²ANNUAL FOIA REPORTS FOR FISCAL YEAR 2015, *supra* note 109, at 19. This number includes both full-time FOIA staff members and the cumulative percentages of the time spent on FOIA requests by personnel whose primary duties do not include FOIA.

¹³³*Id.*

¹³⁴*Id.* at 20.

¹³⁵*Id.*

¹³⁶5 U.S.C. § 552(a)3(A)(2012).

a journalist does not know what records exist or what records to be looking for, FOIA is of little use. Requesters must have at least basic knowledge about the agency they are seeking information from to know what to ask for.¹³⁷ As journalist Shawn Boburg noted, in order to effectively request records, journalists need to understand how agencies work in order to “know what documents to look for.”¹³⁸

There are two solutions to this problem. First, the government should be more open about how records are kept. While Web sites like MuckRock¹³⁹ and FOIAMapper¹⁴⁰ can help a journalist discover what kinds of records can be requested and searchable databases of public information, the ultimate solution would be an online database maintained by each government agency of the types of records available. This sort of affirmative listing of documents would provide greater information to the public without requiring full disclosure of the information stored in the documents. Second, journalists who do not know what they are looking for need to craft more specific requests. For example, finding a source who can confirm or discuss a record can help journalists use FOIA better and confirm information given by a source. Discussing his use of FOIA, journalist Mark Feldstein explained that tips from sources allow him to narrow his focus or request a specific document.¹⁴¹ As Feldstein summarized, “FOIA is a crude tool. Don’t expect too much.”¹⁴²

Economics might also impact FOIA requests by members of the news media. As the U.S. news media have been hit with a historical decline in profits,¹⁴³ some commentators have worried that economic constraints may limit both FOIA requests and challenges to FOIA denials.¹⁴⁴

¹³⁷See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79, 89-90 (2012).

¹³⁸Dyer, *supra* note 129, at 43.

¹³⁹Muckrock “is a non-profit, collaborative news site that brings together journalists, researchers, activists, and regular citizens to request, analyze, and share government documents, making politics more transparent and democracies more informed.” About MuckRock, <https://www.muckrock.com/about/>. In addition to conducting original investigative reporting using government documents the site maintains a repository of original government records and information on how to file FOI requests. *Id.*

¹⁴⁰FOIAMapper provides users with a searchable database of all information obtained by the site *via* FOIA requests. FOIAMapper Q & A, <https://foiamapper.com/questions/>.

¹⁴¹Stephanie Martinez, *The Good, the Bad, the Ugly of Using FOIA*, AM. JOURNALISM REV., Oct. 8, 2014, available at <http://ajr.org/2014/10/08/foia-request-challenges/>.

¹⁴²*Id.*

¹⁴³See Pew Research Center’s Project for Excellence in Journalism, *State of the News Media 2016*, June 15, 2016, <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/> (noting, “Average weekday newspaper circulation, print and digital combined, fell another 7% in 2015, the greatest decline since 2010. . . . In 2015, total advertising revenue among publicly traded companies declined nearly 8%, including losses not just in print, but digital as well”).

¹⁴⁴See, e.g., Michelle Rydell, *No Money to Fight*, QUILL, Sept.-Oct. 2009, at 34.

Professor Cuillier's research focused the use of FOIA by journalists during economic crisis.¹⁴⁵ He found that journalists with the most experience were the most likely to use FOIA.¹⁴⁶ This led Professor Cuillier to worry that as news rooms continue to suffer economic losses and "buy out or lay off more experienced, costly journalists they lose the staff members" most likely to use FOIA.¹⁴⁷

Litigating denials is also both costly and time consuming, additional barriers to access.¹⁴⁸ Professor Seth Kreimer noted media organizations might engage in a cost-benefits analysis when pursuing FOIA litigation. He wrote, "[O]nly news organizations sufficiently large to allow speculative investigation and expenditure of attorney's fees that might bring reputational gains in the medium-term future are likely to undertake the expenditures necessary to bring FOIA effectively to bear."¹⁴⁹ As one author noted, the appeal process at both the state and local level for access denials is "often impractical or impossible — especially for smaller newspapers."¹⁵⁰ Professor Clay Calvert noted this might be the biggest problem with the media's use of FOIA, noting, FOIA is "meaningless in practice" if the financial resources are not available to fight the time-consuming battles when requests are denied.¹⁵¹

Another worry is that privacy concerns are keeping FOIA officials from releasing information to journalists that would be valuable in writing stories. Because journalists frequently are interested in writing about people, some apparently believe FOIA is not worth using because the government goes overboard to protect personal information unless a waiver is signed. A major concern is that as government increasingly gathers personal information and better understands how much can be gleaned from that information, government officials are increasingly reluctant to share personal information with journalists.¹⁵² Professor Jane Kirtley cited privacy as a significant concern, calling it "the biggest

¹⁴⁵Cuillier, *supra* note 105.

¹⁴⁶*Id.* at 17.

¹⁴⁷*See id.*

¹⁴⁸*See* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1021-22 (2008) (citing numerous examples of lengthy and costly litigation of FOIA denials).

¹⁴⁹*Id.* at 1023.

¹⁵⁰Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals to Facilitate the Media's Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 983.

¹⁵¹David L. Hudson Jr., *50 Years Later, Freedom of Information Act Still Chipping Away at Government's Secretive Culture*, ABAJOURNAL.COM, Jul. 1, 2016, http://www.abajournal.com/magazine/article/50th_anniversary_of_the_freedom_of_information_act/ (quoting Calvert).

¹⁵²*See, e.g.*, Dyer, *supra* note 129, at 42 (discussing concerns with the government's unwillingness to release information because the government "know[s] so much about what can be gleaned from [personal] information").

obstacle to successful use of FOIA.”¹⁵³ She contended that the concept of privacy has been expanded and distorted. Kirtley cited *National Archives and Records Administration v. Favish*,¹⁵⁴ a 2004 Supreme Court decision that broadly interpreted the personal privacy exemption in FOIA to include a right of familial or survivor privacy, as an example of how the concept of privacy has changed since FOIA was enacted.¹⁵⁵

For these reasons, in some ways it is not surprising that commercial requesters are using FOIA more than journalists even if the law was primarily intended to benefit the news media. Commercial requesters typically look for information that is easier to find using FOIA, know what information they are looking for, and have advantages that stem from “the resources of business interests [and] their insider status as a repeat player in the process.”¹⁵⁶ Because commercial requesters frequently are in the industry regulated by the agency from which they are seeking information, the commercial requester most likely has far greater knowledge of that industry than journalists and are thus more likely to know what to ask for.¹⁵⁷ As Professor Kwoka noted, “[B]usinesses which use FOIA to further profit interest often meet all of the qualifications for effective requesters: they often have interest that are more long-term, not immediate in nature; they have resources; and they know enough about what they are looking for to effectively seek the information under FOIA.”¹⁵⁸

There is some debate about whether commercial requesters are harming the system. Melanie Ann Pustay, director of the Office of Information Policy at the Justice Department, blamed the delays on the large number of requests received by agencies from private citizens and corporations.¹⁵⁹ Professor Kwoka contended the majority of commercial requests are far from serving the goals of FOIA¹⁶⁰ and are “crowding out more publicly beneficial uses of FOIA.”¹⁶¹ Michael Morisy, co-founder of the news site MuckRock, however, believes that commercial requests help train FOIA officials at smaller agencies how to process requests and in the long run help journalists acquire

¹⁵³Hudson, *supra* note 150 (quoting interview with Kirtley).

¹⁵⁴541 U.S. 157 (2003).

¹⁵⁵Hudson, *supra* note 150 (quoting interview with Kirtley).

¹⁵⁶Kwoka, *supra* note 12, at 1414.

¹⁵⁷Shkabatur, *supra* note 136, at 89-90.

¹⁵⁸Kwoka, *supra* note 12, at 1376.

¹⁵⁹Ravi Somaiya, *A Wizard at Prying Government Secrets from the Government*, N.Y. TIMES, Jul. 19, 2015, available at <http://www.nytimes.com/2015/07/20/business/a-wizard-at-prying-government-secrets-from-the-government.html>.

¹⁶⁰Kowka, *supra* note 12, at 1415.

¹⁶¹*Id.* at 1422.

information.¹⁶² While Kwoka argued commercial requesters are damaging “FOIA’s democratic aspirations,”¹⁶³ rather than limiting commercial requesters or giving journalists a preferred position she advocated for greater affirmative government disclosure.¹⁶⁴ It is also important to note that commercial use of FOIA is not improper. Although FOIA was written with the news media in mind, it clearly applies to everyone. Even Professor Kwoka notes that commercial requests are not “undesirable,” she simply worries that the volume of commercial requests are hurting media requests given the economic constraints of most FOIA offices.¹⁶⁵

Even if news media requests are small compared to commercial requests, it is still important to note these requests frequently result in compelling stories that do advance both the right to know and the ability of the press to work as a government watchdog. FOIA most certainly contributes to journalists’ ability to keep the public informed and increase its understanding of government activities. In addition, some journalists suggest that the use of FOIA is increasing among members of the media and note the many great stories that come from FOIA despite problems with the law. Journalists, after all, cite public records in a fifth of their news stories.¹⁶⁶ Journalist Ravi Somaiya wrote that FOIA has gained new importance since “the Obama administration has overseen a crackdown on government employees talking to journalists.”¹⁶⁷ Jason Leopold, the so-called “FOIA terrorist” and contributor to Vice News, noted that even when government employees will talk they frequently require anonymity and using FOIA is a better alternative to citing an anonymous source.¹⁶⁸ Morisy believes that several high profile stories that have attributed the information in the article to FOIA requests has renewed interest in FOIA.¹⁶⁹ Morisy, who does news room training on how to use FOIA across the country, also noted that during these trainings, more and more journalists now indicate they are comfortable doing FOIA requests than in years past.¹⁷⁰ There is also evidence that new media organizations are using FOIA at greater rates

¹⁶²Telephone interview with Michael Morisy (Jun. 23, 2016).

¹⁶³Kowka, *supra* note 12, at 1427.

¹⁶⁴*Id.* at 1429-33.

¹⁶⁵*Id.* at 1436.

¹⁶⁶*Open Doors: FOI and Daily News Coverage*, SOCIETY OF PROFESSIONAL JOURNALISTS (last visited Jun. 28, 2016), <http://www.spj.org/opendoors5.asp>.

¹⁶⁷Somaiya, *supra* note 158.

¹⁶⁸Rose Creasman Welcom, *Meet Vice News’s Jason Leopold, the “FOIA Terrorist,”* AM. J. REV. Dec. 23, 2014, available at <http://ajr.org/2014/12/23/meet-vices-jason-leopold-foia-terrorist/>(quoting interview with Leopold).

¹⁶⁹Interview with Morisy, *supra* note 169.

¹⁷⁰*Id.*

than traditional news organizations and are engaging in a sort of FOIA carpet bombing that frequently results in a great deal of data.¹⁷¹

Morisy also noted that there are a large number of powerful stories that have used FOIA. “When we started MuckRock we read a lot of Pulitzer Prize winning stories. The thing that many of them had in common, besides great storytelling, was the use of public records,” he said.¹⁷² For example, the 2014 Pulitzer Prize winning “Other than Honorable” series used FOIA requests to the U.S. Army to gather information about Army personnel suffering from Post-Traumatic Stress Disorder who were given so-called Chapter 10 discharges and lost their veterans benefits in lieu of facing a court-martials.¹⁷³ Other authors have also noted that ability of FOI laws to facilitate watchdog journalism, such as the use of state freedom of information laws to reveal corruption by Detroit Mayor Kwame Kilpatrick.¹⁷⁴

In addition, journalists routinely use information provided by non-profit organizations, government watchdog groups, and other organizations that were obtained *via* FOIA requests.¹⁷⁵ Professor Seth F. Kreimer noted that some of the most effective requesters are well-financed nonprofits. Professor Kreimer’s list of “most effective requesters” included the National Security Archives, the American Civil Liberties Union, the Electronic Privacy Information Center, the Electronic Frontier Foundation, the Center for Constitutional Rights, Judicial Watch, and the Center for National Security Studies¹⁷⁶ – organizations that frequently work with the news media to disseminate information on government activities. Others have noted the true benefit of FOIA is that it has fostered greater openness in government. As Professor Kirtly noted, “I don’t think it is possible to overstate the impact of FOIA on openness in government.”¹⁷⁷

¹⁷¹A search of FOIA logs assembled by FOIAMapper.com for the term “MuckRock” returned 993 results for requests made by the organization.

¹⁷²Interview with Morisy, *supra* note 169.

¹⁷³See *Other Than Honorable*, THE GAZETTE, available at <http://cdn.csgazette.biz/soldiers/>. See also, Dyer, *supra* note 129, at 38-39 (calling FOIA the “linchpin” of the series and discussing the process which lead to the authors decision to use FOIA to gather information for the story); *The FOIA Files*, THE SUNSHINE IN GOVERNMENT INITIATIVE, <http://sunshineingovernment.org/wordpress/the-foia-files/> (last visited Jul. 1, 2016)(catalog of more than 700 stories using information obtained *via* FOIA).

¹⁷⁴Danielson, *supra* note 149, at 981-82 (2012) (describing the use of open records laws to obtain information and noting the story “amply demonstrates the importance of open records laws for government transparency and accountability”).

¹⁷⁵See Kreimer, *supra* note 148, at 1024.

¹⁷⁶*Id.*

¹⁷⁷Hudson, *supra* note 150.

CONCLUSION

FOIA was designed to advance First Amendment ideals related to self-government and the watchdog function of the press. It was designed by journalists and their allies in Congress to be a tool of democracy. However, it is clear that news media representatives constitute a small minority of requesters. While exact numbers are difficult if not impossible to ascertain, it's clear that fewer than one tenth of FOIA requests are filed by journalists. However, based on the numerous and important stories that have come from FOIA requests, it is equally clear that it is a valuable tool for journalists reporting on a wide range of topics. Journalists like Morisy have an optimism that is contagious when discussing FOIA. It is hard to not be swayed by his enthusiasm and to believe that despite its flaws and limits, many journalists find FOIA to be an effective tool for gathering information. Despite this optimism, however, both FOIA itself and the way journalists use it could be improved. Decreasing delays and providing information about what kinds of information is available would certainly help improve FOIA, while increased training on how to use FOIA and education on the many powerful stories that have been creating using data obtained by the law would increase its use by journalists.