Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws

by David C. Vladeck

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In this new age of environmental law, scholars, advocates, policy makers, journalists, and other interested members of the public can gain access to and harness information about our environment through federal right-to-know laws, including the Freedom of Information Act (FOIA). The question is whether these statutes ensure that environmental information is made available to the public in a timely and dependable way.

In theory, the answer is yes. These statutes appear to provide a comprehensive right of access to information generated by the federal government or acquired by the federal government from private parties and state and local governments. In practice, however, this net of government-information statutes provides what is at best a piecemeal and not entirely satisfactory pathway to needed environmental information and is at worst the illusion of a right of access where none exists. There are many reasons why the reality does not match the expectations.

First, FOIA—by far the most important access tool—is a requester-driven statute. The government’s responsibility under FOIA is to respond to requests for information, not to initiate the publication or dissemination of information. This is FOIA’s Achilles’ heel. The process of drafting and submitting FOIA requests and then waiting for the agency’s response is a breeding ground for delay and cynicism over the Act’s efficacy.

Congress sought to fine-tune FOIA in 1996 when it enacted the Electronic FOIA Amendments (EFOIA) to place affirmative obligations on agencies to compile information that is of general interest to the public and to make it available on the Internet. But agencies have by-and-large failed to comply with EFOIA’s affirmative disclosure mandate, and thus FOIA remains predominantly a requester-driven statute.

Second, a perennial problem is that access-to-information statutes are subject to political manipulation by administrations that are intent on limiting public access to government-held information. When George W. Bush took office in 2001, one of the first official acts of his Attorney General John Ashcroft was to issue a directive to the heads of all federal agencies and departments notifying them that the Justice Department would defend all agency efforts to withhold information under FOIA so long as there was a plausible basis for so doing. More recently, the Environmental Protection Agency (EPA) has drastically scaled back the information made public under the Toxics Release Inventory (TRI) program of the Emergency Planning and Community Right-to-Know Act. The TRI program tracks the waste production and release of approximately 650 dangerous chemicals. Prior to EPA’s rollback, facilities had to report detailed information under FOIA so long as there was a plausible basis for so doing. For pollution


amounts less than 500 pounds, facilities only had to file a 
short form certifying that the chemical was under the limit.\(^8\)
Now, for the majority of TRI chemicals, the threshold for 
reduced reporting is 5,000 pounds, so long as 2,000 pounds or 
fewer are released directly into the environment.\(^9\)

Third, access-to-information statutes are only as effective as 
courts say they are, and the effectiveness of FOIA and other 
access-to-information statutes, such as the Federal Advisory 
Committee Act, have been undercut by judicial interpretation.
Courts have approved lengthy agency delays in processing 
requests. Courts have interpreted exemptions in FOIA and 
other statutes for trade secrets and confidential business 
information quite expansively, creating a broad and widening gap 
in the public’s ability to acquire environmental information 
generated by corporations.\(^10\) The Supreme Court’s increasingly 
restrictive approach to attorney’s fees has weakened the ability 
of prevailing plaintiffs in access-to-government-information 
litigation to collect their fees.\(^11\) To illustrate the pitfalls in 
ensuring what we call, perhaps naively, FOIA’s “right” of 
access, I use two cases I have worked on for environmental 
groups to show that even diligently pressed FOIA litigation 
takes time and effort and slows substantially the outflow of 
important public-health data.

Where does this leave us? In my view, there is now a signi-
ficant and growing dissonance between the promises made 
by our federal right-to-know laws and their performance. It is 
time to overhaul our nation’s right-to-know laws in three 
important ways:

First, right-to-know laws should place an affirmative duty on 
the government to make environmental information available 
to the public. The Internet and other communication tools have made obsolete the request-and-wait-for-a-response approach designed for paper records. Placing the obligation for disclosure on the government also resolves the nettlesome procedural problems that impair the effectiveness of FOIA and other requester-driven statutes.

Second, right-to-know laws should grapple with the cross-
cutting problem of confidential business information, which is the most frequently invoked justification for denying public access to environmental data. Agencies are ill-equipped to deal with confidentiality claims, and they generally rubber-stamp company claims of commercial sensitivity. Only a small fraction of information asserted to be commercially sensitive is, in fact, sensitive. To handle claims of competitive injury better, procedures must be fashioned: (a) to place a significant burden of proof on the submitting company to substantiate claims of commercial sensitivity; (b) to deter unfounded claims of likely competitive harm by punishing companies that make them; and (c) to enable agencies to evaluate claims of likely competitive injury more effectively.

Third, Congress should send a strong signal to the judi-
ciary that access-to-information statutes should be construed to maximize public access to environmental data and to permit withholding where—but only where—disclosure is likely to cause an identifiable and significant harm to the government or the submitter. All too often courts defer to generalized agency claims of harm without taking into account the age of the records, the remoteness of the alleged injury, or the nature of the alleged injury. At present, none of the federal access-to-information statutes empower courts to balance the public interest in disclosure against the private interest in secrecy—a calculus that would result in the disclosure of valuable environmental information.

I. Crosscutting Federal Right-to-Know Statutes

We will focus our attention first on the Freedom of Information Act and then turn to the Federal Advisory Committee Act.

A. FOIA

1. Background

First enacted in 1966, FOIA establishes a presumption of open access to all records in the hands of the federal govern-
ment. FOIA does so in three ways. First, it requires the government to publish in the Federal Register all “substan-
tive rules of general applicability,” “statements of general policy or interpretations of general applicability formulated and adopted by the agency,” and descriptions of the agency’s organization and rules regarding requests to obtain agency information.\(^12\) FOIA also requires the government to make other information available to the public in reading rooms; EFOIA requires that this information be made available via the Internet. Most importantly, it gives members of the public a general right to ask for and be provided with virtually all government-held information.

2. FOIA §552(a)(3)(A)

The real genius of FOIA is its provision allowing “any person”\(^13\)—including corporations, nonprofit entities, and

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\(^8\) Id.
\(^9\) Id. at 76937.
\(^10\) See generally Critical Mass Energy Project v. NRC, 975 F.2d 871, 22 ELR 21373 (D.C. Cir. 1992) (en banc) (holding that reports submitted to the Nuclear Regulatory Commission are confidential and thus protected from disclosure).
\(^11\) See Alan B. Morrison, Balancing Access to Government-Controlled Information, 14 J.L. & Pol’y 115, 117 n.5 (2006) (noting that the Court’s decision in Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), which held that a plaintiff must obtain court-ordered relief in order to collect attorney’s fees, means that “in the FOIA context . . . the Government can fight for years and then ‘voluntarily disclose’ the requested records before a judge rules against it, and thereby avoid paying any fees”).
\(^13\) Id. §552(a)(3)(A) (emphasis added).
To illustrate the strengths and weaknesses of FOIA in practice, it is useful to briefly sketch the progression of two FOIA cases I worked on for environmental organizations.17 The first, Natural Resources Defense Council (NRDC) v. United States Department of Defense,18 is an ongoing effort to force the Department of Defense (DOD), EPA and the Office of Management and Budget (OMB) to release records relating to perchlorate, an ingredient in rocket fuel that contaminates groundwater in about 30 states.19

The case began in the way almost all FOIA cases begin. NRDC had looked at the health effects data on perchlorate and concluded that it likely posed a significant threat to people who might be exposed to it through their drinking water.20 NRDC submitted a series of FOIA requests in the spring and fall of 2003 to DOD and EPA, and later to OMB.21 Predictably, none of the agencies responded to NRDC’s requests, so NRDC sent in additional letters urging a response and bided its time. After waiting a full year, NRDC filed this action in March 2004 against all three agencies.22

The agencies filed a typically uninformative answer23 and, over the next nine months, requested successive extensions of time to enable the agencies to complete their searches for responsive documents, to process the large volume of documents identified as responsive, and to release nonexempt documents. In November 2004—over 18 months after NRDC filed its initial FOIA requests—EPA and DOD filed motions for summary judgment.24 At that time, between EPA and DOD, 7,000 total records were withheld, and DOD excluded the Air Force from its search for responsive records.25

Three obvious flaws in the Government’s motions fueled my suspicion that they were filed to delay the progress of the litigation. First, DOD acknowledged that it had refused to search Air Force records, even while it claimed that it had designated the Air Force as its “lead military agency” on perchlorate years earlier.26 Second, the declarations and Vaughn27 indexes submitted by the Government were seriously deficient because EPA and DOD either provided no document-specific justifications at all, or if they did, they failed to explain why the withheld records were predecisional.28 The third and final straw was that the Government withheld many records on the basis of obviously overbroad exemption claims.

While preparing its summary judgment motion, OMB decided that twenty records were nonresponsive and excluded them for that reason, and that 57 documents should be released to NRDC.29 This left 243 documents, in whole or in part, at issue; all were withheld under Exemption 5.30 OMB was playing a critical role in pressing EPA to set a high

14. Id. §551(2).
15. Id. §552(a)(3)(A).
16. Id. §552(a)(4)(B).
17. Prior to joining the faculty of Georgetown University Law Center full-time in 2002, I spent over 25 years as a staff lawyer and director of Public Citizen Litigation Group, where I handled FOIA cases for parties seeking disclosure of government-held information. I continue to represent parties in FOIA litigation. The discussion of the cases that follows is based on my participation as counsel for the plaintiffs and on the voluminous court filings and correspondence generated by each case. The assertions that follow are not supported by a conventional citation are based on my account of the events that are reported in the text.
20. Perchlorate contamination poses potential health risks to tens of millions of Americans, particularly fetuses and newborns. See, e.g., Brechner et al., supra note 19, at 778 (outlining the harmful effects of perchlorate).
23. FOIA provides that “the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant . . . unless the court otherwise directs for good cause shown.” 5 U.S.C. §552(a)(4)(C).
25. Motion for Summary Judgment by DOD, supra note 24, at 3.
26. Id.
28. See, e.g., NRDC v. U.S. Dep’t of Def. (NRDC II), 388 F. Supp. 2d 1086, 1096–97, 1103–04, 1106–07 (C.D. Cal. 2005) (rejecting DOD’s and EPA’s Vaughn indexes). Vaughn indexes play a key role in FOIA litigation by injecting a degree of adverseness into FOIA litigation, which is inherently nonadversarial. Courts require the Government to: (1) prepare a Vaughn index to identify each record withheld (typically by the record’s date, author, recipients, title, subject matter, and length), any attachment to the record (which is frequently the case with e-mails), and the exemptions the Government claims justify withholding each segregable portion of the record; and (2) provide a detailed justification (typically in the form of a declaration) correlated to the Government’s exemption claims for each segregable portion of each withheld record. See generally Founding Church of Scientology v. Bell, 603 F.2d 945, 947–49 (D.C. Cir. 1979) (discussing the failings of a Vaughn index prepared by the FBI).
29. Id.
30. Id.
threshold for perchlorate exposure, thereby minimizing the remediation costs the government and defense contractors would face. OMB had shared documents relating to potential cleanup costs with outside lobbyists working for defense contractors, including the Executive Office of the President Group, and Richard Belzer, a former OMB economist who the agency claimed was an unpaid consultant. OMB made the far-fetched claim that doing so was necessary to "preserve the confidentiality of internal Executive Branch deliberations." Although OMB invoked Exemption 5, the agency’s Vaughn index did not identify the authors or recipients of many of the withheld documents, suggesting that the documents may well have been produced by, or shared with, nongovernmental parties.

In March 2006, the court denied the motions for summary judgment filed by OMB, EPA, and DOD. Finding that OMB had engaged in "selective disclosures" to aid private industry in its fight against perchlorate regulation, the court held that OMB had to turn over records shared with outside parties, including the EOP Group, Belzer, and other "contractors." The court also held that DOD’s failure to identify the recipients and authors of withheld records foreclosed the agency’s reliance on Exemption 5, and accordingly ruled that those records had to be released as well.

In April 2006, the Air Force moved for summary judgment. Having spent a full year on its search, the Air Force claimed that it had uncovered barely 400 records relating to perchlorate. Puzzled by the small number of records the Air Force unearthed, the court thought that something was awry and granted our motion to take discovery on the adequacy of the Air Force’s search. Extensive discovery showed that thousands of responsive records had not been identified and turned over.

In July 2006, NRDC and EPA entered into a settlement to establish a process for resolving their dispute over the remaining records. These procedures enabled the parties to resolve their differences and wind up the litigation involving EPA. But, at the time of this writing, proceedings remain active with both DOD and OMB.

**NRDC v. Department of Defense** showcases some of the common procedural pitfalls that await FOIA plaintiffs. Another case, *New York Public Interest Research Group (NYPIRG) v. EPA* spotlights the key substantive difficulty with FOIA in environmental litigation—FOIA’s exemption for confidential business information (Exemption 4). *NYPIRG* involved EPA’s plan to clean up the Hudson River, which had been contaminated by at least one million tons of polychlorinated biphenyls (PCBs) that had been discharged into the river by the General Electric Corporation (GE) over a thirty-year period. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), EPA has the authority to compel a responsible party to implement a cleanup remedy chosen by the agency.

In December 2000, EPA published for public comment a proposed plan for dredging the upper Hudson River to eliminate PCB contaminants, at an estimated cost of over $450 million. GE argued that dredging was the wrong cleanup strategy because it would result in the resuspension of PCB that had settled to the river floor. After the comment period closed on July 1, 2001, GE engaged in off-the-record meetings with EPA and OMB, and GE and EPA entered into a confidentiality agreement in connection with these meetings.

In February 2002, EPA ordered that its proposed large-scale dredging plan be implemented, and in July 2002, EPA issued an Administrative Order on Consent, in which GE agreed to pay EPA $5 million for partial reimbursement of the agency’s past costs and up to $2.625 million for the agency’s future costs—a small fraction of the agency’s past costs and an even smaller fraction of the agency’s estimated future costs.

In NYPIRG’s view, the settlement between GE and EPA had all of the hallmarks of a government giveaway. NYPIRG filed the case against EPA and OMB on July 3, 2002 to learn what had taken place during the secret meetings between GE, EPA, and OMB. The key question was whether, under FOIA, EPA could withhold 43 records it received from GE as part of the negotiations over GE’s responsibility for cleaning up the Hudson. The sole basis for EPA’s withholding was FOIA Exemption 4, which protects trade secrets and con-
fidential business information. The withheld documents, many of which were entitled "Hudson River Proposal" and "Hudson River—Proposed Remedy," set forth GE's analyses of the costs, benefits, and environmental consequences of EPA's proposed remedy and GE's alternatives. Many of the pages were marked "Privileged & Confidential," and the confidentiality agreement executed by the parties contemplated that EPA would not share these submissions with nongovernmental parties. GE made no effort to intervene in the litigation, nor did it submit any declarations or affidavits explaining why, in its view, the documents were privileged or confidential. The question then became whether information of the kind GE provided to EPA falls within the scope of Exemption 4. EPA argued that it did because the information was commercial in nature and because it was confidential, as evidenced in part by the confidentiality agreement GE and EPA had executed. NYPIRG contended that the withheld documents had no intrinsic commercial value, and "were not prepared to aid GE in its business (unless its business is dumping hazardous materials into the Hudson River) but to advocate against the environmental remedy favored by EPA." 

The district court agreed with NYPIRG, but its reasoning reveals the friction points under Exemption 4. To qualify as commercial the "information itself must in some fashion be commercial or financial in nature or use." The court reasoned that although GE "clearly is a commercial entity," the information "does not reveal anything about the nature and character of GE's business, or its revenues, expenses or income, or anything that a commercial business would want to protect for fear of competitive injury." Rather, GE submitted the documents in order to "advocate a policy position, because it had a financial stake in the outcome of its meetings with EPA and OMB, and because it sought to convince EPA to adopt its less expensive remedy in addressing GE's dumping of PCBs into the Hudson River." 

The court also wrestled with EPA's alternative claim that disclosure of the records would impair the agency's ability to obtain necessary information in the future, and therefore that the information was "confidential" under Exemption 4. In addressing this question, the court flagged but did not resolve the question of whether National Parks & Conservation Ass'n v. Morton or Critical Mass Energy Project v. NRC provided the controlling test for impairment. The court recognized that the confidentiality agreement was evidence that GE expected the records to remain confidential and supported the inference that, but for a promise of confidentiality, GE would not have furnished them to EPA. But the court concluded that GE's subjective belief was not dispositive, and ordered EPA to release the records submitted by GE.

4. Lessons Learned?

First, the good news: FOIA remains a viable tool to pry loose environmental data if—but only if—there is no urgent need for the records and one has access to a legal team that can sustain the effort over a long haul.

FOIA also provides incentives for organizations and individuals to turn to the courts to pursue information denied to them by the agencies. Of course, not all FOIA denials lead to litigation. FOIA litigation has also proved to be a useful tool to gain insights into the government's handling of important environmental issues. For instance, in NRDC, DOD claimed that the Air Force is the Department's lead component on perchlorate and touted the lengths to which the Air Force had gone to inventory the extent of contamination, to study perchlorate's health effects, and to devise effective remediation programs but the Department's rhetoric did not match the evidence.

There is also bad news. For one thing, there is a welter of potential procedural disputes that can mire FOIA litigation and derail it altogether. For instance, five years after NRDC's requests—and after four years of litigation, three full rounds of summary judgment briefing, an extensive discovery—the case is still pending. Even NYPIRG, a case that proceeded rather promptly, took over a year from filing to be resolved. Thus FOIA lays down an uncertain path for parties who need prompt access to records.

There are also serious substantive problems that limit FOIA's effectiveness in environmental cases. Perhaps the biggest obstacle is looming presence of Critical Mass. Although the ruling has been adopted only by the D.C. Circuit, it is followed by every federal agency in making determinations about whether to disclose information that arguably falls within Exemption 4. There are two reasons for this. One, the Department of Justice, which oversees the executive branch's implementation of FOIA, takes the view that Critical Mass is controlling as a matter of law, and federal agencies follow its lead. And two, unlike many of FOIA's other exemptions, matters that fall within Exemption 4's scope are not subject to discretionary release by the government. In permitting submitters to sue to enjoin disclosures under the Act (so-called reverse-FOIA cases), the Supreme Court in Chrysler v. Brown suggested that Exemption 4 implicates,

54. Id. Exemption 4 provides that FOIA does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).
55. NYPIRG, 249 F. Supp. 2d at 330.
56. Id.
57. Id. at 337.
59. NYPIRG, 249 F. Supp. 2d at 322–33.
60. Id. at 333–34.
61. Id. at 334–35.
62. Id. at 334–35.
63. Id. at 335–36.
64. Id. at 337.
65. Id.
66. Motion for Summary Judgment by DOD, supra note 24, at 3.
69. Id. at 465.
70. 441 U.S. 281 (1979).
and may be co-extensive with, the Trade Secrets Act, which makes it a crime for a federal employee to knowingly disclose trade secret information in the government’s hands absent legal authorization to do so.\textsuperscript{71} Since then, lower courts have ruled that the Trade Secret Act’s scope is “at least co-extensive with that of Exemption 4.”\textsuperscript{72} The combination of these rulings sends an unmistakable message to agencies: disclosure of trade-secret and confidential business information is impermissible, both under FOIA and the ‘Trade Secrets Act. For that reason, government employees are especially wary about disclosing information that might fall within Exemption 4, since doing so would violate FOIA and may be considered a crime under the ‘Trade Secrets Act.

\section*{B. The OPEN Government Act of 2007}

Congress recently enacted the first major revision to FOIA in a decade. The 2007 Amendments overhaul the procedures agencies use to track and process FOIA requests. The amendments first aim to end disputes over when the agency’s time to start processing a FOIA request begins to run by providing that the clock starts on “the date on which the request is first received by the appropriate component of the agency.”\textsuperscript{73} The amendments further provide that agencies that fail to comply with the time limits may not assess search fees on requesters.\textsuperscript{74}

The amendments require each agency to establish a public-liaison office to “assist in the resolution of any disputes between the requester and the agency.”\textsuperscript{75} Agencies also must establish automated Internet or telephone systems to update requesters on the progress the agency is making on their requests and give estimated completion dates.\textsuperscript{76} The amendments direct the National Archives and Records Administration to establish an Office of Government Information Services, which has government-wide oversight of FOIA.\textsuperscript{77} The amendments also will make it easier for requesters who are forced to go to court to obtain information to recover their attorney’s fees and costs if they prevail. It is too soon to tell whether these amendments will be implemented diligently by the executive branch and, if so, whether they will improve agency performance under FOIA.

\section*{C. The Federal Advisory Committee Act}

The Federal Advisory Committee Act (FACA)\textsuperscript{78} was enacted in 1972 because Congress had become convinced that there were no effective controls in place to regulate the process by which the president, the executive branch, and Congress were eliciting advice from outsiders.\textsuperscript{79} FACA recognizes an unfettered right of the president and the executive branch, as well as Congress, to seek advice from outsiders, subject to modest procedural requirements. The Act requires any branch of government establishing an advisory committee to follow certain guidelines.\textsuperscript{80} Advisory committees must give advance notice of their meetings in the Federal Register and take other measures to ensure that interested parties are notified of upcoming meetings.\textsuperscript{81} All of the committees’ papers and detailed minutes of meetings must be made available to the public.\textsuperscript{82}

FACA’s effectiveness has been undermined by court rulings that have narrowed its scope. Two of these rulings came in high-profile cases involving advisory committees created to advise the president on controversial policy questions.

The first, Association of American Physicians & Surgeons v. Clinton,\textsuperscript{83} involved President Clinton’s Task Force on National Health Care Reform. The Task Force was composed wholly of federal employees, and thus the Task Force asserted that it was not a committee covered by FACA.\textsuperscript{84} But the plaintiffs alleged that the Task Force’s chair, First Lady Hillary Clinton, was not a federal employee, and neither were an unknown number of unpaid, outside advisers who participated actively in meetings of the Task Force and its various working groups.\textsuperscript{85} These outsiders, the plaintiffs claimed, were de facto members of the committee, and the presence of nonfederal employees on the committee required compliance with FACA.\textsuperscript{86} The court held that Mrs. Clinton qualified as a full-time government employee under FACA but remanded the case to determine whether the nongovernment consultants were de facto members of the committee or its working groups.\textsuperscript{87} As the court put it, a de facto member of the committee is one who “regularly attends and fully participates in working group meetings” or in meetings of the Task Force.\textsuperscript{88} By the time the case was remanded, the Task Force had completed its work and had been disbanded.\textsuperscript{89} The government agreed to comply with FACA and open its records to the public.\textsuperscript{90}

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\textsuperscript{79.} Prior to FACA, the use of advisory committees was subject to regulation under Executive Order No. 11007, 3 C.F.R. 182 (1949 & Supp. 1962), \textit{reprinted in} 5 U.S.C. §1333 app. 194–95 (1964). While FACA incorporated some features of the Executive Order, it has a far broader application, especially with regard to presidential advisory committees, which were not covered by the Executive Order but are covered by FACA. \textit{Compare} 5 U.S.C. app. 2 §3(4)(“The term ‘presidential advisory committee’ means an advisory committee which advises the president.”), with Exec. Order No. 11007 §2(a), 27 Fed. Reg. 1875, 1875 (creating no special distinction for presidential advisory committees outside of the base definition of advisory committees).
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\textsuperscript{80.} 5 U.S.C. app. 2 §5(c).
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\textsuperscript{81.} Id. §10(a)(2).
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\textsuperscript{82.} Id. §10(b).
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\textsuperscript{83.} 997 F.2d 898 (D.C. Cir. 1993).
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\textsuperscript{84.} Id. at 901.
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\textsuperscript{85.} Id.
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\textsuperscript{86.} Id. at 915–16.
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\textsuperscript{87.} Id. at 911, 915–16.
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\textsuperscript{88.} Id. at 915.
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\textsuperscript{89.} Id. at 901.
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The de facto membership rule was short-lived because in *Cheney v. United States Dist. Court for Dist. of Columbia*, the D.C. Circuit announced that outsiders could be seen as de facto members of committees only where they “had a vote” or “had a veto” over the committee’s decisions. Under this reading of FAC, outsiders may play an active role in government committees so long as they do not vote or exercise formal veto authority.

Another blow to FAC was delivered earlier in *National Anti-Hunger Coalition v. Executive Committee of the President’s Private Sector Survey of Cost Control*, which addressed whether task forces created by an advisory committee to support its work are subject to the strictures of FAC. The President’s Survey on Cost Control (the Grace Commission) organized 36 task forces to “gather information, perform studies, and draft reports and recommendations,” which were ultimately submitted to the Executive Committee of the Survey, an advisory committee composed of corporate executives. A coalition of low-income groups and individuals sued to gain access to the records and reports prepared by these task forces. The D.C. Circuit held that absent a showing that the Executive Committee was merely “rubber stamping the task forces’ recommendations,” the task forces were not covered by FAC, and thus their meetings could take place in secret with no public oversight.

Congress’ effort to ensure comprehensive regulation of advisory committees has been undermined, if not altogether subverted, by a series of court rulings that have narrowed FAC’s scope and given a clear road map to agencies that want to obtain advice from outsiders but avoid public accountability. Until Congress revisits FAC and plugs these gaping loopholes, FAC will be little more than an empty promise of government oversight of the advisory process.

II. Three Proposals for Reform

As I have tried to demonstrate, there is a growing gap between the promise of open access made by our federal right-to-know laws and their performance. The question, then, is what can be done to bring performance in line with reasonable expectations? I have three modest proposals for reform.

A. Place an Affirmative Duty on Government to Make Categories of Important Environmental Information Available on the Internet

The time has come to place an affirmative duty on government to use Internet technology to make environmental information accessible to the public without routinely having to use FOIA’s request-and-wait procedures. There are two overarching reasons why this paradigm shift in information-access laws is both necessary and overdue. One is that the technology for creating, storing, and sharing information has undergone a seismic transition since FOIA was enacted. But the time when our nation’s records will be created and stored in electronic format is fast approaching, and it is time to adapt our access-to-information laws to that impending reality. The second reason is that FOIA’s file-a-request-and-wait-for-a-response approach is also anachronism. In this age of electronic records, must government respond to every request for information by deploying armies of employees to search through vast storerooms, to process the records that they find, and then to photocopy and mail them to a single requester? The answer is plainly no. So long as there are paper records, FOIA will have its place; for the future, EFOIA charted a course away from that model, but it has been slow to take root.

My proposal bypasses EFOIA and builds on existing models that direct government to make publicly available, via the Internet, discrete categories of information that are especially important to the public. These models could easily be adapted to categories of environmental information as well.

The best and most recent example came about as a result of the Federal Funding Accountability and Transparency Act of 2006 (Transparency Act), which required the government to design and make operational by January 1, 2008, a searchable database that provides detailed information on every entity receiving federal contracts, grants, and other awards. The website is now up and running. The available information includes the entity receiving the award, the amount of the award, information about the award (including the transaction type; the funding agency; the purpose of the funding; the location of the recipient; and an identification of the city, state, and congressional district where the grant will be performed), a “unique identifier” of the entity receiving the award and of the parent entity of the recipient if any, and any other relevant information.

Although the OMB website has been operational only for a brief period, it clearly has fulfilled Congress’ expectations. One can now track from agency to recipient almost every federal dollar spent, except those paid out under entitlement programs. The data available on the website has long been compiled by the government in electronic form, simplifying to some degree the process of making it available on a searchable website. The government also was able to piggyback on the work of OMB Watch, a nonprofit watchdog organization that with foundation support had already constructed a comprehensive, searchable database that is also available free

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93. 711 F.2d 1071 (D.C. Cir. 1983).
94. Id. at 1072.
96. Id.
97. Id. at 1072, 1074.
98. Id. at 1075–76 (internal quotations omitted).
100. See id. §2(b)(1), 120 Stat. at 1187. The website is operational, is easy to use, and contains all of the information that is called for in the Act. See Welcome to USAspending.gov, http://www.usaspending.gov (last visited Feb. 16, 2009); see also Elizabeth Williamson, OMB Offers an Easy Way to Follow the Money, Wash. Post, Dec. 13, 2007, at A33 (detailing the debut of the website).
of charge to the public. As a result of the Transparency Act, it is now easy to track virtually all federal grant and contract expenditures by the recipient company, by the kind of contract, or even by congressional district. There is no reason why OMB’s website cannot serve as a model for similar programs with environmental data.

Indeed, there are many examples of information of undeniable public importance that could be made available in the same way federal spending information is available to the public on USAspending.gov. One set of valuable data would be the enforcement records of EPA, the Occupational Safety and Health Administration, the environmental section of the Department of Justice, and other agencies that engage in environmental enforcement. All of these records are available under FOIA, but none are readily available on the Internet. There is no reason why Congress could not require OMB to compile this data on a searchable website and permit the public to track repeat-offender corporations in the same way the public can now track grants and contracts given to the same corporate recipients.

This is not a pie-in-the-sky suggestion. Once again, the nonprofit sector is a step ahead of government. For more than a decade, the Transactional Records Access Clearinghouse (TRAC), a nonprofit organization housed at Syracuse University, has used FOIA to compile and disseminate statistics about the enforcement activities of the Department of Justice, the Department of Homeland Security, the Federal Bureau of Investigation, the Internal Revenue Service, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco and Firearms. The breadth and range of information on government activities that TRAC makes available is impressive by any measure. TRAC makes most of this information available to the public free of charge. If a single nonprofit organization funded by modest foundation grants and contributions from private citizens can create massive and useful databases of this kind, it is hard to imagine that the government could not also do so at a reasonable cost.

There are other examples as well. Although EPA recently scaled back reporting requirements for the TRI, it remains a valuable source of information for communities about toxic substances stored in their neighborhoods and releases of toxins into their air and water. Not only has EPA made TRI data available in several forms via the Internet, but public interest groups have taken the TRI data and made it accessible along with other government environmental databases, making the data even more comprehensive and useful. These examples illustrate that feasibility and cost are no longer the constraints that they once were. Nor, in my view, is political will. The difficult question ahead will be which categories of information warrant being made available to the public in this way. Public access to information comes at a cost. The government must invest time and effort to put information in a form that can easily be transferred into a database that is useful for the public. No one would benefit if an undifferentiated mass of information were posted on the web; the cost of sifting through it would overwhelm its value. Nor is all information created equally. Some information is more useful and valuable to the public than other information, and priorities will need to be set. The question is how to do so.

In my view, the Paperwork Reduction Act (PRA) could serve as a useful tool to identify potentially worthwhile data. Under the PRA, government agencies must secure approval from OMB before undertaking significant information-gathering activities. The agency must justify its need for the information and identify the utility the information would have for the agency’s regulatory functions. The PRA imposes a high burden on agencies to demonstrate the importance of the information because the Act’s ultimate aim is to reduce the paperwork burden government imposes on regulated industry and individuals. And since the 1998 passage of the Government Paperwork Elimination Act, Congress has encouraged agencies and regulated parties to furnish information to the government in electronic form in order to ease the conversion of the data into a searchable database.

I propose that Congress amend the PRA to require OMB to report annually on the information-collection activities it has approved and to recommend to Congress which categories of information, if any, should be made public through a database or other electronic means. Congress would exercise final decision-making responsibility, but with prompting from OMB, such a system might considerably accelerate the creation of new government databases of information important to the general public.

B. Impose Rigorous Substantiation Requirements on Companies Claiming That Information Submitted to the Government Is Confidential

As noted above, one pervasive obstacle to the disclosure of environmental data is that submitting companies routinely claim that the data is confidential and that disclosure will cause them competitive harm. It is time for Congress to

104. See, e.g., The Right-To-Know Network, www.rtknet.org (last visited Feb. 16, 2009) (allowing users to search the TRI data along with data from a dozen or more other government databases on toxic substances).
106. Id. §3507(d).
107. Id. §3508.
108. Id. §§3501(1), 3507(d).
reexamine how agencies handle these claims. Under statutes that mandate the disclosure of information, like the Toxic Substances Control Act,\textsuperscript{112} agencies often accept these claims without question and keep the information secret\textsuperscript{113}; those determinations are rarely if ever challenged. Under statutes like FOIA, once an agency receives a request for information submitted by a third party, the agency is then required to notify the submitter of the information and give the submitter an opportunity to object.\textsuperscript{114} Sophisticated submitters then inundate agencies with declarations and legal memoranda arguing that the information is confidential, and agencies almost invariably accede to these claims.

In both cases, the results are the same: the agency confronts confidentiality claims that it is ill-equipped to evaluate; the agency gains nothing from the release of the information; the agency has been provided no resources to assess these claims; and the agency faces possible reverse litigation if it decides that the information should be released. The deck is plainly stacked in favor of secrecy.

To reverse this dynamic, Congress should enact legislation that takes a number of steps. First, the legislation should require submitters to provide the agency with a detailed justification, signed by a senior corporate official under the penalty of perjury, explaining why each of the submitted records is commercially sensitive. To keep companies from reflexively contending that every document they submit to the federal government is confidential, this justification should be provided along with the records.

Second, to deter groundless confidentiality claims, companies should be punished—with fines or other civil penalties—for making unfounded claims. This step will further ensure that companies exercise judgment and discretion before claiming that information is commercially sensitive.

Finally, Congress should provide agencies with the resources to evaluate these claims on their own. Under current practice, the agency often has little choice but to rely on the requester to refute the company’s confidentiality claims and to advocate in favor of disclosure. Ensuring that the requester is heard is important because it injects some degree of adverseness into a proceeding that would otherwise be one-sided. But the requester is at a distinct disadvantage in advocating for disclosure—the requester has not seen the records nor reviewed the company’s arguments for secrecy and thus is fighting blindfolded. Agencies must be able to independently evaluate these claims, with whatever assistance the requester can muster, to ensure a fair outcome. In the long run, giving agencies the tools they need to resolve confidentiality claims may cut down on reverse-FOIA cases while increasing the disclosure of environmental information.

C. Strengthen Pro-Disclosure Mandates for Environmental Data

Congress should also recognize that, for a variety of reasons, what we call “environmental information” is different from the other information that companies submit to the government and should, almost without exception, be made public. The most important difference is that the environmental information that companies submit to the government concerns the emissions of toxic materials into our nation’s air, water, or soil, or the use of potentially toxic materials in the products Americans buy. Environmental information uniquely affects the American public; it identifies the toxic substances to which we and our families are exposed. Putting aside the question of whether companies have a right to discharge or otherwise use these substances, there is no question that the government can condition that right on the public disclosure of information that shows precisely what the company is emitting, when the company is emitting it, and how much of each substance the company is emitting or using in its products. Congress has plenary authority to require the disclosure of environmental data to inform the public, so long as it also does not permit competitors to use the information for commercial purposes. Thus, there is no lurking question of the government’s power to require the disclosure of environmental data—there is only a question of will.

Congress should take two measures to promote greater availability of environmental data. First, Congress should amend FOIA to place a higher burden of justification on the government. To be sure, FOIA already requires de novo judicial review and places the burden of persuasion on the government.\textsuperscript{115} But courts have nonetheless been deferential to agency exemption claims. In environmental cases, courts have fallen into the trap of presuming that a company will sustain competitive injury if information it submitted to the government is made public. This presumption must be reversed. The most effective way of achieving that goal is to require the government to show not just that the withheld records fall within a FOIA exemption but also that the records’ disclosure would cause demonstrable harm to the government or the submitter.

Congress should also carve out a special FOIA provision that would empower courts to balance the public interest in disclosure against the private interest in secrecy—a calculus that would result in the disclosure of valuable environmental information. There is precedent for such a balancing test in FOIA already. Under FOIA’s personal privacy exemption, Exemption 6, courts are directed to set aside agency decisions to withhold personal information unless the agency can show that disclosure “would constitute a clearly unwarranted invasion of personal privacy.”\textsuperscript{116} There is no reason why such


\textsuperscript{113} See, e.g., Chemical Regulation, supra note 111, at 5 (discussing EPA’s policy of treating claimed confidential information as such despite the fact that 95% of premanufacture notices for new chemicals contain some claimed confidential information).


\textsuperscript{115} 5 U.S.C. §552(a)(4)(B) (directing de novo review and authorizing in camera inspection of disputed records); Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996) (stating that the agency resisting disclosure bears the burden of proof).

\textsuperscript{116} 5 U.S.C. §552(b)(6). The courts have found that this standard requires reviewing courts to engage in a balancing of interests. See U.S. Dept. of State v. Ray, 502 U.S. 164, 175 (1991) (explaining that the exemption requires courts to
a heightened standard could not apply to environmental data as well.

III. Conclusion

The purpose of this Article is to show that our nation has a long way to go before its right-to-know laws deliver on their promise of a comprehensive and reliable stream of environmental information to the public. At present, the net of government-information statutes is frayed and outdated. As a result, it provides a piecemeal and unreliable pathway to needed environmental regulation.

There are, however, a number of measures that the new administration can take to align the reality of these laws with their promise. The new administration can reallocate agency resources to cut agencies’ FOIA backlogs and give the public a better window into what its government is doing, and the new administration can advocate in court in favor of rules that support openness and transparency instead of secrecy. These changes would be dramatic and swift.

Congress, too, will have to act. It will have to commit greater resources to support openness. It will have to replicate its success in the Transparency Act by requiring the government to open other categories of information to ready public access. And it will have to grapple with the broader question, which already looms on the horizon, of how to replace FOIA once paper records are a thing of the past.

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*balance an individual's privacy rights against the public policy of disclosing agency action.*
Comment on Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws

by Mark A. Cohen

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Prof. David Vladeck’s article, Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws,1 provides a powerful case for strengthening existing environmental right-to-know laws such as the Freedom of Information Act (FOIA) and other enabling statues that require firms to report—and the government to provide public access to—environmental information. He focuses on two examples where almost by default, due to procedural burdens and the ability to claim proprietary business information, the government can withhold and/or delay release of data. Instead of focusing on the legal aspects of right-to-know laws, this brief comment argues that information provides an important social value—but one that must be weighed against the potential costs of information provision. Clearly identifying these costs and benefits helps to shed light on the appropriate legal thresholds for disclosure.

The costs of disclosure are well articulated by both firms and government regulators. From a company’s perspective, there is both the physical cost of disclosure (e.g. filling out Toxics Release Inventory reports) and the potential cost of losing proprietary information. The first cost is not particularly relevant to Vladeck’s article, since he focuses primarily on data that has already been provided to the government or information that the government itself has either collected or generated. Certainly, the issue of firm proprietary data needs to be taken seriously—but it is also one that can be dealt with through judicial oversight without much difficulty. Courts know how to weigh the private interest of proprietary information against the public interest of disclosure. Even if there is a legitimate concern about proprietary data being released, if the potential social benefit is high enough that disclosure is warranted, adequate safeguards can often be provided so that the data can be selectively disclosed without fear disclosure to a competitor.

The costs to the government of disclosure are threefold. First, there are the physical costs of disclosure, which can be substantial when records must be searched and carefully reviewed for legitimate concerns of non-disclosure. Second, concerns have been raised that disclosure might stifle the free flow of internal deliberations that come with transparency. Of course, many people would argue that government should be transparent in its deliberations, and the latter argument is not valid, even if the matter involves settlement negotiations with a defendant. The extent to which more transparency on these deliberations would reduce settlements is an empirical issue to assess. Thus, there might need to be clear legal rules that attempt to protect the settlement process but otherwise allow for government transparency. Third, there have been calls for less disclosure due to national security concerns, especially following 9/11. While potentially a serious cost, there is also evidence that immediately following 9/11, this provided cover for significant reductions in public data provision that provided little or no such threat.2

The benefits of increased transparency accrue to both private parties and to society at large. Individuals who are harmed by chemical releases, for example, might require access to government data in order to both establish liability and to estimate damages. The potential benefits from this information disclosure are significant, and since this is largely compensation for harm caused by one party against another, this compensation is not a social cost at all. Instead, it is a classic instance of internalizing externalities and thus provides a net positive social benefit.

Not all requests for information disclosure are for purposes of litigation. Even if this information is not to be used for litigation, it could provide local residents with important knowledge about the risks they face, and prompt them to alter their behavior in ways that will improve their welfare—whether it be to keep children from playing in certain areas, pressuring local agency regulators to enforce existing laws, lobbying political leaders to tighten environmental laws, or

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pressuring companies directly to voluntarily reduce pollution. Instead, information disclosure has been shown to be a powerful mechanism that may affect firm behavior and reduce potential social harms that are not otherwise regulated.

Information disclosure programs have been characterized as the third wave of environmental regulation, following the original regulatory approach and the subsequent introduction of market-based incentives. Perhaps the best-known example of the third wave is the Toxic Release Inventory (TRI) program in the U.S., whereby firms are required to disclose legally emitted chemical releases. TRI has brought about significant reductions in chemical emissions. For example, total on-site and off-site releases of toxic emissions are reportedly down by 59% between 1988 and 2006. The effect of TRI disclosure on both firm behavior and firm value has been empirically demonstrated. Other disclosure programs have focused on drinking water safety and risk management plans for chemical releases.

In addition to government dissemination of this information, environmental organizations have utilized this information to provide user-friendly, community-based information sources. Some caution must be noted, as it is possible that information disclosure programs can have unintended consequences. For example, an information disclosure program might focus firms on pollutants that are less important than others that are not subject to disclosure, or it might cause them to offshore to another country or smaller facility that is not subject to reporting requirements. Indeed, one of the shortcomings of information disclosure programs is that to date, they have not been subject to rigorous cost-benefit tests. Notwithstanding these concerns, it is likely that information programs will yield significant benefits and generally small costs; hence they are likely to be a cost effective mechanism to shed light on environmental exposure and risks. For example, as Vladeck points out, EPA has recently reduced the availability of TRI data by increasing threshold reporting limits. While no explicit cost-benefit analysis was conducted, EPA noted that the estimated cost savings to firms from reduced reporting was $1.8 million for 1,800, or $1,000 per firm. So, the real question is whether on average, providing information on TRI releases under the older threshold limits provides more or less than $1,000 in social benefits.

While the cost-benefit framework set out above is admittedly theoretical and is largely void of actual data, it does provide a starting point for thinking about appropriate policies. Further study might shed light on the magnitude of these costs and benefits, but for now simply considering them carefully is a first step. For example, Vladeck demonstrated that the current burden of proof standards effectively allow government regulators to withhold documents for years based on procedural delays without clearly justifying an exemption. This power to delay appears to have high costs—not only in legal and judicial costs, but also in raising the cost to potential FOIA requesters so much that they are deterred from requesting information in the first place. This is especially true since, as Vladeck demonstrates, legal standards have made it virtually impossible for plaintiffs to collect attorney’s fees in FOIA litigation if the government ultimately “voluntarily discloses” prior to being ordered by a court. Thus, the benefits of “speedy” disclosure are likely to be very high.

From a research and public policy perspective, one of the most important aspects of Vladeck’s paper is his call for more “pro-disclosure mandates” from Congress. Indeed, the call should go beyond simply requiring that environmental data routinely be made available to the public—unless there are substantial risks as discussed earlier. Because information is a valuable public good, providing more data in ways that are accessible will expand the use of those data by researchers. Currently, even TRI data that are made public are not made available in a format that allows for ease of use by researchers. For example, it is difficult to aggregate facility level TRI data to the corporate owner level and toxicity weights are not provided. Linking TRI data to other facility level enforcement data is tedious, and enforcement data themselves are incomplete and not user friendly. Not only does this mean that the high cost of using these data deters many researchers from utilizing them, but each researcher makes their own independent judgments about how to recode, combine, and otherwise build a usable dataset. As a result, fewer studies are conducted, and the studies that are published oftentimes have conflicting conclusions—which might simply be attributable to differences in the datasets they ultimately used. These shortcomings are not simply of academic concern. Studies of environmental enforcement as well as information disclosure programs can help inform policymakers about who to regulate, how to design appropriate disclosure or enforcement policies, and which firms to target for enforcement. Thus, accurate and readily available data can help inform the policy process in ways that will provide the most bang for the government’s buck.

Information disclosure can be a powerful tool for changing firm behavior—but at its core, information is simply an imperative in a free market economy. Well functioning markets depend upon informed buyers and sellers. Thus, consumers, homeowners, and residents need to know about

6. For example, §1414(c)(4) of the Safe Drinking Water Act Amendments of 1996 requires community water sources to issue “consumer confidence reports” on the safety of their local water supply. 42 U.S.C. §300g-3(c)(4), ELR STAT. SDWA §1414(c)(4). Under §112(r) of the Clean Air Act Amendments of 1990, businesses must publicly disclose “risk management plans” (RPMs) for accidental chemical releases. 42 U.S.C. §7412(r)(7)(B), ELR STAT. CAA §112(r)(7)(B).
8. Vladeck, supra note 1, at 10773-74.
10. Vladeck, supra note 1, at 10774.
11. Id. at 10774 n.11.
the risks and hazards they face in order to make informed judgments about their purchase decisions, where they live and work, where their children play, etc. Without this information, the public themselves will make decisions that are less than optimal. While there are costs to providing information, information itself is valuable—and withholding it is costly. While information disclosure policy should fully take into account these costs and benefits, providing accurate information to the public is unlikely to be too costly relative to benefits, and should become a priority of government regulatory agencies.
Comment on Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws

by Gary D. Bass and Sean Moulton

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Openness is an American bedrock principle, with secrecy being disdained except where absolutely necessary. As former Sen. Daniel Patrick Moynihan (D-N.Y.) said, “Secrecy is for losers.” If information is the lifeblood of democracy, then public access to information would be the arteries that keep democracy healthy. Yet, despite the clear importance of transparency to an effective and accountable government, we continue to fall short of the openness we need and have often been promised. David Vladeck’s article, Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws, lays out a clear case for how and why our federal efforts to establish the public’s right to information, especially environmental information, have not yet succeeded and what next steps would be most helpful in correcting that failure.

We as a nation have made repeated attempts to make our government open and accountable to the people. And while progress has been made, in some areas more progress than others, we continue to struggle with the responsibilities of our often longstanding right-to-know laws, such as the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA). Vladeck appropriately spreads the blame for these shortcomings across all three branches of government. Congress’ right-to-know laws have become outdated and fail to keep pace with the reality of what can and should be accomplished in the Internet age. Executive agencies, fearing criticism and oversight of their actions, continue to be resistant to transparency, causing excessive delays and often requiring those seeking information to go the expensive route of hiring a lawyer and going to court. And the courts have often, though not always, acted with excessive deference to the federal government.

The growth in government secrecy, especially for environmental and health data, has had profound and negative impacts on the United States. It makes the public and communities less safe. It hinders public participation in policy issues that effect their health and well-being. It contributes to near-record lows in trust of the executive branch. With the growth of the Internet, it would seem a no-brainer that government transparency should be at its strongest point—and, accordingly, our democracy very healthy. Yet the opposite is happening; the public disclosure arteries are seriously clogged, jeopardizing our democratic health. As Vladeck notes in his numerous examples, attempts to get information about issues affecting public health are met with intense long-term resistance making the disclosure of the information take longer and cost more. Given this type of government reaction, it is not surprising that a 2009 survey of American adults found 73% think the federal government is secretive, and 44% think state government is secretive. The trend line is not good: in 2006, 62% thought the federal government was secretive.

There are three intertwining problems that influence government secrecy concerning environmental information. First, today’s laws and policies on public access are inadequate for today’s 24-hour, 7-day-a-week Internet world. Too often the burden is on the public to request information; and there are far too many loopholes to allow agencies to withhold information. These policies need radical overhaul. Second, the federal government’s use of interactive technology is largely grounded in the 20th century. The use of Web 2.0 thinking is only starting to make its way into government via the incoming Obama Administration, but the hardware, software, and capacity of public employees needs significant upgrade. Finally, even with the best technology and policies, there is an underlying...
culture of secrecy that pervades government. No civil servant gets rewarded for improving public access, but they sure get attention if they give out information that could be misused. Disincentives for openness are built into the way agencies and government operates. Civil servants need to be given the freedom to disclose information and the rewards for doing so.

Probably the most vexing policy problem is FOIA, the venerable, core right-to-know law. Vladeck explores the repeated attempts to update and fix FOIA.\footnote{Vladeck, supra note 2, at 10773.} The latest fix, the Open Government Act of 2007,\footnote{OPEN Government Act of 2007 §6(a)(1), 5 U.S.C. §552(a)(6)(A)(ii) (2008).} may still help as agencies implement the required changes. While the law’s basic purpose—establishing the fundamental responsibility of government to disclose information to anyone—is laudable, Vladeck concludes that “FOIA’s file-a-request-and-wait-for-a-response approach is also an anachronism.”\footnote{Id. at 10776, 10777.} In this context the Open Government Act is nothing more than a palliative or a band-aid to fix a more profound problem. Congress has not yet realized that the laws itself needs a fundamental overhaul. The ultimate goals should be to have a national standard that affirmatively requires federal agencies to disclose information to the public in a timely manner and in ways that make the information findable and usable.

Even within the current FOIA framework there are major implementation failures. The federal government has been implementing FOIA for more than 40 years and the reality is they have never done a particularly good job at it. A primary reason is that administrations often do not welcome the openness that FOIA promises. Requesters are typically researching governmental problems and failures of management. The temptation to overuse some of the broader exemptions to hide embarrassing information is often too great for agency officials, and corporations, to resist. As Vladeck notes, some of the most problematic exemptions over the years have been Exemption 5, which applies to inter-agency and intra-agency materials that would not be available under litigation, and Exemption 4, for trade secrets and confidential business information.\footnote{Vladeck, supra note 2, at 10779.} Without creating some clearer definitions or establishing some checks and balances for the use of these exemptions, enormous amounts of information will never be disclosed.

No single policy change or action will suddenly make government completely transparent. The solution is not as simple as instituting guidance to agencies to disclose as much information as possible under FOIA requests, although most certainly that must be done. Vladeck lists in his article three proposals for reform.\footnote{Id. at 10776, 10777.} He describes them as ‘modest,’ but these are the type of bold thinking that is needed today. Certainly each contains the possibility of major improvement in the implementation of FOIA and FACA.

The boldest change Vladeck proposes is to establish a new requirement on the executive branch “to use Internet technology to make environmental information accessible to the public without routinely having to use FOIA’s request-and-wait procedures.”\footnote{Id. at 10779.} This would represent a major shift in the government’s disclosure responsibility. Rather than reviewing documents responsive to an information request attempting to determine which met requirements to be withheld, agencies would proactively review environmental data seeking to determine which information needed to be released. Indeed, such an approach would be welcome in other areas beyond the environment.

FOIA already mandates affirmative electronic disclosure of agency final opinions and orders, policy statements, staff manuals that affect the public, and frequently requested information.\footnote{5 U.S.C. §552(a)(2).} So, the Vladeck approach can be implemented immediately by the Obama Administration. If federal environmental and health agencies recognize that much of the information they house is subject to “frequently requested information,” FOIA’s current legal authority can be broadly used. In this context, it would be helpful to include a requirement that agencies also disclose a list of all material not being released to the public with an explanation for each withholding decision. Such a list would allow those still using the FOIA request process to address the government’s argument for withholding the initial request, rather than delaying that discussion to the appeal or a court trial.

Attempting to address the continual overuse of confidential business information (CBI) claims (FOIA exemption 4), Vladeck’s second proposal is directed more at the implementation process of FOIA, but is no less important. The proposal seeks legislative action containing three intertwined parts. First, requirements that companies claiming confidential business information submit detailed justifications to support these claims.\footnote{Id. at 10779.} Second, empower federal agencies to levy fines against false claims.\footnote{Vladeck, supra note 2, at 10774.} And third, provide sufficient agency funding to properly review such claims.\footnote{Id.}

Recently, the U.S. Government Accountability Office (GAO) addressed the problem of CBI claims in relation to the Toxics Substances Control Act (TSCA). According to GAO, “EPA’s ability to provide the public with information on chemical production and risk has been hindered by strict confidential business information provisions of TSCA, which generally prohibits the disclosure of confidential business information.”\footnote{John Stephenson, U.S. Gov’t Accountability Office, GAO-09-428T, CHEMICAL REGULATION: OPTIONS FOR ENHANCING THE EFFECTIVENESS OF THE TOXIC SUBSTANCES CONTROL ACT 3 (2009), available at http://energy-commerce.house.gov/Press_111/20090226/testimony_gao.pdf (last visited June 1, 2009).}

\footnotesize{7. Vladeck, supra note 2, at 10773.  
9. Vladeck, supra note 2, at 10779.  
10. Id. at 10776, 10777.  
11. See id. at 10774.  
12. Id. at 10779.  
14. Vladeck, supra note 2, at 10774.  
15. Id.  
16. Id.  
The undisclosed information is needed for various activities, including “developing contingency plans to alert emergency response personnel to the presence of highly toxic substances at manufacturing facilities,” according to GAO. GAO reports about 95% of TSCA premanufacture notices are submitted containing some information labeled “confidential.” These notices contain basic health and safety information and are required before a company can manufacture a new chemical. While health and safety studies and associated data are not eligible for CBI protection, chemical and company identity can be eligible. According to Richard Denison, a senior scientist at the Environmental Defense Fund, “[t]his allowance can lead to perverse outcomes, such as that a chemical’s adverse effects on mammalian reproduction must be disclosed, but identification of which chemical causes the effect may be kept a secret.”

Vladeck’s model for up-front substantiation is already used for the Toxics Release Inventory (TRI). Under TRI, a company cannot claim trade secrecy if: (1) it has already disclosed the information (other than in limited circumstances) or failed to take reasonable precautions to protect it; (2) another law already requires the company to disclose the information; (3) the information is already easy to find out using reverse engineering; or (4) disclosure is not likely to harm the firm’s competitive position. The result is that less than 2% of TRI submissions claim CBI exemptions.

The final reform proposal advanced by Vladeck in his article seeks to improve the courts’ interpretation of right-to-know laws. He believes Congress should establish a higher burden of justification on the federal government when it seeks to withhold environmental data. Additionally, he believes a special provision should be added to FOIA that empowers courts to use a balancing test to weigh the public benefit of disclosure against the private interest of secrecy. Once again, Vladeck offers practical and useful solutions. There is no reason not to empower courts to use such a balancing test for any disclosure question from the spending of government funds to homeland security. If the public benefit of disclosure is more important then the interests in withholding, the information should be released.

Vladeck appropriately notes that many immediate changes can and should be made by the Obama Administration, which has promised unprecedented levels of transparency. At the same time, congressional action is also needed to ensure that the new emphasis on transparency is maintained by future administrations. The solution is multidimensional: it requires changing the mindset and climate within government to emphasize transparency, as well as establishing the proper policy framework and building the technology capacity of government to seize the potential of the Internet.

Three final points build on Vladeck’s argument for greater disclosure. First, the public’s right to know is a tool to enable greater health, safety, and accountability. Thus, right-to-know is not the ultimate goal; it is the vehicle to achieve a particular purpose. The corollary to this point is that right-to-know is not a substitute for regulation or enforcement. Disclosure provides the ammunition for knowing where regulation is needed.

Second, federal environmental and health agencies need to establish new approaches for assuring the public it is collecting the right information and that what is collected is of high quality. For example, for several years, the TRI was modified to collect less information. The loss of these data is now irreversible. Fortunately, through the FY 2009 omnibus appropriations bill, Congress instructed EPA to restore the data that is no longer collected so that the problem is rectified going forward in time. Similarly, on March 10 EPA announced that it will propose a new rule to require greenhouse gas emissions reporting from thousands of businesses nationwide. A greenhouse gas registry would be created as a database for collecting, verifying, and tracking emissions from specific industrial sources. These are but two examples of the need to have a system of public input about information collection gaps that must be addressed by government.

Third, Vladeck places an emphasis on the use of the Internet as a means for disclosure. While laudable it raises two challenges. First, the Internet should never become the sole vehicle for disclosure. Too many people—low-income, rural residents, and others—still lack high-speed access to the Internet or even any access. Thus, federal agencies must continue to protect print and other forms of dissemination. Second, the emergence of newer interactive technologies provides a call for new ways of bringing policy and technology experts together to work hand-in-hand. Simply putting more data on the Internet is not a solution; it must be done in a thoughtful, coordinated manner that employs open standards and open source programming in all right to know activities.