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Overseeing Oversight

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Overseeing Oversight

MICHAEL KARANICOLAS & MARGARET B. KWOKA

Accountability is at the core of democratic governance. In the United States, the administrative state is formally situated within the executive branch, but the unelected nature of agency officials, combined with the vast power they wield, has long been cause for concern. A crucial tool for establishing accountability within this so-called “Fourth Branch” is the Freedom of Information Act (FOIA), which provides ordinary members of the public with a mechanism for direct oversight of how administrative agencies function. Similar right-to-information laws have been implemented in over one hundred countries. However, in contrast to most of its international counterparts, the FOIA system is severely undermined by its own lack of institutional oversight. Apart from the rare case that makes it to court, agency decisions against releasing records to the public generally are not subject to meaningful review.

While there has been no shortage of scholarship documenting the practical challenges with FOIA, this Article is the first to connect these problems to the institutional design choice at the root of FOIA’s oversight deficit. The Article traces the history of FOIA, including the most recent reforms that introduced a FOIA ombudsman office, and documents how the remedies for agency recalcitrance are inadequate to protect the public’s right to information. It then presents a comparative survey of global right-to-information models to pinpoint precisely what design aspects are essential to an effective oversight regime. It argues that the strongest models rely on an independent administrative body, such as an information commission, which is located outside of the executive branch entirely and has the power to order administrative agencies to release records when the commission’s review results in a conclusion that withholding is unjustified under the law.

At a time when abuses of executive power have jolted the nation’s collective consciousness, and when the United States’ democratic institutions have faced their most serious threat since the Civil War, there is enormous urgency to improve our mechanisms for democratic oversight, namely through developing oversight of these very structures. This Article documents the democratic deficit underlying our current FOIA remedies and analyzes better institutional design alternatives.

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MICHAEL KARANICOLAS*
& MARGARET B. KWOKA**

INTRODUCTION

On July 21, 2021, Ghana's newly created Right to Information Commission released its first ever judgment, ordering the country's mining regulator to reduce its cost estimate for a journalist's document request from around USD \$1,000 to less than \$1 and to deliver the information within fourteen days.¹ The entire complaint process took just over one month.² While the judgment represented an important milestone for Ghana's relatively young democracy, stories like this happen every day around the world and, for the most part, are a relatively unremarkable feature of well-functioning right-to-information systems.

Indeed, in all modern democracies, freedom of information or right-to-information legislation³ is a core mechanism for direct public accountability over administrative institutions, allowing members of the public to obtain a direct and unvarnished view of how these institutions operate through access to government documents, subject to enumerated exemptions.⁴ However, a curious feature of the right to information, in contrast to other democratic indicators, is that the strongest legal frameworks for guaranteeing public access to information tend to be enacted in emerging

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¹ *Ghana's Information Commission Orders Release of Information to Journalist at \$0.33 Instead of \$1,000 Demanded by State Agency*, MEDIA FOUND. FOR W. AFR. (July 21, 2021), <https://www.mfwa.org/ghana-information-commission-orders-release-of-information-to-journalist-at-0-33-instead-of-1000-demanded-by-state-agency/>.

² *Id.*

³ The majority of countries around the world now refer to such laws as protecting “the right to information,” rather than “freedom of information” or “access to information,” concomitant with growing global recognition of access to official documents as a constitutional right. See MICHAEL KARANICOLAS & TOBY MENDEL, CENTRE FOR L. & DEMOCRACY, ENTRENCHING RTI: CONSTITUTIONAL PROTECTIONS OF THE RIGHT TO INFORMATION (Mar. 2012), www.law-democracy.org/wp-content/uploads/2012/04/Const-Report-with-Annex.pdf (providing a broader discussion of the progressive recognition of a constitutional right to information).

⁴ *What Is FOIA?*, FOIA.GOV, <https://www.foia.gov/about.html> (last visited Mar. 18, 2022).

democracies.⁵ One potential explanation for this phenomenon is that countries with a recent experience of dictatorship have an intuitive understanding of the importance of formal public accountability mechanisms and are less likely to take their democracy for granted.

By contrast, one of the first right-to-information laws in the world was the U.S. Freedom of Information Act (FOIA).⁶ FOIA can be a powerful tool of accountability, but the efficacy of this system is heavily dependent on its implementation and, ultimately, on the oversight of the FOIA system itself. In this regard, FOIA is woefully behind. It relies on judicial oversight to police agencies' obligations—a cumbersome, expensive, and lengthy process that is scantily utilized.

Oversight of transparency obligations is crucial because, while the public interest weighs heavily in favor of a well-resourced and effective right of access, agencies and their political leadership often have interests in keeping documents hidden from the public eye, particularly where the disclosures might be embarrassing.⁷ Even when decisions are made by career staff in FOIA offices, institutional interests of the agency can consciously or unconsciously bias decision-making in favor of over-withholding records from the public.

This Article argues in support of FOIA's utility as a core mechanism of public oversight for the executive branch, but it asserts that this function is stymied due to a lack of meaningful oversight of the FOIA system itself. Even the most ambitious and progressive right-to-information framework will be meaningless in the absence of an effective system for guaranteeing that officials actually comply with it.⁸ Although Congress has attempted to strengthen FOIA oversight—most notably by creating the Office of Government Information Services in 2007⁹—its efforts have fallen short of the necessary independence and authority needed to be effective.

⁵ See *Country Data: By Country*, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data> (last visited Mar. 19, 2022). All of the top twenty scoring countries on the Right to Information (RTI) Rating are relatively new democracies. However, an important caveat to this is that the RTI Rating measures only the strength of a country's law as written, and it does not consider how robustly it has been implemented. However, the tendency among emerging democracies to pass stronger legislation is itself noteworthy, even if broader rule of law challenges can, in some cases, lead to structures that only exist on paper.

⁶ 5 U.S.C. § 552(a)(3)(A)–(D), (b).

⁷ Rebecca Beitsch, *Watchdog Report Raises New Questions for Top Interior Lawyer*, HILL (Aug. 11, 2020, 9:00 AM), <https://thehill.com/policy/energy-environment/511342-watchdog-report-raises-new-questions-for-top-interior-lawyer>.

⁸ TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 37–38 (2d ed. 2008).

⁹ Office of Government Information Services, 81 Fed. Reg. 95,547 (proposed Dec. 28, 2016) (to be codified at 36 C.F.R. ch. 7).

The recent reforms also fall short of models that have been implemented around the world, from Canada to Afghanistan.¹⁰ Through a comparative analysis of freedom of information and right-to-information systems around the world, this Article demonstrates that, although the United States was among the first countries to adopt freedom of information legislation, it now lags behind much of the world in terms of how the FOIA system is overseen. In most progressive democracies, this oversight is often channeled through a politically independent administrative body, which has the power to review agency disclosure decisions and order recalcitrant agencies to comply with the law.¹¹ By contrast, the United States requires a dissatisfied requester to appeal an information denial to the very same agency that denied the request.¹² If this process proves fruitless, the requester's only option to compel compliance is through a federal lawsuit, which is time consuming, expensive, and difficult to navigate without legal representation.¹³

Part I of this Article documents the critical role of the right to information in a modern democracy. Using data from a series of original interviews with journalists, it highlights the core areas in which reporters use the law to keep executive agencies in check, including misconduct of officials, influence over agency decision-making, and national security and law enforcement powers. In a landscape of increasing concern about unchecked executive power, Part I describes the critical role of access to agency information in keeping the executive branch accountable. It particularly highlights the central role of journalists, both as a primary constituency that Congress imagined FOIA to serve and as critical users of the law today in uncovering government documents important to public accountability.

Part II assesses Congress's institutional design choices when it passed FOIA initially, as well as small shifts it has made over time through amendments. It documents how Congress's vision for judicial review as the primary mechanism for overseeing agency FOIA decisions has failed to effectively police executive secrecy or provide meaningful redress for frustrated requesters, using journalists' experiences as a benchmark for measuring how FOIA oversight operates. Moreover, its recent shift toward an ombudsman model has not done nearly enough to bridge the gap, leaving agencies as the last decisionmakers in the overwhelming majority of cases regarding which of their records are released. This has created a system that naturally favors excessive secrecy.

¹⁰ Access to Information Act, R.S.C. 1985, c A-1 (Can.); Access to Information Law, 2014, ch. 1, arts. 1–2 (Afg.).

¹¹ See *infra* Part III.

¹² *OIP Guidance: Adjudicating Administrative Appeals Under the FOIA*, U.S. DEP'T OF JUST., <https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20Under%20the%20FOIA> (Aug. 12, 2021).

¹³ See *infra* Part II.B.

Part III provides a broad comparative analysis of the different models of oversight in force around the world, paying particular attention to our nearest neighbors, with an in-depth analysis of institutional design choices in Canada and Mexico.

This comparative approach forms the basis for Part IV, which analyzes the strengths and weaknesses of the different systems. We argue that the most effective information oversight bodies share two key features. First, they are as fully independent of and protected from political influences as can be. Second, they possess what we call “order making power”—that is, the power to review individual decisions to withhold information and to issue binding orders requiring agencies to release information when mandated by law. The Article concludes by suggesting that an independent information commission with order-making power is fully feasible in the U.S. legal context, consistent with the design of other non-Article III adjudication and the separation of powers concerns that militate toward greater oversight of executive agencies.

I. FOIA AS A CHECK ON EXECUTIVE POWER

Accountability is at the heart of the modern representative democracy. The very notion of a democratic republic, stemming from Enlightenment-era political philosophers, is founded on the people knowing enough about what their elected officials are doing to vote them in or out of office accordingly.¹⁴ The earliest transparency law, which dates back to the eighteenth century, is rooted in this enlightenment mentality.¹⁵

The United States was the third country in the world to adopt right-to-know legislation, embodied in the Freedom of Information Act. Enacted in 1966, FOIA created a unique accountability mechanism, giving the right of access directly to the people. Despite the broad drafting, however, journalists in particular were seen as crucial information intermediaries, thought to uncover government information and publicize it for the populace to act upon. As such, journalists’ experiences using the law can act as a benchmark for understanding how FOIA now falls short compared to right-to-know regimes later enacted around the world.

A. *The Theory of FOIA*

Despite the foundational nature of accurate information to a well-functioning democracy, the United States did not see a need for legal protections for

¹⁴ See MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 12–15 (2021) (documenting the link between the development of modern democracies and the focus on government transparency).

¹⁵ Juha Manninen, *Anders Chydenius and the Origins of World’s First Freedom of Information Act*, in THE WORLD’S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS’ LEGACY TODAY 18, 18–19 (Juha Mustonen ed., 2006).

access to government information until the growth of the administrative state associated with the New Deal in the 1930s. As one scholar put it, “[a]n avalanche of new federal agencies and commissions—including the National Recovery Administration, the NLRB, and the SEC—reached ever more broadly into a free market that appeared to have failed,” and the number of federal agencies doubled in this short period of time.¹⁶ Initially, the Supreme Court was reigning in agency power with aggressive judicial review of congressionally approved programs, invalidating vast swaths of agency actions.¹⁷ But, after Roosevelt’s so-called court packing plan to add Justices to the Court, the Court reversed course and began upholding broad agency authority.¹⁸

The Court’s decision to stop standing in the way of New Deal programs was a watershed moment in the growth of the administrative state, and it gave rise to a growing challenge in how to impose accountability over the sprawling applications of executive power. Over the years, academics, policymakers, and the courts have struggled with the mechanisms for agency accountability. Some envision accountability as flowing from the President, who remains ultimately accountable to the electorate. Some envision a greater role for Congressional oversight. And some envision a stronger role for judicial supervisions.

For example, on the presidential control side, then-Professor Elena Kagan has celebrated the rise of what she called the “presidential administration,” where the President is more actively involved in setting agency policymaking agenda, citing accountability as one of its key benefits.¹⁹ In the same vein, the Courts have struck down limits on presidential control over independent agencies, most recently declaring that agency officials’ authority “remains subject to the ongoing supervision and control of the elected President.”²⁰ An even more extreme case for presidential control over agencies has been dubbed the unitary executive theory, under which Congress would be prohibited from crafting agencies as independent from the President and any restrictions on presidential removal of agency heads would be invalid.²¹

On the congressional side, legislation has long experimented with mechanisms for greater control by Congress over agency actions. One attempt—the legislative veto—was a mechanism for Congress to invalidate

¹⁶ George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561–62 (1996).

¹⁷ *Id.* at 1644.

¹⁸ *Id.* at 1563.

¹⁹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331 (2001).

²⁰ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020).

²¹ See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 83–84 (articulating a “unitary executive” theory of the presidency, in which the President exercises complete control over agencies).

agency actions with less formal action than passing new legislation.²² While it was ultimately declared unconstitutional, the Congressional Review Act took its place as a mechanism for agency reporting about significant regulatory actions and for allowing Congress to fast-track legislation to overturn such rules that it deems unwise.²³

On the judicial side, anxiety about concentrated and unchecked agency power has animated debates over the future of various deference doctrines that currently pervade administrative law. For example, Justices Kavanaugh and Gorsuch have called into question the future of the *Chevron* deference doctrine, under which courts must defer to agencies' reasonable interpretations of statutes they administer. As one scholar described, "[t]he *Chevron* doctrine has greatly empowered administrative agencies to recast the law in accord with current policy preferences, without having to go to Congress for legislative change."²⁴

If anything, the Trump administration increased the stakes of this debate. As one scholar described, "Trump's approach to governance has alarmed legal scholars across the political spectrum" and might militate toward an increased role for judicial review, rather than for presidential control over agencies.²⁵ Public debate about executive accountability may have reached its apex during this time.²⁶

At the time of the New Deal, when concerns about concentration of executive power in unaccountable agencies first came into the fore, one answer was Congress's adoption of the Administrative Procedure Act (APA), which created foundational procedural requirements for agency actions and regularized judicial review of those actions.²⁷ Tellingly, the original version of the APA contained the first attempt at a right-to-information provision.²⁸

²² *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 923 (1983).

²³ See *Contract with America Advancement Act of 1996*, 5 U.S.C. §§ 801–08 (creating the congressional review process).

²⁴ Michael McConnell, *Kavanaugh and the "Chevron Doctrine"*, HOOVER INST. (July 30, 2018), <https://www.hoover.org/research/kavanaugh-and-chevron-doctrine>.

²⁵ Daniel A. Farber, *Presidential Administration Under Trump* (Aug. 8, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591).

²⁶ See Richard Blumenthal, *Opinion, Richard Blumenthal: GOP Must Address Trump's Attacks on Courts*, HARTFORD COURANT (Feb. 8, 2017, 6:00 AM), <https://www.courant.com/opinion/op-ed/hc-op-blumenthal-trump-attack-on-courts-gop-0208-20170207-story.html> ("Numerous reports indicate that U.S. Customs and Border Protection officials across the country have failed to enforce federal court orders blocking President Trump's recent executive orders."); George F. Will, *Opinion, A Judicial Rebuke for a Heedless Congress?*, WASH. POST (Feb. 28, 2020), https://www.washingtonpost.com/opinions/a-judicial-rebuke-for-a-heedless-congress/2020/02/27/a03527fa-5986-11ea-9b35-def5a027d470_story.html ("Testifying in 2018 to the House Financial Services Committee, the [Consumer Financial Protection Bureau]'s acting director said his agency is 'not accountable to you. It's not accountable to the public. It's not accountable to anybody but itself' . . .").

²⁷ See generally *Shepherd*, *supra* note 16, at 1558–61 (describing the legislative history of the APA).

²⁸ S. REP. NO. 88-1219, at 10 (1964).

Information access was seen as one integral part of reigning in executive power. While that provision proved ineffective, it paved the way for FOIA reforms.

In 1966, Congress passed FOIA, making it only the third country to codify a right of access to public records. The need for information access rights was codified as part of the APA, and its accountability aims were explicit. President Johnson, when signing the bill into law, declared that “the United States is an open society in which the people’s right to know is cherished and guarded.”²⁹ Shortly after important amendments to the law, the Supreme Court reaffirmed FOIA’s central role in promoting accountability and oversight, stating that it “ensure[s] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”³⁰ One set of scholars even asserted that “quality of responses to identical FOIA requests provides one measure of agencies’ democratic accountability.”³¹ That is, FOIA both facilitates accountability and can even define whether it exists.

While the political and legal context of FOIA in the United States differs from the context of right-to-information regimes in other countries, the link between transparency and accountability is consistent across the globe. Globally, the right to information only gained traction over the past thirty years.³² In 1990, only fourteen countries had adopted access to information laws.³³ As of January 2022, 129 countries comprising over eighty percent of the world’s population had such laws in place.³⁴ Over the same time period, the right to access information became entrenched in international human rights law through decisions of the Inter-American Court of Human Rights³⁵ and the European Court of Human Rights,³⁶ as well as through the United

²⁹ Statement by the President upon Signing the Freedom of Information Act, 2 PUB. PAPERS 699 (July 4, 1966).

³⁰ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

³¹ David E. Lewis & Abby K. Wood, *Judicial Deference and Agency Accountability: A Federal FOIA Experiment 10* (2011) (unpublished manuscript), <https://my.vanderbilt.edu/davidlewis/files/2011/12/lewis-and-wood-paper-v.9.pdf>.

³² *Country Data: By Country*, *supra* note 5.

³³ *Id.*

³⁴ *Id.*; see also *Countries in the World by Population* (2022), *WORLDMETER* (last visited Apr. 16, 2022) (indicating that of the top fifty countries by population, only Egypt, Congo, Algeria, Myanmar, Iraq, Saudi Arabia and Malaysia don't have RTI laws; the percentages of the remaining top fifty countries by population add up to more than eighty percent).

³⁵ See, e.g., *Claude-Reyes v. Chile*, Merits, Reparations, and Costs, Order, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006) (holding that Article 13 of the American Convention on Human Rights protects the right of all individuals to request access to State-held information, and that the information should be provided without the need to prove direct interest or personal involvement in order to obtain it).

³⁶ See generally *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05 (Apr. 14, 2009), <https://hudoc.echr.coe.int/eng/?i=001-9217> (holding that a government creating obstacles that prevented access to readily available information effectively counted as a form of censorship in violation of Article 10 of the ECHR).

Nations Human Rights Committee's 2011 *General Comment on Article 19 of the International Covenant on Civil and Political Rights*.³⁷

Along with the spread of right-to-information legislation, there has been a growing recognition of the benefits of granting the public a broad right of access. Chief among these is that these mechanisms support democratic engagement, just like the evident animating purpose behind FOIA. Democracy depends on having an informed electorate, entrusted with decision-making power over key public policy questions. This includes both voting for leaders, whose campaign platforms align with their own priorities, and public participation in referendums and consultative exercises. Direct access to government information gives the public an unfiltered picture of what is going on, which allows them to exercise this responsibility in an informed and effective way.³⁸

More broadly, the essence of democratic accountability is that members of the public have a right to scrutinize the actions of their leaders and to assess government performance. Placing information into the public realm is a component of this critical task, which facilitates direct public oversight over the mechanisms of government. It also helps to promote trust in public institutions and improve relations between citizens and the government.³⁹ In particular, formal structures to share accurate information can be instrumental in combating rumor and misinformation.⁴⁰

The right to information is also useful to promoting accountability by, for example, exposing waste, mismanagement, and corruption. Around the world, legislation that empowers a right of access is a critical tool among investigative journalists, civil society, and even opposition politicians in exposing mistakes by those in power. There is no shortage of examples of information requests being directly instrumental in exposing government malpractice.⁴¹

³⁷ See, e.g., Hum. Rts. Comm., General Comment No. 34: Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

³⁸ See Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 147, 171–72 (2004) (“FOIA is often explained as a means for citizens to know ‘what their Government is up to.’ This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.”) (citation omitted).

³⁹ See Maria Cucciniello & Greta Nasi, *Transparency for Trust in Government: How Effective Is Formal Transparency?*, 37 INT'L J. PUB. ADMIN. 911, 911 (2014) (mapping the relationship between transparency, trust and government accountability). But see David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1131–36 (2017) (arguing that FOIA contributes to the public's disillusionment with the competency of the administrative state by revealing exceptional instances of failure in an otherwise well-functioning bureaucracy and by itself not being administrable and providing the public with an experience of bureaucratic failure).

⁴⁰ For example, a central aspect of the Canadian government's response to the threat of election interference via misinformation has been to boost transparency rules in the Canada Elections Act. See Elections Modernization Act, S.C. 2018, c. 31.

⁴¹ See, e.g., Anna Clark, *How an Investigative Journalist Helped Prove a City Was Being Poisoned with Its Own Water*, COLUM. JOURNALISM REV. (Nov. 3, 2015), https://www.cjr.org/unity/anna_clark_t/flint_water_lead_curt_guyette_aclu_michigan.php (using freedom of information requests to document

B. *The Unique Role of Journalist Requesters*

Journalists are particularly prolific stakeholders of right-to-information laws. Not only was the role of the news media central to Congress's conception of how FOIA would operate to inform the public, but journalism organizations and reporters remain advocates for transparency laws in a variety of fora. Perhaps most importantly, reporters routinely use the law to good effect in ways that precisely implicate accountability over executive agency exercises of power. Their experiences, therefore, show both the potential and the current limitations of FOIA's promise.

Original interviews one of us conducted with journalists demonstrate three thematic categories of use, which directly align with FOIA's accountability aims.⁴² First, American journalists use FOIA to uncover government waste and misconduct. For example, Kevin Bogardus at E&E News used FOIA to get documents that showed how much Scott Pruitt's extra (and unjustified) security detail cost the taxpayer, one of a collection of problems Pruitt faced while in office that led him to resign from his position as Administrator of the Environmental Protection Agency (EPA).⁴³ In fact, another group of researchers who examined newspaper stories over a year-long period found that twenty-five percent of stories that reference FOIA concern government incompetence or wrongdoing.⁴⁴ These uses of FOIA go to the heart of government accountability.

Second, reporters routinely use FOIA to try to understand what kind of influence might have impacted government decision-making, such as private industries, lobbyists, interest groups, or political motivations. For example, Justin Elliott at ProPublica used FOIA to break the first story linking the request from the Justice Department for a citizenship question on the census to a political appointee, suggesting a political motivation rather than the bureaucratic reasoning officially cited.⁴⁵ Other frequent types of

the government's role in Flint, Michigan's water crisis); Phlis McGregor & Angela MacIvor, *Black People 3 Times More Likely to Be Street Checked in Halifax, Police Say*, CBC, <https://www.cbc.ca/news/canada/nova-scotia/halifax-black-street-checks-police-race-profiling-1.3925251> (Jan. 9, 2017) (noting where freedom of information requests were used to document racist policing policies in Canada).

⁴² KWOKA, *supra* note 14, at 178–79.

⁴³ Telephone Interview by Margaret B. Kwoka with Kevin Bogardus, Reporter, E&E News (Mar. 22, 2019); KWOKA, *supra* note 14, at 37–39, 38 n.33; Kevin Bogardus, *Big Spike in Security Spending for Pruitt*, E&E NEWS (July 5, 2017, 12:00 PM), <https://eenews.net/articles/big-spike-in-security-spending-for-pruitt/>.

⁴⁴ Bruce E. Cain, Patrick Egan & Sergio Fabbrini, *Towards More Open Democracies: The Expansion of Freedom of Information Laws*, in DEMOCRACY TRANSFORMED?: EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES 115, 136 (Bruce E. Cain, Russell J. Dalton & Susan E. Scarrow eds., 2003).

⁴⁵ Telephone Interview by Margaret B. Kwoka with Justin Elliott, Reporter, ProPublica (Apr. 19, 2019); KWOKA, *supra* note 14, at 41–42; Justin Elliott, *The Trump Appointee Behind the Move to Add a Citizenship Question to the Census*, PROPUBLICA (Mar. 7, 2018, 5:10 PM), <https://www.propublica.org/article/john-gore-trump-appointee-citizenship-question-census>.

requests along these lines are government officials' calendars, agency visitor logs, and other documents that tend to show who officials were meeting with prior to important decisions.⁴⁶

Finally, many journalists covering law enforcement and national security matters—matters where the government wields its most coercive powers—use FOIA routinely. This area is somewhat more complex because, as is frequently the subject of commentary, the law enforcement and national security exemptions to disclosure are so broad that FOIA may appear less powerful in these realms.⁴⁷ Nonetheless, the law can be effective in supporting journalism in this space. For instance, the most frequent plaintiff in FOIA cases brought by *The New York Times* is Charlie Savage, a national security reporter.⁴⁸ And other journalists explained how FOIA can often uncover information important to “security-adjacent” stories, such as stories on private immigration prisons⁴⁹ or drone monitoring of water protector protestors at Standing Rock.⁵⁰

While this examination of news media use of FOIA reveals that it does serve its core accountability goal, a robust right to information can also have additional, broader systemic effects, deterring official misconduct by establishing a likelihood that such behavior will be uncovered. Just as an employee is likely to work harder if their supervisor is standing nearby, the knowledge that an official's actions are subject to public scrutiny will likely lead them to be more careful and judicious in their decision-making and to take greater care in expending public resources.⁵¹

These structural effects can be difficult to pin down, but one example from Canada provides an interesting insight as to how this can work. In 2011, a journalist filed an access to information request targeting helicopter

⁴⁶ See, e.g., Press Release, Citizens for Resp. & Ethics in Wash., CREW and Others Sue for White House Visitor Logs (Apr. 10, 2017), <https://www.citizensforethics.org/news/press-releases/crew-others-sue-white-house-visitor-logs/>. Access to the White House visitor logs, which are meant to provide insight into the operations of the executive branch, were a major point of contention throughout the Trump administration.

⁴⁷ See, e.g., Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 139 (2017) (describing those exemptions); Pozen, *supra* note 39, at 1097 (arguing that FOIA is least effective in those areas due to the breadth of the exemptions).

⁴⁸ FOIA Project Staff, *When FOIA Goes to Court: 20 Years of Freedom of Information Act Litigation by News Organizations and Reporters*, FOIA PROJECT (Jan. 13, 2021), <http://foiaproject.org/2021/01/13/foialitigators2020/>.

⁴⁹ Telephone Interview by Margaret B. Kwoka with Seth Freed Wessler, Freelance Investigative Reporter (Apr. 10, 2019); *Special Investigation: Dying in Private Prisons*, NATION, <https://www.thenation.com/special/private-prison-deaths> (last visited Mar. 15, 2022).

⁵⁰ Interview with Will Parrish, Freelance Investigative Journalist (Feb. 25, 2019); Alleen Brown, Will Parrish & Alice Speri, *Police Used Private Security Aircraft for Surveillance in Standing Rock No-Fly Zone*, INTERCEPT (Sept. 29, 2017, 10:41 AM), <https://theintercept.com/2017/09/29/standing-rock-dakota-access-pipeline-dapl-no-fly-zone-drones-tigerswan/>; KWOKA, *supra* note 14, at 46.

⁵¹ See Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Report No 77, p. 8, December 1995), <https://www.ag.gov.au/sites/default/files/2020-03/report-40.pdf> (citing this impact, specifically, as a public interest underlying that country's freedom of information act).

travel by Peter MacKay, then Canada's Defense Minister.⁵² The request revealed that MacKay had utilized a search-and-rescue helicopter to return from a fishing holiday in Newfoundland, asking that the flight be conducted "under the guise" of a training mission in order to mask any impropriety.⁵³ The response of military officials to the initial request reveals the impact of Canada's access to information system on their thinking:

If we are tasked to do this, we of course will comply Given the potential for negative press though, I would likely recommend against it, especially in view of the fact the air force receives (or at least used to) regular access-to-information requests specifically targeting travel on Canadian Forces aircraft by ministers.⁵⁴

This episode demonstrates the impact that transparency can have as a motivator for promoting responsible management of public resources. Faced with an ethically questionable request, officials specifically cited Canada's right to know law as a reason to be careful.

The furor that eventually resulted from the trip is equally illustrative of why access to information systems commonly face resistance from those tasked with responding to requests.⁵⁵ Disclosures may be embarrassing to those involved. Even if officials have not done anything wrong, there may be apprehension that requesters will misinterpret or deliberately spin information to support a negative narrative. While the benefits of a strong and effective right-to-information system are longer term and structural, in terms of promoting trust in government and improving relations with the public, the potential downsides can be immediate and direct for the people responding to requests. It is likely for this reason that there is a "long standing FOIA-averse attitude common within most executive administrations."⁵⁶ And it is precisely for this reason that the oversight system—FOIA—itself needs to be overseen. Robust enforcement of the Act with remedies for its violation are prerequisites to success.

II. THE FAILURE OF FOIA OVERSIGHT

The central role that public agencies subject to FOIA play in implementing the law—by processing requests, making decisions on

⁵² Gloria Galloway & Steven Chase, *PM Defends MacKay Against Charges He Mised House on Chopper Ride*, GLOBE & MAIL (Dec. 2, 2011), <https://beta.theglobeandmail.com/news/politics/ottawa-notebook/pm-defends-mackay-against-charges-he-mised-house-on-chopper-ride/article619735>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ National Post Staff, *MPs Demand Resignation of Peter MacKay After Release of Fishing Trip Airlift Emails*, NAT'L POST (Dec. 2, 2011), <https://nationalpost.com/news/mps-demand-resignation-of-peter-mackay-after-release-of-fishing-trip-airlift-emails>.

⁵⁶ Ben Wasike, *FoIA in the Age of "Open. Gov": An Analysis of the Performance of the Freedom of Information Act Under the Obama and Bush Administrations*, 33 GOV'T INFO. Q. 417, 418 (2016).

whether to release records, and otherwise dispensing of transparency obligations—creates an obvious tension in the efficacy of FOIA as a mechanism of public accountability over these same agencies. As a result, having some recourse when the executive branch resists its transparency obligations is crucial. This Part documents the institutional design choices Congress made when it enacted FOIA, the failure of the primary recourse mechanism—judicial review—to adequately oversee agency oversight, and the recent set of reforms designed to address the failure through an ombudsman office. Using the experience of the news media as a benchmark for measuring FOIA’s success, it demonstrates that current oversight is woefully inadequate, largely insulating executive branch secrecy from meaningful review.

A. *Judicial Review*

The legislative history of FOIA makes clear that Congress understood how important independent oversight of agency decisions to withhold records would be.⁵⁷ Indeed, it was an animating concern in the design of the statute, in particular the judicial review provision that requires courts to review agency decisions to withhold records *de novo*. Judicial oversight remains the primary recourse for a dissatisfied requester, though Congress has tried to strengthen its efficacy over the years.

Prior to the passage of FOIA, the disclosure mandate for agencies was limited to a single sentence of the APA, admonishing that “persons properly and directly concerned” with certain government-held information should be given access, “except information held confidential for good cause found.”⁵⁸ Among its many deficiencies, one House Report explained that, under that law, “there is no remedy available to a citizen who has been wrongfully denied access to the Government’s public records.”⁵⁹

When FOIA was enacted, remedies for dissatisfied requesters were at the forefront of discussions.⁶⁰ The statute initially created two kinds of recourse. The first is an administrative appeal through which a person who receives an adverse determination in response to their request may appeal to a higher official within that same agency.⁶¹ That appeal does not come with any cost, is relatively informal, and is subject to a short deadline for an

⁵⁷ S. REP. NO. 88-1219, at 8 (1964).

⁵⁸ *Id.*

⁵⁹ H.R. REP. NO. 89-1497, at 5 (1966).

⁶⁰ See DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW 1–3 (2020) (noting that FOIA was “enacted . . . as an amendment to the APA” in order “[t]o rectify the APA’s perceived failure to provide the public with adequate access to government information”).

⁶¹ 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

agency response.⁶² But, of course, the review is not independent of the agency where the records reside. Rather, the appeal is to a different decisionmaker within the same executive branch agency to which the initial request was made, and which issued the initial unsatisfactory response.⁶³

The main form of independent oversight and enforcement is through judicial review. Even though most other agency actions are subject to some sort of deferential standard of review, FOIA contains its own cause of action with *de novo* review of any agency decision to withhold records.⁶⁴ As members of Congress explained: “the proceeding must be *de novo* . . . in order that the ultimate decision as to the propriety of the agency’s action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.”⁶⁵

The strength of the judicial review provision was almost immediately undermined by the courts themselves. In a 1973 decision in *EPA v. Mink*, the Supreme Court ruled that, despite the *de novo* review provision, if records were withheld because they were classified, a court had no power to review the propriety of the classification decision.⁶⁶ Congress was swift in its response. It passed a major set of amendments to FOIA in 1974, which included revising the judicial review provision to overrule *Mink*, making clear that courts must review classification decisions and that courts had the power to review classified records *in camera*.⁶⁷

Thus, Congress twice insisted on a full, independent adjudication by the courts without any deference to the executive agency’s determination to withhold records. These legislative efforts underscore that independent oversight was always intended to be a crucial part of the design of the right to know regime in the United States.

B. *Insulating Executive Secrecy*

Since its inception, FOIA experienced serious challenges in its implementation, including agency delay, agency nonresponsiveness, and an expansive interpretation of the statute’s exemptions to mandatory disclosure. These underlying administrative implementation failures are

⁶² *Id.* § 552(a)(6).

⁶³ *Id.*

⁶⁴ For a much more detailed account of the issue of standards of review under FOIA, see generally Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013) [hereinafter Kwoka, *Deferring*].

⁶⁵ 111 CONG. REC. 26,823 (1965).

⁶⁶ *EPA v. Mink*, 410 U.S. 73, 81–84 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *as recognized in* *CIA v. Sims*, 471 U.S. 159, 189 (1985) (Marshall, J. concurring).

⁶⁷ To effectuate this goal, Congress changed Exemption 1, which covers classified records, to clarify that the exemption only covered records that were *properly* classified. 5 U.S.C. § 552(b)(1). Congress also changed the judicial review provision to allow courts to conduct *in camera* review of any withheld records. *Id.* § 552(a)(4)(B).

compounded by the lack of an appropriate mechanism for holding agencies accountable where they flout the law.

One way of measuring how well FOIA is functioning is by examining the experience of journalists and watchdog groups, groups of requesters who Congress thought to be the prime intended users of the law. To the extent FOIA is not serving their interests well, it is not accomplishing the objective Congress had in mind. Moreover, if it is not serving those requesters well, it is likely failing requesters across the board in the same ways.

The single biggest complaint of frequent FOIA requesters, including those using the law for core oversight purposes such as journalists and watchdog groups, is the delays in obtaining information. Though the law requires a response within twenty business days, average processing times far exceed that.⁶⁸ For example, in Fiscal Year 2020, the average processing time, even for designated “simple track” requests, was over thirty business days, and, at the end of the reporting period, the federal government had a total of 141,762 backlogged requests.⁶⁹

News media organizations and civil society watchdog groups alike complain about the persistent delays they experience in accessing public records under FOIA. In honor of FOIA’s fiftieth birthday, for example, investigative news organization ProPublica published a piece entitled “Delayed, Denied, Dismissed: Failures on the FOIA Front,” detailing a series of frustrating experiences their reporters had requesting records under FOIA.⁷⁰ They almost universally featured delay as a central component of the problem.⁷¹ As the summary describes, “waits for records now routinely last longer than most journalists can wait—or so long that the information requested is no longer useful.”⁷²

In a previous study of journalist use of FOIA that one of us conducted, every reporter interviewed cited delay as a significant obstacle to using the law effectively.⁷³ For example, independent journalist Seth Freed Wessler explained that “the obvious problem with FOIA is that for the vast majority of federal FOIAs that I file and others file, information is either never released or it takes so long for that information to be released that it becomes potentially irrelevant.”⁷⁴ Charles Seife, a journalism professor at Columbia University

⁶⁸ *Id.* § 552(a)(6)(A)(i).

⁶⁹ OFF. OF INFO. POL’Y, U.S. DEP’T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2020: HIGHLIGHTS OF KEY GOVERNMENTWIDE FOIA DATA 9 (2021), <https://www.justice.gov/oip/page/file/1393381/download>.

⁷⁰ Cezary Podkul et al., *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016, 8:01 AM), <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ KWOKA, *supra* note 14, at 175.

⁷⁴ *Id.* at 176 (citing Telephone Interview by Margaret B. Kwoka with Seth Freed Wessler, Freelance Investigative Reporter (Apr. 10, 2019)).

who focuses on science reporting, said that, “[b]y the time you get the documents you need, I mean, we’re talking about something that was scandalous in the FDA a decade ago, and it’s really hard to get that out there.”⁷⁵

These accounts are clearly troubling, but delay is not a problem limited to journalists or watchdog groups. Delay is a tremendous issue for individuals seeking their own files to be used as part of their bid for agency administered benefits or to defend against agency enforcement. In the United States, fully half of all FOIA requesters seek their own immigration records, oftentimes for the purpose of establishing their status or defending against deportation.⁷⁶ In 2019, American Immigration Council filed a class action, alleging systemic violations of FOIA’s deadlines, which causes significant injury to noncitizens awaiting their records.⁷⁷ They ultimately won an injunction against federal immigration agencies, requiring them to take certain measures to comply with the law.⁷⁸

Beyond delay and unresponsive agencies, FOIA’s efficacy is further hampered by persistent agency overwithholding of records. As a formal matter, FOIA requires disclosure of all agency records, subject to nine enumerated exemptions listed in the statute.⁷⁹ The scope of those exemptions, however, is the subject of much debate, with public bodies often incorporating an expansive interpretation of what can be legitimately withheld.

For example, in the area of national security, records that have been properly classified pursuant to an executive order are exempt from disclosure.⁸⁰ But, the classification criteria are so broad and so vague that overclassification is a rampant problem, which is something widely agreed upon inside and outside of government.⁸¹ Courts have also been instrumental in stretching an exemption’s meaning to cover vast swaths of government records, as the Supreme Court did when it decided that the exemption for confidential commercial information included any records that a business submitted to the government that it would not ordinarily make public.⁸²

Congress has made some attempts to mitigate these implementation challenges, particularly through the 2016 FOIA Improvement Act, which added a requirement that agencies could only withhold records under a FOIA exemption “if the agency reasonably foresees that disclosure would harm an

⁷⁵ *Id.* at 176 (citing Telephone Interview by Margaret B. Kwoka with Charles Seife, Professor, Columbia School of Journalism (Feb. 15, 2019)).

⁷⁶ *Id.* at 85.

⁷⁷ *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 507 F. Supp. 3d 1193, 1195–96 (N.D. Cal. 2020).

⁷⁸ *Id.* at 1213–14.

⁷⁹ 5 U.S.C. § 552(a)–(b).

⁸⁰ *Id.* § 552(b)(1).

⁸¹ *See, e.g., Examining the Costs of Overclassification on Transparency and Security: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. 1–2 (2016) (statement of Jason Chaffetz, Chairman of H. Comm. on Oversight & Gov’t Reform) (describing, among other things, how “[e]stimates rang[ing] from 50 to 90 percent of classified material [are] not properly labeled”).

⁸² *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2360–61, 2366 (2019).

interest protected by an exemption.”⁸³ It also limited the application of one of the most oft-cited bases for withholding records—the deliberative process privilege—to records less than twenty-five years old.⁸⁴ In the Senate Report accompanying the Act, lawmakers explained that “there are concerns that some agencies are overusing FOIA exemptions that allow, but do not require, information to be withheld from disclosure.”⁸⁵

Yet, these reforms have had a relatively limited impact against the broader trend toward more and more secrecy. In Fiscal Year 2020, only about thirty-one percent of all requests were granted in full, whereas sixty-one percent were released in part and about seven percent were denied in full.⁸⁶ Exemption 5, which contains the deliberative process privilege, remained one of the most frequently cited, alongside privacy and law enforcement exemptions.⁸⁷

At the heart of these problems, however, is a fundamental oversight failure and a demonstration of the inadequacy of judicial remedies to guarantee robust implementation of both the spirit and the letter of the law. Going to court is a costly, time-consuming, and, for most requesters, inaccessible process. Those who make it to court face an uphill battle as a result of the judiciary’s reticence to second guess the executive branch on matters of secrecy. Thus, the availability and independence of judicial oversight are both unsatisfactory.

Beginning with availability, litigating in federal court is both expensive and technically difficult. Filing a civil claim requires paying a \$350 fee, even if a requester is able to represent themself.⁸⁸ But most people are not able to represent themselves in federal litigation. Litigation is complex, with myriad rules and procedures that nonlawyers are ill-equipped to navigate. Lawyers are, of course, expensive, and there are few attorneys who regularly take FOIA cases pro bono. Even attorneys who use FOIA as part of their representation of clients hardly ever go to court to fight FOIA denials; the time and money are too much of a barrier to most clients who are represented in related matters.⁸⁹

For requesters who work at the heart of government oversight—the news media—the cost of resorting to litigation as a remedy for FOIA violations is oftentimes insurmountable. The resource-intensive nature of the FOIA process is illustrated by the fact that FOIA use is declining among

⁸³ FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539 (codified as amended at 5 U.S.C. § 552).

⁸⁴ *Id.*

⁸⁵ S. REP. NO. 114-4, at 2 (2015).

⁸⁶ OFF. OF INFO. POL’Y, *supra* note 69, at 7.

⁸⁷ *Id.* at 8.

⁸⁸ 28 U.S.C. § 1914(a).

⁸⁹ Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204, 2247 (2018).

smaller local outlets.⁹⁰ Instead, journalists who are active requesters tend to work for publications with broader based funding models, such as the *Associated Press*, which is funded by providing content to a range of outlets, or the Center for Public Integrity, which is funded through charitable giving, or *The New York Times*, whose scale and international audience provides greater resources for their reporters.⁹¹ Independent or freelance reporters are even more disadvantaged than their counterparts in local media, as they lack any institutional support to fund a FOIA fight.⁹²

The fact that few reporters can go to court when faced with a recalcitrant agency is particularly troubling when paired with the observations of those who have gone to court about the power of independent review. For example, Will Parrish of the Intercept, citing one FOIA request that had been languishing for two years with no response, opined, “I think that a big problem is there are some agencies that just try to ignore things, [until] they’re pushed by a legal adjudication or something like that.”⁹³ Charles Seife, a journalism professor at New York University, said he only started finding FOIA helpful when he found pro bono representation and was able to litigate denials.⁹⁴

Just filing a case can make a difference, even without actual review. *New York Times* Vice President and Deputy General Counsel David McCraw said the federal court filing fee served as a sort of “conciierge fee” because he uses lawsuits to force a nonresponsive agency to respond to the request.⁹⁵ The ProPublica account of its use of FOIA connected agency nonresponse to the declining resources of journalists, explaining that “they bank on the media’s depleted resources and [in]ability to legally challenge most denials.”⁹⁶

Finally, there is good reason to believe that, even for those requesters who make it through the gauntlet of getting into court, judicial review is often not serving the oversight function well. Court itself is an incredibly slow dispute resolution process. The Transactional Records Access Clearinghouse’s FOIA Project recently reported that, over time, “FOIA requesters are facing longer and longer delays before their cases are decided”

⁹⁰ James T. Hamilton, *FOIA and Investigative Reporting: Who’s Asking What, Where, and When—And Why It Matters*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* 116, 122–23 (David E. Pozen & Michael Schudson eds., 2018).

⁹¹ *Id.*

⁹² See KWOKA, *supra* note 14, at 176–77 (explaining that two independent journalists saw such a need for representation in FOIA cases that they founded an organization to connect freelance reporters to pro bono legal support for FOIA disputes).

⁹³ *Id.* at 176 (citing Telephone Interview by Margaret B. Kwoka with Will Parrish, Freelance Investigative Journalist (Feb. 25, 2019)).

⁹⁴ *Id.* at 53; Telephone Interview by Margaret B. Kwoka with Charles Seife, Professor, N.Y.U. (Feb. 15, 2009).

⁹⁵ *Id.* at 178; Telephone Interview by Margaret B. Kwoka with David McCraw, Deputy Gen. Counsel, N.Y. Times, & Al-Amyr Sumar, First Amend. Fellow, N.Y. Times (May 3, 2019).

⁹⁶ Podkul et al., *supra* note 70.

and that “the backlog of pending FOIA court cases is growing much faster than the increase in litigation because judges are failing to rule in a timely manner and allowing cases to drag on for years.”⁹⁷ Given the speed of the modern news cycle and the pressures that journalists are under to meet publication deadlines, any process which takes years to resolve is clearly not a satisfactory answer to the ongoing implementation challenges.

Moreover, the independence of the review is not always fully realized. Congress prescribed *de novo* review of agency withholdings, which is to say that the courts were to give no deference to agency decisions about the applicability of FOIA’s exemptions to disclosure.⁹⁸ Yet, despite this, courts still exercise significant deference to the government’s position in FOIA litigation, undermining a full independent review.⁹⁹

For example, in the context of national security classification claims, Susan Nevelow Mart and Tom Ginsburg demonstrated that plaintiffs win in FOIA cases only five percent of the time.¹⁰⁰ They further described the sources of judicial reluctance to review agency decisions regarding national security.¹⁰¹ Deference to the agency in these cases is so routine that courts oftentimes refer to the standard of review as “substantial weight” review, rather than “*de novo*” review, because the courts in these cases accord “substantial weight” to the government’s affidavits.¹⁰²

Courts in FOIA cases also allow the government to avail themselves of procedural shortcuts that further undermine the litigant’s position. This includes curtailing discovery, which limits the plaintiff’s ability to uncover evidence that would go to factual disputes surrounding the creation or use of disputed records.¹⁰³ Courts can also be reticent to exercise their power to review records *in camera*.¹⁰⁴

All of this expense, delay, and deference combines to yield a tiny percentage of FOIA denials that are ever reviewed by a court, and an even tinier fraction that result in any relief for the requester. Out of around 800,000 requests now made per year, only around 15,000 administrative appeals are filed, or around three percent.¹⁰⁵ And from the requests and

⁹⁷ FOIA Project Staff, *Justice Delayed Is Justice Denied: Judges Fail to Rule in a Timely Manner on FOIA Cases*, FOIA PROJECT (Feb. 3, 2021), <http://foiaproject.org/2021/02/03/justice-delayed-is-justice-denied>.

⁹⁸ Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People’s Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725, 729–30 (2014).

⁹⁹ *Id.* at 747.

¹⁰⁰ *Id.* at 728.

¹⁰¹ *Id.* at 729.

¹⁰² Kwoka, *Deferring*, *supra* note 64, at 214–15.

¹⁰³ *Id.* at 224–25.

¹⁰⁴ *Id.* at 214.

¹⁰⁵ OFF. OF INFO. POL’Y, *supra* note 69, at 2, 15.

appeals, only about 700 lawsuits are filed in federal court each year.¹⁰⁶ What oversight the federal courts provide to enforce agency compliance with FOIA is therefore relatively minimal.

A. *Incremental Administrative Oversight*

Forty years after passing the first version of the law, Congress amended the Freedom of Information Act to, for the first time, “provide FOIA requestors and federal agencies with a meaningful alternative to costly litigation.”¹⁰⁷ In the 2007 Openness Promotes Effectiveness in our National (OPEN) Government Act, Congress established the Office of Government Information Services (OGIS) within the National Archives and Records Administration.¹⁰⁸ Designed to serve as a “FOIA Ombudsman,” OGIS represents the first step toward administrative, rather than judicial, oversight of FOIA compliance.¹⁰⁹

OGIS was given two primary oversight responsibilities. First, it was tasked with reviewing agencies’ administration of the Act and recommending policy changes to Congress and the executive as needed.¹¹⁰ Second, OGIS was to “offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at OGIS’s discretion, may issue advisory opinions if mediation has not resolved the dispute.”¹¹¹

As to the first set of responsibilities—overseeing agency compliance with the Act—one complication has always been that this responsibility was already, to a great extent, delegated to the Department of Justice’s Office of Information Policy (OIP). OIP has always issued FOIA guidance to executive agencies, maintained the annual FOIA reports, and communicated information about compliance with the Act to Congress.¹¹² The Department of Justice (DOJ), of course, is an executive agency led by the Attorney General, a cabinet-level political appointee who serves at the pleasure of the President, not an independent oversight body.¹¹³ But OGIS is not truly independent. Rather, it is located within the National Archives and Records

¹⁰⁶ FOIA Project Staff, *April 2021 FOIA Litigation with Five-Year Monthly Trends*, FOIA PROJECT (May 15, 2021), <http://foiaproject.org/2021/05/15/april-2021-foia-litigation-with-five-year-monthly-trends>.

¹⁰⁷ 153 CONG. REC. S14,853 (daily ed. Dec. 6, 2007) (statement of Sen. Patrick Leahy).

¹⁰⁸ Openness Promotes Effectiveness in Our National Government Act of 2007 (OPEN Government Act of 2007), Pub. L. No. 110-175, § 10(a), 121 Stat. 2524, 2529 (2007).

¹⁰⁹ 153 CONG. REC. S14,853 (daily ed. Dec. 6, 2007) (statement of Sen. Patrick Leahy).

¹¹⁰ OPEN Government Act of 2007 § 10(a), 121 Stat. at 2529.

¹¹¹ *Id.*

¹¹² OFF. OF GOV’T INFO. SERVS., *THE FIRST YEAR: BUILDING BRIDGES BETWEEN FOIA REQUESTERS AND FEDERAL AGENCIES* 10 (2011).

¹¹³ *About the Office*, U.S. DEP’T OF JUST.: OFF. OF ATT’Y GEN., <https://www.justice.gov/ag/about-office> (Mar. 12, 2021) (describing the DOJ as an “executive department”).

Administration (NARA), which is sometimes thought of as an independent agency but actually lacks its hallmarks, particularly any protection for the Archivist from removal of office by the President at will.¹¹⁴ While NARA often operates more independently than some agencies, NARA is, at base, an executive branch agency.¹¹⁵

Indeed, the relationship between OGIS and OIP has not been entirely smooth. In an early audit by the Government Accountability Office, it was reported that OGIS's Director said that "OGIS's relationship with the DOJ could be more cooperative, but OGIS was able to work with the DOJ in order to meet its statutory requirements"¹¹⁶—hardly a ringing endorsement of inter-agency harmony. But, even if it were harmonious, neither entity is truly independent of the executive branch.

The lack of independence of these oversight bodies has come up in Congressional debates. For example, OIP conducts annual assessments of all agencies' compliance with FOIA on twenty-four different metrics.¹¹⁷ In a 2015 hearing, one member of Congress questioned the director of OIP about the legitimacy of the DOJ's perfect score on that assessment, asking, "Do you really think that anyone in the world believes that the [D]epartment of [J]ustice is a 5 out of 5, A+ for proactive disclosure?," to which the director responded, "I absolutely do."¹¹⁸ The incredulous member of Congress responded, "Man! You live in la-la land, that's the problem! You live in a fantasy land."¹¹⁹

As to OGIS's oversight authority, when the agency was created, DOJ originally took the position that, as part of an executive branch agency, it had to send any proposed recommendations for policy changes through the Office of Management and Budget's executive review processes, an

¹¹⁴ See Stephen H. Yuhon, *The Imperial Presidency Strikes Back: Executive Order 13,233, the National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570, 1578 n.44 (2004) ("The version of the Act initially passed by the Senate provided for the Archivist to serve a fixed term of ten years, removable only for good cause, see S. REP. NO. 98-373, at 23 . . . but this section was changed by the Conference Committee to its present form, in which the term of the Archivist is not specified, and in which there is no 'good cause' requirement for removal . . .") (citations omitted).

¹¹⁵ John W. Carlin, *NARA Marks Twentieth Anniversary of Independence Legislation*, 36 PROLOGUE 4, 4 (2004) (describing the NARA as an "independent agency within the executive branch").

¹¹⁶ NAT'L ARCHIVES & RECS. ADMIN., OFF. OF INSPECTOR GEN., OIG AUDIT REP. NO. 12-14, AUDIT OF NARA'S OFFICE OF GOVERNMENT INFORMATION SERVICES 6 (2012).

¹¹⁷ *Hearing Examines FOIA Reform, and Whether the Act Is an Effective Tool*, REPS. COMM. FOR FREEDOM OF THE PRESS (June 5, 2015), <https://www.rcfp.org/hearing-examines-foia-reform-and-whether-act-effective-tool>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

expressly political review.¹²⁰ OGIS's early recommendations died in this "consultation process."¹²¹

This level of institutional control had not been Congress's intent when it created OGIS, though it was an inevitable result of how the agency was constituted.¹²² OGIS's director testified before Congress in 2015:

I understand that you and your colleagues in the Senate expected to receive unvarnished recommendations for legislative or regulatory change from an independent and impartial ombudsman. If you do want recommendations, reports and testimony that have not had to be reviewed, changed and approved by the very agencies that might be affected, then you should change the statute.¹²³

With the FOIA Improvement Act of 2016, Congress amended the law to expressly allow OGIS to submit recommendations directly to Congress and the President, without the need for political review.¹²⁴ However, the change did not alter the core problem, which is that the OGIS itself is housed within the executive branch agency, and it therefore lacks full independence.

As to OGIS's second set of statutory mandates—the provision of mediation services and possible resulting advisory opinions—here, too, its powers are limited in important ways. To begin, as one report from the Administrative Conference of the United States (ACUS) noted, one "structural problem" with OGIS mediation is that agencies have no "duty to participate" in the process.¹²⁵ Indeed, the very first OGIS annual report noted that "some Federal agencies viewed OGIS as the 'FOIA police' and thus were somewhat reluctant to share information with OGIS and to work with the Office to resolve disputes."¹²⁶

¹²⁰ S. REP. NO. 114-4, at 3 (2015). See also *Office of Management and Budget*, WHITE HOUSE, <https://www.whitehouse.gov/omb> (last visited Mar. 20, 2022) ("The Office of Management and Budget (OMB) serves the President of the United States in overseeing the implementation of his or her vision across the Executive Branch.").

¹²¹ See, e.g., Letter from Miriam Nisbet, Director, Off. of Gov't Info. Servs., to Hon. Patrick J. Leahy, Chairman, U.S. Senate Comm. on the Judiciary, & Hon. Charles E. Grassley, Ranking Member, U.S. Senate Comm. on the Judiciary (Apr. 13, 2012), https://sunshineingov.files.wordpress.com/2012/04/ogis_letter_leahy_grassley_13april2012.pdf (describing OMB as a stumbling block for OGIS's recommendations reaching Congress).

¹²² *Ensuring Government Transparency Through FOIA Reform: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight and Gov't Reform*, 114th Cong. 5 (2015) (statement of Miriam Nisbet, Former Director, OGIS).

¹²³ *Id.* at 9.

¹²⁴ FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(5)(D), 130 Stat. 538, 541 (2016).

¹²⁵ MARK H. GRUNEWALD, ADMIN. CONF. OF THE U.S., REDUCING FOIA LITIGATION THROUGH TARGETED ADR STRATEGIES 51 (2014).

¹²⁶ OFF. OF GOV'T INFO. SERVS., *supra* note 112, at 9.

Even where agencies do choose to engage with the OGIS, however, OGIS has no power to issue a binding order.¹²⁷ Rather, it only has the power to engage in mediation and, if it chooses, to issue advisory opinions.¹²⁸ One director explained that under the 2007 OPEN Government Act, “OGIS struggled with how to reconcile its authority to issue advisory opinions with its ability to be an impartial party that facilitates the resolution of disputes between requesters and agencies.”¹²⁹ In the 2016 amendments, Congress broadened OGIS’s authority to deliver advisory opinions. OGIS then pivoted toward issuing advisory opinions to address not individual cases, but rather “common disputes, complaints, and trends” that OGIS sees through its dispute resolution process.¹³⁰ As a result, in its ten-year existence, OGIS has issued exactly two advisory opinions.¹³¹

OGIS has had some success in its mediation program. It receives more than 4,000 requests for mediation assistance per year.¹³² Moreover, while complex cases still take longer than OGIS’s target of ninety days to resolve,¹³³ the process remains much quicker than judicial resolution ever could be. OGIS has also engaged in extensive outreach, training, and compliance work, and the stature of the office has risen accordingly.¹³⁴ But, for all these successes, continuing implementation challenges demonstrate a need for better oversight of the FOIA system, particularly given the importance of FOIA for maintaining robust public accountability. While the standing up of OGIS represents an important development, the present system also leaves considerable room for improvement. The following Part carries out a comparative survey of global FOIA oversight structures, followed by a deeper dive into enforcement models in the United States’ two neighbors, Canada and Mexico, to consider the elements of a successful system and to develop ideas for improving the OGIS and the FOIA oversight system more generally.

¹²⁷ Alina M. Semo & Sheela Portonovo, *OGIS—Creating a FOIA Process that Works for All*, 63 VILL. L. REV. 959, 965 (2018).

¹²⁸ *Id.* at 961.

¹²⁹ *Id.* at 968.

¹³⁰ *Id.*

¹³¹ *Advisory Opinions*, NAT’L ARCHIVES: OFF. OF GOV’T INFO. SERVS. (OGIS), <https://www.archives.gov/ogis/advisory-opinions> (last visited Mar. 20, 2022).

¹³² OFF. OF GOV’T INFO. SERVS., THE FREEDOM OF INFORMATION ACT OMBUDSMAN: 2021 REPORT FOR FISCAL YEAR 2020 1 (2021) [hereinafter OFF. OF GOV’T INFO. SERVS., FOIA OMBUDSMAN REPORT].

¹³³ *Fiscal Year 2021, 3rd Quarter Performance (Apr 2021–Jun 2021)*, NAT’L ARCHIVES: OFF. OF GOV’T INFO SERVS. (OGIS), <https://www.archives.gov/ogis/mediation-program/fy-2021-q3-performance> (Jan. 4, 2022).

¹³⁴ OFF. OF GOV’T INFO. SERVS., FOIA OMBUDSMAN REPORT, *supra* note 132, at 1, 5, 7.

III. COMPARATIVE OVERSIGHT MODELS

While the United States was an early right-to-know adopter, it is a relative latecomer in its development of a specialized administrative oversight body as part of that framework. There are dozens of other countries around the world that have successfully implemented independent administrative oversight as part of their national right-to-information frameworks.¹³⁵ Some of their oversight bodies have been operating for decades.¹³⁶

Although every country operates in its own unique administrative and bureaucratic context, the experiences of other countries in combating common challenges to the right to information, particularly concerning how to promote compliance and a culture of openness, can be instructive in considering possible avenues to reform. This is particularly true given that the executive accountability function, which is at the core of FOIA, is not unique to the American system, but is relatively common around the world. Although a few right-to-information laws have been implemented as decrees from the executive branch,¹³⁷ the vast majority of global frameworks are enacted as legislation by the congress, parliament, or equivalent legislative body.¹³⁸ Moreover, while nearly every global right-to-information law targets the executive branch,¹³⁹ it is relatively common for these laws to exclude the legislative branch or to only apply to the legislature in a very limited way.¹⁴⁰ In other words, the American context, whereby Congress has implemented FOIA as an accountability check on the executive,¹⁴¹ is

¹³⁵ See generally CÉLINE KAUFFMANN & REBECCA SCHULTZ, OECD REGUL. POL'Y DIV., CASE STUDIES OF REGWATCHEUROPE REGULATORY OVERSIGHT BODIES AND OF THE EUROPEAN UNION REGULATORY SCRUTINY BOARD (2018), <https://www.oecd.org/gov/regulatory-policy/Oversight-bodies-web.pdf>.

¹³⁶ See, e.g., Access to Information Act, R.S.C. 1985, c A-1, § 54 (Can.) (operating in Canada since 1983); Official Information Act 1982, pt. 5, s 28(1) (N.Z.) (operating in New Zealand since 1982).

¹³⁷ See, e.g., NAT'L CONCILIATION & MEDIATION BD., FREEDOM OF INFORMATION: EXECUTIVE ORDER NO. 02 S. 2016 OPERATIONALIZING IN THE EXECUTIVE BRANCH THE PEOPLE'S CONSTITUTIONAL RIGHT TO INFORMATION AND THE STATE POLICIES TO FULL PUBLIC DISCLOSURE AND TRANSPARENCY IN THE PUBLIC SERVICE AND PROVIDING GUIDELINES THEREFOR. 3, https://ncmb.gov.ph/wp-content/uploads/2021/01/foima_nual.pdf (the Philippines is one example of a country where the right to information has been implemented by presidential decree, but the system is limited and comparatively weak).

¹³⁸ See generally OPEN SOC'Y JUST. INITIATIVE, COUNTRIES THAT GUARANTEE A RIGHT OF ACCESS TO INFORMATION (RTI) IN NATIONAL/FEDERAL LAWS OR DECREES + DATES OF ADOPTION & SIGNIFICANT AMENDMENTS: 128 COUNTRIES, INC. 3 NON-MEMBERS OF THE UN, AS OF 1 SEPTEMBER 2018, <https://eyeonglobaltransparency.net/wp-content/uploads/2018/10/Updated-Countries-with-ATI-Laws-Sept-ember-2018-2.pdf> (demonstrating that right to information laws are much more common than decrees).

¹³⁹ According to the RTI Rating, the only country that did not score any points on this indicator was Tajikistan, as a result of the law's ambiguous definitions. *Country Data: By Indicator*, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/by-indicator/7> (last visited Mar. 20, 2022) (select "Indicator 7").

¹⁴⁰ See, e.g., *supra* note 136; Gyōsei kikan no hoyū suru jōhō no kōkai ni kansuru hōritsu [Act on Access to Information Held by Administrative Organs], Act No. 42 of 1999, arts. 1, 2(1)(i) (Japan) (excluding the National Diet entirely).

¹⁴¹ *What Is FOIA?*, *supra* note 4.

common across a number of comparable democracies, thus enhancing the applicability of lessons that may be drawn from these peer systems, in particular regard to the need for oversight structures that are outside the control of the executive.

This Part uses a comparative approach to reveal important factors in the success of independent oversight structures in order to inform possible avenues for improving oversight of FOIA.

A. *Evaluating Oversight*

There has not been much academic treatment regarding the characteristics of a strong and effective oversight system in the right-to-information space, though the general importance of independence in oversight bodies is fairly well established.¹⁴² Sarah Holsen and Martial Pasquier, in a paper specifically addressing this question, noted a “general consensus” that oversight bodies should be granted binding decision-making power in order to give a body the “teeth” to enforce its rulings in the face of political or bureaucratic resistance and to generate official legal precedents that will be useful for future decision-making.¹⁴³ However, Holsen and Pasquier’s analysis draws heavily from civil society writings on this theme, specifically by three organizations which specialize on the right to information: the Centre for Law and Democracy, Access Info Europe, and the Carter Center.¹⁴⁴

Laura Neuman, the Director of the Carter Center’s Global Access to Information Program, lists six qualities of a robust oversight system, namely that it should be independent from political influence; accessible to requesters without the need for legal representation; absent overly formalistic requisites; affordable; timely; and specialist in transparency.¹⁴⁵

These values roughly correspond to the earmarks of a strong oversight system spelled out in the Global RTI Rating, a comparative methodology designed by the Centre for Law and Democracy and Access Info Europe, which assesses the strength of right-to-information systems around the world.¹⁴⁶ Specific indicators assessed by the RTI Rating include the speed with which appeals are processed, the cost to requesters of filing an appeal, the ease with which individuals can access and navigate the system, and the

¹⁴² Chris Hanretty & Christel Koop, *Measuring the Formal Independence of Regulatory Agencies*, 19 J. EUR. PUB. POL’Y 198, 198 (2012).

¹⁴³ Holsen & Martial Pasquier, *Insight on Oversight: The Role of Information Commissioners in the Implementation of Access to Information Policies*, 2 J. INFO. POL’Y 214, 228 (2012).

¹⁴⁴ *Id.* at 238–40.

¹⁴⁵ Laura Neuman, *Enforcement Models: Content and Context* vi, 2 (World Bank Inst., Access to Info. Working Paper Series, 2009).

¹⁴⁶ *The RTI Rating*, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org> (last visited Mar. 20, 2022).

independence of the oversight body.¹⁴⁷ This latter category is assessed through a number of factors, including the body's appointment process, whether its members have the security of tenure, whether individuals with strong political connections are prohibited from being appointed to the body, the body's level of financial independence, and the breadth of the body's mandate.¹⁴⁸

However, while the RTI Rating explicitly values order-making power as preferable to a recommendation-based system, Neuman's analysis adopts a more nuanced approach, presenting the counterpoint that a recommendation-based model can help to foster less adversarial relations between the oversight body and governmental institutions, allowing for the exercise of more collaborative and persuasive approaches to promoting good practice.¹⁴⁹

B. *International Case Studies*

As of August 2021, there are 129 countries with access to information, right to information, or freedom of information laws in force, according to the Global RTI Rating.¹⁵⁰ Of these, at least eighty-two countries allow the public to file appeals with an external oversight body (either a specialized information commissioner or a general purpose oversight body such as an ombudsman).¹⁵¹ In at least fifty of these countries, the oversight body is explicitly designated as reporting to the parliament or to the legislature,¹⁵² though nearly every oversight body includes at least some measures aimed at supporting its independence.¹⁵³

In around half of the countries that have an oversight body, the oversight body is able to issue legally binding orders.¹⁵⁴ For the most part, this tracks with the division between countries that have created a specialized oversight body to handle information requests (typically an information commissioner or commissioner) and those who delegate this responsibility to a general governmental oversight body. There are exceptions to this, particularly Japan's Information Disclosure and Personal Information Protection Review Board¹⁵⁵ and Portugal's Comissão de Acesso aos Documentos Administrativos,¹⁵⁶ which

¹⁴⁷ *Country Data: By Indicator*, GLOB. RIGHT TO INFO. RATING, <https://www.rti-rating.org/country-data/by-indicator> (last visited Mar. 20, 2022).

¹⁴⁸ *Id.*

¹⁴⁹ Neuman, *supra* note 145, at 8.

¹⁵⁰ *Country Data: By Country*, *supra* note 5.

¹⁵¹ *Country Data: By Indicator*, *supra* note 147 (select "Indicator 37").

¹⁵² *Id.* (select "Indicator 39").

¹⁵³ *Id.* (select "Indicator 38").

¹⁵⁴ *Id.* (select "Indicator 42").

¹⁵⁵ Gyōsei kikan no hoyū suru jōhō no kōkai ni kansuru hōritsu [Act on Access to Information Held by Administrative Organs], Act No. 42 of 1999, art. 18 (Japan).

¹⁵⁶ Lei n.º 46/2007 de 24 de Agosto [Act no. 46/2007 of 24 August], art. 12, no. 2 & art. 27, no. 1, para. c (Port.).

are both examples of specialized oversight bodies that operate on a recommendation-based model. But, in the majority of examples where an information oversight body does not have the power to issue binding orders, a general governmental oversight body carries out the task.

In European systems, such as in Finland,¹⁵⁷ Moldova,¹⁵⁸ Kosovo,¹⁵⁹ and Germany,¹⁶⁰ appeals are commonly handled by the ombudsman. However, this structure is not unique to Europe. Trinidad and Tobago,¹⁶¹ the Cook Islands,¹⁶² and Rwanda¹⁶³ also refer appeals to the ombudsman, whose power is limited to making recommendations. Other countries, such as Malawi¹⁶⁴ and Mongolia,¹⁶⁵ direct appeals or complaints to the Human Rights Commission, which is likewise limited to making recommendations or, in the case of Mongolia, to referring matters to the courts if it feels a government body is failing to fulfill its legal obligations.¹⁶⁶

By contrast, where countries establish a specialized information commission or commissioner, the dominant approach is to provide these entities with the power to order documents to be disclosed. India¹⁶⁷ and Mexico¹⁶⁸ are commonly cited as examples of this type of model, but similar arrangements are in place in numerous other countries, including Indonesia,¹⁶⁹ Serbia,¹⁷⁰ and the United Kingdom.¹⁷¹

Of the countries that allow their oversight body to issue binding rulings, there are typically two models for how it is enforced. On the one hand, the enabling legislation may include direct sanctions for violating an order of

¹⁵⁷ Parliamentary Ombudsman Act, Act No. 197/2002, § 11 (Fin.).

¹⁵⁸ *Privind accesul la informație* [Law on Access to Information], Law No. 282/2000, art. 21(2) (Mold.).

¹⁵⁹ Law on Access to Public Documents, Law No. 03/L-215, art. 17 (2010) (Kos.).

¹⁶⁰ *Übersetzung durch den Sprachendienst des Bundesministeriums des Innern* [Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act)], Sept. 5, 2005, BUNDESGESETZBLATT, Teil I [BGBl. I] at 2722, § 12, no. 3 (Ger.).

¹⁶¹ Freedom of Information Act, Act No. 26 of 1999, § 38A (Trin. & Tobago).

¹⁶² Official Information Act 2008, Act No. 2 of 2008, dec. 30 (Cook Islands).

¹⁶³ Law N° 04/2013 of 08/02/2013 Relating to Access to Information, Law No. 04/2013, art. 17 (Rwanda).

¹⁶⁴ Access to Information Act, Act No. 13 of 2017, pt. 2, § 8 (Malawi).

¹⁶⁵ Law on the Information Transparency and Right to Information, Law of June 16, 2011, art. 17, § 17.1 (Mong.).

¹⁶⁶ National Human Rights Commission of Mongolia Act, Law of Dec. 7, 2000, art. 17 (Mong.).

¹⁶⁷ Right to Information Act, 2005, § 19(7) (India).

¹⁶⁸ *Ley General de Transparencia y Acceso a la Información Pública* [General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, art. 157 (Mex.).

¹⁶⁹ Public Information Disclosure Act, Act No. 14 of 2008, ch. 8, art. 39 (Indon.).

¹⁷⁰ Law on Free Access to Information of Public Importance, Official Gazette RS No. 120/04, art. 28 (Serb.).

¹⁷¹ Freedom of Information Act 2000, c. 36, §§ 50, 54 (U.K.).

the oversight body.¹⁷² In some cases, this allows oversight bodies to directly level fines for noncompliance with their decisions or even for broader measures that undermine the right to information, without the need for any intervention from the courts at all.¹⁷³

An alternate model is to include a legal provision stating that the failure to abide by a ruling of the oversight body may be treated as equivalent to contempt of court.¹⁷⁴ Though this is obviously less efficient than allowing the oversight body to levy fines directly, it builds in more procedural fairness for public institutions by requiring court intervention before a fine may be imposed. An additional layer of procedure, found in some systems, is implemented to require the Commission to file its order with a relevant court for enforcement before it is considered binding.¹⁷⁵

Unlike traditional forms of monetary penalty, which come out of the pockets of transgressors, one potential challenge to using fines to promote compliance is that the end result of a fine levied by an oversight body against a public institution means essentially moving funds from one corner of the public purse to another.¹⁷⁶ A particularly unscrupulous government could simply top-off the budget of the offending institution to make up for the cost of fines paid, or it could even nullify the impact of the fine entirely by deducting an equivalent amount from the oversight body's budget. In order to mitigate this risk, some right-to-information systems allow officials responsible for undermining the law to be fined personally.¹⁷⁷ This type of system is generally not a mainstream practice and is likely unpopular among officials who would potentially be subject to fines.

One final note is that it is not unusual for systems that include order-making power to also provide for mediation processes at the front end. For example, in Indonesia, the law mandates that the first stage of the Information Commission's review is to initiate a mediation process between the complainant and the public body, whose consensus result is

¹⁷² See e.g., Access to Information Law, ch. 5, art. 35(1)(6) (2015) (Afg.) (which, under s. 35(1), allows fines and compensation for violations of the law).

¹⁷³ Right to Information Act, 2064 (2007), Act No. 4 of the Year 2064, ch. 5, § 32(5) (Nepal).

¹⁷⁴ See, e.g., Act to Provide for the Right of Access to Information in Transparent and Effective Manner, Subject Only to Reasonable Restrictions Imposed by Law (Right of Access to Information Act), Act No. 34 of 2017, § 20(2) (Pak.) (providing for penalties equivalent to contempt of court for violations of the oversight body's orders).

¹⁷⁵ See Right to Access Information Act, 2013, Act No. 2 of 2013, § 32(6) (Sierra Leone) (requiring the Commission to file its order with a relevant court for enforcement).

¹⁷⁶ See generally Public Information Disclosure Act, Act No. 14 of 2008, ch. 9, art. 52 (Indon.) (appearing to issue fines against institutions for violating the right to information, drawn from their general operating budget).

¹⁷⁷ See An Act to Make Provisions for Ensuring Free Flow of Information and People's Right to Information (Right to Information Act, 2009), Act No. 20 of 2009, § 27 (Bangl.) (allowing for fines to be directly levied against officials that undermine the right to information).

legally binding.¹⁷⁸ Only if this process fails will the Information Commission move to an adjudication process.¹⁷⁹ This runs counter to the narrative that portrays a binary choice between rigid order-making systems and more collaborative approaches.

C. *Canada's Enforcement Models*

Although Canada's Access to Information Act was passed nearly two decades later than FOIA, it was one of the first laws of its kind to include a specialized oversight body under the Information Commissioner.¹⁸⁰ The Commissioner is an independent officer of Parliament whose appointment requires consultation with every recognized party in the Senate and in the House of Commons, as well as approval by resolution of the Senate and of the House of Commons.¹⁸¹ The Commissioner's position includes additional formal safeguards over her independence, notably that she reports to Parliament, rather than to the executive, and that her salary and expenses are established by legislation.¹⁸²

The Information Commissioner may receive and investigate public complaints regarding breaches of the Access to Information Act, and she has the power to initiate complaints of her own volition and to refuse to investigate complaints should she deem them frivolous or otherwise unnecessary.¹⁸³ Importantly, complaints to the Commissioner are free of charge and do not require legal representation to file.¹⁸⁴ The Access to Information Act grants her office with broad powers of investigation, including the ability to summon persons and compel their evidence, to enter any premises occupied by any governmental institution and converse in private with any person found there, and to examine any record within or under the control of any governmental institution.¹⁸⁵

Although the procedures for her decision-making are not spelled out in the law, her office has developed a robust body of precedent to ground her decision-making, including a lengthy investigation guide that spells out case

¹⁷⁸ Public Information Disclosure Act, Act No. 14 of 2008, ch. 9, art. 40 (Indon.).

¹⁷⁹ *Id.* ch. 9, art. 42.

¹⁸⁰ *See* Access to Information Act, R.S.C. 1985, c A-1, §§ 54–67 (Can.). At the time this law was passed, there were a number of general ombudsmen-type offices around the world that were responsible for enforcement under freedom of information rules, but none were tasked solely with enforcement of this kind.

¹⁸¹ *Id.* § 54.

¹⁸² *Id.* § 55(1)–(2).

¹⁸³ *Id.* § 30.

¹⁸⁴ INFO. COMM'R OF CAN., *ACCESS TO INFORMATION ACT COMPLAINT FORM*, https://www.oic-ci.gc.ca/sites/default/files/2020-03/OIC_Complaint_form_-_ENG-filable-final.pdf (last visited Apr. 8, 2022).

¹⁸⁵ Access to Information Act, R.S.C. 1985, c A-1, § 36(1)–(1.1) (Can.).

law and interpretative guidelines related to each exception in the Access to Information Act.¹⁸⁶

Originally, the Information Commissioner was limited to making non-binding recommendations, but this was reformed in 2019 to grant the Information Commissioner power to make binding orders.¹⁸⁷ This includes the power to order documents to be disclosed, as well as any other solutions the Commissioner considers appropriate.¹⁸⁸ However, there are important limitations to this ability, which do not apply to investigations which the Commissioner herself initiates.¹⁸⁹ Another important limitation is that the law expressly provides government agencies with an avenue to appeal the Commissioner's decisions and that, importantly, these appeals are reviewed in Federal Court as a *de novo* proceeding.¹⁹⁰

In contrast to the U.S. model, where, as Part II noted, the *de novo* standard of review is important to support judicial oversight, Canada's implementation of this standard has significantly weakened the position of the oversight body, since it leaves the government with little incentive to engage with the Information Commissioner during her review, given that the government can just wait and introduce their arguments against disclosure when the matter reaches the Federal Court.¹⁹¹ One former Information Commissioner also noted that the lack of any direct recourse to enforce orders was "problematic."¹⁹²

Although the federal Information Commissioner is the most prominent face of Canada's right-to-information system, virtually every province and territory has some sort of independent oversight body. Of these, the Ontario Information and Privacy Commissioner enjoys particularly robust enforcement powers, as the law makes it an offense to fail to comply with her orders, though the consent of the Attorney General is required in order

¹⁸⁶ *Investigation Guidance*, INFO. COMM'R OF CAN., <https://www.oic-ci.gc.ca/en/information-commissioners-guidance> (last visited Mar. 20, 2022).

¹⁸⁷ Act to Amend the Access to Information Act and the Privacy Act and to Make Consequential Amendments to Other Acts, S.C. 2019, c 18 (Can.).

¹⁸⁸ Access to Information Act, R.S.C. 1985, c A-1, § 36(1) (Can.).

¹⁸⁹ *Id.* § 36.1(2).

¹⁹⁰ *Id.* § 44.1.

¹⁹¹ Teresa Scassa, *Bill C-58's Order-Making Powers: A Huge Disappointment*, TERESA SCASSA: BLOG (Sept. 26, 2017, 6:26 AM), https://www.teresascassa.ca/index.php?option=com_k2&view=item&id=262:bill-c-58s-order-making-powers-a-huge-disappointment&Itemid=80; *Failing to Strike the Right Balance for Transparency: Recommendations to Improve Bill C-58: An Act to Amend the Access to Information Act and the Privacy Act and to Make Consequential Amendments to Other Acts*, INFO. COMM'R OF CAN., <https://www.oic-ci.gc.ca/en/resources/reports-publications/failing-strike-right-balance-transparency> (Jan. 1, 2020).

¹⁹² *Failing to Strike the Right Balance for Transparency*, *supra* note 191.

to commence a prosecution under this provision.¹⁹³ In Alberta,¹⁹⁴ Quebec,¹⁹⁵ Prince Edward Island,¹⁹⁶ Nunavut,¹⁹⁷ and British Columbia,¹⁹⁸ decisions of the oversight bodies may be filed with an appropriate court, giving them the force and effect of a judgment by that court. In all five cases, while the government has a right of judicial review, it is not carried out as a *de novo* review.¹⁹⁹ Most of the remaining provinces and territories operate under a recommendation-based model for the oversight body.²⁰⁰ The exceptions to this are Newfoundland and Labrador and Manitoba, which operate under hybrid models.²⁰¹ However, every Canadian oversight body enjoys robust independence from the executive branch.²⁰²

¹⁹³ Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c F.31, § 61(1)(f), (3) (Can.).

¹⁹⁴ Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c F-25, § 72(6) (Can.).

¹⁹⁵ Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q. 2021, c A-2.1, § 144 (Can.).

¹⁹⁶ Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 2001, c 37, § 66(6) (Can.).

¹⁹⁷ Access to Information and Protection of Privacy Act, R.S.N.W.T. 1994, c 20, § 35(6) (Can.).

¹⁹⁸ Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c 165, § 59.01 (Can.).

¹⁹⁹ See Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c F-25 (Can.); Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q. 2021, c A-2.1, (Can.); Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 2001, c 37 (Can.); Access to Information and Protection of Privacy Act, R.S.N.W.T. 1994, c 20 (Can.); Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c 165 (Can.). None of these statutes include any mention of the reviews being *de novo*, which translates to a standard degree of judicial deference.

²⁰⁰ See, e.g., Right to Information and Protection of Privacy Act, R.S.N.B. 2009, c R-10.6, §§ 73–74 (Can.); Freedom of Information and Protection of Privacy Act, R.S.N.S. 1993, c 5, §§ 39–40 (Can.); Freedom of Information and Protection of Privacy Act, R.S.S. 1990–91, c F-22.01, §§ 55–56 (Can.); Access to Information and Protection of Privacy Act, R.S.Y. 2002, c 1, §§ 57–58 (Can.); Access to Information and Protection of Privacy Act, R.S.N.W.T. 1994, c 20, § 36(a) (Can.). All of these statutes limit the respective oversight bodies to issuing non-binding recommendations.

²⁰¹ Access to Information and Protection of Privacy Act, R.S.N.L. 2015, c A-1.2, §§ 50–51 (Can.). In Newfoundland and Labrador, the Access to Information and Protection of Privacy Act limits the Information and Privacy Commissioner to making recommendations, but requires that the government file an order with the Trial Division if they wish to avoid complying. Appeals to the Trial Division are heard as a new matter, but this appeals system does not apply to procedural recommendations, such as regarding timeframes for response or fees for access, which are not subject to additional review. See also Freedom of Information and Protection of Privacy Act, C.C.S.M. 1997, c F175, §§ 66(1), 66(4), 66.8(1), 66.9(1) (Can.). In Manitoba, complaints in the first instance go to the Ombudsman, which may make recommendations. However, if these recommendations are not followed, the Ombudsman has the ability to refer the matter to the Information and Privacy Adjudicator, which has order-making power. In other words, the Ombudsman performs what is essentially a gatekeeping function for complaints. However, at the end of this process, the government retains an ability to apply for a *de novo* review by the court.

²⁰² See MICHAEL KARANICOLAS, CENTRE FOR L. & DEMOCRACY, FAILING TO MEASURE UP: AN ANALYSIS OF ACCESS TO INFORMATION LEGISLATION IN CANADIAN JURISDICTIONS 16–17 (Toby Mendel ed., 2012) (considering the strengths and weaknesses of different provincial and territorial freedom of information legislation, including noting that the independence of these offices is relatively consistent across Canada).

D. Mexico's Enforcement Model

In Mexico, the right to information is specifically guaranteed under Article VI of the Constitution.²⁰³ Although the country's General Act of Transparency and Access to Public Information was first adopted in 2002, an ambitious reform package was passed in 2015, which substantially boosted both the substance of the right to information and its oversight framework.²⁰⁴ As a result, the country has evolved into a position of regional leadership on this issue, and it has come to be regarded as a success story on the promise and potential of strong right-to-information legislation.²⁰⁵

The centerpiece of Mexico's transparency framework is the Instituto Nacional de Transparencia (INAI), a commission of seven members who are appointed by the senate through a two-thirds vote, though the president maintains some power to object to candidates.²⁰⁶ However, the INAI reports to and has its budget approved by the senate.²⁰⁷ Once appointed, the commissioners may only be removed through an impeachment process, giving them strong security of tenure.²⁰⁸ The commissioners serve a term of seven years, which is staggered to ensure a balanced flow of appointments.²⁰⁹

The INAI maintains extremely broad powers of review and remediation, including the power to assess not only refusals to release information, but also the delivery of incomplete information, the delivery of information that does not match the request, the classification of information, the format in which information has been delivered, the costs or delivery times for the information, or any other procedural irregularity.²¹⁰ The INAI also has the power to review classified information in order to verify its status and need for such protections.²¹¹ The INAI is required to resolve appeals for reconsideration within thirty days of their filing, though that time period may be extended once by an additional thirty days.²¹² In a complaint process, the

²⁰³ Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 6 (Mex.).

²⁰⁴ ADRIANA GARCÍA GARCÍA, MEX. INST.: WILSON CTR., *TRANSPARENCY IN MEXICO: AN OVERVIEW OF ACCESS TO INFORMATION REGULATIONS AND THEIR EFFECTIVENESS AT THE FEDERAL AND STATE LEVEL* 3–4 (2016).

²⁰⁵ Vivek Ramkumar & Diego de la Mora, *Mexico's Battle for Transparency*, U.S. NEWS & WORLD REP. (Feb. 13, 2016, 1:31 PM), <https://www.usnews.com/news/best-countries/articles/2016-02-13/mexicos-battle-for-transparency>; Paul Lagunes & Oscar Pocasangre, *Dynamic Transparency: An Audit of Mexico's Freedom of Information Act*, 97 PUB. ADMIN. 162, 162–63 (2019).

²⁰⁶ Constitución Política de los Estados Unidos Mexicanos, CPEUM, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014, art. 6(A)(VIII) (Mex.).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Ley General de Transparencia y Acceso a la Información Pública [General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, art. 38 (Mex.).

²¹⁰ *Id.* art. 143.

²¹¹ *Id.* art. 147.

²¹² *Id.* art. 165.

burden of proof for justifying any denial of access to information lies with the public entities that are the subject of the complaint.²¹³

In addition to the power to order particular records to be disclosed, Mexico also has a sophisticated regulatory structure to set and harmonize right-to-information standards across the country through its National Transparency System, a structure that includes the INAI and state-level agencies, the Superior Audit Office, the General Archive of the Nation, and the National Institute of Statistics and Geography.²¹⁴ Together, these agencies are tasked with establishing and harmonizing standards around records management, data preservation, training, accessibility, and education.²¹⁵ The National Transparency System also has a broad mandate to promote awareness of and engagement with the right to information, supporting citizen participation in this area.²¹⁶

IV. STRONG INSTITUTIONAL DESIGNS

There is no single, cookie-cutter solution to supporting compliance with access to information or right-to-information rules. Each of the examples spelled out in the previous sections operate in their own unique legal and institutional contexts with externalities that might guide different jurisdictions towards different solutions.²¹⁷ Likewise, effective oversight is only one component of a well-functioning right-to-information system, alongside other factors like robust demand for information, public engagement, clear legal standards for disclosure, and an institutional culture that respects the rule of law.²¹⁸

However, evidence suggests that certain design choices generally provide stronger oversight and ultimately stronger executive accountability.²¹⁹ Despite the diverse legal and social contexts, both the universality of bureaucratic resistance to transparency legislation and the similarities in imposing legislative oversight over the executive branch's administrative arms support the value of comparative analysis as an avenue for developing better global practice standards for overcoming this

²¹³ *Id.* art. 105.

²¹⁴ *Id.* art. 30.

²¹⁵ *Id.* art. 31.

²¹⁶ *Id.*

²¹⁷ For example, the status of the rule of law is drastically different across many of the countries surveyed in Part III. *See supra* Part III. *See generally* Moeen H. Cheema, *The Politics of the Rule of Law*, 24 MICH. ST. INT'L L. REV. 449 (2016) (providing a deeper discussion of the relationship between legal standards and contextual social and political pressures).

²¹⁸ *See* MENDEL, *supra* note 8, at 31–40 (providing a general overview of the earmarks of a strong right-to-information framework).

²¹⁹ *See, e.g.*, CENTRE FOR L. & DEMOCRACY, NOTE ON THE PAKISTAN RIGHT OF ACCESS TO INFORMATION BILL, 2017 5 (2017), https://www.law-democracy.org/live/wp-content/uploads/2012/08/Pakistan.RTI_Note_Oct17.pdf (providing a critical analysis of one such legal framework). The Centre for Law and Democracy has authored dozens of similar assessments, which are available on their website.

challenge.²²⁰ This Part identifies two key factors to achieve effective oversight of transparency administration, to the end of increasing accountability over executive agencies.

A. Independence

The most unambiguous lesson to be drawn from transparency experimentation around the globe is the value of having an independent oversight body. From the requester standpoint, there is virtually no downside to having access to a relatively quick, cheap, and effective remedy to breaches of the law, as an alternative to going to court.²²¹ But, given the fundamental role that right-to-know laws have in checking executive power exercised by administrative agencies, it is abundantly clear why oversight structures that are independent from the agencies being held accountable are a structural necessity.

The biases of political actors toward secrecy are not merely hypothetical. For example, in 2019 alone, both Scott Pruitt, President Trump's first appointee to head the EPA, and Ryan Zinke, Trump's first appointee to head the Department of Interior, were forced to resign after malfeasance exposed through requests made under FOIA.²²² This might, at first blush, seem like an illustration of FOIA's power, and, to some degree, it is. But what followed their resignations is equally, if not more, telling. In both cases, the agencies ultimately responded to the scandals by tightening political control over FOIA disclosures. The Department of Interior adopted a new "awareness review" policy, requiring career staff to notify political appointees if the appointees are involved in documents that are about to be released.²²³ Likewise, the EPA adopted a regulation allowing political appointees to issue final determinations under FOIA.²²⁴

These policies elicited strong public outcries that FOIA decisions should not be political,²²⁵ and, it turns out, rightly so. Awareness review was almost

²²⁰ See *supra* Part III.

²²¹ See, e.g., Md Mahmudul Hoque, *Information Institutions and the Political Accountability in Bangladesh*, 9 INT'L J. SCI. & ENG'G RSCH. 1586, 1590 (2018) (discussing the positive impacts of information institutions in improving political accountability in Bangladesh).

²²² Coral Davenport, *Ethics Office Examines Allegations That Interior Dept. Officials Violated Transparency Laws*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/climate/interior-department-freedom-of-information.html>.

²²³ Memorandum from Cindy Cafaro, U.S. Dep't of the Interior Departmental FOIA Officer, to U.S. Dep't of the Interior Assistant Sec'ys, Heads of Bureaus & Offs. & Bureau/Off. FOIA Officers (Feb. 28, 2019), https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf; Davenport, *supra* note 222.

²²⁴ Davenport, *supra* note 222.

²²⁵ See, e.g., Daniel McGrath, *Interior's Proposed FOIA Rule Threatens Transparency and Accountability*, AM. OVERSIGHT (Jan. 29, 2019), <https://www.americanoversight.org/interiors-proposed-foia-rule-threatens-transparency-and-accountability> (arguing that Interior's policy was unlawful and undermined FOIA).

immediately used to hide records for political gain. Daniel Jorjani, a political appointee who was serving as the top lawyer at the Department of the Interior, used the awareness review policy to delay the release of hundreds of pages of records involving then-Deputy Secretary David Bernhardt in advance of confirmation hearings that would elevate Mr. Bernhardt to the position of Secretary of the Interior.²²⁶ When subsequently asked by Congress about his role in disclosure decisions, he misleadingly responded that he “typically did not review records prior to their release under the FOIA,”²²⁷ a statement that later led to criminal investigation.²²⁸

To be sure, the drive to exert political control over FOIA disclosures transcends partisan divisions. In 2010, the Department of Homeland Security under the Obama administration came under fire for issuing a directive that various FOIA responses be reviewed by political appointees for “awareness purposes,” leading to the delay of releases, including those to Congress.²²⁹ If political appointees within administrative agencies are able to interfere with the flow of disclosures to the public, it subverts the purpose of FOIA as a mechanism of direct accountability.

This sort of political bias toward secrecy should not come as a surprise. Accountability, for all its importance to the maintenance of democratic institutions, is not a pleasant process for those on the receiving end of it.²³⁰ At best, being made to explain or justify one’s actions can feel distracting and time consuming.²³¹ It can trigger defensiveness or feelings of hostility at having one’s decision-making or performance questioned.²³² Freedom of information systems can be unpopular among officials, who may prefer to more actively manage public perceptions of their work.²³³ Around the world, journalists and other frequent requesters can relate endless stories of the various measures to stymie information requests that they have encountered.²³⁴

²²⁶ Beitsch, *supra* note 7.

²²⁷ *See id.*

²²⁸ *Id.*

²²⁹ Ted Bridis, *Playing Politics with Public Records Requests*, NBC NEWS (July 21, 2010, 7:30 PM), <https://www.nbcnews.com/id/wbna38350993#.UcNcVPlwpQQ>.

²³⁰ Andrew McGill, *Why FOIA Is Broken, From a Government Worker’s Perspective*, ATLANTIC (July 6, 2016, 3:32 PM), <https://www.theatlantic.com/notes/2016/07/why-the-freedom-of-information-act-is-broken-from-a-government-employees-perspective/490181/>.

²³¹ *Id.*

²³² *Id.*

²³³ Paul Farrell, *Hypocritical Politicians ‘Hate’ Freedom of Information, Says Former Commissioner*, GUARDIAN (Sept. 29, 2015, 9:30 PM), <https://www.theguardian.com/politics/2015/sep/30/politicians-hypocritical-on-freedom-of-information-says-former-commissioner>.

²³⁴ *See, e.g.*, Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India’s Right to Information Act*, 70 PUB. ADMIN. REV. 925, 928 (2010) (detailing harassment and even physical attacks against citizens filing right-to-information requests); David Pugliese, *DND Blames Clerk for Internal Failures, Even as Documents Show Senior Officers Discussed Withholding Records*, NAT’L POST (Jan. 22, 2019), <https://nationalpost.com/news/canada/dnd-blames-clerk-for-internal-failures-even-as-documents-show-senior-officers-discussed-withholding-records> (describing a practice in which

As a result, an independent oversight body should not be subject to the political pressures to protect executive branch interests and further presidential agendas. Agencies cannot be left to police themselves with regard to their disclosure obligations.²³⁵ Because FOIA is a direct mechanism for agency accountability, an independent mechanism to oversee this oversight is imperative.

Existing oversight of FOIA obligations that most requesters can actually access in the United States is not independent. And judicial remedies, while independent, are largely inaccessible.²³⁶ While both internal administrative remedies and judicial remedies can play an important role in a robust oversight structure,²³⁷ they are no substitute for external administrative review.

While internal appeals and mediation can be effective at resolving certain categories of appeals, such as where there is misunderstanding or confusion between the requester and the public body regarding which records are being sought, these appeals are unlikely to be helpful in addressing systemic deficiencies or institutional resistance, since the authorities reviewing the complaint will likely present the same attitude as those that first responded to the request.²³⁸ That is, these internal appeals are decided by another executive branch official, not by an independent adjudicator.

Judicial review, on the other hand, is fully independent, but it tends to fall short due to the time and expense involved in making a complaint. These logistical hurdles make this option impractical for all but a small minority of determined requesters, generally those who have some sort of professional or institutional backing to their request.²³⁹ The timeliness challenge is exacerbated in contexts where requesters are required to exhaust these internal remedies before they even pursue the matter in court, as is the case with the federal system in the United States.²⁴⁰

As it is currently constituted, OGIS likewise fails to perform this independent oversight function. First, it is not independent from the

senior military officials deliberately lie about the existence of information); Jean Laroche, *Nova Scotia Premier Phones Staff to Keep Information Secret*, CBC (Sept. 29, 2016), <https://www.cbc.ca/news/canada/nova-scotia/information-foipop-access-secrecy-premier-stephen-mcneil-1.3784110> (reporting that the head of a Canadian province admitted he would avoid leaving a paper trail specifically so there was nothing for the public to access).

²³⁵ See *supra* notes 223–229 and accompanying text.

²³⁶ See *supra* Part II.

²³⁷ Indeed, many information commissions coexist with these other forms of remedies. See, e.g., Lei No. 12.527, de 18 de Novembro de 2011, *Diário Oficial da União* [D.O.U.] de 18.11.2011, § II, arts. 15, 16, 35 (Braz.); The Right to Information Act, 2005, §§ 18(3), 19(7) (India); Public Information Disclosure Act, Act No. 14 of 2008, arts. 4(4), 26(1), 37(1) (Indon.). Each of these statutes allow for both administrative remedies and judicial appeals.

²³⁸ VIKAS JHA, ACCESSING INFORMATION UNDER RTI: CITIZENS' EXPERIENCES IN TEN STATES - 2008 53 (2008), https://pria.org/knowledge_resource/Accessing_Information_Under_RTI_1.pdf.

²³⁹ Neuman, *supra* note 145, at 6–7.

²⁴⁰ See *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004) (detailing exhaustion requirements for FOIA).

executive. It is housed with NARA, an executive agency.²⁴¹ Although Congress may have arranged this structure on the understanding that NARA was a relatively neutral, relatively expertise-driven agency concerned with records preservation and access, it is nonetheless subject to presidential control, housed within the executive, and otherwise part of the political administration.²⁴² Indeed, its overlapping responsibilities with OIP, a division of DOJ, make clear that it is a political entity. NARA itself does not even have the status of so-called independent agencies,²⁴³ which are headed by multi-member bodies or commissions populated by officials who are protected from presidential control through for-cause removal provisions.²⁴⁴

The value of independent administrative review can be seen in light of the experiences of journalists detailed earlier in Part II. When they can obtain independent review, it is powerful, but too often that review is inaccessible. The United States should learn from the experiences of other legal regimes and create a truly independent oversight body.

B. *Order Making Power*

A second critical element of institutional design for oversight is vesting order-making power in the independent body. The power to issue binding orders—orders to release information with which agencies must comply—is the remedy that requesters need when they face agency recalcitrance and denial of records. It is the authority of a court to order compliance that makes judicial review so powerful for those who can access it, as described in detail in Part II. And only an oversight body that has that power will be able to remedy violations of the law.

The current dissatisfaction with OGIS is illustrative, insofar as the central problem is that OGIS does not possess order making power. As one advocacy organization that is a frequent FOIA plaintiff described, OGIS's characterization of the success of its "team approach" in collaborating with agencies to respond to FOIA requests "is laughable."²⁴⁵ Another transparency organization documented how federal agencies can and have

²⁴¹ See *supra* Part II.C.

²⁴² Nicolas E.M. Michiels, Comment, *Should Inmates Be Running the Jailhouse?: Affirming the Constitutionality of Enhanced Archivist Involvement in White House Record-Keeping Policymaking*, 58 AM. U. L. REV. 1567, 1592 (2009) ("Even if it is argued that granting the Archivist the authority to issue standards and certify presidential implementation is an impermissible transfer of control away from the White House, the EMPA would have passed constitutional muster under *Nixon II* because the Archivist is effectively an executive branch official. The Archivist is the head of the NARA, an administrative entity that is popularly referred to as an independent agency. However, NARA does not possess the traditional characteristics of an independent agency; instead, the structure of NARA resembles that of a more traditional executive branch agency.") (footnotes omitted).

²⁴³ *Id.*

²⁴⁴ *Id.* at 1593–94.

²⁴⁵ *Agency Created to Force FOIA Compliance a Failure*, JUD. WATCH (Sept. 11, 2013), <https://www.judicialwatch.org/corruption-chronicles/agency-created-to-force-foia-compliance-a-failure/>.

ignored OGIS's attempt to mediate disputes, with little to no recourse available to OGIS.²⁴⁶

OGIS's lack of enforcement powers may also be the reason why it so rarely avails itself of the recommendation-making power that it currently has.²⁴⁷ The current OGIS structure may actually encourage the agency to pull its punches. If, for example, an appeal was lodged concerning a document which the oversight body believed should be disclosed in its entirety, but which they knew the agency would never voluntarily release, there is little incentive for the oversight body to engage on the question and risk polluting their future interactions with the agency. This is in addition to the broadly demoralizing impact of undertaking a review that staffers know will ultimately result in no substantive changes. The lack of OGIS follow-up in the face of non-compliance itself encourages officials to continue ignoring their obligations under the Act.

It is also eminently sensible from a design perspective to give an independent information commission or oversight body order-making power. To begin, a specialized information commission or commissioner will be able to develop a strong level of expertise in the right to information and in the appropriate secrecy standards for concepts like national security and commercial confidentiality.²⁴⁸ This expertise should allow the commission to assess the potential harm flowing from disclosures with a higher degree of accuracy.

Second, it is a significant public investment to create a specialized information commission. Where countries are going to devote the resources necessary to establishing this office, they may want to get the most bang for their buck in terms of robust oversight in order to deliver on the perceived benefits of a healthy transparency system.²⁴⁹ It does not make sense to devote substantial resources to establishing a dedicated office specializing in the right to information, only to allow public officials to ignore the opinions that flow from the office whenever they might be inconvenient. Both factors may undermine the efficacy of more collaborative, recommendation-based systems.

Order-making power for oversight bodies is more controversial than independence, but the experience of countries that have adopted a strong order-making power model demonstrates the system's efficacy.²⁵⁰ First, in

²⁴⁶ Alex Howard, *The Interior Department Should Honor Congress' Intentions on FOIA Mediation*, SUNLIGHT FOUND. (May 19, 2016, 2:15 PM), <https://sunlightfoundation.com/2016/05/19/the-interior-department-should-honor-congress-intentions-on-foia-mediation/>.

²⁴⁷ See *supra* Part II.C.

²⁴⁸ See, e.g., *Section 21: Advice and Recommendations*, INFO. COMM'R OF CAN., https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-21_advice-and-recommendations (Sept. 30, 2019) (demonstrating the detailed level of analysis, including through relevant case law and specific examples, applied by Canada's Information Commissioner to the exception for deliberative processes).

²⁴⁹ See *supra* Part I.

²⁵⁰ See *supra* Part III.

general, the systems that have been widely celebrated as global success stories tend to follow an order-making model. The prototypical example here is India, which is often pointed to as exemplifying the potential transformative impact of a strong right-to-information law.²⁵¹ Mexico²⁵² and the United Kingdom,²⁵³ two other countries that are often pointed to as “success stories,” likewise equip their oversight bodies with robust enforcement powers.²⁵⁴

By contrast, the international trend is that those countries that employ multi-purpose oversight bodies, rather than dedicated information commissions, tend to be limited to offering recommendations.²⁵⁵ There are several reasons which may explain this distinction. First, an ombudsman or a human rights commission, which deals with a more general portfolio, is unlikely to cultivate the same level of specific expertise.²⁵⁶ This may lead to less confidence that it will make the right call in balancing the public interest in disclosure against the potential harms. Second, there may be less investment of resources when adding transparency oversight responsibilities to an existing oversight body than when creating a stand-alone information commission. As such, the international trend supports order-making power for dedicated information commission models.

Moreover, the main purported advantage of a recommendation-based model, is, upon close examination, illusory. Proponents suggest that recommendation-based models help to foster a more collaborative and less adversarial approach to promoting disclosure.²⁵⁷ The experience with OGIS, however, shows the weakness of this approach.

In fact, to the contrary, at the international level, there is no shortage of examples of countries, like Indonesia, that merge order-making power with

²⁵¹ ESHA SEN MADHAVAN, BERKMAN CTR. FOR INTERNET & SOC’Y AT HARV. UNIV., REVISITING THE MAKING OF INDIA’S RIGHT TO INFORMATION ACT: THE CONTINUING RELEVANCE OF A CONSULTATIVE AND COLLABORATIVE PROCESS OF LAWMAKING ANALYZED FROM A MULTI-STAKEHOLDER GOVERNANCE PERSPECTIVE 1–2 (2016), https://cyber.harvard.edu/sites/cyber.harvard.edu/files/Publish_Sen%20Madhavan.pdf; Chetan Agrawal, *Right to Information: A Tool for Combating Corruption in India*, 3 J. MGMT. & PUB. POL’Y 26, 26 (2012). However, it is also worth noting that this fundamental right has degraded significantly under the present Modi administration, consistent with a broader erosion of civil and political rights in that country.

²⁵² Ramkumar & de la Mora, *supra* note 205; Lagunes & Pocasangre, *supra* note 205.

²⁵³ Ben Worthy, Peter John & Matia Vannoni, *Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests in England*, 27 J. PUB. ADMIN. RSCH. & THEORY 485, 485 (2017).

²⁵⁴ ANUPAMA DOKENIYA, WORLD BANK, IMPLEMENTING RIGHT TO INFORMATION: LESSONS FROM EXPERIENCE 2 (2013).

²⁵⁵ See *supra* Part III.

²⁵⁶ For example, Mongolia’s Human Rights Commission, which is delegated to hear complaints regarding that country’s right-to-information law, has a mandate that includes everything from gender equity to environmental protection to the rights to education and to a fair trial. NAT’L HUM. RTS. COMM’N OF MONG., 19TH STATUS REPORT ON HUMAN RIGHTS AND FREEDOMS IN MONGOLIA 5 (2020), <https://en.nhrcom.gov.mn/doc/103/>.

²⁵⁷ Neuman, *supra* note 145, at 8.

a robust front-end mediation procedure.²⁵⁸ Indeed, stronger order-making powers appear to support, rather than undermine, more robust mediation efforts by strengthening the Information Commission's hand in trying to push governments to be more accommodating, given the implication that their obduracy could work against them if the mediation process fails. This was the sentiment that David Loukidelis, who was formerly British Columbia's Information and Privacy Commissioner, expressed when asked about the strengths and weaknesses of an order-making system:

Speaking only to the situation and experience in British Columbia, we have found, over the 16 years of our office's experience, that order-making power has served, in fact, to encourage dispute resolution. Using mediation, we consistently resolve some 85% to 90% of the access appeals that come to our office.²⁵⁹

A survey of Canada's information oversight bodies, some of which have order-making power and some of which operate on a recommendations-based approach, shows broad dissatisfaction with the latter.²⁶⁰ In addition to boosting compliance through direct intervention, the utility of strong enforcement powers to support more earnest participation in front-end mediation processes, as well as claims that a stronger enforcement mechanism would help to empower internal champions of transparency and push government departments to direct more resources towards processing information requests, are all worth flagging.²⁶¹

C. *An American Model of Oversight*

While global experiences are useful in making the case for why independent administrative oversight structures would be beneficial to promoting compliance with FOIA, policy-makers need not view these reforms as a wholly foreign concept. First, order-making power in an independent commission or oversight body model is entirely consistent with non-Article III adjudication authority vested for the administrative

²⁵⁸ Public Information Disclosure Act, Act No. 14 of 2008, ch. 8, arts. 38–39 & ch. 9, arts. 40–41 (Indon.).

²⁵⁹ Paul Szabo, Chair, House of Commons, *The Access to Information Act: First Steps Towards Renewal*, Report of the Standing Committee on Access to Information, Privacy and Ethics, 40th Parl., 2d Sess., at 6 (2009).

²⁶⁰ OFF. OF THE INFO. & PRIV. COMM'R FOR NOVA SCOTIA, 2017–2018 ANNUAL REPORT 7, 30 (2018), https://oipc.novascotia.ca/sites/default/files/publications/annual-reports/OIPC%202017-2018%20Annual%20Report_0.pdf; *Failing to Strike the Right Balance for Transparency*, *supra* note 191.

²⁶¹ OFF. OF THE INFO. & PRIV. COMM'R FOR NOVA SCOTIA, *supra* note 260, at 7, 30; *Failing to Strike the Right Balance for Transparency*, *supra* note 191.

adjudication of so-called public rights.²⁶² Indeed, information access decisions would form classic public rights cases, where the government is a party to the dispute and the rights at issue were created by federal statute.²⁶³ It is a natural fit for a non-Article III body to adjudicate these rights in the first instance, one with expertise and independence as its sources of legitimacy.

However, the strongest case for how these structures can be effective in an American context lies at the state level, where several such bodies already exist. Connecticut,²⁶⁴ New Jersey,²⁶⁵ New York,²⁶⁶ Indiana,²⁶⁷ and Utah²⁶⁸ all have established specialized administrative oversight bodies to process complaints related to their local freedom of information legislation. Of these, Connecticut's Freedom of Information Commission, Utah's State Records Committee, and New Jersey's Government Records Council all have the power to order disclosure of records, though the latter appears to rarely exercise this power.²⁶⁹ Indiana's Public Access Counselor, by contrast, issues advisory opinions, as does New York's Committee on Open Government.²⁷⁰ A number of states delegate the power to review appeals to an ombudsman, namely Iowa,²⁷¹ Arizona,²⁷² Tennessee,²⁷³ and Virginia,²⁷⁴ though the ombudsmen typically do not have the power to overrule refusals of access.

²⁶² See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1542–45 (2020) (explaining the public rights doctrine).

²⁶³ *Id.* at 1546–47. See also *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853–54 (1986) (“[T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘‘could be conclusively determined by the Executive and Legislative Branches,’’ the danger of encroaching on the judicial powers’ is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication.” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985))).

²⁶⁴ CONN. GEN. STAT. § 1-205 (2022).

²⁶⁵ N.J. STAT. ANN. § 47:1A-7 (West 2021).

²⁶⁶ N.Y. PUB. OFF. LAW §§ 84–90, § 89(1) (McKinney 2022).

²⁶⁷ IND. CODE § 5-14-4-5 (2022); see also GUIDE TO FILING A FORMAL COMPLAINT, OFF. OF THE IND. PUB. ACCESS COUNS. (JULY 2015), https://www.in.gov/pac/files/Guide_to_Filing_a_Formal_Complaint.pdf (providing a guide to filing complaints for denials of records with the Public Access Counselor).

²⁶⁸ UTAH CODE ANN. § 63G-2-403 (West 2021).

²⁶⁹ CONN. GEN. STAT. § 1-205; UTAH CODE ANN. § 63G-2-403. In a survey of New Jersey Government Records Council decisions, we were unable to find any examples where disclosure was ordered, though there were a number of instances where mediation resulted in additional disclosures by the relevant agency. *GRC Decisions Search*, STATE OF N.J. GOV'T RECS. COUNCIL, <https://www.nj.gov/cgi-bin/dca/grc/decisionsearch.pl> (last visited Mar. 20, 2022).

²⁷⁰ *Advisory Opinions*, IN.GOV, <https://www.in.gov/pac/2330.htm> (last visited Mar. 15, 2022); *Freedom of Information Law Case Summary*, N.Y. STATE OPEN GOV'T, https://www.dos.ny.gov/coog/foil_listing/findex.html (last visited Mar. 15, 2022).

²⁷¹ IOWA CODE § 2C.9 (2022).

²⁷² ARIZ. REV. STAT. ANN. § 41-1376.01 (2022).

²⁷³ TENN. CODE ANN. § 8-4-601 (West 2022).

²⁷⁴ VA. CODE ANN. § 30-178(A) (West 2022).

That some U.S. states have successfully adopted independent oversight models with order-making authority speaks to the feasibility of such systems in the U.S. political and legal context. Indeed, Connecticut's model is hailed as a particularly successful one, and it has regularly contested case hearings, issues decisions, and testifies on policy matters before the Connecticut legislature.²⁷⁵

In other words, the weakness and inefficacy of the OGIS is by no means a necessary consequence of the American system. Rather, it is an area of national weakness that exists because, at the federal level, Congress has implemented solutions that are not fit for purpose, at the cost of its own oversight and the public interest in this critical democratic right. Amid broader conversations about the need for democratic revival and, above all else, a drive to impose accountability against the demonstrated excesses of the executive branch, a revitalized FOIA system should be a central ingredient in restoring faith and confidence in America's democratic processes.

CONCLUSION

America's system of democratic checks and balances is in the midst of a profound political crisis.²⁷⁶ While the most dramatic manifestation of this came in the form of a physical attack on the U.S. Capitol,²⁷⁷ the past five years have witnessed escalating challenges to congressional, and ultimately public, oversight of the executive.²⁷⁸ The shift away from accountability took place against a backdrop of mounting evidence of abuses across the executive branch, including among administrative state agencies.²⁷⁹ In the aftermath of this jarring stress-test of America's democratic institutions,

²⁷⁵ *Connecticut Freedom of Information Commission*, CT.GOV, <https://portal.ct.gov/FOI> (last visited Mar. 15, 2022).

²⁷⁶ Jack M. Balkin, *How to Do Constitutional Theory While Your House Burns Down*, 101 B.U. L. REV. 1723 *passim* (2021).

²⁷⁷ Ed Pilkington, *Incitement: A Timeline of Trump's Inflammatory Rhetoric Before the Capitol Riot*, GUARDIAN (Jan. 7, 2021, 12:35 PM), <https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot>.

²⁷⁸ Robert J. DeNault, Note, *Not a King: President Trump and the Case for Presidential Subpoena Reform*, 16 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 146, 147–48 (2021); Steve Vladeck, *Good Governance Paper No. 7: Executive Branch Vacancies* (Just Sec., Good Governance Papers, 2020), <https://www.justsecurity.org/72980/good-governance-paper-no-7-executive-branch-vacancies/>.

²⁷⁹ See, e.g., Ediberto Román & Ernesto Sagás, *A Domestic Reign of Terror: Donald Trump's Family Separation Policy*, 24 HARV. LATINX L. REV. 65, 65–73 (2021) (discussing the human rights harms of the Trump administration's immigration policy); Donald Moynihan, *Populism and the Deep State: The Attack on Public Service Under Trump*, in DEMOCRATIC BACKSLIDING AND PUBLIC ADMINISTRATION: HOW POPULISTS IN GOVERNMENT TRANSFORM STATE BUREAUCRACIES 151, 151–53 (Michael W. Bauer et al. eds., 2021) (discussing broader efforts by the Trump administration to undermine the integrity of the public service); Chuck Rosenberg, *Why the Attorney General's Meddling on Antitrust Issues Matters*, LAWFARE (July 1, 2020, 2:13 PM), <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters> (discussing political interference with the administration of justice).

scholars and legal commentators are increasingly focused on questions of democratic and constitutional renewal.²⁸⁰

Concerns about accountability and oversight of executive branch institutions are nothing new, and they have indeed been a recurring feature of academic, judicial, and political debate.²⁸¹ Although recent abuses have crystalized the dangers inherent in unchecked executive power, there is a natural concern over the vast authority wielded by unelected government officials, which extends to rulemaking and adjudication across a huge variety of substantive areas.²⁸² The fact that these officials are not directly answerable to the electorate fuels a democratic deficit, which, in turn, drives a need for alternative ways of imposing accountability on executive structures.²⁸³

If this is indeed the case, one might hope that the experience of the past few years is enough to convince Americans, and particularly America's legislators, that now is the time to finally take decisive steps to bring FOIA into the twenty-first century, particularly through an oversight structure that guarantees agencies follow the law.

Over the past few years, Benjamin Franklin's (possibly apocryphal) rejoinder that the Founding Fathers had designed "a republic, if you can keep it," has grown quite popular, particularly among congressional leaders.²⁸⁴ But, while the line was a frequent reference point in the 2019 impeachment process, its underlying message on the need for vigilance to maintain America's democratic institutions is equally appropriate in the context of legislative solutions to impose broad structural oversight over the exercise of administrative power. Though not as flashy as a vote for impeachment, these institutional changes are a more important ingredient in the broader project of rejuvenating American democracy and developing a model of robust oversight which can not only expose abuses from the previous President, but also support accountability for future inhabitants of the Oval Office.

²⁸⁰ See generally Quinta Jurecic, Alan Z. Rozenshtein & Benjamin Wittes, *An Opportunity for Democratic Renewal*, LAWFARE (Nov. 7, 2020, 11:28 AM), <https://www.lawfareblog.com/opportunity-democratic-renewal> (exploring potential strategies for the Biden administration to restore trust in America's institutions of government); BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020) (considering the future of executive branch powers); JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020) (discussing the future of American democracy generally, and how the present crises present an opportunity for renewal).

²⁸¹ See *supra* Part I.

²⁸² See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (describing the scope of agency authority after the New Deal).

²⁸³ See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 1-4 (1994) (arguing that the Supreme Court's acquiescence in broad delegations of authority to agencies should lead the Court to also approve innovative design choices meant to restore the balance of power envisioned in the Constitution).

²⁸⁴ Gillian Brockell, *'A Republic, If You Can Keep It': Did Ben Franklin Really Say Impeachment Day's Favorite Quote?*, WASH. POST (Dec. 18, 2019), <https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/>.