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ARTICLE

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

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In this new age of environmental law, scholars, advocates, policy makers, journalists, and other interested members of the public can gain access to and harness information about our environment through federal right-to-know laws, including the Freedom of Information Act (FOIA).[1] The question is whether these statutes ensure that environmental information is made available to the public in a timely and dependable way.

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

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

Congress sought to fine-tune FOIA in 1996 when it enacted the Electronic FOIA Amendments (EFOIA) to place affirmative obligations on agencies to compile information that is of general interest to the public and to make it available on the Internet.[2] But agencies have by-and-large failed to comply with EFOIA's affirmative disclosure mandate,[3] and thus FOIA remains predominantly a requester-driven statute.

Second, a perennial problem is that access-to-information statutes are subject to political manipulation by administrations that are intent on limiting public access to government-held information. When George W. Bush took office in 2001, one of the first official acts of his Attorney General John Ashcroft was to issue a directive to the heads of all federal agencies and departments notifying them that the Justice Department would defend all agency efforts to withhold information under FOIA so long as there was a plausible basis for so doing.[4] More recently, the Environmental Protection Agency (EPA) has drastically scaled back the information made public under the Toxics Release Inventory (TRI) program of the Emergency Planning and Community Right-to-Know Act.[5] The TRI program tracks the waste production and release of approximately 650 dangerous chemicals.[6] Prior to EPA's rollback, facilities had to report detailed information for any amount over 500 pounds about the amount of any of those chemicals and where the chemical went.[7] For pollution

Professor Vladeck has an active litigation practice and has handled or supervised many cases seeking access to federal records, including many cases discussed in this Article. A version of this Article was originally published in the Texas Law Review *(English version only) at* 86 Tex. L. Rev. 1787 (2008)*, and is reprinted with permission.*

1. 5 U.S.C. §552. FOIA was first enacted in 1966, and has been amended in 1974, 1976, 1986, 1996, 2002, and 2007.
2. Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified as amended at 5 U.S.C. §552).
3. *See, e.g.*, *Implementation of the Electronic Freedom of Information Act Amendments of 1996: Is Access to Government Information Improving?: Hearing Before the Subcomm. on Gov't Mgmt., Info. and Tech. of the H. Comm. on Gov't Reform*, 105th Cong. 20–31 (1998) (statement of Michael E. Tankersley, Senior Staff Attorney, Public Citizen Litigation Group) (examining the implementation of EFOIA in light of reports indicating a lack of agency compliance).
4. Memorandum from John Ashcroft, Att'y Gen. of the United States, to the Heads of All Fed. Dep'ts & Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/oip/011012.htm .
5. EPA Toxics Release Inventory Burden Reduction Final Rule, 71 Fed. Reg. 76932 (Dec. 22, 2006) (codified at 40 C.F.R. pt. 372 (2008)); *see also* 42 U.S.C. §11023, ELR Stat. EPCRA §313 (establishing the reporting requirements for toxic chemical releases).
6. Chemicals and Chemical Categories to Which This Part Applies, 30 C.F.R. §372.65 (2008).
7. EPA Toxics Release Inventory Burden Reduction Final Rule, 71 Fed. Reg. at 76933.

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

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

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

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

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

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

I. Crosscutting Federal Right-to-Know Statutes

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

A. *FOIA*

1. Background

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

2. FOIA §552(a)(3)(A)

The real genius of FOIA is its provision allowing "*any* person"[13]—including corporations, nonprofit entities, and

8. *Id.*
9. *Id.* at 76937.
10. *See generally* Critical Mass Energy Project v. NRC, 975 F.2d 871, 22 ELR 21373 (D.C. Cir. 1992) (en banc) (holding that reports submitted to the Nuclear Regulatory Commission are confidential and thus protected from disclosure).
11. *See* Alan B. Morrison, *Balancing Access to Government-Controlled Information*, 14 J.L. & Pol'y 115, 117 n.5 (2006) (noting that the Court's decision in *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), which held that a plaintiff must obtain court-ordered relief in order to collect attorney's fees, means that "in the FOIA context . . . the Government can fight for years and then 'voluntarily disclose' the requested records before a judge rules against it, and thereby avoid paying any fees").
12. 5 U.S.C. §552(a)(1)(A)–(E) (2000). The publication requirement marks an important step forward in administrative law; rules or interpretations of general applicability that are not published in the *Federal Register* are not enforceable by the agency. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 232–35 (1974); Smith v. Nat'l Transp. Safety Bd., 981 F.2d 1326, 1328–29 (D.C. Cir. 1993); Anderson v. Butz, 550 F.2d 459, 463 (9th Cir. 1977) (all holding that, under the APA, rules and interpretations of general applicability must be published in the *Federal Register* in order to be enforceable).
13. *Id.* §552(a)(3)(A) (emphasis added).

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even foreign nations[14]—to request *any* record from *any* federal agency or government-controlled entity on *any* subject, without saying why the record was requested or what purpose disclosure would serve.[15] FOIA authorizes a disappointed requester to bring suit to compel disclosure of withheld records and places the burden of proof on the government, not the requester.[16]

3. A Tale of Two Cases

To illustrate the strengths and weaknesses of FOIA in practice, it is useful to briefly sketch the progression of two FOIA cases I worked on for environmental organizations.[17] The first, *Natural Resources Defense Council (NRDC) v. United States Department of Defense*,[18] is an ongoing effort to force the Department of Defense (DOD), EPA and the Office of Management and Budget (OMB) to release records relating to perchlorate, an ingredient in rocket fuel that contaminates groundwater in about 30 states.[19]

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

The agencies filed a typically uninformative answer[23] and, over the next nine months, requested successive extensions of time to enable the agencies to complete their searches for responsive documents, to process the large volume of documents identified as responsive, and to release nonexempt documents. In November 2004—over 18 months after NRDC filed its initial FOIA requests—EPA and DOD filed motions for summary judgment.[24] At that time, between EPA and DOD, 7,000 total records were withheld, and DOD *excluded* the Air Force from its search for responsive records.[25]

Three obvious flaws in the Government's motions fueled my suspicion that they were filed to delay the progress of the litigation. First, DOD acknowledged that it had refused to search Air Force records, even while it claimed that it had designated the Air Force as its "lead military agency" on perchlorate years earlier.[26] Second, the declarations and *Vaughn*[27] indexes submitted by the Government were seriously deficient because EPA and DOD either provided no document-specific justifications at all, or if they did, they failed to explain why the withheld records were predecisional.[28] The third and final straw was that the Government withheld many records on the basis of obviously overbroad exemption claims.

While preparing its summary judgment motion, OMB decided that twenty records were nonresponsive and excluded them for that reason, and that 57 documents should be released to NRDC.[29] This left 243 documents, in whole or in part, at issue; all were withheld under Exemption 5.[30] OMB was playing a critical role in pressing EPA to set a high

14. *Id.* §551(2).
15. *Id.* §552(a)(3)(A).
16. *Id.* §552(a)(4)(B).
17. Prior to joining the faculty of Georgetown University Law Center full- time in 2002, I spent over 25 years as a staff lawyer and director of Public Citizen Litigation Group, where I handled FOIA cases for parties seeking disclosure of government-held information. I continue to represent parties in FOIA litigation. The discussion of the cases that follows is based on my participation as counsel for the plaintiffs and on the voluminous court filings and correspondence generated by each case. The assertions that follow that are not supported by a conventional citation are based on my account of the events that are reported in the text.
18. Complaint for Injunctive and Declaratory Relief, No. CV 04-2062 GAF (RZx) (C.D. Cal. Mar. 31, 2004), 2004 WL 5043625. The case has already resulted in two published decisions: *NRDC v. U.S. Dep't of Def. (NRDC I)*, 388 F. Supp. 2d 1086 (C.D. Cal. 2005) and *NRDC v. U.S. Dep't of Def. (NRDC II)*, 442 F. Supp. 2d 857 (C.D. Cal. 2006).
19. *See* Ross Brechner et al., *Ammonium Perchlorate Contamination of Colorado River Drinking Water Is Associated With Abnormal Thyroid Function in Newborns*, 42 J. Occupational & Envtl. Med. 777, 777 (2000) (stating that ammonium perchlorate has been used "as an oxidizer in solid propellants for rockets, missiles, fireworks, and munitions; for manufacture in matches; and in analytical chemistry"); James W. Moeller, *Legal Issues Associated With Safe Drinking Water in Washington, D.C.*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 661, 696 (2007) ("The U.S. Government Accountability Office ('GAO') has identified almost 400 sites in thirty-five states—and in the District—with perchlorate contamination in drinking water, surface water, groundwater, and soil.").
20. Perchlorate contamination poses potential health risks to tens of millions of Americans, particularly fetuses and newborns. *See, e.g.*, Brechner et al., *supra* note 19, at 778 (outlining the harmful effects of perchlorate).
21. Letter from David Beckman, Senior Attorney, Natural Res. Def. Council, to Freedom of Info. Officer, Dir., Freedom of Info. & Sec. Review, Dep't of Def. (Sept. 2, 2003) (on file with the Texas Law Review) (Letter I). Letter from David Beckman, Senior Attorney, Natural Res. Def. Council, to Freedom of Info. Officer, Dir., Freedom of Info. & Sec. Review, Dep't of Def. (Sept. 2, 2003) (on file with the Texas Law Review) (Letter II).
22. Complaint for Declaratory and Injunctive Relief at 1–2, NRDC v. U.S. Dep't of Def. (*NRDC I*), 388 F. Supp. 2d 1086 (C.D. Cal. 2005) (No. CV 04-2062 GAF (RZx)), 2004 WL 5043625.
23. FOIA provides that "the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant . . . unless the court otherwise directs for good cause shown." 5 U.S.C. §552(a)(4)(C).
24. Notice of Motion, and Motion for Summary Judgment by Defendant DOD, *NRDC I*, 388 F. Supp. 2d 1086 (No. CV 04-2062 GAF (RZx)), 2004 WL 5043623 [hereinafter Motion for Summary Judgment by DOD]; Memorandum of Points and Authorities in Support of EPA's Motion for Summary Judgment, *NRDC I*, 388 F. Supp. 2d 1086 (No. CV 04-2062 GAF (RZx)), 2004 WL 5043624 [hereinafter Memorandum in Support of EPA's Motion]. OMB was not yet prepared to file a motion for summary judgment because it claimed that it still needed additional time to search for and process responsive records.
25. Motion for Summary Judgment by DOD, *supra* note 24, at 3.
26. *Id.*
27. Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973).
28. *See, e.g.*, NRDC v. U.S. Dep't of Def. (*NRDC I*), 388 F. Supp. 2d 1086, 1096–97, 1103–04, 1106–07 (C.D. Cal. 2005) (rejecting DOD's and EPA's *Vaughn* indexes). *Vaughn* indexes play a key role in FOIA litigation by injecting a degree of adverseness into FOIA litigation, which is inherently nonadversarial. Courts require the Government to: (1) prepare a *Vaughn* index to identify each record withheld (typically by the record's date, author, recipients, title, subject matter, and length), any attachment to the record (which is frequently the case with e-mails), and the exemptions the Government claims justify withholding each segregable portion of the record; and (2) provide a detailed justification (typically in the form of a declaration) correlated to the Government's exemption claims for each segregable portion of each withheld record. *See generally* Founding Church of Scientology v. Bell, 603 F.2d 945, 947–49 (D.C. Cir. 1979) (discussing the failings of a *Vaughn* index prepared by the FBI).
29. *Id.*
30. *Id.*

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threshold for perchlorate exposure, thereby minimizing the remediation costs the government and defense contractors would face. OMB had shared documents relating to potential cleanup costs with outside lobbyists working for defense contractors, including the Executive Office of the President Group,[31] and Richard Belzer, a former OMB economist who the agency claimed was an unpaid consultant.[32] OMB made the far-fetched claim that doing so was necessary to "preserv[e] the confidentiality of internal Executive Branch deliberations."[33] Although OMB invoked Exemption 5, the agency's *Vaughn* index did not identify the authors or recipients of many of the withheld documents, suggesting that the documents may well have been produced by, or shared with, nongovernmental parties.[34]

In March 2006, the court denied the motions for summary judgment filed by OMB, EPA, and DOD.[35] Finding that OMB had engaged in "selective disclosures" to aid private industry in its fight against perchlorate regulation, the court held that OMB had to turn over records shared with outside parties, including the EOP Group, Belzer, and other "contractors."[36] The court also held that DOD's failure to identify the recipients and authors of withheld records foreclosed the agency's reliance on Exemption 5, and accordingly ruled that those records had to be released as well.[37]

In April 2006, the Air Force moved for summary judgment.[38] Having spent a full year on its search, the Air Force claimed that it had uncovered barely 400 records relating to perchlorate.[39] Puzzled by the small number of records the Air Force unearthed, the court thought that something was awry and granted our motion to take discovery on the adequacy of the Air Force's search.[40] Extensive discovery showed that thousands of responsive records had not been identified and turned over.

In July 2006, NRDC and EPA entered into a settlement to establish a process for resolving their dispute over the remaining records.[41] These procedures enabled the parties to resolve their differences and wind up the litigation involving EPA. But, at the time of this writing, proceedings remain active with both DOD and OMB.

NRDC v. Department of Defense showcases some of the common *procedural* pitfalls that await FOIA plaintiffs. Another case, *New York Public Interest Research Group (NYPIRG) v. EPA*[42] *spotlights the key substantive* difficulty with FOIA in environmental litigation—FOIA's exemption for confidential business information (Exemption 4).[43] *NYPIRG* involved EPA's plan to clean up the Hudson River, which had been contaminated by at least one million tons of polychlorinated biphenyls (PCBs) that had been discharged into the river by the General Electric Corporation (GE) over a thirty-year period.[44] Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[45] EPA has the authority to compel a responsible party to implement a cleanup remedy chosen by the agency.[46]

In December 2000, EPA published for public comment a proposed plan for dredging the upper Hudson River to eliminate PCB contaminants, at an estimated cost of over $450 million.[47] GE argued that dredging was the wrong cleanup strategy because it would result in the resuspension of PCB that had settled to the river floor.[48] After the comment period closed on July 1, 2001, GE engaged in off-the-record meetings with EPA and OMB.[49] EPA and GE entered into a confidentiality agreement in connection with these meetings.[50] In February 2002, EPA ordered that its proposed large-scale dredging plan be implemented, and in July 2002, EPA issued an Administrative Order on Consent, in which GE agreed to pay EPA $5 million for partial reimbursement of the agency's past costs and up to $2.625 million for the agency's future costs—a small fraction of the agency's past costs and an even smaller fraction of the agency's estimated future costs.[51]

In NYPIRG's view, the settlement between GE and EPA had all of the hallmarks of a government giveaway. NYPIRG filed the case against EPA and OMB on July 3, 2002 to learn what had taken place during the secret meetings between GE, EPA, and OMB.[52] The key question was whether, under FOIA, EPA could withhold 43 records it received from GE as part of the negotiations over GE's responsibility for cleaning up the Hudson.[53] The sole basis for EPA's withholding was FOIA Exemption 4, which protects trade secrets and con-

31. OMB is part of the EOP. EOP is a lobbying group composed of former OMB staffers.
32. *NRDC II*, 442 F. Supp. 2d at 867.
33. *Id.* at 865.
34. The best discussion of this point—namely, the failure of DOD to give NRDC discrete, nonexempt portions of the records DOD was withholding—is in *NRDC II*, 442 F. Supp. 2d at 871–77.
35. *Id.* at 861.
36. *Id.* at 865–71.
37. *Id.* at 870–71.
38. The Department of Defense moved for partial summary judgment with respect to the Air Force's withholdings on April 3, 2006. Notice of Motion, and Motion for Partial Summary Judgment by Defendant DOD, *NRDC II*, 442 F. Supp. 2d 857 (No. CV 04-2062 GAF (RZx)).
39. Memorandum of Points and Authorities Submitted in Support of DOD's Motion for Partial Summary Judgment as to Records Held by the Department of the Air Force at 4, *NRDC II*, 442 F. Supp. 2d 857 (No. CV 04-2062 GAF (RZx)).
40. The order permitted NRDC to submit interrogatories to DOD and to take the deposition of three senior Air Force officials, and directed the Air Force to search for records in the Air Force's Research Lab, the Air Force's Perchlorate Study Group, and various other Air Force offices. (Proposed) Order, *NRDC II*, 442 F. Supp. 2d 857 (No. CV 04-2062 GAF (RZx)).
41. Joint Stipulation and (Proposed) Order Regarding Settlement of Claims Against Defendant EPA at 4–5, NRDC v. U.S. Dep't of Def., No. CV 04-2062 GAF (RZx) (C.D. Cal. July 18, 2006).
42. 249 F. Supp. 2d 327 (S.D.N.Y. 2003).
43. 5 U.S.C. §552(b)(4).
44. *NYPIRG*, 249 F. Supp. 2d at 329.
45. 42 U.S.C. §§9601–9675, ELR Stat. CERCLA §§101-405.
46. *NYPIRG*, 249 F. Supp. 2d at 329 (citing 42 U.S.C. §§9601, 9604, 9606–9607, 9622).
47. *Id.*; EPA, Record of Decision, Hudson River PCBs Site, New York 114 (2002), *available at* http://www.epa.gov/hudson/RecordofDecision-text.pdf (last visited June 2, 2009).
48. Plaintiff's Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment at 4–5 [hereinafter Plaintiff's Memorandum], *NYPIRG*, 249 F. Supp. 2d 327 (No. 02 Civ. 5130), 2002 WL 32768713.
49. *Id.* at 4–5.
50. *Id.*
51. *Id.*
52. Complaint for Declaratory and Injunctive Relief, *NYPIRG*, 249 F. Supp. 2d 327 (No. 02 Civ. 5130), 2002 WL 32768612.
53. *Id.* at 330.

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fidential business information.[54] The withheld documents, many of which were entitled "Hudson River Proposal" and "Hudson River—Proposed Remedy," set forth GE's analyses of the costs, benefits, and environmental consequences of EPA's proposed remedy and GE's alternatives.[55] Many of the pages were marked "Privileged & Confidential," and the confidentiality agreement executed by the parties contemplated that EPA would not share these submissions with nongovernmental parties.[56] GE made no effort to intervene in the litigation, nor did it submit any declarations or affidavits explaining why, in its view, the documents were privileged or confidential.[57] The question then became whether information of the kind GE provided to EPA falls within the scope of Exemption 4. EPA argued that it did because the information was commercial in nature and because it was confidential, as evidenced in part by the confidentiality agreement GE and EPA had executed. NYPIRG contended that the withheld documents had no intrinsic commercial value, and "were not prepared to aid GE in its business (unless its business is dumping hazardous materials into the Hudson River) but to advocate against the environmental remedy favored by EPA."[58]

The district court agreed with NYPIRG, but its reasoning reveals the friction points under Exemption 4. To qualify as commercial the "information itself must in some fashion be commercial or financial in nature or use."[59] The court reasoned that although GE "clearly is a commercial entity," the information "does not reveal anything about the nature and character of GE's business, or its revenues, expenses or income, or anything that a commercial business would want to protect for fear of competitive injury."[60] Rather, GE submitted the documents in order to "advocate a policy position, because it had a financial stake in the outcome of its meetings with EPA and OMB, and because it sought to convince EPA to adopt its less expensive remedy in addressing GE's dumping of PCBs into the Hudson River."[61]

The court also wrestled with EPA's alternative claim that disclosure of the records would impair the agency's ability to obtain necessary information in the future, and therefore that the information was "confidential" under Exemption 4.[62] In addressing this question, the court flagged but did not resolve the question of whether *National Parks & Conservation Ass'n v. Morton* or *Critical Mass Energy Project v. NRC* provided the controlling test for impairment.[63] The court recognized that the confidentiality agreement was evidence that GE expected the records to remain confidential and supported the inference that, but for a promise of confidentiality, GE would not have furnished them to EPA.[64] But the court concluded that GE's subjective belief was not dispositive, and ordered EPA to release the records submitted by GE.[65]

4. Lessons Learned?

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

FOIA also provides incentives for organizations and individuals to turn to the courts to pursue information denied to them by the agencies. Of course, not all FOIA denials lead to litigation. FOIA litigation has also proved to be a useful tool to gain insights into the government's handling of important environmental issues. For instance, in *NRDC*, DOD claimed that the Air Force is the Department's lead component on perchlorate and touted the lengths to which the Air Force had gone to inventory the extent of contamination, to study perchlorate's health effects, and to devise effective remediation programs but the Department's rhetoric did not match the evidence.[66]

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

There are also serious substantive problems that limit FOIA's effectiveness in environmental cases. Perhaps the biggest obstacle is looming presence of *Critical Mass*. Although the ruling has been adopted only by the D.C. Circuit, it is followed by every federal agency in making determinations about whether to disclose information that arguably falls within Exemption 4. [67] There are two reasons for this. One, the Department of Justice, which oversees the executive branch's implementation of FOIA, takes the view that *Critical Mass* is controlling as a matter of law, and federal agencies follow its lead.[68] And two, unlike many of FOIA's other exemptions, matters that fall within Exemption 4's scope are not subject to discretionary release by the government.[69] In permitting submitters to sue to enjoin disclosures under the Act (so-called reverse-FOIA cases), the Supreme Court in *Chrysler v. Brown*[70] suggested that Exemption 4 implicates,

54. *Id.* Exemption 4 provides that FOIA does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4).
55. *NYPIRG*, 249 F. Supp. 2d at 330.
56. *Id.*
57. *Id.* at 337.
58. Plaintiff's Memorandum, *supra* note 48, at 2–3.
59. *NYPIRG*, 249 F. Supp. 2d at 332-33.
60. *Id.* at 333.
61. *Id.* at 333–34.
62. *Id.* at 334–35.
63. *Id.* at 335–36.
64. *Id.* at 337.
65. *Id.*
66. Motion for Summary Judgment by DOD, *supra* note 24, at 3.
67. *See, e.g.*, OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 166 n.30 (3d Cir. 2000); In Def. of Animals v. U.S. Dep't of Agric., 501 F. Supp. 2d 1, 6 (D.D.C. 2007); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001).
68. U.S. Dep't of Justice, Freedom of Information Act Guide 372–74 (2007), *available at* http://www.usdoj.gov/oip/foia_guide07/exemption4.pdf (last visited June 2, 2009).
69. *Id.* at 465.
70. 441 U.S. 281 (1979).

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and may be co-extensive with, the Trade Secrets Act, which makes it a crime for a federal employee to knowingly disclose trade secret information in the government's hands absent legal authorization to do so.[71] Since then, lower courts have ruled that the Trade Secret Act's scope is "at least co-extensive with that of Exemption 4."[72] The combination of these rulings sends an unmistakable message to agencies: disclosure of trade-secret and confidential business information is impermissible, both under FOIA and the Trade Secrets Act. For that reason, government employees are especially wary about disclosing information that might fall within Exemption 4, since doing so would violate FOIA and may be considered a crime under the Trade Secrets Act.

B. The OPEN Government Act of 2007

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

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

C. The Federal Advisory Committee Act

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

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

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

71. *Id.* at 319 n.49. The Trade Secrets Act is codified at 18 U.S.C. §1905.
72. McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 305 (D.C. Cir. 1999).
73. OPEN Government Act of 2007 §6(a)(1), 5 U.S.C. §552(a)(6)(A)(ii) (2008).
74. *Id.* §6(b)(1)(A), 5 U.S.C. §552(a)(4)(A)(viii).
75. *Id.* §6(b)(1)(B), 5 U.S.C. §552(a)(6)(B)(ii).
76. *Id.*, 5 U.S.C. §552(a)(7)(B).
77. *Id.* §10(a), 5 U.S.C. §552(h)(1).
78. Pub. L. No. 92-463, §15, 86 Stat. 770, 776 (1972) (codified at 5 U.S.C. app. 2 (2000)).
79. Prior to FACA, the use of advisory committees was subject to regulation under Executive Order No. 11007. 3 C.F.R. 182 (1949 & Supp. 1962), *reprinted in* 5 U.S.C. §133z app. 194–95 (1964). While FACA incorporated some features of the Executive Order, it has a far broader application, especially with regard to presidential advisory committees, which were not covered by the Executive Order but are covered by FACA. *Compare* 5 U.S.C. app. 2 §3(4)("The term 'presidential advisory committee' means an advisory committee which advises the president."), *with* Exec. Order No. 11007 §2(a), 27 Fed. Reg. 1875, 1875 (creating no special distinction for presidential advisory committees outside of the base definition of advisory committees).
80. 5 U.S.C. app. 2 §5(c).
81. *Id.* §10(a)(2).
82. *Id.* §10(b).
83. 997 F.2d 898 (D.C. Cir. 1993).
84. *Id.* at 901.
85. *Id.*
86. *Id.* at 915–16.
87. *Id.* at 911, 915–16.
88. *Id.* at 915.
89. *Id.* at 901.
90. Ass'n of Am. Physicians & Surgeons v. Clinton, 879 F. Supp. 106, 107 (D.D.C. 1994) (dismissing the action as moot after the government released its remaining documents).

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The de facto membership rule was short-lived because in *Cheney v. United States Dist. Court for Dist. of Columbia*,[91] the D.C. Circuit announced that outsiders could be seen as de facto members of committees only where they "had a vote" or "had a veto" over the committee's decisions.[92] Under this reading of FACA, outsiders may play an active role in government committees so long as they do not vote or exercise formal veto authority.

Another blow to FACA was delivered earlier in *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey of Cost Control*,[93] which addressed whether task forces created by an advisory committee to support its work are subject to the strictures of FACA.[94] The President's Survey on Cost Control (the Grace Commission) organized 36 task forces to "gather information, perform studies, and draft reports and recommendations,"[95] which were ultimately submitted to the Executive Committee of the Survey, an advisory committee composed of corporate executives.[96] A coalition of low-income groups and individuals sued to gain access to the records and reports prepared by these task forces.[97] The D.C. Circuit held that absent a showing that the Executive Committee was merely "rubber stamping the task forces' recommendations," the task forces were not covered by FACA, and thus their meetings could take place in secret with no public oversight.[98]

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

II. Three Proposals for Reform

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

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

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

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

The best and most recent example came about as a result of the Federal Funding Accountability and Transparency Act of 2006 (Transparency Act), which required the government to design and make operational by January 1, 2008, a searchable database that provides detailed information on *every* entity receiving federal contracts, grants, and other awards.[99] The website is now up and running. The available information includes the entity receiving the award, the amount of the award, information about the award (including the transaction type; the funding agency; the purpose of the funding; the location of the recipient; and an identification of the city, state, and congressional district where the grant will be performed), a "unique identifier" of the entity receiving the award and of the parent entity of the recipient if any, and any other relevant information.[100]

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

91. 542 U.S. 367, 373–74 (2004).
92. In re Cheney, 406 F.3d 723, 729–30 (D.C. Cir. 2005) (en banc).
93. 711 F.2d 1071 (D.C. Cir. 1983).
94. *Id.* at 1072.
95. Nat'l Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey of Cost Control, 711 F.2d 1071, 1072 (D.C. Cir. 1983).
96. *Id.*
97. *Id.* at 1072, 1074.
98. *Id.* at 1075–76 (internal quotations omitted).
99. Pub. L. No. 109-282, §2(b), 120 Stat. 1186 (reprinted as a note to 31 U.S.C.A. §6101 (West, Westlaw through Pub. L. No. 110-198, excluding Pub. L. No. 110-181)).
100. *See id.* §2(b)(1), 120 Stat. at 1187. The website is operational, is easy to use, and contains all of the information that is called for in the Act. *See* Welcome to USAspending.gov, http://www.usaspending.gov (last visited Feb. 16, 2009); *see also* Elizabeth Williamson, *OMB Offers an Easy Way to Follow the Money*, Wash. Post, Dec. 13, 2007, at A33 (detailing the debut of the website).

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of charge to the public.[101] As a result of the Transparency Act, it is now easy to track virtually all federal grant and contract expenditures by the recipient company, by the kind of contract, or even by congressional district. There is no reason why OMB's website cannot serve as a model for similar programs with environmental data.

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

This is not a pie-in-the-sky suggestion. Once again, the nonprofit sector is a step ahead of government. For more than a decade, the Transactional Records Access Clearinghouse (TRAC), a nonprofit organization housed at Syracuse University, has used FOIA to compile and disseminate statistics about the enforcement activities of the Department of Justice, the Department of Homeland Security, the Federal Bureau of Investigation, the Internal Revenue Service, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco and Firearms.[102] The breadth and range of information on government activities that TRAC makes available is impressive by any measure. TRAC makes most of this information available to the public free of charge. If a single nonprofit organization funded by modest foundation grants and contributions from private citizens can create massive and useful databases of this kind, it is hard to imagine that the government could not also do so at a reasonable cost.

There are other examples as well. Although EPA recently scaled back reporting requirements for the TRI, it remains a valuable source of information for communities about toxic substances stored in their neighborhoods and releases of toxics into their air and water. Not only has EPA made TRI data available in several forms via the Internet,[103] but public interest groups have taken the TRI data and made it accessible along with other government environmental databases, making the data even more comprehensive and useful.[104]

These examples illustrate that feasibility and cost are no longer the constraints that they once were. Nor, in my view, is political will. The difficult question ahead will be which categories of information warrant being made available to the public in this way. Public access to information comes at a cost. The government must invest time and effort to put information in a form that can easily be transferred into a database that is useful for the public. No one would benefit if an undifferentiated mass of information were posted on the web; the cost of sifting through it would overwhelm its value. Nor is all information created equally. Some information is more useful and valuable to the public than other information, and priorities will need to be set. The question is how to do so.

In my view, the Paperwork Reduction Act (PRA)[105] could serve as a useful tool to identify potentially worthwhile data. Under the PRA, government agencies must secure approval from OMB before undertaking significant information-gathering activities.[106] The agency must justify its need for the information and identify the utility the information would have for the agency's regulatory functions.[107] The PRA imposes a high burden on agencies to demonstrate the importance of the information because the Act's ultimate aim is to reduce the paperwork burden government imposes on regulated industry and individuals.[108] And since the 1998 passage of the Government Paperwork Elimination Act,[109] Congress has encouraged agencies and regulated parties to furnish information to the government in electronic form in order to ease the conversion of the data into a searchable database.[110]

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

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

As noted above, one pervasive obstacle to the disclosure of environmental data is that submitting companies routinely claim that the data is confidential and that disclosure will cause them competitive harm.[111] It is time for Congress to

101. Williamson, *supra* note 100; *see* About FedSpending.org, http://www.fedspending.org/aboutthissite.php (last visited Feb. 16, 2009).
102. About the Transactional Records Access Clearinghouse, http://trac.syr.edu/aboutTRACgeneral.html (last visited Feb. 16, 2009).
103. EPA, Get TRI Data, http://www.epa.gov/tri/tridata/index.htm (last updated May 15, 2009).
104. *See, e.g.*, The Right-To-Know Network, www.rtknet.org (last visited Feb. 16, 2009) (allowing users to search the TRI data along with data from a dozen or more other government databases on toxic substances).
105. 44 U.S.C. §§3501–3520.
106. *Id.* §3507(d).
107. *Id.* §3508.
108. *Id.* §§3501(1), 3507(d).
109. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as amended in scattered sections of 44 U.S.C.).
110. 44 U.S.C. §3504(a)(1)(B)(vi).
111. *See, e.g.*, U.S. Gov't Accountability Office, GAO-05-458, Chemical Regulation: Options Exist to Improve EPA's Ability to Assess Health Risks and Manage Its Chemical Review Program 5 (2005) [hereinafter Chemical Regulation], *available at* http://gao.gov/new.items/d05458.pdf (noting that the Toxic Substances Control Act "authorizes chemical companies to claim data as confidential"); *id.* at 31 ("EPA is required under the act to protect trade secrets and privileged or confidential commercial or financial information against unauthorized disclosures.").

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reexamine how agencies handle these claims. Under statutes that mandate the disclosure of information, like the Toxic Substances Control Act,[112] agencies often accept these claims without question and keep the information secret[113]; those determinations are rarely if ever challenged. Under statutes like FOIA, once an agency receives a request for information submitted by a third party, the agency is then required to notify the submitter of the information and give the submitter an opportunity to object.[114] Sophisticated submitters then inundate agencies with declarations and legal memoranda arguing that the information is confidential, and agencies almost invariably accede to these claims.

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

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

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

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

C. Strengthen Pro-Disclosure Mandates for Environmental Data

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

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

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

112. 15 U.S.C. §§2601–2692, ELR Stat. TSCA §§2-412.

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

114. Exec. Order No. 12600, 52 Fed. Reg. 23781 (June 25, 1987).

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

116. 5 U.S.C. §552(b)(6). The courts have found that this standard requires reviewing courts to engage in a balancing of interests. *See* U.S. Dep't of State v. Ray, 502 U.S. 164, 175 (1991) (explaining that the exemption requires courts to

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a heightened standard could not apply to environmental data as well.

III. Conclusion

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

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

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

balance an individual's privacy rights against the public policy of disclosing agency action).