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FOIA, Inc.

Margaret B. Kwoka

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FOIA, INC.

MARGARET B. KWOKA†

ABSTRACT

Government transparency is imagined as a public good necessary to a robust democracy. Consistent with that vision, Congress enacted the Freedom of Information Act (FOIA) to allow oversight and accountability of governmental activities, imagining the prime intended users to be journalists. But this democracy-enhancing ideal is at odds with FOIA's reality: at some agencies, commercial—not public—interests dominate the landscape of FOIA requesters.

This Article provides the first in-depth academic study of the commercial use of FOIA, drawing on original datasets from six federal agencies. It documents how corporations, in pursuit of private profit, have overrun FOIA's supremely inexpensive processes and, in so doing, potentially crowded out journalists and other government watchdogs from doing what the law was intended to facilitate: third-party oversight of governmental actors. It also reveals a cottage industry of companies whose entire business model is to request federal records under FOIA and resell them at a profit, which distorts the transparency system even further.

Counterintuitively, limiting commercial requesting will not solve this problem. Instead, this Article proposes a targeted and aggressive policy of requiring government agencies to affirmatively disclose sets of records that are the subject of routine FOIA requests—a surprisingly large number of the documents sought by commercial

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requesters. By meeting information needs in a more efficient manner that is available equally to all, affirmative disclosure will enable federal agencies to reclaim public records from the private market and free up resources to better serve FOIA requests that advance its democratic purpose.

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INTRODUCTION

Having witnessed adverse reactions in patients, a prominent physician repeatedly emailed various Food and Drug Administration (FDA) officials to sound an alarm about a dangerous dietary supplement on the market.¹ The FDA did not respond for six months, at which point it issued a public health alert and requested that the manufacturer recall the product.² When the *New York Times* investigated why the agency had such a delayed response to a serious public health threat, the paper filed a Freedom of Information Act

1. Anahad O’Connor, *Study Warns of Diet Supplement Dangers Kept Quiet by F.D.A.*, N.Y. TIMES: WELL (Apr. 7 2015, 9:43 PM), <http://well.blogs.nytimes.com/2015/04/07/study-warns-of-diet-supplement-dangers-kept-quiet-by-f-d-a> [<http://perma.cc/ZX39-3G9Y>].

2. *Id.*

(FOIA)³ request for the communications between the doctor and the FDA.⁴ The response: the FDA was “unable to locate” any of the records.⁵

The FDA is not alone in having trouble responding to journalists’ FOIA requests. The Department of Defense’s Inspector General issued a report detailing the misconduct of the Director of the Pentagon Force Protection Agency, who had improperly given preferential treatment to a subordinate with whom he had a special relationship, improperly required his subordinates to perform personal tasks for him, and improperly allowed a family member to use the agency’s firing range.⁶ When a *Washington Post* journalist learned of the investigation and wanted to report on this instance of government malfeasance, he filed a FOIA request.⁷ It took the agency seven months to produce the forty-page report.⁸

In both examples, which are hardly unique, journalists sought to use FOIA as it was intended, to protect the public’s right to know “what [its] government is up to.”⁹ In fact, no law is more centrally intended to promote transparency as a means of democratic governance than FOIA.¹⁰ Nonetheless, FOIA has been rightly critiqued for failing to live up to its promise, hindered by

3. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

4. *Id.*

5. *Id.*

6. INSPECTOR GEN., U.S. DEP’T OF DEF., REPORT NO. 20121204-000911, ALLEGED MISCONDUCT: MR. STEPHEN E. CALVERY, SENIOR EXECUTIVE SERVICE, DIRECTOR, PENTAGON FORCE PROTECTION AGENCY 1-2 (2013), <http://www.dodig.mil/FOIA/err/CalveryROI%28Redacted%29.pdf> [<http://perma.cc/WUV6-NFWL>].

7. Craig Whitlock, *Bad Boss at Pentagon was ‘Misusing’ Underlings, Report Says*, WASH. POST: IN THE LOOP (Nov. 4, 2013), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2013/11/04/bad-boss-at-pentagon-misused-underlings-report-says> [<http://perma.cc/N7AY-5FGC>].

8. *Id.*

9. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973)).

10. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012).

administrative inefficiency,¹¹ overwithholding of information,¹² and courts' failure to act as a meaningful check on agency secrecy.¹³

One failing, however, is particularly notable: FOIA's failure to meet the news media's information needs, as exemplified above. Journalists were at the heart of the purpose of creating a statutory right to access government information; it was thought that the news media would inform the public about government operations, thereby facilitating democratic participation and exposing potential government corruption or malfeasance.¹⁴ Not only was the news media a specially contemplated user of FOIA, but journalists were actually integrally involved in crafting the law.¹⁵ Yet, news agencies and reporters have lamented FOIA's many failures, most importantly the delay in receiving records that often renders them obsolete.¹⁶

Despite these many critiques, however, FOIA remains in high demand. During each of the last two reported fiscal years, federal government agencies received over 700,000 requests.¹⁷ The public's interest in government information appears, therefore, still to be strong. But if FOIA is not primarily serving the newsgathering, democracy-enhancing function of informing public debate on matters of governmental policy, what interests, then, does it primarily serve?

Relying on records logging select federal agencies' FOIA requests (themselves obtained through dozens of FOIA requests), this Article explains how corporations have distorted the principal government-transparency law's operation. To that end, the Article proceeds in four Parts. Part I explores FOIA as it was originally

11. See, e.g., Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.–Apr. 1982, at 14, 15 (calling FOIA “the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored”).

12. See, e.g., PUB. CITIZEN, STATEMENT OF ADINA ROSENBAUM ON ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT 5–6 (Mar. 18, 2010), <https://www.citizen.org/documents/AdinaTestimony.pdf> [<http://perma.cc/QHJ3-3W4R>] (documenting instances of overwithholding).

13. See, e.g., Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 213 (2013) (arguing that despite the formal de novo review standard mandated in the statute, courts give substantial and sometimes conclusive deference to agency decisions to withhold documents).

14. See *infra* Part I.A.

15. See *infra* Part I.A.

16. For a more detailed accounting of the reasons why the press finds FOIA fails to meet their needs, see *infra* Part I.B.

17. U.S. DEPT OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2014, at 2 (2015), http://www.justice.gov/sites/default/files/oip/pages/attachments/2015/05/01/fy_2014_annual_report_summary.pdf [<http://perma.cc/SAT-KKKY>] [hereinafter DOJ, FY 2014 SUMMARY] (documenting 704,394 requests in FY 2013 and 714,231 in FY 2014).

conceived. It documents the democracy-enhancing purposes of the law, the unique role the news media was imagined to play in facilitating that goal, and the eventual failure of the law to serve the news media's information needs.

Part II delves deeply into how businesses, rather than the news media, are using FOIA. Drawing on original data obtained from six federal agencies, it first documents the extent to which commercial requesters—private entities that seek information as part of their profit-making enterprise—dominate the landscape at some agencies. Then, and perhaps most importantly, it explores the kinds of information businesses seek and exactly how some of the most frequent commercial requesters are actually using the records they obtain. This Part demonstrates that, across a variety of contexts, some of the highest-volume commercial requesters are essentially information-reselling businesses whose profit model depends on obtaining government records at low cost and reselling them, for a higher price, to interested parties. It further shows that the vast majority of all commercial FOIA requests are seeking the same types of routine records.

Part III uses these insights to describe the consequences of commercial FOIA practices, generally demonstrating a privatization of information access. It contends that FOIA's fee structure essentially subsidizes commercial requesters' access to records and does so in a way that is highly unlikely to provide the kind of public benefit that justifies the existence of subsidies. It also argues that the volume of commercial requesters creates resource scarcity in FOIA offices, which is likely to negatively affect the quality and speed of responses to other requesters, including the news media. Finally, it problematizes the role of private businesses as information intermediaries that resell government records, likening the practice to *de facto* outsourcing of an inherently public function.

Contrary to any implication that business interests should be disallowed or disfavored in FOIA administration, Part IV suggests that increased affirmative disclosure by government agencies best returns FOIA to its original democratic purpose. Agencies have the power to identify those records that businesses are routinely using for private profit and to eliminate the profit-making potential by themselves publishing databases that are easily accessible, searchable, and downloadable. Raw reselling of this information would no longer be a profitable venture, and agencies would no longer have to respond to thousands of FOIA requests for the same types of records

on a one-by-one basis. Aside from potential cost savings to the agency, secondary benefits are substantial. By removing high cost barriers set up by information resellers in the private market, small businesses would no longer be at a disadvantage in accessing information. In the public domain, affirmative disclosure would free up agencies' FOIA resources to serve citizens and news-media information requests, perhaps reducing the barriers to FOIA's effectiveness in facilitating democratic accountability.

I. FAILING THE FOURTH ESTATE¹⁸

The press has, of course, a revered place in United States history, meriting direct constitutional protection in the First Amendment.¹⁹ In fact, the press is viewed as vital to our democracy.²⁰ Access to government information, however, is relatively new.²¹ This part demonstrates the integral role the press played in crafting the law, the centrality of the press in Congress's vision of FOIA's intended users, and the failure of that vision to come to fruition.

18. The "Fourth Estate" refers to the press. Attribution for this designation is generally given to Edmund Burke, as described in Jeffrey Archer's novel, *The Fourth Estate*:

In May 1789, Louis XVI summoned to Versailles a full meeting of the 'Estates General.'

The First Estate consisted of three hundred nobles.

The Second Estate, three hundred clergy.

The Third Estate, six hundred commoners.

Some years later, after the French Revolution, Edmund Burke, looking up at the Press Gallery of the House of Commons, said, "Yonder sits the Fourth Estate, and they are more important than them all."

JEFFREY ARCHER, *THE FOURTH ESTATE* 1 (1996).

19. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

20. See WHAT GOOD IS JOURNALISM?: HOW REPORTERS AND EDITORS ARE SAVING AMERICA'S WAY OF LIFE 1 (George Kennedy & Daryl Moen eds., 2007) (describing the purpose of the book as to show "the most important roles that journalism, with all its well-documented faults, plays in the world's oldest democracy").

21. FOIA was enacted in 1966. Statement by the President upon Signing the "Freedom of Information Act," in 2 PUB. PAPERS 699 (July 4, 1966).

A. *The Goal of Freedom of Information*

Government transparency is such a lofty and laudable goal that it has become the sort of rallying cry one can hardly be against.²² Difficult as it would have been to imagine at the time of FOIA's enactment, the right of the public to access government information has arguably risen beyond a statutory right,²³ or even arguments for a constitutional right,²⁴ but indeed has been declared a human right.²⁵ Domestic laws have been adopted in at least one hundred countries,²⁶ and movements are afoot in even seemingly unlikely places such as South Sudan²⁷ and Afghanistan.²⁸

The United States, however, led the modern movement in favor of transparency laws. In 1966, when it enacted FOIA, the United States was only the second country to have a freedom of information regime.²⁹ As a brand-new statutory right, the purpose of guaranteeing

22. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888 (2006) (declaring transparency, vaguely defined, to be “clearly among the pantheon of great political virtues”).

23. In the United States, a collection of statutes provides rights of access to the federal government, including FOIA, the Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1–16 (2012), and the Government in the Sunshine Act, 5 U.S.C. § 552(b) (2012). At the state level, analogs in the form of open records and open meetings laws abound. See, e.g., California Public Records Act, Cal. Gov't Code §§ 6250–6268 (2015); Colorado Open Records Act, COLO. REV. STAT. §§ 24-72-201 to -309 (2015); New York Freedom of Information Law, N.Y. PUB. OFF. LAW §§ 84–90 (2015); see also *State Freedom of Information Laws*, NAT'L FREEDOM OF INFO. COALITION, <http://www.nfoic.org/state-freedom-of-information-laws> [<http://perma.cc/69KM-VRKN>] (compiling information regarding state information-freedom laws).

24. See, e.g., Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14 (1976) (arguing for a constitutional basis rooted in the First Amendment for the public's right to access government information).

25. In 2006, the Inter-American Court of Human Rights declared access to government information to be included within the basic human right of free thought and expression. *Reyes v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006). The European Court of Human Rights did the same in 2009. See *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, ¶ 39 (Apr. 14, 2009), <http://hudoc.echr.coe.int/eng?i=001-92171> [<http://perma.cc/3PS7-DESA>].

26. *Chronological and Alphabetical List of Countries with FOI Regimes*, FREEDOMINFO.ORG, <http://www.freedominfo.org/chronological-and-alphabetical-lists-of-countries-with-foi-regimes> [<http://perma.cc/LBF9-PQGL>].

27. *South Sudan Approved Right to Information Law in 2013*, FREEDOMINFO.ORG (Dec. 17, 2014), <http://www.freedominfo.org/2014/12/south-sudan-approved-right-information-law-2013> [<http://perma.cc/L9U3-KETP>].

28. *Afghan President Signs Access to Information Law*, FREEDOMINFO.ORG (Dec. 9, 2014), <http://www.freedominfo.org/2014/12/afghan-president-signs-access-information-law> [<http://perma.cc/SK26-CN5Z>].

29. See *FOI Regimes, What's New*, FREEDOMINFO.ORG, <http://www.freedominfo.org/regions/global/foi-regimes> [<http://perma.cc/N4K2-R8HE>] (follow “FOI Countries by Date”

the public's access to government information should be gleaned from Congress itself. The House of Representatives Report broadly declared, "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."³⁰ The Senate Report similarly explained that "[a]lthough the theory of an informed electorate is so vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure."³¹ It further explained that a central purpose of FOIA was to "provide a court procedure by which citizens and the press may obtain information wrongfully withheld."³²

Indeed, Congress's declarations as to the purpose of enacting freedom-of-information legislation tightly align with two of the most influential theories concerning the role of free speech in a system of democratic governance, both of which directly implicate the need for public access to government information.³³ The work of Alexander Meiklejohn conceptualizes free speech as necessary to democracy so that the electorate may be sufficiently informed to participate in its own governance.³⁴ Distinctly, but relatedly, the work of Vincent Blasi asserts the value of free speech in checking government abuse.³⁵ Both theories, importantly, are instrumental: the right to access government information is merely a tool to improve democratic governance. And the Supreme Court has affirmed this view of

hyperlink for a downloadable document listing FOI regime enactment). The first was Sweden, which has had an FOI regime since 1766, exactly two hundred years prior to the enactment of the US FOIA. *Id.*

30. H.R. REP. NO. 89-1497, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429.

31. S. REP. NO. 88-1219, at 8 (1964).

32. *Id.* at 8.

33. Heidi Kitrosser nicely describes these two theories as they relate to FOI laws in *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 126-30 (2004); *see also* Michael Doyle, *The Freedom of Information Act In Theory and Practice* (May 2001) (unpublished M.A. thesis, Johns Hopkins University) (on file with the *Duke Law Journal*) (articulating these two as the "most common theories . . . undergirding information access," but adding a third suggested theory centering on public ownership claims on government information).

34. *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 63 (1948) ("[The First Amendment] stands alone, as the cornerstone of the structure of self-government. If that uniqueness were taken away, government by consent of the governed would have perished from the earth.").

35. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 527 (1977) (contending that "the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power" as by protecting various individual rights).

FOIA's role: "The basic purpose of FOIA is to ensure 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."³⁶

In considering this ultimate goal, no one's interests were more contemplated than the news media's. In fact, it was largely the news media's clamoring that brought about congressional action in the first place. Professor Mark Fenster has carefully documented the history of the movement that led to the passage of FOIA, demonstrating its origins with the press.³⁷ Fenster describes how a combination of American wire services' defeat of the early-twentieth-century European cartel of news organizations closely tied to particular governments and the Cold War narrative around free press as an American democratic ideal created a strong sense of journalists' professional identity and values around objective independent reporting.³⁸ Kent Cooper, the general manager of the Associated Press (AP), which, under his leadership, was most responsible for defeating the European news cartel,³⁹ authored an article published in *Life Magazine* in 1945 entitled "Freedom of Information," in which he advocated for a broader understanding of freedom of the press that includes the freedom to "seek out news."⁴⁰ Cooper not only believed in a right of the public to access information, but also, as demonstrated in his 1956 book, *The Right to Know*,⁴¹ viewed the press's role as central: the news media was ethically bound to present information to the public to allow for informed political participation.⁴²

Around the same time, the American Society of Newspaper Editors (ASNE), the most prominent organization representing journalists' interests, formed a "Freedom of Information Committee."⁴³ Initially the Committee focused on international press

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

37. Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443, 451-66 (2012).

38. *Id.* at 452-57.

39. *Id.* at 453.

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

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

42. Fenster, *supra* note 37, at 458.

43. *Id.* at 461.

freedoms, but it quickly shifted its efforts to the United States, in particular to U.S. government secrecy.⁴⁴ The committee recruited Harold Cross as its legal advisor in its various fights for access to information,⁴⁵ and in that role he authored the 1953 book, *The People's Right to Know*,⁴⁶ in which he reported on the state of information access, describing an inconsistent and hard-to-discern patchwork of potential rights to government information.⁴⁷ In the book, Cross called on Congress to “legislate freedom of information for itself, the public, and the press,” as a national remedy to the current unsatisfactory state of affairs.⁴⁸

Shortly after Cross's book was published, President Eisenhower, responding to the Cold War, set up an office designed to procure voluntary cooperation from industry and the press in not publishing so-called “strategic information” that might help U.S. enemies.⁴⁹ A year later, the Department of Defense issued a memo to government officials and contractors requiring any release of information to not only be benign, but in fact to make a “constructive contribution” to defense efforts.⁵⁰ These secrecy measures prompted some degree of outrage in the public and the press.⁵¹

A relatively junior Congressman, Representative John Moss, responded by successfully urging leadership to create a Special Subcommittee on Government Information within the Government Operations Committee on which Moss served, and to name him as the subcommittee's chair.⁵² Using Cross's book as a call to action, the ASNE Freedom of Information Committee connected the author with Chairman Moss; Cross became the subcommittee's legal advisor, while journalists made up the bulk of its staff.⁵³ In fact, the

44. *Id.*

45. *Id.*

46. James S. Pope, *Foreword* to HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS*, at viii (1953).

47. *See* CROSS, *supra* note 46, at 19–37 (describing statutes, judicial decisions, regulations, and opinions of attorneys general as the various sources from which a right to know had in some circumstances arisen).

48. *Id.* at 246.

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

50. *Id.* at 49–50.

51. *Id.* at 50.

52. *Id.* at 50–51.

53. Fenster, *supra* note 37, at 464; *see also* Sam Archibald, *The Early Years of the Freedom of Information Act—1955 to 1974*, 26 POL. SCI. & POL. 726, 727 (1993) (“The newspaper-

subcommittee deployed those journalists on a decade-long campaign to investigate the problem of government secrecy.⁵⁴

As work progressed, Moss routinely called journalists to testify before the subcommittee in an attempt both to document the extent of the information-access problem and to gain attention for the cause.⁵⁵ Between 1955 and 1960, the subcommittee collected 176 complaints about unjustified government secrecy, of which 37 percent were from journalists and 45 percent from Congress itself, suggesting an outsized role for journalists in using any new freedom of information law.⁵⁶ Journalists were also key in beating back attempts to defund or abolish the subcommittee.⁵⁷ After more than a decade of effort, the 1966 Freedom of Information Act, as enacted, in fact fully embraced Cross's proposal for a statutory right of the people in a single legislative solution.⁵⁸

In this victory, the news media's role was hardly hidden from public view. Moss himself said on the floor when FOIA was passed, "The list of editors, broadcasters and newsmen and distinguished members of the corps who have helped develop the legislation over these 10 years is endless," and he went on to specially thank journalists at many major news outlets, as well as the ASNE, the American Newspaper Publishers Association, and the National Newspaper Association.⁵⁹ One Congressman noted not only the news media's crucial role in devising FOIA, but its ongoing imperative to use the law: "[I]t will take vigorous action by the . . . Nation's press to make our objectives [in passing FOIA] a reality."⁶⁰

FOIA was thus designed largely by journalists, for journalists, and with the particular goal in mind that journalists would use access to government information to provide knowledge to the public, which would, in turn, facilitate the public's effective participation in democratic governance.

reporter staff members [of the Moss committee] had collected information [about government secrecy] by investigation, interview and research, then reported the results in clear language, just as they had done while writing for newspapers.").

54. Archibald, *supra* note 53, at 728.

55. See LEMOV, *supra* note 49, at 56–57 (describing Moss's strategy of "demonstrating a pervasive problem and then calling on the government . . . to explain why the problem should not be fixed").

56. Doyle, *supra* note 33, at 33–34.

57. LEMOV, *supra* note 49, at 60.

58. Fenster, *supra* note 37, at 465.

59. 112 CONG. REC. 13,642–43 (1966).

60. *Id.* at 13,655 (statement of Rep. Hall).

B. *Effective Requesting*

Given FOIA's relatively distinct and narrow goal—facilitation of effective and informed democratic participation⁶¹—its provisions are startlingly broad. Its signature provision requires each agency, upon receiving a request for records, to “make the records promptly available to any person,” who need only “reasonably describe [the requested] records” and follow the agency's published rules for submitting requests.⁶² In turn, a “person” for purposes of the statute, “includes an individual, partnership, corporation, association, or public or private organization other than an agency.”⁶³ Thus, the right of access is broadly conceived.

In fact, the statute's fee structure, added in a 1986 amendment, specifically contemplates a variety of users.⁶⁴ For commercial-use requests, agencies can charge fees for “reasonable standard charges for document search, duplication, and review,”⁶⁵ whereas if a “request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media,” fees are limited to duplication charges alone.⁶⁶ And for all other requesters, fees are limited to charges for search and duplication.⁶⁷ For all types of fees, agencies can only charge for their “direct costs,”⁶⁸ which means “those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a

61. *See supra* Part I.A.

62. 5 U.S.C. § 552(a)(3)(A) (2012).

63. *Id.* § 551(2).

64. 132 CONG. REC. S14,297–98.

65. 5 U.S.C. § 552(a)(4)(A)(ii)(I).

66. *Id.* § 552(a)(4)(A)(ii)(II). A “representative of the news media” for the purposes of FOIA is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience,” while “news” is defined as “information that is about current events or that would be of current interest to the public.” *Id.*

67. *Id.* § 552(a)(4)(A)(ii)(III). In addition to the three categories, any requester may ask for a waiver of otherwise applicable fees if the request is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii). Because commercial-use requests are essentially disqualified from this fee-waiver provision, the fee-waiver provision has negligible, if any, impact on the commercial use of FOIA, described *infra* Part II.

68. 5 U.S.C. § 552(a)(4)(A)(iv).

FOIA request.”⁶⁹ Other than differential fees charged, however, there are no limits to access based on the identity of the requester or the purpose of the request.⁷⁰

Moreover, agencies may only withhold records that fall within one of nine statutory exemptions, which include protections for classified material, material that would invade personal privacy, certain law enforcement records, and privileged material, among others.⁷¹ Any person denied access to requested information has the right, under the statute, to first appeal the decision within the agency, and then, if still denied, to file a lawsuit in which a federal court reviews the agency’s decision de novo.⁷² In essence, FOIA was designed to simply open the doors of government agencies and allow the public a front seat view of what is inside.

Contrary to the intent of Congress and widespread expectations at the time FOIA was passed, the news media has failed to find FOIA the great government-transparency tool it was promised to be, and, in fact, constitutes a tiny fraction of FOIA users. One 2006 study, which looked at one month’s worth of FOIA logs from eleven cabinet-level departments and six large agencies, found that only 6 percent of FOIA requests were submitted by journalists.⁷³ Members of the news media also represent a tiny—and declining—proportion of the

69. The Freedom of Information Act; Uniform Freedom of Information Act Fee Schedule and Guidelines, 53 Fed. Reg. 10,012, 10,017 (Mar. 27, 1967). These costs include the salary of the employee plus a percentage of that salary for benefits and the cost of operating a photocopy machine, but not overhead such as heating or lighting in the building. *Id.*

70. For an analysis of whether motive should be taken into account, see generally James T. O’Reilly, “Access to Records” Versus “Access to Evil”: Should Disclosure Laws Consider Motives as a Barrier to Records Release?, 12 KAN. J.L. & PUB. POL’Y 559 (2003).

71. 5 U.S.C. § 552(b)(1)–(9). The full range of exemptions applies to records that are properly classified for national-security reasons, are related only to internal personnel rules and practices, are specifically exempted from disclosure by another statute, are trade secrets or confidential commercial or financial information, would be privileged in ordinary litigation, would constitute a clearly unwarranted invasion of personal privacy if released, are certain types of records compiled for law enforcement purposes, are related to reports of examinations of financial institutions, or are certain types of geological records concerning wells. *Id.*

72. *Id.* § 552(a)(4)(B), (6)(A). For a critique of courts’ application of the de novo standard in the FOIA context, see Kwoka, *supra* note 13, at 197–98. If a requester wants to challenge the agency’s decision as to the requester’s fee category (commercial, news, or other), a requester can also administratively appeal that determination and seek judicial review. *See, e.g., Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003).

73. *Frequent Filers: Businesses Make FOIA Their Business*, SOC’Y PROF. JOURNALISTS (July 3, 2006), <http://www.spj.org/rrr.asp?ref=31&t=foia> [<http://perma.cc/BFD9-VZ2L>].

requesters who file lawsuits to challenge FOIA denials, ranging between 1 and 2 percent of all FOIA plaintiffs.⁷⁴

One former president of the Society of Professional Journalists wrote, “From the outset, the FOIA was considered a journalist’s tool, but journalists never have made up more than a fraction of the requesters. Most journalists either malign or ignore it. That lack of respect and recognition bewilders veteran FOIA advocates.”⁷⁵ Mark Feldstein, an award winning investigative journalist formerly at CNN and ABC, explained the sources of frustration for reporters:

I found FOIA to be occasionally, but not frequently useful, when I was an investigative reporter. It was not terribly useful for the vast majority of stories for obvious reasons: There are many exemptions in the law that allow agencies to avoid turning over information, and it can be a slow process under tight news deadlines, especially if you have to file an appeal. That said, I got lucky, either based on a tip that helped me narrow the focus of my request or just by happening to fish in the right waters. The FOIA law is great on paper, but in reality, it has many loopholes. Here’s the bottom line: FOIA is a crude tool. Don’t expect too much. It’s worth doing, but don’t expect too much and hold your breath waiting, because it can be a while.⁷⁶

Delay is one of the biggest problems cited by the media,⁷⁷ and it is indeed a very real problem. The AP’s Gary Pruitt recently recounted how, after Malaysia Airlines Flight 370 went missing, the AP filed a FOIA request regarding the U.S. efforts to help locate the plane.⁷⁸ Despite a twenty-business-day statutory deadline for a

74. *Media Making Fewer Challenges to Government Secrecy in Federal Court*, THE FOIA PROJECT (Mar. 14, 2013), <http://foiaproject.org/2013/03/14/media-making-fewer-challenges-to-government-secrecy-in-federal-court> [<http://perma.cc/7QDQ-YJ5N>]. It is, of course, entirely possible that the declining rate of news media requesting is also in part due to the diminishing resources of the industry as a whole.

75. Paul McMasters, *FOIA: It’s Always There*, SOC’Y PROF. JOURNALISTS, <http://www.spj.org/foiabout.asp> [<http://perma.cc/JG8Z-BC3W>].

76. Stephanie Martinez, *The Good, the Bad, the Ugly of Using FOIA*, AM. JOURNALISM REV. (Oct. 8, 2014), <http://ajr.org/2014/10/08/foia-request-challenges> [<http://perma.cc/ET6Q-PMW7>] (quoting Mark Feldstein in an interview about FOIA use).

77. See, e.g., Michael Doyle, *Missed Information: The Reporting Tool That Reporters Don’t Use*, WASH. MONTHLY, May 2000, at 38, 40 (“Part of the reason that journalists so rarely use FOIA is that agencies can take so long in responding that the information often seems stale by the time it arrives.”); SOC’Y PROF. JOURNALISTS, *supra* note 73.

78. Gary Pruitt, *Public’s Access to Government Records Faces Roadblocks Aplenty*, MCLATCHYDC: OPINION (Mar. 13, 2015, 9:51 AM), <http://www.mcclatchydc.com/opinion/article24781402.html> [<http://perma.cc/KL7F-BDC3>].

response,⁷⁹ the only response the AP ever received—a full year later—was a notice that the agency has too many requests to meet the deadline.⁸⁰ Another AP request to the Treasury Department remained unfilled for nine full years.⁸¹ The AP is hardly alone. The average processing time across the entire federal government for complex FOIA requests is a staggering 118 days.⁸² Even for simple requests, the average across the government slightly exceeds the deadline,⁸³ and some agencies, of course, take much longer.⁸⁴ At the end of FY 2014, the oldest pending requests across the federal government dated back to 1993.⁸⁵

To be sure, FOIA still serves important purposes for the news media. Even if the numbers are small, those individual requests may contribute greatly to the public's understanding of certain government activities.⁸⁶ Moreover, reporting routinely relies on information that advocacy groups may have pried loose under FOIA and passed along to journalists.⁸⁷ For example, one researcher found that some of the most effective requesters in the area of the so-called “War on Terror” were well-financed nonprofits such as the American Civil Liberties Union (ACLU).⁸⁸ And in any case, FOIA's existence

79. 5 U.S.C. § 552(a)(6)(A) (2012).

80. Pruitt, *supra* note 78.

81. *Id.*

82. DOJ, FY 2014 SUMMARY, *supra* note 17, at 14.

83. *Id.* at 12.

84. For example, the U.S. Agency for International Development, though improving over its prior record, still takes an average of 28.48 days to respond to a simple request. *Id.* at 13.

85. *Id.* at 11.

86. Indeed, some journalists are still effectively using FOIA. *See, e.g.*, Ravi Somaiya, *A Wizard at Prying Government Secrets From the Government*, N.Y. TIMES (July 19, 2015), http://www.nytimes.com/2015/07/20/business/a-wizard-at-prying-government-secrets-from-the-government.html?_r=0 [<http://perma.cc/2HWT-J88Y>] (describing journalist Jason Leopold's successful use of FOIA); *On The Line: Jason Leopold Discusses Uncovering Government Secrets*, VICE NEWS (Apr. 6, 2015, 10:30 AM), https://news.vice.com/video/on-the-line-jason-leopold-discusses-uncovering-government-secrets?utm_source=vicenewsyoutube&utm_medium=video&utm_campaign=relatedvideo [<http://perma.cc/H9CA-LD29>] (documenting examples of the same).

87. Doyle, *supra* note 77, at 38.

88. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1024 (2008). The full list of “most effective requesters” identified by Kreimer includes such advocacy groups as the National Security Archives, the ACLU, the Electronic Privacy Information Center, the Electronic Frontier Foundation, the Center for Constitutional Rights, Judicial Watch, and the Center for National Security Studies. *Id.*

may make agencies more likely to release information publicly, knowing it would be required to upon request.⁸⁹

Still, the difficulties encountered by the news media demonstrate some of the prerequisites to effectively make use of FOIA. For instance, the requester has to have time to wait for what may be a much-delayed response.⁹⁰ The requester also has to have some degree of specialized knowledge about the agency and the industry it regulates sufficient to know what to ask for.⁹¹ Expertise in FOIA requesting and in dealing with the agency, and the resources to devote to negotiating and potentially challenging denials are also assets in making use of FOIA.⁹²

Enter commercial requesters. The term “commercial use” in the fee provisions of FOIA has been interpreted by the Office of Management and Budget (OMB) to mean any “use that furthers the commercial, trade or profit interests of the requester or person on whose behalf the request is made.”⁹³ And as it turns out, businesses which use FOIA to further profit interests often meet all of the qualifications for effective requesters: they often have interests that are more long-term, not immediate in nature; they have resources; and they know enough about what they are looking for to effectively seek the information under FOIA.

Although a completely comprehensive study of who uses FOIA across the federal government and for what purposes has never been conducted, various samplings of FOIA requests over time have consistently identified businesses as prominent FOIA users. In 1972, the Congressional Research Service surveyed a sample of approximately 1500 requests over four years and concluded that 43 percent were submitted by commercial businesses or law firms.⁹⁴ In

89. McMasters, *supra* note 75. McMasters quotes Jane Kirley of the Reporters Committee for Freedom of the Press as saying,

Even when journalists don't use the FOIA, it works for them This law creates a legal presumption of openness and accountability. Given how much of a struggle it is to get access with the law in place, I can't imagine what it would be like if we didn't have that kind of legislative mandate.

Id.

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

91. *Id.*

92. *Id.*

93. The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,017–18 (Mar. 27, 1987).

94. Doyle, *supra* note 33, at 46, 66.

1978, the General Accounting Office boldly asserted that FOIA “is being used mostly by businesses and law firms—sometimes for purposes not contemplated by the Congress,” and found that those interests made up 58 percent of requests at agencies reviewed.⁹⁵ More recently, in 2000, journalist Michael Doyle collected data from eleven federal agencies, and concluded that, across agencies, commercial requesters were often the largest in number.⁹⁶ In a final snapshot, using 2005 data, the (now-disbanded) Coalition of Journalists for Open Government found that, across seventeen agencies, about two-thirds of requests were commercial.⁹⁷

Media reports have also noted the strong presence of commercial interests among requesters. In 1996, the *Wall Street Journal* reported that “early on, it was discovered that FOIA was a handy tool for companies” and that there is evidence that FOIA is predominately used to serve business interests.⁹⁸ In 2013, the *Journal* again addressed the issue, specifically reporting on the use of FOIA by hedge funds and finding that “investors use the process to troll for all kinds of information.”⁹⁹ Recently, McClatchy DC reported that “corporate interests now drive the release of information” and that, as a result,

95. COMPTROLLER GEN., GEN. ACCOUNTING OFFICE, LCD-78-120, GOVERNMENT FIELD OFFICES SHOULD BETTER IMPLEMENT THE FREEDOM OF INFORMATION ACT, at ii (1978). The General Accounting Office (GAO) also noted the “prevalent complaint” among agency officials that “businesses and law firms . . . are profiting at taxpayers’ expense” in using FOIA. *Id.* at 36. GAO noted, however, that its review of the makeup of requesters was “hindered by a lack of pertinent agency records.” *Id.* The total number of requests studied was 2515. *Id.* at 37.

96. For example, Doyle found that at the EPA, 87.9 percent of requesters were commercial and 1.2 percent were news media; at the FDA, 26 percent were filed by what Doyle labels FOIA-service companies (what this Article labels information resellers) and only 3.8 percent from the news media, and that attorneys comprised the highest-volume population of requesters at the Department of Health and Human Services. Doyle, *supra* note 33, at 70–71, 97. The outlier was the NSA, at which commercial requesters were few, and the requesters making up largest group were individuals seeking information on unidentified flying objects, standing at 12 percent of all requests. *Id.* at 80.

97. SOC’Y PROF. JOURNALISTS, *supra* note 73. This study sought to characterize the makeup of requesters across government, and thus looked at one month’s worth (September 2005) of FOIA logs from eleven departments and six large agencies. *Id.* The data is limited in that it is a relatively small sample from each agency, and of course now dates a decade old. Nonetheless, the various previous studies cited are a great jumping-off point for the work in this Article.

98. Michael Moss, *Public Eye: Federal Service Gets Wider Use by Sleuths, Snoops – and Senators*, WALL ST. J., Jan. 3, 1996, at A1.

99. Brody Mullins & Christopher Weaver, *Open-Government Laws Fuel Hedge-Fund Profits*, WALL ST. J. (Sept. 23, 2013), <http://www.wsj.com/articles/opengovernment-laws-fuel-hedgefund-profits-1379905298?tesla=y> [<http://perma.cc/B9ZX-YV5K>] (examining 100,000 federal records requests over a five-year period).

information “may not reach the public at all, remaining in the hands of the private interests that sought it out.”¹⁰⁰

Despite the widespread commercial use of FOIA, commercial requesters were barely contemplated or discussed at the enactment of FOIA,¹⁰¹ and it was not until 1986 that Congress addressed issues surrounding commercial requesters at all. Even then, it did so obliquely by passing amendments to FOIA as part of the Anti-Drug Abuse Act of 1986 that changed how fees were charged, introducing the modern regime that requires agencies to assess fees that covered more of their costs as to commercial requesters than as to the news media and other requesters.¹⁰² Still, as this FOIA amendment was a relatively small and technical change buried in an otherwise massive piece of legislation, scant legislative history fails to reveal the extent to which Congress was aware of or concerned about commercial use of FOIA.

Likewise, the practice of commercial FOIA requesting has never been given in-depth academic treatment. We have very little understanding of how corporations are using FOIA, what they are requesting, how they are profiting from that information, and at what cost the government is serving commercial interests in information. If the news media is not the dominant user of a law designed primarily for it, it is worth understanding what interests the law is serving more effectively.

100. Kevin G. Hall & Kevin Johnson, *Open-Records Law Morphs into Tool for Corporations, Advocates*, MCCLATCHY DC (Mar. 13, 2015), <http://www.mcclatchydc.com/news/politics-government/article24781393.html> [<http://perma.cc/9DKL-YCNM>]. This piece also quoted Matt Smith of the Center for Investigative Reporting: “Often it’s all law firms [requesting under FOIA], or if you Google names on a FOIA log they are industry investigators or their competitors It seems to be less sort of public-serving organizations and more individual interests that are using FOIA for something from which they can profit.” *Id.*

101. In fact, in voluminous debate, only two members of Congress raised the possibility during the debates: one inquired whether the maritime industry could use the law to learn about maritime construction subsidies, and another noted the potential for a contractor whose low bid was rejected to use FOIA to uncover the reasons why. Doyle, *supra* note 33, at 46.

102. See 132 CONG. REC. S14296–98 (1986) (statement of Sen. Patrick Leahy). Interestingly, Senator Leahy, sponsor of the FOIA amendment, had a narrow view of commercial use:

A commercial user is one who seeks information solely for a private, profit making purpose [R]equests from a corporation may be presumed to be for commercial use unless the requester can demonstrate that it qualifies for a different fee schedule. A request from an individual or a public interest group may not be presumed to be for commercial use unless the nature of the request suggests otherwise. The resale of documents obtained from the Government is not a commercial use.

Id.

II. COMMERCIAL USE OF FOIA

No one denies commercial enterprises may have legitimate uses for FOIA or that they are entitled to use FOIA to further their financial interests. The ways in which commercial entities are using FOIA, however, is relatively unknown. By analyzing FOIA logs of a select group of agencies, this Part documents the commercial use of FOIA, and explains for what purposes businesses are using FOIA and how they are profiting from it.

This Part does not, however, purport to represent government-wide sampling or to report comprehensive government-wide statistics. Instead, it reports in-depth accounts of commercial FOIA use at a small selection of agencies. The agencies reported both represent a design choice to target agencies likely to have significant amounts of commercial requesting and a practical choice that flowed from the availability of meaningful FOIA data. As to the design choice, I first identified every government agency that reported more than one thousand requests received in FY 2013, such that the volume of requests would make the agency FOIA operations more than merely nominal, and then narrowed down the list to those that collected more than \$10,000 in fees from requesters.¹⁰³ Because commercial users are most often charged fees and in the greatest amounts, I suspected this metric would identify agencies with high levels of commercial requesting. I then sent each of those twenty-three identified agencies a FOIA request for their FOIA logs—the list of requests received along with various pieces of information about the request—for the calendar year 2013. I ended up studying the agencies

103. For the full list of agencies from which I culled based on these criteria, I used the Department of Justice's online list of annual FOIA reports submitted in 2013. *Annual FOIA Reports—FY13*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/oip/annual-foia-reports-fy13-0> [<http://perma.cc/UD7F-3AZ5>]. The list of agencies that met my initial two criteria included 23 federal agencies: Department of Defense (DOD) (Air Force); DOD (Army); DOD (Defense Logistics Agency); DOD (Navy); DOD (National Security Agency); Department of Homeland Security (DHS) (Customs and Border Protections); DHS (Coast Guard); Department of Housing and Urban Development (HUD); Department of Justice (DOJ) (Bureau of Prisons); DOJ (Drug Enforcement Agency); DOJ (Federal Bureau of Investigation); Department of Transportation (DOT) (Federal Aviation Administration); DOT (Federal Motor Carrier Safety Administration); Department of Treasury (Internal Revenue Service); Department of Treasury (Office of the Comptroller of the Currency); Department of Agriculture (Forest Service); Environmental Protection Agency (EPA); Federal Trade Commission (FTC); Health and Human Services (HHS) (Center for Disease Control and Prevention); HHS (Centers for Medicare and Medicaid Services); HHS (Food and Drug Administration); HHS (National Institutes of Health); Securities and Exchange Commission; Small Business Administration; United States Postal Service. *Id.*

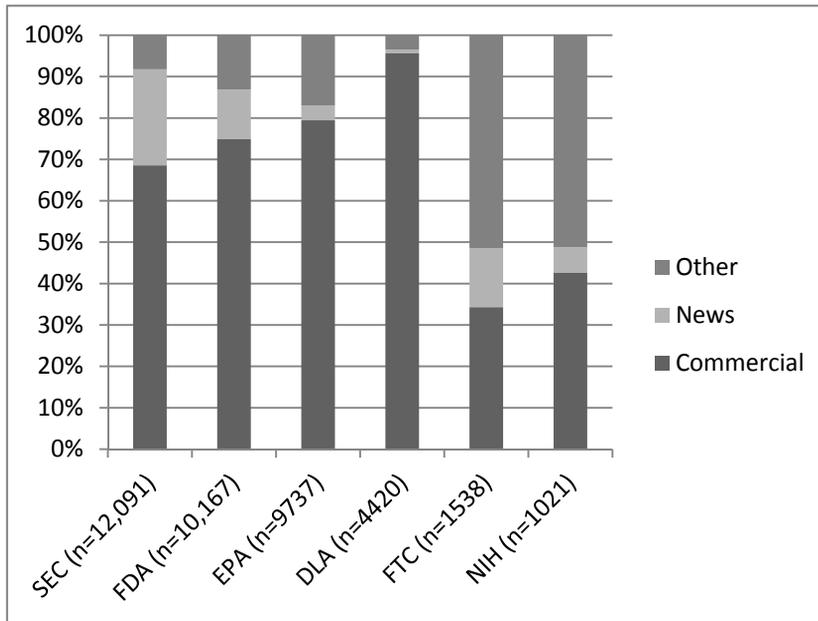
for which I was able to obtain complete data:¹⁰⁴ the Securities and Exchange Commission (SEC), FDA, Environmental Protection Agency (EPA), Defense Logistics Agency (DLA), Federal Trade Commission (FTC), and the National Institutes of Health (NIH). The findings regarding commercial use of FOIA at these agencies is presented below in that order, which is the descending order of the size of the agency's FOIA operations as measured by the number of requests received.

As described below, the data from these agencies shows the heavy use of FOIA by business as a direct input into their profit-making enterprises. In fact, at the four largest FOIA offices studied, commercial requests represent the overwhelming majority of all requests received.¹⁰⁵ Figure 1 reflects the breakdown of requesters at each of the studied agencies.

104. Specifically, data was complete if I was able to obtain all of the fields of the logs that I needed for the full calendar year of 2013, including the tracking number for the request, the date of the request, the identity of the requester, the subject matter of the request, the requester's fee category, the actual fees charged to the requester, and the agency's response (granted, denied, denied in part, or other). For the agencies to which I originally submitted requests but did not end up reporting results, either I did not receive any response within the time frame of the study, I received a partial response but was unable to obtain the remaining information within the time frame of the study, I received a response that indicated the agency would claim a right to withhold whole categories of information I needed and I was unable to devote resources to further battles over disclosure within the time frame of the study, or the agency claimed it simply did not keep some relevant field as part of their records.

105. This is true at the SEC (either 69 or 89 percent commercial requesters, depending on the categorization by SECProbes.com, discussed in further detail below), FDA (85 percent commercial requesters), EPA (79 percent commercial requesters), and DLA (96 percent commercial requesters). *See infra* notes 110, 112, 156, 238, 260 and accompanying text.

Figure 1: Requester Category by Agency



Moreover, although not entirely uniform, there are strikingly similar patterns between agencies in the ways businesses profit from FOIA. Most notably, the data reveals that a cottage industry based on FOIA requesting has emerged; at five of the six studied agencies, some of the highest-volume requesters are companies whose business model is to request federal records under FOIA and resell those very records for a profit,¹⁰⁶ and at two of these agencies, multiple information resellers compete against each other in the private market for public records.¹⁰⁷ By contrast, the relative paucity of news media requests is apparent across the board. That is not to say that the news media requesting may not have had a positive, or even disproportionate, impact for each request made, but rather only to indicate that at the studied FOIA offices, the staff and resources are primarily serving commercial interests, not the public's interest in knowing what its government is up to.

106. These five agencies are the SEC, FDA, EPA, DLA, and NIH. *See* Parts II.A, II.B, II.C, II.D & II.F.

107. These two agencies are the SEC and the FDA, the two largest FOIA offices studied. *See* Parts II.A-B.

A. *Securities and Exchange Commission*

The SEC received a total of 12,091 requests in 2013,¹⁰⁸ which makes it a midsize FOIA office compared to other federal agencies.¹⁰⁹ Of those, it reported 8292 commercial requests, or 69 percent, 2807 news media requests, representing 23 percent, and 992 other requests, or 8 percent of the total number.¹¹⁰ Though commercial requesters clearly dominate, these numbers deceptively suggest that journalists make far more requests than is likely accurate. The 2807 news media requests comprise a far higher proportion than the other studied agencies. Of these purported news media requests, however, 2498 (all but 309 requests) came from a single requester, SECProbes.com,¹¹¹ whose status as a news media requester is dubious, as explained below. If SECProbes.com were designated a commercial requester, as it likely should be, commercial requests would make up 89 percent of all requests, and news media requests only 3 percent.¹¹²

Compared to other agencies, the highest-volume requesters at the SEC request far more often, meaning that the vast bulk of all requesting comes from very few companies. For example, in addition to SECProbes.com, which itself accounts for 21 percent of all SEC requests, the next highest-volume requesters include International Business Research (IBR), which made 2155 requests, or 18 percent of the SEC total; Check Fund Manager, LLC, which made 1820 requests, or 15 percent of the SEC total; Bioscience Advisors, which made 1323 requests, or 11 percent of the SEC total; and EACM

108. U.S. Sec. & Exchange Comm., Freedom of Information Act Responses to Sept. 5, 2014, Feb. 12, 2015, Feb. 13, 2015, and Apr. 21, 2015 Requests by Margaret B. Kwoka (on file with author) [hereinafter SEC Data]. For this and for each other agency dataset I compiled, the responses include a spreadsheet of the log of all requests filed in calendar year 2013, as well as copies of some particular FOIA request letters that were logged in that spreadsheet about which I wanted more information. When I cite to the spreadsheet, I pincite the line on the spreadsheet by “Request Number.” When I cite to a copy of a letter obtained under FOIA, I pincite to that letter by “Request Letter.”

109. See DOJ, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2013, at 3 (2014), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fy2013-annual-report-summary.pdf> [<http://perma.cc/A5S9-H7AP>] [hereinafter DOJ, FY 2013 SUMMARY] (reporting that seven agencies, all department level, received more than 20,000 requests in FY 2013, twenty-two agencies received between 1,000 and 19,000 requests, and another twenty-seven received between 100 and 900).

110. SEC Data, *supra* note 108. Here, I am combining both those designated as “other requesters,” which are 7 percent, and those designated as educational/noncommercial, which are 1 percent, for the purpose of reporting. *Id.*

111. *Id.*

112. *Id.*

Advisors, LLC, which made 726 requests, or 6 percent of the SEC total.¹¹³ That means that the top five requesters accounted for 8522 of the 12,091 requests made to the SEC in 2013, or 70 percent.¹¹⁴

To begin with the largest requester, SECProbes.com is a nonfunctioning website registered to John Gavin,¹¹⁵ who also submits the requests on behalf of the organization.¹¹⁶ Because SECProbes.com does not exist as a functioning website, Mr. Gavin's other activities may illustrate its planned or intended purpose. A 2006 *New York Times* profile of Mr. Gavin described him as a "former money manager and chartered financial analyst" who founded a company called SEC Insight after leaving American Express.¹¹⁷ SEC Insight was based on the model of requesting information from the SEC and keeping a "focus list" of companies on which he obtained information, accompanied by various added warnings such as "troubled" and "monitor," which indicated potential regulatory risks.¹¹⁸ His clients were largely mutual funds and hedge funds, and he charged "upward of \$50,000 a year for his service."¹¹⁹ SEC Insight was seemingly deemed at the time a commercial requester, as the commercial nature of his requests was apparently undisputed in a lawsuit he brought over certain denials.¹²⁰ SEC Insight, which was later renamed Disclosure Insight, eventually closed in 2012, after a major investor suffered serious losses.¹²¹

Mr. Gavin's own profile says he is "creating [his] next company and finding others to invest in."¹²² He appears, however, to have moved his business model to a website and company called "Probes

113. *Id.*

114. *Id.*

115. WHOIS search results for: SECProbes.com, GODADDY, WHOIS DATABASE, https://who.godaddy.com/whoisstd.aspx?domain=secprobes.com&prog_id=GoDaddy&k=ZhKWfJSB%20tx2VpVmMEJO9164vR0gmWzcOeDyc8t2j%20iv7CmiFsbRaZ9WiO2gSpJa [<http://perma.cc/64YR-YG2Q>] (listing John Gavin as the registrant).

116. SEC Data, *supra* note 108.

117. Gretchen Morgenson, *Deafened by the S.E.C.'s Silence, He Sued*, N.Y. TIMES (May 28, 2006), <http://www.nytimes.com/2006/05/28/business/yourmoney/28gavin.html> [<http://perma.cc/PAB4-ZXCH>].

118. *Id.*

119. *Id.*

120. Gavin v. SEC, Civil No. 04-4522, 2007 WL 2454156, at *15 (D. Minn. Aug. 23, 2007) (denying a request for an attorneys' fees award to prevailing plaintiff Gavin in part because he was a "commercial requestor").

121. *Who is John Gavin?*, QUIET INNOVATION, <http://quietinnovation.com/who-is-john-gavin> [<http://perma.cc/B9PN-KSSE>].

122. *Id.*

Reporter,”¹²³ which seems to function as the same entity as or an updated version of SECProbes.com. This can be inferred from the fact that Probes Reporter advertises using FOIA requests to obtain information it provides in its various services,¹²⁴ but no Probes Reporter requests were listed in the SEC FOIA log.¹²⁵ Probes Reporter makes no secret that a large part of its service is to make available the records it obtains under FOIA, including copies of its original FOIA request and the original government response.¹²⁶ Probes Reporter offers two service levels, the lower of which costs \$1,187 per year for access to various FOIA requested records and reports, and the higher of which begins at \$15,000 a year for more customized service and access to “[a]ll of [Probes Reporter's] content.”¹²⁷

Whether its previous free access to much of its content, now discontinued, made Probes Reporter a genuine news media outlet at the time of its 2013 requests, or whether that was merely an attempt to drive traffic for its future commercial information-reselling services, now realized, remains unascertainable.¹²⁸ In either case, Mr. Gavin's requests appear to uniformly target SEC investigations of

123. PROBES REP., <http://www.probesreporter.com> [<http://perma.cc/C7G5-D55V>].

124. *About Us*, PROBES REP., <http://probesreporter.com/about-us> [<http://perma.cc/V2MX-PNTP>]. The website details Probes Reporter's history:

Probes Reporter's origins date back to 2000, when Mr. Gavin started SEC Insight/Disclosure Insight. Disclosure Insight™ is now a trademark and research product line belonging to and produced by Probes Reporter.

Since the late 90's, Mr. Gavin has been steadily filing FOIA requests with the SEC. These requests primarily seek records pertaining to investigations the SEC conducts on publicly-traded companies. Responses received and records released in response to these FOIA requests may then be incorporated into research reports published and disseminated to the investing public by Probes Reporter.

Id.

125. SEC Data, *supra* note 108.

126. *See About Us*, PROBES REP., *supra* note 124; *see also Service Levels*, PROBES REP., <http://probesreporter.com/service-levels> [<http://perma.cc/A52Y-PYH2>] (advertising access to “[r]esults from over 2,500 Freedom of Information Act requests we file annually with the SEC”).

127. *Service Levels*, PROBES REP., <https://probesreporter.com/service-levels> [<http://perma.cc/A52Y-PYH2>].

128. A review of a sample of Mr. Gavin's request letters reveals nothing more about his purpose. The only statement regarding his fee category reads identically in each one: “As I qualify as a non-commercial requestor there should be no fees related to this request.” *See* SEC Data, *supra* note 108, at Request Letters 13-11060-FOIA, 13-11953-FOIA, 13-03667-FOIA, 14-02797-FOIA, 13-06337-FOIA, 14-01226-FOIA, 13-06113-FOIA, 14-02241-FOIA, 13-03126-FOIA, 13-03438-FOIA, 13-06671-FOIA, 14-01680-FOIA.

particular companies.¹²⁹ In a small sample of his request letters that were reviewed, Mr. Gavin requested identical categories of records from the “main investigative file” of any investigation concerning a named company: correspondence to and from the company or with a third party about the company, subpoenas, official notice of a probable legal action (called “Wells notices”), investigative orders, and opening and closing reports.¹³⁰

However SECProbes.com should have been characterized, other high-volume requesters are most certainly information resellers. One such company, Bioscience Advisors—which is the fourth largest SEC requester, having filed 1323 requests in 2013—is a “consulting and database firm focused on biopharma alliances.”¹³¹ Its signature service is a database called BioSciDB, which contains copies of “over 12,000 license, development, co-development, joint venture, distribution, asset purchase and other arm’s-length agreements that have been publicly filed with the U.S. Securities and Exchange Commission.”¹³² In fact, it advertises that most of the documents in the database were “obtained via Freedom of Information Act (FOIA) requests.”¹³³ In a sample of the types of products available within the database, it describes the records and then provides a “link to the full FOIA contract.”¹³⁴ In addition to raw records, it provides various contract comparison tools and best practices.¹³⁵ A one-year subscription to this database service costs \$9,500.¹³⁶ Consistent with that purpose, all but one of the company’s FOIA requests in 2013 sought exhibits that regulated entities included in SEC filings like annual or quarterly

129. SEC Data, *supra* note 108.

130. See SEC Data, *supra* note 108, at Request Letters 13-11060-FOIA (concerning DirectTV Grp., Inc.), 13-11953-FOIA (Goodrich Corp.), 13-03667-FOIA (InterMune Inc.), 14-02797-FOIA (Capital One Fin. Corp.), 13-06337-FOIA (AllianceBernstein Holding LP), 14-01226-FOIA (Taro Pharms. Indus. Ltd.), 13-06113-FOIA (Systemax Inc.), 14-02241-FOIA (Huntsman Corp.), 13-03126-FOIA (Heartland Express, Inc.), 13-03438-FOIA (Helen of Troy Ltd.), 13-06671-FOIA (Darling International Inc.), 14-01680-FOIA (Core Laboratories, N.V.). A “Wells notice” is a letter from the SEC to a regulated party notifying the party of a probable legal action to be taken by the SEC. See Mark Koba, *Wells Notice—CNBC Explains*, CNBC (Nov. 28, 2012, 9:34 AM), <http://www.cnbc.com/id/45612974> [<http://perma.cc/GA9R-MRAY>].

131. *About Mark Edwards*, BIOSCIENCE ADVISORS, <http://www.biosciadvisors.com/about> [<http://perma.cc/R6KH-FDJ4>].

132. *Id.*

133. *Id.*

134. *Features*, BIOSCIDB, <https://www.bioscidb.com/features> [<http://perma.cc/3R99-VXRF>].

135. *Id.*

136. *Pricing*, BIOSCIDB, <https://www.bioscidb.com/pricing> [<http://perma.cc/8HC7-ZCHC>].

reports and reports of material corporate events.¹³⁷ In such exhibits is precisely where the company is mostly likely to find the types of licenses and other contracts that make up its BioSciDB database.¹³⁸

Another information reseller is RoyaltyStat LLC, which submitted 548 requests to the SEC in 2013.¹³⁹ RoyaltyStat offers various online databases, including a license agreement database, which “contains 16,750 (live count) unique and unredacted license agreements filed with the U.S. Securities & Exchange Commission (SEC) and from other sources.”¹⁴⁰ It, too, requests exhibits to public filings where those very license agreements are likely to be located.¹⁴¹ A sample of its request letters demonstrates that the exhibits it requests have titles such as “License Agreement” and “Collaborative Agreement,”¹⁴² “Intellectual Property License Agreement,”¹⁴³ and “Know-How And Patent License,”¹⁴⁴ thus evidencing that it is requesting the records it makes available under its database service.

137. SEC Data, *supra* note 108 (demonstrating all but one request concerned exhibits to forms such as 10-K, 10-Q, and 8-K forms); *see also* *Form 10-K*, U.S. SEC. & EXCHANGE COMM’N, <http://www.sec.gov/answers/form10k.htm> [<http://perma.cc/J43H-XBZR>] (describing annual report form 10-K); *Form 10-Q*, U.S. SEC. & EXCHANGE COMM’N, <http://www.sec.gov/answers/form10q.htm> [<http://perma.cc/62DN-5R4R>] (describing quarterly report form 10-Q); *Form 8-K*, U.S. SEC. & EXCHANGE COMM’N, <http://www.sec.gov/answers/form8k.htm> [<http://perma.cc/4JP8-4N2M>] (describing report of material corporate event form 8-K).

138. *See* 17 C.F.R. § 229.601 (2015) (enumerating the material contracts that must be attached as exhibits to public SEC filings). Normally public filings are all available through the SEC’s online EDGAR database. *See* EDGAR, U.S. SEC. & EXCHANGE COMM’N, <http://www.sec.gov/edgar/searchedgar/companysearch.html> [<http://perma.cc/5MG6-VSA8>]. Review of a few of the request letters, however, suggests that the requested exhibits were originally submitted under SEC’s confidential treatment process, and thus not originally made public through its database of public filings. *See* SEC Data, *supra* note 108, at Request Letters 13-04215-FOIA, 13-07473-FOIA, & 14-02162-FOIA. Because confidential treatment at the time of filing is not definitive of the rights of a FOIA requester, and because that treatment can be time limited, a FOIA request for such records is hardly futile, as evidenced by the 881 such requests made by Bioscience Advisors that were granted in full, and an additional twenty-two that were granted in part. SEC Data, *supra* note 108; *see also* 17 C.F.R. § 240.24b–2 (setting out the confidential treatment process).

139. SEC Data, *supra* note 108.

140. *Databases*, ROYALTYSTAT, <http://www.royalystat.com/ourdatabases.cfm> [<http://perma.cc/C7KK-HQHP>].

141. SEC Data, *supra* note 108. Although the request letters do not specify as such, it is likely that these records, too, were originally submitted for confidential treatment, and thus were not already available on the SEC database. *See supra* note 138.

142. SEC Data, *supra* note 108, at Request Letter 14-02682-FOIA.

143. *Id.* at Request Letter 14-02643-FOIA.

144. *Id.* at Request Letter 14-01762-FOIA; *see also id.* at Request Letters 14-01775-FOIA, 14-00584-FOIA, 13-04998-FOIA (evidencing similar titles of requested documents).

Another set of commercial requesters is due diligence research firms, which provide reasonable research to protect against risk prior to a business deal. International Business Research submitted a total of 2155 requests.¹⁴⁵ Each request has a particular individual or business entity listed as the subject matter, and a review of a sampling of IBR's request letters reveals a formulaic approach: it consistently requests all investigative records in which the subject is listed for the past twenty-five years.¹⁴⁶ In turn, IBR is a due-diligence research firm, for which investigative records would be useful, and it specializes in providing information to clients prior to initial public offerings, mergers and acquisitions, and various other types of large business deals.¹⁴⁷ Among its primary clients are large public companies and investment banks, all regulated by the SEC.¹⁴⁸ Similarly, Check Fund Manager, LLC, which submitted 1820 requests to the SEC, is primarily an investor due-diligence firm.¹⁴⁹ These firms, of course, charge their clients (unadvertised rates) for their investigations, some component of which are no doubt based on the information received in response to their FOIA requests. Investment companies themselves are also frequent requesters. For instance, EACM

145. SEC Data, *supra* note 108.

146. *See id.* at Request Letters 13-03098-FOIA (concerning Jolson Merchant Partners, Inc.), 13-03655-FOIA (Dimitrios Raptis), 13-05167-FOIA (Corinne H. Lyle a/k/a Nin Lyle), 13-08247-FOIA (Matthew L. Sherman), 13-09170-FOIA (MigraTEC, Inc.), 13-10997-FOIA (G-Force 1 LLC), 13-11466-FOIA (Brentwood Beauty Labs. Int'l Inc.), 14-00256-FOIA (Mac Motors Inc.), 14-00365-FOIA (Corbin Capital Partners).

147. *About*, INT'L BUS. RES., <http://ibrusa.com/#about> [<http://perma.cc/A38L-SNQQ>].

148. *Id.*

149. *About Us*, CHECK FUND MANAGER, <http://www.checkfundmanager.com/aboutus.html> [<http://perma.cc/H48S-H4DK>]. A sampling of Check Fund Manager's requests reveals a pattern of requesting "records of consumer complaints, civil complaints, investigations, or preliminary inquiries" regarding the subject of the request. *See* SEC Data, *supra* note 108, at Request Letters 13-03997-FOIA, 13-04856-FOIA, 13-06060-FOIA, 13-10123-FOIA, 13-10555-FOIA, 14-01130-FOIA, 14-01414-FOIA, 14-01475-FOIA, 14-02693-FOIA, 13-03328-FOIA, 13-03893-FOIA, 13-04578-FOIA, 13-05608-FOIA, 13-05743-FOIA, 13-06921-FOIA, 13-08874-FOIA, 13-09586-FOIA, 13-09804-FOIA, 14-01302-FOIA, 14-01705-FOIA, 14-02279-FOIA, 13-03058-FOIA, 13-03411-FOIA, 13-04378-FOIA.

Advisors, LLC, submitted 726 requests.¹⁵⁰ It is a wholly owned subsidiary of BNY Mellon, a large investment services company.¹⁵¹

Excluding SECProbes.com, the news media requesters supply only 3 percent of all SEC requests.¹⁵² The *Wall Street Journal* submitted 99 of those requests, Thompson Reuters submitted 81 (under the name of a Reuters journalist), *The Hill* submitted 23, Bloomberg 29, Center for Public Integrity 14, and all other news media outlets less than 10.¹⁵³ Anomalously, Aguirre Law, APC, a law firm that does plaintiffs' side financial litigation, submitted 37 requests that were deemed news media requests for unknown reasons.¹⁵⁴

B. Food and Drug Administration

In 2013, the FDA received a total of 10,167 requests.¹⁵⁵ Of those requests, a full 75 percent were from commercial requesters, who filed 7615 requests with the FDA that year.¹⁵⁶ By comparison, the news media filed only 1222 requests, or 12 percent, and all other requesters represented 13 percent, or 1330 requests.¹⁵⁷

Although regulated companies have what might be an apparent interest in FDA records, FDA's most frequent requesters are not, say, pharmaceutical companies, but instead are information resellers. For example, the single highest-volume requester is a company called FOI Services, Inc., which submitted 571 requests in 2013.¹⁵⁸ FOI Services, Inc. is a privately held, for-profit corporation founded in 1975 whose sole business model is to request, under FOIA, FDA

150. SEC Data, *supra* note 108. A sample of EACM requests reveals a pattern of requesting "non-public correspondence for any consumer complaints, investigations and/or disciplinary actions" of the subject matter. *See id.* at Request Letters 13-04041-FOIA (regarding concerning Global Credit Advisors LLC), 13-04605-FOIA (regarding Tybourne Equity (US) Fund), 13-06310-FOIA (regarding Brett S. Klein), 13-07497-FOIA (regarding VP Distributors LLC), 13-09811-FOIA (regarding OZ Master Fund Ltd.), 14-01807-FOIA (regarding David K. Riley).

151. *Overview*, EACM ADVISORS, LLC, <http://www.eacm.com/web/eacm-advisors/overview> [<http://perma.cc/X5WX-BADP>].

152. SEC Data, *supra* note 108.

153. *Id.*

154. *Id.*

155. Food & Drug Admin., U.S. Dep't of Health & Human Servs., Freedom of Information Act Responses to June 24, 2014, Feb. 12, 2015, Feb. 13, 2015 and Apr. 21, 2015 Requests by Margaret B. Kwoka (on file with author) [hereinafter FDA Data].

156. *Id.*

157. *Id.*

158. *Id.*

records and resell access to those records to interested parties.¹⁵⁹ It both maintains a “private collection” of FDA documents, access to which can be purchased, and offers a service of “custom” FOIA requests, in which FOI Services, Inc. charges clients to request the desired records under FOIA and manage the process with the FDA.¹⁶⁰ The majority of its requests concern facilities inspection reports, premarket notifications for medical devices, the FOIA logs themselves, and new drug applications.¹⁶¹

Another information reseller that engages in high-volume requesting at FDA is FDA News.¹⁶² Although FDA News may sound like a news media organization, in fact its FOIA practice feeds a business model not unlike that of FOI Services, Inc.¹⁶³ FDA News made 237 FDA requests in 2013, nearly all of which were classified as commercial.¹⁶⁴ The vast majority of its requests were for FDA Form 483s, which are facility inspection reports.¹⁶⁵ In turn, FDA News markets a product called 483sOnline.com, which provides “instant, unlimited access to more than 3100 Form 483s.”¹⁶⁶ For a one-year

159. *About Us*, FOI SERVICES, INC., <http://www.foiservices.com/brochure/about.cfm> [<http://perma.cc/JPN5-QMB3>].

160. *Document Retrieval*, FOI SERVICES, INC., <http://www.foiservices.com/brochure/docretrieval.cfm> [<http://perma.cc/U3UP-SN8U>].

161. FDA Data, *supra* note 155.

162. *Id.*

163. To be sure, some of FDA News’s services are not pure information reselling, but rather are value-added information products that FDA News has generated, such as newsletters, trainings, and even books. See FDA NEWS, <http://www.fdanews.com> [<http://perma.cc/HS3N-Z4YT>]. Nonetheless, the content of FDA News’s requests makes clear that it primarily feeds a database product that purely resells information, as described below.

164. Only five requests made by FDA News were not deemed commercial, and those were designated as news media requests. There are an additional ninety requests made under a similar but differently formatted name, of which twenty-two were designated news media requests. See FDA Data, *supra* note 155. Upon inspecting two FDA News request letters categorized as news media and two categorized as commercial, no apparent difference in content or purpose explained the different labels. Compare *id.* at Request Letters 2013-23 (commercial), 2013-258 (commercial), with *id.* at Request Letters 2013-154 (news media), 2013-7161 (news media).

165. *FDA Form 483 Frequently Asked Questions*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ICECI/Inspections/ucm256377.htm> [<http://perma.cc/MVT6-GR6N>] (last updated Apr. 23, 2015). The remaining FOIA requests were mostly requests for FDA’s FOIA logs. FDA Data, *supra* note 155.

166. *Form 483*, FDA NEWS, <http://www.fdanews.com/form483> [<http://perma.cc/G3CR-2AJF>].

subscription to this service, FDA News charges \$997, or particular forms can be purchased individually for \$117 each.¹⁶⁷

Interestingly, at least one frequent requester, Washington Information Source (WIS), which made 344 requests in 2013,¹⁶⁸ is inconsistently categorized. For 78 percent of its requests, it obtained news media status, and for the remaining 22 percent it was classified as a commercial requester.¹⁶⁹ In fact, its 269 news media-designated requests ranked it as the most frequent news media requester, even though it was not always categorized as such.¹⁷⁰ Nonetheless, a look at its business model and its requesting pattern suggests that it, too, engages in information reselling,¹⁷¹ while also marketing expensive original materials such as books, manuals, and newsletters to interested regulated companies.¹⁷²

The records WIS requested under FOIA fall into a few broad categories. Of WIS's total 344 requests, more than ninety of them were for FDA's FOIA logs for various intervals of time.¹⁷³ Another handful was for specific FOIA request letters.¹⁷⁴ Of the remainder, the vast majority were for records related to particular inspections: FDA observation forms, inspection reports, warning letters, and subsequent correspondence with the inspected entity.¹⁷⁵

In turn, WIS offers a variety of information products that evidently incorporate, rely on, or often simply resell these requested

167. *Id.* (to see individual price, click on the "download" button next to an individual report).

168. FDA Data, *supra* note 155.

169. *Id.* Out of 344 total requests by WIS, 269 were designated news media and seventy-five were designated commercial requests. Again, from looking at a sample, it was not possible to identify differences in content that would explain differing categorizations. For example, two requests contained identical language requesting news media status, and one was granted and another was not. *Compare id.* at Request Letter 2013-7573 (news media), *with id.* at Request Letter 2013-7962 (commercial).

170. *Id.*

171. As described below, some of the products it markets are databases of FDA records of the very sort WIS frequently requests under FOIA. *See infra* text accompanying note 183.

172. *About Washington Information Source*, FDAINFO.COM, <http://www.fdainfo.com/index.php?id=about> [<http://perma.cc/Q6ZG-XJ2L>]; *About WIS...*, FDAINFO.COM, <http://www.fdainfo.com/index.php?id=history> [<http://perma.cc/V4PD-L37E>].

173. FDA Data, *supra* note 155.

174. *Id.*

175. *Id.*; *see, e.g., id.* at Request Letters 2013-7557, 2013-7708, 2013-8076, 2013-8405. The last substantial category is of requests that apparently pertain to food production matters, such as requests for "Food Contact Notification" documents, a type of notification to FDA about packaging that will come into contact with marketed food products, and animal feed additives. *See, e.g., id.* at Request Numbers 2013-3078, 2013-7005, 2013-8459.

records. For example, it offers, for approximately a thousand dollars, a full database of “all the critical inspection records you need,” including thousands of inspection observation forms and establishment inspection reports, “providing you with more than 15 years of FDA inspection history.”¹⁷⁶ These are the very same types of forms that constitute a sizeable portion of records that WIS requests under FOIA.¹⁷⁷ It also sells individually the premarket notifications submitted by companies that want to market a new medical device¹⁷⁸ at between \$25 and \$690 each,¹⁷⁹ and the subsequent premarket approvals issued by the FDA¹⁸⁰ at \$20.50 to \$145 each.¹⁸¹

Even apart from simply selling databases of FDA records as one aspect of its business, WIS’s flagship products, a series of newsletters that are available by annual subscription and range from \$999 per year to \$2,495 per year,¹⁸² also rely on FOIA-obtained records. One such newsletter summarizes FDA warning letters to drug and device manufacturers categorized by industry and is marketed as enabling the consumer to avoid costly and disruptive FDA investigations, research competition, and quickly access FDA inspection documents.¹⁸³ Those FDA inspection documents are the same categories of documents routinely requested by WIS.¹⁸⁴

176. *483s/EIRs on DVD ROM Entire Set*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/483s-eirs-on-dvd-rom-entire-set> [<http://perma.cc/PH37-W83E>]. FDADocuments.org is the website for the RECORD-RETRIEVE Service, a subsidiary of Washington Information Source Company. *About Us*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/about-us/> [<http://perma.cc/WCN7-LRMZ>].

177. FDA Data, *supra* note 155.

178. These are known as 510(k)s. *510(k) Clearances*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/DeviceApprovalsandClearances/510kClearances> [<http://perma.cc/8AUX-MFK3>] (last updated Jan. 13, 2015).

179. *510Ks*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/510ks/?sort=pricedesc> [<http://perma.cc/DVE7-4LN7>].

180. These are known as PMAs. *Premarket Approval (PMA)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Medicaldevices/Deviceregulationandguidance/Howtomarketyourdevice/Pre-market/submissions/Pre-market-approval/pma/Default.Htm> [<http://perma.cc/3XQA-BH6Z>] (last updated Aug. 19, 2014).

181. *PMAs*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/pmas> [<http://perma.cc/UC93-27BV>].

182. *Newsletters*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/newsletters> [<http://perma.cc/W6Z3-9LKA>].

183. *Warning Letter Bulletin*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/warning-letter-bulletin> [<http://perma.cc/576T-G8KB>]. To view a sample issue, see 22 WARNING LETTER BULL., no. 9, Sept. 2009, <http://www.fdainfo.com/samples/warningletter.pdf> [<http://perma.cc/K67C-MVUF>].

184. FDA Data, *supra* note 155.

Another newsletter, “Adverse Event Reporting News,” again contains original content, in this instance describing FDA-reported safety-related concerns for drugs and medical devices.¹⁸⁵ But this product also includes discounted access to the underlying adverse event reports from FDA, for which WIS advertises, “we file FOIA requests for you!”¹⁸⁶ WIS also advertises as part of its newsletter subscriber services that it can provide “[i]nformation on which firms are trying to get copies of the reports you filed with FDA,”¹⁸⁷ which presumably is why WIS frequently requests FDA’s FOIA logs.

A variant on an information reseller, such as FOI Services, Inc., is a for-profit enterprise that resells the information with more added value. The second-largest FDA requester, Thomson Reuters,¹⁸⁸ fits this description. Thomson Reuters has both a media outlet (Reuters News Agency) and a host of business-related information services, including services in the financial, intellectual property, legal, life sciences, scientific research, and accounting areas.¹⁸⁹ Notably, the requests that Thomson Reuters makes of FDA are unlikely to be on behalf of the media outlet because the FDA classifies almost all of them as commercial requests.¹⁹⁰ Instead, the more than 500 requests the company submitted in 2013¹⁹¹ must be almost entirely for the purpose of their other profit-making information products.

Based on the various services it offers, Thomson Reuters’s FOIA requests most likely produce information used in a series of for-pay database products under the umbrella name Cortellis, which covers life sciences industries.¹⁹² In particular, Cortellis Regulatory Intelligence, a product that provides information about regulatory compliance for drugs and medical devices, is advertised as

185. *Adverse Event Reporting News*, FDAINFO.COM, <http://www.fdainfo.com/index.php?id=aern> [<http://perma.cc/95KA-62CG>]. To view a sample issue, see 11 ADVERSE EVENT REPORTING NEWS, Oct. 7, 2014, <http://www.fdainfo.com/samples/adversenews.pdf> [<http://perma.cc/TH6Y-MTQ9>].

186. *Adverse Event Reporting News*, *supra* note 185.

187. *Adverse Event Reporting News*, FDADOCUMENTS.ORG, <http://www.fdadocuments.org/adverse-event-reporting-news/> [<http://perma.cc/QB57-LUHB>].

188. FDA Data, *supra* note 155.

189. *About Us*, THOMSON REUTERS, <http://thomsonreuters.com/about-us> [<http://perma.cc/HBV7-MKH2>].

190. FDA Data, *supra* note 155. Specifically, 509 of 527 requests were classified as commercial. *Id.*

191. *Id.*

192. *Cortellis*, THOMSON REUTERS, <http://lifesciences.thomsonreuters.com/products/cortellis> [<http://perma.cc/9PF5-AVPP>].

“includ[ing] documents obtained through FOI[A] requests.”¹⁹³ Another product, Cortellis Competitive Intelligence, provides intelligence on pharmaceutical companies, marketed as a way to “[t]rack your closest competitors.”¹⁹⁴ A host of other products likewise track regulatory developments, primarily those that would be located at the FDA, both as to general industries and as to particular products or companies.¹⁹⁵

In particular, the vast majority of Thomson Reuters’s requests concern FDA-generated reports following agency inspections, known as Establishment Inspection Reports, or EIRs, and subsequent correspondence between the FDA and the inspected facility.¹⁹⁶ This information appears to be made available in various forms through Cortellis Regulatory Intelligence, including through a service about warning letters the FDA issues following inspections.¹⁹⁷

In contrast, regulated companies are bit players in the FOIA requester landscape at FDA. The only high-volume requester in this category, Merck & Co., Inc., a large pharmaceutical company, filed 373 requests in 2013.¹⁹⁸ However, a full 318 of those were for copies of other FOIA requests made in the past,¹⁹⁹ copies of records produced in response to certain past FOIA requests,²⁰⁰ or logs of all FOIA requests made or fulfilled during particular time periods.²⁰¹ That is,

193. *Cortellis Regulatory Intelligence: Features & Benefits*, THOMSON REUTERS, <http://thomsonreuters.com/en/products-services/pharma-life-sciences/regulatory-affairs/product-overview/features-benefits.html> [<http://perma.cc/S3UF-D7B6>].

194. *Pharma Competitive Intelligence*, THOMSON REUTERS, <http://thomsonreuters.com/pharma-life-sciences/pharma-competitive-intelligence> [<http://perma.cc/KAW7-YFAP>].

195. For example, one product provides “[d]ynamic, relevant drug news and e-mail alerts posted every business day.” *Drug News*, THOMSON REUTERS, <http://thomsonreuters.com/drug-news/?subsector=drug-development> [<http://perma.cc/8KJG-VQJ6>]. Another focuses on news in the medical device industry, advertising that it “[t]rack[s] new regulatory actions by the FDA and other agencies.” *Medical Device Daily*, THOMSON REUTERS, <http://thomsonreuters.com/medical-device-daily/?subsector=pharmaceutical-research> [<http://perma.cc/D8K8-SL2B>].

196. FDA Data, *supra* note 155; see also *Procedure for Release of Establishment Inspection Report*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ICECI/Inspections/FieldManagement/Directives/ucm103299.htm> [<http://perma.cc/SNQ8-U7JF>] (last updated May 18, 2015) (describing the FDA’s procedures for releasing EIRs).

197. See Cyril Carrere, *Examining Foreign Inspection Related FDA Warning Letters*, THOMSON REUTERS: LIFE SCI. CONNECT (Jan. 27, 2014), <https://lsconnect.thomsonreuters.com/fda-foreign-inspection-related-warning-letters> [<http://perma.cc/L368-TKYT>].

198. FDA Data, *supra* note 155.

199. See, e.g., *id.* at Request Letters 2013-1004, 2013-2280, 2013-2329, 2013-4178, 2013-4755, 2013-4766, 2013-5840, 2013-6390, 2013-7365, 2013-9340.

200. See, e.g., *id.* at Request Letters 2013-6827, 2013-6949, 2013-6993, 2013-7040.

201. See, e.g., *id.* at Request Letters 2013-842, 2013-843, 2013-6892.

more than eight out of ten of Merck's requests were about other people's FOIA requests. A small sample suggests that through these requests Merck is seeking to learn what others are requesting pertaining to itself.²⁰² Its remaining requests concerned a variety of other matters, such as reports of adverse drug events made to the FDA about Merck's own products²⁰³ and records related to FDA inspections of facilities with which Merck appears to have a relationship.²⁰⁴

Other industry requesters account for a far smaller volume of requests. The next most frequent such requester, Eli Lilly & Co., for example, made fifty-six requests; all but one concerned reports resulting from FDA inspections,²⁰⁵ many of which apparently concern facilities that are used to manufacture its own products.²⁰⁶ For example, it submitted a set of requests about PETNET Solutions

202. The following examples are illustrative. Merck's request letter 2013-4755 asks for the request letter for request number 2013-3633, which is a law firm's request for information about clinical trials for a particular type of administration of a drug Merck manufactures, Temodar. *See id.* at Request Letters 2013-3633, 2013-4755; *see also* Products, MERCK, <http://www.merck.com/product/home.html> [<http://perma.cc/24A4-J6XW>] (listing Temodar as a Merck product). Merck's request 2013-9340 asks for the request letter for request number 2013-8434, which is a request about adverse events reported for the drug Propecia, a Merck product. *See* FDA Data, *supra* note 155, at Request Letters 2013-8434, 2013-9340; *see also* Products, *supra* (listing Propecia as a Merck product). Merck's request 2013-2280 asks for the request letter for request number 2013-1415, which is a request by INC Research, described *infra* notes 212–15 and accompanying text, for information pertaining to Januvia, another Merck product. *See* FDA Data, *supra* note 155, at Request Letters 2013-1415, 2013-2280; *see also* JANUVIA, MERCK HELPS, <http://www.merckhelps.com/JANUVIA> [<http://perma.cc/78PH-MDQ7>] (offering Merck assistance in providing Januvia).

203. *See, e.g.*, FDA Data, *supra* note 155, at Request Letters 2013-4231, 2013-5647.

204. For example, Request Letter 2013-5788 asks for inspection reports concerning Laboratoire Unither in France, which manufactures a Merck product. *Id.* at Request Letter 2013-5788; *see also* MERCK, PATIENT INFORMATION: ZIOPTAN 5, https://www.merck.com/product/usa/pi_circulars/z/zioptan/zioptan_ppi.pdf [<http://perma.cc/7RC6-N85R>] (last updated Aug. 2013) (stating that Laboratoire Unither manufactures Merck product Zioptan).

205. FDA Data, *supra* note 155. That the requests concerned inspections was ascertained by examining the subject matter of the request as summarized by FDA in its FOIA logs. Every entry for Eli Lilly either contained the designation of a particular "EIR," which is an abbreviation for "Establishment Inspection Report," or "483," which is short for FDA Form 483, an inspectional observations form used by FDA. *See* FDA Form 483 Frequently Asked Questions, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ICECI/Inspections/ucm256377.htm> [<http://perma.cc/74GT-XLWA>]; FDA Data, *supra* note 155.

206. Certainly not all of the requests concerned facilities about which a connection to Eli Lilly was ascertainable, but many did. *See, e.g.*, FDA Data, *supra* note 155, at Request Number 2013-7592 (requesting inspection records related to Dyax Corp.); Press release, Dyax Corp., Dyax Corp. Highlights Recent Progress in Licensing and Funded Research Portfolio (Sept. 22, 2014), <http://investor.dyax.com/releasedetail.cfm?ReleaseID=871840> [<http://perma.cc/8T48-NX PW>] (noting Dyax's joint ventures with Eli Lilly); *see also infra* notes 207–10.

facilities,²⁰⁷ which contracts with Eli Lilly to manufacture and distribute an Eli Lilly product,²⁰⁸ and another set concerning Fisher Clinical Services,²⁰⁹ which distributes clinical trial materials for Eli Lilly.²¹⁰ In the only non-inspection-related request, Eli Lilly requested a new drug application made by AbbVie, a competitor drug company, in 1981.²¹¹

There is also a sizeable category of commercial requesters whose interests are less apparent, largely because they provide services to other for-profit entities but their clients' identities are not public. For instance, INC Research made 139 requests in 2013, about half of which were for inspection-related documents for particular facilities,²¹² and the remainder of which ranged from new drug applications²¹³ to drug approval documents²¹⁴ to requests to introduce a biologic product into interstate commerce.²¹⁵ EAS Consulting, a consulting group “[s]pecializing in FDA [r]egulatory [m]atters,”²¹⁶ likewise requested on a range of matters,²¹⁷ as did Favus Institutional

207. See FDA Data, *supra* note 155, at Request Numbers 2013-766, 2013-898, 2013-899, 2103-900.

208. Siemens PETNET Solutions Signs Nationwide Commercial Agreement to Manufacture and Distribute Lilly's Molecular Imaging Agent, PR NEWswire (Nov. 7, 2011), <http://www.prnewswire.com/news-releases/siemens-petnet-solutions-signs-nationwide-commercial-agreement-to-manufacture-and-distribute-lillys-molecular-imaging-agent-133357843.html> [<http://perma.cc/2D64-WZLT>].

209. See FDA Data, *supra* note 155, at Request Numbers 2013-4011, 2013-4012, 2013-4013, 2013-4014.

210. Press Release, Lilly, Thermo Fisher Scientific and Lilly Announce Expanded Clinical Trial Materials Relationship (Mar. 26, 2010), <https://investor.lilly.com/releasedetail.cfm?releaseid=454894> [<http://perma.cc/LY3Q-G9FT>].

211. FDA Data, *supra* note 155, at Request Number 2013-5305.

212. FDA Data, *supra* note 155.

213. See, e.g., *id.* at Request Numbers 2013-5498, 2013-6463, 2013-6698.

214. See, e.g., *id.* at Request Numbers 2013-2264, 2013-3688, 2013-7277. “SBA” stands for “Summary Basis of Approval,” and includes the data that forms the basis for drug approval. See, e.g., *Summary Basis of Approval*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/ApprovedProducts/NewDrugApplicationsNDAs/ucm083112.htm> [<http://perma.cc/7BRG-AXUU>] (last updated May 21, 2012).

215. See, e.g., FDA Data, *supra* note 155, at Request Numbers 2013-1155, 2013-1676, 2013-6461. “BLA” stands for “Biologics License Applications.” See *Biologics License Applications (BLA) Process (CBER)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/BiologicsBloodVaccines/DevelopmentApprovalProcess/BiologicsLicenseApplicationsBLAProcess> [<http://perma.cc/JNP5-W5SX>] (last updated Nov. 5, 2015).

216. EAS CONSULTING GROUP, <http://easconsultinggroup.com> [<http://perma.cc/MA4K-CZ4E>].

217. FDA Data, *supra* note 155.

Research, a healthcare consulting services group,²¹⁸ in its forty-four requests,²¹⁹ presumably as part of their work for their clients.

An entire subset of these commercial requesters does nothing but repeatedly request the agency's own FOIA logs in small time increments; that is, the list of requests made or fulfilled in a given period of time (the same documents used to gather the data described in this Article). The law firm JH Barr & Associates LLC made 96 requests, every one of which concerned FDA's FOIA logs;²²⁰ Wolters Kluwer Law & Business likewise submitted 94 requests, all for FOIA logs;²²¹ CanReg Inc., a regulatory consulting company,²²² also submitted requests only for FOIA logs, numbering 90;²²³ The Dominion Group, "Healthcare Market Research Specialists,"²²⁴ submitted 46 such requests;²²⁵ and FDA Review/FDAWebview, a daily FDA news service,²²⁶ made 43 of the same.²²⁷

A final group of commercial requesters consist of personal injury law firms that specialize in product liability cases arising from pharmaceuticals. Andrews & Thornton, which "focuses its practice on the areas of serious injury cases resulting from dietary supplements and pharmaceuticals," and is "a leader in the ephedra litigation,"²²⁸ submitted fifty-nine requests.²²⁹ Most of its requests apparently concern metal-on-metal hip implants,²³⁰ including the premarket

218. FAVUS INSTITUTIONAL RES., <http://favusinstitutionalresearch.com> [<http://perma.cc/LZ5N-8ZDS>].

219. FDA Data, *supra* note 155.

220. *Id.*

221. *Id.*

222. CanReg Inc. appears to have merged into Optum, another regulatory consultant. See *Optum (formerly CanReg Inc. & Chinagate)*, REG. AFF. PROFS. SOC'Y, <http://www.raps.org/network-community/regulatory-resource-directory/optuminsight> [<http://perma.cc/54T5-3MVR>] (detailing the merger); *Life Sciences*, OPTUM, <https://www.optum.com/life-sciences.html> [<http://perma.cc/AW7T-5MU2>] (describing Optum).

223. FDA Data, *supra* note 155.

224. THE DOMINION GROUP, <http://www.thedominiongrp.com> [<http://perma.cc/8YCD-356G>].

225. FDA Data, *supra* note 155.

226. *About Us*, FDAWEBVIEW, <http://www.fdaweb.com/default.php?ea=aboutus> [<http://perma.cc/6DPX-6RXJ>].

227. FDA Data, *supra* note 155.

228. *About Our Firm*, ANDREWS & THORNTON, <http://www.andrewsthornton.com/our-firm> [<http://perma.cc/FP6V-Y4F2>].

229. FDA Data, *supra* note 155.

230. *Id.*

approval for various components²³¹ and information concerning certain recalls.²³² Metal-on-metal hip implants have come under scrutiny for various health risks.²³³ Unsurprisingly, Andrews & Thornton is investigating possible lawsuits and advertising to potential clients who might have those claims.²³⁴ Likewise, the firm of Andrus Wagstaff, PC submitted thirty requests apparently concerning products for which they had clients with personal injury claims.²³⁵

In contrast to the dominant commercial interests represented in FDA FOIA requests, traditional news media plays a comparatively small role. Although the commercial requesters were not discussed in full, I provide a full accounting of every news media outlet or advocacy group dedicated to informing the public about government activities that submitted five or more requests in 2013: the *Wall Street Journal* submitted 45; Bloomberg News submitted 37; the Project on Government Oversight, a watchdog group, submitted 30; *USA Today* submitted 20; ProPublica submitted 17; the Associated Press submitted 15; the *New York Times* submitted 10; CBS News submitted 9 (one specifying 60 Minutes and another CBS Evening News); WSB-TV, a local Atlanta station, submitted 6; Scripps Howard News Service submitted 5; CNN submitted 5; MSNBC.com submitted 5; the Natural Resources Defense Council, an environmental advocacy group, submitted 5.²³⁶ The sum total of all of these media outlets' requesting is 209 requests.²³⁷

231. See, e.g., *id.* at Request Numbers 2013-2495, 2013-2720, 2013-2733. The subject matter of the request is a number preceded by the letter “k,” which is a “510(k) number,” a unique control number assigned to each medical device premarket notification submission. *510(k) Submission Process*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/HowtoMarketYourDevice/PremarketSubmissions/PremarketNotification510k/ucm070201.htm> [<http://perma.cc/F8Y4-UUTL>] (last updated Apr. 6, 2015).

232. See, e.g., FDA Data, *supra* note 155, at Request Numbers 2013-2631, 2013-2632, 2013-2634.

233. See *Metal-on-Metal Hip Implants*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ImplantsandProsthetics/MetalonMetalHipImplants> [<http://perma.cc/Z4QP-YVZA>] (last updated Apr. 10, 2015).

234. *Stryker Hip*, ANDREWS & THORNTON, <http://www.andrewsthornton.com/current-litigations/stryker-hip> [<http://perma.cc/6E7Y-GUMS>].

235. FDA Data, *supra* note 155. For example, many of the requests apparently concern transvaginal mesh medical device implants. See FDA Data. The firm lists transvaginal mesh medical device implants as a practice area. *Transvaginal Mesh*, ANDRUS WAGSTAFF ATTORNEYS AT LAW, <https://www.andruswagstaff.com/transvaginal-mesh> [<http://perma.cc/VT7H-YT53>].

236. FDA Data, *supra* note 155.

237. *Id.*

C. *Environmental Protection Agency*

The EPA received 9737 FOIA requests in 2013.²³⁸ Of those, 7736, or 79 percent, were submitted by commercial requesters.²³⁹ Because EPA aggregates media and educational requesters into one category, it is impossible to report a precise number of news media requests. But even if all of the requesters in this category were news media, they would constitute a tiny fraction of requesters. Together, news media and educational requesters submitted 344 requests, or 4 percent of the total number. Requesters categorized as other than commercial, news media, or educational, submitted 1433, or 15 percent of requests, and another 224 requests, or 2 percent, were uncategorized.

As compared to other agencies, the top requesters at EPA submit fewer requests. Only six requesters submitted more than 100 requests, and all were commercial requesters: ECC, Inc. submitted 180; Hillman Consulting submitted 172; REPSG, Inc. submitted 170, EDR, Inc. submitted 160; Environmental Operations submitted 129, and Brinkerhoff Environmental Services, Inc. submitted 101.²⁴⁰ Notably, nearly 900 requests designated as commercial do not have an organizational affiliation listed with the request.

Among these top requesters is yet another apparent information reseller. EDR, Inc. is a company whose “mission is to continuously improve the ways that property stakeholders assess, transact and manage their real estate assets.”²⁴¹ In its description of its history, EDR explains that it was founded after “a few environmental professionals saw a need for consulting firms to get their hands on comprehensive, accurate government records data—quickly.”²⁴²

And mass data gathering, rather than targeted requesting, is evidenced in EDR’s FOIA requests to EPA. For example, EDR requested “Enforcement and violation data from the Office of Ground Water & Drinking Water’s Safe Drinking Water Information

238. U.S. Envtl. Prot. Agency, Freedom of Information Act Responses to June 8, 2015 Requests by Margaret B. Kwoka (on file with author). The data covers calendar year 2013 and was compiled from responses to the June 8, 2015 request and from online data available at <https://foiaonline.regulations.gov> [hereinafter EPA Data].

239. *Id.*

240. *Id.* For five of the six organizations, somewhere between one and three of their requests were uncategorized, but all other requests from all of the organizations were categorized as commercial. *Id.*

241. EDR, INC., <http://edrnet.com> [<http://perma.cc/G6EW-GX4F>].

242. *The EDR Story*, EDR, INC., <http://edrnet.com/edr> [<http://perma.cc/3QH3-YDK3>].

System” for all ten EPA regions between January 1, 2000 and September 30, 2012.²⁴³ Another request sought “Permit Compliance System and ICIS/NPDES Enforcement and Violation Data for all 10 EPA Regions” between January 1, 2000 and June 30, 2012.²⁴⁴ Another sought all “Criminal Cases dealing with Air, Water, Toxics, [Resource Conservation and Recovery Act], and [Comprehensive Environmental Response, Compensation, and Liability Act] for all 10 EPA regions.”²⁴⁵ A series of requests asked for region-by-region “Underground Storage Tank Site locations on Indian Land.”²⁴⁶ These are typical of the breadth of the requests submitted by EDR.

In turn, EDR markets products that seem to incorporate these kinds of records. For example, geared toward environmental consultants, it provides “environmental compliance offerings,” which is a “comprehensive look at current government environmental filings” and includes “corporate liability and enforcement records,” “regulatory information . . . [on] waste management and disposal,” and other similar types of government records.²⁴⁷ Although EDR’s offerings are marketed in such a way that it is harder to discern precisely how each type of request feeds into its profit model, this evidence demonstrates that at least some core part of its business constitutes information reselling.

EDR is not the only information reseller apparent in EPA’s FOIA logs. Although not one of the top requesters by volume at EPA, the FOIA Group, an information reseller that is discussed in detail below with respect to NIH, makes another significant appearance here with thirty-seven requests.²⁴⁸

In contrast to EDR, other top commercial requesters appear to be consulting and due-diligence firms gathering information as part of their advising services for particular clients, not to warehouse information. Typically, the apparent purpose of the request is to aid in a Phase I Environmental Site Assessment (ESA). An ESA is

243. EPA Data, *supra* note 238, at Request Number EPA-HQ-2013-002738.

244. *Id.* at Request Number EPA-HQ-2013-002736.

245. *Id.* at Request Number EPA-HQ-2013-003319.

246. *Id.* at Request Numbers EPA-R4-2013-008495, EPA-R5-2013-008496, EPA-R5-2013-008497, EPA-R6-2013-008498, EPA-R6-2013-008499, EPA-R7-2013-008500, EPA-R7-2013-008501, EPA-R8-2013-008502, EPA-R8-2013-008503, EPA-R9-2013-008504, EPA-R9-2013-008505, EPA-R10-2013-008507, EPA-R10-2013-008508.

247. *Environmental Compliance Offerings*, EDR, INC., <http://edrnet.com/prods/environmental-compliance-reports> [<http://perma.cc/X27E-9NQ9>].

248. EPA Data, *supra* note 238.

essentially a due-diligence search about possible environmental hazards on commercial property, usually prepared before the sale or financing of the property that, under EPA rules, limits the liability of the purchaser if an eventual problem is uncovered.²⁴⁹

For example, Environmental Consultants + Contractors Inc. (ECC Inc.) specifies in each of its requests a particular address about which it seeks records and explains that the records are sought because “ECC is currently performing a Phase I Environmental Site Assessment for the above-referenced location.”²⁵⁰ Likewise, Hillman Consulting, LLC’s requests all identify a particular property about which records are requested.²⁵¹ Although Hillman does not specify the purpose of the request, it also provides Phase I ESA’s as part of their “Real Estate Due Diligence” services,²⁵² and the requests are very likely to be on behalf of clients who have employed such services. The same is true for React Environmental Professional Services Group, Inc. (REPSG), which repeatedly requests “Water Quality Management, Water Supply & Community Health, Underground Storage Tank (UST) Records, Manifests, Environmental Cleanup Program, Solid Waste Management and Air Quality” about particular properties.²⁵³ On its website, REPSG specifies that its property assessment and investigation services include a government records search.²⁵⁴ Environmental Operations, which also requests about particular properties, also specifies that it is conducting a Phase I ESA in its requests.²⁵⁵ Many of Brinkerhoff Environmental Services, Inc.’s requests specify the same.²⁵⁶

249. *General Brownfields Guidelines on All Appropriate Inquiries*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/brownfields/general-brownfields-guidelines-all-appropriate-inquiries> [<http://perma.cc/VTK7-5MNE>] (last updated Oct. 21, 2015).

250. *E.g.*, EPA Data, *supra* note 238, at Request Number EPA-R3-2013-002557. ECC’s 180 requests in the agency’s FOIA logs all contained this language with the exception of forty-six for which the EPA did not provide the text of the request because it was “under agency review.” EPA Data, *supra* note 238.

251. *Id.* Hillman’s requests in the agency’s FOIA logs all identified one or more properties with the exception of eight for which the EPA did not provide the text of the request because it was “under agency review.” *Id.*

252. *Real Estate Due Diligence*, HILLMAN CONSULTING LLC, <http://hillmanconsulting.com/services/real-estate-due-diligence> [<http://perma.cc/77GJ-LU8X>].

253. EPA Data, *supra* note 238.

254. *Overview: Property Assessment/Investigation*, REACT ENVTL. PROF’L SERVS. GROUP, INC., <http://www.repsg.com/services/property-assessment-investigation/#.Vnms4pMrJsM> [<http://perma.cc/UAM2-SYTG>].

255. EPA Data, *supra* note 238. Because the company submitted most of its requests as attachments to e-mails, descriptions of most requests are not present in the EPA’s FOIA logs. A

As for the news media requesters with more than 5 requests, MuckRock News,²⁵⁷ a site that publishes records obtained through public records requests, led with 33 requests; EnergyWire/E&E Publishing, an online news site for environmental and energy news matters, followed with 17 requests; then Environmental Integrity Project, a watchdog group, with 14; the Center for Investigative Reporting with 12; the Associated Press with 12; Reuters with 10; the *Washington Examiner* with 9; *The Hill* with 9; the *Huffington Post* with 9; ProPublica with 8; Junkscience.com with 7; and the *Wall Street Journal* with 6.²⁵⁸

D. Defense Logistics Agency

The DLA also runs a midsized FOIA operation. In 2013, DLA received a total of 4420 FOIA requests, a bit less than half as many as FDA, SEC, or EPA, but still four times as many as NIH or FTC.²⁵⁹ Of those, however, a staggering 4226, or 96 percent, of all requests made were classified as commercial requests.²⁶⁰ Only forty-one requests, representing just under 1 percent of all requests, came from the news media; all other requests numbered 153, almost all of which came from private individuals.²⁶¹

Interestingly, yet again, a prominent requester is an information reseller. Day & Day, Inc., whose 224 requests to DLA in 2013 made it the second-highest requester by volume, holds itself out as “provid[ing] experienced insight into the Defense Logistics Agency Marketplace,” and “enabling [clients] to seize contract

random sample of ten of the attached request letters is available online, though all made reference to a Phase I ESA. *Id.* These letters are available via <http://foiaonline.regulations.gov> by clicking “Search FOIA Requests,” selecting the EPA, and typing in the desired request number.

256. *Id.*

257. MUCKROCK, <https://www.muckrock.com> [<http://perma.cc/RS2A-3N3X>].

258. EPA Data, *supra* note 238. This list omits requesters who appear to be educational rather than news media entities, though EPA categorizes them together. Those requesters are Oberlin College and the University of Alberta. *Id.*

259. U.S. Dep’t of Def., Def. Logistics Agency, Freedom of Information Act Responses to Oct. 6, 2014, Feb. 12, 2015, Feb. 13, 2015 and Apr. 21, 2015 Requests by Margaret B. Kwoka (on file with author) [hereinafter DLA Data].

260. *Id.*

261. *Id.*

opportunities.”²⁶² Day & Day, like other requesters, requests almost entirely information about awarded contracts and bids for contracts.²⁶³

In turn, Day & Day provides a variety of services to DLA contractors, most of which constitute information reselling. Its flagship service is access to an online database of DLA procurements, contracts, and contractors, which is searchable by contract number, solicitation number, and purchase request number, among other methods.²⁶⁴ It advertises that this database constitutes “the most comprehensive collection of cross-referenced information” in this area.²⁶⁵ A monthly subscription for a single user to access the database is \$175, while an annual subscription runs \$1,800.²⁶⁶ Alternatively, the database can be accessed for a per-minute price of \$0.95.²⁶⁷ This database consists of precisely the information Day & Day requests under FOIA from DLA.²⁶⁸

Another service Day & Day offers is the production of competitive pricing reports, which constitute abstracts and second- and third-lowest bidder prices for an awarded contract, to see how competitive the pricing was on a finalized contract.²⁶⁹ Bid abstracts are a frequent subject of Day & Day FOIA requests.²⁷⁰ Day & Day sells each competitive pricing report for \$40.²⁷¹ Separately, Day & Day markets a bid-notification service.²⁷² One of the ways in which Day & Day claims the notification has particularly high value is that Day & Day maintains over thirty years of DLA-contract award history against which to measure the bid information,²⁷³ much of that information presumably coming from its database. Subscription

262. DAY & DAY, INC., <http://www.dayandday.com> [<http://perma.cc/CL62-3VEC>].

263. See, e.g., DLA Data, *supra* note 259, at Request Letters DSCP-13-PFOI-00639, DSCP-13-PFOI-00254, DSCP-13-PFOI-00545, DSCP-13-PFOI-00723, DSCR-13-RFOI-00413, DSCR-14-RFOI-00001, DSCR-14-RFOI-00019, DSCR-13-RFOI-00964.

264. *Online Database*, DAY & DAY, INC., <http://www.dayandday.com/dla-database.html> [<http://perma.cc/QJ5D-P74X>].

265. *Id.*

266. *Defense Procurement Services Pricing*, DAY & DAY, INC., <http://www.dayandday.com/dla-servicespricing.html> [<http://perma.cc/8QJ5-TLDV>].

267. *Id.*

268. See DLA Data, *supra* note 259.

269. *DLA Report*, DAY & DAY, INC., <http://www.dayandday.com/dla-reports.html> [<http://perma.cc/SNT4-SVY4>].

270. See DLA Data, *supra* note 259.

271. *Defense Procurement Services Pricing*, DAY & DAY, INC., *supra* note 266.

272. *DLA Bid Notification*, DAY & DAY, INC., <http://www.dayandday.com/dla-bidservices.html> [<http://perma.cc/X45F-5RBL>].

273. *Id.*

pricing for the bid-notification service is identical to the database pricing, though subscribing to both services together comes at a discount.²⁷⁴ Finally, Day & Day also offers a value-added consulting service, based on its specialized expertise, in which it will represent a contractor seeking to be awarded a contract through the bid process.²⁷⁵

Day & Day is not the only information reseller present within the list of frequent DLA requesters. The FOIA Group, which primarily requests as a paid service on behalf of clients and is chief among the commercial requesters at NIH, makes a significant appearance here as well.²⁷⁶ It submitted forty-six requests in 2013.²⁷⁷

Aside from information resellers, however, other commercial interests still dominate the DLA requesting landscape, and there are vast numbers of repeat players among them. In fact, there are ten businesses with over 100 requests in 2013 to the DLA.²⁷⁸ The other frequent requesters, however, are businesses that regularly contract to provide goods and services to DLA.²⁷⁹ For example, Polytechnic Industries, Inc., which made 246 requests in 2013 (the highest number of any single requester),²⁸⁰ manufactures a wide variety of products that it sells to the U.S. military (and others),²⁸¹ including gears, rotating components, sheet metal, and electronics.²⁸² JGB Enterprises, Inc., with 221 requests in 2013,²⁸³ specializes in the manufacturing of hydraulic hoses and hose assemblies,²⁸⁴ and boasts that “[o]ver 5,000

274. *Defense Procurement Services Pricing*, *supra* note 266.

275. *Manufacturer's Representation Services*, DAY & DAY, INC., <http://www.dayandday.com/manufacturer-representation.html> [<http://perma.cc/2KY2-PZL5>].

276. For a detailed description of the FOIA Group, see *infra* notes 343–53 and accompanying text.

277. DLA Data, *supra* note 259.

278. *Id.*

279. They are, in descending order, Polytechnic Industries, Inc. (246 requests), JGB Enterprises, Inc. (221 requests), BEC Machine Products (208 requests), Dirksen & Associates, Inc. (189 requests), Specialized Metals (159 requests), Midwest Tube Fabricators, Inc. (143 requests), Centroid, Inc. (135 requests), Milwaukee Valve Company (122 requests), Brighton Cromwell, LLC (112 requests), and Allfast Fastening Systems, Inc. (105 requests). *Id.*

280. *Id.*

281. *About Us*, POLYTECHNIC INDUSTRIES, INC., http://www.polytechnicind.com/index_files/Page366.htm [<http://perma.cc/Q7RC-FEDF>].

282. *Just A Sampling Of Our Manufacturing Capabilities*, POLYTECHNIC INDUSTRIES, INC., http://www.polytechnicind.com/index_files/Page481.htm [<http://perma.cc/XVQ4-TJW8>].

283. DLA Data, *supra* note 259.

284. *Company Overview and History*, JGB ENTERPRISES, INC., http://jgbhose.com/base_pages/overview.asp [<http://perma.cc/9MWL-7P6J>].

military contracts pass through our doors annually.”²⁸⁵ Another, BEC Machine Products, which filed 208 requests in 2013, “produce[s] precision machine parts for military systems,” and advertises its fulfillment of Department of Defense contracts.²⁸⁶

Universally, these requests, like the information resellers’ requests, are for awarded contracts, bids, and abstracts pertaining to contracts.²⁸⁷ For example, Polytechnic Industries regularly requested “the ABVS summary data information (or bid abstract)” for particular contracts.²⁸⁸ JGB Enterprises, Inc., for its part, regularly requested “an abstract of bids received for” contracts that JGB Enterprises, Inc. itself was eventually awarded.²⁸⁹

The news media are almost absent from the list of requesters. The only significant repeat player was Scripps Howard News Service, a wire service that distributed syndicated stories,²⁹⁰ which submitted 17 requests.²⁹¹ The remaining news media outlets submitted only occasional requests: MuckRock News, described above, submitted 5; *The Nation*, a progressive magazine, submitted 3; Federal Practitioner, a peer-reviewed journal for health care practitioners, submitted 4; *Stars and Stripes*, a military magazine, submitted 2; The Associated Press submitted 2; and a handful of other media outlets each submitted 1.²⁹²

E. Federal Trade Commission

The FTC processes a relatively small but still significant number of FOIA requests each year. In 2013, it received 1538 total FOIA

285. *Welcome to Military Supplier*, JGB ENTERPRISES, INC., <http://www.militarysupplier.com> [<http://perma.cc/3LE3-NM7T>].

286. BEC MACHINE PRODS., <http://becmachine.com/index.htm> [<http://perma.cc/Q424-LNUS>].

287. DLA Data, *supra* note 259.

288. *See, e.g., id.* at Request Letters DSCR-13-RFOI 13-00874, DSCR-13-RFOI 13-00468; DSCR-13-RFOI 13-00616.

289. *See, e.g., id.* at Request Letters DSCR-13-RFOI 13-00286, DSCR-13-RFOI 13-00364, DSCR-13-RFOI 13-00619.

290. Its wire service is now closed down. Nick Turner, *Scripps Howard News Service Will Close Down After 96 Years*, BLOOMBERG (NOV. 13, 2013), <http://www.bloomberg.com/news/articles/2013-11-13/scripps-howard-news-service-will-cease-operation-after-96-years> [<http://perma.cc/DRY5-ANEJ>].

291. DLA Data, *supra* note 259.

292. *Id.* The others included ABC 7 Chicago, WISN TV 12, Center for Effective Government, *The Hill*, Associated Press, *Tribune Review*, *Salt Lake Tribune*, and *Judicial Watch*. *Id.*

requests.²⁹³ Of that, 34 percent, or 528 requests, were commercial requests.²⁹⁴ Because FTC breaks down the categories of its requesters into more specific designations than the statutory fee categories, it is possible to disaggregate that number further.²⁹⁵ Of all commercial requests, 232, or 15 percent of total requests, were from businesses, and 296, or 19 percent, were from law firms.²⁹⁶ News media requests made up 14 percent, or 219, of total requests.²⁹⁷ And all other requests, which numbered 791, constituted 52 percent.²⁹⁸

The highest-volume commercial requester was the Direct Selling Association (DSA),²⁹⁹ a national trade association for companies that engage in direct sales to consumers,³⁰⁰ such as their more prominent members Amway and Mary Kay.³⁰¹ In 2013, DSA submitted eighty-three requests. Of those, forty-six pertained to current full members of DSA, and another eleven pertained to pending DSA applicants for membership.³⁰² Although the remaining twenty-six requests pertained

293. Fed. Trade Comm'n, Freedom of Information Act Responses to Sept. 29, 2014, Feb. 12, 2015, Feb. 13, 2015 and Apr. 21, 2015 Requests by Margaret B. Kwoka (on file with author) [hereinafter FTC Data].

294. *Id.* This number is a combination of what FTC reports as "Commercial Organization" and what it reports as "Law Firm" in their requester categories. In conversation with the FTC FOIA staff, it was represented that Law Firms are designated in the fee category of whoever their client is; that is, if the client is an individual they will be categorized as "other," and if the client is a business they will be designated as "Commercial Organization." However, an FTC FOIA staff member was candid that mostly Law Firms end up subject to the commercial requester fee category, and it was comparatively rare for Law Firms to be designated as an "other" requester. Telephone Interview with Anna Murray, Att'y, Office of Gen. Counsel, FTC (Mar. 13, 2015).

295. The categories it reports are Commercial Organization, Consumer Group, Educational/Non-scientific, Federal Government, State/Local Agency, Private Individuals, Law Firm, and News Media. FTC Data, *supra* note 293.

296. *Id.*

297. *Id.*

298. *Id.*

299. In the database, FTC lists the name of the individual who signed the request, in this case, John Webb, rather than the organization. John Webb's position as associate legal counsel for the DSA is confirmed by the organization's website. See *DSA Staff Directory*, DIRECT SELLING ASS'N, <http://www.dsa.org/forms/StaffDirectoryPublic/viewRoster> [<http://perma.cc/GB7E-FS8A>].

300. *About*, DIRECT SELLING ASS'N, <http://www.dsa.org/about> [<http://perma.cc/QYQ2-N3GS>].

301. *Direct Selling Association Membership Directory Search Results*, DIRECT SELLING ASS'N, <http://www.dsa.org/forms/CompanyFormPublicMembers/search?action=find> [<http://perma.cc/CW9A-5HFV>].

302. FTC Data, *supra* note 293. These statuses were ascertained at the time of writing, not the time of request, by checking against the DSA membership database. See *Direct Selling Member Organization Search*, DIRECT SELLING ASS'N, <http://www.dsa.org/forms/Company>

to companies whose affiliation with DSA was not able to be confirmed, because these requests were in 2013 it is likely that these companies were applicants or members at the time, but are no longer affiliated or doing business in the industry.³⁰³

Despite its nonprofit status, DSA's revenue-generating interest in checking into the FTC records of its members and applicants is evident from its membership process. As DSA advertises, there is a one-year review process for applicants during which their application is pending. During this time, DSA reviews the applicant's business practices, based on the company's own materials, as well as DSA's "requests [for] information from various sources."³⁰⁴ And review is not just a one-time occurrence. DSA randomly reviews 20 percent of its membership each year on an ongoing basis to ensure compliance with DSA standards.³⁰⁵ DSA's requests to FTC about its own members and applicants are made to facilitate this review process.³⁰⁶

The DSA review is marketed as providing value to the prospective member: "The review process creates an opportunity for our staff to advise on areas where companies may not meet the standards expected by state and federal regulators."³⁰⁷ Importantly, DSA derives considerable revenue from membership. Depending on the annual net sales of the member, dues can range from \$1,600 per year for a company that is not yet doing business to more than \$100,000 for businesses exceeding \$500 million of sales a year.³⁰⁸ In

FormPublicMembers [<http://perma.cc/4NJT-3XUK>]. Individual request letters confirm this purpose. *See, e.g.*, FTC Data, *supra* note 293, at Request Letters FOIA-2014-00239, FOIA-2013-00801.

303. A sampling of the request letters reveals that for at least the few that were examined, this is indeed the case. *See, e.g.*, FTC Data, *supra* note 293, at Request Letters FOIA-2013-00350, FOIA-2013-00351, FOIA-2013-01129.

304. *Pending Applicant FAQs*, DIRECT SELLING ASS'N, <http://www.dsa.org/benefits/member/faqs> [<http://perma.cc/6AZX-3XKD>] (click "How long does it take to become a member of DSA?").

305. *Id.*

306. *See, e.g.*, FTC Data, *supra* note 293, at Request Letters FOIA-2014-00293, FOIA-2013-00801, FOIA-2013-00350, FOIA-2013-00351, FOIA-2013-01129 ("As part of our continuing efforts to promote the highest ethical standards within the direct selling community, DSA is in the process of reviewing all member companies. We seek information from various business and regulatory entities.").

307. *Pending Applicant FAQs*, *supra* note 304.

308. In fact, for each net sales bracket, there is a flat fee plus a percentage of all sales beyond the minimum amount in the bracket, and thus, there is no cap on the maximum amount of dues a company could owe. DIRECT SELLING ASS'N, DSA ANNUAL DUES 1-2, <http://www.dsa.org/docs/default-source/member-resources/2016-renewal/dues-calculation.pdf?sfvrsn=10> [<http://perma.cc/9G4H-7T8R>].

turn, DSA provides a variety of member benefits including public relations, lobbying,³⁰⁹ and representing the interests of direct sellers (and multilevel marketing companies) before federal agencies, including the FTC.³¹⁰

One significant repeat-requester, which submits the third largest volume of requests (numbering twenty-four), is an investment research firm, Height Analytics.³¹¹ Height's requests concern a number of liberal consumers groups, such as the National Association of Consumer Advocates, Public Citizen, U.S. PIRG, and the Consumers Union, as well as a number of the most prominent Latina/o political and advocacy organizations, such as National Council of La Raza, Congressional Hispanic Caucus, and the Hispanic Federation.³¹² Height also requested information about Elizabeth Warren.³¹³ A sampling of these request letters reveals a pattern of asking for all communications, including meetings, visitor logs, and appointments between the FTC and each individual or entity named.³¹⁴ Height, in turn, markets its research-consulting services as its primary product, including by addressing "regulatory and policy topics to corporate boards, industry associations, conferences or universities."³¹⁵ In fact, it distinguishes itself by "going beyond conventional financial modeling and sector coverage" to include "regulatory, macroeconomic and geopolitical risks that

309. DSA describes its advocacy and lobbying role thusly:

We advocate on behalf of our member companies and the sales channel. We lobby, testify and monitor legislation at the local, state and federal levels. We also offer legal advice and marketing plan reviews during the membership application process and random reviews of members to make sure each company starts and continues standing by the best standards in our Code of Ethics.

Benefits: Overview, DIRECT SELLING ASS'N, <http://www.dsa.org/benefits/member/overview> [<http://perma.cc/GV2S-5YZY>].

310. See Karen E. Klein, *How Direct Sellers Dodged FTC Regulation*, BLOOMBERG BUS. (Apr. 16, 2012), <http://www.bloomberg.com/bw/articles/2012-04-16/the-multibillion-dollar-direct-selling-industry-dodges-the-ftc#p1> [<http://perma.cc/7ASX-U85C>].

311. FTC Data, *supra* note 293. The requester's name is Christine Muchanic, who works at Height Analytics. See *id.* at Request Letters FOIA-2013-00918, FOIA-2013-00913, FOIA-2013-00922, FOIA-2013-00916 (affiliating Christine Muchanic with Height Analytics).

312. FTC Data, *supra* note 293.

313. *Id.*

314. See *id.* at Request Letters FOIA-2013-00918 (Public Citizen), FOIA-2013-00913 (Elizabeth Warren), FOIA-2013-00922 (National Council of La Raza), FOIA-2013-00916 (Direct Selling Association).

315. *Our Services*, HEIGHT SECURITIES LLC, <http://www.heightllc.com/our-services> [<http://perma.cc/H48B-68KA>].

impact investments and corporate operating environments.”³¹⁶ Its FOIA requests most likely are made as part of its research, which of course is a sort of value-added consulting model based, in part, on the information it receives.

Lawyers are also significant commercial requesters at FTC. For instance, the second-largest commercial requester, at seventy requests,³¹⁷ is a lawyer at the firm Bryan Cave who specializes in data privacy and data security regulations, and “assist[s] clients in responding to investigations conducted by the FTC.”³¹⁸ Twenty-three of those requests were for the FTC’s FOIA logs or prior FOIA request letters.³¹⁹ Other requests mostly concern particular companies or sets of particular consumer complaints.³²⁰ Two other lawyers at Bryan Cave also submitted significant numbers of requests: one is the “leader of the firm’s global data privacy and security practice” and “advis[es] clients on how to comply with state and federal privacy, security and advertising laws, representing clients before the Federal Trade Commission, and defending national class actions,” (eighteen requests);³²¹ the other “defends individuals and corporations under investigation by government agencies, including the Federal Trade Commission,” (eight requests).³²² Those requests were likewise mostly about a particular company or set of particular consumer complaints.³²³ Other repeat commercial requesters, though much smaller in volume, included investment management firms,³²⁴ a political action committee,³²⁵ and a regulated business.³²⁶

316. *The Firm*, HEIGHT SECURITIES LLC, <http://www.heightllc.com/the-firm> [<http://perma.cc/4Q39-TZN9>].

317. FTC Data, *supra* note 293.

318. *Joshua A. James*, BRYAN CAVE, <http://www.bryancave.com/joshjames> [<http://perma.cc/HL6B-YATL>].

319. FTC Data, *supra* note 293.

320. *Id.*; *see, e.g., id.* at Request Letters FOIA-2013-01040 (requesting consumer complaints about a long list of companies), FOIA-2013-01302 (requesting consumer complaints regarding one particular company, Ceridian Corp.).

321. *See* FTC Data, *supra* note 293; *David A. Zetoony*, BRYAN CAVE, <http://www.bryancave.com/davidzetoony> [<http://perma.cc/4LLN-EQ2H>].

322. *See* FTC Data, *supra* note 293; *Kristin Robinson*, BRYAN CAVE, <http://www.bryancave.com/kristinrobinson> [<http://perma.cc/NDQ3-NHLX>].

323. FTC Data, *supra* note 293.

324. Soros Fund Management LLC submitted six requests. *Id.* (showing six requests from Marshall Levine); *id.* at Request Number FOIA-2014-00034 (showing a request letter from Marshall Levine submitted on behalf of Soros Fund Management LLC). Apex Capital Holdings LLC submitted seven requests. *Id.* (showing seven requests from Michael Samuels); *id.* at

News media requesters play a somewhat more prominent role at the FTC, but no news source dominates. A reporter at the Center for Investigative Reporting was the single biggest media requester, at 12 requests.³²⁷ A “regulatory journalist” at the Policy and Regulatory Report (PaRR), was the runner-up with 10 requests.³²⁸ A journalist at the *New York Post* submitted 7;³²⁹ one for *Politico* submitted 6;³³⁰ one for @thehill, a Twitter feed for policy and political news, submitted 5;³³¹ one for MLex, a wire service on antitrust and regulatory risk, submitted 5;³³² one who operates a website dedicated to exposing government secrets called *The Black Vault* submitted 5;³³³ a freelance journalist submitted 5;³³⁴ and all other journalists submitted fewer than 5 requests each.³³⁵ Consumer groups play a small role, but some are repeat players: for example, Truth In Advertising Inc. (TINA.org) submitted 12 requests,³³⁶ and MuckRock, described above, submitted

Request Number FOIA-2014-00019 (showing a request letter from Michael Samuels submitted on behalf of Apex Capital Holdings LLC).

325. American Bridge 21st Century submitted five requests. FTC Data, *supra* note 293 (showing five requests from Abraham Payton); *id.* at Request Letter FOIA-2013-00330 (showing a request letter from Abraham Payton submitted on behalf of American Bridge 21st Century).

326. CallerID4U appears to have submitted six requests. FTC Data, *supra* note 293 (showing six requests by Viviana Ramirez); *id.* at Request Letter FOIA-2013-00690 (showing a request letter from Viviana Ramirez that is signed by “CallerID4U”).

327. See FTC Data, *supra* note 293; Matt Drange, CTR. FOR INVESTIGATIVE REPORTING, <http://cironline.org/person/matt-drange> [<http://perma.cc/2SD6-7SSM>].

328. See FTC Data, *supra* note 293; *Our Global Network*, POL’Y & REG. REP., <http://www.parr-global.com/our-global-network> [<http://perma.cc/Q5CQ-MCTU>] (listing Ryan Lynch as a Regulatory Journalist).

329. See FTC Data, *supra* note 293; Michelle Celarier, N.Y. POST, <http://nypost.com/author/michelle-celarier> [<http://perma.cc/MM8D-KB22>].

330. See FTC Data, *supra* note 293; *Conor Skelding*, POLITICOBETA, <http://www.capitalnewyork.com/users/conor-skelding> [<http://perma.cc/5V8T-B5HG>].

331. See FTC Data, *supra* note 293; *Megan R. Wilson*, MUCK RACK, <http://muckrack.com/megan-r-wilson> [<http://perma.cc/A8FU-UBDP>]; *Megan R. Wilson*, THE HILL, <http://thehill.com/author/megan-r-wilson> [<http://perma.cc/JGU5-WU7Y>].

332. See FTC Data, *supra* note 293; *Leah Nysten*, MLEX, <http://mlexmarketinsight.com/leah-nysten> [<http://perma.cc/GP79-GQGA>].

333. See FTC Data, *supra* note 293; *John Greenewald*, COAST TO COAST AM, <http://www.coasttocoastam.com/guest/greenewald-john/5909> [<http://perma.cc/6RA2-BKJY>]; THE BLACK VAULT, <http://www.theblackvault.com> [<http://perma.cc/T2HL-W7QQ>].

334. See FTC Data, *supra* note 293; ZACK SAMPSON, <http://zacksampson.com> [<http://perma.cc/FJX4-SVKR>].

335. FTC Data, *supra* note 293.

336. See *id.*; *Fran Silverman*, TRUTH IN ADVERTISING, INC., <https://www.truthinadvertising.org/author/fsilverman> [<http://perma.cc/6746-NC65>].

10.³³⁷ FTC also has a particularly large volume of individual requesters, nearly all of whom are requesting copies of files about their own consumer complaints to the FTC.³³⁸ These number 401 of the total 712 individual requests made.³³⁹

F. *National Institutes of Health*

The NIH has a relatively small, but not negligible, volume of requests: in 2013, it received a total of 1198 requests.³⁴⁰ Of those, 436, or 36 percent were submitted by commercial requesters; 177, or 15 percent, were submitted by requesters who were designated as educational institutions; 62, or 5 percent, were submitted by requesters with news media status; and the remaining 523, which represents 45 percent, were submitted by other requesters.³⁴¹

Of the commercial requesters, a pure information reseller again leads the pack for volume of requests.³⁴² The FOIA Group (mentioned above), a corporation established in 1988,³⁴³ submitted twenty-five requests in 2013, each of which pertains to a particular NIH contract and related documents.³⁴⁴ The FOIA Group's primary service is a requesting service, in which it will submit the FOIA request for the client, negotiate with the agency, and, if necessary, appeal a denial.³⁴⁵ Prime amongst the reasons the FOIA Group

337. See FTC Data, *supra* note 293; *FTC Complaints for www.yelp.com*, MUCKROCK, <https://www.muckrock.com/foi/united-states-of-america-10/ftc-complaints-for-wwwyelpcom-1645> [<http://perma.cc/WJ74-JK6V>] (demonstrating that Robert Delaware requests for MuckRock).

338. FTC Data, *supra* note 293. The names of these individual requesters were redacted from the records under FOIA exemption 6. See 5 U.S.C. § 552(b)(6) (2012). Because these requests concern individuals' own complaints, it seems unlikely that there are many repeat players among them, but it is unknown as their identities were not released.

339. FTC Data, *supra* note 293.

340. U.S. Dep't of Health and Human Servs., Nat'l Institutes of Health, Freedom of Information Act Responses to Sept. 29, 2014, Feb. 12, 2013, and Feb. 13, 2015 Requests by Margaret B. Kwoka (on file with author) [hereinafter NIH Data].

341. *Id.*

342. There are also thirty-one individual requesters whose requests were designated as commercial. *Id.* However, NIH redacted the names of individual requesters, and thus, it is not possible to ascertain the nature of their commercial interest. Moreover, it is highly unlikely that all of those individual requests are from the same individual requester, though there is no way to know.

343. *About FGI*, FOIA GROUP, INC., <http://www.foia.com/aboutfgi.asp> [<http://perma.cc/2B58-L85X>].

344. NIH Data, *supra* note 340.

345. *FOIA Services*, FOIA GROUP, INC., http://www.foia.com/info_services.asp [<http://perma.cc/9XNA-UXNG>].

advertises for using their services, is that “[t]he identity of our client is *never revealed* to any government agency, contractor or other entity.”³⁴⁶ It also claims that its “reputation for being ‘very aggressive’ under the law . . . brings results for our customers that other vendors can’t compare [*sic*].”³⁴⁷ For this service, the FOIA Group charges from \$95 per request and up.³⁴⁸

Most relevant to NIH, one of the specialized services that the FOIA Group offers is the maintenance of a library of government contracts, winning proposals, and labor rates, which it advertises were all “secured under the Freedom of Information Act.”³⁴⁹ A customer can therefore simply purchase these documents, requested by and kept in a database by the FOIA Group, at a cost that varies per document.³⁵⁰ Because the FOIA Group’s NIH requesting pertains to government contracts, it appears that the records it obtains from NIH are used as the raw material for the database product it offers.

Perhaps most striking, and unique, about the FOIA Group are the other services it offers in conjunction with these information and requesting services. Until very recently, it marketed what it called, “Agency FOIA Redaction & Support Services,” a set of services it offered to contract to perform for the *agencies themselves* in administering FOIA.³⁵¹ Among the services it provided to agencies were “request intake [and] internal tracking . . . ; preparation of all relevant correspondence; . . . coordination with FOIA requester for issues concerning document releaseability [*sic*], fees, or other items; responsive document review, screening and redaction; [and] . . . application of FOIA Exemptions.”³⁵² That is, at one time, the FOIA Group both helped companies to request information under FOIA and also helped agencies respond to requests for information under FOIA.³⁵³ Presumably the FOIA Group had some internal process for

346. *Id.* (additional emphasis added).

347. *Id.*

348. *Id.*

349. *FOIACON Library & Databases*, FOIA GROUP, INC., http://www.foia.com/library_db.asp [<http://perma.cc/VXU3-LCBL>].

350. *Id.*

351. *Agency FOIA Redaction & Support Services*, FOIA GROUP, INC., <http://www.foia.com/Suppt.asp> [<http://perma.cc/L3KT-JJQC>]. As of February 2016, this service is no long listed on an updated website.

352. *Id.*

353. See Christopher Lee, *On FOIA Front, More Agencies Contract Out: Private Firms Have Growing Role in Handling Backlogs of Requests for Government Records*, WASH. POST (June 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A23282-2004Jun7.html> [<https://perma.cc/>

ensuring no conflict of interest on any given request or service provided to an agency, but the tension in its positions on a macro level is almost undeniable.

The FOIA Group is not the only information reseller requesting at NIH. Interestingly, FOI Services Inc., though it markets itself as specializing in FDA requesting,³⁵⁴ makes an appearance here, having submitted six requests to NIH.³⁵⁵ Five of those requests were related to grant applications and the last of which was for emails about funded research concerning Bisphenol A, a request that apparently originated with FDA but that was subsequently referred to NIH.³⁵⁶

The third largest requester at NIH designated as commercial, with twenty requests, is the National Disease Research Interchange (NDRI), which is actually a nonprofit organization that supplies human tissues and organs to scientists for use in research.³⁵⁷ Although it is a nonprofit, NDRI does charge fees to researchers to cover the costs of its services,³⁵⁸ and has separate fee arrangements for biotech and pharmaceutical companies that use its services.³⁵⁹ Thus, NDRI certainly has some financial interest in marketing its wares to academic researchers and industry alike. Consistent with that interest, NDRI's FOIA requests to NIH all concern obtaining contact information for various research grantees,³⁶⁰ presumably so they can, in turn, contact the researchers about the services they offer.

Other repeat commercial requesters also seem to use FOIA for monetary gain. The Principal Investigators Association (PIA), for instance, made ten requests in 2013, all for particular grants and

WL78-32H9] (“FOIA Group Inc., a 16-year-old D.C.-based company that helps businesses and nonprofits submit FOIA requests, plans to diversify by moving into processing such requests for agencies, said Jeff Stachewicz, a founder of the firm.”).

354. See *supra* notes 158–61 and accompanying text (discussing FOI Services, Inc. in more detail).

355. NIH Data, *supra* note 340.

356. *Id.*

357. *About NDRI*, NAT'L DISEASE RES. INST., <http://ndriresource.org/About-NDRI/18> [<http://perma.cc/3RPV-EWPO>].

358. *Frequently Asked Questions*, NAT'L DISEASE RES. INST., <http://ndriresource.org/Frequently-Asked-Questions/103> [<http://perma.cc/L83F-LLAC>].

359. *Biotechnology and Pharmaceutical Industry Researchers*, NAT'L DISEASE RES. INST., <http://ndriresource.org/Researcher-Services/Biotech-Pharmaceutical/104> [<http://perma.cc/8ZY-8WSK>]. NDRI boasts that it annually provides “over 10,000 human organs and tissues to researchers in dozens of the USA’s major pharmaceutical and biotechnology companies, providing critical support for many target discovery and validation and drug discovery and development projects.” *Id.*

360. NIH Data, *supra* note 340.

related materials.³⁶¹ In turn, PIA's primary activity is creating and selling materials to help researchers obtain funding.³⁶² For example, PIA publishes a series of guides, sold for between \$149 and \$349 each, that give detailed advice about submitting NIH grant proposals of different kinds.³⁶³ These guides seem to draw, at least in part, on successful proposals as examples. For instance, one such guide includes "detailed examples specific to each type" of the target grant as well as "directly quoted information from successful . . . grant applications."³⁶⁴ It seems highly likely that PIA is using the grants it requests from NIH to assist in the development of these types of manuals, training materials, webinars, and other primary functions of the organization.³⁶⁵ And like with other agencies, law firms also play a role in commercial requesting, presumably on behalf of, or to serve the interests of, their clients.³⁶⁶

Of noncommercial requesters at NIH, animal rights organizations and educational institutions dominate the landscape. On the animal-advocacy side, the largest players were In Defense of Animals, which made 31 requests; People for the Ethical Treatment of Animals (PETA), which made 25; the New England Anti-Vivisection Society (NEAVS), which made 13; and Stop Animal Exploitation Now (SAEN), which made 9.³⁶⁷ As for educational institutions, which primarily would have an interest in NIH activities for research purposes, the highest-volume examples include George Mason University with its 15 requests, University of California, San Francisco with its 15 requests, and the University of Florida with its 13 requests.³⁶⁸

By contrast, organizations that are dedicated to government accountability and public oversight have a presence, albeit smaller:

361. *Id.*

362. *See Our Mission*, PRINCIPAL INVESTIGATORS ASS'N, <http://principalinvestigators.org/about-us/our-mission> [<http://perma.cc/987L-2CN8>].

363. *See, e.g., NIH R01 Grant Application Mentor*, PRINCIPAL INVESTIGATORS ASS'N, <https://principalinvestigators.org/product/nih-r01-grant-application-mentor> [<http://perma.cc/D4J2-RPH2>].

364. *R24 Grants*, PRINCIPAL INVESTIGATORS ASS'N, <https://principalinvestigators.org/product/r24-grants-guide> [<http://perma.cc/BKE3-2QVT>] (emphasis omitted).

365. For a full list of PIA's activities, see PRINCIPAL INVESTIGATORS ASS'N, <https://principalinvestigators.org> [<http://perma.cc/UJ2D-UEF2>].

366. For example, the O'Neal Firm submitted seven requests, Sidley Austin submitted seven requests, and the Metier Law Firm submitted six requests. NIH Data, *supra* note 340.

367. *Id.*

368. *Id.*

MuckRock News, described above, made 14 requests; Public Citizen, an advocacy group, made 12 requests; and the Center for Public Integrity made 3 requests.³⁶⁹ Traditional news media organizations are nearly absent: the Associated Press made 3 requests, *USA Today* made 1 request, the *Baltimore Sun* made 1 request, ProPublica made 1 request, and ABC News made 1 request.³⁷⁰

III. PRIVATIZING FOIA

The sheer volume of commercial FOIA requesting suggests that, at least at a significant subset of agencies, FOIA is working for this constituency in a way that it is not for its principal intended user, the news media. In some ways, regulated industry's advantage in FOIA requesting is akin to its documented advantages in other administrative processes, such as notice-and-comment rulemaking.³⁷¹ These advantages stem both from the resources of business interests, but also from their insider status as a repeat player to the process.³⁷²

Without doubt, commercial uses of FOIA serve a large range of purposes. Some may squarely advance FOIA's intended goal; for example, a company might seek information on the agency's use of its enforcement authority so as to better lobby Congress for change, advocate for different regulatory structures at the agency level, or otherwise publicize its opinions on agency activities. However, the FOIA requests described in Part II demonstrate that most commercial uses are not within FOIA's bailiwick. Researching competitors' business ventures about which an agency happens to have information,³⁷³ uncovering regulatory risks to better advise investors,³⁷⁴ or simply using FOIA to find out what others are learning about you³⁷⁵ neither enhance agency oversight nor promote

369. *Id.*

370. *Id.*

371. See, e.g., Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 68–82 (2013) (documenting the outsized role of the financial industry in the consideration of the so-called Volcker Rule).

372. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974) (documenting advantages repeat players reap in the legal system).

373. See, e.g., *supra* note 194 and accompanying text (describing the activities of Thomson Reuters as, in part, providing intelligence on industry competitors).

374. See, e.g., *supra* notes 315–16 and accompanying text (describing the activities of Height Analytics).

375. See, e.g., *supra* notes 198–204 and accompanying text (describing the FOIA requesting patterns of Merck).

democratic participation in governance. Moreover, this research identifies a surprisingly prominent set of commercial requesters whose FOIA activities are even further from serving its aim: information resellers who request, at a high volume, public records and resell those very records as a private commodity for a profit.³⁷⁶

This Part explores how both commercial requesting generally and information reselling specifically threaten to undermine the FOIA's democratic purposes. First, FOIA has become a mechanism for transferring wealth from the federal government to private enterprise and can be more properly conceptualized as an unjustified form of corporate subsidy never contemplated, much less endorsed, by Congress. Second, commercial interests have overwhelmed FOIA offices and their resources to respond to requests. The sheer volume of commercial requests likely contributes to the delay and inattention often experienced by constituencies at the heart of FOIA's intended use: the press and watchdog groups whose mission is to enhance external oversight of governmental activity and promote democratic governance. And third, as to information resellers in particular, these businesses have become, for many agencies, the true brokers of public information, thereby de facto taking over functions thought to be inherently governmental. These combined effects, as described below, may harm the goal of maximum public transparency for democracy-enhancing purposes.

A. *Subsidizing "Secrets"*

Corporate subsidies come in a variety of forms. From corporate tax breaks³⁷⁷ to bank bailouts³⁷⁸ to farm subsidies,³⁷⁹ government

376. As documented *supra* Part II, five of the six studied agencies have commercial information resellers among their top requesters.

377. For example, state and local governments often offer tax breaks to corporations located within the jurisdiction, a practice that is also labeled "tax subsidies." See Matthew Dolan, *Tax-Subsidy Programs Fuel Budget Deficits*, WALL ST. J. (Feb. 11, 2015), <http://www.wsj.com/articles/corporate-tax-incentives-generate-budget-problems-1423696411> [<http://perma.cc/ZB83-AM9R>]. One scholar described how the charitable tax deduction in the Internal Revenue Code is, in effect, "a subsidy to the organization to which the donated money has been paid." Shannon Weeks McCormack, *Taking the Good With the Bad: Recognizing the Negative Externalities Created by Charities and Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 979 (2010).

378. For example, the International Monetary Fund considers the bank bailouts following the 2008 global financial crisis to be a type of subsidy. See INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: MOVING FROM LIQUIDITY- TO GROWTH-DRIVEN MARKETS 101 (2014), <http://www.imf.org/External/Pubs/FT/GFSR/2014/01/pdf/c3.pdf> [<http://perma.cc/74VX-FF4J>].

routinely provides particular benefits to a particular business or group of businesses.³⁸⁰ Tax breaks, subsidies in the form of checks written, and bailouts, however, are easy to identify, debate, and critique in the public discourse. Harder to identify, however, are the many more subtle government actions that effectively result in a similar financial benefit to certain businesses. As demonstrated by the data collected in this study, FOIA is one such area.

Federal agencies are spending vast resources fulfilling FOIA requests submitted by business enterprises—producing information whose benefit is largely, if not entirely, captured by a single requesting business—and the data shows that they are not recouping even a meaningful fraction of those costs.³⁸¹ The SEC, in FY 2013, had twenty-nine full-time FOIA employees and another 1.92 full-time equivalents administering FOIA, at a total processing cost of \$4,013,157.09.³⁸² Commercial requesters comprise 69 percent of all requests in 2013.³⁸³ Assuming they account for roughly the same

379. See *Milking Taxpayers: As Crop Prices Fall, Farmers Grow Subsidies Instead*, THE ECONOMIST (Feb. 14, 2015), <http://www.economist.com/news/usa/21643191-crop-prices-fall-farmers-grow-subsidies-instead-milking-taxpayers> [<http://perma.cc/YW7B-C8T5>] (describing how 2300 farms that grew no crops were paid subsidies over a four-year period and how subsidies overall cost taxpayers \$20 billion annually).

380. Subsidies are typically conceived of as a financial contribution to a specific business or group of businesses within an industry. See Wentong Zheng, *Counting Once, Counting Twice: The Precarious State of Subsidy Regulation*, 49 STAN. J. INT'L L. 427, 451–52 (2013) (defining subsidy for the purposes of international trade law).

381. Moreover, individual instances of misclassification at the federal level may deter or prevent some requesters from proceeding. See, e.g., *Judge Rejects DHS Classification of Syracuse University Research Center as a Commercial Requester*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (July 2, 2015), <http://trac.syr.edu/foia/ice/20150702> [<http://perma.cc/R3RD-A2WD>]. One public report recently exposed an opposite problem at the state level: state agencies often charge such high fees that open records laws are, as a practical matter, inaccessible for average citizens and the news media. Michael Felberbaum, *Big Fees to View Public Documents Discourage Public Access*, MCCLATCHY DC (Mar. 13, 2015), <http://www.mcclatchydc.com/news/politics-government/article24781396.html> [<http://perma.cc/P2GS-4N92>].

382. U.S. SEC. & EXCHANGE COMM'N, FREEDOM OF INFORMATION ACT (FOIA): ANNUAL REPORT FOR FISCAL YEAR 2013, at 14, <http://www.sec.gov/foia/arfoia13.pdf> [<http://perma.cc/PDV3-VWRC>].

383. See SEC Data, *supra* note 108. All agency data concerning the cost of administering FOIA is reported by fiscal year, while the data collected for this study is sorted according to calendar year. Although of course the time period is overlapping, it is not identical. Both time periods cover exactly one year, however, and there is no reason to believe that anything aberrant occurred to skew the data in the non-overlapping time period. Nonetheless, these are simply estimates of the cost of administering FOIA for commercial users, and thus illustrate, but do not precisely define, the subsidy the government provides.

proportion the SEC's FOIA-processing costs,³⁸⁴ commercial requesters cost the SEC approximately \$2,769,078, even if SECProbes.com is properly categorized as a news media requester.³⁸⁵ If SECProbes.com were deemed a commercial requester, as seems most appropriate, 89 percent of SEC requests would receive the "commercial" designation, raising the cost to more like \$3,571,709.³⁸⁶ Yet, the SEC collected just \$23,492.24 in fees from commercial requesters in 2013, an amount that would barely change by adding the single fee charged to SECProbes.com that year, for \$28.³⁸⁷ Thus, the SEC recoups a paltry 0.8 percent of the cost of responding to commercial requests, or, if SECProbes.com were included, 0.6 percent.

In FY 2013, FDA reported spending a whopping \$33,570,981.00 on FOIA processing, having dedicated eighty-two full-time personnel and additional 52.15 full-time equivalents to the task.³⁸⁸ As approximately 75 percent of their requests are from commercial interests,³⁸⁹ approximately \$25 million would be attributable to commercial interests. And yet, in 2013, FDA collected a mere \$327,075 from commercial requesters in fees, representing only a little more than 1 percent of the approximate cost to FDA of processing commercial FOIA requests.³⁹⁰ In fact, out of 7596 commercial requests, FDA fulfilled 3261 (or 43 percent) free of any charge.³⁹¹

384. Because agencies do not keep an accounting of costs they incur per request, but rather only calculate their total annual FOIA processing costs, it is not possible to ascertain precisely what costs are attributable to commercial requesters. Accordingly, in the rough calculations in this section, I simply divide the costs based on the proportion of requests that are attributed to commercial requesters. It is entirely possible that commercial requests, because they tend to be more routine, account for less agency cost on average per request than, say, news media requests. However, even if these rough estimates of costs attributable to commercial requesters were off by two- or threefold, the point would remain that commercial requesters are not charged fees that come close to covering the costs incurred by agencies.

385. *See id.*

386. *See id.*

387. *See id.*

388. U.S. FOOD & DRUG ADMIN., FREEDOM OF INFORMATION ANNUAL REPORT 2013, <http://www.fda.gov/RegulatoryInformation/FOI/FOIAAnnualReports/ucm386584.htm> [<http://perma.cc/MTW5-7ZHZ>].

389. *See* FDA Data, *supra* note 155.

390. The total amount of fees collected in FY 2013 from all requesters was reported as \$577,039. U.S. FOOD & DRUG ADMIN., *supra* note 388.

391. FDA Data, *supra* note 155. Of course, requesters in other categories were charged, on average, far less frequently and, when charged, were charged lower dollar amounts. *Id.* (demonstrating that of the 1222 news media requests, only one was charged a fee of \$6.25, and of the 1330 other requests, 110 were charged a fee, the average of which was \$50.98).

The EPA, for its part, spent \$16,493,258.50 on its FOIA processing operations, having employed forty-six full-time FOIA staff and just over sixty-eight full-time equivalents to the task.³⁹² With 79 percent of its requests coming from commercial requesters, that would equate to an approximate \$13,029,674.22 cost of processing commercial requests. Although individualized fee information for EPA is not available, only \$241,467.10 was collected from all requesters.³⁹³ Even if all of the fees collected were from commercial requesters, the fees would recoup only 1.8 percent of the expense incurred.

DLA, which of course almost exclusively serves commercial requesters, at 96 percent of their requests, devoted six full-time FOIA staff and eight full-time equivalents to FOIA request processing in FY 2013, costing the agency a total of \$1,870,202.00.³⁹⁴ Nearly all of that cost, roughly \$1,739,287, is attributable to commercial requesters, but only \$71,897.29, or about 4 percent of the cost, was collected from commercial requesters.³⁹⁵ Of the 4226 commercial requests, 2337, or 55 percent, were fulfilled for free.³⁹⁶ Even Day & Day, the biggest commercial information reseller, incurred a charge for only seventy-three of its 224 requests.³⁹⁷

At FTC in FY 2013, one full-time FOIA employee and 8.54 full-time equivalents administered FOIA at a total processing cost of \$658,434.³⁹⁸ Because about 34 percent of the requests are commercial, their proportionate share of costs would be roughly \$223,867; yet, only \$27,312.48, or just under 12 percent, was charged for commercial requests.³⁹⁹ Although the FTC recouped a significantly larger proportion of its costs for processing commercial requests, this is still a small fraction of the costs borne by the agency.

392. U.S. ENVTL. PROT. AGENCY, EPA FOIA ANNUAL REPORT FOR 10/01/2012 THROUGH 09/30/2013, at 13, <http://www2.epa.gov/sites/production/files/2014-08/documents/2013report.pdf> [<http://perma.cc/YKQ2-C6RS>].

393. *Id.*

394. DEP'T OF DEF., FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2013, at 60, http://open.defense.gov/Portals/23/Documents/DoDFY2013AnnualFOIA_Report.pdf [<http://perma.cc/RQY8-FQDD>].

395. DLA Data, *supra* note 259.

396. *See id.*

397. *Id.*

398. U.S. FED. TRADE COMM'N, FREEDOM OF INFORMATION ACT ANNUAL REPORT: FISCAL YEAR 2013, at 32, <https://www.ftc.gov/sites/default/files/documents/reports/foia-report-fy13/2013r-fo.pdf> [<http://perma.cc/NS8P-Q4PW>].

399. FTC Data, *supra* note 293.

And finally, NIH, having employed seventeen full-time FOIA staff and an additional 14.31 full-time equivalents working on FOIA processing, reported spending \$3,336,857.90 on FOIA administration in FY 2013.⁴⁰⁰ Because its commercial requesters are responsible for about 36 percent of requests made,⁴⁰¹ again, it is safe to assume approximately \$1.2 million of the costs are attributable to fulfilling commercial requests. Yet, in 2013, commercial requesters paid a total of \$27,669.65 in fees,⁴⁰² representing just over 2 percent of the processing costs associated with their requests. Here, an even higher proportion of commercial requesters paid no fee at all: 280 of a total 436, or 64 percent.⁴⁰³ This was even true of pure information reseller the FOIA Group, which incurred a fee for only eleven of its twenty-five requests.⁴⁰⁴

FOIA, these cost figures illustrate, allows corporations to profit handsomely from information it obtains from the government for free or close to it.⁴⁰⁵ Even the agency that recoups the most of its expenses associated with commercial FOIA request processing, the FTC, recoups only about a tenth of the cost. The rest of these agencies are collecting between less than 1 and less than 5 percent. All of this in a climate in which the federal government dedicated 4213 federal staff full-time equivalents to administering FOIA in FY 2013 at an

400. U.S. DEP'T OF HEALTH & HUMAN SERVS., HHS FISCAL YEAR 2013 FREEDOM OF INFORMATION ANNUAL REPORT § IX, <http://www.hhs.gov/foia/reports/13anlrpt.html> [<http://perma.cc/RCK2-8478>].

401. NIH Data, *supra* note 340.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* The reasons for the discrepancy between the costs incurred by agencies processing commercial requests and the fees collected from those requesters are not entirely clear. One contributing factor may be FOIA's own prohibition on charging fees if "the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee." 5 U.S.C. § 552(a)(4)(A)(iv)(I) (2012). For example, the SEC will not charge a fee of less than \$20 under this provision. *See* Freedom of Information Act Regulations: Fee Schedule, Exchange Act Release No. 34-75388, 80 Fed. Reg. 41,432, 41,433 (July 15, 2015) (to be codified at 17 C.F.R. pt. 200). If high-volume commercial requesters tend to request discrete items in each request, each request may fall below that threshold and result in no charge. Another possibility is that search, review, and duplication do not account for all of the time spent processing a request. For example, agencies may not (or may not be able to) account for time spent communicating with the requester about the status of a request, tracking the processing of the request, or drafting a response to a request. Perhaps in other cases it is simply difficult to accurately include all of the time spent by personnel on a particular request for logistical reasons. These are merely hypotheses. My data does not reveal reasons behind the discrepancy, only its existence.

estimated cost of \$446,792,333.69.⁴⁰⁶ That is, the federal government spent nearly half a *billion* dollars on FOIA.

Business subsidies are not, of course, all net losses for the public. In fact, the theoretical basis for subsidizing certain business activities is that it promotes a public or collective good that would otherwise be underprovided and, in that way, the subsidy creates a net efficiency gain.⁴⁰⁷ Under this theory, local governments, for example, often offer businesses subsidies to locate in a particular jurisdiction to incentivize job creation, urban revitalization, or infrastructure investments.⁴⁰⁸ In fact, providing an incentive to engage in socially desirable behavior is a prime goal of subsidies.⁴⁰⁹ In contrast, other subsidies may be rightfully critiqued on the ground that they serve “no recognizable social objective.”⁴¹⁰

Under this theory, subsidizing FOIA requesting that promotes FOIA’s democracy-enhancing goals makes good sense.⁴¹¹ In particular, news media outlets that use FOIA as the basis for reporting are using the subsidized government information to create a public or collective good of educating a broad audience and producing knowledge. Individuals may also use FOIA in a way that produces a public good by, for example, requesting records on which

406. DOJ, FY 2013 SUMMARY, *supra* note 109, at 19–20.

407. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1396–1406 (1988).

408. *See, e.g.*, Justin Wm. Moyer, *Tesla ‘Gigafactory’ will go to Sparks, Nev.*, WASH. POST (Sep. 5, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/09/05/tesla-giga-factory-will-go-to-sparks-nev> [<http://perma.cc/4UPH-K7CJ>] (describing the benefits Nevada expects to receive for the \$1.3 billion in tax breaks it offered to win the bid for the Tesla plant).

409. *See* McCormack, *supra* note 377, at 984 (discussing this justification with respect to individual deductions in the tax code).

410. Jeanne Sahadi, *The ‘Chicken Poop’ Credit and Other Bad Tax Breaks*, CNN MONEY (May 24, 2013), <http://money.cnn.com/2013/05/24/news/economy/corporate-tax-breaks> [<http://perma.cc/5WBE-QYU7>] (describing a federal tax credit for producing electricity using certain renewable resources, which, because of the inclusiveness of the definition, is a “total windfall” for chicken producers, who can burn chicken poop and claim the credit).

411. I do not, as others have in various contexts, make the detailed case that the particular costs of the subsidies are justified vis-à-vis the public benefit created, or that the public good would not otherwise have been produced, thus squarely fitting within the subsidy theory. *See, e.g.*, McCormack, *supra* note 377, at 979 (closely analyzing the subsidy theory in the context of charitable contributions deductions to federal income tax). I mean only to loosely use subsidy theory to describe the theoretical differences between FOIA requesting that promotes democratic participation and the vast majority of commercial FOIA requesting.

they rely to later lobby their representatives for policy changes.⁴¹² Democratic participation is itself a sort of collective good.

The subsidy of providing free or low-cost government records to businesses, however, is not justified in the large majority of cases. In fact, businesses' use of the vast majority, if not all, of the records are by definition private uses. As demonstrated above, businesses request records under FOIA to gain a competitive advantage, perform due diligence on their deals, or sell the records to others at a profit. Most of the time they can only reap those benefits if the information they glean is closely held, not publicized for common use. Rather than subsidizing transparency, FOIA's commercial subsidy has the effect of paying for corporate "secrets" discovered using FOIA. Information resellers fare even worse under this sort of analysis. Subsidizing records to resellers validates a sort of buy-low, sell-high arbitrage in federal records at great profit to the reseller, but no public or collective benefit in increased access to information.

Interestingly, the existence of this corporate giveaway has gone unnoticed even in public debates about the cost of FOIA to the federal government.⁴¹³ Private entities that use FOIA to obtain government information certainly have little interest in highlighting this result, so it is no surprise that they do not tout the substantial benefit that corporations receive. Journalists and advocates who lament FOIA's current feebleness as a tool for facilitating government transparency seem not to have noted this feature of corporate requesting.⁴¹⁴ Likewise, the members of Congress who

412. Certainly, other individual uses might produce important public goods as well. For example, immigrants in removal proceedings often use FOIA to obtain the government's information on their own case (because no administrative discovery mechanism is in place). Although it sought to benefit the particular immigrant, these records arguably produce the public good of fairer administrative hearings and more accurate outcomes of immigration determinations. *See* Special FOIA Processing Tack for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017, 9017-18 (Feb. 28, 2007) (documenting the frequency of such requests by creating a special track for FOIA requests to U.S. Citizen and Immigration Services made by individuals appearing before an immigration court); *see also* Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (holding that access to the government's file on an immigrant in removal proceedings is a due-process requirement, and describing the need for access in order to "fully and fairly" litigate a defense to removal).

413. *See, e.g., Ensuring Government Transparency Through FOIA Reform: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Gov't Oversight & Reforms*, 114th Cong. 11 (2015) (statement of Frederick J. Sadler, Former FOIA Officer, Food & Drug Admin.) (failing to acknowledge the subsidy that commercial requesters received as a result of the low fees they are charged).

414. *See, e.g.,* Matthew L. Wald, *Slow Responses Cloud a Window into Washington*, NY TIMES (Jan. 28, 2012), <http://www.nytimes.com/2012/01/29/us/slow-freedom-of-information->

crafted FOIA and pushed it through enactment did not mention this cost discrepancy in their deliberations.⁴¹⁵

Although it would be perilous to infer meaning from silence, everything that FOIA's architects did say points to the conclusion that they did not envision it as a means of subsidizing corporate activity. To them, FOIA was supposed to promote knowledge about governmental activities and accountability of government officials. It was, at bottom, intended to boost the democratic process by arming the citizenry with information about what government is up to. As the Supreme Court put it, FOIA's "basic purpose" is "to hold the governors accountable to the governed."⁴¹⁶ Subsidizing private corporate activity without public benefit is a far cry from that goal. In harnessing FOIA's low-cost, high-value potential for their own gain, commercial requesters perversely have turned the nation's most prominent transparency law into a hidden means of subsidizing valuable corporate secrets.

B. Flooding FOIA Offices

A second implication of this study's findings is that commercial users may be crowding out more publicly beneficial uses of FOIA because of a combination of the sheer volume of commercial requesters and the limited resources agencies have to serve all FOIA users. Particularly because the news media and other users who serve FOIA's core mission, such as watchdog groups, are often working on a short timeline, commercial users may substantially burden the overtaxed FOIA response system.

This research conclusively demonstrates that at some agencies, commercial users of FOIA are a dominant presence. At four of the six studied agencies, commercial requesters formed the majority—indeed the vast majority—of all requesters. Most strikingly, they

responses-cloud-a-window-into-washington.html [<http://perma.cc/2MQX-N9EV>] (discussing FOIA delays and the problems they pose for journalists, citing various possible causes but not mentioning commercial requesters).

415. Senate and House reports as well as floor debates demonstrate that the legislative history of FOIA evidences no discussion of how FOIA might operate as a subsidy. *See, e.g.*, H.R. Rep. No. 89-1497, at 12 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2429; S. Rep. No. 1219, at 4 (1964), <http://nsarchive.gwu.edu/nsa/foialeghistory/S.%20Rep.%20No.%2088-1219%20%281966%20Source%20Book%29.pdf> [<http://perma.cc/BED7-SYRH>]; 112 CONG. REC. 13,640, 13,642 (1966).

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

formed 96 percent of DLA requesters,⁴¹⁷ either 69 percent or 89 percent of SEC requesters (depending on the authenticity of SECProbes.com as a news media organization),⁴¹⁸ 79 percent of EPA requesters, and 75 percent of FDA requesters.⁴¹⁹ At the SEC, the largest commercial requesters were filing literally thousands of requests per year,⁴²⁰ and at FDA, EPA, and DLA, the largest commercial requesters were filing hundreds.⁴²¹

Although it is not possible to quantify the effect on agency response times any given requester or group of requesters might have, especially in light of agencies' ongoing efforts to keep up with demand for FOIA services, it is all but inevitable that this volume of requesters will have an impact. Too often at these same agencies, response times not only exceed the law's twenty-business-day requirement, but also exceed any reasonable point of utility for a journalist or watchdog group. At FDA, in FY 2014, even for simple requests, a tracking designation given by the agency, only 320 of a total 6776 were processed within the twenty-business-day deadline.⁴²² In fact, 1830 of those requests took longer than 200 days to process.⁴²³ For complex requests the situation was worse: the *average* processing time was 138 days.⁴²⁴ Although the SEC is faring better, perhaps because it apparently receives very few complex requests, in FY 2014 it still failed to meet the twenty-business-day deadline to respond to 2332 of its 14,754 requests, and took longer than 100 days to respond to 243 of them.⁴²⁵ Although EPA performed well on its simple requests (which were less than half of its requests), for complex requests the agency's median response time was thirty-three days and

417. DLA Data, *supra* note 259.

418. SEC Data, *supra* note 108.

419. FDA Data, *supra* note 155.

420. *See* SEC Data, *supra* note 108.

421. *See* DLA Data, *supra* note 259; FDA Data, *supra* note 155.

422. U.S. DEP'T OF HEALTH & HUMAN SERVS., HHS FISCAL YEAR 2014 FREEDOM OF INFORMATION ANNUAL REPORT § VII.C.1, <http://www.hhs.gov/foia/reports/14anlrpt.html> [<http://perma.cc/VM6X-GG2B>].

423. *Id.*

424. *Id.*

425. U.S. SEC. & EXCHANGE COMM'N, FREEDOM OF INFORMATION ACT (FOIA) ANNUAL REPORT FOR FISCAL YEAR 2014, at 12, <http://www.sec.gov/foia/arfoia14.pdf> [<http://perma.cc/5CHS-D2QG>].

its longest response time was a staggering 2120 days.⁴²⁶ Similarly, DLA performed well on its simple requests, but still failed in FY 2014 to meet the deadline for 161 of its 488 complex requests.⁴²⁷

As previously documented, delay and administrative burden are some of the most commonly cited reasons why journalists do not make more use of FOIA.⁴²⁸ And the level of service provided by access professionals has been a matter of concern reaching the level of congressional action.⁴²⁹ The sheer volume of commercial requests at some agencies is by definition taxing the system, and can only be making the barriers to the use of FOIA for democracy-enhancing activities all the higher.

C. *Reselling Public Records Access*

The commercial requesters who use FOIA solely or primarily to engage in information reselling present an additional troubling implication: these requesters in essence represent a de facto outsourcing of transparency and public records services. Although agencies sometimes do formally contract with private companies to provide FOIA processing services, those companies merely help agencies respond to FOIA requests, and the final response comes from the agency itself.⁴³⁰ With information resellers, the reseller, having already requested and received federal records under FOIA, unilaterally undertakes to sell those records at a profit on the private market. As the data reported in this research demonstrates, these for-profit businesses have become the actual locus for interested parties to obtain government records at some agencies, a sort of de facto outsourcing of a vital public function.

Information resellers, rather than those who use public records as part of a value-added consulting or advising service, include the primary activities of entities described above such as Bioscience

426. U.S. ENVTL. PROTECTION AGENCY, EPA FOIA ANNUAL REPORT FOR 10/01/2013 THROUGH 09/30/2014, at 9, http://www2.epa.gov/sites/production/files/2015-03/documents/2014_annual_report.pdf [<http://perma.cc/W96E-8APX>].

427. DEP'T OF DEFENSE, FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2014, at 48, http://open.defense.gov/Portals/23/Documents/DoDFY2014AnnualFOIA_Report.pdf [<http://perma.cc/M29R-GSEQ>].

428. *See supra* notes 73–89 and accompanying text.

429. *See, e.g.*, OPEN Government Act of 2007, S. 2488, 110th Cong. § 10 (2007) (requiring each agency, for the first time, to have a Public Liaison to improve communications with requesters).

430. *See infra* note 442 and accompanying text.

Advisors,⁴³¹ Day & Day,⁴³² EDR, Inc.,⁴³³ FOI Services Inc.,⁴³⁴ the FOIA Group,⁴³⁵ RoyaltyStat LLC,⁴³⁶ and Washington Information Source.⁴³⁷ As this research shows, pure information resellers are not limited to a single agency or industry, but rather have cropped up in a variety of contexts—they are present as top requesters at five of the six studied agencies.⁴³⁸ In fact, FDA and SEC evidence multiple substantial-volume requesters of this nature who are evidently competing against one another.⁴³⁹

To be sure, the fact that the products sold are simply copies of raw government records does not mean that these companies do not add value; that is, in fact, what makes their services attractive and profitable. For those records that are contained in resellers' databases, the access provided to third-party paying clients is instantaneous, an obvious advantage over using FOIA itself. For those records that are custom requested on behalf of a paying client, anonymity is a key advantage—the interested party never has to make its identity known by submitting a request in its own name.⁴⁴⁰ In either case, the clients are also essentially paying for the resellers' time and effort in obtaining the records, including drafting and filing the request, any back and forth of communication with the agency, and any negotiation over withholdings or appeal.

But no matter the benefits to the third parties of using a reselling service rather than requesting records under FOIA as an initial matter, the fact is that the reseller becomes the information broker. The records the reseller decides should be requested dictate what is

431. *See supra* notes 131–36 and accompanying text.

432. *See supra* notes 262–75 and accompanying text.

433. *See supra* notes 241–47 and accompanying text.

434. *See supra* notes 159–61 and accompanying text.

435. *See supra* notes 343–53 and accompanying text.

436. *See supra* notes 139–44 and accompanying text.

437. *See supra* notes 172–87 and accompanying text.

438. *See supra* Parts II.A–C, II.E.

439. *See supra* Parts II.A–B.

440. This is an advantage that is advertised by custom requesting services. *See, e.g., Document Retrieval*, FOI SERVICES INC., <http://www.foiservices.com/brochure/docretrieval.cfm> [<http://perma.cc/FCU5-MAVY>] (“Of course, we hold every inquiry confidential. Every request submitted to the government carries the FOI name . . . so no one knows the products, processes, and companies you’re researching.”); *FOIA Services*, FOIA GROUP INC., <http://www.foia.com/foia.aspx> [<http://perma.cc/QT2S-67G7>] (“The identity of our client is *never revealed* to any government agency, contractor or other entity.”). A senior vice president of FOI Services Inc. said that a “huge, huge reason people use our firm is to blind their requests.” Mullins & Weaver, *supra* note 99.

maintained in its database. The records the reseller decides are worth fighting for with the agency if the agency resists disclosure are those that will be available. And the records the reseller decides it no longer can economically pursue will remain locked in government filing cabinets. Because information resellers occupy a substantial piece of the FOIA universe, they hold a great deal of power over what becomes, as a practical matter, available. Transparency in pursuit of democracy has been outsourced.

Limits on formal government contracting provide guideposts by which to measure the de facto outsourcing that occurs in this context. The OMB's Circular A-76 prohibits the outsourcing of "inherently governmental activities," which are activities that involve the "exercise of substantial discretion in applying government authority."⁴⁴¹ In fact, for agencies that have formally contracted for FOIA processing services, they are careful to vest in a government employee the final decision concerning which records will be released, thus illustrating the discretionary authority inherent therein.⁴⁴² This standard, and the government's treatment of it in the FOIA context, illustrates the dangers of the de facto outsourcing that occurs when cottage industries of resellers emerge.⁴⁴³ Making government information available is, and has been treated in the contracting context as, an inherently public function. Although the outsourcing standards do not actually govern information resellers because the government has not formally outsourced FOIA services to these companies, the standards are a useful analogue to understanding the dangers of de facto outsourcing in this area.

441. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), at 4(b), Attachment A B(1)(a), https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction [<https://perma.cc/AW/C8-W9Q3>]. See generally Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006) (describing the various sources of limits on outsourcing, and delimiting the inherent government functions test).

442. Lee, *supra* note 353.

443. This is not to diminish a distinct, but related, transparency problem that occurs as a result of outsourcing: when contractors providing government services themselves are exempt from transparency laws, thereby decreasing accountability in whole sectors of government activity. See generally Sarah Shik Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENVTL. L. 228 (2014) (documenting the transparency-inhibiting effects of the proliferation of environmental government contractors).

IV. RECLAIMING INFORMATION DEMOCRACY

Commercial requesting has distorted the administration of transparency laws at many federal agencies such that FOIA fails to effectively serve the public good as intended and instead fuels and subsidizes profit-driven business models that decrease public accountability. This Part turns to the imbalance between FOIA's democratic aspirations and its corporate reality by proposing remedies policymakers might adopt to realize FOIA's "vital" role in American governance.⁴⁴⁴

One legislative response might be to place restrictions or burdens on the commercial use of FOIA. For instance, it is tempting to consider disallowing FOIA requests made for certain purposes (such as pure resale).⁴⁴⁵ Such a prohibition, however, would be unworkable. Businesses could simply have individuals who are members of their staff send FOIA requests without naming the business. Individual entrepreneurs could enlist friends and family to do the same. Deciphering true individual requesters from these individuals who may be requesting on behalf of someone else would be next to impossible.⁴⁴⁶ Moreover, it may simply lead to a return to the pre-

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

445. Professor James O'Reilly has at least suggested, without specifics, a similar approach, criticizing the idea that "motives [are] only rarely discussed in [FOIA] cases" even as to "requests from commercial competitors," whose motives are "officially disregarded." O'Reilly, *supra* note 70, at 568 (focusing mainly on potential national-security threats, rather than commercial requesting).

446. As an illustration of the difficulty, consider the now-famous *res judicata* case *Taylor v. Sturgell*, 553 U.S. 880 (2008). There, Greg Herrick, an antique aircraft enthusiast who was restoring his vintage airplane, requested certain specifications for the plane on file with the Federal Aviation Administration. *Id.* at 885–86. When he was denied access to the information under FOIA, he sued and lost before the Tenth Circuit. *Id.* at 887. Later, Brent Taylor filed a FOIA request for the same information and was denied, but when he sued, the D.C. Circuit precluded his claim as barred by the doctrine of "virtual representation." *Id.* at 889. The Supreme Court reversed, holding *res judicata* would only bar the suit if Taylor actually represented Herrick in filing the request and maintaining the lawsuit. *Id.* at 906. Even though Taylor and Herrick were friends, were represented by the same lawyer, Taylor was president of an antique aircraft association to which Herrick belonged, Taylor had agreed to help Herrick restore his plane, and the two shared documents Herrick obtained in discovery in the second suit for use in the first suit, *id.* at 889, on remand before the district court the government conceded it could not and would not attempt to demonstrate that Taylor actually represented or was in privity with Herrick, see *Taylor v. Babbitt*, 673 F. Supp. 2d 20, 23 n.1 (2009) (noting that the government has represented it "will not pursue the claim preclusion issue" on remand). If the association between Taylor and Herrick is not enough to suggest Taylor may have been or was acting on Herrick's behalf, no federal agency will ever be able to conclusively determine that one person has submitted a FOIA request on another's behalf, and certainly not in an informal administrative proceeding such as merely responding to a FOIA request.

FOIA APA disclosure provision, which required the public to justify a request for government information, a provision that became known not as a disclosure statute, but a “withholding statute,” for its failure to effectively allow public access to records.⁴⁴⁷

A more modest approach would be to increase the fees charged to commercial requesters in the hopes either of fully compensating the federal government for the cost of processing their requests or of discouraging some amount of commercial requesting. Although increasing fees may be a part of the solution, any increase that only applied to commercial requesters and which was significant enough to make up for the current shortfall in cost recoupment would likely encourage commercial requesters to use individuals as their proxies in FOIA requesting, as described above.⁴⁴⁸ If the cost increase to commercial requesters were more modest, it would fail to fully effectuate its goal. One recent proposal by Lawrence Tai would increase all fees charged for FOIA administration, albeit with greater increases for commercial requesters.⁴⁴⁹ Increasing fees for individuals might, as Tai suggests, weed out individual requests that do not have value to the public in understanding the operations of government,⁴⁵⁰ but it would also likely prove to be a barrier to many individuals who use FOIA to serve information needs not met in any other way. For instance, the Department of Homeland Security receives tens of thousands of FOIA requests a year from noncitizens in removal proceedings who are simply seeking their own immigration file, relying on FOIA only because there is no right of administrative discovery in immigration court.⁴⁵¹ Without somehow handling these legitimate individual-information needs in a way that would not be cost prohibitive to already-disadvantaged groups, raising FOIA fees on individual requesters is ill-advised.

447. S. REP. NO. 88-1219, at 8, 10. The original APA provision read, “Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.” *Id.* at 10.

448. *See supra* note 441 and accompanying text.

449. Lawrence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 483–88 (2015). Tai would pair this fee increase at the administrative level with increased availability of attorneys’ fees awards to prevailing plaintiffs in litigation. *Id.* at 488–90.

450. *Id.*

451. *See supra* note 412. The Ninth Circuit stands as the one exception to the general rule that immigration court proceedings lack an administrative discovery mechanism. *See Dent v. Holder*, 627 F.3d 365, 373 (9th Cir. 2010).

No single solution perfectly solves the problems described above that are posed by the current state of commercial FOIA requesting practices. Targeted, strategic affirmative disclosure, however, provides one of the most promising avenues for alleviating the privatization of FOIA and returning public information to its anticipated democratic use.

A. *Affirmative Disclosure*

FOIA only requires the most minimal amount of affirmative or proactive agency disclosure; yet affirmative disclosure is largely viewed as the way of the future.⁴⁵² President Obama, in his first day in office, issued a transparency memorandum that announced that “[t]he presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public.”⁴⁵³ Especially in light of technological advances, affirmative disclosure holds the key to unlock true government transparency.

From its inception, FOIA has required some amount of affirmative disclosure. First, it required the affirmative publication of agency rules and regulations in the Federal Register, and second, it required final agency orders in adjudications, among limited other materials, to be made “available” even absent a request.⁴⁵⁴ This, however, essentially required affirmative disclosure of agency “law,” not “government information.”⁴⁵⁵ In 1996, Congress passed the E-FOIA amendments which, among other things, required internet publication of requested records that “because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”⁴⁵⁶

452. See David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1792–93 (2008) (contending that the “request-and-wait-for-a-response approach designed for paper records” is obsolete, and calling for more affirmative disclosure obligations). See generally Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 577 (2009) (advocating for affirmative disclosure in FOIA).

453. Memorandum to the Heads of Executive Departments and Agencies from President Barack Obama, Freedom of Information Act (Jan. 21, 2009), https://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act [<https://perma.cc/JKS4-6YXG>].

454. 5 U.S.C. § 552(a)(1), (a)(2) (2012).

455. Herz, *supra* note 452, at 586.

456. 5 U.S.C. § 552(a)(2)(D) (2012).

The success of the E-FOIA provisions, however, has been generally regarded as extremely limited because of agencies' implementation failures.⁴⁵⁷ Even those agencies that have regularly posted frequently requested records online—or even all records released under FOIA⁴⁵⁸—have generally done so in ways that remain hard for the public to search for and locate records they might want.⁴⁵⁹ Accordingly, the public still views the request-and-response model as the centerpiece of FOIA.

Although affirmative disclosure initiatives have not fulfilled their promise thus far, commercial requesting provides an area ripe for targeted affirmative disclosure because, as this study demonstrates, commercial requesting, by and large, is a formulaic enterprise. The request-and-response model may well be a very good model for handling individualized requests for information. But it makes less sense when considering requests for information that essentially reproduce an index of all of the agency's records of a particular type. Companies ask for the same types of records (and sometimes the very same records themselves) over and over again. That is, they are looking for individualized records that the agency creates or maintains as a matter of routine; things such as inspection reports,⁴⁶⁰ contract bids,⁴⁶¹ warning letters,⁴⁶² and grant awards.⁴⁶³ This is particularly true for information resellers who are populating databases full of a single type of easily identifiable agency-held record.⁴⁶⁴

For example, at DLA, commercial requesters uniformly asked for contracts, bids, and bid abstracts for a particular contract

457. Herz, *supra* note 452, at 590–91.

458. For example, some agencies are using the “FOIA Online” system, including, relevant to this study, the EPA. See FOIA ONLINE, <https://foiaonline.regulations.gov/foia/action/public/home> [<http://perma.cc/ZZ7K-MYB7>]; see also Lisa Rein, *White House to Make Public Records More Public*, WASH. POST (July 10, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/07/10/white-house-to-make-public-records-more-public> [<http://perma.cc/ZTM7-VDAB>] (describing initiatives to encourage more agencies to use the system).

459. Tai, *supra* note 449, at 462–64.

460. See *supra* Part II.B (describing the many high-volume commercial requesters who request almost entirely facilities inspection reports from the FDA).

461. See *supra* Part II.C (describing how nearly all commercial requesters—who constitute nearly all requesters—at the DLA are requesting such material).

462. See *supra* Part II.A (describing the activities of John Gavin at his various enterprises requesting SEC investigative materials).

463. See *supra* Part II.E. (describing the requesting activities of commercial users at NIH).

464. See, e.g., *supra* notes 165–71 and accompanying text (describing FDA News's database, 483sonline, which consists entirely of facilities inspection reports from the FDA).

number.⁴⁶⁵ By contrast, the DLA news media requests were more varied. Rather than only requesting contract information by contract number, they also requested maintenance and malfunction reports on particular products,⁴⁶⁶ information about debarment cases (disqualification from contracting),⁴⁶⁷ information about an investigation,⁴⁶⁸ sales information,⁴⁶⁹ information about the impact of sequestration,⁴⁷⁰ and FOIA logs,⁴⁷¹ among other topics.⁴⁷² Just by examining their own FOIA logs, agencies could readily find categories of these repeatedly requested records and, for those categories, could create their own online database affirmatively, rather than responding to individual requests.

This type of affirmative disclosure has several benefits over the past models. First, disclosure of repeatedly requested records would not affect agency deliberations about whether a particular document or type of document ought to be released. Using their existing expertise and discretion, FOIA officers would decide whether to release once and subsequent disclosures would operate automatically. It takes the guesswork out of the staff's decisionmaking about whether something needs to be published or not. Second, if agencies made a policy decision to publish a certain type of record, disseminating could easily be made into a mundane, inexpensive task. It would be easy, for example, to build into the process of, say, producing an inspection report, uploading it to an extant database. Third, if agencies create databases confined to a single category of records, it will be far easier to make those databases sensible, searchable, and user-friendly. One of the difficult aspects of the existing databases of all responses to all FOIA requests is that the requests and responses are so varied it is hard for the agencies even to find and create relevant search terms or fields.⁴⁷³ And finally, the agency does not need to make a determination that a particular record is likely to be requested again, only a determination that it receives a high volume of requests for records within a given

465. DLA Data, *supra* note 259.

466. *Id.* at Request Number HQ DLA-14-HFOI-00025.

467. *Id.* at Request Number HQ DLA-13-HFOI-00060.

468. *Id.* at Request Number HQ DLA-14-HFOI-00008.

469. *Id.* at Request Number DSCP-13-PFOI-00352.

470. *Id.* at Request Number HQ DLA-13-HFOI-00178.

471. *Id.* at Request Number HQ DLA-14-HFOI-00039.

472. DLA Data, *supra* note 259.

473. *See, e.g.*, FOIA ONLINE, *supra* note 458.

category. At any given agency, as illustrated below,⁴⁷⁴ it is often easy to identify promising starting points for this sort of affirmative disclosure model.

Affirmative disclosure alleviates, without completely solving, the various problems posed by the current corporate FOIA practices. As a preliminary matter, it is likely to save agencies money. In fact, almost nothing they could do could possibly be as expensive as responding to FOIA requests on a one-off basis when companies are submitting them by the thousands. Some past empirical evidence suggests that affirmative disclosure in other contexts saves agencies time and money.⁴⁷⁵ Given that hundreds of requests are submitted for very similar records each year, at the very least the money saved by diminished FOIA processing costs should free up resources for affirmative disclosure. Moreover, at agencies where commercial requesters are not only requesting largely the same kinds of records on a repeated basis but are also requesting the agencies' FOIA logs on a regular basis, publication of the FOIA logs should be an immediate and easy target for affirmative disclosure. Without doing so, requesting the agencies' FOIA logs piecemeal becomes itself a source of FOIA processing costs (and in fact adds to those very logs).

Cost savings to the agency and freeing up FOIA processing resources is not just a benefit to the public fisc. It also creates the room for FOIA processing to better serve the public interests for which it was intended. If the news media's primary complaint about FOIA is the long wait to receive a response, more resources dedicated to the requests that do fall within FOIA's primary intended use will surely ameliorate that burden.

In addition to alleviating agency resource constraints, affirmative disclosure of highly targeted information would remove the profit potential of mere information reselling, keep the public function of government transparency public, and allow for equal access to the records at issue. Researchers may find previously unimagined uses for this data to produce public knowledge or insights into government activity.⁴⁷⁶ Instead of subsidizing a particular business or group of

474. See *supra* Part IV.B.

475. Lauren Harper, *Sunshine Week Column: Posting FOIA Releases Online Saves Agencies Time and Money*, THE SENTINEL: OPINION (Mar. 15, 2015), http://cumberlink.com/news/opinion/columnists/guest/sunshine-week-column-posting-foia-releases-online-saves-agencies-time/article_35b8fd5b-a61a-5852-a7a1-dd07da0ca71c.html [<http://perma.cc/M2J9-H7CB>].

476. For a compelling argument for public databases of source material for researchers, albeit in a very different context, see generally Raizel Liebler & June Liebert, *Something Rotten*

businesses by providing free or low-cost government records of value, publishing information for equal use by all is consistent with the government's other publication activities that is useful to private businesses but also to others.⁴⁷⁷ In short, it ensures that public resources remain public, rather than becoming the product to be sold for private gain.

Moreover, affirmative disclosure may benefit the private market as well. For instance, small businesses or market entrants may not have the resources or the savvy to access the for-profit information reseller services, and thus may be at a competitive disadvantage. Making sure that the entire market has access to the same information could foster fairer competition.

To be sure, commercial requesting would remain. Not all records would be encompassed within an affirmative disclosure model. In addition, even as to the records that are subject to the new affirmative disclosure model, businesses will find a way to use that information for profitable ventures, including value-added services such as advising, indexing, interpreting, and otherwise using the records to serve clients' needs. Those uses, however, use expertise to add value, rather than merely taking public records and transforming them into a private commodity. In this way, an affirmative disclosure model holds great promise in democratizing information access.

B. Implementing Publication

Although affirmative disclosure is an attractive option in theory, operationalizing it effectively is crucial to its success in abating the negative externalities of commercial requesting. The necessary predicate to such a proposal is identifying the categories of records at each agency that represent low-hanging fruit for government published databases.

Take, for example, the DLA. There, commercial requests overwhelmingly list a solicitation number for a contract and requests bids or bid abstracts related to that solicitation or awarded contract.⁴⁷⁸ Of 3725 requests for records related to a particular solicitation

in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996-2010), 15 YALE J.L. & TECH. 273 (2013).

477. For example, the Census Bureau regularly publishes data, research, and reports for use by private industry, researchers, and the public alike. See *Data*, U.S. CENSUS BUREAU, <https://www.census.gov/data.html> [<http://perma.cc/4Q8W-L3GG>]; *Publications*, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications.html> [<http://perma.cc/4CDL-TZGJ>].

478. DLA Data, *supra* note 259.

number that were fully processed, 2752, or 74 percent, were granted in full, and all but two of the remaining requests were granted in part.⁴⁷⁹ Thus, the vast majority of the requested records are releasable to the public. Moreover, DLA already has an online contract-bid system that indexes solicitations and accepts bids, but does not affirmatively publish the bids and bid abstracts that are requested by the thousands under FOIA.⁴⁸⁰ Affirmatively publishing these frequently requested records—as part of this database or another searchable, indexed, downloadable form—would greatly reduce the burden on the FOIA office and would make these public records truly public, rather than hidden behind the thousand-dollar-a-year payroll of Day & Day’s database.⁴⁸¹

The FDA’s FOIA logs show equally promising areas for affirmative disclosure. First, the FDA’s facilities inspection reports, known as Form 483s, are the subject of multiple resellers’ private databases,⁴⁸² and also the most frequently requested type of record under FOIA by commercial requesters.⁴⁸³ Out of the 1978 inspection report requests that were fully processed in 2013, 1836, or 93 percent, were granted in full, thereby demonstrating that the vast majority of such records can be routinely released.⁴⁸⁴ In fact, one transparency advocacy organization has identified these very records as ones that “could easily be posted up online with proper redactions,” which would “help to level the playing field between investment companies and the public.”⁴⁸⁵ FDA is also an agency where there are voluminous

479. *Id.* (counting only those requests with a subject line that included an alphanumeric code beginning with “SP”). Again, this number does not include the requests that were closed for other reasons, including, the agency not having any responsive records, the request being withdrawn, the records not being reasonably described, the request being misdirected, or the agency being unable to contact the requester for further information. *See* DEP’T OF DEF., *supra* note 427, at 22–23.

480. *DLA Internet Bid Board System (DIBBS)*, DEF. LOGISTICS AGENCY, <https://www.dibbs.bsm.dla.mil> [<http://perma.cc/WX5U-LZF7>].

481. *See supra* notes 262–75 and accompanying text.

482. *See, e.g., supra* note 163 and accompanying text; *About Washington Information Source*, *supra* note 172.

483. FDA Data, *supra* note 155.

484. *Id.* This sum does not include requests for inspection reports that were closed for reasons other than having reached a substantive determination, including being a duplicate request, not being a proper FOIA request, refusal to pay a fee, and, most commonly, there being no responsive records to produce. *See id.*

485. Ginger McCall, *How to Actually Improve Public Access to Government Documents (Under the FOIA)*, SUNLIGHT FOUND. (Oct. 1, 2013), <http://sunlightfoundation.com/blog/2013/10/01/how-to-actually-improve-public-access-to-government-documents-under-the-foia> [<http://perma.cc/DW8N-7PED>]; *see also* Joel Gurin, *Making FOIA More Free and Open*,

requests for FOIA logs, making it a prime target for existing initiatives around publication of all FOIA requests and responsive material.⁴⁸⁶

To be sure, agencies would need to periodically reevaluate their FOIA logs to address new categories of information that became the subject matter of repeated FOIA requests. The success of any sort of initiative along these lines would depend on agencies' willingness to adjust their approach and exhibit nimbleness in the face of changing demands. Moreover, although this section describes a few easy targets of affirmative disclosure, it certainly does not do the hard work of deciding where to draw the line. Should a database be created if the type of record in it is requested one thousand times a year? One hundred? Ten? What constitutes the sort of record that should be deemed sufficiently similar as to be contained in one database? What happens when an agency has created so many databases that it becomes hard to identify the correct one in which to search? Although not attempting to downplay the importance of those issues, this Article advocates for starting somewhere, and addressing each of those questions as they arise while recognizing the full range of costs and benefits that this research demonstrates are associated with commercial FOIA requesting.

The impetus for this sort of change could originate from a variety of places. For example, agencies could recognize the potential cost savings and public benefits of affirmative disclosure, and could voluntarily undertake this sort of approach. Or, executive branch oversight bodies could nudge, encourage, or even mandate it. Such initiatives could come from the Department of Justice's Office of Information Policy, which issues policy guidance on FOIA and government transparency to all agencies.⁴⁸⁷ It could also come from the relatively new Office of Government Information Services, the federal FOIA ombudsman, which reviews FOIA implementation and

OPENDATANOW.COM, <http://www.opendatanow.com/2013/09/new-making-foia-more-free-and-open/#.Vbk717d4omE> [<http://perma.cc/G5G9-8NGX>] (quoting Miriam Nisbet, Director of the Office of Government Information Services, concerning the new initiatives).

486. See *supra* notes 169, 199–205 and accompanying text.

487. *About the Office*, OFFICE OF INFO. POL'Y, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/oip/about-office> [<http://perma.cc/5LFC-K4DV>] ("The Office of Information Policy (OIP) is responsible for encouraging agency compliance with the [FOIA] and for ensuring that the President's FOIA Memorandum and the Attorney General's FOIA Guidelines are fully implemented across the government. OIP develops and issues policy guidance to all agencies on proper implementation of the FOIA.").

issues advice to agencies and best practices.⁴⁸⁸ Technological innovations could stem from the Office of E-Government & Information Technology, whose mission is to “develop[] and provide[] direction in the use of Internet-based technologies to make it easier for citizens and businesses to interact with the Federal Government, save taxpayer dollars, and streamline citizen participation.”⁴⁸⁹ Or a mandate could come from the President in the form of an Executive Order, or, at his or her direction, from the OMB, which issues instructions to federal agencies, often in the form of OMB Circulars.⁴⁹⁰ Any of these bodies could recommend, and some of them could require, agencies to examine FOIA logs and to propose affirmative disclosure goals. OMB could even undertake review of such agency plans. And of course, Congress could undertake to draft legislation to that effect.⁴⁹¹

CONCLUSION

The commercial use of FOIA is neither improper nor necessarily undesirable. Research reveals, however, that the current quantity and character of commercial FOIA requesting, at least at some agencies, produces negative externalities that affect how FOIA operates and whether it achieves its prime objective: informing the electorate about the activities of government so as to hold the governors accountable to the governed. In particular, this research documents a surprisingly

488. OFFICE OF GOV'T INFO. SERVS., <https://ogis.archives.gov> [<https://perma.cc/R8AC-AZXX>] (“Congress has charged us with reviewing FOIA policies, procedures and compliance of Federal agencies and to recommend changes to FOIA based on what we see.”).

489. *Office of E-Government & Information Technology*, OFFICE OF MGMT. & BUDGET, <https://www.whitehouse.gov/omb/e-gov> [<http://perma.cc/E4NE-KPHW>].

490. *Circulars*, OFFICE OF MGMT. & BUDGET, https://www.whitehouse.gov/omb/circulars_default [<https://perma.cc/QEE9-6LG7>] (describing as one purpose of OMB circulars to give instructions to federal agencies).

491. I recognize the difficulty of coming up with one-size-fits-all rules in this regard, which is why I begin with suggestions at the regulatory oversight level where individual plans could be tailored to the agency. However, if Congress did want to act, it could start by requiring publication of FOIA logs and certain reporting about frequently requested records. It could also require every agency to start by identifying one or two candidates for affirmative disclosure. Admittedly, this sort of approach with President Obama's data.gov initiative proved lackluster. See DATA.GOV, <http://www.data.gov> [<http://perma.cc/X2R3-VUBU>]; Ellen Miller, *Improvements Needed for High Value Datasets on Data.gov*, SUNLIGHT FOUND. (Feb. 3, 2010), <http://sunlightfoundation.com/blog/2010/02/03/improvements-needed-for-high-value-datasets-on-data-gov> [<http://perma.cc/77CQ-C5YU>] (noting that agencies' efforts to self-identify the highest-value datasets to publish often fell short). Nonetheless, any effort in this regard may realize some benefits.

large subset of commercial requesters whose primary product for sale is public records obtained under FOIA. Rather than allow this de facto outsourcing, and in kind subsidization of various types of commercial enterprises without corresponding public benefit, agencies should meet commercial needs for information head on. They should identify those sets of records businesses find valuable and publish them for all to use equally, freeing up resources in FOIA offices that may be better spent on other types of requests. In this way, FOIA can be reclaimed as a democratic tool.