

The Agency Obligation to Explain Redactions

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ABSTRACT

Agencies routinely offer conclusory and boilerplate reasoning to explain their redaction determinations under the Freedom of Information Act (“FOIA”). This is a major problem. When explaining such determinations to requesters, FOIA officers should provide sufficient reasons to allow a reasonable requester to evaluate the underlying claim of privilege. But agencies likely will not implement that commonsense proposition for two main reasons: the executive branch has generally resisted disclosure requirements for almost a century, and federal courts lack the statutory and practical authority to force agencies to better explain their reasoning at the administrative level. The resulting lack of enforcement mechanisms leads many agencies to implement their disclosure obligations in whack-a-mole fashion, fully complying only when sued. Congress should consider a variety of legislative solutions to reverse the trend.

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INTRODUCTION

Last year, American taxpayers paid \$723.4 million to have 5,628 federal servants answer nearly 1.5 million records requests under the Freedom of Information Act (“FOIA”).¹ For sixty years, FOIA has tormented new agency attorneys and paralegals—that is, until they gain enough seniority to upgrade to portfolios more related to their agency’s bottom line. The executive branch, to say the least, has long viewed FOIA as a distracting bureaucratic burden and not the cornerstone of democracy that Congress paints it to be. Despite its infamy, FOIA still serves as a vital tool for citizens seeking insight into federal operations.²

1. U.S. DEP’T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2024 3, 21-22 (2024), <https://www.justice.gov/oip/media/1398111/dl?inline> [<https://perma.cc/J85Q-DD9W>]; U.S. DEP’T OF JUST., 2024 LITIGATION AND COMPLIANCE REPORT (2024), <https://www.justice.gov/oip/media/1392641/dl?inline> [<https://perma.cc/T2VS-59JK>]; The FOIA Project, *When FOIA Goes to Court: 20 Years of Freedom of Information Act Litigation by News Organizations and Reporters*, <https://foiaproject.org/2021/01/13/foialitigators2020/> [<https://perma.cc/EWY8-Q4YQ>]; David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1104-05 (2017) (“Chronically underfunded and historically low-status, these offices employ over 4000 civil servants.”).

2. The “right” to “agency records” has become so deeply embedded in society that some even coin FOIA as a “quasi-constitutional. . . . super-statute” See Mark Fenster, *FOIA as Administrative Law*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 52, 62-63. The Supreme Court, on the other hand, noted in 2013 that “such a sweeping right” to public information is not “‘basic to the maintenance or well-being of the Union.’” *McBurney v. Young*, 569 U.S. 221, 234 (2013) (quoting *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 388 (1978)); see also Antonin Scalia, *The Freedom of Information Has No Clothes*, REGUL.: AEI J. GOV. & SOC’Y 19 (1982) (“This is not to say that public access to government information has no useful role—only that it is not the ultimate guarantee of responsible government, justifying the sweeping aside of all other public and private interests at the mere invocation of the magical words ‘freedom of information.’”); Pozen, *supra* note 1, at 1102 (“And to enable that shift, a shift away from the traditional FOIA model, we will need to let go of FOIA triumphalism—to stop seeing the law as the indispensable centerpiece of the open government universe, and to start seeing its reactionary elements more clearly.”).

Obstacles imperil the journey from request to disclosure: lengthy delays, overuse of exemptions, and excessive redactions, to name a few.³ FOIA's critics, however, fail to recognize one omnipresent deficiency:⁴ Despite the statutory obligation to provide "reasons" for withholding information,⁵ many agencies frequently respond to requests with conclusory and boilerplate language at the administrative level to hide widespread noncompliance with FOIA.⁶ Recognizing that few requesters appeal redactions to federal court, agencies implement their disclosure obligations in whack-a-mole fashion, fully complying only when sued.⁷

3. Pozen, *supra* note 1, at 1097 ("[FOIA] saps regulatory capacity; distributes government goods in an inequalitarian fashion; and contributes to a culture of adversarialism and derision surrounding the domestic policy bureaucracy while insulating the far more secretive national security agencies . . ."). The U.S. House of Representatives Committee on Oversight and Government Reform in 2016 created a report titled "FOIA is Broken" with one of its major subheadings as "The Biggest Barrier of All: Delay, Delay, Delay." STAFF OF H. R. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 34 (Comm. Print 2016).

4. See Scalia, *supra* note 2; Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure under the Freedom of Information Act*, 9 J. LEGAL STUD. 775, 781 (1980) ("[T]he FOIA contains no mechanism for assessing requesters the costs of producing the information. Without such a mechanism, the statute holds out every prospect of engaging a very costly machinery in pursuit of trivial gains."); Pozen, *supra* note 1, at 1136 (2017) (calling for "a radical reassessment of FOIA: not the standard suggestion that the Act needs refinement on this or that margin to achieve its full potential, but rather the much starker proposition that its request-driven strategy may be flawed beyond repair."); Steven Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309 (2011); Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's Power and Constraint*, 45 CASE. W. RES. J. INT'L L. 23, 36 (2012) ("In the war for executive accountability, FOIA is a slingshot attempting to pierce the tank armor of government secrecy and over-classification.").

5. A few words on terminology. As one might expect, "withholding information" in this context generally means not providing requested information to requesters. Agencies may "withhold" entire documents or portions of documents. "Redacting," on the other hand, refers to only the latter category. That is, agencies "redact" records by placing black boxes over the portions that they seek to shield from disclosure and thereafter send those records, often resembling Swiss cheese, to the requester. When agencies refuse to grant access to requested information, they either (a) withhold the entire document by not sending it to the requester or (b) send a fully redacted document. While there are small nuances between these terms, this Article uses "redacting" and "withholding" interchangeably to generally refer to agency denials of requested documents.

6. A law firm specializing in veterans' benefits, for example, recently sought from the VA records reflecting the process by which veterans are added to a background check system that identifies persons barred from possessing firearms for having been adjudicated as "mental defective[s]." *Watkins L. & Advoc., PLLC v. D.O.J.*, 78 F.4th 436, 439 (D.C. Cir. 2023). Upon receiving an inadequate explanation for the proffered redactions, the firm sued and the D.C. Circuit agreed that the VA fell well short of its obligation. *Id.* at 440.

7. The federal government received about 1.5 million FOIA requests in FY 2024, but requesters filed only 889 lawsuits in federal court in calendar year 2024. U.S. DEP'T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2024 3 (2024), <https://www.justice.gov/oip/media/1398111/dl?inline> [<https://perma.cc/J85Q-DD9W>]; U.S. DEP'T OF JUST., 2024 LITIGATION AND COMPLIANCE REPORT 20 (2024), <https://www.justice.gov/oip/media/1392641/dl?inline> [<https://perma.cc/T2VS-59JK>]; The FOIA Project, *When FOIA Goes to Court: 20 Years of Freedom of Information Act Litigation by News Organizations and Reporters*, <https://foiaproject.org/2021/01/13/foialitigators2020/> [<https://perma.cc/EWY8-Q4YQ>].

FOIA requires a better approach.⁸ As explained below, the word “reason,” as used in the provision outlining agencies’ obligation to explain redactions, implies an element of “sufficiency.” Congress has used the exact phrasing, “reasons therefor,” in over 300 provisions of the U.S. Code to require executive officials to explain their decisions, most notably when taking adverse employment actions. Ignoring or merely paying lip service to this affirmative obligation in the FOIA context, in part due to the misguided inference that “insufficient reasons” are “reasons” nonetheless, enables broader ineffective implementation. The bottom line is that to satisfy this obligation agencies should provide nonconclusory reasons sufficient to allow a reasonable requester to evaluate the underlying claim of privilege.⁹

To start, Section I briefly traces the philosophy of transparency from the Enlightenment to the American Founding to modern day. This lays the foundation for better understanding FOIA’s passage and subsequent refinement, as well as how the executive branch has resisted compliance for the last 60 years. Section II restates the problem this Article seeks to unpack, and Section III digs into FOIA’s text and explains why the requirement to provide “reasons” for redactions implies the sufficiency of those reasons. In addition to the plain meaning of the text, this interpretation is further supported by the presumption against ineffectiveness, the D.C. Circuit’s objective in *Vaughn v. Rosen*, the twin aims of

8. See Comment, *Vaughn v. Rosen, Toward True Freedom of Information*, 122 U. PENN. L. REV. 731, 731 (1974) (“The fairness of the procedure through which a citizen may challenge his government’s refusal to disclose information is a sensitive measure of the openness of a democratic society.”).

9. The procedural suggestion that follows is intended to apply to all agencies processing FOIA requests, but it will not apply with the same force to those requesting national security information. See MARGARET KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT 44-45* (2021) [hereinafter KWOKA, *SAVING FOIA*] (explaining how intelligence agencies are less likely to hand over documents and more likely to require a judge to demand turning over documents, or at least an AUSA saying that this is highly advisable); MARK FENSTER, *THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION* 6 (2017) (“[R]isk averse classification authorities . . . would prefer to knowingly overclassify than to mistakenly underclassify.”). The executive branch generally receives deference from Congress and the judiciary when national security information is at issue, and courts in Exemption 1 and Exemption 3 cases usually grant summary judgment without allowing discovery or performing in camera inspection. Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 163-68 (2006); Margaret Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 214 (2013) (“Despite two attempts by Congress to establish de novo judicial review of decisions to withhold records based on national security, courts acknowledge outright the deference they afford to claims of national security classification.”); Pozen, *supra* note 1, at 1119 (explaining how Exemption 3 incorporates nondisclosure provisions of statutes including the CIA Act of 1949, the CIA Information Act of 1984, the National Security Act of 1947, and the National Security Agency Act of 1959); *Ctr. for Nat’l Sec. Stud. v. D.O.J.*, 331 F.3d 918, 928 (D.C. Cir. 2003) (observing that the judiciary cannot second guess executive judgments about the adverse effects that disclosure would have to ongoing law enforcement proceedings related to the war on terror). This makes it “virtually impossible for individual litigants to counter the opinions of agency personnel.” Fuchs, *supra* note 9, at 164; Pozen, *supra* note 1, at 1118 (explaining how agencies receive deference when it comes to national security information). This has also led to the unresponsive rise of widespread government secrecy, which might warrant “an element of *transparency theater* in the conceit that [FOIA] secures the people’s right to know.” *Id.* at 1120.

transparency (to incentivize virtuous government behavior and to improve the public's trust in government), and the presumption of openness. Section IV outlines why the executive and judiciary refuse to adopt this reading, which serves only to perpetuate widespread noncompliance.

I. BACKGROUND

At FOIA's core is the idea that government transparency is essential to a well-functioning democracy.¹⁰ One can trace this line of thinking at least as far back as the Enlightenment.¹¹ According to Immanuel Kant, government actors recognizing the publicity of their official actions will generally avoid enacting policy contrary to the public interest.¹² For Montesquieu and Jean-Jacques Rousseau, smaller states could function more effectively because "evil carried out by leaders" was much more visible in communities where "citizens know and watch over each other."¹³ English philosopher Jeremy Bentham focused more on the public's perception of transparency, as opposed to the officials' behavior, recognizing that "[s]uspicion always attaches to mystery."¹⁴ He argued that "publicity creates a more informed electorate and secures the confidence of the governed in the legislature."¹⁵ Transparency thus serves two main objectives: to incentivize virtuous government behavior and instill the public's trust in government.¹⁶

10. When President Lyndon B. Johnson signed FOIA into law, he issued a statement noting: "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy arounds decisions which can be revealed without injury to the public interest." Lyndon B. Johnson, *Statement by the President Upon Signing the "Freedom of Information Act"*, THE AMERICAN PRESIDENCY PROJECT (July 4, 1966) <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-freedom-information-act> [<https://perma.cc/MTS9-LLY9>]

11. KWOKA, SAVING FOIA, *supra* note 9, at 1-31 (outlining the history of government transparency and FOIA); FENSTER, *supra* note 9, at 19-41 (same).

12. IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT'S PRINCIPLES OF POLITICS 77, 138-39 (William Hastie trans., 1891) (1795).

13. Sandrine Baume, *Transparency in the Handling of Public Affairs: Origins and Meaning of a Requirement*, RUTGERS U.: 1ST GLOBAL CONF. ON TRANSPARENCY RES., May 19-20, 2011, at 10; *see also* 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 93 (London, Nourse & Vaillant 1750) ("It is natural to a republic to have only a small territory; otherwise it cannot long subsist. . . . In a small [republic], the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses have a lesser extent, and of course are less protected."); *cf.* THE ANTI-FEDERALIST: BRUTUS I (Brutus) ("The confidence which the people have in their rulers, in a free republic, arises from their knowing them, from their being responsible to them for their conduct, and from the power they have of displacing them when they misbehave: but in a republic of the extent of this continent, the people in general would be acquainted with very few of their rulers: the people at large would know little of their proceedings, and it would be extremely difficult to change them.").

14. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 310 (John Bowring ed., 1843).

15. FENSTER, *supra* note 9, at 35.

16. Mark Fenster disagrees: "It does not appear, however, that a more transparent state creates a more trusting public. The philosopher Onora O'Neill argues that plentiful disclosure creates uncertainty in the amount of unsorted and unauthoritative information and thus is more likely to breed distrust." *Id.* at 140.

Channeling these thinkers, the American Founders believed that an informed citizenry was the backbone of the American experiment.¹⁷ John Adams, for example, once said that the people “have a right, an indisputable, unalienable, indefeasible divine right to that most dreaded, and envied kind of knowledge, I mean of the characters and conduct of their rulers.”¹⁸ James Madison applauded Kentucky’s provision of public education, famously noting that “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both.”¹⁹ The importance of an informed citizenry helped drive the codification of the “freedom of speech, or of the press” in the First Amendment.²⁰ Allowing the colonists to better circulate their grievances against the Crown, such freedoms enabled the public to remain informed of public issues and the activities of their elected leaders.²¹ It was for this reason, among others, that Benjamin Franklin spent so much of his time operating the printing press.²² At the time, as today, it was generally thought to be the press’s responsibility to “decide what government information is important, to make it digestible, and to inform the people so they can exercise their basic oversight responsibilities.”²³

Several events in the twentieth century underscored the need for greater government transparency and brought this line of thought to the modern fore.²⁴ Starting in the late 1930s, initially thanks to Justice Owen Roberts, the Supreme Court began upholding President Roosevelt’s New Deal legislation, and the federal government ballooned in size.²⁵ To counteract this massive growth, Congress and President Truman in 1946 enacted the Administrative Procedure Act, which included public disclosure requirements.²⁶ Foreshadowing the enduring trend of

17. KEVIN BARON, *PRESIDENTIAL PRIVILEGE AND THE FREEDOM OF INFORMATION ACT* x-xiii (2020) (tracing philosophy of government transparency to the Enlightenment and American Founding). They did not, on the other hand, believe in a “sweeping right” to government records. *McBurney v. Young*, 569 U.S. 221, 234 (2013) (citing *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 388 (1978)); KWOKA, *SAVING FOIA*, *supra* note 9, at 19-20 (explaining the importance of an informed citizenry to the Founders).

18. John Adams, *A Dissertation on the Canon and Feudal Law*, BOS. GAZETTE, Sept. 30, 1765.

19. JEFFREY A SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 45-46 (1988).

20. KWOKA, *SAVING FOIA*, *supra* note 9, at 15-19 (explaining the history of the freedom of the press).

21. *Id.* at 15.

22. JEFFREY A SMITH, *PRINTERS & PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 17-18 (1988); WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 66-67 (2003) (discussing Franklin’s views on the responsibilities of printers).

23. KWOKA, *SAVING FOIA*, *supra* note 9, at 15.

24. *History of FOIA*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/transparency/history-of-foia> [<https://perma.cc/4SZ6-EPLY>].

25. FENSTER, *supra* note 9, at 32 (“[T]he executive branch’s expansion during the New Deal and the president’s administrative prerogative over executive branch secrets following the end of World War II constituted a source of political conflict.”).

26. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 N.W. U. L. REV. 1582 (1996); Daniel Epstein, *Procedural Pluralism: A Model for Enforcing Internal Administrative Law*, 51 HASTINGS CONST. L.Q. 311 (2024).

executive resistance to public disclosure requirements, however, those provisions operated more as a “withholding [statute] than as a disclosure statute.”²⁷ As the Cold War progressed, the American government sought to suppress foreign espionage and began cloaking its behavior with secrecy.²⁸

Meanwhile, with World War II fresh in mind, the American public feared slipping into totalitarianism and communism and grew skeptical of its massive, secretive government.²⁹ Moreover, there arose a “concern about the availability of foreign markets for American news gathering and distribution” as well as “the U.S. media industry’s desire to define and export American free press and liberal democratic ideals.”³⁰ This push “established an understanding of the state, information, and the press that remain key elements of access to information law today. . . .”³¹ These phenomena and the resulting inability to effectively oversee the executive branch helped generate the political willpower for FOIA’s enactment.³² Signing FOIA into law in 1966, a reluctant President Johnson noted his “deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.”³³

Despite the lofty sentiment, FOIA initially failed. Similar to how federal agencies undermined the APA disclosure provisions that FOIA replaced, those same agencies dug in their heels once again and chose not to comply.³⁴ “The 1966 version,” remarked then-Professor Antonin Scalia, “was a relatively toothless beast, sometimes kicked about shamelessly by the agencies. They delayed responses to requests for documents, replied with arbitrary denials, and overclassified documents to take advantage of the ‘national security’ exemption.”³⁵ With the public’s trust in government further plummeting in response to the Watergate affair,

27. S. Rep. No. 88-1219, at 10 (1964); *E.P.A. v. Mink*, 410 U.S. 73, 79 (1973) (explaining the failure of this initial public disclosure provision) (“The section was plagued with vague phrases . . . [a]nd . . . provided no remedy for wrongful withholding of information.”); KWOKA, *SAVING FOIA*, *supra* note 9, at 22 (explaining failure of the information disclosure provision of the APA).

28. KWOKA, *SAVING FOIA*, *supra* note 9, at 22-25 (tracing the political genesis of FOIA from the failure of the APA to the Moss Commission).

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

30. MARK FENSTER, *supra* note 9, at 19.

31. *Id.*

32. *Id.* at 23 (“If one views transparency advocacy as a subset of more general campaigns for good government, then [the movement for open government] emerged in the United States during the Progressive era of the late nineteenth and early twentieth centuries, when a social and political movement led the charge for reforms to eradicate bureaucratic corruption, especially at the municipal level.”).

33. Lyndon B. Johnson, *supra* note 10; *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“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.”); U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (June 1967) (“Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of citizenry in the affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern?”).

34. Scalia, *supra* note 2, at 15.

35. *Id.*

Congress in 1974—overriding President Ford’s veto (as advised by then-OLC attorney, Antonin Scalia³⁶)—equipped FOIA with more enforcement mechanisms.³⁷ These included mandatory timelines for responding to requests, severe court sanctions, and fee waivers for journalists and public interest groups.³⁸ This drastic reform, as well as amendments in 1986,³⁹ 1996,⁴⁰ and 2016,⁴¹ ushered in the modern FOIA framework.

As it now stands, this framework grants all “persons” a right to executive branch “agency records”⁴² unless the processing agency deems the records to qualify for at least one of nine exemptions.⁴³ Upon request for those records (often used to supplement corollary agency proceedings⁴⁴), an agency has 20 business days to compile,

36. JAMES ROSEN, *SCALIA: RISE TO GREATNESS 1936 – 1986*, at 140-43 (2023). Then-Professor Scalia later wrote an article lamenting FOIA as the “Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.” Scalia, *supra* note 2, at 15.

37. Comment, *supra* note 8, at 731 (explaining a “growing undercurrent of congressional anxiety stemming from perceived agency excesses and noncompliance with the spirit of [FOIA]”); FENSTER, *supra* note 9, at 33 (“[Congress] first expanded FOIA in 1974 in response to the revelations about Nixonian secrecy that the Watergate scandal revealed.”).

38. U.S. DEP’T OF JUST., OFF. OF INFO. POL’Y, ATTORNEY GENERAL’S MEMORANDUM ON THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT, (Feb. 1975) <https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia> [<https://perma.cc/JQB4-MSSZ>].

39. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801–04, 100 Stat. 3207, 3207–48; U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MEMORANDUM ON THE 1986 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT, (Dec 1987) (“[I]n the wake of the ‘Watergate affair,’ Congress decided to alter the course of government disclosure policy through a series of ‘liberalizing’ FOIA amendments, the most significant of which restructured and considerably narrowed Exemption 7, the Act’s vital law enforcement exemption. But in its reaction to the perceived need for greater disclosure, Congress overcorrected through those FOIA amendments and seriously impaired the ability of federal law enforcement agencies to perform their crucial mission of protecting our citizenry. It is this very miscorrection in the course of our national information-disclosure policy that the Freedom of Information Reform Act of 1986 recognizes and is principally designed to set right.”).

40. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, (1996) <https://www.congress.gov/bill/104th-congress/house-bill/3802/text> [<https://perma.cc/N54B-SZWH>]; U.S. DEP’T OF JUST. OFFICE OF INFO. POL’Y, *FOIA Update: Congress Enacts FOIA Amendments* (Jan. 1, 1996) <https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments> [<https://perma.cc/3F5X-2NG8>].

41. FOIA Improvement Act of 2016, Pub. L. No. 114-185 130 Stat. 538 <https://www.congress.gov/bill/114th-congress/senate-bill/337/text> [<https://perma.cc/LQZ8-5B7L>]; U.S. DEP’T OF JUST. OFF. OF INFO. POL’Y, *OIP Summary of the FOIA Improvement Act of 2016* (Aug. 17, 2016) <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> [<https://perma.cc/LY2G-PYXS>].

42. The Office of the President, the president’s immediate personal staff, and units in the Executive Office of the President whose sole function is to advise and assist the president are all excluded from the definition of “agency.” *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). For many newly created entities created by Congress or the President, it is unclear whether they are “agencies” under the statute and thus assume FOIA obligations. FENSTER, *supra* note 9, at 88-89.

43. STAFF OF H. R. COMM. ON OVERSIGHT & GOV’T REFORM, 114TH CONG., *FOIA IS BROKEN: A REPORT* 34 (Comm. Print 2016) (“The very nature of exemptions, however, creates an operational impediment to accountability by obscuring information the public could use to assess whether the exemptions were appropriately applied.”). The 2016 FOIA amendment also requires the agency to find that releasing the requested record would cause foreseeable harm protected by the applicable exemption.

44. Examples include government benefits requests or applications for immigration. Pozen, *supra* note 1, at 1138 (“FOIA, in short, is not a satisfying solution but an ersatz band-aid for various procedural deficits generated by the modern administrative state. Where we find FOIA doing due process work, we

redact, and release the documents to the requester.⁴⁵ If the agency seeks to redact requested information, FOIA states that the agency “*shall* immediately notify the person making such request of such determination and the reasons therefor[.]”⁴⁶ When an agency denies a request in whole or in part, it must also “set forth the names and titles or positions of each person responsible for the denial,” “make a reasonable effort to estimate the volume of any [denied] matter,” and “provide any such estimate to the person making the request . . .”⁴⁷ “The agency bears the burden of establishing” the application of a claimed exemption.⁴⁸ When the requester receives an adverse determination, he has 90 days to appeal to the agency’s Office of General Counsel.⁴⁹ And if that authority upholds the redaction, or fails to respond within 20 days, the requester may seek *de novo* review from a U.S. district judge.⁵⁰

Once a requester files suit, most district courts (if not all) will require the agency to produce a “*Vaughn* index,” which stems from the D.C. Circuit’s seminal opinion in *Vaughn v. Rosen*.⁵¹ In that case, a law professor conducting research on the Civil Service Commission requested reports from the Bureau of Personnel Management.⁵² The Bureau responded in “conclusory terms” that FOIA did not warrant their release, and the law professor challenged the agency’s insufficient reasoning.⁵³ On appeal, the D.C. Circuit held that the agency must produce an “index” consisting of detailed affidavits cataloguing and justifying every redaction to “permit the court system effectively and efficiently to evaluate the factual nature of disputed information.”⁵⁴

find due process interests being served poorly. These emergent uses of the Act do not redeem the FOIA strategy, although they may point to holes in the legal fabric that deserve more meaningful mending.”); KWOKA, SAVING FOIA, *supra* note 9, at 98-100, 179 (“Rather than trying to squeeze all of the public’s needs for government information into FOIA, reform efforts should focus on requiring or incentivizing agencies to meet other information needs head-on through tailored mechanisms crafted outside of FOIA.”).

45. 5 U.S.C. § 552(a)(6)(A)(i); FENSTER, *supra* note 9, at 11 (“Divining when transparency must give way because disclosure would harm the public good is a complex task, one that leads to frustrating debates and ritualistic political and legal struggle over abstract democratic ideals and deeply held anxieties.”). Agencies also have an affirmative obligation to post frequently requested records in reading rooms, and Judge Easterbrook has noted that this requirement “indicate[s] that the primary objective [of the statute] is the elimination of ‘secret law.’” Easterbrook, *supra* note 4, at 777.

46. See 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added).

47. 5 U.S.C. § 552(a)(6)(C)(i), (F).

48. Citizens for Resp. & Ethics in Wash. v. D.O.J., 746 F.3d 1082, 1088 (D.C. Cir. 2014).

49. 5 U.S.C. § 552(a)(6)(A)(III)(aa)

50. 5 U.S.C. § 552(a)(4)(B); see Scalia *supra* note 2, at 17 (“If, however, an agency denies a freedom of information request, shazam!—the full force of the Third Branch of government is summoned to the wronged party’s assistance.”).

51. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Since 1974, this case has been cited over 2,500 times and has seemingly become *de facto* policy across the federal judiciary. “While this index is not a universal requirement in FOIA cases, it has become a widely used and effective method of placing the burden of showing why information should be exempt on the agency attempting to do so.” Wightman v. A.T.F., 755 F.2d 979, 981 n.1 (1st Cir. 1985).

52. *Vaughn*, 484 F.2d at 822.

53. *Id.* at 823.

54. John Doe Agency v. John Doe Corp., 493 U.S. 146 n.2 (citing *Vaughn*, 484 F.2d at 346); see *Vaughn index*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A comprehensive list of all documents that the government wants to shield from disclosure in Freedom of Information Act (FOIA) litigation.”).

The index requirement, the D.C. Circuit reasoned, was a simple extension of *E. P.A. v. Mink*, the Supreme Court's first opinion interpreting FOIA.⁵⁵ In *Mink*, the Supreme Court reversed a lower court's in camera inspection order and held that Congress did not authorize District Judges to conduct their own review of classified documents.⁵⁶ In interpreting Exemption 5⁵⁷ as applied to *unclassified* documents, the Court stated:

An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting the disclosure, 5 U.S.C. § 552(a)(3), and if it fails to meet its burden without in camera inspection, the District Court may order such inspection. . . . In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case.⁵⁸

Vaughn is thus "a reasoned elaboration upon the language in *Mink* calling for detailed affidavits, providing a similar but more precisely focused procedural framework within which to test the adequacy of the government's defenses."⁵⁹ This "enable[s] the trial judge to form an accurate picture of the documents in question without the need for actual access to them."⁶⁰

Vaughn highlighted several practical concerns in adjudicating whether undisclosed information qualifies for an exemption. "[The] lack of knowledge by the party seeking disclosure," for example, "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution."⁶¹ Moreover, "since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information."⁶² In crafting the *Vaughn* requirement, the D.C. Circuit "hoped to remove the plaintiff's handicap of blind reliance upon

55. *E.P.A. v. Mink*, 410 U.S. 73 (1973).

56. *Id.*

57. Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has construed this language to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

58. *Mink*, 410 U.S. at 94.

59. Comment, *supra* note 8, at 738.

60. *Id.*

61. *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977) ("Where there is such a factual dispute over the nature of the information sought in a FOIA suit, the lack of access of the party seeking disclosure undercuts the traditional adversary theory of judicial dispute resolution."); Comment, *supra* note 8, at 735.

62. *Vaughn*, 484 F.2d at 826.

generalized government defenses which may or may not fairly characterize each part of the information sought, in litigation over documents he has never seen.”⁶³ Imagine those concerns *without* judicial oversight.

II. THE CENTRAL PROBLEM

A FOIA attorney—let’s call him “Andrew”—sits down at his desk to start his day at work. He peruses the FOIA log and begins working on the oldest pending request, which seeks records on his agency’s national project. He tracks down the employees with the relevant knowledge, and they forward him the responsive records. Andrew quickly determines that he may release most of the documents because no exemptions apply, and there is no harm in their disclosure.⁶⁴ But there is one responsive email chain between lower-level employees discussing the optimal way to complete the project, and they had yet to make a final decision. Andrew understands this to be a textbook application of the deliberative process privilege under Exemption 5, and shielding such deliberations is critical to ensuring frank and effective communications between employees.⁶⁵

Andrew begins to question the extent to which he must explain his determination to withhold these communications from the requester. He asks ChatGPT to explain the FOIA statute and learns that he must affirmatively notify the requester of his “[redaction] determination” and the “reasons therefor.”⁶⁶ Given the complexity of the responsive communication, Andrew isn’t entirely sure how much is enough to satisfy this requirement. May he “black-out” the email text, slap an “Exemption 5” label on top, and say in the letter to the requester that this record implicates the deliberative process privilege? With his office’s endless FOIA requests and limited resources to answer them, that would save precious time. If all agencies used this approach, the federal government could save tens of millions of dollars. Alternatively, must Andrew, per the requester’s demand, create a *Vaughn* index explaining his redaction analysis in painstaking detail and provide sworn affidavits from the records custodians?

To gain a deeper perspective on how to satisfy this “reasons” requirement, Andrew continues researching. Unfortunately, he encounters a vacuum of guidance from the Department of Justice and academia on this specific question.⁶⁷ But

63. Comment, *supra* note 8, at 733.

64. FOIA permits agencies to withhold requested records if (1) the information qualifies for a FOIA exemption; and (2) “the agency reasonably foresees that” disclosing the withheld information “would harm an interest protected by an exemption . . .” 5 U.S.C. § 552(a)(8)(A).

65. *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.”).

66. See 5 U.S.C. § 552(a)(6)(A)(i).

67. To no avail, I submitted the following FOIA request to three agencies: “I’m preparing a law review article on the extent to which an agency must explain its FOIA redactions at the administrative level before judicial intervention. This objective in mind, I’d like to submit a FOIA request for any and all documents—including policy FOIA procedures, policies, and emails—that implicate the extent to which your FOIA personnel must explain its FOIA redactions to requesters. I’d also like to request any

he does find an obscure line of court cases and articles explaining the *Vaughn* index requirement. Andrew is delighted to find that the DOJ⁶⁸ and all federal courts agree that agencies need not produce a *Vaughn* index for their requesters prior to litigation.⁶⁹ After all, the index requirement stems from practical judicial necessity to evaluate whether disputed factual material qualifies for a FOIA exemption before reaching in camera review. The same conclusion does not necessarily control the way in which an agency should interpret its statutory obligation to provide “reasons” for its redactions at the administrative level. “So far, so good,” Andrew thinks. “Because courts cannot force me to provide an index, any level of detail should satisfy this statutory obligation.”

This misguided inference drawn from the above-mentioned sources is widespread and leads many FOIA officers to resort to boilerplate and conclusory reasoning on a routine basis. By the end of the process, most requesters are thus unaware of the government’s reasons for redacting or withholding information, despite the government’s affirmative obligation to the contrary. Without such reasons, requesters have no way of evaluating their chances of prevailing in federal

and all documents dealing with the question of whether your agency routinely prepares a ‘*Vaughn* Index’ at the administrative level before litigation. This search should include any letters sent to FOIA requesters explaining whether your agency prepares a *Vaughn* index at the administrative level. This search should also include all documents with the key words, ‘*Vaughn* index’ and ‘*Vaughn v. Rosen*.’” The Department of Veterans Affairs responded that this was a request for publicly available records, and thus it was not required to process my request. The EPA sent me two documents (one named “EPA [FOIA] Procedures” issued by the EPA Acting Chief FOIA Officer and another named “EPA [FOIA] Toolkit” updated in March of 2022) that do not address my underlying question. U.S. Citizenship and Immigration Services responded that my FOIA request did not implicate any responsive records. *See* BARON, *supra* note 17, at 136 (“One major fault of FOIA was that the legislation did not establish a uniform procedure for all agencies to follow regarding requests, appeals, and lawsuits. The lack of a clear and consistent process allowed each agency and department to create its own unique procedures and processes, resulting in a very uneven practice subject to variation and driven by internal bureaucratic politics.”).

68. U.S. DEP’T OF JUST. OFF. OF INFO. POL’Y, *FOIA Update: FOIA Counselor: Questions & Answers* (Jan. 1, 1986) (“The requirement of *Vaughn v. Rosen* . . . that an agency should ordinarily provide an itemized index correlating each withheld document (or portion) with a specific exemption justification was fashioned only in connection with the adjudication of a defendant agency’s motion for summary judgment in litigation.”).

69. *Sakamoto v. E.P.A.*, 443 F. Supp. 2d 1182, 1189 (N.D. Cal. 2006) (granting summary judgment because “[i]nitial agency responses to FOIA requests are not required to contain a *Vaughn* index”); *Schwarz v. Dep’t of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000); *Jud. Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (finding that agencies need not provide *Vaughn* index until ordered by court after plaintiff has exhausted administrative remedies); *Schaake v. I.R.S.*, No. 91-958, 1992 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1992) (ruling that the court “lacks jurisdiction” to require an agency to provide a *Vaughn* Index at either initial request or administrative appeal stages); *Mayock v. I.N.S.*, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff’s request for *Vaughn* index at administrative level); *Safecard Servs., Inc. v. S.E.C.*, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) (“Plaintiff has cited no authority for the proposition that a FOIA requester is entitled to a *Vaughn* index before it exhausts an agency’s appeal procedures.”); *Zemansky v. E.P.A.*, 767 F.2d 569, 574 (9th Cir. 1985); *Crooker v. C.I.A.*, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-4 (D.D.C. Sept. 28, 1984) (“There is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation.”).

court. Because so few requesters appeal adverse determinations to federal court, an arbitrary and mysterious denial marks the end of the road for most FOIA requests. Agencies—Andrew, at the lowest level—internalize the missing enforcement mechanism and loosen their overall adherence to FOIA’s mandate. Why put so much costly effort into implementing FOIA on the front end when they can hide behind boilerplate reasoning and wait for the few brave FOIA requesters to file lawsuits? This whack-a-mole approach allows Andrew to divert his limited resources to more important purposes.

The inadequacy of redaction explanations enables agency officials to mask their ineffective performance, which grinds the machinery to a halt and leaves FOIA as a permanent backburner portfolio. As suspicion attaches to mystery, requesters are left to wonder just what the government is failing to disclose. The next Section further explores the statutory framework and principles of statutory interpretation that undergird agencies’ obligations.

III. THE STANDARD FOR MEASURING AN AGENCY’S REDACTION EXPLANATION

If an agency seeks to withhold requested information, FOIA affirmatively requires that the agency “shall immediately notify the person making such request of such [redaction] determination and the *reasons therefor*”⁷⁰ Because the adverb, “therefor,” refers to the underlying withholding determination, a simpler way to phrase this obligation is that an agency must provide its “reasons” for redacting or withholding information. The ordinary public meaning of the word “reasons” in this context outlines the contours of the obligation to explain redactions because it defines the substance of what the agency must, in fact, provide the requester.⁷¹ If the word as used in the statute is clear, then that meaning ends the inquiry at hand, but if it is ambiguous, it becomes necessary to consider the broader statutory regime and relevant interpretative canons.⁷² In the context at hand, both steps support the same conclusion: When explaining redactions to requesters, agencies must provide nonconclusory reasons, sufficient to allow a reasonable requester to analyze the underlying claim of privilege.

A. Textual Interpretation

Dictionaries offer a good starting point.⁷³ Before jumping into the range of applicable definitions, however, it is worth excluding two recurring categories at

70. See 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added).

71. *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (outlining original public meaning standard).

72. See *Sackett v. E.P.A.*, 598 U.S. 651, 674-75 (2023). But see Dave Owen, *Sackett v. Environmental Protection Agency and the Rules of Statutory Misinterpretation*, 48 HARV. ENV’T. L. REV. 333 (2024) (critiquing the Court’s interpretive methodology in *Sackett*). Those canons range from “linguistic” (rules of grammar that govern ordinary language usage, such as the rule of the last antecedent) to “substantive” (consideration of normative justifications, such as federalism), or a combination of both. *West Virginia v. E.P.A.*, 597 U.S. 697, 721 (2022).

73. Linguistic drift is a common problem in interpreting older texts. A prominent example of this phenomenon is the “domestic violence” clause in the Constitution. In 1789 this clause referred to violent

the outset. First, the FOIA statute employs the word “reasons” as a plural noun, which excludes definitions of the verb “to reason.” Second, the statute requires the provision of “reasons” for a particular decision, which also excludes the category of definitions referring to “intellectual power,” “sanity,” and “powers of mind.”⁷⁴ The remaining definitions may generally be grouped into two categories: one that implies the sufficiency of the underlying reasons, and one that does not.

The first category of applicable definitions implies the sufficiency of the reasons justifying a conclusion, including the following examples:

(1) “A *sufficient* ground of explanation or of logical defense; *esp*: a general principle, law or warranted presumption that supports a conclusion, explains a fact, or validates a course of conduct”⁷⁵

(2) “[T]he thing that makes some fact *intelligible*.”⁷⁶

(3) “[A] consideration, motive, or judgment including or confirming a belief, influencing the will, or leading to an action or course of action: a *rational* ground or motive”⁷⁷

(4) “[S]ufficient cause, as produced by a situation that makes an act, feeling, etc., obviously proper or appropriate”⁷⁸

Applied to the context at hand, it becomes clear that agencies must notify requesters of a sufficient and intelligible ground of explanation for their redaction determination. And the explanation would have to be sufficient *as deemed by a reasonable requester* because agency officials prepare those justifications for requesters being denied information to review the underlying claim of privilege; and only requesters have standing to appeal redaction determinations to federal

unrest and uprisings but today almost exclusively refers to violence within the family. Thomas Lee & James Phillips, *Data-Driven Originalism*, 167 U. PENN. L. REV. 261, 296 (2019). In the context at hand, the word “reasons” is a common term—i.e., not a term of art—that likely has not changed meaning since Congress added it in 1974 and therefore is not likely subject to the same degree of linguistic drift. The definitions that follow are nevertheless mostly pulled from dictionaries published within a few years of FOIA’s passage in 1974.

74. The 1971 Oxford English Dictionary offers one definition of “reason” as “[t]hat intellectual power or faculty (usually regarded as characteristic of mankind, but sometimes also attributed in a certain degree to the lower animals) which is ordinarily employed in adopting thought or action to some end; the guiding principle of the human mind in the process of thinking.” THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2431 (Oxford Univ. Press 1971). The Merriam Webster Dictionary from 1977 also defines “reason” as “the power to think: Intellect,” “a sane or sound mind,” and “due exercise of the faculty of logical thought.” THE MERRIAM WEBSTER DICTIONARY FOR LARGE PRINT USERS 757 (Merriam G. & C. 1977).

75. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1891 (G. & C. Merriam Co. 1976) (emphasis added).

76. *Id.* (emphasis added).

77. *Id.* (emphasis added).

78. *Reason*, DICTIONARY.COM, <https://www.dictionary.com/browse/reason> [<https://perma.cc/NXT6-3VAZ>] (emphasis added).

court. Conclusory and boilerplate reasons are necessarily insufficient because they contain inadequate information about the underlying determination, and requesters would have no way of evaluating whether to appeal to federal court. Instead, an agency must provide a justification that allows requesters to understand its thought process for withholding information.

One may generally group the remaining definitions into a category that omits reference to the underlying justification being sufficient, rational, or intelligible. Some of those definitions include the following:

- (1) “[A] statement offered in explanation or justification”⁷⁹
- (2) “GROUND, CAUSE”⁸⁰
- (3) “An expression or statement offered as an explanation of a belief or assertion or as a justification of an act or procedure”⁸¹
- (4) “A statement of some fact (real or alleged) employed as an argument to justify or condemn some act, prove or disprove some assertion, idea, or belief.”⁸²

Put this way, the unqualified term, “reasons,” encompasses *all* reasons—not just the sufficient, rational, or intelligible ones. Congress could have further specified the level of detail to which agencies must explain their reasons, and it chose not to do so. Congress has, in fact, required the provision of “*specific* reasons therefor” on at least seven occasions.⁸³ Because Congress chose broader language, the theory is that insufficient (including boilerplate and conclusory) reasoning satisfies this requirement.

Because of the limitations of dictionaries, it is always worth considering the customary usage of language.⁸⁴ “Corpus linguistics” allows researchers to further uncover the ordinary meaning of statutory text by key word searching naturally occurring language databases.⁸⁵ Seeing how the relevant linguistic community employs words or phrases in context—court opinions, magazines, statutes, and so

79. THE MERRIAM-WEBSTER DICTIONARY FOR LARGE PRINT USERS 757 (Merriam G. & C. 1977).

80. *Id.*

81. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1891 (G. & C. Merriam Co. 1976).

82. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2431 (Oxford University Press 1971).

83. See 30 U.S.C. § 1264(c) (environmental impacts of surface coal mining); 5 U.S.C. § 7513(b)(4) (explaining the decision to fire a federal employee); 22 U.S.C. § 2799aa-1(a)(2) (requiring President to explain termination of assistance to foreign countries); 5 U.S.C. § 7117(c)(6) (requiring explanation in labor organization negotiations); 38 U.S.C. § 7462 (b)(3) (requiring explanation in major adverse actions in employee discipline); 5 U.S.C. § 7503(b)(4) (employee suspension); 38 U.S.C. § 714(c)(2) (employee adverse decision).

84. Stephen C. Mouritsen, *The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915 (2010).

85. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J., 788, 828 (2018). Judges Kathryn Mizelle and Trevor McFadden provide excellent models for how to employ

forth—sheds light on the meaning of those words and phrases. At this point, it is better to research the phrase “reasons therefor” as used in the FOIA statute partly because it is more specific than the more generic word “reason,” which triggers a larger pool of dissimilar analogs.

Two corpus datasets unveil a distinction between reasons rendered in the past, and the requirement to provide reasons in the future. First, the Corpus of the U.S. Code⁸⁶ (up until July 2019) revealed 319 instances in which Congress has required the provision of “reasons therefor” to explain government action—most commonly for justifying adverse employment decisions.⁸⁷ U.S. Supreme Court opinions, on the other hand, have used this phrase 135 times between 1826 and 2011 to refer to reasons previously provided by litigants, lower courts, and other justices.⁸⁸ This distinction matters because a proscriptive requirement implies that reasons proffered in the future should be adequate to satisfy the purpose for which they are being provided.

Reasons provided in the past, however, are not all sufficient—the basic impetus for an appellate process. Moreover, it is hard to imagine that Congress would ratify this language over 300 times if the executive branch could so easily undermine it by providing “insufficient” reasons.⁸⁹ Because the term at hand appears in a proscriptive statutory requirement, and not a Supreme Court opinion, Congress intended those reasons to be sufficient.

B. Textual Construction

As the Supreme Court recently stated in *Sackett v. E.P.A.*, “construing statutory language is not merely an exercise in ascertaining ‘the outer limits of a word’s definitional possibilities’”⁹⁰ In that case, the Court found that “only one . . .

corpus linguistics in judicial opinions. *See, e.g.*, *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1160 (M.D. Fl. 2022); *United States v. Seefried*, 639 F. Supp. 3d 8, 13 (D.D.C. 2022).

86. B.Y.U. L., *Law & Corpus Linguistics, Corpus of the Current U.S. Code*, <https://lcl.byu.edu/projects/corpus-of-the-current-us-code-cocusc/#:~:text=The%20US%20Code%20Corpus%20contains,Office%20of%20Law%20Revision%20Counsel> [https://perma.cc/RE4V-Q4SS]

87. *See, e.g.*, 12 U.S.C. § 5329(c)(2) (Resolution of supervisory jurisdictional disputes among member agencies); 18 U.S.C. § 925(c) (A.G. may grant exceptions to those prohibited from having firearms but must explain determination on Federal Register); Pub. L. 106–554, sec. 1(a)(5), § 125(a)(1), 114 Stat. 2763, 2763A–412 (2000).

88. *See, e.g.*, *Schindler Elevator Corp. v. United States*, 563 U.S. 401, 410–411 (2011) (discussing FOIA requirement to provide “reasons therefor”); *F.C.C. v. Nat’l Broad. Co.*, 319 U.S. 239, 243 (1943) (recounting Communications Act of 1934 § 312(b)); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (Curtis, J., dissenting) (“I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar.”); *Finley v. Bank of the U.S.*, 24 U.S. 304, 306 (1826) (“Finley filed a petition praying that the sale and decree might be set aside, alleging, among other reasons therefor, that Coleman, the prior mortgagee, had not been made a party”).

89. This is despite the fact that Congress at least eight times has required “specific reasons therefor,” reflecting that it knows how to require more specific justifications. However, just because Congress did not require reasons for withholding determinations to be “specific” does not mean “reasons” without a qualifier may be obtuse, conclusory, or insufficient.

90. *Sackett v. E.P.A.*, 598 U.S. 651, 666 (2023) (quoting *F.C.C. v. AT&T Inc.*, 562 U.S. 397, 407 (2011)); *Dole v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“The definition of words in isolation,

meanin[g] produce[d] a substantive effect that [wa]s compatible with the rest of the law”⁹¹ Furthermore, the “presumption against ineffectiveness” warrants the inference that a “textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”⁹² This presumption flows from three propositions: (1) “interpretation always depends on context”; (2) “context always includes evident purpose”; and (3) “evident purpose always includes effectiveness.”⁹³

The interpretation of “reasons” that is most “compatible with the rest of the law” and “furthers . . . [FOIA’s] purpose” is the following: when explaining redactions to requesters, agencies must provide nonconclusory reasons, sufficient to allow a reasonable requester to evaluate the underlying claim of privilege.⁹⁴ As explained more fully below, this interpretation is supported by the D.C. Circuit’s objective in *Vaughn v. Rosen*, both twin goals of government transparency (incentivizing virtuous government behavior and instilling the public’s trust in government), the context surrounding FOIA’s enactment, the presumption of openness, and the inadequacy of foreseeable counters.

1. *Vaughn*’s objective

There exists an important yet often-confused distinction between *Vaughn*’s objective (to “permit the court system effectively and efficiently to evaluate the factual nature of disputed information”⁹⁵) and the *means* proscribed (the index

however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 479 (1892) (“[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”).

91. *Sackett*, 598 U.S. at 676 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

92. ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63-65 (2012); *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979) (“[I]f the language is susceptible of two constructions, one of which will carry out and the other defeat [its] manifest object, [the statute] should receive the former construction.”). *But see* *Garland v. Cargill*, 602 U.S. 406, 427 (2024) (“The presumption against ineffectiveness cannot do the work that ATF and the dissent ask of it. A law is not useless merely because it draws a line more narrowly than one of its conceivable statutory purposes might suggest. Interpreting §5845(b) to exclude semiautomatic rifles equipped with bump stocks comes nowhere close to making it useless.”).

93. SCALIA & GARNER, *supra* note 92, at 63.

94. *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (“[T]he objective of the *Vaughn* requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within [an] agency.”); *Shermco Indus., Inc. v. Sec’y of U.S. Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978), *rev’d on other grounds*, 613 F.2d 1314 (5th Cir. 1980).

95. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, n.2 (1989); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (explaining that the objective was to “(1) assure that a party’s right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.”).

requirement) to achieve that objective. Just a few years after *Vaughn*, the D.C. Circuit importantly noted “that the *objective* of the *Vaughn* requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within [an] agency.”⁹⁶ Just because agencies need not offer a *Vaughn* index at the administrative level does not mean they should deny requesters the ability to evaluate the factual nature of the disputed information. Agencies often conflate the two as a hat trick to evade performing their statutory responsibilities.

When corresponding with agencies, FOIA requesters routinely request a *Vaughn* index outlining justifications for every redaction. While case law generally rejects the necessity of the *Vaughn* index at the agency level, such rejection tempts agency officials to think that *any* level of detail satisfies its statutory obligation to explain its redactions. In other words, looking to the above-mentioned cases, agency officials might falsely equate not having to provide an index with not having to provide any explanation of their redactions to the requesters. The FOIA lexicon—and the little existing guidance on this obscure issue—revolves around the index requirement, even though it makes much more sense to focus on the agency’s statutory obligation to provide “reasons” for its redactions.

So, what practical guidance may FOIA officers draw from the legalese recommendation to apply *Vaughn*’s objective at the administrative level? For one, this goalpost allows the ruling out of two ends of a spectrum. At one extreme, conclusory and boilerplate reasons, often accompanied by an unexplained reference to an exemption, are always impermissible because they never allow a requester to effectively analyze the agency’s redaction determination.⁹⁷ Such insufficient reasoning causes significant uncertainty as to whether the requester should appeal the redactions to federal court. At the other extreme, a *Vaughn* index may provide

96. *Mead Data Cent., Inc.*, 566 F.2d at 251 (emphasis added); *Shermco Indus., Inc.*, 452 F. Supp. at 317, n. 7 (“It would be impossible for a requesting person to effectively appeal an agency decision through the administrative process with any hope of changing the agency’s mind if the person were denied access to adequate information about the adverse decision. A person cannot effectively appeal a decision about the releasability of documents or the charging of fees if he is not informed of at least a list of the documents to which he was denied access, what fees he will be charged for releasable documents, and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.”). In that case, however, such a finding was insufficient for the D.C. Circuit to overturn a District Judge’s *de novo* determination of whether information qualified for a FOIA exemption. *Mead Data Cent., Inc.*, 566 F.2d.

97. *Batton v. Evers*, 598 F.3d 169, 179 (5th Cir. 2010) (“[W]hile we assume the IRS is telling the truth in its affidavits, its conclusory ‘say so’ does not, alone, carry its burden of establishing an exemption.”); *Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999) (courts should not accept an agency’s “conclusory and generalized assertions” when it bears the burden of establishing an exemption); *Mayock v. I.N.S.*, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (“This language seems to require more information than just the number of pages withheld and an unexplained citation to the exemptions.”), *rev’d on other grounds* 938 F.2d 1006 (9th Cir. 1991); *Nat’l Ass’n of Minority Veterans v. U.S. Dep’t of Veterans Affs.*, Civil Action 21-1298 (RC) (D.D.C. Feb. 27, 2024) (finding agency’s rationale explaining FOIA redactions to be “conclusory” and “boilerplate”); *Davin v. D.O.J.*, 60 F.3d 1043, 1051 (3d Cir. 1995) (“It is insufficient for the agency to simply cite categorical codes, and then provide a generic explanation of what the *codes* signify.”).

the most robust opportunity to review an agency's withholding analysis, but for the reasons stated above it is by no means necessary. Also, providing *too much* analysis for the denial may, in effect, compromise the underlying information and undermine the basis for the exemption.⁹⁸ Somewhere between these two extremes is the goldilocks justification that provides the requester just enough analysis to understand the underlying claim of privilege.⁹⁹

The level of specificity required will depend mostly on the amount and complexity of the withheld information.¹⁰⁰ The fewer redactions, the smaller the justification. A fully withheld or redacted document will require more explanation than just a few names blacked out on the same record, where the remaining portion of the document helps provide more context.¹⁰¹ Section 552(b) reinforces the expectation that requesters will receive as much information as possible by requiring agencies to provide "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt"¹⁰² Furthermore, explaining the redaction of names and how their release would undermine Exemption 6 generally involves far less effort than explaining how complicated commercial information submitted by a government contractor qualifies for Exemption 4. Two examples help illustrate the main point here.

Consider a hypothetical. Someone submits a FOIA request for all records Contractor Z submitted to Agency Y in pursuance of executing Project X. It would fail *Vaughn's* objective to state: "Agency Y is withholding the responsive records because they contain confidential commercial information that the agency may shield from disclosure under Exemption 4." A better approach would start by outlining the factual nature of the withheld information: "Your request implicates three documents that comprise Contractor Z's vendors and subcontractors participating in Project X." The analysis would proceed to apply Exemption 4's elements¹⁰³ to both categories of records: "The list of vendors and contractors is commercial in nature because it relates to how Contractor Z executed the

98. There are, however, certain circumstances (namely, law enforcement investigations and the national security context) in which revealing *any* level of detail will undermine the confidentiality of the underlying information.

99. For more comprehensive requests it might make more sense to postpone a thorough explanation for withholding until the administrative appellate authority, assuming it does not serve as a rubber stamp, has double checked the line attorney's work. The important thing is that the requester at the end of the process receives an effective opportunity to evaluate the agency's reasoning. *Safecard Servs. v. S.E.C.*, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, *4 (D.D.C. 1986) ("Preparation of such [a Vaughn] index prior to [an administrative] appeal may well be a costly and ultimately pointless exercise for the agency, especially given the enormity of the plaintiff's FOIA request and the possibility that the General Counsel may overrule the decision to withhold some or all of the documents sought."); Comment, *supra* note 8, at 742 ("If it is not possible for both parties to argue intelligently upon the merits of each segment of allegedly exempt material, the defense justification should not satisfy *Vaughn*.").

100. Comment, *supra* note 8, at 741.

101. *Baez v. F.B.I.*, 443 F. Supp. 2d 717, 723 (E.D. Pa. 2006).

102. 5 U.S.C. § 552(b).

103. To be withheld under Exemption 4, the information must meet three requirements: it must be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4).

project at hand¹⁰⁴; Agency Y obtained the information from Contractor Z, which qualifies as a “person” for Exemption 4 purposes¹⁰⁵; and such information is privileged and confidential because Contractor Z has never released this information to the public, and Agency Y explicitly assured the contractor it would maintain confidentiality.”¹⁰⁶ It often takes only a few sentences—not an elaborate memo—to provide requesters a full picture of why the agency is withholding information.

Next, consider the facts in *Vaughn*. The government purportedly withheld its personnel management evaluation reports because they contained “[n]ot only the names and job descriptions but actual case histories dealing with job performance” of agency personnel.¹⁰⁷ “This general claim of exemption,” however, “contained no details or references to any particular document which, if disclosed, would constitute an unwarranted invasion of privacy.”¹⁰⁸ Given the dearth of information about the content of the documents at hand, Vaughn could argue only that the record “contains no proof . . . that materials contained in the reports are of a personal nature and that disclosure would be clearly unwarranted.”¹⁰⁹ Not knowing the underlying information thus prevented Vaughn from being able to argue why it did not qualify for the exemption.

2. The Twin Aims of Transparency

Recall from above that transparency in government fulfills two main interests: incentivizing virtuous government behavior in accordance with the common good and instilling the public’s trust in government.¹¹⁰ Setting *Vaughn*’s objective as the standard for “reasons” (i.e., requiring those reasons to be sufficient) promotes both interests.

a. Incentivizing Virtuous Government Behavior

The practical concerns *Vaughn* outlined apply with greater force at the administrative level.¹¹¹ That is, “the lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system’s form of

104. Courts generally “have little difficulty in regarding information as ‘commercial or financial’ if it relates to a business or trade.” U.S. DEP’T OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 4, at 4 (2021) (collecting cases).

105. *Nadler v. F.D.I.C.*, 92 F.3d 93, 95 (2d Cir. 1996) (explaining that under the APA, the term “person” includes “an individual, partnership, corporation, association, or public or private organization other than an agency”).

106. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427 (2019).

107. Comment, *supra* note 8, at 736 (quoting Brief for Appellees at 17, *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)).

108. *Id.* at 736.

109. *Id.* at 736-737 (quoting Reply Brief for Appellant at 8, *Vaughn*, 484 F.2d at 820).

110. These two named interests are, to some extent, an oversimplification of FOIA’s primary purpose. Professor Kwoka, for example, notes that FOIA is intended to: uncover government waste and abuse, reveal influence over government decision-making, and shed light on security and policing. KWOKA, SAVING FOIA, *supra* note 9, at 37-49.

111. STAFF OF H.R. COMM. ON OVERSIGHT & GOVERNMENT REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 9 (Comm. Print 2016) (“The agency making the decision to withhold information is also the agency with the most at stake if embarrassing or controversial information is released.”).

dispute resolution.”¹¹² Not knowing the underlying information or the reasons why it qualifies for an exemption prevents the requester from analyzing whether he or she should appeal the adverse determination.¹¹³ The uncertainty of prevailing multiplied by the steep cost of litigation creates a vacuum of appeals to federal court.¹¹⁴ This lack of judicial intervention and case law eases the pressure to get the law right that normally accompanies official action. With no external authority looking over its shoulder, an agency from the highest to the lowest ranks gains false confidence and loosens its standards for processing FOIA requests and, ultimately, explaining its redactions to requesters.¹¹⁵

Allowing a requester to effectively evaluate an agency’s claim of privilege fights back against this phenomenon on several fronts. First, forcing the agency to more fully articulate its rationale would improve the accuracy of the agency’s redaction determination; agencies are less likely to flat-out lie than to omit a rationale altogether. Moreover, the heightened certainty of a requester’s prospects of prevailing in court would, in theory, increase the probability of requesters filing a lawsuit.¹¹⁶ With the heightened threat of judicial intervention, agencies will implement their FOIA duties with greater diligence.¹¹⁷ This would generate additional case law and thereby increase the certainty of answers to tougher FOIA questions—something that would benefit both agencies and requesters. Alternatively, “this greater burden

112. *Vaughn*, 484 F.2d at 824; *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977) (“When there is such a factual dispute over the nature of the information sought in a FOIA suit, the lack of access of the party seeking disclosure undercuts the traditional adversary theory of judicial dispute resolution.”); Comment, *supra* note 8, at 735.

113. Comment, *supra* note 8, at 735 (“Absent the specific justification and indexing of documents mandated by *Vaughn*, the plaintiff is in reality required to reverse roles and carry the burden of proving that the document is not exempt, contravening the very purpose and structure of the FOIA.”).

114. A Bloomberg Reporter (Zachary Mider) informed Professor Kwoka that “there are actually untested areas of FOIA . . . where people can’t afford the fight or to go to court.” KWOKA, SAVING FOIA, *supra* note 9, at 176. The resulting lack of case law prevents efficient bargaining in the shadow of the law. Robert Cooter, Stephen Mark, & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, U. CHI. J. LEGAL STUD. 225, 225 (1982) (“The courts encourage private bargaining but stand ready to step from the shadows and resolve the dispute by coercion if the parties cannot agree.”).

115. William Marshall, *The Limits on Congress’s Authority to Investigate the President*, 4 U. ILL. L. REV. 781, 799 (2004) (“Without some outside check on the Executive Branch, there would be little to discourage unscrupulous officials from acting in their own, and not in the nation’s, best interests.”); Benny L. Kass, Counsel, Memorandum for the Record: Justice Department Views on Current Draft of H.R. 5012, U.S. Dep’t of Just. 2 (Aug. 11, 1965), (on file with Nat’l Archives & Records Admin., Box M-45, Folder Alphabetical Files—1965—“Kass Memos”) (“Not only does the Executive not like the watchful eye of the court peering over its shoulder, but also the Judges are not ‘equipped to handle the informational problems which occur within the Executive.’”).

116. Gbemende E. Johnson & Tracey E. George, *To Preserve, Release, and Litigate: Dimensions of Executive Branch Transparency*, 53 PRESIDENTIAL STUD. Q. 209, 218 (2023) (“Federal courts, and particularly district courts, play a central role when the public’s or Congress’s wish to access government records is met with resistance or complete refusal by the executive branch.”).

117. David McCaw, having handled all FOIA matters for the N.Y. Times noted in a conversation with Professor Kwoka: “[T]he threat of having a federal judge actually look at the response that we get or the failure to respond is often enough to get a much better FOIA response than what we get otherwise.” KWOKA, SAVING FOIA, *supra* note 9, at 54.

may have a collateral beneficial result as an agency may be less apt to litigate exemptions of questionable validity and thus be more disposed toward disclosure.”¹¹⁸ In this sense, the agency is “more likely to settle the average cases by granting disclosure at the agency level and concentrate its efforts upon defending those cases in which an arguably meritorious exemption exists.”¹¹⁹

Second, explicitly committing to a legal justification in explaining its redactions to the requester blocks off—or at least seriously discourages—post hoc justifications.¹²⁰ By providing broad, conclusory, and boilerplate reasons up front, the agency preserves the ability to swap its reasons for its redactions later down the road. In other words, the initial inadequacy of its reasoning provides greater flexibility in litigation. Although a U.S. district judge assumes de novo review over the FOIA suit, it will appear inconsistent for the agency to offer one rationale at the administrative level and a wholly distinct rationale in federal court. As the Supreme Court routinely recognizes, “*post hoc* rationalizations of [an] agency . . . cannot serve as a sufficient predicate for agency action.”¹²¹

b. Instilling the Public’s Trust in Government

To better understand FOIA’s text, one must return to the problem it was designed to solve. With World War II fresh in its mind, the American people feared sliding into totalitarianism and communism as the country faced off with the Soviet Union in the Cold War.¹²² And such fear was further triggered by the 1972 Watergate affair as well as the government’s secretive behavior resulting from its desire to protect itself from foreign espionage.¹²³ The secrecy extended across an ever-expanding federal bureaucracy, the power of which the Supreme

118. Comment, *supra* note 8, at 743.

119. *Id.*

120. “[A]s a general rule, [the Government] must assert all exemptions at the same time, in the original district court proceedings.” *Maydak v. D.O.J.*, 218 F.3d 760, 764 (D.C. Cir. 2000). “[T]he Government generally waives any FOIA exemption it fails to raise at the initial proceedings before the district court.” *August v. F.B.I.*, 328 F.3d 697, 698 (D.C. Cir. 2003). “Courts typically find the government has forfeited the right to claim an exemption when an agency asserts the exemption for the first time only after the district court has already ruled in the other party’s favor, such as, for instance, in a motion for reconsideration.” *Cole v. Olthoff*, No. 19-cv-1070, 2021 WL 2555505, at *3 (D.D.C. June 22, 2021) (holding that Government did not waive FOIA exemption when court had not yet had a chance to rule on issue); *Nat’l Ass’n of Minority Veterans v. U.S. Dep’t of Veteran Affs.*, No. 21-1298, 2024 WL 810032, at *3 (Feb. 27, 2024) (“It is, thus, apparent that the VA’s failure to invoke the FOIA exemptions in its first motion for summary judgment was not an attempt to gain a strategic advantage. And as a result, the Court has not previously had the opportunity to rule on any of the VA’s asserted FOIA exemptions. The exemptions the VA invokes have not been forfeited.”).

121. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981); *Dep’t of Homeland Sec. v. Regents of the Univ.*, 591 U.S. 1, 23 (2020); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 50 (1983) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalization for agency action.”).

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

123. FENSTER, *supra* note 9, at 31 (“[P]ress advocates had appropriated the classical liberal ideal of press freedom from the Cold War ideological struggle against the Soviet Union to the fight against excessive state secrecy, using the First Amendment both as a negative right against state censorship and as an implied affirmative right of access to information.”).

Court formally upheld starting in the late 1930s. Against this backdrop, Congress and a reluctant President Johnson enacted FOIA with the hope of rebuilding the public's trust in a government that was both secretive in nature and massive in size.¹²⁴

Few things jeopardize this trust more than arbitrary government action.¹²⁵ Whenever the government acts or imposes a rule, especially when restricting liberty or affecting private rights, the public expects a sufficient justification. Accordingly, Section 706(2)(A) of the APA furnishes the right to challenge "final agency action" for being "arbitrary and capricious."¹²⁶ While the publicity of an agency action varies by its nature and scale, the American people expect and deserve sufficient justifications to buttress government action. We the People relinquished some of our natural liberty to create the Constitution and secure the individual rights of all Americans; unexplained government behavior causes serious doubt whether our bureaucracy is striving toward that goal.¹²⁷

How an agency explains its redactions is no exception. In designing FOIA, Congress found it necessary to require an agency to enunciate its "reasons" for redacting or withholding information.¹²⁸ Receiving conclusory, boilerplate, or insufficient reasoning frustrates requesters and makes them wonder just what their government seeks to hide, and why.¹²⁹ As Jeremy Bentham noted, "suspicion always

124. KWOKA, *SAVING FOIA*, *supra* note 9, at 22-24 (tracing FOIA's inception from the failure of the APA to the Moss Commission); FENSTER, *supra* note 9, at 33 ("[President] Johnson disliked [FOIA] so much, as it represented a significant incursion into what had long been executive and bureaucratic prerogative.").

125. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding San Francisco law regulating laundries unconstitutional because it was "purely arbitrary" and was thus beyond the state's police power) ("[Under the municipal ordinance n] o reason whatever, except the will of the supervisors, is assigned why [the laundry owners] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood.").

126. 5 U.S.C. § 706(2)(A).

127. SAIKRISHNA PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE*, 317 (2015) ("[U]nexplained actions are likely to receive less respectful consideration in the future, precisely because the basis for the actions will be opaque. Finally, the discipline resulting from a public justification may strengthen the president's ultimate constitutional conclusions. A written justification often brings to the surface areas of uncertainty and weakness, leading the writer to explore the issue further and either strengthen or abandon her conclusion. Modern presidents engage in some public constitutional reasoning in various documents; they should do more of it.").

128. 5 U.S.C. § 552(a)(6)(A)(III)(aa).

129. STAFF OF H.R., COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 114TH CONG., *FOIA IS BROKEN: A REPORT* 6 (Comm. Print 2016) ("Many groups and individuals have been denied records they have a right to access. These stories rightfully cause the public to wonder what the federal government is trying to hide. Secrecy fosters distrust."); FENSTER, *supra* note 9, at 165 ("Sometimes informed speculation will prove accurate; sometimes it will lead the public to imagine the worst, perhaps by assuming the existence of a conspiracy or official incompetence where neither existed. Even when redaction successfully censors information, and even when the majority of the public might not pay attention to the original text and the redaction, black marks cannot fully obstruct the process of producing meaning about the text it hides.").

attaches to mystery.”¹³⁰ Haphazard responses to requesters reflect a broken statutory regime and inspire despair in their observers, leaving them to question which other laws the federal bureaucracy may so easily circumvent.¹³¹ While agencies routinely drop the hammer on ordinary Americans for violating endless and always-changing regulations,¹³² the bureaucracy seemingly shrugs off the rules Congress imposes on it.¹³³ Such hypocrisy drains the public’s trust in government.

Furnishing the requester—the driver of the FOIA process—with an effective chance to review the redaction analysis helps avoid this result.¹³⁴ The requester may not like the determination, but at least he knows why the government acted the way it did. These reasons in hand, the requester may better evaluate his chances of prevailing in federal court and make a more-informed decision on whether to spend an eye-popping amount of money to hire a FOIA attorney. Although a robust *Vaughn* index would inspire the most confidence, especially in terms of authenticating the agency’s rationale, providing just a few concise and fact-specific sentences would suffice to give the requester a full picture of the government’s redactions.

While a requester’s identity is generally irrelevant to the processing of FOIA requests,¹³⁵ FOIA attorneys and paralegals are usually instructed to work with *all*

130. The modern analog is when an iPhone user learns that the person receiving a text message has “read” the text but does not respond. The mind lurches to any number of negative inferences explaining why the receiver might ignore the message.

131. Epstein, *supra* note 26, at 325 (“What does it say about our administrative law that laws on the books may mean nothing if the sovereign—here, the chief executive, i.e., President—does not implement them?”).

132. See generally NEIL GORSUCH, *OVERRULED* (2024).

133. It remains possible, however, that the apparent lack of enforcement reflects an unjust law. See THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 90 (referencing Saint Augustine by saying that the “force of a law depends on the extent of its justice”); MARCUS TULLIUS CICERO, *DE LEGIBUS* (translation by Clinton Walter Keyes, 1928) (“[I]t can be readily that those who formulated wicked and unjust statutes for nations, thereby breaking their promises and agreements, put into effect anything but ‘laws.’”).

134. PRAKASH, *supra* note 127, at 316-17 (“Another means of securing the public’s confidence involves public explanations of constitutional decisions. Though the president is under no obligation to explain his reasoning (at least outside the context of veto messages), publicly revealing the bases of constitutional decisions will tend to increase public confidence in them.”).

135. See *E.P.A. v. Mink*, 410 U.S. 73, 86 (1973) (“[FOIA] by its terms, [does not] permit inquiry into particularized needs of the individual seeking the information . . .”); U.S. DEP’T OF JUST., OFF. OF INFO. POL’Y, *FOIA UPDATE: FOIA COUNSELOR: QUESTIONS AND ANSWERS* (1985) (“[T]here simply exists no statutory or other legal prohibition against using the FOIA to supplement civil, criminal, or administrative discovery in pending cases.”); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1041 (7th Cir. 1998) (“[W]e have indicated that neither an individual’s identity nor his intended use for the documents is relevant to a FOIA request.”); ABA, *THE FEDERAL INFORMATION MANUAL* 346 (2013) (“The FOIA itself does not preclude parties in litigation with the government from submitting a request, nor does it authorize an agency to withhold records because they will be released to an adverse litigant.”); Rebecca Green, *FOIA-Flooded Elections*, 85 OHIO STATE L.J. 255, 273 (2024) (“Consistent with the presumption of openness, neither the identity of the requestor nor their motive are relevant to access decisions.”); Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119 (1984) (describing how it is neither fair nor workable to deny a litigant access to records available to anyone else; discrimination based on requester’s status is inconsistent with FOIA’s goal of providing all members with first level access to information about government

requesters with the “spirit of cooperation.”¹³⁶ This helps secure maximum transparency by ensuring prompt communication and removing barriers to accessing agency records.¹³⁷ Many requesters will despise the agency even if it prepares a treatise explaining its redactions. But cooperative, as opposed to adversarial, communication helps the requester better understand that on the other end of that email is a human being trying to do his best.¹³⁸ Similar to the role of juries and baseball umpires, FOIA stewards, despite their proclivity to err, provide the human touch that helps soothe often annoyed information seekers.

Sufficient explanations help build those relationships. Especially for repeat requesters, this spirit of cooperation benefits FOIA offices by reducing the number of appeals to higher agency authority and federal court. Astute requesters avoid antagonizing officials processing their FOIA requests because much of FOIA is discretionary. Agencies may hand over otherwise exempt information when releasing it does not implicate foreseeable harm protected by the applicable exemption.¹³⁹ Put simply, it is always best to not bite the hand that feeds you. And, if you are the one doing the feeding, it is always best to avoid being bitten.

c. The Presumption of Openness

When implementing FOIA, agencies must adhere to the “presumption of openness,” which generally means that “[r]ecords should be reviewed with an eye toward determining what can be disclosed, rather than what can be withheld.”¹⁴⁰ “In case of doubt,” the Attorney General instructed a few years ago, “openness should prevail.”¹⁴¹ Like any other legal presumption, the presumption of openness forces the agency to start with the conclusion that a requested record is subject to disclosure, and to rebut this presumption requires an affirmative demonstration of evidence. Compare this with the presumption of criminal

operations). *But see* 32 C.F.R. § 286.12 (agencies can take identity into account when processing fees); *Doyle v. D.O.J.*, 668 F.2d 1365, 165 (D.C. Cir. 1981) (fugitive from justice may not demand a federal court to service his FOIA complaint); *Shores v. FBI*, 185 F. Supp. 2d 77, 84 (D.D.C. 2002) (finding that the requester’s identity as convicted murderer and his previous retaliation against a witness impacted whether to require disclosure).

136. U.S. DEP’T OF JUST., MERRICK GARLAND, FREEDOM OF INFORMATION ACT GUIDELINES 3 (2022); BARACK OBAMA, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS & AGENCIES, FREEDOM OF INFORMATION ACT (2009) (“In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.”).

137. *See generally* GARLAND, *supra* note 136.

138. Pozen, *supra* note 1, at 1133 (“In addition to causing delays and denials, these practices socialize the journalists who use FOIA into an impersonal, adversarial, and seemingly lawless administrative culture.”).

139. Johnson & George, *supra* note 116, at 220 (“[A]lthough a record *may* be protected, an agency could still determine to release a requested document.”)

140. U.S. DEP’T OF JUST., OFF. OF INFO. POL’Y, GUIDANCE: APPLYING A PRESUMPTION OF OPENNESS AND THE FORESEEABLE HARM STANDARD (2024). The real-world impact of this presumption remains to be seen. It is unlikely, however, that the presumption’s enactment will significantly impact nearly sixty years of entrenched agency practice for processing FOIA requests.

141. GARLAND, *supra* note 136, at 1; *see also* OBAMA, *supra* note 136.

innocence; the prosecution must offer enough evidence to create a reasonable doubt to effectively rebut one's innocence.¹⁴² Consider also the presumption against retroactivity, which requires prospective statutory interpretation unless Congress clearly signified otherwise.¹⁴³

In passing the FOIA Improvement Act of 2016, Representative Mark Meadows noted on the House floor that: "The most important reform [in the Act] is the presumption of openness. Now, while some — but far from all — Federal agencies have made an effort to comply with the letter of the law, very few have complied with the spirit of the law. The presumption of openness puts that spirit into the letter of the law."¹⁴⁴ Congress thus intended to employ the presumption as yet another mechanism to force the executive branch to comply with FOIA.

To overcome the presumption of openness, the government must demonstrate enough reasoning to provide the requester a sufficient opportunity to review the agency's redaction analysis. Anything short of this standard will not adequately rebut the presumption. Put differently, the presumption's enactment in 2016 raised the bar for agencies to establish that the information qualifies for a relevant exemption. Such a change in an agency's internal thought process must be accompanied by an external manifestation of that analysis to give it effect. Importantly, this presumption post-dates all the above-cited cases rejecting the *Vaughn* index requirement at the agency level.¹⁴⁵ To date, no federal court to the author's knowledge has referenced the presumption in discussing an agency's level of obligation in explaining its redactions to requesters. This change in the law warrants reconsidering the agency's obligation to explain redactions.

iii. Timeliness

Some will bemoan the approach to explaining redactions as outlined herein as too cumbersome. The federal government in FY 2024 received 1.5 million FOIA requests, they will say, and explaining redactions in further detail will only compound existing delays.¹⁴⁶ The time spent fleshing out reasons might be better used tackling the remaining FOIA requests.¹⁴⁷ This criticism fails for at least two reasons.

142. *Coffin v. United States*, 156 U.S. 432, 433 (1895).

143. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 144 (2010).

144. 162 CONG. REC. H3717; *Jud. Watch, Inc. v. U.S. Dep't of Comm.*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (explaining presumption of openness); Green, *supra* note 135, at 272-74 (same).

145. *Supra* note 69.

146. U.S. DEP'T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2024, <https://www.justice.gov/oip/media/1398111/dl?inline> [<https://perma.cc/J85Q-DD9W>]; STAFF OF H.R., COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT (Comm. Print 2016).

147. Scalia, *supra* note 2, at 17 ("The 'free lunch' aspect of the FOIA is significant not only because it takes money from the Treasury that could be better spent elsewhere, but also because it brings into the system requests that are not really important enough to be there, crowding the genuinely desirable ones to the end of the line.").

First, the amount of time required to fulfill a statutory obligation is irrelevant to the scope and validity of that obligation. As the Fourth Circuit said in *Wellford v. Hardin*, FOIA was “not designed to increase administrative efficiency, but to guarantee the public’s right to know how the government is discharging its duty to protect the public interest.”¹⁴⁸ Therefore, it matters not that applying *Vaughn*’s objective *might* require extra work. “It’s too hard” or “it takes too long” are rarely valid excuses to comply with a legal requirement. Explaining redactions to requesters is no exception.

Second, while this approach requires more work than simply providing boilerplate or conclusory language, it should not, in fact, impose an additional burden. If an agency is actually thinking through its reasons for redacting—the lion’s share of the work—how much extra effort does it require to put those reasons in writing? Depending on the context, the agency will, of course, want to describe the factual material at a higher level of generality to avoid undermining the exempt nature of the information.¹⁴⁹ By no means, however, does that practical necessity require abandoning an adequate justification altogether. Typing out these thoughts, assuming they exist, will not overburden an agency.

Furthermore, implementing FOIA through computers, as opposed to by hand and over paper, has saved FOIA officers tremendous time over the past three decades.¹⁵⁰ All the proposed approach requires, at least in many cases, is typing a few concise sentences tying the redaction analysis to the facts at a higher level of generality. Looking to the future, artificial intelligence might help streamline this process by explaining redactions to requesters with mathematical precision.¹⁵¹

IV. ENFORCEMENT

To put things charitably, administrative agencies would likely receive the above position with varying levels of enthusiasm. Many already execute this standard by thoroughly explaining their redactions. Other agencies may think that virtually any level of detail satisfies this obligation, considering the vacuum of guidance in federal courts, academia, and the executive branch. Some will scoff at the idea of voluntarily accepting a greater responsibility to explain their withholding determinations. This Section explains how an agency’s decision to reject or poorly execute the proposed idea would embody the broader trend of executive

148. 444 F.2d 21, 24 (4th Cir. 1971).

149. FENSTER, *supra* note 9, at 9 (“Secrecy advocates . . . push in the opposite direction on the basis of the state’s unquestionable need to control information so that it can advance diplomacy and protect national security, law enforcement, personal privacy, and other widely cherished concerns.”).

150. Judicial opinions underscoring the severe burden of requiring agencies to produce a *Vaughn* index at the agency level originate from this earlier, bygone era. *See, e.g.,* Safecard Servs. v. S.E.C., No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *4 (Apr. 21, 1986) (“Preparation of such an index prior to appeal may well be a costly and ultimately pointless exercise . . .”).

151. FENSTER, *supra* note 9, at 49 (“Whereas the traditional FOI approach seeks to open a window onto state activity, allowing the public to peer in, digital transparency offers to plug the state into existing data flows and to connect government, which it reconceives largely as a data repository, into part of a seamless web of information.”).

resistance to public disclosure, and how litigation to enforce this standard would likely fail.

A. *Executive Resistance*

A major impediment to implementing this standard is the enduring trend of executive resistance to public disclosure requirements. Since the inception of these requirements, the executive branch has thrashed and squirmed, finding every way possible to avoid disclosing many of its records to the public.¹⁵² Congress, in turn, has consistently tightened the screws on these regimes in countless ways to wrestle the executive branch into submission. FOIA has thus become a political football kicked back and forth between the executive and legislative branches, as sometimes umpired by the judiciary.¹⁵³ The executive's commitment to implementing FOIA varies according to context and reflects its strategy in this broader constitutional struggle.¹⁵⁴ A brief history of the executive's resistance to FOIA underscores several reasons why the executive branch continues to come up short.¹⁵⁵

1. A Brief Historical Recap

The interbranch struggle over information traces back to the founding but took center stage following World War II.¹⁵⁶ To quash the communist infiltration from abroad and within, President Truman began drastically limiting the release of

152. As Presidents contemplating whether to ratify or veto FOIA and its amendments would eventually come to realize, calling for less government transparency is almost always a losing argument. Pozen, *supra* note 1, at 1147 (“No congressperson wishes to be seen as ‘anti-freedom of information.’”).

153. FENSTER, *supra* note 9, at 142 (“The legislative and executive branches are deeply political—not only partisan, but also zealously territorial about protecting the scope of their own authority. The president, his or her cabinet officers and those he or she assigns to gather information, and individual agencies can oversee their own performance, but for political reasons or because of limited resources or simply to further their own interests, they also have incentives either to fail to gather information, turn a blind eye toward that which they gather, or cover it from public view.”); BARON, *supra* note 17, at x (“Less defined in the Constitution is the relation between the executive and legislative branches over access to information, in particular when it comes to congressional oversight functions, or in situations where the president claims a need for secrecy out of nation security concerns. It is this institutional power ambiguity that led to the modern use of executive privilege and the subsequent congressional pushback.”); C.J. Ciaramella, *DOGE Isn't Exempt From FOIA Requests, Judge Rules*, REASON (Mar. 11, 2025, 2:15 PM), <https://reason.com/2025/03/11/doge-isnt-exempt-from-foia-requests-judge-rules/> [<https://perma.cc/9K8J-R9N4>]; U.S. DOGE Serv. v. Citizens for Responsibility & Ethics in Wash., No. 24-1246, 2025 U.S. LEXIS 2202 (June 6, 2025).

154. FENSTER, *supra* note 9, at 168 (“Presidential administrations also vary in the extent of their willingness to comply with the statute’s spirit and letter, thereby illustrating once again that the existence of disclosure laws and policies does not ensure disclosure. The legal and bureaucratic machinery of secrecy can, at least in theory, continue to hide the state’s covert actions.”); PRAKASH, *supra* note 127, at 2 (“[A] politician’s stance on presidential powers often turns on whether he or she occupies the Oval Office.”).

155. PRAKASH, *supra* note 127, at 228-37 (evaluating the presidential claim of executive privilege).

156. *Id.* at 232-35 (President Washington refused to give the House of Representatives documents conveying his instructions to implement the Jay Treaty); RON CHERNOW, *WASHINGTON: A LIFE* 668 (2010) (President Washington refused to hand over correspondence detailing the St. Clair campaign); Richard Nixon, *Statement About Executive Privilege*, THE AM. PRESIDENCY PROJECT (Mar. 12, 1973), <https://www.presidency>.

information from the executive branch.¹⁵⁷ Federal agencies accordingly resisted and largely undermined the public disclosure requirements in the 1946 Administrative Procedure Act, which Congress designed to counteract the bureaucracy's massive growth.¹⁵⁸ As Justice White later explained in *E.P.A. v. Mink*, federal agencies took advantage of the APA's vague phrases and lack of remedy to turn it into a "withholding statute [more] than a disclosure statute."¹⁵⁹ Under the banner of national security, President Eisenhower expanded Truman's practice of secrecy to "maintain the separation of power" between the executive and legislative branches.¹⁶⁰ He also centralized information control by creating the Office of Strategic Information (OSI), which institutionalized a culture of secrecy and created a "paper curtain" around the executive branch.¹⁶¹

Congress and a reluctant President Lyndon Johnson eventually enacted FOIA, in part, to rein in this massive and secretive bureaucracy.¹⁶² Congress did not win, however, with FOIA's passage in 1966.¹⁶³ Similar to how they undermined the initial APA's disclosure requirements, and how many still behave today, agencies "delayed responses to requests for documents, replied with arbitrary denials, and overclassified documents to take advantage of the 'national security exemption.'"¹⁶⁴ This led Congress a decade later to strengthen FOIA with more serious enforcement mechanisms, a measure that President Ford notably vetoed as advised by then-OLC attorney Antonin Scalia.¹⁶⁵

More recently, Dick Cheney, as a ranking House Republican in 1987 during the Iran-Contra investigation and later as vice president, advocated for expanded executive power and informational privilege, claiming a "zone of autonomy" from Congress.¹⁶⁶ The Bush administration's purported secrecy and Supreme

ucsb.edu/documents/statement-about-executive-privilege [https://perma.cc/U937-BTFF] (tracing executive privilege back to President Washington).

157. BARON, *supra* note 17, at 32-53 (explaining President Truman's shift to a Cold War paradigm); Exec. Order No. 9835, 3 C.F.R. 1935 (1947).

158. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 N.W. U. L. REV. 1582 (1996).

159. *E.P.A. v. Mink*, 410 U.S. 73, 79 (1973).

160. BARON, *supra* note 17, at 54-84 (explaining President Eisenhower's formal embrace of executive privilege).

161. *Id.* at 62-63.

162. *Id.* at 5, 109-39 (explaining the politics in FOIA's passage); FENSTER, *supra* note 9, at 33 ("It is no wonder that Johnson disliked it so much, as it represented a significant incursion into what had long been executive and bureaucratic prerogative.").

163. BARON, *supra* note 17, at 196 ("Each president from Truman through Nixon grew and expanded the use of executive privilege and government secrecy . . .").

164. Scalia, *supra* note 2, at 15.

165. Comment, *supra* note 8, at 731 (explaining a "growing undercurrent of congressional anxiety stemming from perceived agency excesses and noncompliance with the spirit of [FOIA]"); FENSTER, *supra* note 9, at 33-34 ("[Congress] first expanded FOIA in 1974 in response to the revelations about Nixonian secrecy that the Watergate scandal revealed.").

166. FENSTER, *supra* note 9, at 62 (explaining Dick Cheney's history with executive privilege); REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR: WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987); Brief for Petitioners at 34, *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004); PRAKASH, *supra* note

Court victory in asserting its informational privilege “seemed to demonstrate that the laws protecting executive privilege trump open government laws and the apparent ability of a unified White House to manage communication.”¹⁶⁷

As a presidential candidate, Barack Obama lambasted the Bush administration for this lack of transparency with the American people.¹⁶⁸ On his first day in office, President Obama published two memos making “transparency” a touchstone of his regulatory vision.¹⁶⁹ The thinking was that greater transparency would increase the public’s trust, which in turn would increase participation and collaboration.¹⁷⁰ Several high-level scandals in his administration, however, would lead some to question the sincerity of this desire.¹⁷¹ These blunders led Congress to further tighten the screws with the presumption of openness and other measures being codified in the FOIA Improvement Act of 2016, which passed unanimously in the Senate and by a voice vote in the House.¹⁷² Quite the feat in the era of congressional inaction.

While the Trump administration, to the author’s knowledge, has never published any formal FOIA guidance, Attorney General Bill Barr reflected his general sentiment with his remarks at a Federalist Society event a few years back:

The costs of this constant harassment are real. For example, we all understand that confidential communications and a private, internal deliberative process are essential for all of our branches of government to properly function. Congress and the Judiciary know this well, as both have taken great pains to shield their own internal communications from public inspection. There is no FOIA for Congress or the Courts. Yet Congress has happily created a regime that allows the public to seek whatever documents it wants from the Executive Branch at the same time that individual congressional committees spend their days trying to publicize the Executive’s internal decisional process. That process cannot function properly if it is public, nor is it productive to have our government devoting enormous resources to squabbling about what becomes public and when, rather than doing the work of the people.¹⁷³

127, at 3 (“Cheney and other supporters of a robust presidency believe that the Founders established a mighty, energetic, and almost unrestrained executive.”).

167. FENSTER, *supra* note 9, at 154-60 (As Vice President, Cheney created the National Energy Policy Development Group and infamously shielded many of its documents from disclosure).

168. BARON, *supra* note 17, at ix.

169. Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009); Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

170. BARON, *supra* note 17, at ix.

171. Alex Howard, *How Should History Measure the Obama Administration’s Record on Transparency?* SUNLIGHT FOUND. (Sept. 2, 2016), <https://sunlightfoundation.com/2016/09/02/how-should-history-measure-the-obama-administrations-record-on-transparency/> [https://perma.cc/9G87-E4KY] Ted Bridis, *Administration Sets Record for Withholding Government Files*, ASSOCIATED PRESS (Mar. 18, 2015), <https://apnews.com/united-states-government-ab029d7c625149348143a51ff61175c6> [https://perma.cc/YXN9-5MWK].

172. BARON, *supra* note 17, at ix.

173. U.S. DEP’T OF JUST., OFF. OF PUB. AFFS., ATTORNEY GENERAL WILLIAM P. BARR DELIVERS THE 19TH ANNUAL BARBARA K. OLSON MEMORIAL LECTURE AT THE FEDERALIST SOCIETY’S 2019 NATIONAL LAWYER’S CONVENTION (2019).

These comments preview just a handful of reasons explaining the executive branch's resistance to FOIA across most administrations. The following analysis teases out some of these concerns that prevent effective administration of FOIA across the executive branch.

2. Theoretical Justifications Explaining the Tension

For starters, presidential administrations' views on information disclosure influence FOIA implementation.¹⁷⁴ The Constitution vests all "executive power" in the President, who leads the executive charge in the constitutional struggle against the other branches.¹⁷⁵ Congress, especially in responding to Watergate, excessively hampered the President by diverting his precious resources away from achieving his bottom line and instead toward complying with arduous disclosure requirements.¹⁷⁶ In this light, FOIA weakens Hamilton's notion of an "energetic" executive that must act with "decision, activity, secrecy, and dispatch" to tackle the pressing issues of the day.¹⁷⁷ These thinkers recommend scrapping FOIA altogether and replacing it with alternative measures to achieve greater transparency.¹⁷⁸

According to its critics, FOIA also undermines—or at least partially replaces—the Constitution's original plan for squeezing information from the

174. FENSTER, *supra* note 9, at 172 (discussing balance between legitimate and illegitimate assertions of secrecy; "the cover up is worse than the crime").

175. PRAKASH, *supra* note 127, at 68-73 (explaining the executive vesting clause).

176. Pozen, *supra* note 1, at 1141 ("If one believes, as most constitutional scholars do, that Congress has expansive authority to demand executive branch information that may be relevant to its legislative duties, then the Vietnam-era turn to 'citizen suits' and the indirect FOIA route—at the height of the executive's credibility gap and Congress's commitment to imposing statutory constraints—may be an instance in which Congress 'underplayed its constitutional hand and undercut its own aims.'"); William Marshall, *The Limits on Congress's Authority to Investigate the President*, 4 U. ILL. L. REV. 781, 782 (2004) ("Theodore Olson (the former Solicitor General in the Bush Justice Department), in turn, has argued that oversight has been used improperly by Congress to influence decision making of executive branch officials in a way that undercuts the President's power to assure that laws are faithfully executed.") (citing Federalist Soc'y Symp., *Reforming Government Through Oversight: A Good or Bad Idea?*, 13 J.L. & POL. 557, 565 (1997)).

177. THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); U.S. DEP'T OF JUST., OFF. OF PUB. AFFS., ATTORNEY GENERAL WILLIAM P. BARR DELIVERS THE 19TH ANNUAL BARBARA K. OLSON MEMORIAL LECTURE AT THE FEDERALIST SOCIETY'S 2019 NATIONAL LAWYER'S CONVENTION (2019); Scalia, *supra* note 2, at 19 ("It is possible to save the desirable features of FOIA—and even to give it teeth it did not have before 1974—without going to absurd extremes."); Pozen, *supra* note 1, at 1100 ("Those agencies that do have large FOIA practices can expect to be diverted from their mission by tens of thousands of requests each year, along with a steady stream of lawsuits filed by ideologically hostile parties, charges of lackluster implementation, and episodic news stories that draw on the agencies' FOIA disclosures to spotlight alleged incompetence and venality.").

178. Professor Pozen suggests four different regulatory models: affirmative disclosure, conditioning legal effect on prior publication of documents, whistleblowing and leaking, and congressional monitoring. Pozen, *supra* note 1, at 1107-11 (2017); FENSTER, *supra* note 9, at 196 (outlining advisory investigative commission as transparency-enforcing institution; inspectors general; these groups have relative independence from the entity they are reviewing, which can give their transparency efforts more credibility); KWOKA, SAVING FOIA *supra* note 9, at 181-225 (evaluating the promise of affirmative disclosure and agency adjudications).

executive.¹⁷⁹ Those methods include congressional oversight hearings and funding decisions, judicial review of executive action, the State of the Union address, and subpoenas for high-level executive officials.¹⁸⁰ As Attorney General Barr suggests above, FOIA is generally unfair because it imposes arduous requirements on the executive but not the judiciary or Congress.¹⁸¹ Others might respond by arguing that Congress's primacy in defining the manner by which the executive implements the law likely warrants the conclusion that FOIA might reflect bad policy, but is probably constitutional.¹⁸² Recognizing the political cost of explicitly rejecting FOIA, the executive channels its frustration through poor execution and implementation.¹⁸³

The likelihood of FOIA decision makers tapping into this mentality depends on their proximity to the President. The closer an official is to the President—namely, cabinet officials and political appointees—the higher the likelihood that the official will see him or herself playing a greater role in this constitutional royale. This often leads those officials to lean into ambiguity and grey areas to serve presidential priorities. Career officials and those lower in the chain of command—the vanguard of attorneys and paralegals in the FOIA trenches—will not view their responsibilities through the same lens. Instead, they will likely see themselves as just implementing the law in a much less romantic fashion.

One should not expect most line-level employees to fashion their FOIA compliance on the larger political struggle at hand, but the top-level mentality will have some impact. Attorneys General, for example, often publish FOIA guidelines for all

179. FENSTER, *supra* note 9, at 61 (“At most, the constitutional framework strikes a balance between democratic debate about the state’s performance and goals on the one hand and a functional government that could best preserve the nation’s security and further its interests abroad on the other.”).

180. PRAKASH, *supra* note 127, at 243 (describing how George Washington “repeatedly spoke of the duty to share information with Congress”).

181. FENSTER, *supra* note 9, at 86-87 (explaining FOIA’s interbranch dynamics). Early commentators like William Blackstone noted that “from the nature of the executive office it possesses more immediately the sources, and means of information than the other departments of government.” 1 WILLIAM BLACKSTONE, COMMENTARIES 344 (St. George Tucker ed., 1803); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 412-13 (1st ed., Cambridge: Brown, Shattuck & Co., 1833) (noting that “[f]rom the nature and duties of the executive department, he must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to congress”).

182. PRAKASH, *supra* note 127, at 174 (“[T]he power to create offices encompasses ancillary authorities. Congress may specify an office’s authority and duties.”). It’s interesting to consider the extent to which the Supreme Court’s recent opinion in *Trump v. United States* would impact a constitutional challenge against FOIA. 603 U.S. 593 (2024). In granting the President immunity for official acts, the Court reasoned that the threat of criminal prosecution would excessively hamper the “energetic” executive Hamilton envisioned in Federalist 70. *Id.* FOIA hampers the executive branch more broadly but likely not the way in which the President exercises command and control over the executive. To wit, FOIA does not apply to the President nor the President’s immediate personal staff and the units within the Executive Office of the President.

183. Scalia, *supra* note 2 (“The executive branch generally limits its criticism to relatively narrow or technical aspects [of FOIA]—lest it seem to be committing the governmental equivalent of ‘taking the Fifth.’”).

federal agencies,¹⁸⁴ which might reflect the President's appetite for transparency. Given the sheer size of the bureaucracy and separation between the A.G. and the FOIA frontlines,¹⁸⁵ the reality is that the bulk of FOIA attorneys and paralegals are not aware of those guidelines and will not read them. If they have, there are few enforcement mechanisms to ensure their FOIA practices match those guidelines. A seasoned FOIA paralegal having operated her agency's disclosure practice for decades is not likely to change course because someone in Washington, D.C. published a memo.

Compliance thus varies agency to agency.¹⁸⁶ "Although the White House issues occasional implementation guidance and may consult with agencies on requests involving 'White House equities,'" Professor Pozen has observed, "the overall degree of FOIA presidentialization is low."¹⁸⁷ The lack of top-level command and control thus grants much discretion to individual agencies to implement FOIA. Many different factors will affect the way in which an agency exercises that discretion. There exists, for example, a major distinction between agency missions on domestic policy and national security. Agencies such as the FBI and the CIA handling more existential, national security policies will be much more likely to lean on executive privilege to withhold information. Agencies working on more domestic matters, in theory, will recognize the less sensitive nature of the subject and more willingly comply with FOIA's broad mandate.

Furthermore, Congress and the President evaluate an agency mostly by its ability to execute its bottom line—not to comply with public disclosure requirements. From an agency's perspective, information requests thus serve only to distract from an agency's overarching mission, leading executive officials to de-prioritize FOIA accordingly.¹⁸⁸ Current arrangements do not incentivize agencies to effectively

184. U.S. DEP'T OF JUST., OFF. OF PUB. AFFS., ATTORNEY GENERAL ISSUES NEW FOIA GUIDELINES TO FAVOR DISCLOSURE AND TRANSPARENCY (Mar. 19, 2009); U.S. DEP'T OF JUST., OFF. OF PUB. AFFS., ATTORNEY GENERAL MERRICK B. GARLAND ISSUES NEW FOIA GUIDELINES TO FAVOR DISCLOSURE AND TRANSPARENCY (Mar. 15, 2022).

185. FENSTER, *supra* note 9, at 81 ("The contemporary state's size and complexity resist the kind of information controls that transparency and secrecy require as administrative ideals."); *id.* at 85 ("The Constitution's initial distribution of authority between the federal and state government and among the federal government's branches blocks the creation of a uniform, comprehensive approach to government information.").

186. Daniel Epstein, *supra* note 26, at 313 ("Who holds power in the administrative state determines whether an agency complies with procedures.").

187. Pozen, *supra* note 1, at 1104; *see also* PRAKASH, *supra* note 127, at 84 ("Indeed, the modern administrative state may rest (in part) on the belief that the president has no constitutional authority to direct the execution of federal law.").

188. Scalia, *supra* note 2, at 18 ("We must, alas, set some priorities—and unless the world is mad the usual Freedom of Information Act request should not be high on the list."); KWOKA, SAVING FOIA, *supra* note 9, at 180 ("The only way [FOIA] ever matters to the agencies' higher ups or political appointees is when it goes badly, i.e., creates an embarrassment. So do the program staff listen with the FOIA office has ideas for better information delivery practices? 'No, oh my god,' said [Helen] Foster, without missing a beat.").

implement FOIA, and in fact might discourage agencies—and agency officials seeking promotions¹⁸⁹—from allocating scarce resources toward implementing FOIA.¹⁹⁰ When the only consequence of poor execution is frustrated requesters, FOIA will naturally fall to the wayside, and agency officials will execute it to the extent that they have the time, resources, and appetite.¹⁹¹ Against this backdrop, subpar reasoning in explaining redactions becomes a logical extension of the executive branch's broader frustration with FOIA.

B. Judicial Resistance

A few decades ago, then-Professor Scalia noted: “If . . . an agency denies a freedom of information request, shazam!—the full force of the Third Branch of government is summoned to the wronged party’s assistance.”¹⁹² But may a FOIA requester harness the same judicial force to order an agency to adhere to FOIA’s affirmative obligation to explain redactions at the administrative level? There exist two potential avenues for judicial enforcement, including the FOIA remedial provision (de novo review in federal court) and an APA arbitrary and capricious challenge, but those seem likely to fail.¹⁹³

First, one could sue under the FOIA remedial provision, which grants federal courts “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”¹⁹⁴ For the reasons stated in Section III above, a requester could argue

189. Easterbrook, *supra* note 4, at 778 (“Monitoring or dedicated performance of duties also could be spurred by the employees’ desire to advance in rank and salary.”).

190. KWOKA, SAVING FOIA, *supra* note 9, at 179 (“FOIA budgets compete with programmatic budgets within their agencies, and FOIA is typically not seen as a crucial part of the agency’s overall mission.”).

191. PRAKASH, *supra* note 127, at 132 (“This seemingly less than strictly faithful execution of treaties can be justified in much the same way that less than strict enforcement of the laws often can be justified as a sound exercise of prosecutorial discretion and resource allocation.”).

192. Scalia, *supra* note 2, at 15. Perhaps because the data was unavailable at the time, then-Professor Scalia does not acknowledge anywhere in his article that requesters appeal far less than 1 percent of FOIA redactions to federal court. His memorable quote thus latches onto a rare circumstance to prove the severity of the remedy Congress included in the FOIA statute.

193. It is also possible that FOIA requesters, especially those asserting injury for inadequate reasoning at the administrative level, may lack Article III standing. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 441-42 (2021) (suggesting that an “informational injury” as outlined in *F.E.C. v. Akins*, 524 U.S. 11 (1998) and *Pub. Citizen v. D.O.J.*, 491 U.S. 440 (1989) may still satisfy the injury in fact requirement); *Consumers Rsch. v. Consumer Prod. Safety Comm’n*, 91 F.4th 342, 349 (5th Cir. 2024) (finding that an organization’s concrete interest in information sought pursuant to FOIA, in combination with Consumer Product Safety Commission’s alleged violation of separation of powers doctrine, satisfied injury-in-fact element of standing); Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 271 (2021) (“But after *TransUnion*, it is unclear whether suits to enforce the Freedom of Information Act will still be allowed. Because there was neither a common law right to access documents nor a tradition of such a right before the statute, it is questionable whether suits to enforce it are allowed under Justice Kavanaugh’s approach.”).

194. The full provision reads: “On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In

that an agency systematically withholds agency records, in part, by not offering sufficient “reasons” for redactions as required under Section 552(a)(6)(A)(i). The court’s equitable power to “enjoin” this deficiency, the theory goes, includes the ability to require the agency to adhere to its statutory obligation to explain redactions at the administrative level.¹⁹⁵ This argument, however, likely fails for several reasons.

As a threshold matter, there exists little to no incentive to challenge an agency’s procedures that lead to such inadequate reasoning.¹⁹⁶ U.S. district judges review redaction determinations *de novo* and thus do not confine their analysis to the agency’s reasoning at the administrative level.¹⁹⁷ For that reason, why should requesters challenge the administrative FOIA procedures when the district judge will require the agency to produce a *Vaughn* index and thereafter decide whether the proposed redactions qualify for the relevant exemption(s)? Most one-off FOIA requesters will not care as much about the arbitrary denial at the agency level, so long as the district judge orders the production of the redacted material. Repeat requesters (trade groups, for example), on the other hand, will have a stronger need for more analysis because they submit requests on a routine basis and would prefer to avoid costly and uncertain litigation.

Moreover, a court order to produce a *Vaughn* index and subsequent *de novo* review suffice to remediate a plaintiff’s injury of having received inadequate information.¹⁹⁸ Ordering the agency to generate procedures requiring FOIA officers

such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B).

195. *Citizens for Resp. and Ethics in Wash. v. D.O.J.*, 846 F.3d 1235, 1241 (D.C. Cir. 2017) (“We start with the proposition that FOIA section 552(a)(4)(B) vests courts with broad equitable authority.”); *id.* at 1242 (“This circuit’s case law reflects the wide latitude courts possess to fashion remedies under FOIA, including the power to issue prospective injunctive relief.”); *Aeronautical Sales v. Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (FOIA plaintiff may challenge an agency’s “policy or practice” where it “will impair the party’s lawful access to information in the future.”).

196. “The government,” on the other hand, “has a substantial stake in the value of FOIA rules as precedents. Most plaintiffs have very little interest in the precedential value of the litigation. The government therefore should invest more in litigation than do plaintiffs, in order to influence the development of the rules. But the government’s interest is in obtaining rules that minimize the sum of the administrative and information-gathering costs, not in rules that maximize the social value of information.” Easterbrook, *supra* note 4, at 798.

197. *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (“In a FOIA action the district court is not limited to review of the quality of agency decision-making.”).

198. Along the same lines, a D.C. District Judge in 2016 rejected a similar argument in the national security context:

Although the plaintiff may be correct that the administrative process would be more meaningful if agencies were required to identify withheld documents at the administrative stage, those arguments are better directed at the political branches. The Judiciary’s powers are limited to saying what the law is, and it would be inappropriate for the Court to add a substantial procedural requirement to the FOIA when there is no indication that Congress intended such a requirement to exist. This

to better explain their redactions to all requesters likely surpasses the court's jurisdiction to "enjoin the agency from withholding agency records."¹⁹⁹ And even if it could order these measures, it is hard to see how federal courts could enforce them in practice.²⁰⁰ Further, such an approach would map onto the D.C. Circuit's logic in *Citizens for Responsibility and Ethics in Washington*, which held that the FOIA remedial provision did not allow courts to order agencies to post frequently requested materials in a "reading room."²⁰¹ Such an injunction would "reach beyond section 552(a)(4)(B)'s focus on 'relieving the injury suffered by the individual complainant' to remedy an injury suffered by the 'general public.'"²⁰² Relying on these cases, a district judge would likely decline the invitation to adhere to the dicta in *Mead* by extending *Vaughn*'s objective to the agency level.²⁰³

In addition to a FOIA jurisdictional claim, a FOIA requester could also challenge an agency's "final agency action" (either the agency's redaction determination or FOIA procedures) for being arbitrary and capricious.²⁰⁴ Every federal court to have heard such an argument, however, has declined to allow a requester

result may or may not 'rob the requester of his ability to intelligently appeal any decisions at the administrative level.' . . . but Congress elected not to grant requesters that ability. Instead, the FOIA provides requesters with the opportunity for *de novo* judicial review of all withholding decisions—an ample and powerful procedural mechanism See 5 U.S.C. Section 552(a)(4)(B).

Nat'l Sec. Couns. v. C.I.A., 898 F. Supp. 2d 233, 287 (D.D.C. 2012).

199. *Schaake v. I.R.S.*, No. 91-958, 1992 U.S. Dist. LEXIS 9418, at *9-10 (S.D. Ill. June 3, 1992) (ruling that the court "lacks jurisdiction to require agency to provide Vaughn Index at either initial request or administrative appeal stages"); *Safecard Servs. v. S.E.C.*, No. 84-3073, 1986 U.S. Dist. LEXIS 26467, at *5 (D.D.C. Apr. 21, 1986) ("Plaintiff has cited no authority for the proposition that a FOIA requester is entitled to a Vaughn index before it exhausts an agency's appeal procedures.").

200. Asking how to frame the appropriate relief to force an agency to comply with a statutory deadline, Judge Chutkan recently noted that any draft order would read awkwardly: "Should I say: 'Act in accordance with the statute?'" Transcript of Oral Argument, *Signal Peak Energy, LLC v. Haaland*, No. 24-366, 2024 WL 3887386 (D.D.C. 2024). [Can't find source for quote]

201. *Citizens for Resp. and Ethics in Wash. v. D.O.J.*, 846 F.3d 1235 (D.C. Cir. 2017). *But see* *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858 (2019) (taking a broader view of this language, finding that this equitable power allows federal courts to in fact order the creation of a reading room); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[The] government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. . ."). Reflecting on this circuit split, Professor Kwoka notes "[t]hat even this basic question has not been answered definitively – whether FOIA provides a right to sue for affirmative disclosure violations – itself speaks volumes about the lack of [FOIA] enforcement." KWOKA, *SAVING FOIA*, *supra* note 9 at 183.

202. *Citizens for Resp.*, 846 F.3d at 143.

203. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[T]he objective of the *Vaughn* requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within [an] agency.").

204. *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("The APA, by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' Section 704, and applies universally 'except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,' Section 701(a). Nothing in the ESA's citizen-suit provision expressly precludes review under the APA, nor do we detect anything in the statutory scheme suggesting a purpose to do so.").

to use the broader APA remedial provisions to challenge a FOIA determination.²⁰⁵ The District Court in *Baez v. F.B.I.*, for example, found that Section 706(2)(A) provides only a “default standard of review” of agency action; FOIA, on the other hand, requires de novo review, which “supplants review under Section 706(2)(A).”²⁰⁶ The D.C. Circuit reached the same result over twenty years ago.²⁰⁷ Therefore, an arbitrary and capricious challenge would likely fail.

While de novo judicial review may vindicate the right to agency records, judicial involvement likely will not and cannot spur the agency to effectively explain its redactions at the administrative level. One might go as far as to say that a federal court might lack jurisdiction even if a federal agency proscribed procedures disavowing the need to explain redactions at all. Why spend the time and money to explain redactions on the front end when the agency can wait until the handful of requesters file a lawsuit seeking withheld information? Internalizing the lack of an enforcement mechanism, agencies naturally lower the quality of their redaction explanations at the administrative level, resort to conclusory and boilerplate language, and loosen their adherence to FOIA’s overall mandate.

The upshot is that virtually all redaction determinations go unchecked, giving requesters little to no idea what the government is hiding. Some may celebrate this lack of judicial involvement. FOIA offers only a “low value right,”²⁰⁸ and having federal judges resolve such “petty” lawsuits is a monumental waste of resources.²⁰⁹ If a requester does not care enough about the underlying information to lawyer up and sue the agency, that’s a good indicator of something that does not belong in federal court.²¹⁰

CONCLUSION

When explaining redactions to requesters, agencies should provide nonconclusory reasons sufficient to allow a reasonable requester to evaluate the underlying privilege claim. This reading inheres in the definition of “reason” as used in FOIA and as reflected by Congress having used the phrase “reasons therefor” over 300 times requiring the executive branch to justify its actions. Such an interpretation effectuates the twin aims of transparency as well as the presumption of

205. *Citizens for Resp.*, 846 F.3d at 1245-46 (“Thus, despite some mismatch between the relief sought and the relief available, FOIA offers an ‘adequate remedy’ within the meaning of section 704 such that CREW’s APA claim is barred.”); *Al-Fayed v. C.I.A.*, 254 F.3d 300, 304 (D.C. Cir. 2001) (“FOIA sets forth its own standard of judicial review, rendering the APA standard inapposite.”). *Baez v. F.B.I.*, 443 F. Supp. 2d 717 (E.D. Pa. 2006); *Brestle v. Lappin*, 20 F. Supp. 3d 65 (D.D.C. 2013).

206. *Baez*, 443 F. Supp. 2d at 728.

207. *Al-Fayed v. C.I.A.*, 254 F.3d 300, 304 (D.C. Cir. 2001) (“FOIA sets forth its own standard of judicial review, rendering the APA standard inapposite.”).

208. Epstein, *supra* note 26, at 345.

209. *Savage v. C.I.A.*, 826 F.2d 561 (7th Cir. 1987) (judicial consideration of “petty” FOIA request is a monumental waste of judicial resources).

210. Epstein, *supra* note 26, at 342 (“The empirical evidence suggests that agencies will only comply with internal administrative rules if interested parties petition for appropriate remedies, which should reorient how we think about ‘power’ in the administrative state.”).

openness. Far from an end-all solution, better redaction explanations would ensure greater government transparency and help thwart widespread noncompliance. Congress could implement several solutions to reverse this trend and buck the dominant notion that FOIA is a “machine built to fail.”²¹¹

Congress could, for example, throw more money at the problem. In doing so, Congress should limit those appropriations to *only* implementing FOIA to prevent agency decision makers from reshuffling those funds to other purposes. Similarly, developing a dedicated corps that focuses exclusively on FOIA could help remove this portfolio from the permanent backburner. Artificial intelligence will certainly help streamline this portfolio by enabling quicker data collection, classifying exempt from nonexempt information, and generating agency correspondence with requesters. At some point, however, the American people need to have a serious conversation about whether FOIA’s benefits outweigh its almost billion-dollar operating expense. Can any sum of money reverse the executive branch’s natural resistance to public disclosure requirements?

Congress could also formally enunciate that conclusory and boilerplate language never satisfies the reasons requirement. This explicit mandate would further underscore the blatant nature of agency noncompliance. But the current statutory framework, as explained in Section III, *should* suffice to warrant that common-sense proposition. Congress could also widen FOIA’s jurisdictional provision to enable the judiciary to enforce more robust procedures for explaining redactions. The deeper Congress and the judiciary pry into the executive, however, the greater the concerns regarding FOIA’s constitutionality. Agencies could stave off such potential reforms by just doing their job and explaining their work. Is that too much to ask?

211. Pozen, *supra* note 1, at 1333.