Freedom of Information Laws

Frank D. LoMonte

In 2010, a 26-year-old South Florida man was convicted of vehicular homicide for plowing into a pedestrian while driving an estimated 90 mph on his way home from his job as a Fort Lauderdale police officer.

That episode, and the subsequent 2011 arrest of an off-duty Miami officer who tried to flee after being clocked at 120 mph on the Florida Turnpike, provoked the curiosity of reporters at Fort Lauderdale’s daily newspaper, the Sun Sentinel.

How often were local police driving at unsafe speeds? Based on anecdotal information, the journalists suspected the answer was “frequently.” But proving it would be another matter.

The Sun Sentinel investigative team solved the puzzle by harnessing the power of Florida’s Public Records Law. They knew that police cruisers were outfitted with “SunPass” dashboard readers enabling motorists to roll through South Florida’s ubiquitous toll plazas without stopping—and that each time a SunPass triggered the indicator on a tollbooth would produce a time-stamped digital record.

After some cajoling, the SunPass oversight agency released records of 1.1 million transactions for 3,900 police transponders. Then it became a matter of simple algebra: How long it took for a car to travel the distance from tollbooth A to tollbooth B would yield the driver’s speed. The calculations showed that almost 800 officers from a dozen police agencies drove from 90 to 130 mph during the previous year; a few habitually drove 120, including the (since-fired) officer whose 2011 chase prompted the investigation.

This ingenious use of public records—and the team’s follow-up reporting that documented 320 crashes statewide attributable to speeding police officers, with only one known case of any speeder serving jail time—earned the Sun Sentinel the 2013 Pulitzer Prize for Public Service Journalism.

The Sun Sentinel’s series (“Speeding Cops”) exemplifies the essential, and at times lifesaving, government oversight that is possible when public-records laws are faithfully applied and enforced. Regrettably, disregard for freedom of information laws persists, and enforcement is challenging, generally left to individual requesters through lawsuits. The delay of litigating, and the improbability of obtaining attorney fees, means that requesters must be prepared to sacrifice tens of thousands of dollars fighting to obtain documents that may be useless by the time of a final judgment.

Freedom of information (FOI) laws underlie some of the most consequential news stories of modern times, whether the public realizes it or not. A public-records request by a freelance journalist led, after a 13-month legal battle with the City of Chicago, to the belated release of dash-cam video showing police fatally shooting 17-year-old Laquan McDonald, leading to felony charges against the shooter and against three fellow officers accused of trying to fabricate a cover story justifying the killing. Freedom of Information Act lawsuits seeking access to emails sent and received by Hillary Clinton during her tenure as secretary of state prompted security questions about her use of an offsite server, a lingering issue that haunted her presidential campaign.

Public records can be a powerful tool not just for journalists but for engaged citizens. Environmental groups commonly use state and federal FOI laws to keep watch on permits to fill wetlands, harvest timber on public land, or tap into the underground aquifer for irrigation. Social-justice reformers have used public records to document inequities in school discipline, producing a “school-to-prison pipeline” that disadvantages disabled students and students of color.

The Dawn of Sunshine

The public’s right of access to records from federal executive agencies is secured by the Freedom of Information Act, 5 U.S.C. Sec. 552 (FOIA), which President Lyndon Johnson signed into law on July 4, 1966—by all accounts, grudgingly and fearing the law was a political ambush. Grudging or not, the president’s signing statement resoundingly declared that “a democracy works best when the people have all the information that the security of the Nation permits.”

Organizations including the American Society of Newspaper Editors had been advocating behind-the-scenes for decades for a legally enforceable right to inspect government records. A California congressman, John Moss, championed the need for a federal open-government law for more than a decade before the idea gained widespread political traction, driven in part by concern over increasing government secrecy during the Cold War with the Soviet Union. But the law did not grow teeth until a 1974 rewrite, fueled by public distrust of government following the Watergate scandal and President Richard Nixon’s resignation. Congress augmented the
statute to include penalties for noncompliance and to clarify that the presence of some exempt material in a document did not justify withholding it entirely.

Open-government laws did not originate with Rep. Moss, and indeed were on the books in some states as early as the 1950s. But the enactment and subsequent modernization of the federal FOIA energized the open-government movement nationally, leading to a wave of lookalike state statutes including Florida (1967), Texas (1973), and New York (1974).

Congress gave the FOIA a thorough updating with the FOIA Improvement Act of 2016 (Public Law No. 114-185). Most notably, the Act instructs executive agencies to start with the presumption of openness rather than concealment, and to invoke statutory exemptions only if there is a reasonable belief that disclosure will harm a legally protected privacy interest. Thus, agencies should no longer default to withholding the maximum amount of information that the law allows.

How FOIA Works
Every open-records law begins with the presumption that information memorialized in any medium and created or maintained by a government agency should be open to public inspection. Every statute provides some guidance about the fees that a requester may be charged to retrieve and copy records, though details vary considerably among states.

While it’s commonplace to speak of “public information,” access laws are not about “information” at all—they are about the documents that contain information, and that can be a decisive distinction. An agency cannot be compelled by law to answer questions, or to create brand-new records to suit the requester’s interests. A request for “the names of every county employee earning more than $100,000” may be denied if no compilation already exists; a request for “records from which the salaries of county employees, by name, may be derived” is a request that must be fulfilled.

Except for a handful of statutes (for instance, those limiting the inspection of car-accident reports to the parties, their insurance companies, and the news media), the right of access belongs equally to all citizens regardless of their purpose. Although FOI statutes are thought of as “journalists’-rights laws” because news organizations bring most of the high-profile enforcement actions, journalists represent a small minority of requesters. A March 2017 study by Max Galka of FOIA Mapper found that journalists accounted for just 7.6 percent of the FOIA requests made to federal agencies. Private businesses (39 percent), non-media individuals (20.1 percent) and law firms (16.7 percent) all used the federal access law far more frequently.

A “record” includes any medium in which information is stored, which in the digital age encompasses a wide range of electronic data. When reporters for The Atlanta Journal-Constitution received a tip that well-paid members of the state’s utility-regulating commission seldom came to work, they used public records to document how infrequently the commission members scanned their I.D. badges to gain entry to the agency’s doors.

The duty to disclose records typically extends not just to wholly governmental agencies but to those performing governmental functions under state supervision. For example, the Ohio Supreme Court ruled in 2015 that the police department at a private college was subject to the state open-records act when employing arrest powers delegated by the state.

A persistent modern question—brought to the front page by the Clinton email controversy—is whether records maintained on personal electronic devices or on personal email accounts are subject to public inspection because they concern official business. In an especially impactful case, journalists at the Detroit Free Press used text messages sent on a paging device issued to then-mayor Kwame Kilpatrick to expose a pattern of false statements that would eventually land the mayor in prison for perjury. The growing consensus of courts is that the content of the messages, not the medium in which they are transmitted or stored, determines their status. As the California Supreme Court held in a March 2017 ruling granting a requester access to texts and emails exchanged...
by city officials in San Jose, “If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.”

To the frustration of requesters, the usefulness of FOI laws is limited by an ever-growing proliferation of exemptions. Even in Florida, where the right of access to government records is enshrined in the state constitution, an estimated 1,120 categories of records are carved out as statutorily exempt from disclosure, from agricultural production methods to the medical records of pets treated at state veterinary hospitals. Exemptions commonly result from public controversies when the publication of government records leads to distress or embarrassment. For example:

- The Florida legislature, 2001, closed off public access to photographs kept in coroners’ autopsy files in response to news organizations’ attempts to obtain photos from NASCAR legend Dale Earnhardt’s autopsy to determine how a seemingly minor crash killed him.

- After a New York newspaper provoked outrage by publishing a map of the addresses of homeowners holding concealed-weapons permits in 2012, the New York legislature declared the permits off-limits to public access. A wave of lookalike laws from Maine to Mississippi quickly followed, and today the records are accessible in fewer than 10 states.

- In a 2016 ruling, the federal Sixth Circuit U.S. Court of Appeals overturned longstanding precedent and declared that arrestees’ personal privacy interests outweighed the public’s right of access to booking photos—a decision that focused on the

“long, damaging shadow” cast by the newfound accessibility of mugshots through searchable websites.

In each of these situations, the public’s interest in oversight over police or emergency-response agencies was deemed less compelling than the privacy interests of individuals depicted in the records. Following a wave of caught-on-video shootings by police that provoked coast-to-coast protests and birthed the “Black Lives Matter” movement, legislatures everywhere are debating the public’s right of access to footage from police body-cams and the names of officers under investigation for using deadly force.

There is persistent, and growing, tension over public access to records from colleges and schools, which in an era of heightened competition for donations, government subsidies and top student recruits have become more assertively image-protective. Requesters regularly report unfounded claims of “student privacy” when colleges and schools are asked for anything potentially unflattering, particularly records involving crime and safety.

In 2014, bestselling author and investigative journalist Jon Krakauer sued the state of Montana for access to records reflecting why the state commissioner of higher education overturned a campus disciplinary board’s finding that a star University of Montana football player should be expelled for sexual assault. Although the facts of the case were already widespread knowledge after being aired in a criminal trial—in which the player was acquitted—the state insisted that the commissioner’s files qualified under federal privacy law as “confidential education records.” The Montana Supreme Court agreed, and the records remain unexamined.

Obstacles and Workarounds

The federal FOIA statute requires a response within 20 business days of receipt of a request—but “response” has commonly come to mean a form-letter acknowledgment, with documents produced months and even years belatedly (if at all). Federal agencies were so heavily backlogged in honoring FOIA requests that the Obama administration issued a seemingly modest directive in 2009 instructing agencies not to eliminate their backlogs but simply to reduce them by 10 percent a year. At the end of the administration, only the Department of Health and Human Services reported having met this humble objective; most agencies acknowledged they were further behind than they’d been eight years earlier. Most state statutes dispense with the fiction of a compliance deadline that is practically impossible to enforce and simply require compliance within a “reasonable” time, with reasonableness depending on the complexity of the retrieval task.

Heavy-handed redactions and unaffordable fulfillment fees are frequent sources of aggravation for FOIA users. When the ACLU requested access to an Obama administration memo instructing prosecutors and law enforcement agencies about the standards for electronically intercepting text messages in criminal investigations, the Justice Department responded with 15 pages of blacked-out text, leaving only the memo’s heading. The open-government organization MuckRock was quoted an estimate of $1.5 million to fulfill a FOIA request to the Drug Enforcement Administration for documents about the 2014 capture of a Mexican drug kingpin. After gathering mountains of such horror stories, the U.S. House Committee on Oversight and Government Reform concluded in a January 2016 report:

The FOIA process is broken. Hundreds of thousands of requests are made each year and hundreds of thousands of requests are backlogged, marked with inappropriate redactions, or otherwise denied. More experienced requesters push through the process in hopes of eventually receiving something.
Less experienced requesters are shocked at the delays and procedural burdens.

Marking FOIA’s 50th anniversary in 2016, the nonprofit news site ProPublica published its reporters’ worst horror stories—agencies that simply lie about the existence of known records, appeals that take three years to resolve—and concluded, pessimistically:

Local, state and federal agencies alike routinely blow through deadlines laid out in law or bend them to ludicrous degrees, stretching out even the simplest requests for years. And they bank on the media’s depleted resources and ability to legally challenge most denials. Many government agencies have gouted or understaffed the offices that respond to public records requests. Even when agencies aren’t trying to stymie requests, waits for records now routinely last longer than most journalists can wait—or so long that the information requested is no longer useful. This, in turn, allows public agencies to control scrutiny of their operations.

When a requester believes that access has been denied wrongfully, the primary (and at times only) recourse is to bring a civil action. Enforcing the right of access can be prohibitively costly and time-consuming. In the Kilpatrick case, the Detroit newspapers laid out more than $660,000 in attorney fees to prevail in their quest for the mayor’s text messages, although because of a favorable state fee-shifting statute, they eventually recouped $450,000 from the city.

A handful of states—including Connecticut, Iowa and Pennsylvania—provide an expedited dispute-resolution outlet through a state freedom-of-information council. These councils can adjudicate disputes without the cost and delay of civil litigation, but their rulings are not binding as precedent and are subject to judicial appeal. Many states provide for advisory rulings through the state attorney general’s office, but these opinions rarely carry binding force (Kentucky’s law is a rare exception) and agencies can, and do, ignore the advice.

Successful requesters have developed some tricks and techniques to make requests more likely to yield prompt, affordable and complete records.

An increasing number of states now explicitly require agencies to make documents available electronically rather than on paper if that is their “native” format. Seek electronic records wherever possible, to maximize searchability and minimize copying costs. Almost all states permit requesters to make their own copies, such as by using a cellphone scanner app, which may also hold down the time and expense of copying.

If a request entails multiple parts, consider filing them as separate requests several days apart; otherwise, the most inaccessible document may end up setting the fulfillment time for all of the rest. If it’s known that records will contain confidential information that is immaterial to the purpose of the request, agreeing at the outset to accept the documents in redacted form may avoid a time-consuming back-and-forth of denials and appeals.

**FOIA in the Classroom**

“FOI audits” are a staple of journalism education and can provide students in a civics or social studies class with a rare insider’s glimpse into how government works—or, occasionally, how it fails to work.

Deborah Nelson and Sandra Banisky at the University of Maryland have tasked their journalism students with yearly open-records projects that at times result in unearthing scoops. In 2014, their students blanketed major public universities with requests to examine any policies or protocols governing athletes’ use of social media—and found that many were straining the boundaries of the First Amendment by purporting to penalize any off-campus speech that coaches subjectively deemed “inappropriate.”

In the K-12 setting, students can use public records to examine everything from the safety of school buses to the hygiene of food service to the frequency with which corporal punishment is administered. Using public records, education journalists have provoked important reforms, including documenting the frequency with which schools put unruly students into confinement rooms or physical restraints, leading many states to outlaw the practice except in emergency situations. In an especially ambitious project, parents in Fairfax County, Virginia, obtained statistics about all of the disciplinary appeals in their suburban Washington-area district over a six-year period; when their findings demonstrated that not a single student had successfully overturned a disciplinary decision in 5,025 tries, the district overhauled its zero-tolerance regime.

Among the types of records that students might find intriguing to pursue are (1) budgets reflecting the amount spent on girls’ versus boys’ sports, and how that amount has changed over the years, (2) internal guidelines or protocols for monitoring students’ social-media use, both on and off campus, (3) lists of “blacklisted” terms or websites that are blocked (at times overzealously) on school computers and wifi, and (4) settlement agreements and payments to resolve liability suits against school districts and their employees. Students might also attempt to replicate the Fairfax County experiment to see whether their own districts track (or make it possible for the public to track) the success rate of disciplinary appeals.

In designing a FOIA project for classroom use, keep in mind that the turnaround time for obtaining responsive documents may be measured in months, if not years. State, county, and city agencies are far likelier to yield timely responses than the federal government, and many records belonging to local governments are immediately accessi-
Discussion Questions

1. Why is there an “extra charge” for citizens to get records that a government agency has created as part of its job? What economic incentives are created when a government agency is allowed to charge requesters for the amount of time spent fulfilling a request and even (in some states) for the amount of time spent redacting material to be withheld? Should documents be provided entirely free of charge? For everyone, without exception?

2. Police records are frequently the source of friction between requesters and government. The public has compelling interests in seeing that crimes get investigated diligently and that police are using their authority properly, but are there times when public disclosure harms rather than helps those objectives? Are there records about crimes that should be withheld temporarily? Permanently? Whose interests other than the police officers’ should be given weight?

3. How has technology changed (for better and worse) the landscape for access to public records since the time FOIA was conceived in 1966? Are there more compelling privacy arguments now that records are searchable online as opposed to requiring a trip to a faraway courthouse? What are the counter-arguments?

Note

Lessons on the Law is a contribution of the American Bar Association, through its Division for Public Education. The mission of the Division is to promote public understanding of law and its role in society. The content in this article does not necessarily represent the official policies of the American Bar Association, its Board of Governors, or the ABA Standing Committee on Public Education.

Frank D. LoMonte is a Professor of Journalism and Director of the Brechner Center for Freedom of Information at the University of Florida. Previously, he spent nine years as Executive Director of the Student Press Law Center, a Washington, D.C.-based nonprofit advocacy group promoting transparency in schools and colleges.

Celebrate Law Day in the Classroom

The Law Day 2018 theme enables us to reflect on the separation of powers as fundamental to our constitutional purpose and to consider how our governmental system is working for ourselves and our posterity.

For Law Day Teaching Resources and more, visit: lawday.org.