Check Your [Deliberative Process] Privilege—Revealing the Foibles of FOIA's Framing via a Ride into the Sunset/Retention Mismatch

Journalists and commentators widely lauded the 2016 FOIA Improvement Act's passage, which they saw as promoting principles of open government and transparency. The Act accomplished its goals primarily through two mechanisms. First, it codified the "foreseeable harm rule." Second, it instituted a 25-year sunset on the deliberative process privilege, an oft-criticized rationale used by agencies to withhold documents despite FOIA's general presumption in favor of government disclosure.

Initially, the FOIA Improvement Act led to a decrease in agency citations of Exemption 5, the FOIA provision that encompasses the deliberative process privilege. But the number of Exemption 5 citations has since risen again, and the DPP's return—truthfully, it never went away—demands attention. The sunset provision, if it works as intended, provides a powerful tool for citizens to shine light on their government's internal deliberations and discussions. In addition, researchers could use it to examine the actual contents of old documents once withheld under the DPP and, ideally, compare those contents with the agency's original rationales for withholding them.

But the sunset provision fails to work as it should because the concept of document retention and document disclosure have not been sufficiently linked. The sunset provision only kicks in after a quarter of a century—the entirety of this author's lifespan to-date. But subject to typical agency records-disposition schedules, most deliberative materials would have been deleted long before. Of the survivors, most would have already been released anyway as permanent archival materials under NARA's control. Even those targeted by FOIA requests before disposal are shielded for a mere six years. What reformers thought was a Garden of Eden for transparency was actually an edentulous measure and will remain so until Congress more intentionally shapes the obligation to retain records. More than just fixing this immediate problem, legislators and legal practitioners in both freedom-of-information and records retention circles need to adjust their framework for thinking about records and information access. Too often do we conceptualize these as two separate, independent spheres, instead of thinking of one with an eye towards the other. This paper aspires to serve as a steppingstone in bridging the gap between the two.

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I. INTRODUCTION

"[E]very once in a while, Congress moves forward on something that is really significant and important. And I want to make sure that the American public are aware of what I'm going to be signing here today. . . . Hopefully [the FOIA Improvement Act of 2016] is going to help and be an important initiative for us to continue on the reform path."[1]

- President Barack Obama on the passage of the FOIA Improvement Act of 2016

"The Agency conducted a search for the requested documents and did not locate any responsive records. As you are aware, the records sought are decades old. Any documents responsive to the matters listed above have long exceeded the document retention time and would have been appropriately dispositioned according to federal records retention schedules."[2]

- EPA response to a FOIA request for decades-old material

"If responsive records existed at one point, we no longer have them due to our records retention policies."[3]

- Commodity Futures Trading Commission response to a FOIA request for decades-old material

"Non-permanent records, which the requested information would likely fall under, are destroyed after 10 years. Permanent records . . . are transferred to NARA [the National Archives and Records Administration] after 10 years. . . . In the unlikely event that [the requested records] were preserved as permanent records, they would be in the custody and control of NARA."[4]

- Department of Labor response to a FOIA request for decades-old material once held by the Mine Safety and Health Administration

The Freedom of Information Act (FOIA) has long been heralded as a meaningful, if imperfect, way for citizens to learn more about how their government works. Congress last

[1] Barack Obama, *Remarks by the President at Bill Signings of the FOIA Improvement Act of 2016 and PROMESA*, WHITE HOUSE ARCHIVES (June 30, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/remarks-president-bill-signings-foia-improvement-act-2016-and-promesa.
[2] Letter from Wendy Blake, Associate Gen Couns., EPA Off. Gen. Couns., to author (Feb. 9, 2022) (on file with author).
[3] Letter from Rosemary Bajorek, Assistant Gen Couns., FOIA Office, Commodity Futures Trading Comm'n, to author (Mar. 17, 2022) (on file with author).
[4] Letter from Sharon Hudson, Deputy Associate Solic., Div. Mgmt. & Admin. Legal Servs., Dep't Lab., to author (Sept. 29, 2022) (on file with author).

amended FOIA in 2016 to cut back on a withholding privilege known as the deliberative process privilege (DPP). But that sunset provision is not nearly as effective as its proponents argue.

My experiences provide one anecdote as to its inefficacy. Initially, this paper aimed to compare agency rationales for withholding documents under the DPP with the actual redacted content of withheld documents. This research was made theoretically possible by the sunset provision, through which I had planned to request twenty-five-year-old documents that would have previously been unavailable to researchers.[5] Ultimately, I filed thirty-seven FOIA requests to obtain records from 109 cases and received responses over the following two years.

The results surprised me. Although I had not expected a 100% hit rate, after a year passed, not a single agency had responded with documents truly responsive to my FOIA requests, and only a handful of agencies responded with any documents at all. Many of their responses perfunctorily noted that the documents I had requested did not exist anymore due to the agencies' retention schedules. Although a few FOIA practitioners whom I had briefly consulted before filing any requests mentioned retention schedules, none dwelled on the issue; the FOIA literature, too, failed to forewarn me of retention schedules and deleted records as an obstacle to my FOIA requests.

I later discovered that my inability to gather data was not merely bad luck—instead, it revealed a systematic failure by policymakers and advocates to consider agency disclosure and agency disposal together. In short, deliberative materials can be withheld by agencies for twenty-five years. But agencies destroy most of those materials by six years after their creation under most records schedules. Of the surviving materials, many likely achieve public record status after the National Archives obtains legal custody of them. Part II maps the terrain this paper navigates,

[5] I have reproduced my methodology and results of this initial research in appendices A and B.

FOIA and the subsequent FOIA Improvement Act of 2016. This background is necessary to understanding the motives and development of this research: what FOIA is, why it was enacted, and why it was ultimately amended six years ago. Part III then delves specifically into the DPP, one crucial half of the sunset/retention mismatch. I first provide a brief background of the doctrine and its actual use by agency officials before turning to a deeper historical background. That historical background leads to a discussion of why the DPP exists in the first place, and reasons some argue it ought not to exist at all. I then excavate the legislative history of the compromise to limit the DPP contained in the FOIA Improvement Act of 2016.

Part IV investigates a topic not traditionally discussed in the FOIA context: how agencies store and dispose of their records. I begin with the history of retention schedules as discussed by archivists and then turn to the retention system today. One number kept reappearing, both during my independent research and as agencies responded: six. As one metric, documents withheld under FOIA have a six-year retention period under a General Records Schedule promulgated by the National Archives. Almost every agency adheres to this schedule.

Strangely enough, despite the intuitive connection between the two, the conversations in Parts III and IV take place largely in their own circles. The recurring senators and activist organizations in the freedom-of-information world debate FOIA with few references to records retention; archivists and records retention officials similarly acknowledge FOIA's existence without deeply grappling with its ramifications as they regulate how records are categorized and managed. This disconnect in discourse between the "freedom of information" and "records retention" worlds results in ineffective policies like the sunset provision, and only by fusing these two forms of life can we optimize future policymaking in both.

Part V focuses on the mismatch, first suggesting a more integrated approach to FOIA and records, and then recommending changes to the current schedules for the Archivist of the United States, agency heads, Congress, or a combination of the above to fix an ineffective sunset provision. Two solutions are particularly promising. The first is an administrative fix by NARA and individual agency heads to allow individual citizens to request retention of specific deliberative files until the sunset provision sets. This solution would account for challenges that agencies currently face in creating and managing vast amounts of electronic information. The second is a legislative solution that would decrease the sunset period to two or four years, bringing FOIA's disclosure provisions—originally intended to ensure government accountability—in line with election cycles. Part VI concludes.

II. FOIA AND THE FOIA IMPROVEMENT ACT OF 2016

A. FOIA

"Publicity is the very soul of justice. . . . Without publicity, all other checks are fruitless: in comparison of publicity, all other checks are of small account."[6] In declaring the value of what he termed "publicity," Jeremy Bentham captured a powerful intuition that has led the values of transparency, openness, and accountability to grow deep roots in democratic theory and our nation's history. Bentham was joined by his ally in normative ethics, John Stuart Mill, who connected "unbounded publicity" and "an ever present newspaper press" with governmental accountability.[7] On this issue, these two consequentialists agree with some of the most widely known deontologists as well: "publicity" is a necessary condition "to every legal title" in Kant's

[6] Jeremy Bentham, *Bentham's Draught for the Organization of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same*, *in* 4 THE WORKS OF JEREMY BENTHAM 305, 316-17 (1843).
[7] JOHN STUART MILL, ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 323 (Mark Philp & Frederick Rosen eds., 2015).

political utopia.[8] And these theories have been borne out in practice, with American democracy and the ratification of the Constitution contingent on the public's reading about the proposed Articles in newspapers all across America.[9]

Before FOIA was enacted, no statute required government agencies to affirmatively disclose information to the general public. The next-best provision was located in section 3 of the Administrative Procedure Act (APA), passed into law in 1946.[10] Then-section 3 of the APA required agencies to publish a description of the agency, its substantive rules, its opinions and orders "except those required for good cause to be held confidential and not cited as precedents," and public records "to persons properly and directly concerned except information held confidential for good cause found."[11] There was also a general exception to disclosure when documents involved "any function of the United States requiring secrecy in the public interest" or "any matter relating solely to the internal management of an agency."[12] Congress found that these "loopholes" allowed "agencies to deny legitimate information to the public," finding "innumerable times" that agencies withheld information "only to cover up embarrassing mistakes or irregularities."[13] And when agencies withheld requested information, section 3 did not provide for judicial review.

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[8] IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH 184 (Mary Campbell Smith ed., 2016) (1795). *See also* MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 14 (2021) (summarizing Kant and Rousseau as arguing that "[w]here officials know their actions will come to public light, they will not abuse their power or act in interests other than the public interest. We can think of this transparency as a form of regulating the behavior of government officials").

[9] *See* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVENTION, 1760-1840 (2021).

[10] 5 U.S.C. §§ 551-559, 701-706 (2018).

[11] S. REP. NO. 89-813, at 39-40 (1965).

[12] *Id.* at 39.

[13] *Id.* at 38.

In 1966, Congress—after finally dragging a "kicking and screaming" President Lyndon B. Johnson to his desk to sign "the damned thing"[14]—decided to remedy this situation by passing FOIA, which created a general presumption in favor of disclosing government records to the citizenry.[15] FOIA effectuates this presumption via two mechanisms. It mandates the creation of a "reading room" for proactive disclosure by agencies. In addition, it allows "any person" to request specific records from agencies, with judicial review available when requests are denied. This paper focuses on the complications arising under the latter method.

Although agencies must generally turn over responsive documents to an individual's FOIA request, exemptions exist for nine enumerated categories of documents.[16] Those categories include national security, documents with private information, trade secrets, information concerning wells, and certain information related to law-enforcement investigations. Congress realized that agencies could not operate on a completely transparent basis. Unfettered openness would hamper the ability of Department of Justice prosecutors to investigate certain criminals or deter companies from releasing trade secrets to agencies. Thus, Congress built in these exemptions to strike a balance between certain confidential interests and the values of transparency and openness.

B. The FOIA Improvement Act of 2016

What Congress provided, the people used. In 2021 alone, the federal government received 838,164 FOIA requests and processed 838,668.[17] Entities ranging from news

[14] Steve Zansberg, *July 4, 1966: Birth of the FOIA—A Look Back*, 32 COMM. LAW. 34, 34 (2016).
[15] 5 U.S.C. § 552 (2018); *see also* S. REP. NO. 89-813, at 45 (1965) ("[T]his bill . . . would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality. A government by secrecy benefits no one.").
[16] 5 U.S.C. § 552(b) (2018).
[17] *Summary of Annual FOIA Reports for Fiscal Year 2021*, DEP'T JUSTICE 2, 4 (July 21, 2022), https://www.justice.gov/oip/page/file/1521211/download.

organizations,[18] individuals, corporations,[19] and law school clinics[20] have requested everything from personal records to FBI investigation tactics[21] to the White House beer recipe.[22]

Implementation flaws gradually emerged as the public used FOIA more. Although most people think of journalists and watchdog organizations as FOIA requesters, FOIA's primary users are corporations and individuals.[23] Agencies, inundated by requests, face significant delay in sending responsive documents within statutory deadlines.[24] And agencies have faced serious criticism for overusing the exemptions, withholding more documents than they should and causing needless, sometimes expensive, FOIA litigation.[25] Agencies' willingness to withhold documents also depends on the presidential administration. President Clinton and Attorney General Janet Reno, for example, required "foreseeable harm" before an agency could withhold documents under a FOIA exemption.[26] A subsequent administration eventually rescinded that requirement, and President Barack Obama and Eric Holder's Justice Department revived it.[27]

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[18] *See, e.g.*, David McCraw, *How the Times Uses FOIA to Obtain Information the Public Has a Right to Know*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/02/reader-center/foia-freedom-of-information-public-records.html.
[19] *See, e.g.*, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).
[20] *See, e.g.*, *About*, MEDIA FREEDOM & INFO. ACCESS CLINIC, https://law.yale.edu/mfia/about.
[21] Reporters Comm. for Freedom of the Press v. FBI, 3 F. 4th 350 (D.C. Cir. 2021).
[22] Byron Tau, *Transparency Advocates Want White House Beer Recipe*, POLITICO (Aug. 21, 2022), https://www.politico.com/blogs/politico44/2012/08/transparency-advocates-want-white-house-beer-recipe-132683.
[23] Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204 (2018) (describing individuals' use of FOIA as an imperfect substitute for discovery in certain agency enforcement proceedings or other adjudications); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (describing corporations' use of FOIA to obtain information cheaply) [hereinafter Kwoka, *FOIA, Inc.*].
[24] *See, e.g.*, Lauren Harper, Nate Jones, Tom Blanton & Tena-Iesly Reid, *25-Year-Old FOIA Request Confirms FOIA Delays Continue Unabated*, NAT'L SEC. ARCHIVE (Mar. 8, 2019), https://nsarchive.gwu.edu/foia-audit/foia/2019-03-08/25-year-old-foia-request-confirms-foia-delays-continue-unabated. In my own FOIA requests (described in Appendices A and B), most of the agencies granted themselves extensions.
[25] In 2021, the federal government spent $38,530,913.53 on FOIA litigation, roughly 6.9% of the total FOIA costs that year. *Summary of Annual FOIA Reports for Fiscal Year 2021*, DEP'T JUSTICE 20 (July 21, 2022), https://www.justice.gov/oip/page/file/1521211/download.
[26] Off. Info. Pol'y, *FOIA Update: President and the Attorney General Issue New FOIA Policy Memoranda*, DEP'T JUSTICE (Jan. 1, 1993), https://www.justice.gov/oip/blog/foia-update-president-and-attorney-general-issue-new-foia-policy-memoranda.
[27] Eric Holder, *Memorandum for Heads of Executive Departments and Agencies Re FOIA*, OFF. ATT'Y GENERAL (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf

Congress passed the FOIA Improvement Act of 2016 in response to concerns about the lack of openness due to agency overuse of FOIA exemptions.[28] The FOIA Improvement Act attempted to restrict agency withholding in two main ways: first, it codified the "foreseeable harm" standard from the Obama and Clinton administrations.[29] Second, it created a "sunset provision" for the fifth enumerated exemption, which encompasses the DPP. The sunset provision bars agencies from relying on the privilege for "records created 25 years or more before the date on which the records were requested."[30]

This paper slots into a discourse that focuses on improving FOIA's effectiveness in terms of making government information available to the public. One major player in this respect has been Margaret Kwoka, who undertook a breathtaking empirical study of FOIA requests and concluded that we need to reimagine FOIA from the ground up by, for example, focusing more on affirmative agency disclosures and releasing more records in the context of individual agency adjudications.[31] Others have also offered structural changes, such as a comparative study that suggests institutional design alternatives like an independent information commission.[32] Still others suggest immediate improvements to the existing framework to release information in a more nuanced manner.[33] This paper suggests immediate improvements to the current request system, focusing on an obligation to retain records (as opposed to reinforcing the obligation to affirmatively disclose records), while also following the lead of Kwoka and others in suggesting

[28] Pub. L. No. 114-185, 130 Stat. 538 (2016); H.R. REP. NO. 114-391 (2016); S. REP. NO. 114-4 (2015).
[29] FOIA Improvement Act § 2.
[30] FOIA Improvement Act § 2; 5 U.S.C. § 552(b)(5) (2018).
[31] KWOKA, *supra* note 8.
[32] Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655 (2022).
[33] *See, e.g.*, Nathaniel E. Castellano, *Where the Sunshine Meets the Shade: Using FOIA Exemption 4 to Protect Confidential Compliance Information After the 2016 FOIA Improvement Act*, 46 PUB. CONT. L.J. 589 (2017).

a new framework for thinking about FOIA and the "everyday social and institutional practices that constitute the federal FOIA process."[34]

Having provided an overview of the FOIA context, I now turn to a discussion of the DPP itself.

III. THE DPP AND ITS SUNSET

A. DPP Doctrine and Practice

An agency invoking the deliberative process privilege may withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."[35] Although courts differ as to how exactly they operationalize tests to determine what should be withheld under the DPP,[36] they agree that the DPP applies to documents that are both predecisional and deliberative.[37] Predecisional documents are those "antecedent to the adoption of agency policy."[38] Deliberative documents are those that reflect "the advisory and consultative process by which decisions and policies are formulated,"[39] excluding factual material.[40] More recently, some courts have found a

[34] Austin Kocher, *'Studying Up' the FOIA State*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (Feb. 10, 2022), https://www.yalejreg.com/nc/symposium-saving-foia-08/.
[35] 5 U.S.C. § 552(b)(5) (2018).
[36] *See, e.g.*, Andrew Scott, Comment, *O'Neill, oh O'Neill, Wherefore Art Thou O'Neill: Defining and Cementing the Requirements for Asserting Deliberative Process Privilege*, 123 DICKINSON L. REV. 815, 829-832 (2019) (discussing the different approaches that district courts in the Third Circuit take in determining whether the privilege applies, including whether or not a department head must invoke the privilege, and providing instances of courts using ten-factor tests and five-factor balancing tests to determine whether or not to allow the privilege after it has been determined to have merit).
[37] *See, e.g.*, Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 MO. L.R. 279, 300 (1989); Edward J. Imwinkelried, *The Government Misconduct Exception to the Deliberative Process Privilege: Bringing Clarity to the Most Important Exception to the Most Frequently Invoked Government Evidentiary Privilege*, 65 S.D. L. REV. 76, 81 (2020) ("The cases are legion declaring that to fall within the ambit of the privilege, a document must be both predecisional and deliberative.").
[38] Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988) (citation omitted).
[39] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).
[40] EPA v. Mink, 410 U.S. 73, 87-88 (1973).

governmental misconduct exception to the DPP, though those that hold it exists often disagree on how to apply it.[41] One point of contention, for example, involves whether the exception requires illegal misconduct in governmental deliberations or misconduct in the underlying subject of deliberation; at least one scholar favors the former understanding.[42]

The DPP's actual application varies between agencies. Some agencies, such as the Office of Management and Budget (OMB), "appear[] to apply the deliberative process exemption liberally."[43] Others, such as the Nuclear Regulatory Commission (NRC), represent themselves as "utilitiz[ing] [the] deliberative process [privilege] only in exceptional cases involving privacy or security."[44] Application also varies within agencies, both over time and between different individuals. For example, the Fish and Wildlife Service (FWS)'s approach to invoking the DPP for internal documents "has varied over time and generally lacks clear guidance."[45]

When an agency chooses to apply the DPP, it bears the burden of proof to show that the material falls under the remit of the privilege. That is, the agency must show that the material is both predecisional and deliberative; the requester does not have to prove the negative.[46] The agency cannot do so in a conclusory manner and simply assert the privilege, and as a result of the FOIA Improvement Act of 2016, it must also show that the agency "reasonably foresees" a harm to the deliberative process.[47] Courts often require that the agency present its withholdings and

[41] Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1787 (2005).
[42] Imwinkelried, *supra* note 37, at 78. Imwinkelried also proposes two different standards of proof that would trigger increased judicial scrutiny to determine if the government misconduct exception is warranted in a given case, one for in camera examination and one for final disclosure orders. *Id.* at 78-79.
[43] WENDY WAGNER, SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES 35 (2013), https://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf.
[44] *Id.* at 116. The NRC is an independent agency.
[45] *Id.* at 63.
[46] Weaver & Jones, *supra* note 37, at 300.
[47] 5 U.S.C. § 552(a)(8)(A) (2018).

rationales for withholding in the form of a table known as a *Vaughn* index.[48] I provide an example of a *Vaughn* index below[49]:

VAUGHN INDEX
FOIA Request No. GSA-2018-001496

Category of Documents	The total amount of responsive documents/ Redacted page numbers.	Exemptions Cited	Content of Withheld Portion and Reason for Withholding
A draft copy of GSA's responses to Questions for the Record from the U.S. Senate's Committee on Environment and Public Works regarding the FBI Headquarters Project sent between White House Counsel and GSA's Office of General Counsel. This document is an attachment to pages 4, 14 and 15 of the responsive email correspondence sent over to Plaintiff in response to their FOIA request.	4 pages fully withheld from release. (No pages were fully or partially released).	Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5) (in conjunction with the deliberative process)	**Content of Withheld Portion:** The document was withheld in its entirety. **Reason for Withholding:** In this draft document, included herein are proposed GSA responses and interagency deliberations between the Office of White House Counsel and GSA's Office of General Counsel prior to any determination being reached on how GSA would move forward with responding to questions for the record regarding the FBI Headquarters project. The release of this document would have a chilling effect on the ability of GSA to engage in either interagency and intraagency discussions about matters of policy and agency action without concern that said information could be disclosed prior its soccurrence.

As this example illustrates, the agency can respond to a group of documents in one fell swoop as long as they fit within a coherent category. The agency will list the number of documents that respond to the request, which parts of the documents (up to the entire document) it plans to withhold, which exemption is cited (for the DPP, this will always be Exemption 5), and a description of the content of the withheld portion and the reason for withholding.

The DPP draws the heaviest criticism of the exemptions. Its detractors characterize it as the "most abused"[50] of them all and as the "withhold it because you want to" exemption.[51] Scientists have alleged that the administrative state "[has] abused [the DPP] to improperly

[48] Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975).
[49] Vaughn *Index, FOIA Request No. GSA-2018-001496*, CITIZENS RESPONSIBILITY & ETHICS IN WASH. (2018), https://www.citizensforethics.org/wp-content/uploads/legacy/2018/09/2019-3-28-18-4-Vaughn-Index.pdf.
[50] *Administration of the Freedom of Information Act: Current Trends: Hearing Before the Subcomm. On Info. Pol'y, Census, & Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 111st Cong. 127 (2010) (statement of Tim Fitton, President, Judicial Watch).
[51] Nate Jones, *The Next FOIA Fight: The B(5) "Withhold It Because You Want to" Exemption*, UNREDACTED (Mar. 27, 2014), https://unredacted.com/2014/03/27/the-next-foia-fight-the-b5-withold-it-because-you-want-to-exemption/; *see also* H.R. REP. NO. 114-391 (2016) (evidencing special congressional attention to the deliberative process privilege in enacting the FOIA Improvement Act); S. REP. NO. 114-4 (2015) (same).

withhold information crucial to ensuring accountability, such as research and communications informing regulatory decisionmaking."[52] Whether or not it is the most "abused," it is certainly one of the most "used." The below table shows how often federal agencies—across all agencies—cited Exemption 5 from 2008 to 2021, the applicable years for which the federal government's FOIA website has information[53]:

Year	Applications of Exemption 5
2008	48,124
2009	71,705
2010	64,673
2011	56,267
2012	79,474
2013	81,752
2014	71,005
2015	69,341
2016	61,977
2017	65,565
2018	61,132
2019	73,706
2020	59,507

[52] UNION OF CONCERNED SCIENTISTS, PUBLIC PARTICIPATION IN RULEMAKING AT FEDERAL AGENCIES : RECOMMENDATIONS FOR 2021 AND BEYOND 4 (2020), https://www.ucsusa.org/sites/default/files/2020-09/public-participation-in-rulemaking-at-federal-agencies_0.pdf.

[53] *Create an Annual Report*, FOIA.GOV, https://www.foia.gov/data.html. To recreate the below table and chart, hit "select all agencies" under query one, "Exemptions" for query two, and select all fiscal years for query three. You may then either view the report in the web browser or download a .csv of the requested data. I recommend that users download a .csv, as the in-web report appears to occasionally glitch and produce inaccurate numbers.

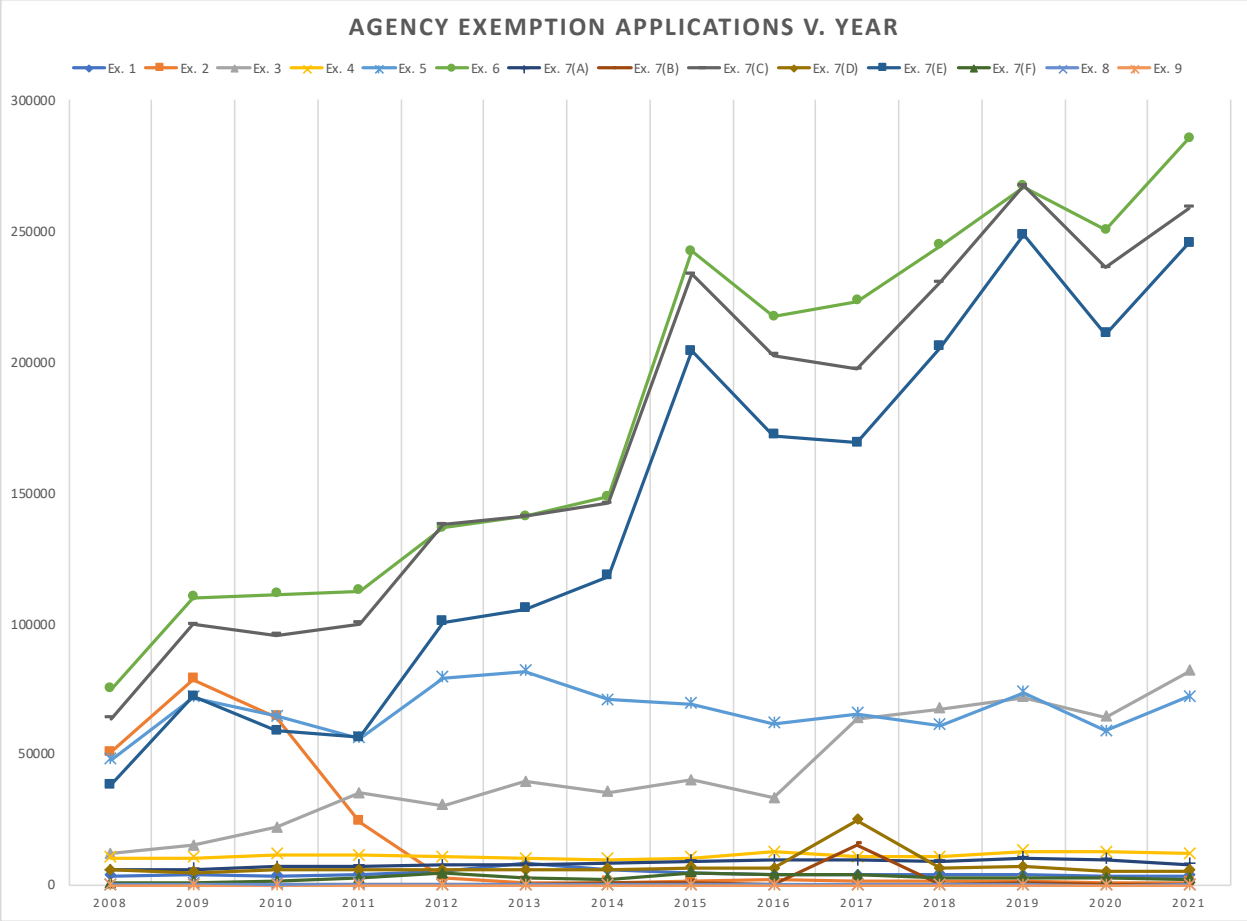
Year	Applications of Exemption 5
2021	72,111

Unfortunately, the federal government's data does not break down Exemption 5 into further applications of its three privileges: attorney-client, work-product, and deliberative process. But agencies rely on the DPP the most out of the three privileges,[54] and the data still provides a rough idea of how often the deliberative process privilege may be at play, especially since attorney-client communications and drafts of legal memos are often *also* deliberative materials.

The data also suggests a number of interesting trends, though I preface this discussion by highlighting that I am not making causal claims. First, it seems that despite the Obama administration's reintroduction of the "foreseeable harm" policy, agencies on balance actually withheld information *more* during than Obama years. Second, the data is consistent with a short-term, moderate reduction in Exemption 5 citations after the passage of the FOIA Improvement Act, though they may be back on the rise. The Act was signed by President Obama on June 30, 2016, almost bisecting the year. Whether coincidentally or not, by the year's end, Exemption 5 citations decreased by 7,364, an almost 15% decrease from 2015. They then stayed below 70,000 until 2019, when a sudden uptick occurred again. 2020 saw a decrease, though COVID-19 was almost certainly an influential factor; 2021 levels have returned to those of 2019.

To shed more light, I provide a chart below in which I graphed agencies' use of Exemption 5 against all other exemptions:

[54] H.R. REP. NO. 114-391, at 10 (2016).



The light blue line represents Exemption 5 citations, which consistently come within the top five exemptions cited. What, then, are the other four? Exemptions 6 and 7(C), which consistently hold the top two positions, both deal with personal privacy—and of course an agency shouldn't release an employee's medical files to "any person" who requests it.[55] Note that two personal privacy exemptions exist because 7(C) applies specifically to law-enforcement records. Exemption 7(E), generally in spot number three, also concerns law-enforcement records, but those that "would disclose techniques and procedures for law enforcement investigations or prosecutions" or agency guidelines that could result in individuals circumventing the law.[56]

[55] 5 U.S.C. § 552(b)(6), 7(C) (2018).
[56] *Id.* § 552(b)(7)(E).

Margaret Kwoka has published excellent literature describing the phenomena of individuals' use of FOIA in the enforcement context, which I believe explains the relatively high use of Exemption 7(E).[57] Finally, Exemption 3, which has risen in popularity in the past five years, essentially incorporates nondisclosure provisions from other statutes.[58] In other words, it allows agencies to withhold information if another statute requires or permits the agency to do so. Although agencies could theoretically invoke any of these four exemptions to withhold information based on a false pretense, Exemption 5 stands out from the rest in terms of its unlimited scope and relatively amorphous character. It applies to any records, not just those of law enforcement, and unlike personal data or specific information withheld in other statutes, what counts as "deliberative process" is a much more subjective inquiry.[59]

B. The DPP Debate

Though the earlier discussion touched on the views of both proponents and critics of the DPP, this Section more thoroughly examines the academic debate. The most salient piece offering reasons to adopt some version of the DPP is Kennedy's *Escaping the Fishbowl*, which characterizes the DPP as "relatively uncontroversial."[60] Kennedy points to its instrumental purposes, which include the "candid discussions" rationale, protecting against premature disclosure of proposed policies, and avoiding "public confusion by ensuring that officials are judged only by their final decisions."[61] Kennedy identifies a number of drawbacks of

[57] Kwoka, *FOIA, Inc.*, *supra* note 23.
[58] 5 U.S.C. § 552(b)(3) (2018); *see, e.g.*, Am. Jewish Cong. v. Kreps, 574 F.2dd 624, 628 (D.C. Cir. 1978).
[59] For differing accounts of the DPP's history and how it has evolved, see Weaver & Jones, *supra* note 37; Morgan v. United States, 304 U.S. 1 (1938); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 858 (1990); and Kennedy, *supra* note 41, at 1779.
[60] Kennedy, *supra* note 41, at 1770. Although Kennedy suggests improvements to the DPP, his suggestions are to *strengthen* it. His proposes to merge the DPP with the presidential communication privilege into a unitary executive privilege that would enjoy the stronger protections of the presidential communication privilege.
[61] *Id.*

governmental transparency, using the story of Miguel Estrada's nomination as a case study.[62] Miguel Estrada was a former staff attorney at the Solicitor General's office who was later nominated to a D.C. Circuit judgeship by George W. Bush. When he was nominated, Senate Democrats demanded memos that Estrada had produced during his time at the Solicitor General's office. His nomination ultimately failed due to a democratic filibuster. Kennedy suggests that the DPP functions in part to protect staff attorneys like Estrada from public disclosure of the opinions they produce at the request of their supervisors.

Based on this anecdote, Kennedy draws out two harms that would result from a revocation of the DPP. One harm relates to the difficulty the government has in attracting talent from the private sector.[63] The government already faces stiff competition in hiring because it is unable to offer the same level of pay as many private firms can in some sectors. Thus, potential personal accountability for deliberative opinions would act as another barrier to people transitioning from the private sector to the public sector. The second harm relates to potential conflicts of interest for those in office. Kennedy points out that many staff attorneys in the Solicitor General's office are "extremely ambitious,"[64] and their future ambitions for career-related advancement prospects may cause them to temper the types of advice they would give higher-up executive officials if the DPP did not exist.

Kennedy also offers a subsidiary policy purpose that results from the candor rationale—the fact that the DPP may help government officials prioritize the long term over the short term, thus counteracting the natural tendency of democracies to favor the present.[65] He recounts an anecdote centered on the Defense Advanced Research Projects Agency (DARPA) and argues

[62] *Id.* at 1791.
[63] *Id.* at 1792.
[64] *Id.* at 1793.
[65] *Id.*

that had the DPP not existed, many of their less conventional projects may have never taken off, which may have slowed the progress of modern science given DARPA's several contributions thereto. As Kennedy points out, a DARPA project developing a terrorist futures market was prematurely revealed and quickly killed because of the almost instantaneous public backlash after disclosure.[66]

The leading piece arguing against the privilege is Wetlaufer's 1990 article.[67] While Wetlaufer acknowledges that the Court implements the DPP in a sophisticated matter, he still argues for its complete abolishment. Wetlaufer operates from a presumption that "the right to keep secrets is, as a matter of general discourse, a right that requires justification."[68] In other words, he places the burden of justifying the privilege on those who would want to continue its existence, drawing on the general body of literature that emphasizes the importance of freedom of information and transparency in our democracy.

Wetlaufer lays out five overarching arguments against the DPP. First, he points to general intuitions counseling against secrecy, such as the tendency for corruption or other bad acts to occur under the veil of secrecy (even though not all secret acts are "bad"), secrecy's tendency to alienate, and the relationship between information and power.[69] Second, he contests the notion that deliberations would be chilled in the absence of the DPP, stating that the allegation of a chilling effect "is not well established, is easily countered, and is inconsistent with the way the executive has chosen to conduct its own affairs."[70] Third, he argues that the DPP actually

[66] *Id.* at 1795-96.
[67] *See* Kennedy, *supra* note 41, at 1797 ("This author has found only one law review article, by Professor Gerald Wetlaufer, that conducts a thorough critique of the deliberative process privilege.").
[68] Wetlaufer, *supra* note 59, at 883.
[69] *Id.* at 885-86.
[70] *Id.* at 886.

decreases the effectiveness of the executive.[71] Fourth, he points out that even if the DPP actually decreases the effectiveness of the executive, said diminished effectiveness may not result in a net adverse effect on the public interest because imposing the DPP also negatively affects the public interest.[72] Fifth, he highlights alternative methods that function similarly to the DPP that promote executive effectiveness and protect the public interest with fewer adverse effects, such as the power of courts to seal records and close discovery proceedings both pre-trial and during trial proceedings.[73]

These theoretical debates play out in practice, specifically in the FOIA context. In *National Security Archive v. CIA*,[74] the CIA withheld the fifth volume of a Bay of Pigs history written by CIA historian Jack Pfeiffer because it would "confuse the public." But after the FOIA Improvement Act forced the CIA to disclose the history, the National Security Archive decried that motive as a pretense: the agency wanted to hide its "dirty linen."[75] Similarly, when the Trump administration froze aid to Ukraine, watchdogs and journalists submitted FOIA requests for relevant emails between agency officials, which the Trump administration withheld under the DPP. But after a news outlet obtained the unredacted emails, it accused the government of invoking the DPP "not to protect an internal deliberative process, but to keep from the public compelling evidence of the president's misconduct and abuse of power and the complicity of administration officials in his actions."[76]

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[71] *Id.* at 888-90. On my read, Wetlaufer implicitly assumes that achieving effectiveness is the underlying reason behind making sure that agency officials feel free to express their viewpoints.
[72] *Id.* at 890-94. On my read, Wetlaufer implicitly assumes that the public interest is the underlying reason behind making sure that the executive operates efficiently.
[73] *Id.* at 894-97.
[74] 752 F.3d 460 (D.C. Cir. 2014).
[75] Lauren Harper & Thomas Blanton, *CIA Releases Controversial Bay of Pigs History*, NAT'L SEC. ARCHIVE (Oct. 31, 2016), https://nsarchive.gwu.edu/briefing-book/cuba/2016-10-31/cia-releases-controversial-bay-pigs-history.
[76] Anne Weismann, *How Should FOIA Be Reformed to Prevent Further Abuse of Redactions?*, JUST SEC. (Jan. 9, 2020), https://www.justsecurity.org/67945/how-should-foia-be-reformed-to-prevent-further-abuse-of-redactions/.

C. The DPP Compromise: The FOIA Improvement Act's Sunset Provision

The FOIA Improvement Act's sunset provision prohibits agencies from withholding documents based on the DPP after twenty-five years.[77] In doing so, it attempts to strike a balance between transparency and the "fishbowl" concerns discussed above, relying on the intuition that government officials will not fear embarrassment for deliberations that took place a quarter century ago.[78] Indeed, as historians have argued, "government officials likely presume that their work-related actions and advice will *someday* become public," and will likely not change their behavior based on disclosure decades in the future.[79]

But just as the previous balance had its proponents and detractors, the FOIA Improvement Act's new sunset provision had mixed reviews. Several groups released uncritical press releases applauding the passage of the FOIA Improvement Act through its various stages.[80] Others recognized its limitations, calling it "modest" due to the length of the sunset.[81] And still other commentators fell in between, such as one student who suggested that the sunset provision, when combined with the foreseeable harm provision, was a more powerful tool than critics realized.[82]

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[77] 5 U.S.C. § 552(b)(8)(A)(i)(I) (2018).

[78] H.R. REP. NO. 114-391, at 11 (2016) (discussing an "appropriate balance between privacy that is absolutely necessary for candid conversations in the development of effective public policy and transparency that is necessary and expected in a government by the people and for the people"); S. REP. NO. 114-4, at 4 (2015) ("The [sunset] provision ensures government records be made available to the public for their educational and historic value, while providing sufficient time for agencies to protect against the disclosure of their deliberative processes. The world can change significantly over the span of 25 years, and the public benefits derived from access to historical records should continue to be given special consideration when weighted against the government's interest in withholding information.").

[79] Amicus Brief of the Nat'l Coalition for History in Support of Appellant at *8, Nat'l Sec. Archive v. CIA, 752 F.3d 460 (D.C. Cir. 2013) (No. 11-cv-00752-GK), 2013 WL 354014, at *8-9.

[80] *See, e.g.*, *SPJ Applauds Senate Passage of FOIA Improvement Act*, SOC'Y PROF. JOURNALISTS (Mar. 15, 2016), https://www.spj.org/news.asp?ref=1417; *FOIA Improvement Act Widens Public's Window on Workings of Government*, AM. LIBRARY ASS'N (July 1, 2016), https://www.ala.org/news/press-releases/2016/07/foia-improvement-act-widens-public-s-window-workings-government.

[81] *See, e.g.*, David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J.F. 232, 237 (2016).

[82] Zachary D. Reisch, Note, *The FOIA Improvement Act: Using a Requested Record's Age to Restrict Exemption 5's Deliberative Process Privilege*, 97 B.U. L. REV. 1893, 1928-31 (2017).

The legislative history of the FOIA Improvement Act and its sunset provision sheds light on why the sunset provision, though well intentioned, was perhaps underdeveloped in its execution. The earliest traces of the FOIA Improvement Act of 2016 emerged in a hearing before the Senate Judiciary Committee on March 15, 2011, kicked off by Senator Patrick J. Leahy in response to agency delays in processing FOIA requests and an increasing use of exemptions, especially section (b)(3).[83] Advocates for a change in FOIA tended to consist of various nonpartisan organizations, mostly those with a special focus on government accountability such as the Project on Government Oversight, the National Security Archive, and the Sunlight Foundation, but also partisan groups and think tanks such as the Cato Institute.[84]

While the deliberative process privilege was brought up in testimony during that initial hearing, it was paid no special attention at the time—in fact, the Obama administration was lauded for cutting back on its use of (b)(5) exemptions compared to the Bush administration.[85] Those testifying in a hearing before the House Committee on Oversight and Government Reform treated Exemption 5 in much the same manner.[86] The first indication that exemption 5 was viewed as a problem occurred a year later, when Senator Grassley of Iowa noted that the Obama administration was "backsliding on the key indicator of the most discretionary FOIA exemption, Exemption 5 for deliberative process."[87]

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[83] *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1-2 (2011) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

[84] *About*, POGO, https://www.pogo.org/about; *About*, SUNLIGHT FOUNDATION, https://sunlightfoundation.com/about/; *About*, NAT'L SECURITY ARCHIVE, https://nsarchive.gwu.edu/about. Other nonprofits with a broader scope, such as the Cato Institute, also had representatives testify before Congress.

[85] *Id.* at 20, 31, 100 (statements of John Podesta, Thomas Fitton, and the National Security Archive of the George Washington University).

[86] *The Freedom of Information Act: Crowdsourcing Government Oversight: Hearing Before the H. Comm. on Oversight & Gov. Reform*, 112th Cong. 48, 52-53 (2011) (statement of Angela Canterbury, Dir. of Pub. Pol'y, Project on Open Gov't Oversight).

[87] *The Freedom of Information Act: Safeguarding Critical Infrastructure Information and the Public's Right to Know: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4-5 (2012) (statement of Sen. Chuck Grassley, Member, S. Comm. on the Judiciary) (noting that "the Justice Department cited Exemption 5 to withhold

Despite this recognition, the first iteration of the FOIA Improvement Act that passed the House in February 2014 didn't even include the sunset provision,[88] which did not appear until ten months later when the Senate passed its version.[89] And even then, when introducing the bill, Senator Leahy failed to even mention the sunset provision, focusing instead on the foreseeable harm provision and amendments to the reading-room provision.[90] No one else brought up the sunset provision either, showing where congressional attention at the time rested.

Perhaps testimony at an unpublished hearing on March 11, 2014 before the Senate Judiciary Committee caused it to include the twenty-five year sunset.[91] At this hearing, Senator Leahy recognized that Exemption 5 withholdings continued to increase, with "a 41 percent increase from the previous year" to over 79,000 withholdings based on Exemption 5.[92] Amy Bennett, an assistant director for OpenTheGovernment.org, expressed a "[f]oremost" concern among "the open government community" about the "government's overuse of FOIA's Exemption 5, or as many FOIA requesters refer to it, the 'We don't want to give it to you' exemption."[93] She specifically critiqued the aforementioned CIA denial of a request for records from the Bay of Pigs invasion over five decades old as an example of the exemption's misuse,

information 1,500 times" in 2011, "up from 1,231 times in 2010"). Yet at this point, Exemption 5 did not weigh heavily on policymakers' minds. It barely received mention, for example, in two GAO reports created for the purposes of considering changes to FOIA. *See Freedom of Information Act: Office of Government Information Services Has Begun Implementing Its Responsibilities, But Further Actions Are Needed*, GAO (Sept. 2013), https://www.gao.gov/assets/gao-13-650.pdf; *Freedom of Information Act: Additional Actions Can Strengthen Agency Efforts to Improve Management*, GAO (July 2012), https://www.gao.gov/assets/gao-12-828.pdf.

[88] 113 H.R. 1211, 113th Cong. (as referred to S. Comm. on the Judiciary, Feb. 26, 2014); *see also* 160 CONG. REC. 1887-91 (2014) (congressional debates about the bill similarly not mentioning the deliberative process privilege).

[89] 113 S. 2520, 113th Cong. (as passed by Senate, Dec. 8, 2014).

[90] 160 CONG. REC. 6375 (2014) (statement of Sen. Leahy).

[91] *Statement of Amy Bennett*, CONG. PROQUEST (Mar. 11, 2014), https://congressional.proquest.com/congressional/result/congressional/congdocumentview?accountid=15172&groupid=94346&parmId=18490E7792C&rsId=18490E6D649.

[92] *Opening Statement of Patrick Leahy*, CONG. PROQUEST (Mar. 11, 2014), https://congressional.proquest.com/congressional/result/congressional/congdocumentview?accountid=15172&groupid=94346&parmId=18490EDD868&rsId=18490E6D649.

[93] *Statement of Amy Bennett*, *supra* note 91.

and suggested two changes to exemption five. First, she suggested a "public interest balancing test," and second, she suggested—for what I believe to be the first time in testimony before the Committee—a time limit.[94] Her suggested time limit was for twelve years, reasoning that "we should not accord more secrecy to agency business than we accord the President of the United States."[95]

Despite the suggestion of twelve years, a twenty-five-year sunset was chosen. The legislative history is virtually silent on why exactly legislators landed on twenty-five years.[96] Perhaps the timing was lengthened from a baseline of twelve years because of continued concerns about increased litigation and embarrassing government employees that were raised.[97]

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[94] *Id.*

[95] *Id.* At the president's option, presidential records are protected for twelve years under the Presidential Records Act (PRA), 44 U.S.C. § 2204(a) (2018). Legislators, like humans in general, often reason by analogy to previous similar circumstances, even when they shouldn't. *See* David Patrick Houghton, *Analogical Reasoning and Policymaking: Where and When Is It Used?*, 31 POL'Y SCIS. 151 (1998). Reasoning by analogy to the PRA is unwise in large part because standing in stark contrast to the mass deletion schema governing agency records, Congress has mandated that the president retain *all* presidential records in perpetuity. 44 U.S.C. § 2203(a) (2018) ("[T]he President shall take all such steps as may be necessary to assure that . . . [previously specified] records are preserved and maintained as Presidential records . . . ."). In addition, the PRA's temporal restriction on public access to presidential records—a number that had fluctuated between ten and twenty years during legislative debate—was acknowledged as "an arbitrary number" within a range that Congress found balanced the interests of the public, the president, and presidential staff. *See Presidential Records Act of 1978: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 95th. Cong. 56 (1978) (statement of Philip W. Buchen, former Couns. to the President); *see also id.* at 311 (statement of Herbert Brownell, former U.S. Att'y Gen. and Chairman, Nat'l Study Comm'n on Records & Documents of Pub. Offs.) ("[T]he basic reason that is given for establishing this arbitrary 15-year period . . . is that counselors to a Government official might hesitate to give their best advice to their boss if they knew it was going to become public after 15 years."); *id.* at 382 (statement of Ann Morgan Campbell, Exec. Dir., Soc'y of Am. Archivists, Chi., Ill.) (responding to a question of why the Commission on Public Documents recommended a period of fifteen years instead of twenty-five years or ten years by stating, "Some [members] wanted 20 years. Some wanted 10; 15 seemed like a reasonable compromise").

[96] Indeed, Thomas Blanton noted that "no damage has been done with a 12-year sunset," but also didn't question the additional thirteen years added onto the sunset in the agency deliberative context. *Statement of Thomas Blanton*, CONG. PROQUEST (May 6, 2015), https://congressional.proquest.com/congressional/result/congressional/congdocumentview?accountid=15172&groupid=94346&parmId=18490FB7009&rsId=18490FB4150.

[97] *See, e.g.*, *Ensuring Government Transparency Through FOIA Reform: Hearing Before the H. Subcomm. on Gov't Operations of the Comm. on Oversight & Gov't Reform*, 114th Cong. 17 (2015) (statement of Frederick J. Sadler, Former FOIA Officer, FDA); *Statement of Karen Kaiser*, CONG. PROQUEST (May 6, 2015), https://congressional.proquest.com/congressional/result/congressional/congdocumentview?accountid=15172&groupid=94346&parmId=18490FB54F0&rsId=18490FB4150 ("As this Committee noted in its Feb. 23, 2015, Report, enforcing this 25-year outer limit will help ensure that a proper balance is struck between the FOIA's goal of transparency and avoiding the unintended consequences that might chill internal decision-making between government employees.").

Those who discuss the twenty-five-year sunset merely assert the merits of sunsetting the privilege without justifying the exact length of the sunset.[98]

More importantly, the legislative history reveals one factor legislators and advocates failed to consider when creating the sunset provision: agency retention schedules and records management. Not a single person at any of the hearings or debates I mention above—indeed, no one in the entire legislative history of the FOIA Improvement Act of 2016—brought attention to agency retention schedules.

IV. RETENTION SCHEDULES

A. Retention's History

Record retention and disposal has been long overlooked in the legal field. Most of the literature regarding it stems, unsurprisingly, from archivists, who write intermittently on contemporary records management policies and their history. As one account from 1944 shows, Congress also paid little attention to record management policies from the early Republic. The early Congresses were aware of records and provided for their recordkeeping, and Congresses a century later passed criminal statutes prohibiting their willful destruction in enumerated policy spheres, but for the most part, recordkeeping was a function delegated to secretaries and their clerks.[99] In fact, because no statute provided for the legal destruction of records, all government papers were kept in a public building near the President's house until 1810, when they were moved into fireproof rooms.[100] The lack of attention paid to recordkeeping perhaps corresponded

[98] *See, e.g.*, 162 CONG. REC. 253-54 (2016); 162 CONG. REC. 1494-96 (2016). The closest to a justification is Representative Darrell Issa's remark that 25 years is "long after a President has left office." 162 CONG. REC. 3718 (statement of Rep. Darrell Issa).
[99] Henry P. Beers, *Historical Development of the Records Disposal Policy of the Federal Government Prior to 1934*, 7 AM. ARCHIVIST 181 (1944).
[100] *Id.* at 181-82.

with the actual amount of existing records in the new Republic—after George Washington's terms, the nation likely possessed at most 10,000 cubic feet of records.[101]

Afterwards, Congress did not legislate generally with respect to public records until 1870, when the Secretary of War William W. Belknap began to complain of the records reaching an unmanageable degree—records that, according to a War Department board, often "possess[ed] no value whatever," such as "[u]nsuccessful applications for office" or "mere letters of transmittal."[102] Around that time, federal records had reached 200,000 cubic feet, twenty times their amount in 1797.[103] Other cabinet secretaries soon added their voices to Belknap's, with Treasury Secretary George S. Boutwell in 1872 noting that Treasury Department records added 7,688 cubic feet of storage space per year and forced the conversion of potential rooms for clerks or public halls into records storage.[104] Despite all this, the prevailing opinion was to create more storage space, not to begin to destroy records.[105]

This changed in 1877, when a fire destroyed part of the Interior Department building on September 24. A commission appointed by President Hayes to investigate buildings' general susceptibility to fires in the District of Columbia blamed not only the fireproof construction of the buildings, but also drew attention to the fact that "[t]he files cases and boxes, books, papers, &c., belonging to the several departments of the government, have accumulated to such an extent as to crowd the spaces provided for them; and a fire fairly under way would be difficult to control."[106] That commission, however, still did not go so far as to suggest destroying any of the records, reasoning that "[e]very paper worthy at any time to be recorded and placed on the public

[101] James Gregory Bradsher, *A Brief History of the Growth of Federal Government Records, Archives, and Information 1789-1985*, 13 GOV'T PUBL'NS REV. 491, 491 (1986).
[102] Beers, *supra* note 99, at 182.
[103] Bradsher, *supra* note 101, at 491.
[104] Beers, *supra* note 99, at 182.
[105] *Id.* at 183.
[106] *Id.*

files may be of value at some future time, either in a historical, biographical or pecuniary way, to the citizen or the nation."[107] Instead, it recommended the construction of a new fireproof building.

Initially, the quartermaster general submitted a plan for a $200,000 "Hall of Records" that President Hayes supported, but for which Congress failed to appropriate funds.[108] Finally, perhaps one of the most powerful agency heads in early America—the Postmaster General—called for congressional permission to destroy records, which Congress promptly granted in an appropriation act when it allowed the Postmaster General to "sell as waste paper, or otherwise dispose of, the files of papers which have accumulated, or may hereafter accumulate in the Post-Office Department that are not needed in the transaction of current business and have no permanent value or historical interest"—the first use of the phrase "permanent value or historical interest" that has since proliferated in legislation relating to records disposal.[109] Soon thereafter, Congress directed House and Senate officers to sell worthless documents under committee direction.

For six years, no further records disposal policies were passed. During that time, a committee formed to investigate issues with pension-application processing learned of the widespread recordkeeping policies of the various cabinet departments.[110] That committee, known as the Cockrell Committee because it was led by Senator Francis M. Cockrell of Missouri, lambasted "much of the recordkeeping activity in nearly all of the executive departments" as "useless and wasteful," with special ire directed at the "large number of employees engaged in

[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 185.

copying by hand into huge record books press copies of outgoing letters."[111] As a result of its recommendation, Senator F. M. Cockrell of Missouri proposed, and eventually Congress passed, the federal government's first general records disposal policy.[112]

That initial records disposal policy required agency heads to report wastepaper to Congress; the Speaker of the House and the Senate's presiding officer would then appoint two members of each of their respective houses to a committee (which was called a "Joint Committee on Useless Papers" in one form or another until 1935)[113] to examine the report and the accompanying papers for final disposal approval.[114] This remained the primary method for disposing records until the National Archives was established forty-five years later.[115] The Cockrell Committee's recommendations likely failed to sufficiently safeguard historical records; it promoted the use of press copies "that after a few years faded and became illegible," and the general records disposal policy "neither provided for obtaining adequate information about the records recommended for disposal nor established a system for the competent appraisal of such records. As a result, many records of value for research were probably destroyed under the act of 1889."[116] Congress later organized other groups to investigate records following the Cockrell Committee. The Dockery Commission pushed for the use of carbon copies.[117] The Keep Committee suggested first giving an expert historian or archivist an opportunity to preserve

[111] Harold T. Pinkett, *Investigations of Federal Record-Keeping, 1887-1906*, 21 AM. ARCHIVIST 163, 167 (1958).
[112] Act of Feb. 16, 1889, 25 Stat. 672 (repealed 1951).
[113] Beers, *supra* note 99, at 188.
[114] Act of Feb. 16, 1889, 25 Stat. 672 (repealed 1951).
[115] Beers, *supra* note 99, at 187. For a more detailed history of how much each department disposed of its records under the act or under individual acts, *see id.* at 187-93.
[116] Pinkett, *supra* note 111, at 172.
[117] *Id.* at 172-78.

records before their destruction and also exposed several agencies destroying records outside of congressionally approved methods.[118]

Around this time, the seeds of what now are known as records retention and disposal schedules—that is, indexing specific periods of retention to predetermined categories of documents—germinated.[119] Less than nine months after the general records disposal policy was passed, the Office of Internal Revenue submitted "a schedule of papers, showing in columnar form the room number, form number, description of papers, cubic feet, and recommendation as to disposition . . . arranged according to form number" and indicating periods of retention.[120] Other departments submitted similar schedules, and the iterative process eventually resulted in improved schedules, such as the U.S. Coast Guard's inclusion for the first time in 1917 of three classes of records: those marked for permanent retention, those marked for destruction after a set time, and those that could immediately be deleted.[121] That format was picked up and circulated in a memorandum to all department heads by the Director of the Bureau of the Budget and that department's Interdepartmental Board on Simplified Office Procedure.[122] Meanwhile, records continued to pile up, with over one million cubic feet of federal records in existence by 1912.[123]

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[118] *Id.* at 178-91; James Gregory Bradsher, *An Administrative History of the Disposal of Federal Records, 1789-1949*, 3 PROVENANCE, J. SOC'Y GA. ARCHIVISTS 1, 6 (1985).

[119] Reasonable minds differ on what exactly constitutes the beginnings of records schedules. Pinkett, for example, traces the beginnings of records schedules instead to various statutes setting retention periods on postal records. Pinkett, *supra* note 111, at 177-78. I also briefly note here that the current use of record groups is not completely without controversy in the archival community. Some archivists push for other systems, such as "authority control records." Matt Gorzalski, *Reimagining Record Groups: A Case Study and Considerations for Record Group Revision*, 32 PROVENANCE, J. SOC'Y GA. ARCHIVISTS 28 (2014).

[120] Beers, *supra* note 99, at 199.

[121] *Id.* at 200.

[122] *Id.* at 193-95; *see also id.* at 196-99 (reproducing a circular issued by the Departments of Treasury and Labor that also suggested the schedule system).

[123] Bradsher, *supra* note 101, at 491. Beginning shortly after, records were created at an exponentially increasing rate as the federal government expanded, the population of the United States grew more rapidly, and the role of records itself became more central to the actual functioning of government agencies. *Id.* at 492-94.

Before the National Archives was established in 1934, one significant change to general records disposal occurred via an executive order that required the Librarian of Congress to first examine the lists of papers before the congressional committee saw them.[124] This added a layer of review to a previously perfunctory process, at least when it came to records with potential historical value.[125] Beyond that, legislative activity consisted primarily of Congress granting one-off authorizations to dispose of records to individual departments.[126] The Department of Agriculture, for example, had its own disposal mechanisms and relied on them to destroy over half its records "both valuable and worthless" from between 1862 and 1889, an "unusually high rate of destruction [that] probably resulted from the desire of the custodians to rid themselves of the annoyance caused by historians desiring to use the records and from a lack of appreciation of the value of the records."[127]

The Secretary of Agriculture's willingness to destroy records in bulk and the unauthorized records destruction mentioned earlier resulted in growing fears among historians that valuable records were being destroyed.[128] These fears dovetailed with government officials' desires to create a building for permanent records and led to the creation of the National Archives on June 19, 1934.[129] That said, the National Archivist at the time mainly carried on the function of checking disposal lists that had once been delegated to the Librarian of Congress. And in its early days, its authority overlapped with the specific disposal procedures still in force in certain agencies, leading to some uncertainties with respect to what was supposed to go where.[130]

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[124] Exec. Order No. 1499 (Mar. 16, 1912).
[125] Beers, *supra* note 99, at 189.
[126] *See id.* at 190-93.
[127] *Id.* at 190.
[128] Bradsher, *supra* note 118, at 6.
[129] National Archives Act, Pub. L. No. 73-432, 48 Stat. 1122 (1934).
[130] Bradsher, *supra* note 118, at 7.

Congress passed the General Disposal Act of 1939 to remedy some of these problems. That act defined the word "records" for the first time, clarified its application as the sole authorized method of destruction for all agency records, and required submission of disposal lists to the National Archives for review before lists were sent to the joint congressional committee.[131] This marked the first time that the National Archives and its experts were put in charge of appraising records from all federal agencies.[132] Four years later, the Federal Records Disposal Act of 1943 would allow agencies to create continuing schedules instead of resubmitting disposal lists every year and clarified that records of "permanent value or historical interest to the Federal Government" were records that had "sufficient administrative, legal, research, or other value to warrant their continued preservation by the United States Government."[133]

Congress via legislation and the president via executive order continued to tweak with records management programs before arriving at the current system. These corrections often responded to issues of resource constraints, pushes to centralize or decentralize certain functions, and tensions between efficiency and information-preserving goals. The Federal Records Act of 1950, for example, moved the then-named National Archives and Records Service (NARS) under the General Services Administration (GSA).[134] The GSA was associated, broadly speaking, with more resources and an increased focus on efficiency. NARS, on the other hand,

[131] *Id.* at 7-8.
[132] *Id.* at 9. Around this time, around ten million cubic feet of records had accumulated. Bradsher, *supra* note 101, at 491.
[133] Bradsher, *supra* note 118, at 12. Agencies initially did not really use their new scheduling powers, so the National Archives sought and successfully received authority to initiate schedules covering records common to multiple agencies. Isadore Perlman, *General Schedules and Federal Records*, 15 AM. ARCHIVIST 27, 27 (1952). For more on the development of general schedules, see generally *id.*
[134] Bradsher, *supra* note 118, at 15-16.

took more of a historians' approach, though lacked the finances to deal with the twenty million cubic feet of records in existence on its own.[135]

That structure dominated until the National Archive and Records Administration Act of 1984 was passed during the Reagan Administration.[136] That legislation reacted to a report of the Federal Paperwork Commission criticizing records management and called for a greater focus on the actual informational content of documents, rather than treating them as mere physical objects to be stored, designed, or destroyed with an eye towards economy.[137] Meanwhile, government agencies—which began storing files on computers as early as the 1960s—continued to expand its use of this new storage technology, with over 14 million reels of computer tape at the close of 1984 storing the equivalent of over 100 million cubic feet of records.[138] That computer tape and the accompanying computers cost the government between 12 billion dollars in 1983.[139]

The history of records disposal policies sheds light on our modern understanding of records retention in two ways. First, it helps us understand why we moved towards a system of records disposal. The main historical probmes to solve were a combination of physical space and public safety resulting from flammable paper records—neither of which is as pressing a danger today. Second, this history illuminates a leitmotif that carried on for over a century since the nation's founding: disposing of records was a last resort. Understanding the history of congressional response to unideal recordkeeping policies suggests a way forward: it is time to reconsider records once again, but with an eye towards public accountability schemes and FOIA.

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[135] Bradsher, *supra* note 101, at 491. The total cost of creating, maintaining, and using these records cost the government one billion dollars, a sixfold increase from just seven years earlier. *Id.* at 494.
[136] Linda Vee Pruitt, *Archives and Records Management in the Federal Government: The Post-GSA Context*, 3 PROVENANCE, J. SOC'Y GA. ARCHIVISTS 87, 87 (1985).
[137] *Id.* at 88. At the end of 1984, the federal government had custody of 40 million cubic feet of records, with 1.4 million cubic feet belonging to NARS's archives. Bradsher, *supra* note 101, at 491.
[138] Bradsher, *supra* note 101, at 498.
[139] *Id.* at 499.

B. Retention Schedules Today

As the tale above foreshadows, agencies today do not keep all of their files forever, but Congress also prohibits them from deleting documents at their sole discretion. The National Archivist of the United States, the agency head of the National Archives and Records Administration (NARA),[140] issues a "General Records Schedule" (GRS) that sets out agency retention and disposal schedules for certain documents while requiring agencies to promulgate their own schedules for others.[141] Debra Steidel Wall, who has a background in archival work with a specialty in film, currently holds the position of Acting Archivist.[142] Most National Archivists come, unsurprisingly, with deep experience in archival work and undergraduate degrees in history and other liberal arts, though one librarian ended up in the role. None are lawyers. Oftentimes, but not always, they are promoted from within the National Archives.[143]

NARA promulgates retention schedules regulating six general categories of documents: financial documents, human resources, technology, information management, general operations support, and mission support.[144] These six tables are each an independent GRS and combine to

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[140] 44 U.S.C. § 2103 (2018). The statutory scheme mandates that the Archivist "be appointed without regard to political affiliations." *Id.* § 2103(a).

[141] 44 U.S.C. § 3303a(d) (2018); *General Records Schedules (GRS)*, NAT'L ARCHIVES (June 27, 2022), https://www.archives.gov/records-mgmt/grs.html. In broad terms, the GRS is for records common to all agencies; individual agencies then fill out Standard Form 115 to schedule their own individual program records and any administrative records not covered by the GRS. Richard A. Wire, *Disposition of Federal Records: A Records Management Handbook*, NAT'L ARCHIVES 89-92 (2000), https://www.archives.gov/files/records-mgmt/pdf/dfr-2000.pdf.

[142] *Acting Archivist of the United States: Debra Steidel Wall*, NAT'L ARCHIVES (May 2, 2022), https://www.archives.gov/about/organization/senior-staff/acting-archivist. She replaced David Ferriero, the 10th Archivist of the United States. He retired on April 30, 2022 after twelve years (so President Biden could replace him), and underwent a moment of controversy during his tenure for supporting a decision to censor an exhibit photograph with signs critical of President Trump. Orlana Gonzalez, *Retiring U.S. Archivist to White House: "You Better Not Hire Another White Male,"* AXIOS (Mar. 15, 2022), https://www.axios.com/2022/03/15/national-archivist-white-house-white-male; Joe Heim, *National Archives Exhibit Blurs Images Critical of President Trump*, WASH. POST (Jan. 17, 2020, 6:54 p.m. EST), https://www.washingtonpost.com/local/national-archives-exhibit-blurs-images-critical-of-president-trump/2020/01/17/71d8e80c-37e3-11ea-9541-9107303481a4_story.html.

[143] *Archivists of the United States 1934 – Present*, NAT'L ARCHIVES (July 5, 2022), https://www.archives.gov/about/history/archivists.

[144] *General Records Schedules (GRS)*, NAT'L ARCHIVES (June 27, 2022), https://www.archives.gov/records-mgmt/grs.html.

form one overarching GRS (akin to how "Section II.B" and "Section II.B.1" are both "Sections" under some law journals' systems). Where, then, would typical deliberative material fall?

The answer: oftentimes, outside the GRS. The GRS primarily covers administrative records and "mission support records" that have "business and historical value" across the government.[145] "Mission records," or records pertinent to an agency's specific function and mission (such as EPA memoranda concerning environmental protection or IRS memoranda concerning tax collection), are generally not covered by the GRS.[146] Instead, each agency promulgates its own agency-specific schedules and submits those schedules to NARA.[147]

Based on my review of individual agency schedules,[148] agencies generally do not treat "deliberative materials" as a distinct category. Of the agencies that publish detailed retention schedules, their categories generally are broken up by office and subject matter. The Equal Employment Opportunity Commission, for example, has a matrix that organizes documents by exactly those two criteria, categorizes records as "temporary" or "permanent," and then describes how long each file must be kept.[149] "General correspondence" files (which would likely contain material covered by the DPP) at the Office of the Chair and Commissioners or the Office of Legal Counsel are disposed after one year, whereas those at the Office of the Chief Financial Officer are stored "in a separate letter-size two through five-drawer metal vertical or lateral filing

[145] *Frequently Asked Questions (FAQs) about the General Records Schedules*, NAT'L ARCHIVES (Mar. 11, 2020), https://www.archives.gov/records-mgmt/grs/faqs-about-grs.
[146] *Id.*
[147] 44 U.S.C. § 3303(3) (2018).
[148] All agencies' records control schedules are available on NARA's website. *Records Control Schedules*, NAT'L ARCHIVES, https://www.archives.gov/records-mgmt/rcs/schedules/index.html.
[149] *Matrix by Office of Primary Responsibility for Commission Program Records, including Administrative Records Common to All Headquarters and Field Offices*, EEOC, https://www.eeoc.gov/matrix-office-primary-responsibility-commission-program-records-including-administrative-records; *see also EEOC Directives Transmittal Number 201.001*, EEOC (Dec. 3, 2003), https://www.eeoc.gov/management-programs-records-management (establishing the matrix).

cabinet with a lack" in the CFO's Office, moved to NARA-compliant storage, transferred to the Federal Records Center, or destroyed in three years.[150]

Thus, we see that one category of information can receive different treatment with an agency based on the office within the agency from which it originates. And because agencies do not treat "deliberative materials" as one category of information, they will also receive different treatment within a single agency office. Sticking with the EEOC, its Office of Communications and Legislative Affairs would destroy deliberative materials that constitute "general correspondence" after three years, but deliberative materials within the "Office of the President File" after two.[151] It goes without saying that between agencies, records will receive different treatments as well. Compare the EEOC retention schedules, for example, with the FCC, where memorandum and subject files are destroyed after three years.[152] That said, most agency-specific and GRS retention periods covering deliberative materials fall far short of the twenty-five years required for the DPP's sunset.

Hundreds of agency-specific retention schedules have been uploaded to NARA's website. To simplify the discussion a bit, I focus on retention schedules for records requested via FOIA. I pick this focus for several reasons. First, the GRS has a centralized schedule that many agencies parrot for documents that become subject to FOIA requests. Second, the centralized schedule sets a minimum retention time of six years, which is on the longer end of most retention policies that I reviewed.[153] Third, many of the agencies from which I requested documents cited

[150] *Id.*
[151] *Id.*
[152] *FCC Request for Records Disposition Authority, NI-773-91-2*, FCC (Oct. 18, 1990), https://www.archives.gov/files/records-mgmt/rcs/schedules/independent-agencies/rg-0173/n1-173-91-002_sf115.pdf.
[153] Some agencies retain deliberative documents for longer than six years in certain instances, but this seems rare. The Department of Justice, for example, keeps drafts and comments of DOJ Orders for up to seven years (if they aren't first transferred to NARA). *DOJ Request for Records Disposition Authority DAA-0060-2011-0009*, DOJ (July

to the relevant FOIA retention schedule and not agency-specific schedules governing the underlying document when responding to my FOIA request. Fourth, for a project like mine, once a FOIA request is filed, the relevant copy would be subject to the six-year retention requirement. Thus, savvy requesters can ensure that some documents are saved for at least the six-year period by proactively filing a FOIA request for it. If a document were otherwise nearing the end of its retention period, its copy would receive an additional six years of retention in a FOIA folder. As can be seen from the sampling of EEOC and FCC documents, this can triple or quadruple the lifespan of a given document.[154]

24, 2012), https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/daa-0060-2011-0009_sf115.pdf.

[154] Theoretically, one could file serial FOIA requests every six years to try to preserve a deliberative document for over twenty-five years, as each subsequent request would create a new file that would be preserved for six years beyond the filing of that request. That, however, would require at least four FOIA requests spaced over twenty-four years (assuming the first request was filed a year after the document's creation). This process would obviously be extremely burdensome on filers and only possible if filers knew what documents they wanted to preserve in advance—it would not help historians looking back. Additionally, it's unclear if the subsequent requests would actually lead to the compilation and release of the relevant records. Agency guidance often indicates that duplicate requests (i.e., when someone requests the same information more than once) will not result in the release of records. *See, e.g.*, *CMS FOIA Frequently Asked Question*, CTRS. MEDICARE & MEDICAID SERVS. 4 (2022), https://www.cms.gov/files/document/foia-faq-2022.pdf; *FOIA FAQs: Besides Withholding Any Portion of a Record, Are There OIther Reasons for Not Releasing Records?*, HEALTH & HUM. SERVS. (Sept. 17, 2015), https://www.hhs.gov/foia/faqs/besides-withholding-any-portion-of-a-record-are-there-other-reasons-for-not-releasing-records/index.html; *DoD Freedom of Information Handbook*, U.S. DEP'T DEF. (Apr. 13, 2018), https://open.defense.gov/transparency/FOIA/FOIA-Handbook/. Theoretically, this would preclude the release of the records on the fourth or fifth request because the records are "duplicate requests." Based strictly on the text of agency guidance, no temporal limits are imposed on duplicate requests, which can be filed "at the same or different times." *See, e.g.*, *DoD Freedom of Information Handbook*, *supra*. That said, the purpose of the "duplicate request" restriction appears to be directed at duplicate requests for the same information within a shorter timeframe.

Another complication arises from the administrative complexity and lack of standardization between and within agency FOIA offices. Different FOIA officers may be unaware of previous requests, especially ones filed six years before. On the one hand, this would make subsequent requests less likely to be flagged as "duplicates." On the other, it would make it harder to ensure that serial requests return the same records. It also is unclear whether the original documents are preserved for six years, or whether only the copies of the documents in the FOIA record are preserved. If the latter, the system would not work unless the subsequent requests explicitly referred to the earlier ones, which may trigger the "duplicate requests" condition. It's possible that the last FOIA officer in the series would, in her equitable discretion, choose to release the files anyway. But her ability to do so depends on the proclivities of the three or four before her, as if any one of them summarily denies the request without compiling a record because of the "duplicate requests" exception, the records will fail to be preserved for the appropriate time and the whole enterprise will fall. The success of the enterprise, therefore, relies heavily on the actions of four independent FOIA officers.

GRS 4.2 covers "information access and protection records," or "records created in the course of . . . responding to requests for access to Government information."[155] This includes Item 020, "Access and disclosure request files," comprised of "[c]ase files created in response to requests for information under the Freedom of Information Act . . . [including] copies of requested records . . . ."[156] Many of the records I requested would fall under this category: various task reports or intra-agency memoranda that had previously been requested in litigation.[157] GRS 4.2 Item 020 calls for these records to be destroyed after the later of (1) six years after the final agency action (for example, granting or denying a request, or adjudication in subsequent FOIA litigation), or (2) three years after final adjudication by the courts.[158] Generally the six-year retention period occurs later. In either event, "longer retention is authorized if required for business use."[159]

Agencies theoretically have the option to submit their own schedules to NARA and voluntarily retain records for a longer period. I found only one agency with a longer retention schedule, an unsurprising outcome given the lack of incentives for agencies to do so.[160] At the

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[155] *General Records Schedule 4.2: Information Access and Protection Records*, NAT'L ARCHIVES (Mar. 2022), https://www.archives.gov/files/records-mgmt/grs/grs04-2.pdf.
[156] *Id.*
[157] *See, e.g.*, Letter from Michael L. Heise, Acting Assistant Legal Couns., EEOC Off. Legal Couns., to author (Jan. 21, 2022) (on file with author) (explaining that "FOIA Requests Files are maintained, at a maximum, six years from the date of reply . . . . The Commission temporarily keeps FOIA Requests files in accordance with its records retention and then they are automatically destroyed").
[158] *Id.*
[159] *Id.* The ways in which the GRS and agency-specific retention schedules use words like "disposable" and "destroy" do not entirely follow common usage. For example, Note 1 to GRS 4.2 Item 020 notes that "disposable" records "may be retained" longer, suggesting that normally they are not "dispos*able*," but rather *marked for disposal*. But Note 2 then suggests that agencies may exercise discretion in choosing to retain redacted copies for business use, conforming more with the plain meaning of the term "disposable." Complicating matters further, not every single item has a textual basis for retention for business use, such as GRS 4.2 Item 180, virtual public access library records. Yet the enabling statute, the Federal Records Act, only grants the Archivist rulemaking authority to "empower" an agency to "dispose of" records and "authoriz[e]" disposals, *not* mandate them. 44 U.S.C. § 3303a(a)(1), (d) (2018). I think the best reading of the GRS would be exactly that: it permits, but does not require, disposal of records at the end of the retention periods it specifies.
[160] The Department of Interior retains their appealed and denied FOIA records for seven years instead of six. *Introduction to the DOI Departmental Records Schedule*, DEP'T INTERIOR 10-11 (June 19, 2014), https://www.doi.gov/sites/doi.gov/files/uploads/DRS-Admin-Schedule-Final-Approved-06-19-2014.pdf.

very least, the Consumer Product Safety Commission,[161] the Department of Defense,[162] the Department of Justice,[163] the Environmental Protection Agency,[164] the Equal Employment Opportunity Commission,[165] the Federal Aviation Administration,[166] the Internal Revenue Service,[167] the National Oceanic and Atmospheric Administration,[168] the State Department,[169] and all agencies within those agencies adhere to the six-year retention schedule set by the GRS.

V. THE SUNSET/RETENTION MISMATCH AND POTENTIAL SOLUTIONS

A. The Sunset/Retention Mismatch

A simple numerical comparison betrays a mismatch between FOIA's sunset on the DPP and the retention schedules currently set out by the GRS and by individual agencies. Under the current system, the DPP sunset kicks in long after most documents have already been deleted under most agencies' retention schedules. Most of the remaining documents would have accessioned to the National Archives as archival records, at which point the vast majority become publicly available anyway (and harder to obtain).[170] The only way for the DPP sunset to

[161] Privacy Act of 1974; Revision and Republication of Systems of Records, 77 Fed. Reg. 29596, 29609 (May 18, 2012).
[162] *OSD Records Disposition Schedules: Series 200—Management and Operations*, DEP'T DEFENSE 71 (Apr. 2021), https://www.esd.whs.mil/Portals/54/Documents/RPDD/RDS/200_Series_Management_and_Operations_(Updated_Apr_21).pdf.
[163] *Records Management*, DOJ (Nov. 6, 2020), https://www.justice.gov/archives/open/records-management.
[164] *EPA Records Schedules in Final Status*, EPA 595 (July 2022), https://www.epa.gov/system/files/documents/2022-08/20220812_epa_records_schedules_in_final_status.pdf.
[165] *Matrix by Office of Primary Responsibility for Commission Program Records, including Administrative Records Common to All Headquarters and Field Offices*, EEOC, https://www.eeoc.gov/matrix-office-primary-responsibility-commission-program-records-including-administrative-records.
[166] *Chapter 4. General Management and Administration*, FAA 23-25 (Aug. 29, 2001), https://www.faa.gov/documentLibrary/media/order/finance/1350-15C/media/chapter4.pdf.
[167] *General Records Schedules*, IRS 69 (2016), https://www.irs.gov/pub/irs-utl/d12829.pdf.
[168] *NOAA Records Schedules Chapter 200: Administrative and Housekeeping Records*, NOAA 71 (June 2020), https://www.noaa.gov/sites/default/files/legacy/document/2020/Aug/Chapter_200-Adminstrative_and_Housekeeping_Records.pdf.
[169] *U.S. Department of State Records Schedule*, DEP'T STATE 59, https://foia.state.gov/_docs/RecordsDisposition/B-02.pdf.
[170] 36 C.F.R. § 1256.20 (2021). Requesting archival documents from NARA is also a more expensive process than the FOIA request process in many ways. It takes about as much time (NARA took over a month just to tell me that

have any bite (setting aside agencies forgetting to delete documents) is for the following to occur: first, the agency must accession the record to NARA.[171] Then, NARA must affirmatively decide to withhold it from the public under its "general restrictions," which includes a discretionary restriction on deliberative material.[172] NARA can decide this *sua sponte* or the agency can direct NARA to withhold the documents.[173] Finally, the Archivist must not have determined that releasing the information would not result "in the harm that the privilege was intended to protect" or reveal "confidential attorney-client communications."[174] Only then would the DPP sunset work to force the reveal of a document that would otherwise be withheld.[175] Although little empirical research exists on how zealously NARA guards its documents,[176] it's fair to say that only a fraction of deliberative documents would make it to this stage. As a result, the DPP sunset is largely without teeth.

Usually, discussions regarding FOIA and discussions regarding records management occur in completely parallel universes, despite the deeply interconnected nature of the two.[177]

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the card I used was declined), and those documents fall outside of FOIA's fee waiver provisions. *See* 36 C.F.R. § 1250.51(a) (2021). Scans cost eighty cents per page. *NARA Reproduction Fees as of April 20, 2018*, NAT'L ARCHIVES, https://www.archives.gov/research/order/fees. The documents I requested from NARA—a single case with 400 pages of documents—ran me $320, costs which were paid via the generosity of the Oscar M. Ruebhausen Fund. Email from Kevin M. Taylor, Fin. Program Specialist, NARA, to author (Dec. 30, 2022) (on file with author). It's possible to avoid paying copying fees, but that requires visiting in-person the NARA facility where the records are located.

[171] 36 C.F.R. §§ 1235.1-1235.50 (2021). If, on the other hand, the agency merely transfers the records to a federal records center (thus retaining legal custody), it's possible that the record lasts for twenty-five years.

[172] *Id.* §§ 1256.40, 1256.54.

[173] *Id.* §§ 1256.20(b), 1256.54(a).

[174] *Id.* § 1256.54(b).

[175] At this point, a requester would file a FOIA request for the restricted information. *Id.* §§ 1250.10, 1256.22.

[176] That said, at least in the presidential records context, NARA redacts and withholds information to some extent. *See, e.g.*, Matthew N. Beckmann, *Researching the President's [Redacted]*, 45 CONG. & PRESIDENCY 315 (2018).

[177] *See supra* Section III.C (finding no mention of records management in the legislative history of the FOIA Improvement Act of 2016); MEGHAN M. STUESSY, CONG. RSCH. SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND, LEGISLATION, AND POLICY ISSUES (2015) (Congressional Research Service report on FOIA with only cursory mentions of records management). I could find only one instance in which an academic highlighted the importance of bundling freedom of information acts with record retention policies, an article by Richard Peltz that focused on Arkansas (which had no state-wide records retention system at all even in 2005) and not federal retention policies or the federal FOIA). Richard J. Peltz, *Arkansas's Public Records Retention Program: Finding the FOIA's Absent Partner*, 28 U. ARK. LITTLE ROCK L. REV. 175, 175-78 (2006).

And even in the rare instances when FOIA and records management are discussed together, it is almost never in the context of the potential of records management policies to unintentionally stymy FOIA's purpose. In a discussion of NARA, for example, historian Matthew Connelly mentions FOIA as an inefficient, but ultimately still "useful workaround . . . when all else fails" for historians conducting research.[178] This perspective envisions the two as alternative mechanisms for information gathering, not two interdependent systems. The government itself tends to discuss the two when analyzing costs of FOIA requests on government agencies, as poorly managed records lead to higher costs when responding to FOIA requests.[179]

Before addressing any specific fixes to this statute's current implementation, I wish to take a moment to pause on the oddity of the above situation. How we manage our records and how we provide access to them are two intuitively interconnected subjects. In fact, one of the *Ur*-reasons the government retains any records at all is to benefit members of the public, because America is a democracy of, by, and for the people. Our historians need these records to fully understand our past; our journalists need them to hold administrations accountable in the present; our advocates need them to better and improve our system of governance in the future.[180] For this to happen, both sides must shift their current frameworks. Freedom-of-information practitioners and policymakers need to grasp how those records are actually maintained to more sharply tailor their requests and policy proposals. Simultaneously, archivists and records management officials need to fully comprehend the discussions motivating the primary

[178] Matthew Connelly, *State Secrecy, Archival Negligence, and the End of History as We Know It*, KNIGHT FIRST AMEND. INST. 11 (Sept. 13, 2018), https://s3.amazonaws.com/kfai-documents/documents/81034e80e7/State-Secrecy--Archival-Negligence--and-the-End-of-History-as-We-Know-It.pdf.
[179] *See, e.g.*, MEGHAN M. STUESSY, CONG. RSCH. SERV., R43165, RETAINING AND PRESERVING FEDERAL RECORDS IN A DIGITAL ENVIRONMENT: BACKGROUND AND ISSUES FOR CONGRESS 6 (2013); *see also* Wire, *supra* note 141, at 28-29 (mentioning FOIA primarily when discussing differing definitions of an agency "record").
[180] Though, as hinted at above, this is a particularly idealized version of FOIA. *See generally* KWOKA, *supra* note 8. Still, "FOIA remains a powerful tool for many journalists." *Id.* at 32.

mechanisms through which members of the public gain access to government records. Whether through conferences, workshops, or other means, our records and information systems cannot achieve homeostasis without drawing these two seemingly disparate circles closer together.

No one, for example, has yet considered the sunset provision on conjunction with records retention policies. Congress's enactment of the Freedom of Information Act reflects a powerful intuition among Americans that transparency and accountability serve a vital function in a modern democracy. The gap between retention schedules and duties to disclose should be narrowed, and I propose three ways in which agency officials and legislators can act to fix the problem. Ideally, these solutions would be taken in tandem with broader solutions at improving NARA's overall situation, such as increasing its budget or requiring agencies to define and report their recordkeeping costs.[181]

B. Potential Solutions

One of the two simplest solutions would be for the Archivist of the United States to promulgate a retention schedule that requires retaining deliberative documents for twenty-five years or more.[182] Agencies could proactively categorize all documents as part of the deliberative process in one unit, triggering a twenty-five-year retention schedule instead of the usual shorter schedule. I was unable to find a rationale for why the current FOIA schedule calls for those records to be held for exactly six years (as opposed to eight or four). Alternatively, instead of or in addition to the Archivist of the United States, individual agency heads could proactively set retention schedules with longer retention periods than the GRS minimum. These regulatory

[181] STUESSY, *supra* note 179, at 16-17.
[182] 44 U.S.C. § 3302, 3303a (2018).

solutions can and should also be guided by a President who uses their appointment and agenda-setting powers to push for transparency.[183]

In terms of legislative solutions, Congress could act to amend the Federal Records Act to clarify that agencies must maintain deliberative records until a certain number of years after the sunset provision. For example, 44 U.S.C. § 3105 currently provides that agency heads must "establish safeguards against the removal or loss of records" that are "necessary and required by regulations of the Archivist." Congress could add a third requirement to the two existing ones that agency heads must "mak[e] it known to officials and employees of the agency— . . . (2) that deliberative records in the custody of the agency are not to be alienated or destroyed until *X* years after the sunsetting of the deliberative process privilege, and . . . ."[184] This statutory fix would, obviously, be more permanent than a regulatory fix, and make clear a *legislative* desire for a link between agency retention and disclosure regimes. Both statutory and regulatory fixes would also introduce some standardization in agencies' retention of correspondence, which as shown above can vary based on agency and type of correspondence.

Any solution that requires an agency to store more documents for longer, however, must square with the marginal costs of continued storage. Electronic storage is a double-edged sword because although it has greatly facilitated information storage, cheaper storage costs have led to a massive increase in what is stored, combined with less care and attention to how efficiently information is stored. It also leads to concerns of data obsolescence.[185] In 2010, the State

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[183] *See, e.g.,* Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 6485 (Jan. 26, 2009) (expressing President Obama's commitment to openness and transparency).

[184] 44 U.S.C. § 3105(2) would become 44 U.S.C. § 3105(3) in this hypothetical.

[185] These concerns have existed since the 1960s. As one records officer put it:

> [Computers] have compounded our problems in several ways. They belch forth records at the rate of more than 800 lines a minute, adding to our accumulation. They bring about a need for complete reevaluation of retention periods for computer-involved records. In many cases our source

Department was estimated to generate two billion emails every year; a single intelligence agency produced a petabyte (one million gigabytes, or roughly "20 million four-drawer file cabinets" worth of textual documents) of classified information in 1.5 years.[186] Agencies *should* have the ability to store records for twenty-five years without incurring significant marginal costs, given today's technology. But given the realities of the federal government's inability to keep up with emerging technologies, this ideal may not be realized in the near-term.[187]

Therefore, if retaining all records requested under the deliberative process privilege for twenty-five years proves too burdensome, agencies could still be required to maintain a subset. Congress, individual agency heads, or the national Archivist could set up procedures for individuals to request—at any point before a document's deletion—that the agency retain specific documents, such as those withheld under the deliberative process privilege or a specific

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> documents cannot be read without machines—and who knows now whether the same machines will be available 50 years hence?

J. J. Hammitt, *Government Archives and Record Management*, 28 AM. ARCHIVIST 219, 221 (1965); *see also* Peltz, *supra* note 177, at 10-12 (discussing issues with electronic records); Henry H. Perritt, *Electronic Records Management and Archives*, 53 U. PITT. L. REV. 963 (1992) (same).

[186] Connelly, *supra* note 178, at 14-15. Connelly further points out that the NARA budget has remained stagnant or even decreased in recent years and that more records must be manually reviewed because of their classified nature. *Id.* at 12-13. This already existing issue of potential overstorage exists at the same time as an understorage, with NARA reporting investigations of unauthorized losses or deletion of federal records for the first time in the late 2010s. *Id.* at 15-18. Then-National Archivist David Ferriero responded to Connelly's essay, acknowledging that Connelly accurately identified many of the challenges that NARA faced, while also focusing on steps NARA was taking to meet those challenges. David S. Ferriero, *A Response from the National Archives*, KNIGHT FIRST AMEND. INST. (Sept. 13, 2018), https://knightcolumbia.org/content/response-national-archives [https://perma.cc/B6XH-4LBN].

[187] *See, e.g.*, *Information Technology: Agencies Need to Develop Modernization Plans for Critical Legacy Systems*, U.S. GOV'T ACCOUNTABILITY OFF. (June 2019), https://www.gao.gov/assets/gao-19-471.pdf. OMB/NARA's deadline for all agencies to manage permanent records electronically was recently postponed from the end of 2022 to June 30, 2024. *See* Shalanda D. Young & Debra Steidel Wall, *Memorandum for the Heads of Executive Departments and Agencies re: Update to Transition to Electronic Records*, EXEC. OFF. PRESIDENT 1 (Dec. 23, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/M_23_07-M-Memo-Electronic-Records_final.pdf. Once agencies manage their records primarily in electronic form anyway, the marginal cost of holding onto some records for longer should be lower than it is now. Artificial intelligence also has promising implications for lowering the costs of records management. *See* NARA, COGNITIVE TECHNOLOGIES WHITE PAPER: RECORDS MANAGEMENT IMPLICATIONS FOR INTERNET OF THINGS, ROBOTIC PROCESS AUTOMATION, MACHINE LEARNING, AND ARTIFICIAL INTELLIGENCE 18-21 (2020).

group of deliberative documents, for the twenty-five-year sunset period.[188] In this sense, citizens would have the opportunity to have input into the "research value" of a given document.[189]

Although this solution would not assist researchers looking back retrospectively (since what exactly to request would, at the earlier predeletion stage, constitute "unknown unknowns" for them), it would at least provide some semblance of accountability for those initially willing to go through the burden of FOIA litigation. And the changes should be within the realm of feasibility. The National Archives, for example, stores Census data for seventy-two years before its public release,[190] and the fact that some agencies returned decades-old documents in response to my requests suggests that some capacity changes would not be overly burdensome. Given the relatively high probability that most agencies are destroying more records than they should,[191] if any indicators suggest preserving a document (such as a citizen request), an agency should

[188] Agencies may worry that permitting records-retention requests would incentivize individuals to paint with broad strokes and request retention of, for example, "all agency deliberative documents created in the last two years." However, agencies currently refuse "unduly burdensome" FOIA requests and receive the auspices of the courts in doing so. *See, e.g.*, Letter from Dione J. Stearns, Assistant Gen. Counsel, Fed. Trade Comm'n, to author (Jan. 4, 2021) ("[Y]our request is broad and the search would create an undue burden on the agency."); *Department of Justice Guide to the Freedom of Information Act: Procedural Requirements*, DOJ (Aug. 20, 2021), https://www.justice.gov/oip/page/file/1199421/download ("As a corollary to the 'reasonably described' inquiry [of § 552(a)(3)(A)(i)], courts have held that agencies are not required to conduct wide-ranging, 'unreasonably burdensome' searches for records."); Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Com., 907 F.2d 203, 209 ("An agency need not honor a request that requires 'an unreasonably burdensome search.'" (quoting Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978))); *cf.* Stephanie Alvarez-Jones, Note, *"Too Big to FOIA": How Agencies Avoid Compliance with the Freedom of Information Act*, 39 CARDOZO L. REV. 1055, 1063-71 (2018) (discussing case law developing the "undue burden" rule). Agencies could similarly refuse "unduly burdensome" retention requests. Congress could also preserve this solution's cost-saving effects via a specificity mandate that transforms this "undue burden" principle's current common-law basis into a statutory one.

[189] *See* Elizabeth B. Drewry, *Records Disposition in the Federal Government*, 15 PUB. ADMIN. REV. 218, 220 (1955).

[190] Albert E. Fontenont, Jr., *2020 Census Program Memorandum Series: 2021.13*, U.S. CENSUS BUREAU (June 10, 2021), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/ARC_detailed_operational_plan.pdf.

[191] U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-15, NATIONAL RECORDS & ARCHIVES ADMINISTRATION: OVERSIGHT AND MANAGEMENT IMPROVEMENTS INITIATED, BUT MORE ACTION NEEDED 18 (2010) ("[NARA] concluded that almost 80 percent of agencies were at moderate or high risk of improper destruction of records . . . .").

refrain from destroying it. The retention-request solution attempts to strike a balance between the current situation and having agencies mass retain deliberative materials.

This group of suggestions has downsides in addition to its upsides. Any requirement that an agency retain more records may increase the length of an individual FOIA request because of the additional documents the agency will have to search. They would also burden already overworked agency staff, who would have to categorize preemptively whether or not a given memorandum or letter fell within the DPP. But without these changes, the DPP's sun largely sets on an empty wasteland of shredded documents.

The second obvious solution is to shorten the sunset period. Many commentators and academics have proposed this before, but previous recommendations failed to factor in retention periods. This has led to some commentators suggesting, for example, that the sunset should be cut back to twelve years to bring it in line with the Presidential Records Act, 44 U.S.C. § 2204(a), which allows for presidential records to be published after twelve years.[192] In a vacuum, that suggestion is well-intentioned and thought out—but would have no practical effect because of agency retention schedules. Every proposal that would fix a sunset period of roughly six years or more (at most, the document's original retention schedule + six years of retention as a FOIA record) would result in the exact same situation in which we currently find ourselves.

That leaves, of course, the question of how long exactly a new sunset period would be. Some commentators have suggested that the relevant period be six months or a year;[193] others suggest that the period end as soon as the relevant decision is made.[194] Though shorter

[192] *See, e.g.*, Kyle Singhal, Essay, *Disclosure, Eventually: A Proposal to Limit the Indefinite Exemption of Federal Agency Memoranda from Release Under the Freedom of Information Act*, 84 GEO. WASH. L. REV. 1388, 1402-06 (2016); *Statement of Amy Bennett*, *supra* note 91.
[193] Stephen Gidiere, *FOIA Gets a Facelift,* ABA (Nov. 1, 2016), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2016-2017/november-december-2016/foia_gets_a_facelift/.
[194] McCraw, *supra* note 81, at 237.

timeframes may be ideal,[195] less extreme options exist and can be tied to currently existing phenomena. One logical way of governing the deliberative process privilege would be to tie the period to election cycles—a sunset period with constitutional precedent in Congress's budget for the army.[196] A number of rationales would support a two-year sunset (for House elections) or a four-year sunset (for presidential elections). Opening up information about an administration's records every two years would ideally allow voters to make informed decisions during Mid-Term elections and express displeasure with the President's party in Congress; recall that the original impetus for FOIA was to promote government accountability. And how do citizens in democracies keep governments accountable? They exercise their right to vote.

This paper finds a two-year sunset optimal, as this would also be shorter than at least the three-year agency-specific retention periods that occasionally govern deliberative materials, while still allowing at least some time to pass after the deliberative process and the final decision. Sunsetting the privilege about the executive branch's deliberations every four years, conversely, would allow voters to judge an administration before deciding whether or not to continue re-elect it or to switch to a new one. But then again, if the DPP sunset after each election, voters would have an opportunity to immediately judge the actions of a past administration and pressure the current one—whether a continuing incumbent or a fresh face—to avoid its pitfalls and emulate its virtues. For full transparency, this approach weighs the additional government accountability more heavily than the added potential for government embarrassment, two factors that each wax and wane in inverse relationship to the other.

[195] Though, admittedly, the downsides of this approach increase in magnitude the shorter the sunset becomes. A DPP that terminated upon the final decision's occurrence could theoretically still have a chilling effect on someone like Miguel Estrada.
[196] U.S. CONST. art. I, § 8 cl. 12.

And no matter how the future of the sunset provision is resolved, records management and access to records need to be conceived of together in the future. Someone, somewhere—perhaps within each agency's FOIA office or a specialized individual at NARA—should be tasked with thinking about records from the moment they are created, to how they are organized and retained or deleted, and to how they end up in the hand of the citizens for whom they were created.

VI. CONCLUSION

A right to a deleted record is a right in name only. For far too long, people have generically attacked the 25-year sunset as too long and suggested shorter time periods that seem as equally picked out of thin air as the original one. This paper changes that by showing that there is a real, concrete reason to shorten the sunset period: agency retention schedules frustrate its entire purpose. The schedules must be elongated to accomplish the sunset provision's purpose, a new mechanism for creating exceptions to those schedules must be introduced, or the sunset itself must be shortened to the point that it has real import. Reformers should push to effectuate the sunset provision and more broadly further think about FOIA and records retention as part of one integrated whole.

Appendix A: Methodology

Little research systematically compares the actual content of documents withheld under the DPP with agency's rationales for withholding them. This paper initially hoped to begin filling that gap in the literature by examining actual agency use (or abuse) of the DPP. By examining actual previously withheld documents under FOIA, the various rationales for the DPP, such as the "candid discussions" rationale, could be strengthened or questioned. Knowing what agencies actually withhold may shed light on other issues: how consistently does the judiciary allow assertions of the DPP? How often should the judiciary defer to agencies' assertion of the privilege? Should the DPP-related reforms from the 2016 FOIA Improvement Act be taken further, or were they sufficient?

The sunset provision on the DPP passed in the 2016 amendments to FOIA would serve as the mechanism making this research possible. In order to make use of that provision, I would have to identify "records created 25 years or more" before the date I requested them that were deliberative in nature. And to find agency rationales, it would be best if I could find documents that had previously been FOIA'd and withheld on DPP grounds.

A number of avenues presented themselves. I could look at existing *Vaughn* indices, but those were not publicly available in a systematic fashion. Nor do they bear relation to how agencies generally store and index their records, an important consideration because of my time constraints. Thus, they provided helpful context but were otherwise unhelpful in my search. Ultimately, I decided that the best course would likely be to identify *litigation* with opinions from over twenty-five years ago in which judges allowed agencies to withhold documents, especially when the agencies or judges expressed their reasons for withholding in the course of such litigation.

After identifying such litigation, I would issue FOIA requests to the relevant agencies for the documents once withheld based on identification numbers related to the case, which would hopefully assist with processing. For example, the FOIA Project has a database of FOIA lawsuits that challenge federal government withholding starting on October 1, 1992, which I combed through as a starting point.[197] This would have the added benefit of more detailed agency rationales, argued before the judge in oral argument or in briefs, that I could compare with the contents withheld. And it would at least be somewhat likely that since the agency had gathered and compiled the material for litigation once before that the records would not be overly burdensome to locate if I gave the agency the corresponding case information.

One way of obtaining these records would be to file blanket FOIA requests with the agencies asking for "all records covered by the deliberate process privilege from over twenty-five years ago." However, such a broad request would likely take an extraordinary amount of time. Agencies typically categorize requests into "simple" and "complex," with complex requests taking longer because of the extra processing involved.[198] To achieve a quicker turnaround, I decided to request documents from a narrower set of cases that I would determine myself.

I ran a natural-language search on WestLaw for the search terms "deliberative process privilege FOIA" and filtered for federal cases in all jurisdictions decided before October 31, 1996. This approach ensured that the FOIA requests would have been filed at least twenty-five years in advance, since those requests logically predated the opinion resulting from the FOIA

[197] Jeff Lamicela, *Search Lawsuits*, FOIA PROJECT, https://foiaproject.org/case_search/.
[198] The federal government generally faces a backlog of FOIA requests. *See Freedom of Information Act: Federal Agencies' Recent Implementation Efforts*, U.S. GOV'T ACCOUNTABILITY OFF. 16 (Mar. 2020), https://www.gao.gov/assets/gao-20-406r.pdf (demonstrating an eighty percent increase in the backlog from 2012 to 2018).

litigation. That search returned 345 cases. I then read through the cases to determine which ones resulted in the agency successfully withholding all or part of a document solely due to the deliberative process privilege. Because the sunset provision applies only to the deliberative process privilege and not, for example, the trade secrets privilege, a document withheld on the basis of both the deliberative process privilege and the trade secrets privilege could still be withheld on the basis of the latter alone.

The aforementioned process filtered the list of cases to 109. I list those cases below, sorted by agency.

Federal Bureau of Prisons: three cases.
Owens v. U.S. Bureau of Prisons, 379 F. Supp. 547 (D.D.C. 1974).
Durns v. Bureau of Prisons, 806 F.2d 1122 (D.C. Cir. 1986).
Bruscino v. Fed. Bureau of Prisons, Civ. A. No. 94-1955, 1995 WL 444406 (D.D.C. May 15, 1995).
Central Intelligence Agency: two cases.
Pfeiffer v. C.I.A., Civ. A. No. 91-736, 1994 WL 80869 (D.D.C. Mar. 3, 1994); Pfeiffer v. C.I.A., 721 F. Supp. 337 (D.D.C. 1989).
Assassination Archives & Rsch. Ctr., Inc. v. C.I.A., 720 F. Supp. 217 (D.D.C. 1989).
Commodity Futures Trading Commission: one case.
Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47 (D.D.C. 1979).
Consumer Product Safety Commission: one case.
Chemical Mfrs. Ass'n v. Consumer Product Safety Comm'n, 600 F. Supp. 114 (D.D.C. 1984).
Customs and Border Protection: two cases.
Texas Instruments, Inc. v. U.S. Customs Service, 479 F. Supp. 404 (D.D.C. 1979).
Steyermark v. von Raab, 682 F. Supp. 788 (D. Del. 1988).
Department of Commerce (including the Census Bureau and the National Oceanic and Atmospheric Administration): three cases.
City of Virginia Beach, Va. v. U.S. Dep't of Commerce, 995 F.2d 1247 (4th Cir. 1993).
American Federation of Government Employees, Local 2782 v. U.S. Dep't of Commerce, 907 F.2d 203 (D.C. Cir. 1990); American Federation of Government Employees, Local 2782 v. U.S. Dep't of Commerce, 632 F. Supp. 1272 (D.D.C. 1986).
Florida House of Representatives v. U.S. Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992).
Department of Education: two cases.
Maryland Coalition for Integrated Educ. v. Dep't of Educ., No. Civ.A. 89-2851, 1992 WL 1311694 (D.D.C. July 20, 1992).
U.S. v. Board of Educ. of City of Chicago, 610 F. Supp. 695 (N.D. Ill. 1985).
Department of Energy: five cases.

Burke Energy Corp. v. Dep't of Energy for U.S. of America, 583 F. Supp. 507 (D. Kan. 1984).
Conoco, Inc. v. U.S. Dep't of Justice, 521 F. Supp. 1301 (D. Del. 1981).
Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690 (D.D.C. 1983); Exxon Corp. v. Dep't of Energy, Dkt. No. Civil 78-0531, 1981 WL 1278 (D.D.C. June 28, 1981).
State of Minnesota v. Dep't of Energy, Dkt. No. Civil 4-81-434, 1982 WL 1155 (D. Minn. Dec. 14, 1982).
Taylor Oil Co. v. U.S. Dep't of Energy, Dkt. No. Civil 78-1369, 1980 WL 1069 (D.D.C. Jan. 22, 1980).
Department of Labor (including the Mine Safety & Health Administration and the Occupational Safety and Health Administraiton): six cases.
Brush Wellman, Inc. v. Dep't of Labor, 500 F. Supp. 519 (N.D. Ohio 1980).
Cuccaro v. Secretary of Labor, 770 F.2d 355 (3th Cir. 1985).
Lead Industries Ass'n, Inc. v. Occupational Safety & Health Administration, 610 F.2d 70 (2d Cir. 1979).
Lloyd & Henniger v. Marshall, 526 F. Supp. 485 (M.D. Fla. 1981).
Slesin v. Administrator, Occupational Safety & Health Admin., 644 F. Supp. 366 (S.D.N.Y. 1986).
Ashley v. U.S. Dep't of Labor, 589 F. Supp. 901 (D.D.C. 1983).
Department of State: four cases.
Brinton v. Dep't of State, 636 F.2d 600 (D.C. Cir. 1980).
Public Citizen v. Dep't of State, 787 F. Supp. 12 (D.D.C. 1992); Public Citizen v. Dep't of State, 782 F. Supp. 144 (D.D.C. 1992).
Rothschild v. Dep't of State, Civ. A. No. 92-0186-LFO, 1993 WL 405752 (D.D.C. Sept. 30, 1993).
U.S. Committee for Refugees v. Dep't of State, Civ. A. No. 91-3303 SSH, 1993 WL 364674 (D.D.C. Aug. 30, 1993).
Department of Treasury (including the Internal Revenue Service and the Treasury Inspector General for Tax Administration): seventeen cases.
American Soc. of Pension Actuaries v. I.R.S., 746 F. Supp. 188 (D.D.C. 1990).
Arthur Andersen & Co. v. I. R. S., 679 F.2d 254 (D.C. Cir. 1982).
Becker v. IRS, Nos. 91 C 1203, 91 C 1204 and 91 C 1205, 1992 WL 67849 (N.D. Ill. Mar. 31, 1992).
Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979).
Church of Scientology Intern v. IRS, 845 F. Supp. 714 (C.D. Cal. 1993).
Church of Scientology of Texas v. IRS, 816 F. Supp. 1138 (W.D. Tex. 1993).
Cliff v. IRS, 496 F. Supp. 568 (S.D.N.Y. 19890).
Common Cause v. IRS, 646 F.2d 656 (D.C. Cir. 1981).
Fischer v. IRS, 621 F. Supp. 835 (S.D.N.Y. 1985).
Fulbright & Jaworski v. Dep't of Treasury, 545 F. Supp. 615 (D.D.C. 1982).
King v. IRS, No. 80C3006, 1981 WL 1902 (N.D. Ill. July 2, 1981).
Moody v. IRS, Civ. A. No. 77-1825, 1980 WL 1503 (D.D.C. Feb. 28, 1980).
Naranjo v. IRS, CIV. No. 86-16, 1988 WL 126570 (E.D. Ky. Jan. 26, 1988).
Tabcor Sales Clearing, Inc. v. Dep't of Treasury, 471 F. Supp. 436 (N.D. Ill. 1979).
Tex. Independent Producers Legal Action Ass'n v. IRS, 605 F. Supp. 538 (D.D.C. 1984).

Va. Independent Schools Ass'n v. C.I.R., Civ. A. No. 75-925, 1976 WL 995 (D.D.C. Mar. 26, 1976).
Church of Scientology of California v. Simon, 433 F. Supp. 1107 (D.D.C. 1977).
Department of Defense (including the Air Force, Army, Marines, and Navy): twenty-two cases.
Badhwar v. U.S. Dept. of Air Force, 829 F.2d 182 (D.C. Cir. 1987); Badhwar v. U.S. Dept. of Air Force, 622 F. Supp. 1364 (D.D.C. 1985); Badhwar v. U.S. Dept. of Air Force, 615 F. Supp. 698 (D.D.C. 1985).
Brockway v. Dep't of Air Force, 518 F.2d 1184 (8th Cir. 1975).
Brownstein Zeidman & Schomer v. Dep't of Air Force, 781 F. Supp. 31 (D.D.C. 1991).
Dudman Communications Corp. v. Dep't of Air Force, 815 F.2d 1565 (D.C. Cir. 1987).
Hass v. U.S. Air Force, 848 F. Supp. 926 (D. Kan. 1994).
May v. Dep't of Air Force, 777 F.2d 1012 (5th Cir. 1985).
Rabbitt v. Dep't of Air Force, 401 F. Supp. 1206 (S.D.N.Y. 1974).
Russell v. Dep't of Air Force, 682 F.2d 1045 (D.C. Cir. 1982).
SMS Data Products Gp., Inc. v. US. Dep't of Air Force, Civ.A. No. 88-0481-LFO, 1989 WL 201031 (D.D.C. Mar. 31, 1989).
Times Journal Co. v. Dep't of Air Force, 793 F. Supp. 1 (D.D.C. 1991).
U.S. v. Weber Aircraft Corp., 465 U.S. 792 (1984).
Ahearn v. U.S. Army Materials & Mechanics Rsch. Ctr., 580 F. SUpp. 1405 (D. Mass. 1984).
Brinderson Constructors, Inc. v. U.S. Army Corps of Engineers, Civ. A. No. 85-0905, 1986 WL 293230 (D.D.C. June 11, 1986).
Murphy v. Dep't of Army, 613 F.2d 1151 (D.C. Cir. 1979).
Providence Journal Co. v. U.S. Dep't of Army, 981 F.2d 552 (1st Cir. 1992); Providence Journal Co. v. U.S. Dep't of Army, 781 F. Supp. 878 (D.R.I. 1991).
Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438 (1st Cir. 1992).
Hunt v. U.S. Marine Corps, 935 F. Supp. 46 (D.D.C. 1996).
Hamrick v. Dep't of Navy, Civ. A. No. 90-0283, 1992 WL 739887 (D.D.C. Aug. 28, 1992).
Jowett, Inc. v. Dep't of Navy, 729 F. Supp. 871 (D.D.C. 1989).
Nickerson v. U.S., No. 95 C 7395, 1996 WL 563465 (N.D. Ill. Oct. 1, 1996).
Pototsky v. Dep't of Navy, 695 F. Supp. 1084 (D. Hawai'i 1988).
Quarles v. Dep't of Navy, 893 F.2d 390 (D.C. Cir. 1990).
Department of Justice (including the Drug Enforcement Administration, the Office of Legal Counsel, the Office of the Associate Attorney General, the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of Legal Policy, and the Criminal Division): twelve cases.[199]
Manchester v. Drug Enforcement Admin., 823 F. Supp. 1259 (E.D. Pa. 1993).
Morrison v. U.S. Dept. of Justice, Civ. A. No. 87-3394, 1988 WL 47662 (D.D.C. Apr. 29, 1988).
Carney v. U.S. Dep't of Just., 19 F.3d 807 (2d Cir. 1994).

[199] Note that some agencies within the Department of Justice, such as the Office of Legal Policy, are under this header, whereas others, such as the Federal Bureau of Prisons, are not. This apparent inconsistency stems from how the Department of Justice's different agencies handle their FOIA requests.

Williams v. U.S. Dept. of Justice, 556 F. Supp. 63 (D.D.C. 1982).
Access Reports v. Department of Justice, 926 F.2d 1192 (C.A.D.C. 1991).
Cofield v. City of LaGrange, Ga., 913 F. Supp. 608 (D.D.C. 1996).
North v. Walsh, Civ. A. No. 87-2700-LFO, 1988 WL 68881 (D.D.C. June 20, 1988).
Conoco, Inc. v. U.S. Dept. of Justice, 521 F. Supp. 1301 (D. Del. 1981).
Nadler v. U.S. Dept. of Justice, 955 F.2d 1479 (11th Cir. 1992).
Mapother v. Dep't of Just., 3 F.3d 1533 (D.C. Cir. 1993).
Dow Jones & Co., Inc. v. U.S. Dept. of Justice, 724 F. Supp. 985 (D.D.C. 1989).
Nishnic v. U.S. Dept. of Justice, 671 F. Supp. 776 (D.D.C. 1987).
Equal Employment Opportunity Commission: five cases.
Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981).
EEOC v. Roadway Exp., Inc., Civ. A. No. H-78-73, 1978 WL 160 (S.D. Tex. Dec. 6, 1978).
EEOC v. Sears, Roebuck & Co., 111 F.R.D. 385 (N.D. Ill. 1986).
Greyson v. McKenna & Cuneo, 879 F. Supp. 1065 (D. Colo. 1995).
Scott v. PPG Industries, Inc., 142 F.R.D. 291 (N.D. W. Va. 1992).
Environmental Protection Agency: four cases.
U.S. v. Allsteel, Inc., No. 87 C 4638, 1988 WL 139361 (N.D. Ill. Dec. 21, 1988).
Montrose Chemical Corp. of California v. Train, 491 F.2d 63 (D.C. Cir. 1974).
Chemcentral/Grand Rapids Corp. v. U.S. E.P.A., No. 91 C 4380, 1992 WL 281322 (N.D. Ill. Oct. 6, 1992); Chemcentral/Grand Rapids Corp. v. U.S. E.P.A., No. 91 C 4380, 1992 WL 724965 (N. D. Ill. Aug. 20, 1992).
American Petroleum Institute v. U.S. E.P.A., 846 F. Supp. 83 (D.D.C. 1994).
Federal Aviation Administration: two cases.
Van Aire Skyport Corp. v. F.A.A., 733 F. Supp. 316 (D. Colo. 1990).
Norwood v. F.A.A., 993 F.2d 570 (6th Cir. 1993).
Federal Bureau of Investigations: five cases.
Playboy Enterprises, Inc. v. U.S. Dept. of Justice, 516 F. Supp. 233 (D.D.C. 1981); Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931 (D.C. Cir. 1982).
Nadler v. U.S. Dept. of Justice, 955 F.2d 1479 (11th Cir. 1992).
Matter of Wade, 969 F.2d 241 (7th Cir. 1992).
Freeman v. U.S. Dept. of Justice, 723 F. Supp. 1115 (D. Md. 1988).
Dusenberry v. F. B. I., Civ. A. No. 91-0665, 1992 WL 115606 (D.D.C. May 5, 1992).
Federal Communications Commission: one case.
ITT World Communications, Inc. v. F.C.C., 699 F.2d 1219 (D.C. Cir. 1983).
Federal Reserve: three cases.
9To5 Organization for Women Office Workers v. Bd. of Governors of Federal Reserve System, 547 F. Supp. 846 (D. Mass. 1982).
Gregory v. Bd. of Governors of Federal Reserve System, 496 F. Supp. 342 (D.D.C. 19890).
Nat'l Courier Ass'n v. Bd. of Governors of Federal Reserve System, 516 F.2d 1229 (D.C. Cir. 1975).
Food and Nutrition Service: one case.
Covington & Burling v. Food & Nutrition Serv. of U.S. Dep't of Agriculture, 744 F. Supp. 314 (D.D.C. 1990).

Federal Trade Commission: five cases.
A. Michael's Piano, Inc. v. F.T.C., No. 292CV00603, 1993 WL 54617 (D. Conn. Jan. 27, 1993).
Cities Service Co. v. F.T.C., 627 F. Supp. 827 (D.D.C. 1984).
Fund for Constitutional Government v. F.T.C., No. CA 79-0250, 1981 WL 2117 (D.D.C. July 10, 1981).
Lone Star Industries, Inc. v. F.T.C., Civ. A. No. 82-3150, 1984 WL 21979 (D.D.C. Mar. 26, 1984).
Novo Laboratories, Inc. v. F.T.C., Civ. A. No. 80-1989, 1981 WL 2214 (D.D.C. July 21, 1981).
General Services Administration: one case.
MCI Telecommunications Corp. v. General Services Admin., Civ. A. No. 89-0746 (HHG), 1992 WL 71394 (D.D.C. Mar. 25, 1992).
National Labor Relations Board: seven cases.
Wayland v. N.L.R.B., 627 F. Supp. 1473 (M.D. Tenn. 1986).
Strang v. Collyer, 710 F. Supp. 9 (D.D.C. 1989).
N. L. R. B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975).
Marathon LeTourneau Co., Marine Div. v. N.L.R.B., 414 F. Supp. 1074 (S.D. Miss. 1976).
Joseph Horne Co. v. N. L. R. B., 455 F. Supp. 1383 (W.D. Pa. 1978).
Electri-Flex Co. v. N.L.R.B., 412 F. Supp. 698 (N.D. Ill. 1976).
Associated Dry Goods v. N. L. R.B., 455 F. Supp. 802 (S.D.N.Y. 1978).

I then filed thirty-seven unique FOIA requests to each agency for the above cases via email, FOIAOnline, or web portal based on the following template:

Dear FOIA Officer:

I am a law student at Yale Law School working on a research paper on the deliberative process privilege ("DPP") under the supervision of Professor Nicholas Parrillo. I am submitting this request under the Freedom of Information Act, 5 U.S.C. § 552 *et seq* ("FOIA") for records that will inform the public about federal agencies' use of the DPP in response to FOIA requests.

> I intend to use the responsive records in a paper that will be the first to compare the content of documents withheld under the DPP with agencies' rationales for withholding them. The mechanism making this research possible is the sunset provision on the DPP passed in the FOIA Improvement Act of 2016, 5 U.S.C. § 552(b)(5), which prohibits use of the DPP to shield documents from FOIA requests if they were created 25 years or more before the date on which the records were requested. All the records requested below were the subject of litigation occurring before October 31, 1996, and so were certainly created 25 years or more ago.

<u>Documents Requested</u>:

Please provide me within 20 business days, via email to the email address listed below, copies of the following records:

1. All documents withheld under the DPP by [agency], and all documents in which it explains its rationales for withholding under the DPP (e.g., the original FOIA request and response, the briefs in the case), in response to all FOIA requests at issue in the following cases:
    a. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).
2. Any summary tables or databases of *Vaughn* indices about records created before twenty-five years ago that the agency has still retained.

If the production is likely to be lengthy, please contact me to discuss a rolling production schedule.

Application for Waiver or Limitation of All Fees:

I also request that [agency] waive and/or limit the search, review, and duplication fees associated with this request. This request is not subject to search or review fees because it is not made for commercial use and is made by an educational institution. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II); [agency-specific regulation]. I am a student at Yale Law School writing a research paper on the DPP. Professor Parrillo is the William K. Townsend Professor of Law at Yale and focuses on administrative law and government bureaucracy.[200] I intend to publish my research in a law review; the research will be the first to conduct an empirical analysis into the actual content of what agencies withhold under the DPP. I am making this request solely for these purposes and have no commercial interest in it.

I am also entitled to a waiver of all fees because the request satisfies the three regulatory factors used to assess fee waivers. *See* [agency-specific regulation]. First, disclosure "would shed light on the operations or activities of the government." [Agency-specific regulation]. The requested records all relate to agencies' practices of withholding documents under the DPP, and thus indisputably "concern identifiable operations or activities of the Federal Government." *Id.* Second, disclosure is "likely to contribute significantly to public understanding of those operations or activities." [Agency-specific regulation]. Disclosure of the requested records would "be meaningfully informative about government operations or activities" and would meaningfully increase the public's understanding, particularly since none of the information requested is in the public domain. [Agency-specific regulation]. Disclosure would also "contribute to the understanding of a reasonably broad audience of persons interested in the subject." [Agency-specific regulation]. I have the intention to convey information to the public through this request. *See id.* I intend to publish my analysis of the responsive records in a law review, described above. Finally, I am writing under the guidance of an expert in the relevant subject area for reasons discussed above. *See id.* Third, as explained above, this request is not primarily in my commercial interest. *See* [agency-specific regulation].

[200] https://law.yale.edu/nicholas-r-parrillo.

Should [agency] determine that I am required to pay a fee in connection with this request, I authorize it to charge up to $50. Please contact me via email or telephone if the estimated fee exceeds that amount. In addition, please contact me if the agency requires additional information to assess my entitlement to a waiver or limitation of fees.

Finally, while I would prefer to receive documents electronically, please contact me via email or telephone if you intend to produce documents in hard copy. Due to work restrictions related to the COVID-19 pandemic, it might be more efficient to send documents to my home address.

Thank you for your prompt attention to this matter.

In addition to the individual agencies, I filed FOIA requests for all of the above cases to the Executive Office for United States Attorneys (EOUSA) and the National Archives and Records Administration (NARA). The EOUSA litigated each case; theoretically, it would have copies of the materials that the relevant agency provided it for the FOIA litigation. NARA permanently archives certain records that agencies designate.

Appendix B: Results

The following table sets out the agency responses to my FOIA requests:

Agency	Result
Bureau of Prisons	One *Vaughn* index redacted in part on (b)(6), (b)(7)(C), (b)(7)(E), and (b)(7)(F) grounds.
CIA	No response yet.
CFTC	No responsive records. Explicitly mentioned records retention policies.
CPSC	Two responsive records.
CBP	No responsive records.
Dep't of Commerce—Census Bureau	Search underway.
Dep't of Commerce—NOAA	Search underway.
Dep't of Education	Still in progress, last communication Jan. 11, 2022.
Dep't of Energy	Last communication Jan. 10, 2022.
Dep't of Labor—MSHA	No responsive records.
Dep't of Labor—OSHA	No responsive records.
Dep't of State	Acknowledged Jan. 5, 2022, no updates since.
Dep't of Treasury—IRS	Search extended Jan. 27, 2022, no updates since.
Dep't of Treasury—Main	No responsive records.
Dep't of Treasury—TIGTA	No responsive records.
Dep't of Defense—Air Force	No responsive records; letter was quite detailed as to the agency search process.
Dep't of Defense—Army	Acknowledged Dec. 28, 2021; no updates since.
Dep't of Defense—Marines	Case administratively closed.
Dep't of Defense—Navy	No responsive records.
Dep't of Justice—DEA	Acknowledged Jan. 3, 2022; no updates since.
Dep't of Justice—Criminal Division	Acknowledged Jan. 12, 2022. No updates since.
Dep't of Justice—Main	No responsive records.
Dep't of Justice—OLC	Acknowledgment received July 08, 2022, no further communications.
EEOC	No responsive records. Records are deleted after six years. EEOC Order 201.001, *Records Retention and Destruction Directives Transmittal* (Dec. 3, 2003), https://www.eeoc.gov/management-programs-records-management.
EOUSA	No responsive records, as EOUSA did not consider the records from those cases its own records.
EPA	No responsive records.

Agency	Result
FAA	No response yet.
FBI	No response yet.
FCC	Responded with an irrelevant record.
Federal Reserve	Unable to access portal.
FNS	Last communication Dec. 29, 2021; no response since.
FTC	Request denied because it would "create an undue burden on the agency."
GSA	No responsive records.
NARA	Still in process; largely unresponsive, though case files are available for D.D.C. cases, and I received documents for one case. Fee waiver provision does not apply.[201]
NLRB	Found a few responsive records, though most documents could not be found.

To summarize, the agencies largely could not find the documents I requested. Some have not had enough time yet to finish their searches, despite my attempts at narrowing my request as much as possible. Others found a few related documents, but not the underlying documents I requested. The FCC, for example, produced its legal briefing on non-FOIA-related issues in *ITT World Communications*, the Bureau of Prisons produced a *Vaughn* index but no underlying documents, and the CPSC produced the final versions of two reports involved in litigation, but not the draft reports that had originally been requested.[202] Most agencies cited their retention schedules as the reason for their inability to produce their documents.

[201] I would suggest that a more well-resourced individual in terms of time and money interested in this topic begin with NARA. It's almost certainly the case that NARA possesses deliberative materials, including some that were once withheld under the DPP. I could not conduct further research into NARA's archives because of the possibility of financial charges and time limits outside my control.
[202] These documents are all on file with the author.