knows about the sexual abuse allegations facing Gibney, lewd as they are. And although he has a privacy interest in DHS immigration decisions, the public has a strong interest in understanding how and why their government allowed a man with a far-worse-than-checkered past (and perhaps present) to stay here for more than two decades. In other words, the allegations here are far better substantiated than those in Hunt—and with them the claims of possible government malfeasance.”

Breyer rejected much of the agency’s Exemption 7(E) claims as well. He pointed out that “DHS has properly redacted documents that reveal the databases USCIS uses, ‘coded information,’ ‘biometric checks,’ and other technical information. Those are law enforcement ‘techniques’ under Exemption 7(E). The real fight here is whether DHS must disclose what those ‘techniques’ revealed, namely the sexual abuse accusations.” DHS argued that disclosure would reveal the kind of information sought by immigration officials when conducting background checks. Breyer, however, indicated that “so long as DHS redacts how it obtained information about Gibney, disclosing what it found out would not disclose a law enforcement technique, procedure or guideline. That is all the more true given that the allegations here are no secret.” (Irvin Muchnick v. Department of Homeland Security, Civil Action No. 15-3060 CRB, U.S. District Court for the Northern District of California, Nov. 2)

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

Evaluating FOIA’s Annual Reports
By A. Jay Wagner

In the tradition of FOIA analysis previously conducted by Harold Relyea for the Congressional Research Service, I recently completed a dissertation exploring FOIA use and implementation from 1975 to 2014. The study was premised on a database constructed of FOIA annual reports from cabinet-level departments, comprising 527 of the approximately 569 annual reports produced over the period of analysis. The quantitative study uncovered findings both expected and novel. I will briefly summarize some of the more interesting discoveries below.

The number of total requests has continued to rise over the course of the study. Since 1975, 20 percent of all requests have received denials, 16 percent prior to 1998 and 23 percent after. The data demonstrate dramatically different initial disposition patterns over the two most recent periods of analysis. From 1998 to 2007, cabinet-level departments provided a full grant to 80 percent of requests, partial denials to 17 percent of requests and full denials only three percent of the time. After 2007, only 48 percent of requests received a full grant, while another 44 percent received a partial grant and eight percent were given a full denial.

Having produced its first annual report 2003, the Department of Homeland Security has established an extraordinary FOIA record since. The department receives far and away the most requests of any cabinet-level department. From 2008 to 2014, Homeland Security has processed more than one-third of all requests. The Department of Justice was next with 13 percent, followed by the Department of Health and Human Services at 12 percent. Due to a remarkable 58 percent denial rate, Homeland Security accounts for 56 percent of all denials issued over the same period. The Department of State was the only other department to deny more than half of their processed requests.
Despite its high public profile, Exemption 1 claims are scant. This was not always the case. In the mid-1980s, it accounted for 10 to 20 percent of all exemption claims, but in recent years Exemption 1 use has typically been less than one percent of all exemption claims, placing its use above only Exemptions 8 and 9.

As previously acknowledged by retired Penn State professor Martin Halstuk, privacy – both Exemptions 6 and 7(C) – is an enormous portion of exemption claims. Since 1998 when the subparts of Exemption 7 were required in annual reports, the privacy exemptions have accounted for 57 percent of all exemption claims.

Exemption 7, including 7(C), has consistently had significant presence – always above 30 percent of all exemption claims – but has witnessed a strong surge in usage post-2008 and now amounts for more than half of all exemption claims. The recent increase is responsive to the increased popularity of 7(C) and 7(E).

The bubble of High 2 use is evident in the data as well. Exemption 2 claims steadily increase after Crooker and spike after Attorney General John Ashcroft’s FOIA guidance. After Milner, Exemption 2 use crashes to nearly nil (and High 2 use appears to shift to 7(E), as directed in the Milner opinion).

“Other authorities” for closure (e.g. “no records,” “fee-related,” “withdrawn,” etc.), which do not figure into denial rates, accounted for 39 percent of all requests processed in the final period of analysis, 2008-2014. In 2008, half of all processed requests were closed under an “other authority” claim. “No records” closures rose precipitously after the 1986 amendments to FOIA, which codified clause (c), allowing federal agencies to provide a “no records” response in instances where records do in fact exist. “No records” closures now account for 12 percent of all requests processed annually.

Despite a striking lack of guidance and oversight in FOIA budgeting, FOIA administration has amounted to just 0.011 percent of departmental budgets over the life of the study. Fees collected from requesters have hardly subsidized administration, accounting for only six percent of all costs accrued.

Study of annual reports provides a checkered history of FOIA use and implementation. Look no further than present denial rates – 92 percent of requests receive records, yet only 48 percent receive the full complement of responsive records. Trends in exemption claims suggest implementation of FOIA is more strongly influenced by widespread public fears than the politicians in power. “Other authorities” for closure – on their surface, clerical failures – present a particularly troublesome trend in unfilled requests, posing little opportunity for recourse, as do off-statute rationales, like the Glomar response, mosaic theory and “still interested” letters. Ultimately, incremental gains appear throughout the life of the FOIA and the 2016 amendments and the codification of the “presumption of openness” provide reason for continued optimism in establishing the FOIA mechanism – to paraphrase the Supreme Court’s opinion in National Archives & Records Administration v. Favish – not as a convenient formalism but as a structural necessity in a real democracy.

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