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Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases

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BITS, BYTES, AND THE RIGHT TO KNOW:
HOW THE ELECTRONIC FREEDOM OF
INFORMATION ACT HOLDS THE KEY TO
PUBLIC ACCESS TO A WEALTH OF USEFUL
GOVERNMENT DATABASES*

Martin E. Halstuk†

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I. INTRODUCTION

After five years of congressional hearings, floor debates, and
compromises,1 the Electronic Freedom of Information Act Amend-
ments (EFOIA)2 became law on October 2, 1996.3 Congress enacted

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Act of 1991. See Senate Hearing Before the Subcommittee on Technology and the Law of the
Committee on the Judiciary. See S. 1940, 102d Cong. § 5 (1991); H.R. REP. No. 104-795, at 14
3. On September 20, 1996, Congress presented the Electronic Freedom of Information Act
Amendments to President Clinton for his signature. He signed the bill into law on October 2, 1996.
the EFOIA, which amended the Freedom of Information Act of 1966 (FOIA), for two principal reasons. First, Congress wanted to clarify that the federal disclosure statute applied equally to agency records maintained in electronic formats as well as to paper formats. Second, Congress wanted to make a number of administrative and procedural changes to help ease serious delays and backlogs in government responses to FOIA requests.

The purpose of this article is to shed light on the goals and implications of one of the EFOIA’s key electronic provisions, Section 3. According to a 1996 House report that accompanied the legislation, one of the purposes of Section 3 was to explicitly reject a 1976 definition of “agency records” used by the U.S. Court of Appeals for the Ninth Circuit in SDC Development Corp. v. Mathews. In SDC Development Corp. v. Mathews, the Ninth Circuit held that a widely used medical database compiled and stored in a computer data bank by a federal agency did not qualify as an “agency record” for the purposes of the FOIA.

The implications of this provision need to be examined for several reasons pertaining to important issues of information warehousing, federal information dissemination, and economics. First, the federal government is increasingly involved in the gathering, storage, and manipulation of information in electronic form and digital formats, including the creation of databases. Second, both profit-making and

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6. See id. at 13-14. In June 1996, for example, the FBI had a 4-year-backlog in responding to FOIA requests. See id. at 16 (citing statement of U.S. Rep. Steven Horn at a hearing on federal information policy before the Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, June 13, 1996).
7. See Electronic Freedom of Information Act of 1996, Pub. L. 104-231, §§ 1-12, 110 Stat. 3048 (1996) (codified as amended in 5 U.S.C. § 552(f)). Section 3 is entitled Application of Requirements to Electronic Format Information. The EFOIA comprises 12 sections in all, 10 of which directly or indirectly address issues pertaining to the recording, storage, and disclosure of electronic records. See id. §§ 1-6 and §§ 9-12. Sections 7 and 8 concern administrative and procedural changes that deal with delays in processing FOIA requests and backlogs. See id. §§ 7, 8 (codified as amended in subsection (a)(6) of 5 U.S.C. § 552). These two sections are beyond the scope of this analysis.
9. See SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976). The appellant, F. David Mathews, was Secretary of Health, Education and Welfare.
10. See id. at 1120-21.
nonprofit organizations request government-held information for a variety of uses, including dissemination to other users. Third, government information stored electronically is potentially far more valuable than the equivalent data on paper because information in electronic formats can be used and manipulated faster, easier, and at less cost. In sum, the EFOIA's electronic provisions are tremendously important to the future of public access to government-held information in the electronic age. If effective, this statute can help keep the government from restricting access to electronically recorded information and also undercut efforts to establish information monopolies. As the Department of Justice observed, "no development in the history of the Act has held as much potential for shaping [the FOIA's] contours, even the very future of its implementation," If effective, this statute can help keep the government from restricting access to electronically recorded information and also undercut efforts to establish information monopolies. As the Department of Justice observed, "no development in the history of the Act has held as much potential for shaping [the FOIA's] contours, even the very future of its implementation."

The general question this paper tries to answer is: What is the practical effect of EFOIA Section 3, the electronic provision that Congress crafted to reject the ruling in SDC Development Corp. v. Mathews? Two important corollary queries flow from this broad central question. First, does EFOIA Section 3 prevent the government from selling—or at least from recovering its costs of producing—databases compiled by federal agencies? Second, what is the practical effect of EFOIA Section 3 in light of the 1989 U.S. Supreme Court decision in U.S. Department of Justice v. Reporters Committee for Freedom of the Press? There seems to be a conflict between the congressional intent behind Section 3 and the Supreme Court's semi-

15. Law Professor Henry H. Perritt Jr. wrote that the Freedom of Information Act is an "instrument of the diversity principle. It undercuts efforts to establish information monopolies because it grants private sector redisseminators an entitlement to public information notwithstanding agency efforts to block access in order to support exclusive distribution arrangements." HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 477 (1996).
nal ruling in Reporters Committee. The House report accompanying the EFOIA said information an agency has created and is directly disseminating remains subject to the FOIA in any of its forms or formats. But according to the Reporters Committee opinion, public access to government information under the FOIA is limited to only "official information that sheds light on an agency's performance of its statutory duties."

To gain some insight into these questions, this paper will discuss the background of the Freedom of Information Act in the next section. Section III will outline the EFOIA in general. Section IV will examine EFOIA Section 3 and analyze SDC Development Corp. v. Mathews. Section V will discuss the economic implications of EFOIA Section 3. Section VI will explore the implications of the Reporters Committee decision. Finally, sections VII and VIII will offer some concluding perspectives on the important issues raised in this analysis. This article will conclude that Congress needs to amend the FOIA further in one specific area in order to fulfill the statute's broad policy of full disclosure.

II. THE FREEDOM OF INFORMATION ACT

An understanding of the FOIA's legislative history and historic roots is important because the statute's broad policy of full disclosure is the foundation on which the EFOIA is built. In addition, the Act's legislative history is especially relevant to the latter parts of this analysis.

Passed by Congress in 1966 and subsequently amended in significant respects, the FOIA creates a judicially enforceable policy that favors a general philosophy of full disclosure. The Act applies to

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19. See Reporters Comm., 489 U.S. at 772-74 (holding that the disclosure of computerized FBI compilations of an individual's criminal records is an unwarranted invasion of privacy under FOIA Exemption 7(C) when the request does not seek official information that directly sheds light on an agency's performance of its statutory duties).
23. Congress revised the FOIA in 1974, 1976 and 1986 before it enacted the electronic amendments in 1996. These earlier amendments will be discussed later in this analysis.
"records" held by "agencies" within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies such as the Federal Communications Commission, the Environmental Protection Agency, and the Securities and Exchange Commission. The FOIA makes agency records available to the public upon request and places the burden of justifying nondisclosure on the government. The FOIA does not include records maintained by state or local governments, by the courts, by Congress, or by private citizens.

The statute is potentially one of the most valuable tools of inquiry available to the general public, journalists, scholars, and others who want to know what the federal government is doing. For instance, in the months preceding the October 1996 enactment of the EFOIA, records released under the statute revealed Federal Aviation Administration (FAA) actions against Valujet before the May 11, 1996 crash into the Everglades that killed all on board; the unsafe lead content of tap water in Washington, D.C.; the U.S. government's treatment of South Vietnamese commandos who fought in a CIA-sponsored army in the early 1960s; and the types of tax cases that the IRS recommends for criminal prosecution.

In crafting the Freedom of Information Act, Congress recognized it is crucial for citizens in a democracy to have access to government information to make informed decisions. The FOIA prevents politicians and bureaucrats from being the exclusive judges of what the

of the Committee on the Judiciary, U.S. Senate, is a primary source for the legislative history of the FOIA. See also Rose, 425 U.S. at 360-361. But see U.S. Dep't of Justice v. Reporters Commn., 489 U.S. 749, 774-75 (1989) (holding that the "central purpose" of the FOIA is to disclose only those records that directly shed light on the operations of government.)


26. See id.


31. See id.

32. H.R. REP. No. 89-1497, pt. 1 (1966), reprinted in THE FOIA SOURCE BOOK, supra note 24, at 33. "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies . . . [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate." Id.
public can know. Congress also recognized that there are rightful reasons to keep some information secret. A 1965 Senate report, which accompanied the original Freedom of Information Act, declared that the public’s statutory “right to know” must be balanced against the government’s need to keep some information confidential. For this reason, Congress created nine exemptions, under which federal agencies may refuse to disclose information.

Congress amended the FOIA four times since the law was enacted: 1974, 1976, 1986, and 1996. A discussion of the amendments that preceded the Electronic Freedom of Information Act Amendments of 1996 is relevant to this discussion because the amendments — especially those approved in 1974 and 1976 — evinced Congress’ intent for the FOIA to represent a broad policy of full disclosure. The intent of the legislature in enacting the FOIA is important because the Act’s scope and purpose became significant issues in SDC Development Corp. v. Mathews and U.S. Department of Justice v. Reporters Committee for Freedom of the Press, examined in Parts III, IV, and V.

Congress amended the FOIA in 1974 with the intention to strengthen the statute because there was a general reluctance by agencies to comply with the law’s policy of full disclosure. Federal agencies had been interpreting the exemptions broadly to justify withhold-

33. "right to know" has been attributed to a 1945 speech by Kent Cooper, then Executive Director of the Associated Press. He is also the author of THE RIGHT TO KNOW (1956).

34. "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." S. REP. No. 89-813, pt.1 (1965), reprinted in THE FOIA SOURCEBOOK, supra note 24, at 38.

35. See 5 U.S.C. § 552(b)(1)-(9)(1994). Briefly stated, the FOIA does not apply to matters that fall under the categories of (1) classified information and national security, (2) internal agency personnel information, (3) information exempted by other Congressional statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions and (9) geological and geophysical information.


37. See SDC Dev. Corp., 542 F.2d 1116 (9th Cir. 1976).


39. In a critique of the FOIA, then University of Chicago Law Professor Antonin Scalia characterized the 1966 version of the Act as a “relatively toothless beast, sometimes kicked about shamelessly by the agencies.” Antonin Scalia, The Freedom of Information Act Has No Clothes, REGULATION, Mar.-Apr., 1982, at 15.
ing documents, and officials often used various ploys to discourage use of the FOIA, including high fees for copying documents, long delays, and claims that they could not find the documents requested.40

The 1974 amendments required agencies to respond to information requests within ten days or face a lawsuit,41 and directed each agency to issue FOIA fee regulations for the recovery of only the direct costs of search and duplication.42 A key revision authorized federal judges to conduct in camera review of classified information in order to confirm that the requested materials actually fell within the guidelines of Exemption 1, the national security exemption.43 Congress revised Exemption 1 in direct response to a 1973 Supreme Court decision in EPA v. Mink.44 In deciding Mink, the Supreme Court interpreted Exemption 1 broadly and held that classified documents were exempt from judicial review.45 Congress acted to override the Mink decision because legislators believed the Court’s ruling conflicted with the general philosophy of full disclosure evinced in FOIA.46

In 1976, Congress amended the FOIA for the second time because legislators wanted to clarify Exemption 3. This exemption provided that the FOIA did not apply to information clearly exempted by other laws previously passed by Congress.47 Legislators revised Exemption 3 to override a 1975 Supreme Court ruling with which Congress did not agree.48 In Administrator, FAA v. Robertson,49 the Court held that the FAA administrator possessed wide discretion to withhold requested government records.50 Congress disagreed with the Court’s broad construction of Exemption 3.51 Legislators said the Supreme Court deci-

40. See ALLAN ROBERT ADLER, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 8 (1995). In great part, this state of affairs was the result of sometimes vague or even poor draftsman of the FOIA. Criticism of the Act ranged from the subtle — “hardly... the apogee of legislative craftsmanship” — to the blunt — “primitive and ineffective.” JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE — PROCEDURES, FORMS AND THE LAW § 3.01, 3-2 (1990).
45. See id. at 84.
49. See Adm’r, Federal Aviation Adm’r v. Robertson, 422 U.S. 255 (1975).
50. See id. at 266-67.
51. In a House subcommittee report accompanying the proposed amendment, Congress specifically stated that the Supreme Court “misconceive[d] the intent of Exemption (3) . . .” H.R.
sion allowed an agency administrator "carte blanche to withhold any information he pleases."52 Consequently, Congress revised Exemption 3 to create guidelines that strictly limit the discretion of an agency's executive to withhold information from the public.53 This change is significant because, by expressly limiting agency discretion for withholding, the amendment reflected a congressional FOIA policy that favors disclosure.54

Congress revised the FOIA for the third time in 1986 when legislators amended the Act by passing the Freedom of Information Reform Act of 1986.55 The amendment provided broader exemption protection for law enforcement information and added new exclusions for law enforcement records under Exemption 7, FOIA's law enforcement exception.56 More pertinent to this analysis, however, the 1986 amendment also created new provisions that liberalized fees and fee waivers.57 Under these guidelines, fees recover only a small portion of the costs of responding to requests, thus making information economically accessible.58 The legislative history of the 1974 amendments indicate that the fee adjustments were specifically intended by Congress to help further the statute's broad policy of full disclosure.59 As a Ninth Circuit opinion noted, the amendment liberalized fees so that the FOIA charges could not be used "for the purpose of discouraging requests for information or as obstacles to disclosure of requested information."60

An examination of the FOIA amendments of 1974, 1976, and 1986 shows that these revisions comport with Congress' intent that the Act represent a broad policy of full disclosure, limited only by the nine exemptions,61 which must be narrowly construed.62 The public policy of

53. See id.
54. See id.
56. See id.
57. See id. § 552(a)(4)(A)(i-vi). The FOIA fee structure will be discussed in Part IV of this analysis.
58. See id.
59. See Long v. Internal Revenue Service, 596 F.2d 362, 366-67 (1979) (holding that the expenses of editing computerized records cannot justify an agency's decision to refuse to segregate disclosable materials subject to the FOIA).
60. Id. quoting S. REP. NO. 1200-93 (1974).
61. See id. § 552(b)(1-9). See note 35, supra and accompanying text.
behind the FOIA was echoed by President Johnson\textsuperscript{63} when he signed the FOIA into law on July 4, 1966:

This legislation springs from one of our most essential principles:
A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest.\textsuperscript{64}

The Supreme Court has also articulated Congress' intent for the FOIA to represent a broad policy favoring disclosure. In a 1976 opinion written by Justice William J. Brennan in \textit{Department of the Air Force v. Rose},\textsuperscript{65} the Court said the FOIA's legislative history makes it "crystal clear" that the congressional objective for the Act was to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."\textsuperscript{66} The Court further declared that the FOIA's statutory language and legislative history indicate that the statute was "broadly conceived"\textsuperscript{67} and its nine exemptions must be narrowly construed.\textsuperscript{68} Justice Brennan wrote that these "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the act."\textsuperscript{69}

An analysis of the EFOIA amendments of 1996 reveals that Congress wanted to maintain its broad policy of full disclosure by clarifying that the statute applies to electronic records — a requirement that Congress had not before explicitly stated.\textsuperscript{70}

III. THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS

When President Johnson signed the FOIA into law, the statute made no mention of electronically recorded or stored information because government records were primarily produced on paper.\textsuperscript{71} In 1955, when congressional hearings began laying the foundation for the

\begin{itemize}
  \item\textsuperscript{63} See \textit{Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act}, WKLY COMP. PRES. DOC. 895 (July 4, 1966).
  \item\textsuperscript{64} Id.
  \item\textsuperscript{65} \textit{Department of the Air Force v. Rose}, 425 U.S. 352 (1976).
  \item\textsuperscript{66} Id. at 361 (quoting \textit{Department of the Air Force v. Rose}, 495 F.2d. 261, 263 (1974)).
  \item\textsuperscript{67} Id. (quoting \textit{Environmental Protection Agency v. Mink}, 410 U.S. 73, 80 (1973)).
  \item\textsuperscript{68} See \textit{Rose}, 495 F.2d. 261, at 263.
  \item\textsuperscript{69} Id.
\end{itemize}
FOIA, the federal government had 45 computers.\(^72\) Ten years later, when the Senate passed its version of the FOIA, the computer inventory for the federal government was 1,826.\(^73\) The number jumped to 5,277 by 1970.\(^74\) By 1994, the federal government used about 25,250 small computers (costing $10,000 to $100,000 each); 8,500 medium computers (costing $100,000 to $1 million each); and 890 large computers (more than $1 million each).\(^75\) Other estimates for the number of computers used by the federal government run even higher.\(^76\)

Against this backdrop of rapid computerization combined with the reluctance of agencies to apply the FOIA to electronic information,\(^77\) as in *SDC Development Corp. v. Mathews*, Congress enacted The Electronic Freedom of Information Act Amendments of 1996.\(^78\) The amendments were the culmination of years of efforts by Senator Patrick Leahy and his supporters\(^80\) to update the FOIA because public access to electronic information had become a problem.\(^81\) Beginning in

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73. See id.
74. See id.
75. Id.
76. See BUNKER & SPLICHAL, supra note 11, at 559-60, citing GENERAL SERVS. ADMIN., FEDERAL EQUIPMENT DATA CENTER, AUTOMATIC DATA PROCESSING EQUIPMENT IN THE U.S. GOVERNMENT (Apr. 1990).
78. See SDC Dev. Corp., 542 F.2d 1116 (9th Cir. 1976).
81. See supra note 1. Congress acknowledged as early as 1974 that maintenance of federal agency records in computerized formats could potentially alter the calculus of information disclosure requirements under the FOIA. See S. REP. No. 93-854, at 12 (1974). The report said: [w]ith respect to agency records maintained in computerized form, the term 'search' would include services functionally analogous to searches for records that are maintained in conventional form. Difficulties may sometimes be encountered in drawing clear distinctions between searches and other services involved in extracting requested information from computerized record systems. Nonetheless, the
the mid-1970s, some agencies rejected FOIA requests for records in electronic form, arguing that the information did not qualify for disclosure under the Act. The problem was underscored in some instances when federal courts ruled against FOIA requesters in disputes with agencies that withheld information that was recorded or stored electronically.

The 1996 amendments establish that the rules for public access under the FOIA apply equally to electronic records and paper records, and a search request for electronic records using software is to be treated the same as a paper search. The law states that a “record” that is subject to the FOIA comprises information maintained by an agency in any format, including an electronic format. Under the EFOIA, agencies must make reasonable efforts (1) to provide a record “in any form or format requested by the person if the record is readily reproducible by the agency in that form or format,” and (2) to maintain records “in forms or formats that are reproducible” so that requests for the information can be honored. The law also mandates that when agency officials redact parts of an electronic record because the information is determined to fall within one of the nine exemptions, they must note the location and the extent of any deletions made on the electronic record.

Committee on the Judiciary believes it desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies are not required to provide — for example, using its computer to identify records.


83. See id.


88. Id.

IV. EFOIA SECTION 3 AND SDC DEVELOPMENT CORP. v. MATHEWS

In all, the Electronic Freedom of Information Act comprises 12 sections,90 of which pertain directly or indirectly to electronic access or dissemination issues.91 EFOIA Sections 7 and 8 concern administrative and procedural changes that deal with delays in processing FOIA requests and backlogs, and are beyond the scope of this analysis.92 Section 3,93 the focus of this research project, clarifies the terms “agency” and “record,” and expressly states that agency records maintained in electronic format are controlled by the requirements of


91. See id. §§ 1-6, 9-12.

92. The EFOIA’s administrative and procedural provisions are beyond the scope of this analysis. Briefly stated, the key provisions pertain to:


 Expedited Processing: The expedited-processing provision gives priority to two categories of requesters. The first category comprises those who would face significant harm if they fail to obtain information in a timely manner, including an imminent threat to life or physical safety. The second category applies to requesters “primarily engaged in the disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.” See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231 §8, 1996 U.S.C.C.A.N. (110 Stat. 3051), amending 5 U.S.C § 552(a)(6)(E) (1994). Although this category does not specifically mention the terms “press” or “news media,” it was created in response to requests from news media representatives and their supporters during EFOIA hearings. The requests came from hearings witnesses such as Byron York, reporter for The American Spectator, and Eileen Welsom, on behalf of the Society of Professional Journalists, the American Society of Newspaper Editors, and the Newspaper Association of America. See H.R. REP. No. 104-795, at 17 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3460. For example, Jane E. Kirtley, Executive Director of The Reporters Committee for Freedom of the Press, suggested in testimony that agencies should speed access requests from the media “whenever records are requested that would enlighten the public on matters where public concern is strong.” Id.


the FOIA in the same way as paper records. The section states that the FOIA is amended as follows:

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

There are several reasons why Section 3 is significant: First, it provides, for the first time, a FOIA definition for the term "record," which the statute never explained before. The Freedom of Information Act defined the term "agency," but it did not define either "record" or "agency record." And still, the term "agency record" is not defined in the FOIA or any of its amendments. Second, the section helped bridge the gap between law and technology by making clear that the term "record" applies to information in any format, including electronic formats. A 1996 House report that accompanied the EFOIA.

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95. See id.
96. See id.
97. See id.
98. Professor Sandra Davidson Scott noted that disparities between law and technology can restrict or slow public access to government information. Undesirable social and political consequences would result because decreased access to government information creates a climate that tends toward a closed society rather than an open one. See Sandra Davidson Scott, Suggestions for a Model Statute for Access to Computerized Government Records, 2 WM. & MARY BILL OF RTS. J. 29, 30 (1993).
illuminates the congressional intent behind another of Section 3's purposes — to explicitly reject a 1976 definition of "agency records" used by the U.S. Court of Appeals for the Ninth Circuit in SDC Development Corp. v. Mathews.101

In SDC Development Corp. v. Mathews, the Ninth Circuit held that a widely used medical database, compiled and stored in a computer data bank by the National Library of Medicine, did not qualify as an "agency record" for the purposes of the FOIA.102 Because the term "record" was not defined in the FOIA at that time, the Ninth Circuit decided to draw its definition of an "agency record" from a portion of the Records Disposal Act that deals with library materials.103 The Ninth Circuit reasoned that a definition keyed to library materials was appropriate because the requested information was compiled by the National Library of Medicine.104

But according to the EOFOIA House report, the Ninth Circuit's holding was inconsistent with the general policy of full disclosure expressed in the FOIA.105 The House report said the Ninth Circuit used the library material exclusion in the Records Disposal Act "as an excuse to place these records beyond the reach" of the FOIA.106 The EOFOIA, the House report said, now "makes clear, contrary to SDC Development Corp. v. Mathews, that information an agency has created and is directly or indirectly disseminating remains subject to the FOIA in any of its forms or formats."107

SDC Development Corp. v. Mathews, a complex case and one of the earliest cases in computer access litigation under the FOIA,108 serves as an illustration of how the ability to control and manipulate information in electronic formats makes electronically stored information more desirable and potentially far more valuable than equivalent data on paper.109 But compiling data, incorporating it into a software delivery system, and maintaining it can be costly, which is the issue

102. See id. at 1120-21.
103. Id. at 1120, n. 8, (citing 44 U.S.C. §§ 2901, 3301).
104. See id.
106. Id.
107. Id.
109. See Perritt, supra note 13; see also Gellman, supra note 13.
that prompted the FOIA access request in *SDC Development Corp. v. Mathews*.  

In this case, SDC Development Corp., a private, commercial user of biomedical and research information, made a FOIA request to obtain a database of the Medical Literature Analysis and Retrieval System (MEDLARS) for $500 — the nominal cost of reproduction. The MEDLARS database was created by the National Library of Medicine (NLM), a federal agency established by Congress in 1956 as a division of the U.S. Department of Health, Education and Welfare. The MEDLARS family of databases — a computerized system for storing, indexing, and retrieving medical bibliographical data — is an important and basic resource that is widely used in the biomedical and research communities.

At the time, public access to the MEDLARS tapes was available online through MEDLINE, the National Library of Medicine’s online database system. But MEDLINE users were required to pay an hourly rate of $8 to $15 per hour for access to the MEDLARS tapes, depending on time of day; the higher rate applied to prime use hours. Additionally, the computer tapes were available on an annual subscription basis for $50,000 through the National Technical Information Service, a clearinghouse for the collection of scientific, technical, and engineering information for dissemination to industry, business, government, and the general public.

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110. See *SDC Dev. Corp.*, 542 F.2d at 1118.

111. See *id*.


113. See *id* § 275. The Department later became the Department of Health and Human Services.

114. The MEDLARS database contains citations and abstracts of 2 million biomedical research articles from about 3,000 medical and scientific journals. See *SDC Dev. Corp.*, 542 F. 2d at 1117 n.1.

115. See *SDC Dev. Corp.*, 542 F.2d at 1117.

116. See *id*. In 1976, when the Ninth Circuit heard the case, about 350 institutions subscribed to the MEDLINE online service. See *id*.

117. See *SDC Dev. Corp.*, 542 F. 2d at 1117-18.

118. See The Technical Information Act, 15 U.S.C. §§ 1151-57 (1994). The database is updated annually, which is why subscribers must renew each year at the full subscription fee of $50,000 if they want to stay current. At oral arguments before the Ninth Circuit, the government said that no individual or institution had as yet paid $50,000 for the tapes. Instead, the NLM had entered into agreements under which universities and foreign government can have the tapes in exchange for services such as cataloguing, indexing and abstracting of medical publications to update the database. See 542 F.2d at 1118 n.4.
The public also could have access to a printed version of the requested database, called Index Medicus, for the nominal cost of reproduction. However, a printed listing is not as useful to or convenient for users of the information as a database could be. For example, the user would have to incur the expense of rekeying the text into a computer, building the indices, and creating computerized search capability. Furthermore, a printed text is not updated as quickly or as easily as its computerized counterpart, which can be continually updated. In other words, information in electronic formats is more valuable than the same data on paper because information users can manipulate the electronic information more efficiently.

SDC Development Corp. brought suit in the U.S. District Court for the Central District of California after the government refused to release the MEDLARS database for nominal reproduction costs. The district court entered a summary judgment in favor of the government. On appeal, the Ninth Circuit affirmed the district court decision, holding that the requested database did not qualify as an “agency record” under the FOIA.

SDC’s argument for access consisted of what the Ninth Circuit described as a “simple syllogism”: The FOIA requires reproduction, at a nominal cost, for all agency records not falling within one of the listed exemptions. The MEDLARS tapes were agency records, not specifically exempted. Therefore, the tapes must be reproduced at nominal cost. Under the FOIA’s fee structure, access fees essentially cover only the cost of search and reproduction.

The Ninth Circuit, however, rejected SDC’s premise that the MEDLARS tapes were agency records. The appellate court’s analysis, written for the three-judge panel by then-Circuit Judge Anthony M. Kennedy, now a Supreme Court Justice, began by noting that the terms “record” and “agency records” are not specifically defined by the statute. The Ninth Circuit turned to the FOIA’s legislative history for

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119. See SDC Dev. Corp., 542 F.2d at 1117.
120. See Gellman, supra note 13.
121. See Bunker & Splichal, supra note 11, at 560-61. See generally Perritt, supra note 13.
122. See SDC Dev. Corp., 542 F.2d at 1118.
123. Id. at 1120-21.
124. Id. at 1118.
125. See id.
127. SDC Dev. Corp., 542 F.2d at 1118. See generally supra note 97, and accompanying text.
guidance on how to clarify these terms, and concluded that Congress intended for the statute's disclosure provisions to apply primarily to information concerning the "structure, operation, and decision-making procedure" of federal agencies.\textsuperscript{128}

The Ninth Circuit then examined the MEDLARS tapes to determine if they fell within the aforementioned description of information that qualified for disclosure, and made three findings. First, the court said there was a difference between the information in the MEDLARS tapes and the software system that delivers the information.\textsuperscript{129} The court said the agency was not trying to protect its information; the agency simply wanted to protect its software delivery system, which "constitutes a highly valuable commodity."\textsuperscript{130} The appellate court concluded that the agency was not contravening the legislative intent of the FOIA because the agency did not seek to "mask its processes or functions from public scrutiny . . . [I]ts principal mission is the orderly dissemination of material it has collected. The agency is seeking to protect not its information, but rather its system for delivering that information."\textsuperscript{131}

The software system's value led to the court's second finding: There was an economic issue behind disclosure.\textsuperscript{132} The court said that by allowing any requester to gain access to the system at a nominal charge, the information gathering and dissemination function of the agency would be substantially impaired.\textsuperscript{133} The impairment would result because the National Library of Medicine had entered into agreements under which universities and foreign governments can have the tapes at no cost in exchange for services such as cataloguing, indexing,

\begin{itemize}
\item \textsuperscript{128} See \textit{SDC Dev. Corp.}, 542 F.2d at 1119. The Ninth Circuit cited H. Rep. No. 89-1497, at 5-6 (1966) as "particularly enlightening." \textit{Id.} at n.7. The sections in the House report cited in the \textit{SDC Dev. Corp. v. Mathews} opinion outlined a history of disclosure abuses by federal agencies in the years before the FOIA was enacted. From 1946 until the FOIA was signed into law in 1966, federal disclosure policies were controlled by The Administrative Procedure Act. See 5 U.S.C. § 1002 (1964) (current version at 5 U.S.C. §552 (1994)). However, the Ninth Circuit opinion does not specify exactly what language in the report the court relied on as "particularly enlightening." It is significant to note also that the Ninth Circuit's interpretation of Congressional intent for the FOIA's purpose is substantially similar to the U.S. Supreme Court's interpretation of the Act's "core purpose" as articulated in a case decided 13 years later: \textit{U.S. Dep't of Justice v. Reporters Comm.}, 489 U.S. 749, 774-75 (1989). The \textit{Reporters Committee} decision will be discussed in detail later in this analysis.
\item \textsuperscript{129} Id. at n.7.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} See \textit{id.}
\item \textsuperscript{133} See \textit{id.}
\end{itemize}
and abstracting of medical publications to update the database.\textsuperscript{134} Thus, the Ninth Circuit reasoned, contractual relations with these organizations, "designed to increase the agency's ability to acquire and catalog medical information, would be destroyed if the tapes could be obtained essentially for free."\textsuperscript{135} The court found that releasing the database at a nominal fee to the general public and private sector would undermine the system's commercial value, depriving the agency of income to defray the $10 million cost of developing and continually updating the system.\textsuperscript{136} In other words, users would not pay the market rate for commercial access to the MEDLARS tapes if they could obtain the tapes for a nominal FOIA fee.

Third, the court made a distinction between the types of records that Congress intended to make available through the FOIA and the MEDLARS tapes. The court held that the MEDLARS tapes did not fall within any of the categories of information that Congress intended the FOIA to control, namely, information that "directly reflect[ed] the structure, operation, or decision-making functions" of federal agencies.\textsuperscript{137} Instead, the court reasoned that the MEDLARS tapes qualified as library reference materials because the tapes were compiled by the National Library of Medicine.\textsuperscript{138} Furthermore, under the National Library of Medicine Act,\textsuperscript{139} the Department of Health, Education and Welfare has wide discretion in setting charges for the use of library materials.\textsuperscript{140} Therefore, the court of appeals concluded, the National Library of Medicine was not obligated to provide the MEDLARS database for the nominal cost of duplication.\textsuperscript{141}

\textsuperscript{134} See SDC Dev. Corp., 542 F.2d at 1118 n.4.
\textsuperscript{135} Id. at 1120.
\textsuperscript{136} See id at 1118, 1120.
\textsuperscript{137} Id. at 1120.
\textsuperscript{138} See id.
\textsuperscript{140} See 42 U.S.C. § 276(c) (repealed 1985).
\textsuperscript{141} See SDC Dev. Corp., 542 F.2d at 1121.
Congress, however, explicitly rejected the Ninth Circuit’s rationale in EFOIA Section 3.\textsuperscript{142} The House report accompanying the EFOIA said Section 3 nullifies \textit{SDC Development Corp. v. Mathews} because the statute now clarifies that any information an agency has created and is directly or indirectly disseminating remains subject to the FOIA in any forms or formats.\textsuperscript{143} Indeed, Section 3 may open the door for both commercial and non-profit FOIA users to gain access to a wide variety of useful electronically stored information, such as value-added computerized data, for nominal costs. But Section 3 also raises some important questions. Does EFOIA Section 3 prevent the government from selling — or at least recovering reasonable costs of producing — databases compiled by federal agencies at a substantial expense to the public?

V. \textbf{ECONOMIC IMPLICATIONS OF EFOIA SECTION 3}

Critics argue that congressional rejection of \textit{SDC Development Corp. v. Mathews}, in particular, and efforts to widen the FOIA’s applicability to computerized information, generally, may have far-reaching and undesirable implications for federal agencies because of the FOIA’s liberal fee structure.\textsuperscript{144} Under the FOIA fee guidelines established in the 1986 amendments, fees recover only a small portion of the costs of responding to requests.\textsuperscript{145} In 1992, for example, government-wide costs for FOIA were reported at $108 million whereas fees amounted to $8 million.\textsuperscript{146}

Fee schedules are established by each agency according to standards set by the Office of Management and Budget.\textsuperscript{147} The statute provided that commercial requesters can be required to pay “reasonable standard charges” at most for only the direct costs of search, duplication, or review.\textsuperscript{148} When review costs are assessed, only the direct costs incurred during the initial examination of a document may be re-

\begin{itemize}
  \item \textsuperscript{143} See id.
\end{itemize}
covered. Review costs may not include any expenses incurred in resolving issues of law or policy that may be raised in the course of processing a request.

Charges are limited to only document duplication costs if the records are not sought for commercial use, and if the request is from an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or from a representative of the news media. Charges can be waived or reduced below the fees established for noncommercial users if disclosure would be in the public interest "because it is likely to contribute significantly to public understanding of the operations or activities" of the government.

As a result of Congress' decision to override SDC Development Corp. v. Mathews, agencies that compile value-added data can suffer adverse economic consequences, argued attorney David MacDonald. By permitting "indiscriminate access" to value-added proprietary databases under the FOIA fee structure, he asserted, agencies are prevented from recovering reasonable costs from private parties who benefit commercially from access to the information.

MacDonald contended that the Ninth Circuit decision in SDC Development Corp v. Mathews was correct in making an important distinction between proprietary information systems and agency records reachable under the FOIA. In his view, the distinction protected value-added information contained in the databases such as MEDLARS from access under the FOIA fee structure.

By overriding the Ninth Circuit decision, Congress established that all electronic records would be subject to disclosure, including information libraries and other value-added data. Consequently, agencies that produce value-added information may find it difficult to protect their substantial investments, and this is a reasonable concern.

The expense of building and maintaining some databases can run into the millions of dollars. It cost the National Library of Medicine

149. See id. § 552(a)(4)(A)(iv).
150. See id.
151. See id. § 552(a)(4)(A)(ii)(II).
152. Id. § 552(a)(4)(A)(iii).
153. See MacDonald, supra note 144, at 379.
154. Id. at 388.
155. See id. at 373.
156. See id.
157. See id.
158. See MacDonald, supra note 144, at 380.
$10 million to create the MEDLARS family of databases in 1976.\textsuperscript{159} The technology of that time was rudimentary and relatively costly compared to the technology emerging today. To illustrate this point, compare the cost and capability of a personal computer today with a personal computer built 10 or even five years ago. Still, the new technology remains very expensive, as it enables the government to embark on highly complex projects to produce value-added data that were not imagined by most people a quarter of a century ago. For example, a single municipal geographic information system (GIS) can cost $8 million to complete,\textsuperscript{160} and this price tag is modest compared to what it can cost to create and maintain the kinds of databases used by federal agencies.

Extending FOIA access to the growing number of computerized records in general would increase agency costs exponentially,\textsuperscript{161} according to Professor Fred H. Cate and his colleagues. Cate argued that the FOIA already has been extended "far beyond its original purpose" by requesters, agencies, litigants, and courts.\textsuperscript{162} The vast majority of FOIA requesters do not seek information about government activities, he said, but rather want information about business competitors, opposing parties in litigation, and the activities of other non-governmental entities.\textsuperscript{163}

Cate said that extending the applicability of the FOIA violates the purpose for which the Act was created and also costs taxpayers billions of dollars responding to requests "seeking no information ‘about what the government is up to.’"\textsuperscript{164} The costs associated with "this misuse of the FOIA increase as more requesters use the Act to discover information about non-governmental activities and as the volume of agency records subject to the FOIA expands," Cate and his colleagues

\begin{itemize}
  \item \textsuperscript{159} See SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1118 (1976).
  \item \textsuperscript{160} See Gary H. Anthes and Mindy Blodgett, \textit{States Eye Online Revenues}, COMPUTERWORLD, Aug. 19, 1996, at 26. The subject of this article was an $8 million geographic information system produced by the city of Phoenix.
  \item \textsuperscript{161} See Cate, \textit{supra} note 144, at 66.
  \item \textsuperscript{162} See Cate, \textit{supra} note 144, at 65.
  \item \textsuperscript{163} See Cate, \textit{supra} note 144, at 65.
  \item \textsuperscript{164} Cate, \textit{supra} note 144, at 65 (quoting U.S. Dept of Justice v. Reporters Comm., 489 U.S. 749, 772-773 (1989)). Cate quotes the often cited remark — "what the Government is up to" — to allude to the \textit{Reporters Committee} opinion, which supports Cate’s point of view and which will be discussed in detail in Part V of this analysis. But actually, this remark derives from a passage in an article written by historian Henry Steele Commager for \textit{THE NEW YORK REVIEW OF BOOKS}, Oct. 5, 1972, at 7. See infra note 209 and accompanying text.
\end{itemize}
said. "Those costs threaten to increase exponentially, however, if the FOIA is applied to the increasing number of computerized agency records." \(^{166}\)

The burgeoning use of the federal disclosure statute, which Professor Cate said prompted his concerns,\(^ {167}\) is well documented. The FOIA's expanded use since its enactment in 1966 is reflected in its costs of operation. FOIA operations cost $108 million in 1992,\(^ {168}\) representing an increase of about $17 million over the previous year.\(^ {169}\) By comparison, the FOIA's government-wide costs in 1966 were $50,000.\(^ {170}\) Even allowing for inflation during this 26-year-period, the increase in FOIA costs is substantial.

Patricia M. Wald, Circuit Judge for the U.S. Court of Appeals for the District of Columbia, observed in 1984 that "like all freedoms, the FOIA turned out to have its price, financially and otherwise, and some costs proved to be more unexpected than others."\(^ {171}\) Judge Wald explained that within a decade after the FOIA was enacted, businesses realized they could use the FOIA to get information about competitors, and lawyers found they could often extract facts faster through FOIA requests than through civil discovery.\(^ {172}\) The FOIA became a "mini-industry," she wrote, providing information mainly to businesses or their lawyers.\(^ {173}\) She cited a General Accounting Office survey that showed only one out of every 20 FOIA requests was made by a journalist, a scholar, or an author.\(^ {174}\)

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165. See Cate, supra note 144, at 66. Cate and his co-authors cited a 1982 article by Antonin Scalia, in which Scalia described the FOIA as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." See Scalia, supra note 39, at 15.

166. See Cate, supra note 144, at 66.

167. Cate, supra note 144, at 66.


169. See Sinrod, supra note 168, at 334.


172. See id. at 665.

173. Id.

174. Id., (citing 1 1981 Senate Hearings 159, 161 (testimony of Jonathan Rose, Executive Summary, Oversight of the Administration of the Federal Freedom of Information Act))
But MacDonald, Cate, and other critics may be tolling warning bells prematurely. Under current law, the test for FOIA applicability arguably would already exclude many of the materials that critics fear would be subject to disclosure. This test was established in a seminal 1989 Supreme Court case, U.S. Department of Justice v. Reporters Committee for Freedom of the Press. Reporters Committee is a most important ruling because it stands for the Supreme Court's current interpretation of the FOIA's central purpose.

VI. U.S. DEPARTMENT OF JUSTICE v. REPORTERS COMMITTEE

The Supreme Court held unanimously in Reporters Committee that federal agencies can withhold computerized FBI compilations of "rap sheets" on private citizens even though the information might be found in public records available in local or state offices. In an opinion written by Justice John Paul Stevens, the Court ruled that the disclosure of compilations of an individual's criminal records is an unwarranted invasion of privacy under Exemption 7(C), the FOIA law enforcement exception, when the request does not seek official information that directly reveals government operations or activities.

The decision ended an 11-year effort by CBS reporter Robert Schakne and the Reporters Committee for the Freedom of the Press to obtain the FBI's rap sheet — a record of arrests, indictments, convictions, or acquittals — about reputed crime figure Charles Medico. Schakne was investigating Medico because Medico's company allegedly received defense contracts in exchange for political contributions to a corrupt Pennsylvania Congressman, Daniel J. Flood. The Penn-

175. See George B. Turbow, Protecting Informational Privacy in the Information Society, 10 N. Ill. U. L. REV. 521 (1990) (supporting the Supreme Court decision in U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749 (1989)). In Reporters Committee, the Court presented the "core purpose" doctrine that limits disclosure of private information under the FOIA. Id. at 774-75.


177. See id. at 774.

178. See id. at 765.

179. See id. at 773-75.

180. See id. at 757.

181. See id. Flood pleaded guilty on Feb. 26, 1980 to conspiracy to violate federal campaign laws and was placed on probation for a year. He was convicted of conspiracy to solicit campaign contributions from persons seeking federal government contracts. The 76-year-old Pennsylvania Democrat had resigned from the House Jan. 31, 1980. He was tried on charges of bribery, perjury and conspiracy in 1979. However, that trial, held in U.S. District Court in Washington, D.C., ended in a mistrial on Feb. 3, 1979, when jurors could not reach a decision after three days of deliberations. See Laura Kieman, Flood Is Placed on Year's Probation, THE WASHINGTON POST, Feb. 27, 1980, at A8.
sylsvania Crime Commission had identified Medico Industries as a legitimate business dominated by organized-crime figures. The FBI provided Schakne with information about three of Charles Medico's brothers, who were deceased, but the agency refused to release the requested information about Charles Medico, who was still living. Schakne brought suit in U.S. District Court for the District of Columbia, and the district court granted the FBI's motion for summary judgment, holding that the information was protected under FOIA Exemption 7(C) and disclosure would be an unwarranted invasion of Charles Medico's privacy. The D.C. Circuit reversed, concluding

183. See id.
184. 5 U.S.C. § 552(b)(7)(C) (1994). The exemption states that the FOIA does not apply to matters that are "(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." Exemption 7(C) is one of two privacy exceptions to the FOIA. The other exception, Exemption 6, pertains to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Id. § 552(b)(6).

Two key differences between the exemptions are evident in the statutory language. First, Exemption 6 calls for "a clearly unwarranted invasion" of privacy (italics added). Id. Exemption 7 requires a less strict standard, asking an agency to show only "an unwarranted invasion of privacy." Id. § 552(b)(7)(C). Second, Exemption 6 applies to information that, if disclosed, "would constitute" an invasion of privacy (italics added). Id. § 552(b)(6). Exemption 7, on the other hand, applies to information, the disclosure of which "could reasonably be expected to constitute" an invasion of privacy (italics added). Id. § 552(b)(7)(C).

The difference in language was intentional. The legislative history shows that Exemption 7(C), as originally proposed by Sen. Gary Hart, also required a "clearly" unwarranted invasion of personal privacy. See 120 CONG. REC. 17,033 (1974). However, the word "clearly" was dropped by the Conference Committee as a concession in negotiations with President Ford to get the Act approved. See CONG. REP. No. 93-1380, at 11 (1974). By dropping "clearly," the Exemption lessened the agency's burden to meet the test. See O'REILLY, supra note 40, at §17.09, 17-44. Legislators also agreed to the difference in language between "would" in Exemption 6, and "could reasonably be expected" in Exemption 7(C) in order enact the legislation.

As a result, courts have concluded that Exemption 7(C) allows law enforcement officers more latitude to withhold records to protect the privacy of individuals than is permitted under the stricter standard of Exemption 6. See U.S. Dep't of Justice v. Reporters Comm., 489 U.S. 749, 755-756 (1989). Additionally, Exemption 7(C) means the public interest in disclosure carries less weight. Id.

In making a determination in a privacy-interests case under Exemption 7(C), the courts use a two-step test. See 5 U.S.C. § 552(b)(7)(C) (1994). First, the documents must have been compiled for law enforcement reasons because this Exemption pertains only to investigative records. Second, the government must prove that the disclosure could "reasonably be expected to constitute an unwarranted invasion of privacy." Id.

Likewise, the courts use a similar test in deciding an Exemption 6 privacy-interests case. The courts first must determine if the records fall within the definition of "personnel," "medical" or "similar" files. Id. § 552(b)(6) (1994). Second, the courts must balance the invasion of the individual's personal privacy against the public benefit that would result from disclosure. To withhold
that the government cannot claim a privacy interest in FBI-compiled
records that would be available to the public if sought from the indi-
vidual law enforcement agencies.\textsuperscript{186}

But the Supreme Court reversed the D.C. Circuit and permitted
the FBI to withhold the information. The Court said it reached its out-
come by balancing the individual's right of privacy against the public
interest in disclosure.\textsuperscript{187} The Court held that the public interest to be
balanced against the privacy interest is that of disclosing only informa-
tion that directly reveals the operations or activities of the govern-
ment.\textsuperscript{188}

Justice Stevens wrote that the FOIA's "central purpose is to en-
sure that the government's activities be opened to the sharp eye of
public scrutiny, not that information about private citizens that hap-
pens to be in the warehouse of the government be so disclosed."\textsuperscript{189} The
Court concluded that disclosure of a computerized compilation of an
individual's criminal records, which do not directly reveal government-
al operations or performance, is an unwarranted invasion of privacy
because the information falls "outside the ambit of the public interest
that the FOIA was enacted to serve."\textsuperscript{190} In the Court's view, in other
words, the rap sheets did not directly reveal information about how the
government operates and, therefore, could be withheld.\textsuperscript{191} The informa-
tion would "tell us nothing directly about the character of the Con-
gressman's behavior," Justice Stevens wrote.\textsuperscript{192} "Nor would it tell us
anything about the conduct of the Department of Defense (DOD) in
awarding one or more contracts to the Medico Company."\textsuperscript{193}

Justice Stevens made a particular point to note that the request
was for computerized information and that computerization of personal
information poses a special potential threat to privacy.\textsuperscript{194} The Court
acknowledged that Medico's criminal history of arrests, indictments,
and convictions are public records, which might be acquired after a search of courthouse files and records of local law enforcement agencies that investigated and prosecuted him.195 But Justice Stevens emphasized that Schakne sought a computerized compilation of all of this information, and the privacy interest in a rap sheet is substantial.196 "The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains the age of 80, when the FBI's rap sheets are discarded."197 Justice Stevens said there is a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."198

The Reporters Committee majority position was criticized, however, in a concurring opinion by Justice Harry A. Blackmun, joined by Justice Brennan. Justice Blackmun argued that the Court opinion exempting all rap-sheet information from the FOIA's disclosure requirements was overbroad in light of Exemption 7(C)'s plain language, legislative history, and case law.199 He characterized the Court majority's "bright-line rule" as not basically sound.200 To illustrate his point, Justice Blackmun presented a hypothetical situation in which a rap sheet disclosed a congressional candidate's conviction of tax fraud before he ran for office.201 The FBI's disclosure of that information could not reasonably be expected to constitute an invasion of personal privacy, much less an unwarranted invasion, because the candidate gave up any interest in preventing disclosure of this information when he chose to run for office, Justice Blackmun said.202 "I would not adopt the Court's bright-line approach but would leave the door open for the disclosure of rap-sheet information in some circumstances," he concluded.203

195. Id at 764.
196. See id. at 771.
197. Id.
199. See id. at 780-81 (Blackmun, J., concurring).
201. See id.
202. See id.
203. Id. at 781.
The Reporters Committee ruling is very significant because its holding stands for the Supreme Court's current interpretation of the FOIA's purpose—to provide public access only to official information that directly reveals governmental operations or activities. \textsuperscript{204} This ruling represents a significantly narrower interpretation of the FOIA's scope than the Court found in \textit{U.S. Department of the Air Force v. Rose} \textsuperscript{205} in 1976. The \textit{Rose} Court said the FOIA's legislative history clearly shows that Congress intended for the "broadly conceived" Act to permit access to official information and open agency action to public scrutiny. \textsuperscript{206} Justice Brennan emphasized in \textit{Rose} that the exemptions are limited, must be narrowly construed, \textsuperscript{207} and do not obscure the fact that disclosure is the FOIA's dominant objective. \textsuperscript{208}

The Reporters Committee opinion set forth the principle that the "statutory purpose" of the FOIA is to disclose only official information that "sheds light on an agency's performance." \textsuperscript{209} By so holding, the Court established a "conduct test" as a threshold question that a lower court must determine, before it examines whether requested information falls within one of the nine exemptions. \textsuperscript{210}

An analysis of the Court's reasoning in \textit{Reporters Committee} shows that its conduct test derives from a two-step process. First, the Court established that the FOIA's basic policy of disclosure "focuses on the citizens' right to be informed about 'what their government is up to.'" \textsuperscript{211} Second, the Court equated the public's need to know "what their government is up to" with a need to evaluate government performance:

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of informa-

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  \item \textsuperscript{204} \textit{See id.} at 773-75.
  \item \textsuperscript{205} \textit{Rose}, 425 U.S. 352 (1976).
  \item \textsuperscript{206} \textit{Id.} at 361 (citing Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973)).
  \item \textsuperscript{207} \textit{See id.}
  \item \textsuperscript{208} \textit{See id.}
  \item \textsuperscript{209} \textit{Reporters Comm.}, 489 U.S. 749, 780 (1989).
  \item \textsuperscript{210} \textit{See id.}
  \item \textsuperscript{211} \textit{Id.} at 773. The reference to citizens having a right to know "what their government is up to," comes from an Oct. 5, 1972, article written by historian Henry Steele Commager in \textit{The New York Review of Books}. A passage from Commager's article was quoted by Justice William O. Douglas in his dissent to Environmental Protection Agency v. Mink, 410 U.S. 73, 105 (1973). The entire passage bears repeating because the \textit{Reporters Committee} opinion quotes the phrase several times. Commager wrote: "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to."
\end{itemize}
tion about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct. In this case — and presumably in the typical case in which one private citizen is seeking information about another — the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed light on the conduct of any Governmental agency or official.212 (Emphasis added.)

In other words, although federal agencies collect vast amounts of information on virtually every facet of society, compiled at a tremendous expense to the public, the public is entitled to gain access to only a limited class of information as prescribed by the Court's narrowly drawn "core purpose" of the Freedom of Information Act.213 The Court's narrow interpretation of the FOIA's purpose seemingly ignores the public interest value of a wealth of government-held information that does not reveal government operations or conduct. Such information includes census data, economic data, and public health and safety information, ranging from the commercial aircraft maintenance records of the FAA to the results of clinical trials on over-the-counter drugs regulated by the FDA.

As a result of the Court's narrow interpretation of the FOIA's central purpose, dire warnings about EFOIA Section 3's implications are largely overstated. One critic cautioned that Congress's decision to override SDC Development Corp v. Mathews. would permit indiscriminate access to value-added proprietary databases created by federal agencies, thus preventing the government from recovering the substantial costs of compiling the information.214

However, under the Reporters Committee conduct test, it seems unlikely that types of information like the data in the MEDLARS tapes would qualify for disclosure. As the Supreme Court plainly said in a 1997 ruling that relied on Reporters Committee as precedent: “[T]he only relevant public interest in the FOIA balancing analysis” is “the extent to which disclosure of the information ‘sheds light on an agency’s performance of its statutory duties’ or otherwise lets citizens know ‘what their government is up to.’”215

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212. Reporters Comm., 489 U.S. at 773.
213. See id. at 774-75.
214. See MacDonald, supra note 144, at 387.
VII. DISCUSSION

Congress intended for EFOIA Section 3 to provide access to federal agency databases containing the kinds of public interest information found in the MEDLARS tapes. Meanwhile, however, the decision in U.S. Department of Justice v. Reporters Comm. still stands for the proposition that the scope of the FOIA is limited and would exclude precisely the kind of information contained in the MEDLARS tapes. Under the Court’s central purpose theory, the tapes would not directly reveal government operations or activities and would therefore flunk the conduct test.

Consequently, the future implications of Section 3 remain elusive even though the MEDLINE/MEDLARS question has been settled. The National Library of Medicine made both services available to the public free of charge on the Internet as of June 26, 1997. MEDLINE users now can gain access to the online terminal service on the World Wide Web. In addition to MEDLINE, the National Library of Medicine is also making the MEDLARS databases available online. Although the MEDLINE/MEDLARS question is resolved,
the much larger issue it represented from the outset remains unsettled. The intent behind EFOIA Section 3 seems to clash with the “core purpose” rationale expressed by the Supreme Court in Reporters Committee. 225 Perhaps some in Congress intended Section 3 to be an attack on Reporters Committee, but the evidence is elusive.

Some members of the Senate, at least, were fully aware of the Reporters Committee ruling’s profound consequences on the scope of the FOIA. 226 The record shows that the Senate Committee on the Judiciary reached a consensus in 1995 that the Reporters Committee decision conflicted with the FOIA’s general philosophy of full disclosure. 227 This view was articulated in a Senate report that accompanied a 1995 precursor to the House-sponsored EFOIA of 1996 — The Electronic Freedom of Information Improvement Act of 1995, which was a Senate bill introduced by Senator Leahy. 228 In the Senate report, Leahy directly addressed the Supreme Court’s central purpose theory, and concluded in strongly worded terms that the Court construed the purpose of the FOIA too narrowly in Reporters Committee. 229

The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government. Effort by the courts to articulate a ‘core purpose’ for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness. 230

Leahy’s bill was unanimously approved by the Committee on the Judiciary on April 25, 1996, 231 but congressional action on the Senate proposal ended there. After negotiations with the House, Leahy’s Senate bill was revised and reintroduced as House bill, H.R. 3802 on July 12, 1996. 232 Three months later, that bill was signed into law as the Electronic Freedom of Information Act Amendments of 1996

under way at the time of the interview, April 23, 1998, and was several months from completion, he said.

227. See id.
230. Id.
231. See id. at 6.
However, the House report accompanying the legislation failed to contain any language criticizing the Reporters Committee decision.

The omission of such clarifying language makes it possible for Reporters Committee to trump EFOIA Section 3 because there is nothing in the statutory language of Section 3 to specifically override Reporters Committee. The new FOIA language contained in Section 3 offers a definition of “record.” “The term ‘record’ and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including electronic format.” However, the attack on SDC Development Corp v. Mathews, contained in the EFOIA House report’s explanation of Section 3’s goals, made no mention of Reporters Committee.

As a result, the Reporters Committee ruling remains a serious threat to the future of public access to information held by federal agencies. There already is a long line of lower court FOIA cases that have relied on the Reporters Committee central purpose test. In these cases, the lower courts have used the central purpose analysis.

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234. At least one federal court already has held that the EFOIA does not broaden the narrow scope of the statute as articulated in Reporters Comm. See O’Kane v. U.S. Customs Service, No. 95-0683-CIV-MORENO (S.D. Fla. Nov. 6, 1997). U.S. District Judge Federico A. Moreno held that if "Congress intended to significantly enlarge the scope of the public interest served by FOIA, Congress could have taken a clear and more direct approach, most likely by amending the exemptions themselves. This they did not do."


only in FOIA cases involving privacy Exemptions 6 or 7(C).\textsuperscript{238} But several courts recently have applied the Supreme Court's central purpose test\textsuperscript{239} to FOIA cases whose issues go beyond the Act's traditional privacy exemptions.\textsuperscript{240}

Such a trend might find support among FOIA critics such as MacDonald, Cate, and other commentators mentioned in this analysis. Indeed, Cate and his colleagues wrote that in order to achieve the FOIA's intended purpose, the Court's central purpose test "should be the touchstone for disclosure."\textsuperscript{241} They urged further that the central purpose test should be expanded "beyond [privacy] Exemptions 7(C) and 6, and beyond FOIA exemptions altogether."\textsuperscript{242}

For access advocates, however, a broad application of the central purpose test by the courts might be viewed as a disturbing trend that could further constrict the ambit of the FOIA's statutory purpose as evinced in its plain language and legislative history. This analysis strongly suggests that Section 3 does not solve the problem posed by Reporters Committee — namely, that the Court's interpretation of the FOIA's purpose was narrowly drawn and contravened the statute's legislative intent.

Finally, there is the question of how EFOIA Section 3 may affect the government's ability to sell databases compiled by federal agencies. Critics have cautioned that the extension of FOIA access to the growing number of computerized records in general would increase agency costs exponentially.\textsuperscript{243} In particular, it is argued, EFOIA Section 3 would permit indiscriminate access to value-added proprietary databases created by federal agencies.\textsuperscript{244} In other words, no one would pay

\textsuperscript{238} See 5 U.S.C. §§ 552(b)6 & (b)7(C) (1994).

\textsuperscript{239} See Reporters Comm., 489 U.S. 749, 774-75 (1989).

\textsuperscript{240} See Christopher P. Beall, The Exaltation of Privacy Doctrines Over Public Information Law, 45 DUKE L.J. 1249, 1273 (1996). Beall cited three cases in which courts have broadened the applicability of the central purpose doctrine. See id. at 1273-80. See Sweetland v. Walters, 60 F.3d 852, 855 (D.C. Cir. 1995) (per curiam) (holding that the Executive Residence staff of the White House is not an "agency" under the FOIA); Baizer v. Department of the Air Force, 887 F. Supp. 225, 228 (N.D. Cal. 1995) (holding that an electronic copy of the Air Forces' computerized database of Supreme Court opinions should not be considered an "agency record" under the FOIA); Vazquez-Gonzalez v. Shalala, Civ. No. 94-2100 (SEC), 1995 WL 67659 (D.P.R. Feb. 13, 1995) (dismissing a suit brought by a physician, who sought information about Medicare billing practices, because the requested information concerned the plaintiff's own commercial interests). See id. at 1273-80.

\textsuperscript{241} See Cate, supra note 144, at 45.

\textsuperscript{242} Id.

\textsuperscript{243} See id. at 66.

\textsuperscript{244} See MacDonald, supra note 144, at 387.
for government databases if the information can be obtained for only
the nominal costs of reproduction under the FOIA. Consequently, the
argument goes, federal agencies would be prevented from recovering
reasonable costs from FOIA requesters who may benefit commercially
from the information. 245

Both statutory law and case law illuminate this issue, and seem to
have settled this question in favor of the public interest in disclosure,
regardless of cost factors. The 1974 amendments to the FOIA directed
each agency to issue fee regulations for the recovery of only the direct
costs of search and duplication. 246 And the 1986 amendments created
new provisions that liberalized fees and fee waivers further, as outlined
earlier in this article. 247 Congress explained that the rationale behind
the liberal fee provisions was to prevent agencies from using fees to
discourage FOIA requests or as obstacles to disclosure. 248

Additionally, case law has upheld the fee system established in the
FOIA. The Ninth Circuit held in 1979 that the FOIA made no refer-
cence to "cost or convenience as a relevant factor" in the determination
to disclose information, including electronically stored data. 249 The
Ninth Circuit noted that "[d]espite the massive expenses that can be
involved in even a single request, Congress has not limited access un-
der the Act." 250

VIII. CONCLUSION

Section 3 of the Electronic Freedom of Information Act of 1996
advances the public interest in open government because it makes ex-
licit that information an agency creates and directly or indirectly dis-
seminates remains subject to the FOIA in any of its forms or for-
mats. 251 This provision reinforces a public policy that keeps federal
government information in the public domain. Such policy is important
for two reasons. First, the federal government is the largest single pro-
ducer, collector, consumer, and disseminator of information in the

245. See id.
249. See Long v. IRS, 596 F.2d 362, 366 (1979) (holding that the time and expense required
to "sanitize" IRS data, requested by an FOIA user, did not constitute an unreasonable burden to
place on an agency.)
250. Id. at 367.
United States.252 Some of this information can have direct and immediate political and economic consequences on the general public and the private sector.253 Second, the government is increasingly creating, recording, and storing information in digital form, which permits the data to be more easily used, shared, and disseminated by both for-profit and not-for-profit organizations.254

The danger that arises is that government control over information in the computer age has the potential to allow federal agencies to maintain information monopolies.255 Congress expressed its concern over information monopolies in the electronic era as early as 1986.256 In a report issued after a series of hearings on electronic collection and dissemination of information by federal agencies, Congress concluded:

The new technology of electronic data distribution can undermine the practical limitations and structures that have prevented Federal agencies from exploiting the ability to control access to and distribution of the information that the government collects, creates and disseminates.257

Around the same time, the Second Circuit also explained the dangers of information monopolies controlled by the government.258 In a 1985 decision, the Second Circuit likened monopolistic activity to censorship when that court said the "evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion.... Such actions are an exercise of censorship that allows the government to control the form and content of the information reaching the public."259


253. See Gellman, supra note 13, at 1003.

254. See id.


257. See id. at 9.

258. See Legi-Tech v. Keiper, 766 F.2d 728 (2d Cir. 1985) (holding that commercial information users are entitled to the same access to a New York state-owned database as the general public).

259. Id. at 733.
In the final analysis, EFOIA Section 3, therefore, serves the important purpose of undercutting efforts by federal agencies to create information monopolies in which the government may be a partner.

Meanwhile, it is poor public policy for Congress to allow the conflict between the FOIA and the 1989 Reporters Committee ruling to remain unresolved for so long — a decade has elapsed since the Court handed down its FOIA core purpose ruling.\textsuperscript{260} The problem is that the Supreme Court’s narrow interpretation of the FOIA’s purpose can potentially undermine the very policy that EFOIA Section 3 was intended to advance.

In EFOIA Section 3, Congress seemed to broaden public access rights. But the Reporters Committee ruling, on the other hand, established that the “statutory purpose” of the FOIA is to disclose only official information that “sheds light on an agency’s performance.”\textsuperscript{261} This conflict, which can be likened to driving a car with one foot on the gas pedal and one foot on the brake, needs to be resolved.

There is ample precedent for Congress to override the Supreme Court’s ruling in order to settle this conflict. As noted earlier in this article, Congress in 1974 revised Exemption 1, the national security exemption, in direct response to a 1973 Supreme Court decision in EPA v. Mink.\textsuperscript{262} And in 1976, Congress amended the FOIA to clarify Exemption 3 in the aftermath of a 1975 Supreme Court decision, Administrator, FAA v. Robertson.\textsuperscript{263}

An FOIA amendment aimed at overriding Reporters Committee would serve the nation’s democratic interests in open government and comport with the intent of the Freedom of Information Act as articulated by Congress when it originally crafted the statute. The spirit of


\textsuperscript{261} Id. at 773.

\textsuperscript{262} Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). See discussion supra Part II.

\textsuperscript{263} Adm’r, Federal Aviation Admn., 422 U.S. 255 (1975). See discussion supra Part II.
the Act was expressed by Senator Edward V. Long, who, in introducing the FOIA legislation in 1965, quoted James Madison:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.²⁶⁴

²⁶⁴ See S. REP. No. 89-813, at 2-3 (1965). Actually, Sen. Long did not get Madison's quote quite right. The quotation in the above text is correct. Letter from James Madison to William T. Berry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, at 103 (Gaillard A. Hunt ed., 1910). Sen. Long juxtaposed the order of the first and last sentences of the original quotation, and that is how Madison's remarks are printed in the 1965 Senate report. FOIA legislators and commentaries on the Act have ever since cited Madison to support the view that public access to government information has historic roots traceable to the Framers. The philosophy Madison expressed in the quotation certainly can be interpreted in this regard, but it is important to note that the comment actually was made in the context of expanding public education. See Paul H. Gates, Jr. and Bill F. Chamberlin, Madison Misinterpreted: Historical Presentism Skews Scholarship, 13 AMERICAN JOURNALISM 38 (1996).