

INTERNATIONAL JOURNAL OF DIGITAL AND DATA LAW

REVUE INTERNATIONALE DE DROIT
DES DONNÉES ET DU NUMÉRIQUE

Vol. 2 - 2016



ISSN 2553-6893

International Journal of Digital and Data Law
Revue internationale de droit des données et du numérique

Direction :
Irène Bouhadana & William Gilles

ISSN : 2553-6893

IMODEV
49 rue Brancion 75015 Paris – France
www.imodev.org
ojs.imodev.org

*Les propos publiés dans cet article
n'engagent que leur auteur.*

*The statements published in this article
are the sole responsibility of the author.*

Droits d'utilisation et de réutilisation

Licence Creative Commons – Creative Commons License -



Attribution

Pas d'utilisation commerciale – Non Commercial

Pas de modification – No Derivatives

À PROPOS DE NOUS

La **Revue Internationale de droit des données et du numérique (RIDDN)/ the International Journal of Digital and Data Law** est une revue universitaire créée et dirigée par Irène Bouhadana et William Gilles au sein de l'IMODEV, l'Institut du Monde et du Développement pour la Bonne Gouvernance publique.

Irène Bouhadana, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV.

William Gilles, docteur en droit, est maître de conférences (HDR) en droit du numérique et en droit des gouvernements ouverts, habilité à diriger les recherches, à l'Université Paris 1 Panthéon-Sorbonne où il dirige le master Droit des données, des administrations numériques et des gouvernements ouverts. Il est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Il est aussi fondateur et Président de l'IMODEV.

IMODEV est une organisation scientifique internationale, indépendante et à but non lucratif créée en 2009 qui agit pour la promotion de la bonne gouvernance publique dans le cadre de la société de l'information et du numérique. Ce réseau rassemble des experts et des chercheurs du monde entier qui par leurs travaux et leurs actions contribuent à une meilleure connaissance et appréhension de la société numérique au niveau local, national ou international en analysant d'une part, les actions des pouvoirs publics dans le cadre de la régulation de la société des données et de l'économie numérique et d'autre part, les modalités de mise en œuvre des politiques publiques numériques au sein des administrations publiques et des gouvernements ouverts.

IMODEV organise régulièrement des colloques sur ces thématiques, et notamment chaque année en novembre les *Journées universitaires sur les enjeux des gouvernements ouverts et du numérique / Academic days on open government and digital issues*, dont les sessions sont publiées en ligne [ISSN : 2553-6931].

IMODEV publie deux revues disponibles en open source (ojs.imodev.org) afin de promouvoir une science ouverte sous licence Creative commons **CC-BY-NC-ND** :

- 1) la *Revue Internationale des Gouvernements ouverts (RIGO)/ International Journal of Open Governments* [ISSN 2553-6869] ;
- 2) la *Revue internationale de droit des données et du numérique (RIDDN)/ International Journal of Digital and Data Law* [ISSN 2553-6893].

ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

Irène Bouhadana, PhD in Law, is an Associate professor in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where she is the director of the master's degree in data law, digital administrations, and open governments at the Sorbonne Law School. She is a member of the Institut de recherche juridique de la Sorbonne (IRJS). She is also the founder and Secretary General of IMODEV.

William Gilles, PhD in Law, is an Associate professor (HDR) in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where he is the director of the master's degree in data law, digital administration and open government. He is a member of the Institut de recherche juridique de la Sorbonne (IRJS). He is also founder and President of IMODEV.

IMODEV is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

IMODEV regularly organizes conferences and symposiums on these topics, and in particular every year in November the Academic days on open government and digital issues, whose sessions are published online [ISSN: 2553-6931].

IMODEV publishes two academic journals available in open source at ojs.imodev.org to promote open science under the Creative commons license **CC-BY-NC-ND**:

- 1) the *International Journal of Open Governments/ la Revue Internationale des Gouvernements ouverts (RIGO)* [ISSN 2553-6869] ;
- 2) the *International Journal of Digital and Data Law / la Revue internationale de droit des données et du numérique (RIDDN)* [ISSN 2553-6893].

GOVERNMENTAL TRANSPARENCY AND OPENNESS IN A DIGITAL ERA: A U.S. PERSPECTIVE

by **Russel L. WEAVER**, Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law (U.S.) and **Laurence BOISSIER**, Professor, Université Paul Valéry (Montpellier, France).

With the dawn of the Enlightenment, and the influence of writers such as John Locke¹ and Thomas Paine,² the concept of Divine Right³ fell into disrepute,⁴ and an entirely new conception of government and governmental authority began to emerge. In the United States, this new approach was reflected in the U.S. Declaration of Independence⁵ which implicitly rejected the concept of Divine Right, and declared the primacy of democratic principles: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”

Over the centuries, democratic governance and the concept of the “consent of the governed,” have come to include two essential elements. First, a free and democratic society must include, and be premised upon, the right to freedom of expression.⁶ If the citizenry is free to decide who they will vote for, and which ideas or propositions they will support and promote, they must be free to communicate their ideas with each other, and to attempt to persuade others regarding their preferred candidates and positions.⁷ Second, the people must have access to information regarding the functioning of government. It is difficult to participate meaningfully in the democratic process, or to make democratic institutions accountable, when the government conceals information, and starves the public of information regarding its functioning.⁸

¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689); JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE (1664).

² THOMAS PAINE, COMMON SENSE 3 (1776) (Dover ed. 1997).

³ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 96 (1996) (noting that “centuries ago” there was a “belief that the monarch served by divine right”).

⁴ See THOMAS PAINE, COMMON SENSE 6 & 13-14 (1776) (Dover ed. 1997).

⁵ U.S. DECLARATION OF INDEPENDENCE (July 4, 1776).

⁶ See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 S. CT. REV. 245; RUSSELL L. WEAVER, UNDERSTANDING THE FIRST AMENDMENT 10-13 (5th ed. 2014).

⁷ See *id.*

⁸ See John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 89 (2006); Katherine McFate, *Keynote Address: The Power of an Informed Public*, 38 VT. L. REV. 809, 825.

This article provides a short evaluation of the status of openness and transparency in the United States in the digital era. It begins by tracing the evolution of transparency principles over the last century, mainly from a non-digital perspective. As we shall see, while the U.S. has made significant strides towards creating a government that is more open and transparent, and more consistent with democratic ideals, the U.S. government falls far short of that ideal in important respects. Second, the article examines how digital technologies have enabled the creation of E-Government.

§ 1 – U.S. EFFORTS TO PROMOTE OPENNESS AND TRANSPARENCY: PROGRESS AND SET BACKS

Unquestionably, the U.S. government has become far more open and transparent than it was a century ago. Prior to the 1930s, neither the federal government, nor state governments, were subject to much in the way of transparency requirements. For example, even though the U.S. Constitution provides that “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for,” may be confirmed only with the “advice and consent” of the U.S. Senate,⁹ for most of U.S. history these confirmation hearings were closed to the public.¹⁰ In addition, prior to the 1930s, administrative agencies were not required to publish proposed rules or regulations, much less their policy positions and choices, so that the process for promulgating rules and regulations was neither open nor transparent.¹¹ Commonly, agencies would simply announce and implement their regulatory wishes.

The U.S. government started moving towards greater openness and transparency in the early part of the twentieth century. The movement began with U.S. Senate’s processes for considering nominations to the U.S. Supreme Court. About a hundred years ago, the U.S. Senate broke with tradition and began holding public confirmation hearings.¹² The result of that openness ve been both interesting and enlightening. Although many confirmation hearings were contentious prior to the open hearing era, the public became more interested and involved once the proceedings became public,¹³ and began to realize that a nominee’s views are important to how he/she decides cases, the public began to galvanize both for and against particular nominees.¹⁴ As a result, when Robert

⁹ U.S. CONST., Art. II, cl. 2, sec. 2.

¹⁰ See RICHARD S. BETH & BETSY PALMER, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2011 10 (2011).

¹¹ See WILLIAM E. FUNK, SIDNEY SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE LAW 740 (West, 5th ed., 2014).

¹² See Beth & Palmer, *supra* note 10, at 10.

¹³ *Id.* at 10-11.

¹⁴ *Id.*

Bork was nominated to the U.S. Supreme Court,¹⁵ public scrutiny of his nomination was intense, focusing on such hot button issues.¹⁶ Interest groups galvanized and actively opposed his nomination,¹⁷ objecting to his positions on civil rights¹⁸ and abortion.¹⁹ Attempts to influence Senate confirmation proceedings have now become commonplace with interest groups routinely mobilizing in an effort to influence the Senate and thwart nominations.²⁰

The next major openness and transparency advance occurred in the 1930s when the U.S. Congress adopted its first major piece of “open government” legislation, the federal Administrative Procedure Act (APA).²¹ Prior to the adoption of that act, agencies had been free to unilaterally adopt regulatory changes without consulting the public or regulated entities.²² The APA altered the status quo by establishing two different procedures for creating rules, “formal” and “informal” processes.²³ The APA required that formal rules, also known as “adjudicative rules,” be created by “trial-type” procedures, involving subpoenas, offers, of proof, and traditional “trial” procedures.²⁴ Although formal procedures continue to exist, very few agencies use them because the process is regarded as difficult and too cumbersome. Today, most U.S. administrative agencies create virtually all regulations using “informal” procedures which require agencies to publish a NOPR (notice of proposed rulemaking) in the Federal Register,²⁵ thereby providing the public with notice of the proposed rule.²⁶ The NOPR must contain three specific types of information: “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”²⁷ In addition to allowing interested parties the opportunity to comment on NOPRs,²⁸ and requiring the agency to “consider” those

¹⁵ See Linda Greenhouse, *Washington Talk: The Bork Nomination; In No Time At All, Both Proponents and Opponents are Ready For Battle*, *The New York Times* A24 (July 9, 1987).

¹⁶ See Philip Shenon, *The Bork Hearings: Poll Finds Public Opposition to Bork is Growing*, *The New York Times* A20 (Sept. 24, 1987).

¹⁷ See Greenhouse, *supra* note 15.

¹⁸ *Id.*

¹⁹ See Andrew Rosenthal, *Bork Gives Abortion Rights Convention Something to Shout About*, *The New York Times* A12 (July 13, 1987).

²⁰ *Id.* at 14; see also Neil A. Lewis, *Gay Rights Groups Join Opposition to Ashcroft for Justice Department*, *The New York Times* A15 (Jan. 9, 2001).

²¹ 5 U.S.C. § 551, *et seq.*

²² See FUNK, SHAPIRO & WEAVER, *supra* note 11, at 740.

²³ 5 U.S.C. § 553.

²⁴ 5 U.S.C. §§ 556-557.

²⁵ 5 U.S.C. § 553(b).

²⁶ *Id.* at § 553(b) (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.”).

²⁷ *Id.*

²⁸ *Id.* at § 553(c) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”).

comments,²⁹ the APA also requires agencies to issue a “concise general statement” of the “basis and purpose” of any final rule that it issues.³⁰ The APA exempts various types of information from its rulemaking processes.³¹

As with the U.S. Supreme Court’s confirmation processes, adoption of the APA’s rulemaking procedures have led to greater citizen involvement. When administrative agencies propose a new rule or regulation, it is not at all uncommon for affected individuals and entities to offer comments, changes and amendments. In some instances, regulated entities mobilize (much as they do in response to U.S. Supreme Court nominations), and present detailed arguments both for and against proposed regulatory changes.³²

The APA also promoted openness because it required administrative agencies to voluntarily disclose various types of information to the public, including publishing “interpretative rules and statements of policy.”³³ However, even though the APA was beneficial, in that it was designed to require agencies to voluntarily disclose information to the public, the disclosure obligations were limited to certain types of information (*e.g.*, certain documents related to rulemakings, interpretations and policy statements), and did not create a general right of access to agency documents.³⁴ Moreover, the obligation to publish interpretative rules and statements of policy was frequently ignored by administrative agencies without consequence,³⁵ even though FOIA purports to impose sanctions on agency’s that fail to satisfy their disclosure obligations.

Congress has also enacted other legislation designed to promote openness and transparency. For example, in the 1960s, Congress enacted the Freedom of Information Act (FOIA),³⁶ which gives individuals and corporations a right of access to information held by the U.S. government. FOIA is a “disclosure” statute because Congress assumed that government would disclose rather than withhold requested documents.³⁷ Indeed, FOIA specifically states that “upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”³⁸ However, agencies must decide within twenty days whether to comply with a request,³⁹ and the time limit can be tolled if the agency requests additional information, or as necessary to clarify whether fees

²⁹ *Id.*

³⁰ *Id.* at § 553.

³¹ 5 U.S.C. § 553 (a)(1) &(2), and (b)(3)(A) & (B).

³² See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. L. REV. 7, 96 (2000).

³³ 5 U.S.C. § 553(d).

³⁴ See FUNK, SHAPIRO & WEAVER, *supra* note 11, at 740.

³⁵ See JAMES T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE*, § 6.05 at 6-19 (2d ed. 1995).

³⁶ 5 U.S.C. § 552 (1982).

³⁷ 5 U.S.C. § 552(a)(3).

³⁸ *Id.*

³⁹ *Id.* at § 552(a)(6)(A)(I).

apply.⁴⁰ If the agency fails to comply with the applicable time limits, it cannot require the requesting party to pay search fees absent “unusual or exceptional circumstances.”⁴¹

Although FOIA is a disclosure statute, it does not require disclosure of *all* governmental documents. Despite the assumption of disclosure, FOIA explicitly authorizes administrative agencies to withhold various types of information, including classified information, internal agency rules and practices, information specifically exempted from disclosure by statute; private commercial or trade secret information, inter-agency or intra-agency privileged communications, personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy; information compiled for law enforcement purposes, information related to reports for or by an agency involved in regulating financial institutions, and geological information concerning wells.⁴²

In addition to the APA and FOIA, Congress has enacted the Federal Advisory Committee Act (FACA),⁴³ the Government in the Sunshine Act,⁴⁴ and amendments to FOIA.⁴⁵ Both statutes were designed to allow individuals and organizations to understand the functioning of government, and enhance governmental openness and transparency. In addition, many state legislatures have adopted their own open records provisions that are similar to FOIA.⁴⁶

Despite the advances towards openness and transparency that have occurred in the U.S., the ability of Americans to participate in the governmental process is curiously beset by a significant lack of transparency. There are many different reasons for these problems. For example, in regard to FOIA, many agencies do not fully comply with FOIA’s requirements,⁴⁷ do not create indices of their adjudicatory decisions,⁴⁸ do not comply with FOIA’s production deadlines,⁴⁹ and suffer from “substantial FOI request backlogs that preclude timely determinations.”⁵⁰ There are various reasons for these problems, including a lack of sufficient funding,⁵¹ and a lack of adequate systems⁵² so that the “public has no efficient and accurate way of learning what information the agency has [and no idea] how the files are arranged, how long they are kept, or where

⁴⁰ *Id.* at § 552(a)(6)(A)(1) & (2).

⁴¹ *Id.*

⁴² 5 U.S.C. § 552(b).

⁴³ 5 U.S.C. app. §§1-15 (2000) (enacted 1972).

⁴⁴ 5 U.S.C. s 552b(b), (h) (1994).

⁴⁵ See FUNK, SHAPIRO & WEAVER, *supra* note 11, at 667-668.

⁴⁶ Kentucky Open Records Act, KRS 61.878(1)(h).

⁴⁷ See FUNK, SHAPIRO & WEAVER, *supra* note 11, at 742.

⁴⁸ See GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS (1986).

⁴⁹ See FUNK, SHAPIRO & WEAVER, *supra* note 11, at 742.

⁵⁰ *Id.*

⁵¹ See Michael E. Tankersley, *How the Electronic Freedom of Information Act Amendments of 1966 Update Public Access for the Information Age*, 50 AD. L. REV. 421, 423 (1998).

⁵² See *id.* at 424.

they are stored.”⁵³ Although Congress has amended FOIA,⁵⁴ in an effort to solve some of these problems, many difficulties remain.⁵⁵

§ 2 – THE IMPACT OF DIGITAL INNOVATIONS ON OPENNESS AND TRANSPARENCY

The advent of the digital age has improved transparency in important respects, and has transformed interactions between the U.S. government and the citizenry. The movement to digitization was driven in part by the Paperwork Reduction Act of 1995 and the Government Paper Elimination Act of 1998 which required governmental agencies to reduce their use of paper.⁵⁶ However, the movement has also been encouraged because it affects government-citizen relations.⁵⁷ Digitization has increased “citizen involvement including electronic voting, virtual town hall meetings, cyber campaigns, feedback polls, public surveys, community forums, and access to meeting agendas and minutes.”⁵⁸ In other words, “information technology initiatives, now known as electronic government, are changing the way that the public sector works and interacts with citizens, businesses, and other governments.”⁵⁹

Illustrative of the impact of digitalization are illustrated by government websites. Under the E-Government Act of 2002, federal agencies are required to maintain websites that include various types of information.⁶⁰ One commentator has estimated that this law has led affected or led to the creation of some 10,000 government Web sites at the federal, state, and local government levels.⁶¹ These websites provide many different types of information, including “the names of government officials, agency addresses and phone numbers, online publications, e-mail addresses, as well as other things pertinent to that particular government entity.”⁶²

The federal government now uses websites to publish many different types of information. For example, the federal courts have “established the Public Access to Court Electronic Records (PACER) system⁶³ and Congress has created Congress.gov⁶⁴ which

⁵³ DEPARTMENT OF THE INTERIOR, REPORT OF THE NAT'L PERFORMANCE REV. FREEDOM OF INFORMATION ACT REINVENTION TEAM, GATEWAY TO GOVERNMENT INFORMATION at 11 (1995).

⁵⁴ Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 (Supp. II 1996)).

⁵⁵ See Tankersley, *supra* note 51, at 450.

⁵⁶ See Mark Lavigne, *Electronic Government: A Vision of a Future That is Already Here*, 52 SYRACUSE L. REV. 1243, 1245 (2002).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1246.

⁵⁹ See Mark Lavigne, *Electronic Government: A Vision of a Future That is Already Here*, 52 SYRACUSE L. REV. 1243, 1244 (2002).

⁶⁰ See Jillian Raines, *The Digital Accountability and Transparency Act of 2011 (Data): Using Open Data Principles to Revamp Spending Transparency Legislation*, 57 N.Y.L. SCH. L. REV. 313, 322 (2012-2013).

⁶¹ *Id.*

⁶² Lavigne, *supra* note 59, at 1247.

⁶³ <http://www.pacer.gov>.

⁶⁴ <https://www.congress.gov>.

electronically publishes every piece of legislation introduced into Congress as well as other information regarding congressional activities.⁶⁵ Other websites address specific topics. For example, the Federal Funding Accountability and Transparency Act (FFATA) and the American Recovery and Reinvestment Act of 2009 mandate disclosure of information on government “spending data in an effort to better monitor for waste, fraud, and abuse in government.”⁶⁶ These acts led to the creation of USASpending.gov⁶⁷ and Recovery.gov,⁶⁸ “websites where the public can access and search government spending information that federal agencies have collected.”⁶⁹ In addition, Grants.gov⁷⁰ “provides the public with a centralized bank of information on grant and contract opportunities from all federal agencies.”⁷¹ The Federal Funding Accountability and Transparency Act of 2006, which also correlates to USASpending.gov, enables the public “to search, aggregate, and evaluate the information provided by the recipients of federal monies and contracts” and thereby search “for waste and inefficient spending by the federal government.”⁷² There is also the American Recovery and Reinvestment Act of 2009⁷³ which created the Recovery Accountability and Transparency Board (RATB) to oversee the spending of recovery-related funds and “[t]o detect and prevent fraud, waste, and mismanagement.”⁷⁴ RATB publishes this information on line on Recovery.gov.⁷⁵ In subject specific areas, individual governmental agencies are beginning to release large amounts of information. For example, the Environmental Protection Agency (EPA) is illustrative. At one point, it was relatively difficult for ordinary individuals to obtain and analyze environmental information.⁷⁶ This work with largely left to large environmental organizations who could afford to hire large staffs.⁷⁷ With the advent of the Internet, the calculus has changed. Professor William Gilles is a strong advocate of the idea of “sousveillance” – the idea that members of society can observe the actions of governmental actors and attempt to influence their

⁶⁵ See Raines, *supra* note 60, at 322.

⁶⁶ *Id.*

⁶⁷ <https://www.usaspending.gov>

⁶⁸ <https://www.recovery.gov>

⁶⁹ See Raines, *supra* note 60, at 322.

⁷⁰ <http://www.grants.gov/>

⁷¹ See Raines, *supra* note 60, at 327

⁷² *Id.* at 328.

⁷³ Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁷⁴ See Raines, *supra* note 60, at 333.

⁷⁵ *Id.*

⁷⁶ Keith Harley & Holly D. Gordon, *Public Participation and Environmental Advocacy in the Internet Era*, 16 NAT. RESOURCES & ENVIRONMENT. 296 (2001) (“Ten years ago, [the] logistics of participating in simple permitting proceedings, let alone complex rulemakings, were overwhelming. In this pre-Internet era, the environmental movement inevitably was dominated by environmental organizations that could afford to maintain staffs of scientists, organizers and lawyers. Such organizations could accomplish internally driven policy initiatives, fueled by membership contributions and grants from large foundations.”).

⁷⁷ *Id.*

actions.⁷⁸ He describes sousveillance as involving the “increasing tendency of the citizenry to watch, gaze, look and monitor, from the bottom, the practices of their governments, or even more widely, everyone’s action thanks to the democratization of ICT tools.”⁷⁹ In the modern era, sousveillance is possible. As one commentator noted, “Today, one environmental advocate with a 56k modem and a \$20 per month Internet account has more power to acquire information, to communicate, and to participate than a whole staff of people did ten years ago.”⁸⁰

There are a number of websites, including governmental websites, that allow the public to access environmental information.⁸¹ For example, the United States Environmental Protection Agency (EPA) maintains a website entitled “Envirofacts”⁸² that is designed to provide “multi year information about stationary sources of air pollution; large-quantity generators of hazardous wastes; treatment, storage and disposal facilities; Superfund sites; facilities required to develop Risk Management Plans under the Clean Air Act; facilities that submit Toxic Release Inventory reports characterizing multimedia releases of toxic chemicals; and facilities required to report wastewater discharges pursuant to the Permit Compliance System.”⁸³ Some analysts tout Envirofacts as “one of the best sources of environmental information on the Internet” because it is available in multiple formats (*e.g.*, “as a map, as well as lists by facility, chemical, and media), is easy to use because it is accessed through a “fill-in-the-blank” form, and “almost all of the information on the site is derived directly from industry self-reporting to the U.S. EPA and/or its state counterparts, pursuant to mandates imposed by law.”⁸⁴

There are also private websites that can be used to supplement the EPA website. For example, the Right-To-Know Network⁸⁵ “offers information from government files about chemical accidents and unpermitted releases, chemical testing and federal civil enforcement action, and also includes other information (*e.g.*, census, environmental, and mapping information).”⁸⁶ In addition, Environmental Defense maintains the website Scorecard,⁸⁷ which publishes information in an effort to “encourage and sustain activism,” focusing on matters “like lead poisoning and runoff from animal lots,” and including “a report card ranking system by which states (and in most cases, smaller geographic areas) and

⁷⁸ William Gilles & Irene Bouhadana, *From the Right to Be Let Alone to the Right to Be Forgotten: How Privacy Is Moving in the Collecting Data Age*, in RUSSELL L. WEAVER, STEVEN I. FRIEDLAND, WILLIAM GILLES & IRENE BOUHADANA, *PRIVACY IN A DIGITAL AGE: PERSPECTIVES FROM TWO CONTINENTS* ___ (2016) (forthcoming).

⁷⁹ *Id.* at ___.

⁸⁰ See Harley & Gordon, *supra* note 76.

⁸¹ See *id.*

⁸² www.epa.gov/enviro

⁸³ See Harley & Gordon, *supra* note 76, at 297.

⁸⁴ *Id.*

⁸⁵ www.rtknet.org

⁸⁶ See Harley & Gordon, *supra* note 76, at 297.

⁸⁷ www.scorecard.org

facilities are contrasted with each other.”⁸⁸ Another website is maintained by the Natural Resources Defense Council’s (NRDC) which posts information related to the EPA’s Cumulative Exposure Project (CEP), involving comparisons of “modeled concentrations of toxins in ambient air to EPA health-based benchmarks.”⁸⁹ Through maps and other graphics, NRDC’s site (www.nrdc.org/air/pollution/cep) describes the ratio by which these air toxins cumulatively exceed healthy standards in different parts of the country.”⁹⁰ There are other similar websites.”⁹¹

More importantly, there are governmental websites that individuals can use to locate scientific and technical information that will allow them to evaluate the environmental information that they find on sites like Envirofacts.”⁹² For example, the Office of Air Quality, Planning and Standards maintains the Technology Transfer Network⁹³ which provides a “clearinghouse of the scientific and engineering information used to generate EPA’s multiple Clean Air Act activities.”⁹⁴ The website includes the Maximum Achievable Control Technology (MACT), including emissions and pollution control information reported by industry sector, and the Ozone Transport Assessment Group, which documents “nitrogen oxide (NO_x) transportation across the eastern United States.”⁹⁵ Of course, individuals can also use search engine directories to access private websites that provide technical information such as the Google Web Directory which “offers numerous subcategories of websites under ‘environment,’ including ten sites on environmental ethics, seventy-six sites on forests and rainforests, and 385 sites on biodiversity.”⁹⁶

In addition to accessing technical and scientific information on the Internet, individuals can also access legal information related to the environment through such sites as “Findlaw” and the Government Printing Office’s “GPO Access.”⁹⁷ Findlaw⁹⁸ “provides a wide array of useful legal documents and links to legal resources for environmental advocates.” For example, it includes the United States Code, the Code of Federal Regulations and *Federal Register* notices, as well as statutes and administrative codes for many states, and some U.S. Supreme Court opinions and lower court information and opinions.”⁹⁹ “Findlaw also provides links to websites for nonprofit legal groups and information regarding the U.S. House of Representatives, Senate, and Council on

⁸⁸ See Harley & Gordon, *supra* note 76, at 297.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ www.epa.gov/ttn

⁹⁴ See Harley & Gordon, *supra* note 76, at 297.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 297-298 (“Acquiring legal information on websites such as “Findlaw” or “GPO Access” offers advocates a relatively inexpensive substitute for costly legal information providers such as Westlaw and Lexis.”).

⁹⁸ www.findlaw.com

⁹⁹ See Harley & Gordon, *supra* note 76, at 298.

Environmental Quality.”¹⁰⁰ GPO Access¹⁰¹ provides many of the same documents available on Findlaw, including a collection of earlier U.S. Supreme Court opinions, as well as “congressional bills and hearing reports, House and Senate reports and *Congressional Records*.”¹⁰²

In addition to simply publishing information online, the digital age has better enabled ordinary citizens to participate in governmental decisionmaking. Agencies can inform the public regarding proposed rulemakings through the Internet by publishing Notices of Proposed Rulemakings (NPRs) both in the Federal Register and online.¹⁰³ For example, the EPA's rulemaking process can be accessed through the web.¹⁰⁴ On a local level, many states and regional EPA now place online draft permits, public notices, final permits, summary documents, and point-of-contact information online.¹⁰⁵ In Illinois, air permits are posted on a single website (www.epa.gov/ARD-R5/permits)¹⁰⁶ In addition, agencies can allow the citizenry to submit comments on NPRs through online “click here to comment” boxes¹⁰⁷ It is also possible for agencies to allow participants to view and respond to the comments made by others, and possibly even rate or evaluate other comments.¹⁰⁸ Of course, unbridled citizen participation is not necessarily all good because online comment processes can be abused or result in overload.¹⁰⁹

CONCLUSION

Freedom of expression is an essential element of the democratic process. In order to choose their representatives, or express their opinions on policy ideas or proposals, the citizenry must have the right to freely and openly express their beliefs. However, in order for free expression to be effective, openness and transparency are also essential. Unless the public has information regarding the functioning of government, it is impossible for the citizenry to fully and effectively exercise their right to comment on governmental actions. As a result, democratic accountability is inextricably intertwined with transparency.

Over the last century, the United States has made significant strides towards increasing openness and citizen participation. Senate hearings on U.S. Supreme Court nominees, which were once held in secret, are now open to public participation and scrutiny. In addition, Congress has passed various pieces of legislation designed

¹⁰⁰ *Id.*

¹⁰¹ www.access.gpo.gov

¹⁰² See Harley & Gordon, *supra* note 76, at 298.

¹⁰³ See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 Emory L.J. 433 (2004).

¹⁰⁴ www.epa.gov/fedrgstr

¹⁰⁵ See Harley & Gordon, *supra* note 76.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 441.

¹⁰⁸ *Id.* at 442.

¹⁰⁹ *Id.* at 442-443.

to open up government, including the Administrative Procedure Act, the Freedom of Information Act, the Federal Advisory Committee Act, and the Government in the Sunshine Act. Many of these efforts to increase openness have enhanced the ability of the citizenry to participate in the functioning of governmental processes.

The advent of the digital era has the potential to further the drive towards openness and transparency. Agencies are publishing large amounts of information on their websites. In some areas, such as the environmental area, this information can provide much information to the public. When coupled with other technical and legal information, sometimes available through government websites, and at other times through non-governmental Internet sources, individuals and organizations can find the information they need to engage in environmental advocacy.

Of course, the situation is not perfect, and the progress towards open government has been halting and incomplete. Even though both the APA and FOIA require agencies to publish various types of documents, those laws are frequently honored in the breach. Moreover, although FOIA requires agencies to disclose various types of information on request, FOIA is beset by numerous exceptions, as well as delays and calculated efforts to avoid disclosure. The net result has been less than perfect, and less than that which might otherwise be considered desirable. As a result, the goal of open government remains a work in progress in the United States in both the digital and non-digital arenas.

Moreover, there are significant other “transparency gaps.” Even though government has enacted various pieces of legislation designed to promote greater openness and transparency, the government has maintained secrecy regarding major aspects of its operations.¹¹⁰ In particular, the government has operated a massive and secret cybersurveillance operation.¹¹¹ Had it not been for Edward Snowden, an NSA contractor who stole and released thousands of National Security Agency (NSA) documents,¹¹² the American people might never have known about the size and scope of the cybersurveillance program.¹¹³ And the size of the NSA surveillance and collection program was absolutely staggering,¹¹⁴ with the NSA spending some \$10.8 billion per year¹¹⁵ and maintaining a staff of some 35,000 employees.¹¹⁶ For many years, the NSA was systematically collecting data about virtually

¹¹⁰ For a more comprehensive discussion and analysis of this program, and its democratic implications, see Russell L. Weaver, *Cybersurveillance in a Free Society*, 72 Wash. & Lee L. Rev. 1207 (2015).

¹¹¹ See Doug Stanglin, *Snowden Says NSA Can Tap Email Chats*, *The Courier-Journal*, A3 (Aug. 1, 2013); Shane Scott, *Disclosures on NSA, Surveillance Put Awkward Light on Previous Denials*, *N.Y. Times*, Jun. 12, 2013, at A. 18.

¹¹² See Scott Shane, *No Morsel Too Minuscule for All-Consuming NSA: From Spying on Leader of U.N. to Tracking Drug Deals, on Ethos of ‘Why Not?’*, *The New York Times*, A10 (Nov. 13, 2013).

¹¹³ E.g., Scott, *supra* note 111, at A18.

¹¹⁴ See Shane, *supra* note 112, at A10.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

everyone, including millions of cell phone call records, e-mails, text messages, credit card purchase records and information from social media networks.¹¹⁷ In addition, the NSA created a system (muscular) that enabled it to easily access Yahoo and Google accounts.¹¹⁸ The end result was that the NSA intercepted some 182 million communication records, including “to” and “from” e-mail information, as well as text, audio and video information.¹¹⁹ From the perspective of openness, transparency and democratic accountability, the NSA program was particularly disturbing. Undoubtedly, government has an interest in shielding aspects of the program from terrorists. The difficulty is that the NSA program has been shrouded in almost complete secrecy without any semblance of democratic accountability.

¹¹⁷ See *id.* at A10; see also Peter Maass, *How Laura Poitras Helped Snowden Spill His Secrets*, *The New York Times*, § MM (Aug. 13, 2013); Charlie Savage, *C.I.A. Ties to AT&T's Add Another Side to Spy Debate*, *International Herald Tribune*, A5 (Nov. 8, 2013).

¹¹⁸ See Barton Gellman & Ashkan Soltani, *NSA Hacks Yahoo, Google: Global Data Links Expose Untold Millions of Accounts*, *The Courier-Journal*, A-1 (Oct. 31, 2013).

¹¹⁹ See Martha Mendoza, *Reagan's Order Led to NSA's Broader Spying*, *The Courier-Journal*, A10, c. 1-6 (Nov. 24, 2013).

