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Irène Bouhadana & William Gilles

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

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À PROPOS DE NOUS

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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.

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** 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].

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THE EVOLVING BALANCE OF TRANSPARENCY AND PRIVACY IN OPEN GOVERNMENT

by **Irma S. RUSSELL**, Professor of Law, University of Montana
School of Law, USA.

The important principles informing the topic of this symposium include recognition that meaningful citizen participation in government is essential to a viable democracy, and that governmental transparency is a necessary condition for fostering citizen participation. Any discussion of openness or transparency in government necessarily involves administrative law, the area of law dealing with the “organization and the operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public.”¹

Open records and transparency of process are necessary predicates for the protection of individual rights as well as for accountability of government programs and policies. In the modern regulatory state, the volume, range, and significance of decisions delegated to administrative agencies are remarkable. Aside from the success or failure of governmental policies as a substantive matter, participation by citizens and accountability of the government are key indicators for successfully sustaining a democratic form of government. Perhaps most important is the vital need for an informed and involved citizenry, and the check on governmental corruption that an informed citizenry provides. Resting on this theoretical framework, both the national government of the United States, as well as state and local governments, have embraced freedom of information policies and open access to government information. As is true of legal issues generally, countervailing principles are also at work, including such important interests as personal privacy, confidentiality, and the need to secure the physical safety of the citizenry, often referred to as protecting the National Security.

This paper explores the ongoing and evolving relationship between transparency and privacy in relation to open government. It explores background principles and laws relating to the release of government information and exceptions to the requirement. It then examines the *Glomar* exception to FOIA disclosure law, in which an agency may respond to a FOIA request by stating that it will not confirm or deny the existence of the documents sought. The focus on this particular exception provides a heightened example of the continuing tension between the concepts of

¹ BLACK’S LAW DICTIONARY 53 (10th ed. 2014).

transparency and privacy. The paper concludes with observations and speculation regarding the ongoing interplay between these fundamental principles in modern democracies.

§ 1 – THE PRINCIPLE OF TRANSPARENCY

The term “transparency” is used in a wide range of contexts. Within the field of administrative law, the term often is used to refer to the commitment of an agency to provide information to the public. In other words, it stands for the right of the public to learn information about the functioning of government agencies, and the right to offer input regarding governmental decision-making. At its core, transparency stands for the notion that the public has a right to understand agency action and decisions. In recent years, agencies have become proactive about this commitment, explaining on websites and in other publications their missions and their particular work. Some government initiatives on transparency and FOIA modernization present a decidedly public relations tone in declarations and proclamations on transparency. For example, in 2013 the White House issued multiple guidance documents, including the Second Open Government National Action Plan,² and Sunshine Week: In Celebration of Open Government.³ Earlier administrations also declared advances in the area of transparency and projected similar goals.⁴

§ 2 – THE PRINCIPLE OF PRIVACY

Privacy is also a foundational principle in democracy and the Rule of Law, and serves as a counterbalance to the general principle of transparency. It is closely linked with confidentiality.⁵ Both privacy and confidentiality typically are defined narrowly in the context of state controlled information, the principle of confidentiality has deep roots in legal requirements relating to transparency and disclosure. Statutes and common law principles protect confidentiality in a wide range of relationships and contractual undertakings. Evidentiary rules respect confidential relationships between clients and lawyers and other professionals. The attorney-client privilege provides significant protection for communications from clients to lawyers for the purpose of representation. Information shared by married couples and professionals such as clergy and psychological professionals are also generally shielded

² Office of Comm., The White House, The United States Releases its Second Open Government National Action Plan (2013).

³ Office of Comm., The White House, Sunshine Week: In Celebration of Open Government (2013).

⁴ See, for example, Office of Comm., The White House, Executive Order: Improving Agency Disclosure of Information, 2005 WL 3419427 (2005).

⁵ BLACK’S LAW DICTIONARY 361 (10th ed. 2014) (confidentiality, *n.* (1834) (Secrecy; the state of having the dissemination of certain information restricted. 2. The relations between lawyer and client or guardian and ward, or between spouses, with regard to the trust that is placed in the one by the other).

from public view by legal rules. Notions of privacy and autonomy underlie these rules and processes. For example, one regulatory definition in the area of scientific environmental information defines “transparency” as a process insuring “that background documents and reports from peer review are publicly available, subject to Magnuson–Stevens Act confidentiality requirements, and allows the public full and open access to peer review panel meetings.”⁶ This definition captures both the principle of openness and, additionally, a carve-out for the principle of confidentiality, two factors typically linked in the discussion of disclosure and openness of administrative processes.

This concentrated focus on the need for disclosure and the mechanisms of disclosure law may lead to a view of transparency as an unalloyed good. While privacy and confidentiality may seem to run counter to the goal of open government, arguably, these principles are necessary corollaries to transparency, essential to the goal of open government because they protect individual rights and incentivize input from individual citizens who might feel vulnerable without such protections. The reason for this apparent paradox lies in the fact that each citizen needs personal privacy both as a matter of autonomy and also to insure that their exercise of their rights will not result in retaliation against them. This solicitude for individual rights is found at all levels of public institutions and administrative processes.

§ 3 – TRANSPARENCY IN THE OPEN GOVERNMENT ERA

Resting on the theoretical framework of accountability and openness, the national government of the United States and the individual states themselves espouse policies of freedom of information and open access to government information. The most well-known and far reaching of these laws is the U.S. Freedom of Information Act of 1966 (FOIA).⁷ The animating principle of FOIA is the belief that transparency and accountability generally improve government and the functioning of democratic processes. FOIA was signed into law by President Lyndon Johnson on July 4, 1966, creating a presumption that citizens have the right to access governmental data. Nevertheless, the Act established countervailing principles as exceptions and exclusions to the disclosure mandate. These include exceptions for personal privacy and confidential personal information, the maintenance of protections for the criminal justice system, as well as for the national security.

A) The Federal Register

Even before the passage of FOIA, the federal government provided a disclosure mechanism by means of the Federal Register.

⁶ 50 C.F.R. § 600.315 (2014).

⁷ 5 U.S.C. §§ 552-553 (2012).

Created in 1935 under the authority of the Federal Register Act,⁸ the work and mission of the Office of the Federal Register were enlarged by the Administrative Procedure Act of 1946⁹ and the Freedom of Information Act of 1966.¹⁰ Often called “The Daily Journal of the United States Government,”¹¹ the Federal Register records virtually all major agency actions. It even allows users to track the cycle of agency action from manuscript versions through to the final formatted versions of documents published in the Register.¹²

Access to government information via the Internet has resulted in a tremendous leap in the ability of requesters to obtain and process information. The Federal Register website explains the goal of providing for public participation. “Our goal in converting print-based material to machine-readable XML data is to make the Federal Register more searchable, more accessible, easier to digest, and easier to share with people and information systems.”¹³ Even though the government has made much progress, research efforts can lead to more research and even to circles of research and frustration for the researcher, resulting in a belief by some that some government websites or compilations of information may be intentionally difficult to master. Nevertheless, the government information available through the Federal Register provides more and better information, organized online, than in the past.

When Congress passed the Federal Register Act, explanatory materials were far more limited than those available from today’s modern administrative system.¹⁴ Today, the website of the Federal Register provides a separate access portal and a breakdown of information about each major agency.¹⁵ Such portals give basic information and a template for accessing published materials in the Register, providing real help to users in monitoring a particular agency action. Now agencies provide separate listings for documents awaiting publication, for recent significant regulations, and also provide notifications when regulatory comment periods are closing.¹⁶

The website for the Federal Register¹⁷ is a service of the Office of the Federal Register (OFR), National Archives and Records Administration

⁸ 44 U.S.C. § 1501, et seq. (2012).

⁹ 5 U.S.C. § 551 et seq.

¹⁰ 5 U.S.C. §§ 552-553.

¹¹ Id.

¹² See U.S. Government Publishing Office, <http://www.gpo.gov/fdsys/> (last visited Feb. 4, 2015); Federal Register, <https://www.federalregister.gov/> (last visited Feb. 4, 2015).

¹³ Federal Register, *About Us*, <https://www.federalregister.gov/policy/about-us> (last visited Feb. 4, 2015).

¹⁴ Lars Noah, *Divining Regulatory Intent: The Place for A "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 286 (2000) (noting that agencies did not provide meaningful preambles with regulations until decades after the passage of the APA in 1946).

¹⁵ See, for example, Federal Register, *Environmental Protection Agency*, <https://www.federalregister.gov/agencies/environmental-protection-agency> (last visited Dec. 22, 2014).

¹⁶ Id.

¹⁷ Federal Register, <https://www.federalregister.gov/> (last visited Dec. 22, 2014).

(NARA), and the U.S. Government Printing Office (GPO). Like other government agencies, the regulations of these agencies include disclosure requirements about the regulations of the Federal Register itself.¹⁸ Notices appear every weekday by 6 a.m. except for federal holidays. The vast majority of federal actions appear in notices. Most are comprised of the following types of documents: (1) Presidential documents, including executive orders and proclamations, (2) agency rules and regulations (including policy statements and interpretations of rules), (3) proposed rules, including petitions for rulemaking and other advance proposals, (4) notices, including scheduled hearings and meetings open to the public, grant applications, administrative orders, and other announcements of government actions.¹⁹

Roughly summarized, FOIA requires all agencies to make available to the public virtually all information relating to the agency and its work, including rules, opinions, orders, records, and proceedings, the organization of the agency, its established places of business, methods of obtaining information about the general course and method of its functions, formal and informal procedures, rules of procedure, forms and ways to obtain forms, substantive rules, policy statements, interpretations, and amendments or changes relating to any of this information.²⁰ The act mandates that agencies make available for public inspection and copying final opinions, statements of policy and interpretations (even if not published in the Federal Register), administrative staff manuals and instructions to staff that affect a member of the public, and, additionally, “a general index of the records.”²¹ Both the scope of the duty and the presumption of disclosure favor the party requesting disclosure.

Like similar legislation in other countries, FOIA seeks to serve the general principle of disclosure. Thus, FOIA empowers citizens to gain governmental information with the goal of securing an informed citizenry. By requiring agencies to release government records upon request, FOIA protects the rights of citizens to know what actions the government is taking and the reasons for the agency action. Like most legislation, FOIA includes exemptions and exclusions designed to strike a balance between countervailing needs and objectives. Prominent among the competing needs is the protection of personal privacy interests, such as personnel and medical records whose release would constitute an unwarranted invasion of personal privacy.²² Arguably, the public’s interest in obtaining information regarding private matters fails to satisfy the underlying rationale for disclosure of matters related to the public interest. Regarding such documents, the FOIA request may be seen as an attempt to satisfy the requesters’ curiosity rather than as a legitimate need to know. In such cases, the agency will confirm that

¹⁸ See 1 C.F.R. Ch. I-II (2014).

¹⁹ See Federal Register, *About Us*, <https://www.federalregister.gov/policy/about-us> (last visited Dec. 22, 2014).

²⁰ 5 U.S.C. § 552(a)(2).

²¹ *Id.*

²² *Id.* § 552(b)(1)-(9).

it has a record but refuse to provide access to the document on the basis of the exemption.

Despite its strong presumption in favor of disclosure, the Act allows agencies to delete information from their records in order “to prevent a clearly unwarranted invasion of personal privacy.”²³ When agencies delete information, they must provide a justification and explain the deletions in writing.²⁴ Also, FOIA prohibits the disclosure of information regarding to intelligence operations and the intelligence community under the National Security Act of 1947.²⁵ FOIA also provides exceptions or exclusions designed to protect the national security, as well as against unwarranted invasions of personal privacy. The rationale of the “public good” is articulated in cases in which protection of individual rights is regarded as a cumulative good that outweighs the public’s interest of the public in gaining access to particular information. Additionally, the public good is emphasized in cases in which national exigencies or national security are found to outweigh the right of the public to know the information sought. Moreover, secrecy is relatively routine regarding executive functions. For example, under U.S. law, presidential files are, in large part, exempt from open records requests. The Presidential Records Act of 1978 allows for the sealing of presidential records for up to twelve years.²⁶

The work of agencies in revealing information is cabined further cabined by the need to protect privacy. For example, the Federal Register makes a commitment to protecting privacy despite its strong commitment to providing the public with access to public information: “We at FederalRegister.gov are committed to protecting the privacy and security of your visits to this website. We follow OMB recommendations and best practices for protecting Internet privacy. Outlined below is our online privacy policy.”²⁷

B) The Glomar Response

In some circumstances, an agency may refuse to provide any information to a requester based on an exclusion sometimes referred to as “Glomarization.”²⁸ The problem from the point of view of the requester is that the Glomar response seems like a “free card” for the agency since the response provides no information regarding whether a record exists at all, or even whether the agency is taking the position that FOIA allows it to be withheld.

Under the privacy exemptions of FOIA, the individual’s right of privacy allows limited exceptions to the disclosure principle. The exemptions protect personnel and medical records the release of

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* § 552(a)(3)(E).

²⁶ 44 U.S.C. § 2204 (2012).

²⁷ Federal Register, *Privacy*, <https://www.federalregister.gov/policy/privacy> (last visited Feb. 4, 2015).

²⁸ *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

which would involve an unwarranted invasion of personal privacy. In the case of a request for information that impinges on personal privacy, agencies generally acknowledge that they hold a record but refuse to provide the document on the basis of the exemption. When national security issues are involved, agencies sometimes exempt documents under the rubric of the “Glomar” response. When providing a Glomar response, the agency may refuse to confirm or deny that the records sought exist or are within the agency’s possession.²⁹ Executive Order 13,526 discusses the Glomar response.³⁰ It provides: “An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.”³¹

In the Glomar case, a journalist sought access to records held by the CIA and the Department of Defense in an effort to establish a connection “between those agencies and a ship named the ‘Glomar Explorer,’ which purportedly was being used to recover a sunken Soviet submarine. The agencies would neither confirm nor deny the existence of the requested records. In this 1976 case, *Philippi v. CIA*, the Court of Appeals for the D.C. Circuit first recognized the “Glomar denial” or defense,³² noting that national security requires secrecy and that irrevocable harm could result from divulging the information. Although there had been speculation in the press concerning the nature of the Glomar Explorer’s mission, the agencies argued that official confirmation of the agencies’ involvement would create problems for the agencies and would harm the public interest.

The courts subsequently expanded the Glomar defense so as to protect individuals named in government records.³³ On its website, the Department of Justice discusses this rationale in the context of personal privacy when a records request includes named individuals and “involve[s] sensitive personal privacy considerations.”³⁴ DOJ emphasizes the need for care when special privacy considerations are at issue.³⁵ When a FOIA request seeks records that would reveal a law enforcement investigation, DOJ notes that an agency may need to “flatly refuse to confirm or deny whether such records exist” when the agency response would “reveal exempt information.”³⁶ The DOJ discussion applies ‘Glomarization’ to the privacy context based on the notion that

²⁹ U.S. Dept. of Justice, Freedom of Information Act Guide, Exemption 1 Glomar Response, 2013 WL 4500602, at *1. (2013).

³⁰ Exec. Order No. 13,526, 3 C.F.R. § 13526 (2009).

³¹ *Id.*

³² *Philippi*, 546 F.2d 1009 (upholding CIA refusal to confirm or deny ties to Howard Hughes’ submarine retrieval ship, the *Glomar Explorer*).

³³ See DEPT. OF JUSTICE, FOIA UPDATE: OIP GUIDE: PRIVACY ‘GLOMARIZATION’, (1986) available at:

<http://www.justice.gov/oip/blog/foia-update-oip-guidance-privacy-glomarization> (last visited Dec. 20, 2014).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

disclosure of the fact of law enforcement action may stigmatize the person named.³⁷

DOJ memoranda not only provide the rationale for applying the Glomar defense, they also provide a balancing test to be used by agencies in deciding whether to invoke the Glomar response. “Specifically, a FOIA request seeking records which would indicate that a particular political figure, prominent businessman, or even just an ordinary citizen has been the subject of a law enforcement investigation may require an agency to flatly refuse to confirm or deny whether such records exist. Such an extraordinary response can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information.”³⁸ The gravamen of the DOJ’s analysis focuses on the potential stigmatization of the individual concerned. “The application of ‘Glomarization’ in the privacy context is appropriate because disclosure of the mere fact that an individual is mentioned in an agency’s law enforcement files carries a stigmatizing connotation, one certainly cognizable under FOIA Exemption 7(C).³⁹

In discussing the possibility of stigmatization, the DOJ analysis notes that an individual who is named as the subject of an investigation would be forced to defend himself in a public forum rather than in a criminal proceeding in which protections are afforded the accused.⁴⁰ DOJ also emphasizes that the government needs to weigh the individual’s privacy interest against the public interest in disclosure under Exemption 7(C).⁴¹ Balancing the interests requires that agencies review records to determine if the public interest is implicated, and to balance the privacy interest against the public interest. In this area, the DOJ suggests that agencies should place a thumb on the scale in favor of the individual, noting that “the public interest in disclosure would have to be particularly acute in order to override the privacy considerations of an individual who would be exposed as a subject of a criminal law enforcement investigation.”⁴²

As is common when competing interests must be balanced, different parties will bring different perspectives to the discussion. From the agency’s perspective, if it is required to reveal information relating to national security, it may create risks for CIA personnel or other personnel involved in intelligence-gathering operations. To the extent that the requested information involves hostilities with a foreign power or terrorist groups, even acknowledging the existence of documents discussing those issues could compromise the government’s position and endanger U.S. personnel or the public. From the perspective of the person or

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* (citing *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 865 (D.C. Cir. 1981; 5 U.S.C. § 552(b)(7)(C)).

⁴⁰ *Id.* (citing *Baez v. Department of Justice*, 647 F.2d 1328, 1338 (D.C. Cir. 1980)).

⁴¹ *Id.*

⁴² *Id.*

entity requesting such information, the Glomar response seems like a “free card” for the agency. It allows the agency to refuse to provide any information in response to the request. If an agency is the final judge of whether to reveal the existence of a record, it could simply deny any request it prefers not to answer, thereby frustrating and impeding the principle of open government. The requester will not know, from a Glomar response, whether the agency is taking the position that the information they seek does not exist, or whether FOIA allows it to withhold the information. Until recently, the Glomar exclusion has been applied to federal agencies but not to state agencies. In October of 2014, however, a state court upheld the New York Police Department’s (NYPD) assertion of the Glomar defense in response to an open records request regarding police surveillance of the plaintiff requester comings and goings at a mosque.⁴³ In doing so, the NYPD neither confirmed nor denied the existence of records related to the request, not even information regarding the existence of the information sought.⁴⁴ Nevertheless, the court upheld the right of the state to decline to provide information in response to the request.

§ 4 – OTHER RESOURCES

FOIA is not the only tool for accessing information about the government. A wealth of information is available without the need for a formal request. Numerous websites offer insights about open government and the ability of citizens to have input into governmental decision-making. Additionally, private NGO websites provide extensive information about elected officials and the government. For example, organizations such as Followthemoney.org,⁴⁵ The Center for Public Integrity,⁴⁶ and The National Tax Payers Union⁴⁷ provide information relating to campaign contributions in an attempt to reduce corruption in elections.⁴⁸

In addition to FOIA, the federal government maintains websites for all branches of government, allowing citizen oversight of government actions as well as providing citizens with the ability to interact with government agencies, learn more about government

⁴³ *Abdur-Rashid v. New York City Police Dept.*, 992 N.Y.S.2d 870 (N.Y. Sup. Ct. 2014).

⁴⁴ Adam Marshall, *Trial Court Allows Police to Use “Glomar” Response to Deny Records Requests*, Reporters Committee for Freedom of the Press (Oct. 16, 2014) available at: <http://www.rcfp.org/browse-media-law-resources/news/trial-court-allows-police-use-glomar-response-deny-records-requests> (last visited Dec. 19, 2014) (court allowed exemption by NYPD under the New York Freedom of Information Law (“FOIL”) for refusal to provide information on surveillance of applicant at his mosque in New York City).

⁴⁵ See National Institute on Money and State Politics, <http://www.followthemoney.org/> (last visited Dec. 20, 2014).

⁴⁶ See The Center for Public Integrity, <http://www.publicintegrity.org/> (last visited March 19, 2015).

⁴⁷ See The National Taxpayers Union, <http://www.ntu.org/> (last visited March 19, 2015).

⁴⁸ See Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL’Y REV. 217, 237 (2013) (noting important ends served by disclosure of campaign contributions).

programs, and even apply for benefits electronically. For example, the U.S. Environmental Protection Agency (EPA) website provides a wide variety of information and data, including scientific information on climate change and environmental statutes, and extensive information on regulatory initiatives in a variety of contexts.⁴⁹ Additionally, the EPA website gives specific guidance on how to submit a FOIA request.⁵⁰ Other specific exclusions turn on the needs and incentives in particular areas.⁵¹

EPA and other agencies recently began embracing social media in new ways. For example, EPA has recently provided blast emails through Thunderclap in an effort to get its message out to the public on particular initiatives, and to poll the public about environmental protection measures.⁵² The EPA and Army Corps of Engineers ambitiously used Thunderclap to explain to the public its need to define “waters of the United States” broadly in a proposed regulation.⁵³ How EPA and other agencies may use social media tools in the future remains to be seen, of course. The possibilities are significant, particularly in terms of soliciting input and offering relevant data to the public.

State and local governments in the United States have also begun to endorse principles of transparency and accountability. Some state constitutions provide for the right of citizens to access governmental records.⁵⁴ Generally, state statutes guarantee citizens a right of access to governmental information, subject to exceptions, and allow individuals “to inspect and take a copy of any public writings” of the state.⁵⁵ Such state statutes exempt records and materials constitutionally protected from disclosure, in particular information in which an individual privacy interest clearly exceeds the public’s interest in disclosure.⁵⁶ Cities and states also provide access through websites and other mechanisms

⁴⁹ See Environmental Protection Agency, *Climate Change Science*: <http://www.epa.gov/climatechange/science/> (last visited Dec. 19, 2014).

⁵⁰ See Environmental Protection Agency, *Freedom of Information Act (FOIA)*: <http://www.epa.gov/foia/> (last visited Dec. 19, 2014).

⁵¹ See, for example, Gregg Kunzi, *Revised OMB Circular A-110 Opens Federally-Funded Research to the Public*, 141 ED. LAW REP. 17 (2000) (discussing and clarifying application of FOIA disclosure requirements to data involved in published research findings used in developing federal agency action).

⁵² See, for example, Thunderclap: <https://www.thunderclap.it/?locale=en> (last visited Feb. 2, 2015); Thunderclap, *I Choose Clean Water*, (Sept. 29, 2014): <https://www.thunderclap.it/projects/16052-i-choose-clean-water> (showing EPA as organizer of the Thunderclap poll) (last visited Feb. 2, 2015).

⁵³ See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22187 (April 21, 2014) *available at*: <https://www.federalregister.gov/articles/2014/04/21/2014-07142/definition-of-waters-of-the-united-states-under-the-clean-water-act> (last visited Feb.4, 2015).

⁵⁴ See, for example, Mont. Const. Art. 2, § 9 (stating that “No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure”).

⁵⁵ See, for example, Mont. Code Ann. § 2-6-102 (2014).

⁵⁶ *Id.* (referencing as protected from disclosure “legitimate trade secrets,” “matters related to individual or public safety,” and authorizing withholding information relating to “individual privacy,” “individual or public safety or security” among other specific examples).

designed to provide information about government and facilitate input from citizens. These mechanisms range from newsletters about governmental operations, to agendas and summaries of county and city council meetings, to posted notices regarding public hearings processes. Citizens can sign up to receive weekly information about programs, can receive public notices about boards, commissions and public meetings, and obtain information about openings for positions on boards and commissions and even business relating to government such as building contracts offered for bid.⁵⁷ Meetings are often available on community access television.

The avenues for citizen access can be nearly overwhelming, with the potential for confusion and even obfuscation of information sought. Examples are readily found in the confusion of citizens trying to monitor pollution discharge. Users may get lost on a website while trying to sign up for insurance under the Affordable Care Act or seeking Medicare benefits under longer-established systems. To take a narrow example, state laws may provide information about contaminated property, but offer information only in a piecemeal fashion.⁵⁸

CONCLUSION

The foundational principles of confidentiality and transparency provide corollary protections that exist in beneficial tension with each other. An illustration is provided by discussion of the right to vote. The right to have information about an election is clearly established. It is essential for citizens need to know about an election process in order to exercise the franchise. Elections must be open and not secret to serve the goal of democracy. Any changes in the processes of decisions of public entities must be communicated to the public. The place to vote or mechanics of voting should be clear to all under the principle of transparency. By contrast, the right to vote includes the protection of confidentiality for the individual. Voting is generally anonymous in a democracy.

The need for public input and access in democracy can hardly be overstated. It underlies the genius of the Open Government Era. Laws and traditions in the U.S. and other democracies depend on the concept of transparency to insure an informed electorate, and to obtain meaningful input from citizens and stakeholders. In the United States, federal, state, and local governments promise transparent processes and provide access to records and governmental information. However, without involvement by the public, lawmakers would lack real guidance from the electorate, and the public would lack the ability to monitor and hold government accountable. This exploration of the principles of

⁵⁷ See, for example, City of Missoula, *Records*, <http://www.ci.missoula.mt.us/292/Records> (last visited Dec. 19, 2014).

⁵⁸ See Sarah L. Inderbitzin, *Taking the Burden Off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 ENVTL. LAW. 513 (1995).

transparency and privacy reveals an ongoing balance is necessary to sustain democracy. The Glomar exception to FOIA provides an example of the balance and makes clear that such balance is not something that is easily or finally captured. Rather the goal of finding and maintaining a sustainable balance to protect both transparency and privacy will continue to be one of the significant challenges in the open governmental era.