An End to Topictivity: Making All Topics Equally Transparent Under the Freedom of Information Act

Submitted for the 2026 Sunshine Week research competition

Benjamin W. Cramer – Bellisario College of Communications – Penn State University
bwc124@psu.edu

I. Introduction

This article argues that the spirit of American government transparency in the Freedom of Information Act (FOIA)[1] has been partially denied by a focus on particular topics that are protected from disclosure by dozens of other statutes that are less transparent than FOIA but are ironically enabled by its exemptions. Those exemptions enable the secrecy of documents based on their topic rather than their usefulness to citizens and journalists. FOIA enables such withholding via Exemption 3, which allows the act's own transparency requirements to be overridden by other more secretive statutes.[2] Some such withholding is also enabled by Exemption 9, the only one of the Act's exemptions to focus on just one specific topic – fossil fuel wells.[3]

This article modestly coins the term *topictivity* – perhaps not seriously but as a pun on *subjectivity*. According to dictionary.com, one definition of a *topic*, taken from linguistic studies, is "the part of a sentence that announces the item about which the rest of the sentence

[1] 5 U.S.C. §§ 552 et seq. (1966).
[2] 5 U.S.C. § 552 (b)(3). This exemption states that a requested document can be withheld if it is: "specifically exempted from disclosure by statute […] if that statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Some of this statutory text was not in the original 1966 version of FOIA but was added in 1976, *at* 5 U.S.C. §§ 552 (b)(3)(A)(i)-(b)(3)(A)(ii) (1976).
[3] 5 U.S.C. § 552 (b)(9). The text of this exemption is brief, mentioning only "geological and geophysical information and data, including maps, concerning wells" as information that can be withheld under FOIA.

communicates information."[4] This definition implies that a *topic* is a narrow item in a larger discussion, and this definition is used in this article for a very precise type of information that is less important than the larger matters that surround it. This article introduces a body of jurisprudence surrounding the Freedom of Information Act, particularly for two of its exemptions, which forces an incongruous focus on narrow *topics* in a way that belies the wider-ranging spirit of government openness and transparency that inspired the passage of FOIA in 1966.

This article also differentiates a *topic* from a *subject area* in which there is some justification for withholding a wider range of documents because the subject area is generally sensitive. This applies to far-reaching subject areas that can be withheld under other exemptions to the Freedom of Information Act, such as the nearly undefinable "national security"[5] or the under-critiqued "trade secrets".[6] Instead, this article focuses on particular and much narrower *topics* that have been deemed sensitive, and less worthy of disclosure under FOIA than others. Perhaps this has created a lesser-known state of *topictivity* that has reduced

[4] *See* Dictionary.com, *available at* www.dictionary.com/browse/topic (last visited Jan. 31, 2026).

[5] On the uncertain and overused definition of "national security" in American law*, see e.g.* Britta C. Brugman & Christian Burgers, *Political Framing Across Disciplines: Evidence from 21st-Century Experiments,* 2018 RESEARCH & POLITICS 1, 1-2 (2018).

[6] For legal research on the overuse of FOIA Exemption 1 (national security) caused by loose definitions of the term, *see e.g.* Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SOUTHERN METHODIST L. REV. (2000); Martin E. Halstuk, *Holding the Spymasters Accountable after 9/11: A Proposed Model for CIA Disclosure Requirements under the Freedom of Information Act*, 27 HASTINGS COMMUNICATIONS & ENTERTAINMENT L.J. 79 (2004); David B. McGinty, *The Statutory and Executive Development of the National Security Exemption to Disclosure under the Freedom of Information Act: Past and Future*, 32 NORTHERN KENTUCKY L. REV. 67 (2005); Susan Nevelow Mart & Tom Ginsburg, *[Dis-]informing the People's Discretion: Judicial Deference under the National Security Exemption of the Freedom of Information Act*, 66 ADMINISTRATIVE L. REV. 725 (2014).

For similar research on the overuse of FOIA Exemption 4 (trade secrets), *see e.g.* Charles N. Davis, *A Dangerous Precedent: The Influence of Critical Mass III on Exemption 4 of the Federal Freedom of Information Act*, 5 COMMUNICATION L. & POLICY 183 (2000); Samuel L. Zimmerman, *Understanding Confidentiality: Program Effectiveness and the Freedom of Information Act Exemption 4*, 53 WILLIAM & MARY L. REV. 1087 (2012).

the transparency of the American government in unappreciated ways. Some absurdly narrow topics have been granted secrecy in FOIA jurisprudence to the point of awkward justifications in court, avoidance of discussions of why similar topics are less secretive, avoidance of discussions of affiliated statutes that contradict both themselves and FOIA, and court rulings that neglect meaningful discussion of the spirit of FOIA and the utility of withheld documents for the requester and for the public interest.

The next section of this article explains the general transparency philosophy of FOIA and the usage of Exemption 3 by agencies to justify withholding requested documents because the *topic* found in those documents has been deemed secretive by different statutes. The third section presents several illustrative examples of topics that have been deemed secretive, via court precedents on the use of Exemption 3, and the outcomes when similar topics do not receive the same consideration. The fourth section offers a similar analysis of FOIA Exemption 9, which enables secrecy on the very specific topic of wells, why that topic received its own exemption, and the outcomes of the resulting judicial focus on this one topic at the expense of similarly enlightening or important topics. The article then concludes with a discussion of how this conjectured *topictivity* violates the spirit of the Freedom of Information Act, with calls for the judiciary to enhance the transparency of Executive Branch agencies by reconsidering decades of topical precedents and returning to earlier judicial attitudes toward the governmental openness that the act pledged to achieve.

II. Qualified Non-Transparent Topictivity

The wide-ranging governmental openness philosophy of the Freedom of Information Act was much discussed around the time of its passage in 1966. That spirit was built upon the assumption that any Executive Branch agency should hand over any document in its possession upon citizen request, unless there is a distinct reason for not doing so for a particular document.[7] On the other hand, some documents in wide subject areas like national security, privacy, or trade secrets could justifiably be withheld from prying eyes due to their sensitivity. This conundrum was resolved by the nine exemptions that were added to FOIA, which provide justifications for agency personnel to deny a document request,[8] but per that original philosophy of openness, this determination should be made on a document-by-document basis.[9]

During Congressional debates surrounding the passage of the Freedom of Information Act, lawmakers determined that the new statute would contradict myriad pre-existing statutes that had already determined that government-held documents on particular topics were too sensitive for FOIA's lenient disclosure procedures.[10] Those are now called "qualifying statutes" in FOIA parlance. Despite the fact that those statutes prevent the disclosure of requested documents, FOIA is largely powerless to resist such strictures due to the procedures of

[7] S. REP. NO. 813, 89th Cong., 1st Sess. (1965) at 3-5.
[8] 5 U.S.C. §§ 552 (b)(1)-552(b)(9).
[9] *See* FOIAdvocates, *FOIA Exemptions*, unlisted date, *available at* http://foiadvocates.com/exemptions.html (last visited Jan. 26, 2026).
[10] S. REP. NO. 813, *supra* note 7, at 3.

Exemption 3, which expressly enable withholding a given document per such a previous statute that calls for nondisclosure.[11]

The judicial history of Exemption 3 has established a pattern in which courts apply the procedural requirements of the exemption to the standard operations of the agency that enforces the qualifying statute, rather than the merits of the requested document itself. In other words, if a qualifying statute includes a procedure for withholding the document, then it can be withheld under Exemption 3 without much discussion. This has enabled agency personnel to determine for themselves if their own governing statute forbids disclosure, and this determination is typically made before considering the transparency philosophy of FOIA.[12] In effect, the very existence of the qualifying statute stops the FOIA request in its tracks, with little need for further explanation.[13]

Courts typically defer to the agency's decision in such disputes. In *Wolf v. CIA*, a seminal ruling on this procedure that has often been cited as a precedent, the District of Columbia Circuit ruled in 2004 that an agency can invoke FOIA Exemption 3 to withhold a document regardless of its content. In the court's words, "the sole issue for decision is the existence of a relevant [qualifying] statute and the inclusion of withheld material within the statute's coverage."[14] In its instructions to the public on how to file a FOIA request, the Department of Justice has advised that a request is unlikely to proceed if a qualifying statute triggers a denial

---

[11] *See* Vickie Waitsman, *Privacy Act Exemption (j) (2) Does Not Specifically Preclude Disclosure of Information within Meaning of Exemption (3) of the Freedom of Information Act*, 56 TEMPLE L. QUARTERLY 127, 140 (1983).
[12] *See* Cordell A. Johnston, *Greentree v. United States Customs Service: A Misinterpretation of the Relationship between FOIA Exemption 3 and the Privacy Act*, 63 BOSTON U. L. REVIEW. 507, 524 (1983).
[13] *See* Benjamin W. Cramer, *Polluters Anonymous: How Exemptions to the Freedom of Information Act Contradict American Environmental Law*, 39 J. OF ENVIRONMENTAL L. & LITIGATION, 125, 137 (2024).
[14] 357 F. Supp 2d 112, 117 (D.C. Cir. 2004) (concerning a denied FOIA request in which a researcher sought documents held by the Central Intelligence Agency on the assassination of a Columbian politician).

under Exemption 3, even though Congress originally intended the exemption to merely acknowledge pre-existing statutes.[15] This has enabled a *de facto* presumption of secrecy under Exemption 3 that directly contradicts the presumption of openness that underlies the rest of the Freedom of Information Act.[16]

The original statutory text of Exemption 3 included no instructions on whether it should be interpreted narrowly (documents are presumed disclosable unless agency officials can justify withholding per specific provisions of their qualifying statute) or interpreted widely (documents are presumed non-disclosable due to the existence of the qualifying statute). The result is a plethora of inconsistent Circuit Court and District Court rulings that have defaulted into a *wide* interpretation of how the exemption can be invoked by agency personnel as the reason for refusing to disclose documents.[17] This in turn reflects a general trend in the judiciary to allow agency withholding of requested documents, per procedural strictures, rather than reconsidering the FOIA rejection based on the merits of each document or the needs of the requester.[18]

This outcome became apparent relatively early in FOIA jurisprudence, in the only case in which the statutory meaning of Exemption 3 was considered by the Supreme Court. In 1975, the high court issued a controversial ruling in which it upheld the denial of a FOIA request by the

---

[15] *See* U.S. Department of Justice, *Guide to the Freedom of Information Act: Exemption 3* (2023-2025), available at https://www.justice.gov/media/1380871/dl? (last visited Jan. 26, 2026), at 54-58.
[16] *See* Cramer, *supra* note 13, at 137-138.
[17] This was the complaint of a Circuit Court judge. A. Michael's Piano, Inc. v. Federal Trade Commission, 18 F.3d 138, 144 (2d Cir. 1994) (concerning a company's attempt via a FOIA request to reacquire documents that it had previously submitted to the Federal Trade Commission; the commission refused the request per Exemption 3 and a provision in its governing statute).
[18] *See* Michael H. Hughes, *CIA v. Sims: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 CATHOLIC U. L. REV. 279, 287-291 (1985).

Federal Aviation Administration (FAA). The request was for documents related to an ongoing FAA investigation into the performance of commercial airlines, for which the safety of paying passengers was among the items of concern. The FAA denied the request under Exemption 3, because investigatory documents were deemed eligible for withholding in its governing statute, the Federal Aviation Act of 1958.[19] In *FAA Administrator v. Robertson*, the Supreme Court upheld the FOIA denial due to the existence of the governing (qualifying) statute, and the merits of the request and contents of the documents were not considered any further.[20]

That ruling got the attention of Congress, who bemoaned the unintended secrecy enabled by Exemption 3 in the ruling.[21] An update to the statutory text of Exemption 3 in 1976 clarified the matter of judicial deference to agency decisions, and emphasized that a qualifying statute (that is used to justify a FOIA denial) should describe why a particular document should remain withheld "in such a manner as to leave no discretion on the issue" and that it clearly "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[22] However, while this new statutory language ordered courts to review the text of qualifying statutes more carefully, the ultimate result was another type of deference. Instead of deferring to agency withholding decisions, courts now deferred to Congress and its wishes when drafting the text of the qualifying statutes.

This new type of deference became evident in one of the first post-1976 cases in which an Exemption 3 denial was challenged in court. In the words of the District of Columbia Circuit,

[19] 49 U.S.C. § 1504 (1958). The document withholding provision in the Federal Aviation Act has since been removed and the management of investigatory documents is now under the supervision of the FAA's overseers at the U.S. Department of Transportation.
[20] 422 U.S. 255, 264-267 (1975).
[21] S. REP. NO. 854, 93d Cong., 2d Sess. (1974) at 6; H.R. REP. NO. 880, 94th Cong., 2d Sess. pt. 1 (1976) at 22-23.
[22] 5 U.S.C. §§ 552 (b)(3)(A)(i)-(b)(3)(A)(ii) (1976).

Exemption 3 is "the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator [of a federal agency] may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw."[23] This has been interpreted as giving Congress (via statutory text in qualifying statutes) the authority to determine what types of government-held information shall remain undisclosed, rather than Executive Branch agencies making that determination via procedural decisions.[24] However, the same deference was not given to the wider spirit of transparency in FOIA, so patterns of agency secrecy mostly continued but with a different procedural justification.[25]

This article argues that such deference to qualifying statutes under FOIA Exemption 3 has created a trend in which certain *topics* – some quite esoteric and with unexamined relevance for government secrecy – have been deemed worthy of withholding just because they are named in qualifying statutes, while similar topics of lesser or greater importance receive no such consideration. This illustrates the problem of considering a *topic* as either more or less important than all other topics when addressing the matter of government transparency. While we cannot escape the primacy of a much larger *subject area* like national security or trade secrets, perhaps topics should not be considered whatsoever. In other words, at least for esoteric and precise topics, government transparency policy should address the document and who holds it, not its topictivity.

---

[23] American Jewish Congress v. Kreps, 574 F.2d 624, 628-629 (D.C. Cir. 1978) (concerning a FOIA request to the Department of Commerce for documents on how the agency handled boycotts of American products by the residents of other countries, which was rejected per Exemption 3).
[24] *See* Edward L. Wilkinson Jr., *Foiled FOIA: The Excessive Exemption,* 55 ST. MARY'S L. J. 819, 838 (2024).
[25] *See* Cramer, *supra* note 13, at 146.

There are more about 80 qualifying statutes (and a few treaties with foreign governments) that enable government-held information on precise topical matters to be withheld under FOIA Exemption 3.[26] Granted, some of them focus on larger subject areas and do not display the narrow topictivity that is being critiqued in this article. Many such statutes are directly or tangentially related to national security matters, in which case the withholding of documents is enabled by FOIA Exemption 1 (national security) *and* Exemption 3.[27] Many qualifying statutes specify industry trade secrets that could be revealed during governmental investigations of other matters, in which case the withholding of documents is enabled by FOIA Exemption 4 (trade secrets) *and* Exemption 3.[28] Other qualifying statutes require the withholding of the names of persons being investigated or the government employees investigating them, in which case the withholding of documents is enabled by FOIA Exemption 6 (personal privacy) *or* Exemption 7(C) (privacy during law enforcement investigations), *and* Exemption 3.[29] These subject areas allow withholding that adds up to a significant number of

[26] For an extensive list, which inadvertently illustrates how many topics can be withheld from FOIA disclosure, *see* U.S. Department of Justice, *Statutes Found to Qualify under Exemption 3 of the FOIA*, Oct. 2023, available at https://www.justice.gov/d9/2023-10/exemption_3_chart_october_2023_clean.pdf (last visited Jan. 22, 2026).

[27] As one example among many, the Espionage Act of 1917 enables the withholding of government-held information on various cryptographic methods and communications devices used by the U.S. government when spying on other nations, or those used by other nations when spying on the U.S. 18 U.S.C. § 798(a); *affirmed in* Larson v. Department of State, 565 F.3d 857 (D.C. Cir. 2009).

As another example, the Atomic Energy Act of 1954 prevents citizens and journalists from knowing if technologies and materials developed for civilian electrical power have been transferred to military researchers for the development of nuclear weapons. This provision has been deemed to qualify for FOIA Exemption 3 and would also qualify for the expansive realm of national security under Exemption 1. 42 U.S. Code § 2162(c); *affirmed in* Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

[28] Most notably, the Federal Trade Commission Act of 1914 allows the withholding of "any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential" – a category of information that thus qualifies for withholding under FOIA Exemption 3 *and* which received protection against disclosure again via Exemption 4 when FOIA was passed in 1966. 15 U.S.C. § 46(f); *affirmed in* Center for Digital Democracy v. Federal Trade Commission, 189 F. Supp. 3d 151, 158-159 (D.D.C. 2016).

[29] As one example among several, the Immigration and Nationality Act allows the withholding of the names of "aliens" tracked in a database for investigation into alleged crimes. 8 U.S.C. § 1202(f); *affirmed in* Medina-Hincapie

denied FOIA requests; the exemptions described in this paragraph were used by agencies to justify FOIA rejections more than 29,000 times in 2024.[30]

This has created the unintended consequence of the pro-transparency FOIA enabling *more* government secrecy via overuse of its exemptions by government officials who wish to withhold requested documents. In effect, Exemption 3 has made FOIA largely powerless in countering other statutes that exhibit a weaker transparency philosophy than itself,[31] and many of which were passed decades earlier and were not influenced by later transparency philosophy.[32] Perhaps more troublingly, there are also many qualifying statutes that were enacted *after* FOIA and ignored its by-then established transparency philosophy, particularly a plethora of security-related laws passed in the wake of the 2001 terrorist attacks. Many of those later qualifying statutes allow the withholding of documents based purely on their topics, particularly types of information purloined during electronic surveillance, which arguably ignores the wide-ranging transparency goals of FOIA but enable the withholding of requested documents via FOIA Exemption 3 regardless.[33]

---

v. Department of State, 700 F.2d 737, 740 (D.C. Cir. 1983); *and* De Laurentiis v. Haig, 686 F.2d 192, 193-195 (3rd Cir. 1982).

[30] *See* United States Department of Justice, *Fiscal Year 2024 Annual Freedom of Information Act Report*, Mar. 6, 2025, *available at* https://www.justice.gov/oip/media/1392121/dl?inline (last visited Jan. 26, 2026), at 33-34. The most recent fiscal year for which figures were available at the time of writing was 2024. Also, many FOIA requests are rejected for multiple reasons and with citations to more than one exemption, so the "29,000" figure in the text includes some overlap and overstates the quantity of *unique* denials.

[31] *See* Cramer, *supra* note 13, at 136-139.

[32] H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966) at 10; *see also* S. REP. NO. 813, *supra* note 7.

[33] *See e.g.* Ava Barbour, *Ready...Aim...FOIA!: A Survey of the Freedom of Information Act in the Post-9/11 United States*, 13 BOSTON U. PUBLIC INTEREST L. J. 203 (2004); Adam S. Davis, *The Power of Information: The Clash between the Public's Right to Know and the Government's Security Concerns in a Post-September 11th World*, 33 WILLIAM MITCHELL L. REV. 1741 (2007); Martin E. Halstuk & Eric B. Easton, *Of Secrets and Spies: Strengthening the Public's Right to Know about the CIA*, 17 STANFORD L. & POLICY REV. 353 (2006).

III. Topictivity that Qualifies for FOIA Exemption 3

This section selects some Exemption 3 qualifying statutes that illustrate particularly esoteric and sometimes absurd topics that have been deemed worthy of government secrecy regardless of the public interest in disclosing documents about them. Some of these statutes have document withholding provisions that directly contradict their own goals, with results ranging from the curious to the tragic. Our first several examples come from the realm of agricultural regulation.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[34] mostly regulates the pesticides used by farmers and the reporting thereof.[35] One noteworthy provision of this statute allows the withholding of "data, including the location from which the data was derived, that would directly or indirectly reveal the identity of individual producers [of certain pesticides]"[36] Congressional debate leading to the passage of FIFRA included some concern about the wishes of parties who have submitted information about a pesticide being reviewed for approval or rejection by regulators. The problem is that this can be self-determined by the applicant, who is typically a corporate operator more concerned about profitability than the environmental and health impacts overseen by regulators.[37]

The document withholding provision in FIFRA qualifies for FOIA Exemption 3, as affirmed by the Fifth Circuit in 2004. The *Veneman* ruling elevated the privacy of employees at companies that make pesticides above public knowledge of the possibly detrimental effects of those

[34] 7 U.S.C. §§ 121 et seq. (1972).
[35] *See* unlisted author, *Federal Insecticide, Fungicide and Rodenticide Act*, 14 NAT. RESOURCES LAW 75 (1981).
[36] 7 U.S.C. § 136i-1(b).
[37] H.R. REP. NO. 511, 92nd Cong., 1st Sess. (1971) at 71-72.

products.[38] This case concerned a "reverse-FOIA" dispute in which an anonymous plaintiff sought to block a FOIA request by an environmental group for documents about a company that made protection collars, which are worn by livestock and are designed to poison coyotes that attempt to bite those animals in the throat. (Coyotes are considered agricultural "pests" that can be repelled with "pesticides" in the text of FIFRA.)[39] The court upheld the FOIA denial because someone at the producing company was named in the documents, and such information must be withheld under the FIFRA provision.[40]

Importantly, that withholding provision in FIFRA is directed towards the producers, not the users, of pesticides. Farmers and other large operators often routinely buy their pesticides wholesale, with such products not appearing on retail shelves where they can be inspected by environmentalists and other interest groups. Thus, someone who lives near a farm is unlikely to know, without digging up government records, which pesticides are used at that farm and which companies produce them.[41] Keeping this particular topic (who produces a pesticide) secretive has no support in the history of American environmental law, as pesticides have long been known to affect animals and ecosystems far beyond the initially targeted pests. This is a prime concern in environmental policy,[42] in which the producers of such pesticides could be asked to account for their ingredients and their effects.[43]

---

[38] *Affirmed in* Doe v. Veneman, 380 F.3d 807 (5th Cir. 2004).
[39] *Id.* at 810.
[40] *Id.* at 816-817.
[41] *See generally* American Bar Association, *Pesticides, Chemical Regulation, and Right-to-Know Committee Report* (May 22, 2023), *available at* https://www.americanbar.org/groups/environment_energy_resources/resources/year-in-review/2022/pesticides-chemical-regulation-right-to-know/ (last visited Jan. 26, 2026).
[42] *See* C. J. Topping, A. Aldrich & P. Berny, *Overhaul Environmental Risk Assessment for Pesticides*, 367 SCIENCE 360, *available at* https://www.science.org/doi/full/10.1126/science.aay1144 (last visited Jan. 26, 2026).
[43] *See* Peter Riggs & Megan Waples, *Accountability in the Pesticide Industry*, 9 INT. J. OF OCCUPATIONAL AND ENVIRONMENTAL HEALTH 74, 74-76 (2003).

Per this article's arguments, this type of focus on a distinct topic in government transparency policy makes that topic appear so sensitive that it needs to remain secret, while a similar topic that might be equally important for the public interest receives less transparency jurisprudence simply because it is not mentioned in a qualifying statute enforced by a government agency. For the present discussion, the topic of who produces a *pesticide* has become more worthy of government secrecy than the topic of who produces a *fertilizer*, which is equally important for the public's knowledge of the environmental impacts of farms. This absurd dichotomy is caused merely by the absence of any statute focusing on fertilizer production that also happens to include a withholding provision that has been found to qualify for Exemption 3.[44]

Also from the realm of agricultural regulation, the Federal Crop Insurance Act[45] sets up a government-subsidized insurance program for farmers facing dire economic impacts caused by crop failures and natural disasters, particularly when those farmers are likely to be rejected by commercial insurers.[46] This statute has a precise document withholding provision: "the Secretary [of Agriculture], any other officer or employee of the Department [of Agriculture] or an agency thereof, an approved insurance provider and its employees and contractors, and any other person may not disclose to the public information furnished by a producer under this

[44] This conclusion is not meant to imply that there are no statutes that regulate the use of fertilizers, only that no such statute includes a withholding provision that has been found by the U.S. Department of Justice, or any court, to qualify for the FOIA rejection process under Exemption 3. This type of conclusion is relevant for most of the following examples *infra*. *See* U.S. Department of Justice, *Statutes Found to Qualify under Exemption 3 of the FOIA*, *supra* note 26.

[45] 7 U.S.C. §§ 1501-1524 et seq. (1938).

[46] *See* David F. Rendahl, *Federal Crop Insurance: Friend or Foe*, 4 SAN JOAQUIN AGRICULTURAL L. REV. 185, 198-192 (1994).

subchapter."[47] For purposes of this article, this provision is focused on the relatively narrow topic of the information that a farmer gives to a party from which he/she is trying to buy insurance coverage. The Federal Crop Insurance Act has faced professional criticism for the complexity and poor transparency of governmental funding programs,[48] making citizen oversight of obscure Executive Branch procedures all the more essential.

That topical withholding provision in that statute was found to qualify for FOIA Exemption 3 by a federal court in 2017.[49] In a case involving the denial of a FOIA request for government-held documents on corn and soybean yields in an Iowa county, the court upheld the denial because disclosure might allow a third party to "reverse engineer" the identity of the farmers and investigators who supplied that information to the Department of Agriculture, and such information must remain secret per the withholding provision of the Federal Crop Insurance Act.[50] The ruling is devoid of any discussion of whether that objectionable behavior by a hypothetical third party was actually likely to happen, or whether the requester would nefariously release the requested documents to bad actors.

On the matter of federal insurance oversight, there is one other statute in that regulatory realm with a withholding provision that qualifies for Exemption 3. The Railroad Unemployment Insurance Act[51] mandates the withholding of any document that reveals the name of any employee of the Railroad Retirement Board.[52] This falls within the common theme in many American statutes about protecting the privacy of individuals named in government-

[47] 7 U.S.C. § 1502(c)(1).
[48] *See* Herman B. DeCell, *Federal Crop Insurance: Another Cup of Hemlock*, 26 MISSISSIPPI L. J. 221, 228 (May 1955).
[49] *Affirmed in* Bush v. U.S. Department of Agriculture, 2017 WL 3568672 (N.D. Iowa, 2017).
[50] *Id.* at 7.
[51] 45 U.S.C. §§ 351-369 (1938).
[52] 45 U.S.C. § 362(d).

held documents.[53] But oddly, the names of the leaders of this board, and general descriptions of the staff departments that they oversee, are easily visible on the board's website.[54]

Conversely, the statute offers little guidance on how the privacy of employees whose names can be easily found online is more important than information about how they do their jobs, in the event that this is of interest to a journalist or citizen watchdog. That act's withholding provision was found to qualify for FOIA Exemption 3 by a federal court in 1987.[55] Granted, this was before easily accessible government agency websites, but similar information has historically been available in public hard copy documents. The 1987 ruling is noteworthy because the court upheld the denial of a FOIA request from the exact population that the board is intended to assist – retired railroad workers – and the request was denied by that same board. An association of retired workers sought information held by the board about their colleagues, but the group was denied access to the documents because they included the names of board members that were most likely already known to the requesters.[56]

No other forms of federal insurance regulation have statutes with withholding provisions that qualify for greater secrecy under FOIA Exemption 3, leaving one to wonder what is more sensitive about insurance that helps farmers and retired railroad workers, as compared to all other forms of insurance.

---

[53] *See supra* note 38 and accompanying text.
[54] *See* U.S. Railroad Retirement Board, *Our Agency*, unknown date, *available at* https://www.rrb.gov/OurAgency (last visited Jan. 26, 2026).
[55] *Affirmed in* Association of Retired Railroad Workers v. U.S. Railroad Retirement Board, 830 F.2d 331 (D.C. Cir. 1987).
[56] *Id.* at 334.

The Food, Conservation, and Energy Act[57] was passed by Congress in 2008 to address post-9/11 fears of threats to food delivery networks that could then cause financial shocks for the farming profession.[58] This statute has a provision that allows the following topics to be withheld by the Department of Agriculture: "information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in programs of the Department" or "geospatial information […] maintained by the Secretary [of Agriculture] about agricultural land or operations".[59]

That withholding provision appears to cover all information about a particular farmer's practices, and even "the land itself," in any document furnished to federal regulators. With farming operations being an item of interest among environmentalists and others concerned about water supplies and pests, as well as those concerned about how farming practices affect the healthiness and availability of the food supply, this secrecy toward basic farming operations has no support in the history of American environmental law.[60] Regardless, the statute's withholding provision has been confirmed to qualify for FOIA Exemption 3 in a Circuit Court ruling, which upheld the denial of a request by state regulators in Nebraska for information on what the federal government knew about farms that polluted their own region's rivers.[61] Per

[57] Pub. L. No. 110-246, 121 Stat. 1651 (2008); codified at various sections of the United States Code at U.S.C. §§ 7, 16.
[58] *See* Wes Harris, Brad Lubben, James Novak & Larry Sanders, *The Food, Conservation, and Energy Act of 2008 Summary and Possible Consequences*, conference paper (2008), *available at* https://hdl.handle.net/10724/19318 (last visited Jan. 26, 2026), at 2-4.
[59] 7 U.S.C. § 8791(b)(2).
[60] *See* Cramer, *supra* note 13, at 147-148.
[61] *Affirmed in* Central Platte Natural Resources Dist. v. U.S. Department of Agriculture, 643 F.3d 1142, 1147-48 (8th Cir. 2011).

decades of American environmental and agricultural policy, the health of those rivers is likely a larger concern than whatever specific topic at a small selection of farms triggered the qualifying statute and FOIA Exemption 3.

Moving from the realm of agricultural regulation to the related but more expansive matter of environmental protection, there are several environmental laws with curious withholding provisions that negate the types of natural protection, and public knowledge thereof, that drive this policy realm. One example is the Federal Cave Resources Protection Act,[62] which has its own withholding provision: "Information concerning the specific location of any significant cave may not be made available to the public […] unless the Secretary [of Agriculture or of the Interior] determines that disclosure of such information would further the purposes of this chapter and would not create a substantial risk of harm, theft, or destruction of such cave."[63] Caves are environmentally sensitive and are often vandalized by criminals or accidentally damaged by well-meaning but careless recreationists, and this has gotten the attention of lawmakers.[64] In turn, regulators who wish to protect those caves must ask knowledgeable local people, scientists, and land managers about where they are. The transparency provision is intended to keep that locational knowledge out of the hands of bad actors seeking to damage a given cave.[65]

However, this post-FOIA statute contradicts FOIA's philosophy of government transparency, and it also has the ironic consequence of keeping cave location information secret

[62] 16 U.S.C. §§ 4301-4310 (1988).
[63] 16 U.S.C. § 4304(a). Note that the Departments of Agriculture and of the Interior are named because both have jurisdiction over caves depending on location.
[64] S. REP. NO. 559, 100th Cong. (1988), at 8.
[65] Jacob A. Kramer, *Preventing the Destruction of America's Cave Resources: Enforcing Cave Protection Legislation against Vandals and Profiteers*, 9 THE ENVIRONMENTAL LAWYERS 733-734 (2003).

from those who want to *protect* caves and need to know where they are to carry out their conservation work. This contradicts much of American environmental law, in which those who want to protect nature are entitled to government-held information on what they hope to protect.[66] There are no known prohibitions on citizens knowing the location of a forest or wetland that they wish to protect, just because vandals and polluters could use that same knowledge for nefarious purposes. This provision in the cave protection law also restricts scientific research by the profession that studies the unique ecosystems and flora and fauna found in caves.[67]

Regardless, the withholding provision of the Federal Cave Resources Protection Act has been found to qualify for FOIA Exemption 3 by a federal court, in a case brought by environmentalists who sought information on gold mining in their area, some of which took place in caves, to determine the impact on regional water supplies.[68] The court partially overturned the rejected FOIA request because the U.S. Forest Service had failed to explain why disclosing the documents would create the risk of destruction of the caves in question, as required by the withholding provision.[69] The agency was given 60 days to provide that explanation, after which the FOIA rejection would apparently be upheld.[70]

In the environmental protection realm, another self-contradictory withholding provision can be found in the National Parks Omnibus Management Act,[71] which was passed in 1998 to

[66] *See* Cramer*, supra* note 13, at 160-161.
[67] Henry L. Welch, *From Caveman to Cave Protector: The Quest for Responsible Cave Protection Legislation*, 38 ENVIRONMENTAL L. REP. NEWS & ANALYSIS 10089, 10090 (February 2008).
[68] *Affirmed in* Central Black Hills Clean Water Alliance v. U.S. Forest Service, 2022 WL 2340440 (D.S.D., 2022).
[69] *Id*. at 9.
[70] *Id*. at 14.
[71] 54 U.S.C. §§ 100101 *et. seq.* (1998).

oversee the rapidly proliferating private contractors who provide hospitality services, food and beverage concessions, gift shops, and even resource extraction at America's increasingly popular National Parks.[72] This statute has a withholding provision: "Information concerning the nature and specific location of a National Park System resource which is endangered, threatened, rare, or commercially valuable, of mineral or paleontological objects within units of the National Park System, or of objects of cultural patrimony within units of the National Park System, may be withheld from the public in response to a request under [FOIA]."[73]

This provision was found to qualify for FOIA Exemption 3 by a federal court in a case involving a rejected FOIA request from an environmental group for documents pertaining to federal efforts to protect the habitat of the endangered northern goshawk, which was known to reside in Grand Canyon National Park. The Department of the Interior determined that disclosing information about that population of the bird would lead to human meddling in its habitat, and as a federally listed endangered species the northern goshawk could be considered "endangered" and "rare" per the withholding provision of the Omnibus act.[74] This secrecy about habitats is not present in endangered species protections for threatened creatures that live anywhere other than National Parks, because knowing where those habitats are located is crucial for scientific research into saving those creatures from extinction, and essential for

[72] *See* Richard J. Ansson Jr. & Dalton L. Hooks Jr., *Protecting and Preserving Our National Parks in the Twenty First Century: Are Additional Reforms Needed Above and Beyond the Requirements of the 1998 National Parks Omnibus Management Act?*, 62 MONTANA L. REV. 213, 220 (2001).
[73] 54 U.S.C. § 100107.
[74] *Affirmed in* Southwest Center for Biological Diversity v. U.S. Department of Agriculture, 170 F.Supp.2d 931. 937 (D. Ariz. 2000).

efforts by nature lovers to review government management of those habitats under the Endangered Species Act.[75]

A similarly over-cautious withholding provision can be found in the Archaeological Resources Protection Act.[76] This statute's intent is clearly seen in its name, as the American government determined that ancient treasures deserve protection, particularly because they are often targeted by thieves and black-market collectors, while historians and other interested persons should know about the existence of such treasures in order to advocate for their protection.[77] Unfortunately, the statute contradicts its own high-level philosophy with this withholding provision: "Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission" should be withheld, because those permissions could "create a risk of harm to such resources or to the site at which such resources are located."[78]

This provision was found to qualify for FOIA Exemption 3 by a federal court, in a particularly absurd ruling for a case brought by a landowner whose parcel bordered an Indian Reservation where mining was permitted. The plaintiff's FOIA request for mining permit documents was denied per the withholding provision of the Archaeological Resources Protection Act, because the parcel on the Indian Reservation was believed to host ancient artifacts. The ruling did not consider the possibility that the mining could damage or destroy

[75] *See* J. B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENVIRONMENTAL L. & POLICY FORUM 275, 288-289 (2009). The Endangered Species Act governs federal efforts to prevent the extinction of endangered animals and plants, typically via locating and preserving their habitats. 16 U.S.C. §§ et seq. (1973).
[76] 16 U.S.C. §§ 470aa *et seq.* (1979).
[77] *See* Roberto Iraola, *The Archaeological Resources Protection Act – Twenty Five Years Later*, 42 DUQUESNE L. REV. 221, 222-223 (2004).
[78] 16 U.S.C. § 470hh(a).

those very same priceless treasures.[79] Per this article's theme of topictivity, there are no known secrecy provisions about mining permits on lands that are *not* believed to host ancient artifacts, and for such lands, concerned persons can find the names of extraction companies and descriptions of the processes that they perform, in order to assess potential risks to the environment.

Another statute that hopes to improve the lot of the Native American population – the Indian Health Care Improvement Act (IHCIA)[80] – hopes to address the miserly health care resources available to that group. Due to centuries of neglect and displacement, the poor health of Native Americans was almost entirely caused by the same government that seeks to fix it in the statute.[81] The IHCIA was first passed in 1976, expired in 2000, then was reauthorized by and amended to the Affordable Care Act in 2010.[82] The original and reauthorized versions of the statute, in their introductory declarations, took great pains to point out that the American government has a moral obligation to address the problem, particularly because many treaties on the matter of assistance to displaced Native American populations had been ignored over the centuries.[83]

That noble language may have been partially negated by a withholding provision: "Medical quality assurance records described in subsection (b) may not be made available to

[79] *Affirmed in* Central Starkey v. U.S. Department of the Interior, 238 F.Supp.2d 1188, 1192-1193 (S.D. Cal. 2002). Despite the term *Indian* being outdated and rejected by Native Americans for the past several decades, it is still used in American statutory language for Indian Reservations. the Bureau of Indian Affairs, and the Indian Health Care Improvement Act (see next paragraph *infra*), among others.
[80] 25 U.S.C. §§ 1601-1685 (1976).
[81] *See* Beverly Graleski, *The Federal Government's Failure to Provide Health Care to Urban Native Americans in Violation of the Indian Health Care Improvement Act*, 82 U. DETROIT MERCY L. REV. 461, 462-464 (2005).
[82] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10221, 124 Stat 119, 935 (2010).
[83] *See* Lauren E. Schneider, *Trust Betrayed: The Reluctance to Recognize Judicially Enforceable Trust Obligations under the Indian Health Care Improvement Act (IHCIA)*, 52 LOYOLA U. OF CHICAGO L.J. 1099, 1124-1128 (2021).

any person."[84] Subsection (b) as referenced concerns any such records pertaining to any "Indian health program" managed by government officials or by the tribes themselves.[85] Meanwhile, a medical quality assurance record is a document related to a review by a government agency of the quality and regulatory compliance of a health care facility or program.[86] One could conclude that these are exactly the types of documents needed to determine if the American government is providing health care for Native Americans that is as effective and equitable as the statute hopes, thus partially negating its own promises by refusing to furnish documents to interested watchdogs.

Regardless, the withholding provision was found to qualify for FOIA Exemption 3 by the Second Circuit, in a case brought by the *New York Times*, which had filed a FOIA request for documents about an investigation into the Indian Health Service. Some employees of that service, which had been instructed by the IHCIA to deliver the promised health care outcomes to the Native American community, had been accused of sexually abusing some of that community's patients, and the nation's most prominent newspaper was blocked from obtaining the associated investigatory documents.[87] Thus, via FOIA Exemption 3, the IHCIA prevented journalistic investigation of its own performance, even in light of serious criminal allegations. On the matter if topictivity, statutes regulating health services for general populations, outside of the Indian Health Service and related entities, have no known withholding provisions that reduce the transparency of government investigations into those services.

[84] 25 U.S.C. § 1675(g).
[85] 25 U.S.C. § 1675(b).
[86] 10 U.S.C. § 1102(j).
[87] *Affirmed in* New York Times v. Department of Health and Human Services, 15 F.4th 216, 219-221 (2nd Cir. 2021).

Moving from the tragic to the merely absurd, other realms of law are littered with stray withholding provisions that ignore the spirit of the Freedom of Information Act and sometimes create internal contradictions with the goals of the statutes that contain them. For example, the National Construction Safety Team Act instructs the National Institute of Standards and Technology (NIST) to form teams to investigate structurally unsound buildings that could collapse and cause "substantial loss of life".[88] Contradictorily, the act contains this withholding provision: "A Team and the National Institute of Standards and Technology shall not publicly release any information it receives in the course of an investigation under this chapter if the Director finds that the disclosure of that information might jeopardize public safety."[89] If read with a critical eye, this provision achieves the circular logic of allowing the NIST to determine that public knowledge of a public safety investigation could endanger public safety.

Even if not viewed so critically, that withholding provision has been found to qualify for FOIA Exemption 3 by a federal court, in a ruling pertaining to a rejected FOIA request for documents about the structural integrity of the buildings in New York City that fell during the 9/11 attacks.[90] In particular, World Trade Center 7 was not hit by one of the planes during the terrorist attack, but collapsed upon being pummeled with falling debris from its neighboring buildings. The plaintiff in the case filed a FOIA request for NIST documents pertaining to a computer simulation with which the agency tried to determine, after the fact, the structural integrity deficiencies in World Trade Center 7 that caused it to collapse.[91] The NIST denied the

[88] 15 U.S.C. §§ 7301-7313 (2002).
[89] 15 U.S.C. § 7306(d).
[90] *Affirmed in* Quick v. U.S. Department of Commerce, 775 F. Supp. 2d 174 (D.D.C. 2011).
[91] *Id*. at 178.

request, and was found by the court to have satisfied the requirements of the withholding provision in the National Construction Safety Team Act, which in turn justified nondisclosure under FOIA Exemption 3. This was accomplished with a brief statement that the disclosure "*might* jeopardize public safety."[92] Since that satisfied the qualifying statute, no further explanation was given for how public safety would be threatened by knowing the cause of a building collapse that had already happened. One can surmise that public knowledge of this topic would be useful in making sure architects do not make the same mistakes again.[93]

Also in the realm of buildings, but this time concerning discriminatory practices, the Fair Housing Act seeks to fight housing discrimination due to race, gender, disability, or family status.[94] The statute instructs the Department of Justice to investigate allegations of such discrimination and to file suit against unscrupulous landlords and lending institutions.[95] Despite the public interest in housing discrimination suffered by marginalized communities and its attendant social and economic effects,[96] the Fair Housing Act has an expansive withholding provision: "Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned."[97] The term "conciliation" in that provision refers to

---

[92] *Id*. at 181 (emphasis added).
[93] Most cities keep the blueprints of buildings for periodic use in permitting reviews, safety inspections, and the like. Such records are typically available upon request under state open records laws. For example, the process for making such a request in Pennsylvania is found at the state government website, *available at* https://www.pa.gov/services/dli/submit-a-request-for-building-plans (last visited Jan. 27, 2026).
[94] The Fair Housing Act is a component of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968), codified at various sections of the United States Code at U.S.C. §§ 18, 25, 42.
[95] *See* U.S. Department of Justice, Civil Rights Division, *The Fair Housing Act*, unlisted date, *available at* https://www.justice.gov/crt/fair-housing-act-1 (last visited Jan. 26, 2026).
[96] *See e.g.* Cheryl P. Derricotte, *Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing*, 40 HOWARD L. J. 689 (1997).
[97] 42 U.S.C. § 3610(d)(1).

an agreement in which the investigator finalizes the investigation in return for promises from the perpetrator to end the practices that aroused the original complaint.[98]

In practice, that withholding provision would prevent watchdogs from learning what the discriminatory landlord or lending institution promised to stop doing, which is essential for determining if they really did stop doing it, and whether the same perpetrator has a pattern or habit of committing the same offenses that were investigated multiple times. Regardless, the withholding provision was found to qualify for FOIA Exemption 3 by a district court in 2006, in a case about a rejected FOIA request for documents desired by a citizen who wanted to review the progress of a housing discrimination complaint that he had filed on his own behalf.[99]

In *West v. Jackson*, the plaintiff could not gain access to documents about his own discrimination allegation because the court interpreted that the withholding provision in the Fair Housing Act only allows such disclosures if the investigation has been completed,[100] though that distinction is not present in the statutory text. This interpretation was reached indirectly via a different provision in the Fair Housing Act that says that the results of a completed investigation can be disclosed to the claimant, and this provision was cited by the court.[101] Without support, the court inferred that this prohibited the disclosure of information on an in-progress investigation. That prohibition is not visible in the statute, but the court's determination was found to satisfy not just the Fair Housing Act but FOIA Exemption 3 as well. Per this article's theme of topictivity, other federal statutes that illegalize similar forms of

[98] 42 U.S.C. § 3610(b)(1).
[99] *Affirmed in* West v. Jackson, 448 F. Supp. 2d 207 (D.D.C. 2006).
[100] *Id*. at 212-213.
[101] 42 U.S.C. § 3610(d)(2).

discrimination, such as the Equal Pay Act[102] or the Americans with Disabilities Act,[103] do not have withholding provisions that qualify for FOIA Exemption 3 nor any known procedures that treat in-progress and completed investigations differently.

The final entry in our list of topical qualifying statutes is not just absurd and self-contradictory, but it also creates significant Constitutional implications. The Federal Election Campaign Act was passed in 1971,[104] with the goal of getting rampant and unidentified campaign contributions under control by (among other strictures) requiring the names of all donors to be reported to the Federal Election Commission.[105] Campaign finance reform was a frequent topic of discussion in Congress in the early 1970s, with legislators aghast at the tens of millions of dollars that had been forwarded anonymously or indirectly to the last several Presidential campaigns.[106] The effort was bipartisan quest for solutions, but with the two political parties equally disagreeing about the possible remedies.[107] The act was ultimately passed after great rancor, but compromises and dealmaking among the dueling legislators had left it with a weak administrative structure and cumbersome procedural requirements that made enforcement difficult.[108]

In addition, the Federal Election Campaign Act includes a withholding provision: "Any notification or investigation made under this section shall not be made public by the

[102] Pub. L. No. 88-38, 77 Stat. 56 (1963); codified at various sections of the United States Code at U.S.C. § 29.
[103] 42 U.S.C. §§ 12101 *et seq.* (1990).
[104] 52 U.S.C. §§ 30101-30126 (1971).
[105] *See* Jeffrey M. Berry & Jerry Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARVARD J. ON LEGISLATION 331, 331-332 (1973).
[106] S. REP. NO. 96, 92nd Cong., 1st Sess. (1971) at 76.
[107] S. REP. NO. 229, 92nd Cong., 1st Sess. (1971) at 60.
[108] *See* Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMINISTRATIVE L. REV. 575, 579-589 (2000).

Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."[109] The "section" referenced outlines procedures for an investigation of suspicious campaign contributions that can be requested by any citizen or journalist.[110] While the withholding provision keeps the accuser and accused informed, documents about the investigation are not available to anyone else who may be interested in reviewing the efficacy of the governmental investigation, whether the accused was appropriately sanctioned, or whether the accused has a pattern of offenses and is likely to strike again.[111]

Even so, this withholding provision was found to qualify for FOIA Exemption 3 by a district court in a case that is noteworthy for not even being about campaign finance. In a dispute between two federal government agencies over a rejected FOIA request (by one agency to the other) for documents that could include corporate trade secrets, a district court cited the withholding provision of the Federal Election Campaign Act to justify the nondisclosure of documents in *any* governmental investigation.[112] Oddly, the denying agency had cited FOIA Exemption 3 to justify the nondisclosure enabled by the specific provision in the Federal Election Campaign Act, but the court found that argument unpersuasive for the FOIA rejection at issue but persuasive for a wider range of government investigations.[113] Regardless of the

[109] 52 U.S.C. § 30109(a)(12)(A).
[110] 52 U.S.C. § 30109(a)(1).
[111] Repeat offenders in campaign finance law, who can afford relatively lenient penalties or take a chance on not being noticed and investigated, are a perennially vexing problem in America law enforcement, largely because the potential political rewards outweigh the punishment that may in fact never happen. *See generally* Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations*, 2 ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 23 (2003).
[112] *Affirmed in* Government Accountability Project v. Food and Drug Administration, 206 F. Supp. 3d 420. 433 (D.D.C. 2016).
[113] *Id.* at 433-437.

indirect logic, because of this ruling the Department of Justice considers that withholding provision to qualify for FOIA Exemption 3.[114] Given the undeniable public interest in controlling the purchase of political favors and the resulting deleterious effects on the democratic process,[115] and the constitutional implications of being unable to review the backroom dealings of elected officials,[116] this is a particularly ruinous precedent for the statute that claims to address those difficulties. Here, the distinct topic of campaign contributions has been endowed with a type of secrecy that has implications for much larger matters of government oversight and the democratic process.

These are just some illustrative examples among dozens of statutes that have withholding provisions that qualify for FOIA Exemption 3,[117] and all those described here allow the withholding of government-held information on narrow topics while whittling away at the higher philosophy of the Freedom of Information Act. Exemption 3 is unique among the FOIA exemptions because it enables the withholding of documents for purely procedural reasons if a topic has been deemed secret by a different qualifying statute. As discussed in this section, many of those qualifying statutes focus on distinct and esoteric topics.

Conversely, this article also argues that this process has ironically resulted in many topics receiving more protection against disclosure than other topics that may be equally important but simply do not have their own qualifying statutes. This creates a situation in which

[114] *See* U.S. Department of Justice, *Statutes Found to Qualify under Exemption 3 of the FOIA*, *supra* note 26, at 17.
[115] *See e.g.* Burton A. Abrams & Russell F. Settle, *Campaign Finance Reform: A Public Choice Perspective*, 120 PUBLIC CHOICE 379 (2004); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUMBIA L. REV. 1126 (1994).
[116] *See e.g.* Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUMBIA HUMAN RIGHTS L. REV. 357 (2011); Christopher F. Zurn, *Deliberative Democracy and Constitutional Review*, 21 LAW AND PHILOSOPHY 467 (2002).
[117] *See* U.S. Department of Justice, *Statutes Found to Qualify under Exemption 3 of the FOIA*, *supra* note 26.

documents are withheld from requesters simply based on what they are about (the topic) rather than their utility for the requester or for the public interest. This contradicts the governmental openness and transparency philosophies of the Freedom of Information Act.

IV. Why Wells Are More Secretive than Other Holes in the Ground

Another exemption to the Freedom of Information Act – Exemption 9 – has an unusual history that illustrates the themes of this article. As opposed to wide *subjects* like national security or trade secrets that have their own exemptions, Exemption 9 is the only one dedicated to a distinct *topic*. In a nutshell, Exemption 9 allows the withholding of government-held information on the very specific topic of the locations and functions of wells. The entire text of the exemption is: "geological and geophysical information and data, including maps, concerning wells."[118] The exemption applies only to wells on federal lands, for which permits from the Department of the Interior or the Bureau of Land Management are required.[119] On its face, this exemption creates the unusual situation in which wells on federal lands are more secretive than those on state lands, for which documents pertaining to drilling permits and environmental reviews are managed by the state and are often available to a various extent via state open records laws.[120]

---

[118] 5 U.S.C. § 552(b)(9).

[119] See United States Department of the Interior, Bureau of Land Management, *Applications for Permits to Drill*, unlisted date, *available at* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/permitting/applications-permits-drill (last visited Jan. 27, 2026).

[120] For example, the process for making such a request in Pennsylvania is found at the state government website, *available at* https://www.pa.gov/agencies/dep/data-and-tools/reports/oil-and-gas-reports (last visited Jan. 27, 2026). That state furnishes information on well locations and measurements that would be prohibited under FOIA Exemption 9 if the wells were on federal lands, though an extraction company's trade secrets (usually involving drilling techniques) can be withheld.

Also note that wells on private land are governed by contract law per negotiations between the landowner and the extraction company, and thus are out of scope for this discussion.

FOIA Exemption 9 is rarely invoked in requests or denials, possibly because the locations of wells on federal lands are not a widespread topic of citizen concern. This does not negate the possible environmental consequences of drilling a well however.[121] Granted, the locations of such wells can be considered legitimately sensitive, depending on one's point of view. When a fossil fuel company explores for deposits of oil or natural gas, it will first drill numerous exploratory boreholes to locate a suspected underground pool of the resource. When a pool is located, a true well is then drilled for extraction. This process is lengthy and expensive, with a fair number of unsuccessful attempts. This makes the location of a successful well a contested piece of information, because competitors or even bootleggers could drill nearby and tap into the same underground pool of the resource without needing to do all the expensive exploratory work. When that well is on federal land, the regulatory agency knows the location but should be prevented from revealing that location to competitors who file a dishonest FOIA request. This is the primary reason for a denial under Exemption 9.[122]

The fossil fuel industry's concerns were recorded in at least one Congressional Report: "Witnesses contended that disclosure of seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration."[123] Unusually, the year *after* FOIA was signed into law, the Senate saw the need to reiterate in a declaratory report that "geophysical information" on wells, indicating

[121] *See* Cramer, *supra* note 13, at 150-151.
[122] *See* American Bar Association Task Force, *Disclosure and Use of Proprietary Data*, 15 NATURAL RESOURCES L. 799, 804 (1983).
[123] H. REP. NO. 1497, 89th Cong. 2d Sess. (1966) at 11.

their locations on and below the Earth's surface, should be withheld from the public in most cases.[124]

On the other hand, fossil fuel wells have long been known to leak toxic chemicals into the surrounding groundwater, which can have a significant impact on local and regional drinking water supplies. This makes knowledge of the location of a leaky well imperative for citizens and watchdogs trying to find the source of pollution. Furthermore, knowledge of the well's location enables further investigation into its structural integrity.[125] Modern drilling practices make the possibility of water contamination more acute, because those practices are becoming more intensive and at greater depths.

Natural gas is often found embedded in rock formations hundreds or thousands of feet underground.[126] In the practice known professionally as hydraulic fracturing, and colloquially as fracking, fluid is pumped down a well shaft at enormous pressure to crack open the rock formation, releasing the natural gas which then floats up the column of fluid that freed it.[127] The fracking fluid that is pumped downward mostly consists of water mixed with toxic chemicals, so this process *uses* great amounts of water as well. That water must be taken from nearby natural sources, causing depletion;[128] later, the used fracking fluid must be disposed of somewhere

---

[124] S. REP. NO. 248, 90th Cong. 1st Sess. (1967) at 2.
[125] *See* Timothy T. Eaton, *Science-Based Decision-Making on Complex Issues: Marcellus Shale Gas Hydrofracking and New York City Water Supply*, 461-62 SCIENCE OF THE TOTAL ENVIRONMENT 158, 160-161 (2013).
[126] The basic process happens over millions of years, as decaying plants and animals dissolve into natural gas while surrounded by mud, and the mud is compressed by weight from above and solidifies into rock. The result eons later is underground rock formations with natural gas embedded within. *See* U.S. Energy Information Administration*, Natural Gas Explained,* http://www.eia.gov/energyexplained/index.cfm?page=natural_gas_home (last visited Jan. 28, 2026).
[127] *See e.g.* Carl T. Montgomery & Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, 62 J. OF PETROLEUM TECHNOLOGY 26, 26-27 (2010).
[128] *See* Suzanne Goldenberg, *Fracking is Depleting Water Supplies in America's Driest Areas, Report Shows*, THE GUARDIAN, Feb. 5, 2014, *available at* http://www.theguardian.com/environment/2014/feb/05/fracking-water-america-drought-oil-gas (last visited Jan. 28, 2026).

nearby, causing another risk of contaminating natural water supplies.[129] Knowing the locations of fracking wells can be crucial for understanding how operational mishaps or poor design at well sites can damage drinking water supplies and other aspects of the local environment.[130]

Compared to its fellow exemptions that address large subject areas like national security, FOIA Exemption 9 is incongruously narrow to the point of suspicion. While the terse text of the Exemption may succinctly address the concerns of Congress at the time of drafting,[131] those concerns deserve closer consideration in themselves. The exemption was almost entirely a reaction to complaints from the fossil fuel industry, which actively lobbied against FOIA when it was being drafted, and that industry – particularly companies active in Texas – had extensive political and financial ties with President Lyndon B. Johnson, whose signature was needed to pass the bill into law.[132] The exemption's suspiciously narrow and specific topic – wells – has caused leading government transparency researchers to conclude that the exemption was an unapologetic gift to a powerful industry, which in turn received even more protection against disclosure of their information than all other industries whose trade secrets were already protected from disclosure by Exemption 4.[133] At the time, it was unclear if maps could be considered trade secrets, so maps (as items of "geophysical information") received special

[129] *See* Jennifer S. Harkness, *What Are the Impacts of Fracking Operations on Local Water Quality?*, 6 NATURE REVIEWS EARTH AND ENVIRONMENT 159, 159-160 (2025); Gayathri Vaidyanathan, *Fracking Can Contaminate Drinking Water*, SCIENTIFIC AMERICAN, Apr. 4, 2016, available at https://www.scientificamerican.com/article/fracking-can-contaminate-drinking-water/ (last visited Jan. 28, 2026).
[130] Elliott Fink, *Dirty Little Secrets: Fracking Fluids, Dubious Trade Secrets, Confidential Contamination, and the Public Health Information Vacuum*, 29 FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT L.J. 971, 995-1001 (2019).
[131] *See* American Bar Association Task Force, *supra* note 122, at 804.
[132] *See* Christopher Gozdor, Shana Campbell Jones, Kristen Klick & Matthew Steinhilber, *Where the Streets Have No Name: The Collision of Environmental Law and Information Policy in the Age of Terrorism*, 33 ENVIRONMENTAL L. REPORTER 10978, 10991 (2003).
[133] *See e.g.* James T. O'Reilly, 1 FEDERAL INFORMATION DISCLOSURE 256 (3rd ed. 2000).

consideration in Exemption 9, but once again only if they displayed locations of interest for a single politically connected industry.[134] Maps of all other types have generally been found disclosable and many attempts by government agencies to withhold maps when requested under FOIA have been overturned in court,[135] though this changed somewhat in later years.[136]

FOIA Exemption 9 is also so specific that it has only ever been relevant for the few agencies involved in land management and regulation on federal lands, namely the Department of the Interior and Bureau of Land Management, and a few others with environmental or energy-related oversight responsibilities. This is also a departure from all other FOIA exemptions,[137] because the others are relevant for many more, if not all, agencies across the Executive Branch.

The judicial history of Exemption 9 is limited but indicates the perils of making a specific topic more secretive than others, because the definition of that topic becomes more expansive over time and leads to the withholding of more documents. The early history of Exemption 9 rejections that were contested in the courts indicates that the judiciary had initially adopted the expansive government openness philosophy of FOIA and were skeptical toward overuse of that exemption. In a landmark 1976 ruling on the meaning of the Freedom of Information Act, the Supreme Court held that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[138] Just months later, that high

---

[134] *See* American Bar Association Task Force, *supra* note 122, at 804.
[135] *See* Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. OF CIVIC INFORMATION 1, 25 (Spring 2019).
[136] *See infra* note 154 and accompanying text.
[137] *See* Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 443 (2008).
[138] Department of Air Force v. Rose, 425 U.S. 352, 361 (1976).

court ruling inspired the Fifth Circuit to address the limitations of Exemption 9 in two different cases. In *Pennzoil Co. v. Federal Power Commission*, which was an industry request for judicial review of the exemption rather than a dispute over a rejected request for documents, the oil industry challenged a policy at the agency presuming that documents describing the locations of offshore natural gas wells would be furnished to the public upon request unless the industry could argue against doing so on a document-by-document basis. The industry asked for this policy to be overturned, and for Exemption 9 to be applied liberally when rejecting citizen requests for such documents, but its argument was rejected by the court with a reference to the openness philosophy of FOIA.[139]

A similar dispute reached the Fifth Circuit a short time later. In *Superior Oil Co. v. Federal Energy Regulatory Commission*, an industry consortium requested judicial review of an agency rule that required companies to furnish well-related information to the agency proactively and on an enforced schedule. The industry argued that this compulsory requirement was unnecessary because the documents could be withheld from the public under Exemption 9 in the event of FOIA requests later. The circuit court rejected this argument as well, opining that collection of information by a government agency is a separate process from disclosing that information to the public (or not) if requested to do so later. Procedurally, Exemption 9 could be cited later when an agency denies a FOIA request, but it did not prevent the agency from collecting that information in the first place. This ruling was also supported by a reference to the

[139] 534 F.2d 627, 629-630 (5th Cir 1976). Note that the Federal Power Commission was disbanded in 1977 and its former functions are now under the jurisdiction of the Federal Energy Regulatory Commission, which was a litigant in the next case described *infra*.

openness philosophy of FOIA and the idea that government-held documents are presumed disclosable unless someone can justify withholding on a document-by-document basis.[140]

Following a trend in which the American judiciary has gradually whittled away the strength of FOIA while allowing more and more expansive use of the exemptions to justify rejecting document requests,[141] courts have been more forgiving on the use of Exemption 9 in later years. Most of the subsequent judicial history of Exemption 9 illustrates the perils of obsessing over a specific topic as a matter of governmental secrecy in court. First, the fossil fuel industry's concerns about competitors and bootleggers profiting from a company's expensive exploratory work had been tossed aside by the courts for several years, but in 1984 it was revived and affirmed by a district court as a valid reason for the exemption's existence and for its use in rejecting citizen requests for maps.[142] That district court ruling, *Black Hills Alliance v. U.S. Forest Service*, nonetheless kept the meaning of the exemption relatively narrow, sticking

[140] 563 F.2d 191, 204 (5th Cir. 1977). This dispute was initiated under the old Federal Power Commission, shortly before it was supplanted by the Federal Energy Regulatory Commission.

[141] For research on the overuse of FOIA exemptions in general, *see e.g.* Tyler Prime & Joseph Russomanno, *The Future of FOIA: Course Corrections for the Digital Age*, 23 COMMUNICATION L. & POLICY 267 (2018); David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. FORUM 232 (2016).

For research on the overuse of Exemption 1 (national security), see *supra* note 6. In addition to the present article, for research on overuse of Exemption 3, *see* Wilkinson, *supra* note 24. For research on the overuse of Exemption 5 (inter- or intra-agency deliberative documents), *see* Zachary D. Reisch, *The FOIA Improvement Act: Using a Requested Record's Age to Restrict Exemption 5's Deliberative Process Privilege*, 97 BOSTON U. L. REV. 1893 (2017).

For research on the overuse of Exemptions 6 and 7(C), which both pertain to personal privacy, *see e.g.* Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally Identifiable Information in Government Records*, 12 WILLIAM & MARY BILL OF RIGHTS J. 1 (2003); Martin E. Halstuk, Benjamin W. Cramer & Michael D. Todd, *Tipping the Scales: How the U.S. Supreme Court Eviscerated Freedom of Information in Favor of Privacy*, in TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD 16, 20-24 (Charles N. Davis & David Cuillier, eds., 2014).

[142] Black Hills Alliance v. U.S. Forest Service, 603 F. Supp. 117, 122 (D.S.D. 1984) (concerning a rejected FOIA request for documents related to uranium mining permits that had been granted by the U.S. Forest Service).

with the "well information of a technical or scientific nature" that can be implied from the text of the exemption, but *not* non-scientific information like the well's basic design or depth.[143]

Arguments over the meaning of "well" – as both a topic in government-held documents and as a word that one can find in the dictionary – have littered Exemption 9 jurisprudence since the turn of the millennium. The fossil fuel industry adopted a new strategy of expanding the definition of "well" to include exploratory boreholes and other industry minutiae, while also sweeping in wells that provided access to pools of other liquids including water.[144] This resulted in increasingly finicky litigation that drifted away from the openness philosophy of FOIA by finding more and more well-related things in government-held documents that could be withheld from the public. Granted, the fossil fuel industry failed in an attempt to add information about coal mining to that which can be withheld under Exemption 9, and the presiding court admonished the industry thusly: "Wells are not used to extract solid matter such as coal; they are used to extract liquids or gases."[145] While this ruling prevented solid fuels from being added to the list of things that can come out of a well at an undisclosed location, it inadvertently caused an expansion of the liquids that do the same.

Water can also be obtained from wells, though research for this article did not find any evidence that this precious fluid was discussed in the Congressional record when Exemption 9 was being drafted. Regardless, in 2002 a California district court ruled that government-held

---

[143] *Id*.

[144] *See* Cramer, *supra* note 13, at 155.

[145] Natural Resources Defense Council v. U.S. Department of Interior, 36 F. Supp. 3d 384, 415-416 (S.D.N.Y. 2014). This case concerned a rejected FOIA request for agency documents on coal mining leases and permits in the Powder River Basin region of Montana and Wyoming. The Department of the Interior partially rejected the request under Exemption 9, per an industry claim that oil and natural gas wells are sometimes drilled *through* coal deposits, while liquid fuel deposits are sometimes found in conjunction with coal mining operations. This convoluted reasoning was rejected by the court.

information on “ground water inventories” and “well yield in gallons [of water] per minute” could be withheld because the water wells relevant for the case were commercial and the associated data furnished to the government should therefore be kept confidential. Without citing any precedent or discussions of Congressional intent, the court then determined that this justified a FOIA rejection under Exemption 9.[146] Hence, water wells were now included in the wells covered by the exemption.

In 2005, another California district court determined that the meaning of “well” in Exemption 9 could be interpreted more liberally because, even though fossil fuels were the exclusive matter of discussion in Congressional deliberations while drafting FOIA in the 1960s, there was no evidence that Congress intended to *not* include other types of liquids such as water.[147] This curious act of proving and accepting a negative further affirmed that water, when obtained from a well, could be a secretive topic in FOIA jurisprudence. In another expansion of this topic, in 2019 the District of Columbia district court added exploratory fossil fuel boreholes that *unexpectedly* become water wells to the well-related things that can remain secretive under Exemption 9.[148]

The eligibility of water for withholding under that exemption was perhaps solidified at the circuit court level in 2017, in a case brought by an environmental group called AquAlliance

[146] Starkey v. U.S. Department of Interior, 238 F. Supp. 2d 1188, 1195-1196 (S.D. Cal. 2002) (concerning a rejected FOIA request for documents pertaining to a sand mining operation adjacent to the requester’s property).
[147] Natural Resources Defense Council v. Department of Defense, 388 F. Supp. 2d 1086, 1107-1108 (C.D. Cal. 2005) (concerning a rejected FOIA request for documents on water wells that had been contaminated by a chemical that was being researched by the requesting organization).
[148] Story of Stuff Project v. U.S. Forest Service, 366 F. Supp. 3d 66, 81-82 (D.D.C. 2019) (concerning a rejected FOIA request for documents on natural water sources in San Bernadino National Forest that had been tapped by the Nestle corporation to manufacture bottled water). A borehole is a very narrow shaft drilled into the ground during the exploration process, in search of fossil fuels or water. Typically, a borehole that successfully finds an underground source is then expanded into a larger well for extraction.

that filed a FOIA request for documents on the depths of drinking water wells in central California. The group was researching the impact of deep wells on natural water supplies found in groundwater and aquifers, which can be a crucial factor for the viability of California's complex public water system.[149] The request was rejected by the Bureau of Reclamation (which oversees water systems in California) under the "well" terminology of Exemption 9.[150] AquAlliance claimed that water wells were not within the original Congressional intent for Exemption 9, and cited Congressional reports that only discussed fossil fuel wells during the drafting of FOIA. The group also argued that its interest in the depth of wells was outside the "geological and geophysical information" named in the text of the exemption, which implies a focus on a well's location on a map of the Earth's surface.[151]

Without citing precedents or documents that would verify Congressional intent, the circuit court rejected the group's argument because there was no evidence that Congress intended Exemption 9 to *only* cover fossil fuel wells, nor evidence that Congress did *not* intend to include other kinds of wells. With the strange logic of proving a negative while also making that negative larger, the court reasoned that the entire text of Exemption 9 ("geological and geophysical information and data, including maps, concerning wells") contains "nothing ambiguous" which in turn allows a wider interpretation of its meaning rather than a narrower one.[152] The court used this double logical fallacy to add both the location of a water well *and* its

[149] *See* Taylor Wetzel, *AquAlliance v. United States Bureau of Reclamation: The Impact of Withholding Information from the Public*, 44 ECOLOGY L.Q. 565, 568 (2017).
[150] AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101 (D.C. Cir. 2017).
[151] *Id*. at 104.
[152] *Id*. at 105.

depth to Exemption 9, which by all available evidence was originally intended to only cover the geographic locations of fossil fuel wells.[153]

Exemption 9 is also prone to new developments in political history, which have caused the expansion of types of information that can be withheld from the public under the exemption. Maps indicating the locations of fossil fuel wells became more secretive after the terrorist attacks of 2001, when officials adopted the belief that terrorists could use maps of sensitive fossil fuel infrastructure and facilities to plot attacks with the intent of causing economic chaos. This resulted in more citizen requests for maps that illustrate well locations being withheld under Exemption 9, and this is now often done in conjunction with Exemption 1 (national security).[154]

Exemption 9 jurisprudence offers a lesson in how the secrecy of a specific topic leads to over-interpretation of that topic, and hence more secrecy. An early concern about bootleggers hijacking a company's underground fossil fuel source has become a reason to keep government-held documents about water wells secret. On the topictivity of wells in general, the statutory text of FOIA and its attendant deliberations in Congress provide no guidance (except for the wishes of an influential industry) for wells being more important for the nondisclosure of government-held documents than any other esoteric topic that might appear in agency paperwork. Some examples of such topics, among many, include economic statistics,[155]

---

[153] *See* Wetzel, *supra* note 149, at 570-571.

[154] Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F.Supp.2d 1313, 1321-1322 (D. Utah 2003) (concerning a rejected FOIA request from an environmental group for documents about the interior designs of dams, which were believed in the post 9/11 period to be attractive targets for terrorists). *See also* Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 MARYLAND L. REV. 1060, 1079-1080 (2014).

[155] The Bureau of Economic Analysis coordinates economic statistics like Gross Domestic Product (GDP) that are used by legislators. 15 C.F.R. §§ 801.1-801.13 (1972).

mediation practices during labor disputes,[156] or the management of personnel decisions among the federal work force,[157] all of which are relevant for far larger populations than those who worry about a citizen knowing the location of an oil well.

The statutory meaning of Exemption 9 has never been addressed by the Supreme Court, resulting in a hodgepodge of lower court rulings in which judges were convinced by agency officials that the terse original text of the exemption should be expanded to include more types of wells and more of the liquids found in them. This is another consequence of the topictivity being conjectured in this article. A definitive ruling from the Supreme Court that demands a return to the original interpretation of Exemption 9 would help organize the current jurisprudential mess, while making the government at least a little less secretive when citizens and watchdogs request information on a topic that has a direct influence on many of their lives – the pollution caused by the fossil fuel industry and its effects on the water needed for life to thrive.

V. Conclusion: The Trouble with Topictivity

For FOIA Exemption 3, the qualifying statutes used as examples in this article all allow the withholding of government-held information based on a specific topic. Meanwhile, the topical focus of Exemption 9 creates its own strange pattern of secrecy via judicial interpretations of its statutory text. These outcomes are enabled by an unsupported focus on

[156] The Federal Mediation and Conciliation Service oversees the use of mediators during contract negotiations between labor unions and employers that are regulated by the National Labor Relations Board. 29 U.S.C. § 172 (1947).
[157] The Office of Personnel Management oversees the hiring of federal workers and manages their salaries, health benefits, and retirement plans. 5 U.S.C. §§ 1101-1105 (1966).

the procedural minutiae of statutes that qualify for Exemption 3 while ironically violating the openness and transparency philosophies of FOIA itself; while courtroom arguments have made the statutory text of Exemption 9 less and less distinct. This jurisprudence is almost entirely devoid of awareness of how the distinct topic at hand becomes more secretive, via procedural arguments in court, than similar topics that have not been given the same statutory consideration.

For example, and as discussed here, the names of federal employees who review crop insurance applications are more secretive than those of their colleagues who review flood insurance applications;[158] or, the location of a northern goshawk's nest within Grand Canyon National Park is more secretive than the locations of the nests of that bird's cousins on nearby private lands.[159] Furthermore, an agency investigation of practices in the Indian Health Service is more secretive than an investigation by the same agency of a corporate health care provider;[160] or, the structural integrity of a damaged building that is currently being investigated by the feds is more secretive than that of a building being investigated by a non-governmental safety expert.[161]

For Exemption 3 disputes in particular, these awkward outcomes are engendered by qualifying statutes that do not reflect the openness philosophy of FOIA, making the use of FOIA Exemption 3 in conjunction with those statutes inherently illogical. As discussed in this article, this had resulted in some absurdly specific topics receiving justification for their secrecy via

[158] *See supra* notes 49-50 and accompanying text.
[159] *See supra* notes 74-75 and accompanying text.
[160] *See supra* note 87 and accompanying text.
[161] *See supra* notes 90-93 and accompanying text.

purely procedural court arguments that very rarely discuss *why* that topic should be more secretive than something similar. This in turn can make a particular topic look more important than something else that is very similar and equally important outside of the minutiae of procedural courtroom analyses, such as crop insurance deliberations vs. flood insurance deliberations. Routinely, these conclusions are reached with practically no rhetorical or logical justification. Conversely, one must wonder why the similar but different topic now appears less important (and less secretive) simply because it does not have its own withholding statute that qualifies for FOIA Exemption 3.

The statutory text of Exemption 3, and the Congressional debates when it was being drafted, acknowledged the potential conflict with pre-existing withholding provisions in other statutes. However, that political record gives no indication that the other statutes should have primacy over the governmental openness philosophy of FOIA. That record also hints at the value of document-by-document discussions of what is worthy of being withheld, but it has no indication of Congressional intent to make certain named topics more secretive than others. Meanwhile, the statutory text of Exemption 9 names the locations of wells specifically, but with no indication that Congress intended that topic to be expanded to wells in general and all related information about them. Even the Congressional debates when that exemption was being drafted – complete with the demands of the powerful fossil fuel industry – only indicated that industry's very specific concerns about being rewarded for their initial exploratory labors. All of that Congressional intent has been stretched and obfuscated by jurisprudence that focused on procedural minutiae and neglected the spirit of FOIA.

This article argues that agencies have thus been enabled to declare that certain esoteric topics can be withheld, in contradiction of the non-topical philosophy of FOIA. Furthermore, there are even more qualifying statutes that have not yet resulted in noteworthy topics becoming excessively secretive, but which could if an Exemption 3 denial reaches the courts and receives the same procedural focus. For example, if the Securities and Exchange Commission believes that the current market positions of a commodities trader who is currently under investigation are sensitive enough to remain secret, with that secrecy embedded in a qualifying statute that the commission enforces, then this topic can be withheld under FOIA Exemption 3 regardless of its utility to the requester.[162] As another example, a qualifying statute enforced by the Department of Education allows that agency to place extra importance on the secrecy of an educational institution's responses to questions during an agency review of its operations, and this topic can also be withheld under Exemption 3.[163]

As the Freedom of Information Act reaches a milestone anniversary in 2026, this article argues that the judiciary can regain the original spirit of the act, while relieving judges and agency officials of the need to have awkward discussions of how a narrow topic deserves secrecy or to concoct rhetorical strategies to avoid such discussions altogether. As a result, unlike wide-ranging subject areas like national security and trade secrets, there would be no more unwarranted secrecy of esoteric and narrow topics whose secrecy has little support in the

[162] Commodity Exchange Act, 7 U.S.C. § 12(a)(1) (1936); *affirmed in* Hunt v. Commodity Futures Trading Commission, 484 F. Supp. 47, 49 (D.D.C. 1979) (concerning a rejected FOIA request from a commodity trading company for documents related to an ongoing investigation of itself).
[163] Higher Education Act, 20 U.S.C. § 1099c-1 (1965); *affirmed in* Bagwell v. U.S. Department of Education, 183 F. Supp. 3d 109, 126-27 (D.D.C. 2016) (concerning a rejected FOIA request for documents pertaining to agency reviews of the compliance patterns of various universities in observing the requirements of the Clery Act, which in turn requires timely submission of campus crime statistics).

Congressional record for either FOIA or the qualifying statutes. This is turn would eliminate awkward *topictivity* and make all topics equally transparent.

FOIA jurisprudence has simply drifted away from the statute's original intent.[164] Judges in modern FOIA disputes that reach their courts should not depend on recent precedents that found obtuse procedural justifications for keeping topical documents secret, and instead should reach back to the earlier precedents that were both more aware of the original FOIA philosophy and were unaffected by the nondisclosure strategies that secretive agencies figured out how to use later. Granted, an appreciable percentage of citizen FOIA requests are honored without controversy. But when an agency rejects a request and the requester challenges the matter in court, research by a long line of legal commentators has shown that FOIA is then analyzed by courts in a fashion that enables procedural minutiae and even loopholes in the exemptions to justify the withholding, while FOIA's spirit of openness tends to be relegated the background. The judiciary openly disdained that relegation back in 1976, when the Supreme Court proclaimed: "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[165]

For Exemption 3, the judiciary should return to the statutory language of the 1976 amendment to its original text, in which a qualifying statute was required to succinctly state its reason for a particular document to be withheld, and that determination should be made on a document-by-document basis.[166] Qualifying statutes were either passed before FOIA and did not share its future transparency philosophy, or were passed after it and ignored that

[164] *See e.g.* McCraw, *supra* note 141; Prime & Russomanno, *supra* note 141; Kwoka, *supra* note 154.
[165] 425 U.S. at 361; *see also supra* note 138.
[166] *See supra* note 2 and accompanying text.

philosophy altogether. FOIA was purposefully written to increase the transparency of the entire Executive Branch,[167] so it should be the primary arbiter of document disclosure rather than succumbing to less expansive statutes that have been used to chip away at its transparency goals.

For Exemption 9, lawmakers could consider repealing it altogether, because it is targeted at an incongruously precise topic while later jurisprudence somehow allowed that topic to get bigger. Due to the continuing political influence of the fossil fuel industry,[168] this is unlikely in practical terms, but the jurisprudential record has shown that Exemption 9 is likely to decrease transparency for finicky procedural reasons and has done little to increase transparency when citizens seek government-held information on a topic of great environmental and economic importance. For the time being, judges could return to the terse statutory text of Exemption 9 and stop accepting industry and agency arguments that the text could or should say more than it really does.

This may bring an end to awkward and unsupported *topictivity*, at least as a term that was made up for this article. Much more importantly, unless there is more solid justification found in Congressional intent and the original statutory text of FOIA, these narrow topics can and should be as transparent as all other less nitpicked but equally important topics.

[167] Or to use the terminology in the statute, "Public information; agency rules, opinions, orders, records, and proceedings." 5 U.S.C. § 552 *at* preamble.
[168] *See* Open Secrets, *Industry Profile: Oil & Gas* (2025), *available at* https://www.opensecrets.org/federal-lobbying/industries/summary?id=E01 (last visited Jan 31, 2026); Nina Lakhani, *Fossil Fuel Lobbyists Outnumber All Cop30 Delegations except Brazil, Report Says*, THE GUARDIAN, Nov. 14, 2025, *available at* https://www.theguardian.com/environment/2025/nov/14/fossil-fuel-lobbyists-cop30 (last visited Jan. 31, 2026).