Data Deserts and the Duty to Document

ABSTRACT

Freedom-of-information laws speak aspirationally about furthering the public's right to know. But in practice, there is no entitlement to *information* – only to *documents*. If the government fails to document essential performance metrics, FOI law provides no recourse. And government agencies have demonstrated a remarkable capacity for ignorance: There is no reliable data about how many prisoners are kept in solitary confinement, how frequently U.S. postal trucks crash, how often students assault teachers, and all manner of other information that well-managed agencies logically should track. This paper imagines what a "duty to document" might look like, requiring agencies not just to disclose the records they choose to create, but to create the high-value datasets that effective public oversight demands.

Data Deserts and the Duty to Document

By Frank D. LoMonte[i]

I. INTRODUCTION

We don't know how many people die in county jails, or what they die from.[1] We don't know why students get suspended from public schools.[2] We don't know how many college dormitory buildings contain asbestos.[3] We don't know how often U.S. Postal Service trucks crash,[4] how often teachers are assaulted by their students,[5] or how often people get evicted from their rental homes.[6] That the public cannot answer these fundamental questions is not the product of deficiencies in freedom-of-information laws. If records containing this information existed, the records would be accessible, under every state's open-records statute. The reason the public lacks answers is that the government lacks answers: Government agencies do not reliably gather data or create assessments reflecting how effectively they are doing their jobs.

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[1] Aaron Sankin & Ilica Mahajan, *How We Analyzed the Justice Department's Death in Custody Data*, MARSHALL PROJ. (Aug. 7, 2025), https://www.themarshallproject.org/2025/08/07/dcra-leak-data-analysis-methodology.

[2] Fazil Khan & Sarah Butrymowicz, *Suspended for 'other': When states don't share why kids are being kicked out of school*, HECHINGER REPORT (May 28, 2024), https://hechingerreport.org/suspended-for-other-when-states-dont-share-why-kids-are-being-kicked-out-of-school/.

[3] Sara Ganim, *Unwilling to pay to remove dangerous asbestos, universities across the U.S. claim it's safe to ignore*, PENNLIVE (Aug. 17, 2020), https://www.pennlive.com/news/2020/08/unwilling-to-pay-to-remove-dangerous-asbestos-universities-across-the-us-claim-its-safe-to-ignore.html.

[4] Peter Musurlian, *Lawmakers troubled by data dearth of USPS trucking contractors' accidents, fatalities*, FED. NEWS NET. (May 7, 2024), https://federalnewsnetwork.com/federal-newscast/2024/05/lawmakers-troubled-by-data-dearth-of-usps-trucking-contractors-accidents-fatalities/.

[5] Arlinda Smith Broady, *Georgia schools: Violence against teachers often underreported, advocates say*, ATLANTA JOURN.-CONST'N (May 17, 2019), https://www.ajc.com/news/local/violence-against-teachers-often-underreported-advocates-say/DqTyVdvI9vlHllmayX2gvJ/.

[6] Andre Claudio, *Cities Need More Robust Data and Analysis to Better Address the Eviction Crisis*, ROUTE FIFTY (Dec. 6, 2021), https://www.route-fifty.com/management/2021/12/cities-need-more-robust-data-and-analysis-better-address-eviction-crisis/187301/.

One of the existential shortcomings of freedom-of-information ("FOI") law is that agencies can be compelled to produce only the records they choose to create. If agencies decide to remain ignorant to matters of great public importance – even matters that go directly to the agencies' own competency and trustworthiness – FOI law provides no recourse. As judges have said many times over, FOI laws do not require agencies to create new records.[7] Even if raw data might exist somewhere within an agency's repository, the agency cannot be compelled to gather and produce a compilation of it.

The question is: Why not? Why are agencies allowed to willfully blind themselves to shortcomings in their own performance and outcomes?

This paper imagines what a "duty to document" might look like, requiring agencies to affirmatively create the datasets that the public most needs to see for effective government oversight. The paper looks both through the lens of history – a "duty to document" even appears in the Constitution, which requires Congress to keep a journal of its proceedings – and by analogy to the way government regulations frequently impose a duty to document on private industry (such as reporting workplace injuries, pollutant discharges, layoffs and product recalls).

Following this brief introduction, the paper will proceed in five parts. Section II will introduce the workings of FOI laws, and how legislatures and courts have generally avoided imposing any obligation on agencies to create records responsive to requesters' queries. Section III will identify some of the most glaring examples of "data deserts" that illustrate the government's systematic blindness to trends and patterns that well-managed agencies would logically want to track and memorialize. Section IV will assess prior attempts at imposing a duty to document on the public sector – such as the FBI's Uniform Crime Reporting system and the

[7] *See* Sec. III(A), *infra*.

Jeanne Clery Campus Safety Act administered by the Department of Education – and how those efforts have produced only modestly useful results, owing largely to ineffectual enforcement. Section V focuses on one area of the law where a "duty to document" explicitly exists – the Federal Records Act – but concludes that, even where the law appears plainly to obligate agencies to create a public-records trail of their activities, enforcement has proven elusive. Section VI will draw on examples from the private sector, where government has required regulated industries to report data addressing crucial public health and safety concerns, to demonstrate that better data-gathering is possible when there is political will to make reporting compulsory and meaningful consequences for noncompliance. Section VII will examine what strategies might more effectively compel government actors to reliably create the records that the public needs, concluding that FOI statutes could logically be broadened to encompass not just documents that exist, but documents that *should* exist. Finally, Section VIII concludes that, for FOI laws to realize their full potential, agencies must be required to gather, retain and periodically audit high-value datasets necessary for the public to hold their government accountable.

II. THE HOLE IN THE CIVIC INFORMATION SAFETY NET

During the early days of both of Donald Trump's presidential administrations, public-facing datasets began disappearing from government websites or becoming less visible on those sites, including those documenting the severity of global climate change.[8] The erasure or alteration of government-maintained data accelerated with the onset of the second Trump

[8] Laignee Barron, *Here's What the EPA's Website Looks Like After a Year of Climate Change Censorship*, TIME (Mar. 1, 2018), https://time.com/5075265/epa-website-climate-change-censorship/; Chris Mooney & Julia Eilperin, *EPA website removes climate science site from public view after two decades*, WASH. POST (Apr. 29, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/04/28/epa-website-removes-climate-science-site-from-public-view-after-two-decades/.

presidency in 2025. The entire unit within the Department of Education charged with tracking school performance data was shuttered.[9] Statistics about misconduct by police and correctional officers were pulled from the Justice Department's website.[10] More than 200 datasets addressing public health disappeared from the online repository of the Centers for Disease Control and Prevention, with some later restored in altered form.[11] Other health databases simply went dormant, left for months without customary updating.[12] As federal websites began disappearing, panicked nonprofits and researchers scrambled in what resembled a "digital barn-raising" to duplicate and preserve as many datasets as possible, arguing that informed policymaking depends on data.[13] Whatever one thinks of the president and his policies, prioritizing the deletion of data that undermines the government's preferred narrative underscores a powerful reality: Information is the fuel for informed, participatory citizenship. The most effective way to disarm one's political opposition is to deprive the opposition of the ammunition of facts. As one commentator critical of the president observed, referring to the erasure of federal data about jobs and other economic metrics: "Control the data, and you control the narrative."[14]

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[9] Jodi S. Cohen & Jennifer Smith Richards, *Elon Musk's Team Decimates Education Department Arm That Tracks National School Performance*, PROPUBLICA (Feb. 11, 2025), https://www.propublica.org/article/department-of-education-institute-education-science-contracts-doge.
[10] Andrew Free, *Trump's Deleted Police Misconduct Database Was Full of Prison and Border Incidents*, THE APPEAL (Feb. 27, 2025), https://theappeal.org/nlead-trumps-deleted-police-misconduct-database-full-of-prison-and-border/.
[11] Janet Freilich, W. Nicholson Price II & Aaron S. Kesselheim, *Disappearing Data at the U.S. Federal Government,* N.E. J. OF MED. (Mar. 26, 2025), https://www.nejm.org/doi/full/10.1056/NEJMp2502567.
[12] Aria Bendix, *Dozens of CDC databases are not being updated — most related to vaccines, study finds*, NBC NEWS (Jan. 26, 2026), https://www.nbcnews.com/health/health-news/cdc-databases-not-updated-vaccines-study-rcna255467.
[13] Mike Schneider, *Why are data nerds racing to save US government statistics?*, ASSOCIATED PRESS (July 25, 2025), https://apnews.com/article/census-bureau-data-doge-trump-statistics-4af6380f23dc9878c76515d5626baffd.
[14] Irwin Stelzer, *Donald Trump is seizing control of data to bend America's narrative*, THE TIMES (June 13, 2025), https://www.thetimes.com/business/economics/article/donald-trump-is-determined-to-control-all-aspects-of-civil-society-2njq3q0k9.

Although access to government data is central to effective public oversight of government, the public's right of access to information is legally precarious. The Supreme Court has recognized a generalized right to receive information that is implicit in the First Amendment's guarantee of freedom of speech.[15] But at the same time, the Court has refused to find that the Constitution compels the government to affirmatively afford access to information in its possession.[16] In other words, the First Amendment is understood to furnish only a "negative right" against government interference with speech, not a "positive right" to compel the government to turn loose of information, or grant access to closed physical spaces.[17]

Lacking a constitutional right of access, the public must instead rely on a patchwork of federal and state disclosure statutes, the most prominent of which is the Freedom of Information Act ("FOIA")[18] and its analogs in every state.[19] Requesters have used FOI statutes with remarkable results, exposing malfeasance and dysfunction both within government and in

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[15] *See* Lamont v. Postmaster General, 381 U.S. 301 (1965) (invalidating a statutory requirement that foreign mailings of "communist political propaganda" be delivered only upon request by the addressee, which would inhibit would-be readers from ordering the material); Martin v. City of Struthers, 319 U.S. 141 (1943) (striking down a municipal ordinance outlawing door-to-door distribution of handbills as violative of the First Amendment rights of both the recipients and the speakers).

[16] *See* 438 U.S. 1, 9 (1978) (Burger, J., plurality) ("This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.").

[17] *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 917-18 (2010) (stating that "the First Amendment, understood in its traditional, largely negative aspect, remains almost completely unconcerned with market failure in the marketplace of ideas and with imbalance among speakers, their resources, and their persuasive power" and that the First Amendment "was designed to serve a quite limited purpose in preventing government suppression, rather than serving as a guarantor of the accuracy (or quality in general) of public debate") (parenthetical in original); Erik Ugland, *Demarcating the Right to Gather News: a Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 143 (2008) (stating that Supreme Court First Amendment decisions "uniformly shape rights by a negative construction" with the one notable exception of cases recognizing a constitutionally based right to attend criminal court proceedings).

[18] 5 U.S.C. § 552.

[19] *See* Cat Reid, *Shading Sunshine: The Proliferation of Exemptions to State Open Records Laws*, 73 DUKE L.J. 424, 427 (2023) ("Just as the Freedom of Information Act (''FOIA') ensures citizens can access records maintained by federal agencies, every state has its own statute granting access to information within its borders.")

government-regulated industries.[20] While each FOI statute is slightly different, they share a common purpose and core function: Because public accountability is critical for a functioning democracy, all records created or received in the course of government activity are strongly presumed to be open for inspection, with narrow exceptions.[21]

But FOI statutes have well-recognized shortcomings.[22] Owing in large measure to government agencies' own conscious decision to understaff FOI compliance, results can be slow, with requesters receiving records – if at all – months or even years belatedly.[23] Enforcement, too, can be slow, costly and ineffective. Suing is the primary (and in many instances the only) recourse when records are wrongfully withheld, a time-consuming process that only the most patient and well-financed requesters are in a position to undertake. And while FOI statutes

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[20] *See* Stephanie M. Lee, *Hidden in Plain Sight: Using Public Documents to Report on Elusive Stories*, OPEN NOTEBOOK (Aug. 12, 2025), https://www.theopennotebook.com/2025/08/12/hidden-in-plain-sight-using-public-documents-to-report-on-elusive-stories/; Denise-Marie Ordway, *How they did it: Public records helped reporters investigate police abuse of power*, JOURNALIST'S RESOURCE (Mar. 5, 2019), https://journalistsresource.org/politics-and-government/elkhart-public-records-investigation/; Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html.

[21] *See* Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (stating that FOIA "was enacted to facilitate public access to Government documents" in order to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny") (internal quotation marks and citation omitted). *See also* TEX. GOV'T CODE § 552.001(a) ("Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.").

[22] *See* Barry Sullivan, *Executive Secrecy: Congress, the People, and the Courts*, 72 EMORY L.J. 1301, 1311 (2023) ("Scholars generally agree that FOIA has not created the degree of governmental transparency, citizen empowerment, and democratic renewal that some of its proponents hoped for."); Daxton R. "Chip" Stewart & Charles N. Davis, *Bring Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 515, 519 (2016) ("FOIA has failed to live up to its promise of transparency, with agencies broadly applying exemptions and federal courts enabling expansion of the scope of these exemptions, typically in the name of protecting privacy.").

[23] *See* Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 342 (1994) (stating that compliance with federal FOIA's statutory requirement of a response within 10 working days "has become the exception rather than the norm" and observing: "FOIA processing delays are caused in part by limited government resources and by an agency perception that FOIA responses are not within an agency's core mission.").

provide – and courts dutifully recite – that exemptions to disclosure are narrowly construed,[24] the experience of frustrated requesters is quite different: In practice, even the most aggressive interpretations of exemptions are typically reviewed with extreme deference, and denials are difficult to overturn.[25]

Given the failings of FOI statutes to meet the public's need for information about government activities, some have argued for locating a constitutionally based right of access in the Due Process Clause.[26] Due process is understood to forbid government authorities from withholding or revoking access to property – including government-created property, such as licenses or entitlement payments – without substantial justification.[27] Under this theory, FOI laws create a form of "property right" in the form of the expected receipt of records documenting government functions, denial of which could give rise to a constitutional claim enforceable in federal court.[28] However creative this theory is, it exists only in theory, and constitutional

[24] *See* State ex rel. Thomas v. Ohio State Univ., 643 N.E.2d 126, 128 (Ohio 1994) (stating that Ohio Public Records Act "generally is construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records"); VA. GOV'T CODE § 552.001(b) ("This chapter shall be liberally construed in favor of granting a request for information."); WASH. CODE ANN. § 42.56.030 ("This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.").

[25] *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 187 (2013) (observing that FOIA calls for *de novo* judicial review of the agency's denial decision but "[d]espite Congress's clear intentions, commentators have observed that judicial review of agency FOIA decisions is less than vigorous" and citing research that indicates the government wins 90 percent of FOIA lawsuits); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 166 (2006) (commenting that "judicial deference has been the norm in FOIA cases involving national security").

[26] *See* D. Victoria Baranetsky, *Corporate Secrecy and a Due Process Right to Access*, 14 UC IRVINE L. REV. 1011, 1057 (2024) (arguing that courts could consider government-maintained health-and-safety data to be "property" to which the public has an entitlement, enforceable by way of a due process claim).

[27] *See* Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1466 (2007) (explaining mid-20th century "new property" revolution in Supreme Court's due process jurisprudence: "The government is not required to confer on individuals valuable entitlements such as welfare benefits, professional licenses, or employment. But when it does so, it may not withhold or take away those entitlements for unconstitutional reasons; nor, where the entitlements rise to the level of a property interest, may it take them away without due process of law.").

[28] Baranetsky, *supra* note 26, at 1057.

recourse against government actors who refuse to furnish information remains a remote and speculative prospect.

While the state of public access to essential information is fragile and arguably worsening,[29] a few encouraging signs exist. There is a growing "open data" movement – particularly well-developed in major metropolitan areas – to affirmatively publish datasets addressing crime, transportation, and other government performance metrics.[30] Virtually every state and large city has an open data portal, though they vary considerably in their level of detail and public utilization.[31] Journalists have put government-published datasets to productive use, including examining the backlog of unprocessed citizen complaints against police in Detroit[32] and publicizing an increase in out-of-order parking meters in Sacramento.[33] The movement toward affirmatively pushing out data – rather than waiting to receive a demand for it – has been hailed as a value-add for the FOI movement, potentially reducing the caseload for perennially

[29] *See* GOV'T ACCOUNTABILITY OFC., ADDITIONAL GUIDANCE AND RELIABLE DATA CAN HELP ADDRESS AGENCY BACKLOGS 8, 15 (Mar. 2024), https://www.gao.gov/assets/gao-24-106535.pdf (documenting growing delays in federal FOIA processing times, with those categorized as backlogged – awaiting processing beyond the 20-day statutory deadline – exceeding 200,000 for the first time in 2022, and only 14 percent of requests regarded as "complex" fulfilled within the statutory period). *See also* Miranda S. Spivack, *Local governments hide public records, face few consequences*, REVEAL NEWS (Nov. 16, 2016), https://revealnews.org/article/local-governments-hide-public-records-face-few-consequences/ ("There are no definitive national studies of the scope of state and local secrecy, but the studies, surveys and anecdotal evidence that do exist strongly suggest state and local government secrecy has increased in the past 10 years. While there are many reasons for this, it has coincided with a decline in local news coverage, technological advances that governments haven't been able to afford and an increase in outsourcing of government functions to private entities.").

[30] Frank D. LoMonte, Brittany Suszan & Priya Dames, *Open and Shut? The Promise-And Problems-Of Government Open Data Portals in Meeting Community Information Needs*, 28(2) UCLA J. L. & TECH. 93, 106-08 (2023).

[31] Andrew Adams, *Open Data Is Here. But What Data Do Governments Publish?*, GOV'T TECH. (Oct. 18, 2022), https://www.govtech.com/biz/data/open-data-is-here-but-what-data-do-governments-publish.

[32] Kayleigh Lickliter, *Detroit police complaint backlog grows despite efforts to bolster closure rates*, BRIDGEDETROIT (May 8, 2025), https://www.bridgedetroit.com/detroit-police-complaint-backlog-grows-despite-efforts-to-bolster-closure-rates/.

[33] Ariane Lange, *How you pay to park in Sacramento is changing. Why are coin slots being blocked?*, SACRAMENTO BEE (Apr, 4, 2025), https://www.sacbee.com/news/local/article303502156.html.

backlogged FOI fulfillment offices, and helping justify investing in better records-management technology.[34]

But researchers have documented recurrent deficiencies in these data sites, including failure to furnish the underlying documentation from which data summaries are derived, which would enable interested observers to exercise quality control over the government's work.[35] As commentators have pointed out, open "data" is not synonymous with open "government," nor does one necessarily accompany the other, since it is possible to selectively disclose trivial data yet remain opaque about matters of real importance.[36] So while the popularization of public-facing data dashboards is a welcome additive to the information constellation, these portals still suffer from the same problem afflicting FOI law: Open data portals contain only the datasets that agencies have chosen to assemble, not necessarily the ones answering the public's most pressing questions.

In sum, the U.S. legal system aspirationally recognizes a broad public right of access to information about government functions. But the law does not guarantee that the information the

[34] *See* Daniel Berliner, Alex Ingrams & Susanne J. Piotrowski, *The Future of FOIA in an Open Government World: Implications of the Open Government Agenda for Freedom of Information Policy and Implementation*, 63 VILL. L. REV. 867, 886-87 (2018) (enumerating potential spillover benefits from emerging government investment in making data accessible). The authors also acknowledge potential risks and downsides, citing the example of Mexico, where a move toward making more records digitally accessible resulted in greater wait times for FOI requesters, because agencies did not receive sufficient staffing to carry out the new digitization work. *Id.* at 888.

[35] *See* Inês A. Ferreira *et al.*, *Why Do Open Data Platforms Fail? A Revised Conceptual Model with Mitigation Actions*, 203 COMPUTERS & INDUS. ENG. 111042 (2025) (identifying challenges to successfully maintaining open data platforms, including limited usability of data and lack of public engagement).

[36] Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government,"* 59 UCLA L. REV. DISC. 178, 181 (2012); *see also id.* at 182 (pointing out that "governments may be able to take credit for increased public accountability simply by delivering open data technology"). *See also* Graham Moomaw, *Gibson pushing for robust FOIA library in package of City Hall transparency measures*, RICHMONDER (Sept. 11, 2025), https://www.richmonder.org/gibson-pushing-for-robust-foia-library-in-package-of-city-hall-transparency-measures/ (reporting that city of Richmond's open data portal is unstaffed and has rarely been updated since its launch in 2017).

public most needs will actually be accessible, and – as will be explored in Sec. III – does not provide much recourse if the government fails to document its activities in a retrievable way. In the absence of an enforceable right, the public is left largely dependent on agencies' honesty and diligence in publishing their own data – the quality of which can be spotty and difficult to verify.

III. "DATA DESERTS" ACROSS THE CIVIC MAP

During 2010, reporters for the *Chicago Tribune* learned of the case of a gynecologist who had been allowed to continue practicing despite nearly a decade's worth of allegations from multiple patients accusing him of sexually assaulting them during examinations.[37] The case of Dr. Bruce Smith set the newspaper off on a deeper inquiry into the way Illinois regulates doctors, leading to an impactful series, "Predatory Doctors," which documented at least 16 instances of Illinois physicians keeping their medical licenses despite criminal convictions for sex offenses.[38] The series was credited with impelling the state legislature to enact the Patients' Right to Know Act, requiring the state's professional regulatory agency to compile and publish information about accusations of wrongdoing against physicians, including firings, criminal convictions, and medical malpractice judgments.[39] But as successful as the *Tribune* series was, it also exposed a dangerous gap in the public's right-to-know.

The *Tribune* was forced to sue the state Department of Financial and Professional Regulation in search of records documenting the number of complaints lodged against particular doctors who had faced charges of sexual misconduct.[40] The agency denied the newspaper's

[37] CHICAGO TRIB., *Women charged rape; doctor still practiced* (Apr. 30, 2010), https://www.chicagotribune.com/2010/04/30/women-charged-rape-doctor-still-practiced/.
[38] Megan Twohey, *Doctors Operate Unchecked*, CHICAGO TRIB. (Mar. 2, 2011), http://www.chicagotribune.com/lifestyles/health/chi-doctor-sex-charges-gallery-storygallery.html.
[39] CHICAGO TRIB., *Patients' Right to Know Act passes Assembly* (May 17, 2011), https://www.chicagotribune.com/2011/05/17/patients-right-to-know-act-passes-assembly/.
[40] Chicago Trib. v. Dept. of Fin. & Prof. Reg., 8 N.E.3d 11 (Ill. App. 2014).

request, asserting that it could not discern the number of complaints against any particular physician without manually reviewing and totaling documents in multiple paper files – which it was not legally obligated to do.[41] An appellate court agreed, citing the statement of legislative intent prefacing Illinois' Freedom of Information Act, which provides that the statute "is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time(.)"[42] In other words, the agency prevailed in the FOIA case because of the very lack of commonsense recordkeeping that the newspaper set out to spotlight: Regulators remaining ignorant of problematic doctors facing repeat complaints of the same type of misconduct. This situation exemplifies the "data deserts" problem afflicting the public's ability to remain informed: Records that answer pressing public questions often simply don't exist.

There are multiple explanations for why the public is unable to get answers to seemingly obvious questions about governmental functions. It is of course possible that the government is simply lying – that information does exist, but that agency officials have unlawfully chosen to withhold it, hoping to avoid exposure of scandal or incompetence.[43] Regrettably, that explanation cannot be ruled out. Agencies regularly tell requesters that they have no responsive documents,

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[41] *Id.* at 84.
[42] *Id.* at 85, citing 5 ILCS § 140/1.
[43] *See* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 117 (2012) (stating that, given considerable discretion to decide what data to post online, "agencies naturally refrain from disclosing potentially sensitive or embarrassing information about their own activities"); *see also* Alain Stephens & Daniel Nass, *The ATF's Failure to Produce Public Records Keeps the Gun Industry in the Shadows*, THE TRACE (June 25, 2021), https://www.thetrace.org/2021/06/atf-foia-request-firearm-industry-regulation-lawsuit/ (discussing Bureau of Alcohol, Tobacco & Firearms' persistent failure to promptly honor FOIA requests, and citing present and former ATF employees who acknowledge that "the agency obfuscates to avoid embarrassment").

only to suddenly "discover" the documents when sued or threatened with litigation.[44] But other explanations are also plausible.

First, it is possible that information does exist within the vast stockpile of data that agencies ingest or create, but that the agency has never compiled or analyzed it so as to be amenable to production when faced with a request. One might refer to this explanation as the "we-don't-know" explanation.

Second, it is possible that the agency has simply failed to gather information that a well-managed agency logically would obtain – either because of laziness or purposeful avoidance. One might refer to this explanation as the "we-don't-care" explanation.

Statutory remedies already exist when agencies simply lie about the existence of responsive documents. It is illegal to purposefully withhold records responsive to an FOI request

[44] *See, e.g.,* Islamic Shura Council v. FBI, 779 F. Supp. 2d 1114, 1117 (C.D. Cal. 2011) ("The Government previously provided false and misleading information to the Court. The Government represented to the Court in pleadings, declarations, and briefs that it had searched its databases and found only a limited number of documents responsive to Plaintiffs' FOIA request and that a significant amount of information within those documents was outside the scope of Plaintiffs' FOIA request. The Government's representations were then, and remain today, blatantly false."). *See also* Mark Boxley, *New lawsuit accuses state agency of illegally withholding public records concerning 'Alligator Alcatraz,'* SPECTRUM NEWS 13 (Oct. 14, 2025), https://mynews13.com/fl/orlando/news/2025/10/14/new-lawsuit-accuses-state-agency-of-illegally-withholding-public-records-concerning--alligator-alcatraz- (quoting lawsuit by environmentalists over siting of immigrant detention camp, which alleges that Florida regulators initially denied having any responsive records about the camp, then later came forward with an "incomplete" production); Jen Fifield, *Maricopa County recorder turns over texts sought by Votebeat about his fight for election authority*, VOTEBEAT (Sept. 22, 2025), https://www.votebeat.org/arizona/2025/09/22/maricopa-county-recorder-justin-heap-releases-text-messages-supervisors/ (detailing dispute between news organization and county election clerk's office, which repeatedly denied requests for clerk's text messages on the grounds that none existed, only to produce 135 messages when threatened with legal action under Arizona's Public Records Law); PROPUBLICA, *Delayed, Denied, Dismissed: Failures on the FOIA Front* (July 21, 2016), https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front (recounting experience of reporter Cezary Podkul, who was told by the New York Housing Authority that documents regarding a tax-evasion scheme by landlords did not exist even though two inside sources had already shown him the documents – only to have the records materialize after the reporter escalated by involving legal counsel).

– and, indeed, in some states a crime.[45] It is the latter two "data desert" issues – the "we-don't-know" information buried in agency repositories eluding disclosure, or the "we-don't-care" information that agencies entirely fail to gather – that evade easy legal solution.

A. "We Don't Know": Answers Entombed in Practical Obscurity

The Supreme Court has recognized the concept of "practical obscurity" in the FOIA context: A requester may theoretically be able to assemble the answer to a question by combing through many different remote and obscure data sources, but as a practical matter will never do so.[46] FOI requesters regularly encounter a variant of the "practical obscurity" issue in trying to elicit meaningful responses from government agencies: Responsive data exists, but it is buried within agency repositories, and the agency has no interest in extracting it.

Among the recognized weaknesses in FOI law is the principle that government agencies can be compelled to produce only records they actually have.[47] In other words, while these statutes are referred to as "freedom of *information*" laws, it is more accurate to describe them as "access to *records*" laws, because there is no generalized requirement to furnish information in response to public inquiries.[48]

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[45] *See* NAT'L FREEDOM OF INFO. COALITION, BLUEPRINT TO TRANSPARENCY: ANALYZING NON-COMPLIANCE AND ENFORCEMENT OF OPEN RECORDS LAWS IN SELECT U.S. STATES 5 (2020), https://www.nfoic.org/wp-content/uploads/2020-02/Blueprint%20to%20Transparency_%20Enforcing%20Open%20Records%20Laws-4.pdf (stating that criminal penalties exist in 17 state FOI statutes, 14 of which carry the potential of jail time).

[46] United States Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989).

[47] *See* National Security Counselors v. Central Intelligence Agency, 969 F.3d 406, 409 (D.C. Cir. 2020) (stating that FOIA "only requires disclosure of documents that already exist, not the creation of new records not otherwise in the agency's possession").

[48] *See* Forsham v. Harris, 445 U.S. 169, 185 (1980) ("The Freedom of Information Act deals with 'agency records,' not information in the abstract."). In *Forsham*, the Supreme Court held that federal FOIA does not extend to records created by a federal contractor under a government grant, even if the funding agency has a right to demand access to the records, if the records are not in fact in the agency's physical possession. *Id.* at 171.

Whether an agency "has" a record is, perhaps surprisingly, not a straightforward inquiry. Agencies have resisted being forced to run queries of their own databases to identify data points responsive to FOI requests, insisting that the act of extracting that subset of data amounts to being compelled to create a new record not currently in existence.[49] At times, requesters have succeeded in convincing courts that a request to produce records from a database is the digital equivalent of a search for documents within paper files in a cabinet, which are routinely understood to be subject to FOI requests even if the retrieval requires some effort.[50]

The principle that agencies are obligated only to produce records currently in existence is spelled out explicitly in some state FOI statutes, excusing authorities from any obligation to honor requests for compilations or summaries.[51] Over and over, courts have rebuffed FOI requesters on the grounds that agencies cannot be forced to create new records.[52] For example,

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[49] *See, e.g.,* Center for Investigative Reporting v. United States Dept. of Justice, 14 F.4th 916 (9th Cir. 2021) ("*CIR*"). In *CIR*, the Justice Department denied a FOIA request from a nonprofit investigative journalism organization, seeking data about instances in which guns recovered in criminal investigations turned out to formerly belong to law enforcement agencies. The department argued that it had no such compilation, and had no duty to create one. *Id.* at 937. But an appellate court – relying in part of the intent of Congress expressed when FOIA was updated in 1996 to apply to digital records – found that the requester was asking merely for a search using existing DOJ computer capabilities: "[U]sing a query to search for and extract a particular arrangement or subset of data already maintained in an agency's database does not amount to the creation of a new record." *Id.* at 938. The court said that, since the data elements are already in the agency database, "the result produced by a query is an existing record, regardless of the form it takes." *Id.* at 939.

[50] *See, e.g.,* Pub. Employees' Retirement Sys. v. Nevada Policy Res. Inst., Inc., 429 P3d 280, 286-87 (Nev. 2018) (explaining that, while there is no duty to create a customized report to fulfill a FOIA request, simply applying computer code to retrieve records from a database does not constitute the creation of a new record).

[51] *See, e.g.,* PA. STAT. § 67.705 ("When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.").

[52] *See* Ochsner v. N.C. Dept. of Revenue, 835 S.E.2d 491, 502 (N.C. App. 2019) ("The Public Records Act does not require an agency to create or compile records responsive to a request if those records do not exist; the agency must produce only the records which already exist."); Sander v. Superior Court, 237 Cal.Rptr.3d 276, 288 (Cal. App. 2018) ("while the [FOI law] requires public agencies to provide access to their existing records, it does not require them to create new records to satisfy a request"); State ex rel. Morgan v. New Lexington, 857 N.E.2d 1208, 1215 (Ohio 2006); ("Requests for information and requests that require the records custodian to create a new record by searching for selected information are

when a nonprofit watchdog group asked the CIA to identify, by category, the type of requesters submitting FOIAs – those in the news media category, those in the commercial category, and so forth – a court refused to order the agency to respond, because the agency asserted that it did not organize records in that manner.[53] Courts have differentiated between producing records versus producing "information about or derived from public records," and found no duty to furnish the latter.[54]

There is no clear legal entitlement to access even if all of the underlying raw data is provably within the agency's possession, so that the requester is not asking for new *information* but merely a new *format*. For instance, the Pennsylvania prison system evaded fulfilling a request for data about the diagnoses of inmates receiving medical treatment, which would have required extracting data from each prisoner's medical file.[55] Although the state did not deny being able to create such a dataset – and both the agency and the requester agreed that the medical files themselves could not be produced, because of patient confidentiality – the state was not required to extract the data to satisfy the requester, who was researching whether toxic coal waste from an industrial plant was causing prisoners to suffer respiratory ailments.[56] In another instance, an appellate court ruled in favor of the Chicago district attorney's office in a dispute over records identifying every case in which prosecutors relied on evidence from cellphone

improper requests" under Ohio law); Schulten, Ward & Turner, LLP v. Fulton-DeKalb Hosp. Auth., 535 S.E.2d 243, 245 (Ga. 2000) (stating that Georgia FOI law "places no duty on an officer or agency to create a record, but concerns itself only with the records which a public body actually creates") (internal quotes and citation omitted); State ex rel. Kerner v. State Teachers Retirement Bd., 695 N.E.2d 256, 258 (Ohio 1998) (holding that "a compilation of information must already exist in public records before access to it will be ordered").

[53] Nat'l Security Counselors v. Central Intel. Agency, 969 F.3d 406, 409 (D.C. Cir. 2020).

[54] Hites v. Waubonsee Cmty. Coll., 56 N.E.3d 1049, 1066 (Ill. App. 2016).

[55] Uniontown Newspapers, Inc. v. Pennsylvania Dept. of Corrections, 151 A.3d 1196, 1207 (Pa. Cmmnw. 2016).

[56] *Id.* at 1200.

tracking devices, because the agency did not maintain a list of such cases and would have been forced to individually search each case file: "FOIA does not compel compilation of data [the agency] does not ordinarily keep."[57]

The Supreme Court has stated the scope of an agency's FOIA obligations in relatively narrow terms: FOIA extends only to "documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create."[58] It is of no legal consequence that the agency *should* be able to answer the requester's query, but simply does not keep track of its activities in a logical manner. Take the case of *ACLU v. Arizona Department of Child Safety*, a dispute over records identifying instances in which children suffered abuse or neglect while in state foster placements.[59] In that case, the ACLU sought data from Arizona's child-welfare agency about how often children were harmed by caregivers that the state placed them with – which, logically, would be a question that the agency should be asking itself. Nevertheless, the incurious agency did *not* ask the question – and the state appellate court found that FOI law provides no recourse to compel the agency to do so. Drawing on federal caselaw, the court drew what it acknowledged to be a somewhat fuzzy distinction between running a digital search (which the agency is required to do) versus creating a tally or compilation (which the agency is not required to do).[60] Under state FOI law, the appeals court concluded, "an agency has no legal duty to create a new record that compiles or aggregates information about preexisting records."[61] So, regardless of whether an agency is neglecting essential public duties by failing to analyze its

[57] Martinez v. Cook County State's Atty's Ofc., 103 N.E.3d 351, 357 (Ill. App. 2018).
[58] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975).
[59] 377 P.2d 339 (Ariz. App. 2016).
[60] *Id.* at 345-46. *See also id.* at 347 (acknowledging that it is "a difficult task" for courts to distinguish between searching a database versus creating a new compilation).
[61] *Id.* at 346.

own data to assess its performance, an agency's choice to remain uninformed is impervious to FOI challenge.

B. "We Don't Care": Data Deserts Litter the Landscape

When investigative reporters with the public-radio podcast *In The Dark* began pursuing the cold case of an 11-year-old boy kidnapped from his Minnesota neighborhood and never found, they began asking questions about how often children are reported to be abducted by strangers.[62] Seemingly, this is a gettable piece of information through law enforcement agencies that process reports of missing people. But the answer turned out to be surprisingly elusive: Congress requires the Justice Department to issue a report on child abductions only once every 10 years, and the data is known to be incomplete because reporting by local law enforcement agencies is voluntary.[63] In fact, the journalists said they were told by the FBI not to rely on the agency's two most recent surveys – published in 1988 and 1999 – because the methodologies were so different that no meaningful comparisons could be drawn.[64]

Time and again, people seeking answers to obvious questions about matters within the jurisdiction of government agencies – how many, how often, how bad – are disappointed to learn that the government has never compiled reliable responsive data, even about life-and-death matters. Where it exists at all, data is frequently so incomplete and misleading that – as with the FBI's child-abduction statistics – no intelligible conclusions can be drawn.

On occasion, enterprising journalists and researchers are able to cobble together their own counts, or approximations, of problems that government regulators fail to track. The Associated Press and Cox Media Group built a nationwide database documenting vehicle injuries

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[62] AMER. PUB. MEDIA, IN THE DARK, SEASON 1, https://features.apmreports.org/in-the-dark/season-one/.
[63] *See id.*, Episode 6, https://www.apmreports.org/episode/2016/10/04/in-the-dark-6.
[64] *Id.*

and fatalities among school crossing guards, after learning that no government agency was keeping track of the problem.[65] Vermont Public Radio created its own estimate – culled from death notices, police records, news reports and interviews – of how many homeless people die every year, noting that "(l)ike most states, Vermont does not keep track of how many homeless residents die or what kills them."[66] When an Atlanta television station discovered that the state Department of Transportation did not have records of how often highway guardrails are patched together using pieces from multiple rails – a known safety concern called "Frankensteining" – reporters went on the road with a highway-safety expert and compiled their own inventory.[67] But the public's ability to keep track of government activities and failings should not depend on living in proximity to a well-staffed news organization, given that fewer and fewer Americans are served by local media coverage.[68]

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[65] *See* Dasia Garner, Haya Panjwani, Aaron Kessler, Shannon Butler, Tina Terry & Ted Daniel, *School crossing guards face life-threatening dangers on the job*, ASSOCIATED PRESS (Nov. 7, 2025), https://apnews.com/article/school-crossing-guard-fatal-traffic-accidents-725e0fdb61dd1246318028de92bc7add ("A full accounting is impossible. No federal agencies and just two states track how many crossing guards are injured or killed each year. And local police accident reports often have no code to distinguish between school crossing guards and other pedestrians hit near schools.").

[66] Liam Elder-Connors & Derek Brouwer, *Vermont doesn't track homeless deaths. So we did*, VT. PUB. RADIO (Feb. 5, 2025), https://www.vermontpublic.org/local-news/2025-02-05/vermont-doesnt-track-homeless-deaths-so-we-did.

[67] Kristin Crowley, *Georgia begins guardrail inspection following 11Alive investigation*, 11 ALIVE NEWS (Dec. 31, 2022), https://www.11alive.com/article/news/investigations/georgia-guardrail-investigation-deaths-danger-hazard-frankensteined/85-85b8aa8c-5fef-414c-ae47-f0a382e0faf1#:~:text=ATLANTA%20%E2%80%94%20Guardrails%20across%20the%20state,road%20safety%20advocate%2C%20Steve%20Eimers

[68] Angela Fu, *An alarming number of independent publishers and small chains closed papers last year, new Medill study finds*, POYNTER (Oct. 20, 2025), https://www.poynter.org/business-work/2025/medill-report-local-news-closures-independent-papers-news-deserts/.

Data deserts exist throughout all levels of government and across all subject areas – from student suicides at public universities[69] to the location of hazardous sinkholes.[70] But they are perhaps most prevalent – and most dangerous – in the realm of criminal justice, where people's safety can depend on government agencies using their resources in a sensible, informed way. As one team of researchers concluded after examining 19,000 responses to FOI requests submitted to state and local law enforcement agencies, "official statistics on crime and policing are systematically biased and cannot be taken at face value."[71]

Perhaps most notably, official data about how often people are killed by police officers has been found to be grossly deficient[72] – so deficient that the director of the FBI expressed embarrassment in admitting that the *Washington Post*'s compilation of killings was more complete than his own.[73] As a result, public-policy debate around an issue of utmost national urgency – whether police are abusing their authority to use deadly force – has been taking place in what commentators have called "an information vacuum."[74] As poor as recordkeeping is

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[69] Collin Binkley, *Most big public colleges don't track suicides, AP finds*, ASSOCIATED PRESS (Jan. 2, 2018), https://apnews.com/article/45f78abcfcec43e49f4c0fbe06b66a8b/

[70] *See* Molly Duerig, *Proposed federal law aims to keep better track of sinkhole locations, causes*, CENT. FLA. PUB. MEDIA (Feb. 11, 2025), https://www.cfpublic.org/environment/2025-02-11/proposed-federal-law-better-track-sinkhole-locations-causes (noting that "no comprehensive sinkhole database is currently maintained and made available to the public").

[71] Scott Cook & David Fortunato, *The Politics of Police Data: State Legislative Capacity and the Transparency of State and Substate Agencies*, 117(1) AM. POL. SCI. REV. 280, 281.

[72] *See id.* at 281 (concluding that "police agencies systematically underreport their lethality, annually concealing *hundreds* of killings from the official record") (emphasis in original). *See also id.* at 288 ("The fact that the wealthiest and most durable democracy in history does not know how many of its residents are killed by agents of the state is alarming(.)").

[73] Aaron C. Davis & Wesley Lowery, *FBI director calls lack of data on police shootings 'ridiculous,' 'embarrassing'*, WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html.

[74] Logan Seacrest & Jillian Snider, *Measured Force: The Benefits of Police Data Transparency*, R STREET (Apr. 2024), https://www.rstreet.org/research/measured-force-the-benefits-of-police-data-transparency/. As the authors persuasively argue there: "Few other areas in public policy have such a wide delta between public discourse and available facts."

regarding deadly force, documentation of instances of *non*-deadly force may be even less reliable, with even government authorities admitting that their data should not be relied upon.[75] Police departments are notoriously secretive about records reflecting misconduct allegations against officers, making it virtually impossible to draw conclusions about how serious the problem is and whether it is trending up, down or remaining steady.[76] The deficiencies do not stop there. Journalists have discovered that law enforcement agencies do not reliably keep track of the number of shootings in schools, or about how many recruits die during their police training.[77] The justice system's inability – or refusal – to keep trustworthy records is longstanding. During the 1990s, researchers examining whether death sentences were being imposed equitably in New Jersey discovered that the database of capital murder cases they obtained from the State Police was missing 700 cases – one-sixth of all murders – and noted that this was the same data being submitted to the FBI.[78]

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[75] *See* Dave Altimari, *CT police use-of-force report hampered by incomplete data*, CT MIRROR (Aug. 18, 2022), https://ctmirror.org/2022/08/18/ct-connecticut-police-officers-use-of-force-report-arrest/ (citing state government report that called data cataloging instances of police use of force "inexcusably deficient"). *See also* Brian Howey, Wesley Lowery & Steven Rich, *The unseen toll of nonfatal police shootings*, WASH. POST (Oct. 21, 2025), https://www.washingtonpost.com/investigations/interactive/2022/police-shootings-non-fatal/ ("[T[here is no comprehensive data on incidents in which officers shoot and wound someone. That has made it difficult not only to know how often this happens, but also to hold departments and officers accountable.").

[76] *See* Jon M. Shane, *Improving Police Use of Force: A Policy Essay on National Data Collection*, 29(2) CRIM. JUST. POL'Y REV. 128, 129-30 (2018) ("If we wish to improve police-citizen interaction as it related to use of force, then we must have accurate and timely data about its circumstances. … Public opinion based on isolated episodes or small samples tends to be personal, idiosyncratic, or unique, which may represent the best (or worst) case of its type.") (parentheses in original).

[77] *See* David Riedeman, *FBI's 'gold standard' active shooter report leaves out some school shootings* (June 3, 2025) SCH. SHOOTING DATA ANALYSIS & REP., https://riedmanreport.substack.com/p/fbis-gold-standard-active-shooter (pointing out omissions in FBI annual report that purports to catalog all school shootings); Ryan J. Foley, *Dying to serve: Dozens of recruits have died nationwide while training to become police officers*, ASSOCIATED PRESS (Feb. 18, 2025), https://apnews.com/article/police-academy-recruits-deaths-investigation-sickle-cell-14362b1a86d648967645986cfb4529c8 (describing results of AP's effort to gather nationwide data about deaths of police trainees – data not tracked by any government agency – which documented 29 deaths, a figure one expert called "shocking").

[78] Leigh B. Binen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"*, 87 J. CRIM. L. & CRIMINOLOGY 130, 202 n. 259 (1996).

While immigration enforcement is receiving front-burner national priority and attention, with spending on U.S. Immigration and Customs enforcement experiencing a "meteoric spike" to $85 billion a year,[79] keeping track of how federal immigration authorities do their jobs is elusive. After filing multiple unsuccessful records requests, researchers from the University of Colorado learned that no agency keeps track of how often migrants die trying to cross the Mexican border into Texas, making whatever figures are circulated likely wrong by hundreds, if not thousands, of cases.[80] U.S. Customs and Border Patrol has an internal policy of keeping track of body-cavity searches of detainees, but told a FOIA requester that it does not maintain any data on the outcomes of those searches (*i.e.*, whether any drugs are found that result in an arrest).[81] A research center based at Syracuse University, long considered the authoritative source of information about immigration court cases, discontinued its case-tracking app, concluding that federal data was so unreliable that continuing to distribute it was misleading.[82]

Prisons and jails, too, operate largely in a data vacuum. An investigation by Bloomberg Law and NBC News found that, although there have been multiple horrifying cases of pregnant mothers or their newborn babies dying during childbirth in county jail cells, there is no duty to keep track of pregnancies behind bars or their outcomes – and in the absence of a binding obligation, 22 states maintain no data at all.[83] Likewise, there is no legal requirement for prisons

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[79] Bill Chappell, *How ICE grew to be the highest-funded U.S. law enforcement agency*, NPR NEWS (Jan. 21, 2026), https://www.npr.org/2026/01/21/nx-s1-5674887/ice-budget-funding-congress-trump.
[80] Cody DeBos, *Counting hidden deaths at the U.S.'s most dangerous border crossing*, COLORADO ARTS & SCI. MAG. (Feb. 26, 2025), https://www.colorado.edu/asmagazine/2025/02/26/counting-hidden-deaths-uss-most-dangerous-border-crossing.
[81] Melissa Del Bosque, *Checkpoint Nation*, TEX. OBSERVER (Oct. 8, 2018), https://www.texasobserver.org/checkpoint-nation/.
[82] TRAC IMMIGRATION, *EOIR's Data Release on Asylum So Deficient Public Should Not Rely on Accuracy of Court Records* (June 3, 2020), https://tracreports.org/immigration/reports/611/.
[83] Mackenzie Mays & Jon Schuppe, *Lawmakers vow to improve care for pregnant women in jails*, NBC NEWS (Dec. 18, 2025), https://www.nbcnews.com/news/us-news/lawmakers-vow-improve-care-pregnant-women-jails-rcna246879.

to count and report the number of people held in solitary confinement, or the number of prisoners subject to assaults (with the exception of sexual assault, for which a federal reporting requirement does exist).[84] In Illinois, correctional officials were forced to acknowledge that they know basically nothing about a supervised-release program that uses ankle-bracelet monitors: Why people are being placed under monitoring, how many of them are classified as being at high risk for recidivism, and how many re-offend while wearing the bracelets.[85]

It is perhaps understandable that data is particularly elusive in policing and corrections, because those quasi-military institutions are renowned for their culture of secrecy.[86] As one open-government scholar has observed:

> State and local police departments are, in theory, bound by the same transparency law obligations that apply to every other agency. In reality, in spite of these laws, police departments maintain extraordinary levels of secrecy(.) … Through a web of informational protections extended by all three branches of government—statutory carve-outs crafted by legislators, favorable interpretations of those statutes extended by judges, and agency-level resistance to transparency obligations—police departments systematically evade meaningful public oversight through transparency law mechanisms.[87]

But while the lack of trustworthy data is understandable, it is not excusable. Legislators – federal, state and local – have a responsibility to oversee the operations of the law enforcement and correctional agencies they fund. If those policymakers are not demanding answers, then they

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[84] Matt Ford, *The Missing Statistics of Criminal Justice*, ATLANTIC (May 31, 2015), https://www.theatlantic.com/politics/archive/2015/05/what-we-dont-know-about-mass-incarceration/394520/.

[85] Joseph Darius Jaafari, *Illinois puts ankle monitors on thousands. Now it has to figure out who gets tracked—and why*, MARSHALL PROJ. (July 15, 2019), https://www.themarshallproject.org/2019/07/15/illinois-puts-ankle-monitors-on-thousands-of-people-now-it-has-to-figure-out-exactly-who-gets-tracked-and-why.

[86] *See* Cook & Fortunato, *supra* note 71, at 283 (commenting that "opacity allows agencies to operate with impunity, free from fear of reprisal when drifting from their mandate. … .Police have strong incentives for opacity regarding use of force in particular, as the revelation of police brutality or killings may draw public ire and, with it, the potential for official sanctions(.)").

[87] Christina Koningisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 619 (2023).

are issuing blank checks of authority to agents armed with deadly weapons and empowered to take away people's freedom.[88]

IV. FALTERING ATTEMPTS TO IMPOSE A "DUTY TO DOCUMENT"

The government's duty to keep records is literally as old as the United States; the Constitution obligates Congress to keep and publish "a journal of its proceedings(.)"[89] State constitutions establish a similar duty at the state legislative level.[90] Historically, state statutes have imposed recordkeeping duties on the top executives of state and local government, as in Arizona, where state law charged the governor to "keep a record of his official acts; an account of his official expenses and disbursements, including the incidental expenses of his department(.)"[91] Additionally, courts have sometimes recognized a common-law duty to create and maintain records memorializing governmental activities and functions.[92] Virginia's Supreme Court has explained the common-law responsibility in expansive terms:

> The duty that the common law assigns public officers to make a written record of governmental action reflects the importance of public records in providing accurate and transparent accounts of governmental acts. The serious nature of this responsibility is such that the duty may be required under the sanction of official oath. … Public officers are charged with the duty to keep written records of

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[88] *See* Cook & Fortunato, *supra* note 71, at 280 ("Police enjoy extraordinary discretion in exercising their power–including life and death decisions–making oversight and management crucial.").
[89] U.S CONST., ART. I, SEC. 5, CL. 3.
[90] *See, e.g.*, COLO. CONST. ART. V, § 13; GA. CONST. ART. III, § V; UTAH CONST. ART. VI, § 14.
[91] Mathews v. Pyle, 75 Ariz. 76251 P.2d 893, 894 (Ariz. 1952). *See also* State v. Allen, 159 N.E. 591, 592 (Ohio 1927) (describing duties imposed on county court clerks by state law, which requires them to "enter all orders, and … keep journals records, books, and papers pertaining to the court, and record its proceedings"); State ex rel. Lindsay v. Boyden, 100 N.W. 761, 762-3 (S.D. 1904) (quoting South Dakota statute that assigned county auditors to "keep an accurate record of their official proceedings, and carefully preserve all of the documents, books, records, maps and other papers required to be deposited or kept in his office, and prepare a financial statement of the county annually").
[92] *See* State ex rel. Charleston Mail Ass'n v. Kelly, 143 S.E.2d 136, 139 (W.Va. 1965) ("Whenever a written record of the transactions of a public officer … in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document[.]"). *See also* Keddie v. Rutgers, State University, 689 A. 2d 702, 709 (N.J. 1997) ("A common-law record is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office.").

> governmental action affecting the citizens of their jurisdictions, and the record entries made by those public officers serve as the 'public record' on which the citizens can rely.[93]

When a legal duty to keep records does exist, premature destruction of those records can give rise to liability.[94] The duty to document government proceedings carries weight in evidence law, which recognizes that records kept in the ordinary course of government business are admissible at trial without need for testimony from their creator.[95] In rare instances, government officials have been held legally accountable for neglecting their duty to maintain records, such as the case of a small-town Louisiana mayor who was convicted of a years-long pattern of malfeasance in failing to prepare the town's financial records and provide them to the state auditor, in violation of a statutory duty to preserve and maintain public records, among other charges.[96] But the existence and scope of the duty to keep records is not universally agreed-upon. In Indiana, for instance, the state Supreme Court recently declined to impose a common-law responsibility on the state to maintain reliable driving records about motorists.[97] Even where a duty exists, it is not clear that a legal obligation to *create* records confers a right for the public to

[93] State of Maine v. Adams, 672 S.E.2d 862, 867-68 (Va. 2009) (internal quotes and citation omitted).
[94] *See* OHIO REV. CODE §§ 149.351(B) (providing cause of action for person adversely affected by destruction of public records to bring civil claim for damages).
[95] *See* Village of Evanston v. Gunn, 99 U.S. 660, 666 (1878) (recognizing that records kept by a public servant "whose public duty it is to record truly the facts" are competent evidence); *see also* Rosenfeld v. City of New York, 197 A.D.3d 746, 747 (N.Y. App. Div. 2021) ("Under the common-law public document exception, when a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports so made by or under the supervision of the public officer are admissible in evidence since such public official has no motive to distort the truth and the writing is prepared in discharge of a public duty(.)") (internal quotes, brackets and citation omitted). Federal Rule of Evidence 803(8) codifies this long-established principle, providing that government records of "a matter observed while under a legal duty to report" are not hearsay and are admissible to prove the truth of their contents.
[96] State v. Thompson, 233 So.3d 529 (La. 2017).
[97] Kelly v. Ind. Bureau of Motor Vehicles, 260 N.E.3d 934 (Ind. 2025).

inspect those records.[98] Nor is there a clear legal pathway for any particular citizen to bring an enforcement action against an agency that neglects its recordkeeping responsibilities.[99]

State and federal statutes occasionally carry a legally enforceable duty to create documentation, as is common in open-meeting laws, which require decisionmaking bodies not only to conduct their meetings in public but also to publish agendas and maintain minutes documenting their activities.[100] These statutes confer a right of action for a citizen aggrieved by the absence of documentation to bring a civil action and obtain redress.[101] But these laws are something of an anomaly, and outside of a few subject-matter-specific statutes, there is no overarching statutory obligation for government employees to routinely quantify and report their activities or the activities of those they regulate.

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[98] *See* Belt v. Prince George's County Abstract Co., 20 A. 982, 983 (1890) (rejecting contention that general public has common-law right of access to records maintained under court clerk's legal recordkeeping duty).

[99] *See, e.g.*, Florez v. Broward Sheriff's Ofc., 270 So.3d 417, 420 (Fla. App. 2019) (deeming it "well established that the government does not owe individual citizens a common law duty to convey accurate information or maintain accurate records"); Layton v. Fla. Dept. of Highway Safety & Motor Vehicles, 676 So.2d 1038, 1041 (Fla. App. 1996) (dismissing claim brought by motorist who claimed state agency disregarded its common-law duty to maintain accurate driving records, because the duty is owed to the public generally and not to any particular motorist). *See also* Chicago Title & Trust Co. v. Danforth, 86 N.E. 364, 367 (Ill. 1908) (recognizing that, at common law, access to records maintained by county property office was limited to parties with a "special Interest" in the records and did not extend to the general public).

[100] *See* GA. CODE ANN. §§ 50-14-1(e)(1), (e)(2)(A)-(B) (providing that, in advance of each meeting, a public body shall "make available an agenda of all matters expected to come before the agency or committee" and that the body shall publish a summary of its activities within two days of the meeting, and prepare minutes available for public inspection no later than the time of the body's next scheduled meeting); KY. REV. STAT. § 61.835 (providing that minutes memorializing activities of government bodies "shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body"); OHIO REV. CODE. § 121.22(C) ("The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection.").

[101] *See* Florida Citizens' Alliance, Inc. v. School Bd. of Indian River County, 398 So.3d 1005 (Fla. App. 2024) (finding county school board to be in violation of Florida's "Sunshine Law" when textbook committee failed to maintain records of its proceedings other than some members' informal handwritten notes, which were not preserved or made public); State ex rel. Long v. Cardington Village Council, 748 N.E.2d 58 (Ohio 2001) (recognizing writ of mandamus compelling town council to prepare and file adequate minutes of proceedings as proper remedy when citizen complains that official business was discussed at meetings without legally required documentation).

In the absence of a legally enforceable "duty to document," it has become commonplace for officials at all levels of government to purposefully avoid creating records for the sole purpose of avoiding disclosure laws.[102] In one especially elaborate dodge, the city of Knoxville, Tennessee, structured its search for a new police chief so that search committee members would never come into possession of the candidates' resumés; rather than let committee members handle the documents, which would have clearly rendered them public records, the city's private headhunting contractor held the documents up to a video camera so committee members could view them remotely.[103] At the start of Donald Trump's second presidential administration, the *Washington Post* reported on a "creeping culture of secrecy," with executive-branch employees directed to stop sending politically sensitive correspondence via email to evade detection.[104] As the *Post*'s Hannah Natanson reported, refusing to commit information to writing has substantive

[102] *See, e.g.*, Dakota Antelman, *Speak your mind — but not in writing — schools chief urged staff,* CONCORD BRIDGE (Sept. 2, 2025), https://concordbridge.org/index.php/2025/09/02/speak-your-mind-but-not-in-writing-schools-chief-urged-staff/ (reporting that employees in Massachusetts school district were instructed, in the midst of controversy over antisemitism in schools, to "avoid putting comments in writing … citing public disclosure laws"); J. Scott Trubey, *Watchdogs: Atlanta skirting records law in probe of $40,000 payment*, ATLANTA JOURN.-CONST'N (July 30, 2018), https://www.ajc.com/news/local-govt--politics/watchdogs-atlanta-skirting-records-law-probe-000-payment/MEZ49C4eQ2CKIT95QYNAMI/ (describing how a law firm hired by the Atlanta mayor's office briefed the mayor only verbally for the express purpose of leaving no discoverable public records).

[103] Tyler Whetstone, *Knoxville admits it hired a police chief search firm to go around public records laws*, KNOXVILLE SENTINEL (Nov. 16, 2022), https://www.knoxnews.com/story/news/local/2022/11/16/knoxville-hired-police-chief-search-firm-to-bypass-open-record-laws-hide-candidate-names/69618035007/.

[104] Hannah Natanson, *The first rule in Trump's Washington: Don't write anything down*, WASH. POST (June 29, 2025), https://www.washingtonpost.com/politics/2025/06/29/first-rule-trumps-washington-dont-write-anything-down/. Perhaps validating the obsession with avoiding scrutiny, a few months after her initial story, Natanson became the target of an FBI search of her home and seizure of her electronic devices as federal agents sought to expose government leakers who might have corresponded with her. Perry Stein & Jeremy Roebuck, *FBI executes search warrant at Washington Post reporter's home*, WASH. POST (Jan. 14, 2026), https://www.washingtonpost.com/national-security/2026/01/14/washington-post-reporter-search/.

consequences for agencies' ability to function: "The overall effect has been to impede honest discussion, slow work, stir confusion and depress morale."[105]

At times, lawmakers have tried to impose enforceable obligations on governmental entities to gather and report data about particularly critical functions. But the history of these attempts demonstrates how challenging it is to legislate reliable documentation practices up against the entrenched culture of secrecy inimical to powerful institutions.

For instance, in 1990, Congress enacted the Jeanne Clery Campus Safety Act in response to the murder of a 19-year-old Lehigh University freshman in a campus dormitory.[106] The Clery Act imposes a variety of affirmative disclosure obligations on federally supported colleges and universities, including the duty to publish an annual report enumerating how many serious crimes, by category, took place on campus property during the prior year.[107] Although the reporting requirements are relatively minimal – colleges have 10 months to put the report together, and it encompasses a handful of enumerated crimes – colleges still regularly fall short of even these undemanding standards.[108] In a 2014 investigative report, the *Columbus Dispatch* found that nearly half of all Clery reports filed by colleges each year reported zero sexual assaults, and 20 percent never reported a single sexual assault over a 12-year span.[109] The *Dispatch* found that even implausibly crime-free reports were uncritically posted to the Department of Education's online Clery Act repository, because the department exercised no

[105] Natanson, *supra* note 104.
[106] *See* Dennis E. Gregory & Steven M. Janosik, *The Clery Act: How Effective is it? Perceptions from the Field–The Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 7-8 (2002) (explaining background to enactment of statute).
[107] 20 U.S.C § 1092(f)(1)(F).
[108] *See* Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31, 44 (2017) ("One reason the Clery Act reports have had minimal impact is that they vastly understate the campus sexual assault problem.").
[109] Collin Binkley, Jill Riepenhoff, Mike Wagner & Sara Gregory, *Reports on College Crime are Deceptively Inaccurate*, COLUMBUS DISPATCH (Sept. 30, 2014), https://perma.cc/G58W-P7SN.

systemic quality control, and only examined the data's accuracy if someone complained.[110] The threat of federal financial sanctions for underreporting, which are relatively rare, has proven insufficient to incentivize full disclosure up against universities' self-interest in avoiding the reputational harm that accompanies being known as a high-crime campus.[111]

Similarly, the FBI's Uniform Crime Reporting ("UCR") program, which purports to be the authoritative national census of crime in America, is notoriously incomplete.[112] In 1930, Congress tasked the FBI with compiling an annual statistical report about the incidence of serious crimes across the United States.[113] It soon became apparent that the statistics – gathered only from local police and sheriff's departments that chose to cooperate voluntarily – were incomplete and misleading, causing one expert to opine that the United States had "the worst criminal statistics of any major country in the Western World."[114] Besides the gaps left by agencies electing not to participate, even the data the FBI succeeded in gathering was recognized

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[110] *Id.*

[111] *See* Josh Moore, *Out from the Curtains of Secrecy: Private University Police and State Open Records Laws*, 2(2) J. CIVIC INFO. 1, 16 (2020) (commenting that "self-reported statistics are not a sufficient or reliable check" on campus police powers and observing that "[e]ven the most well-intentioned college administrator has an incentive not to call much attention to officer abuse or high crime rates, because those revelations would likely hurt the university's public image, affecting enrollment and donations(.)"); *see also* Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOLOGY, PUB. POL'Y & L. 1, 4 (2015) (reporting that colleges increased the number of reported sexual assaults by an average of 44 percent during years they were undergoing federal auditing, suggesting that prior figures were likely understated); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1613 (2014) ("Clery Act enforcement and monitoring have proven insufficiently rigorous …to encourage robust action against sexual harm on college and university campuses.").

[112] *See* Amanda Watford, *Politicians love to cite crime data. It's often wrong*, STATELINE (Oct. 27, 2023), https://stateline.org/2023/10/27/politicians-love-to-cite-crime-data-its-often-wrong/ (reporting that 30 percent of law enforcement agencies habitually fail to submit data to FBI, including the majority of agencies in Florida); Weihua Li and Jasmyne Ricard, *4 Reasons We Should Worry About Missing Crime Data*, MARSHALL PROJ. (July 13, 2023), https://www.themarshallproject.org/2023/07/13/fbi-crime-rates-data-gap-nibrs (explaining that, despite FBI's 2021 modernization effort, "[m]ore than 6,000 law enforcement agencies were missing from the FBI's national crime data … representing nearly one-third of the nation's 18,000 police agencies" and one-quarter of the nation's population).

[113] Sophia M. Robison, *A Critical View of the Uniform Crime Reports*, 64 MICH. L. REV. 1031, 1033 (1966).

[114] *Id.* at 1033-34.

as unreliable, because local law enforcement agencies were not applying consistent methodologies.[115]

It has proven equally difficult to enforce compliance with the Deaths in Custody Act,[116] a statute originally passed in 2000, and renewed in 2014, with the goal of requiring law enforcement and correctional authorities to quantify the known problem of prisoners dying avoidable deaths, such as from abuse or neglect.[117] Journalists with the nonprofit criminal-justice news organization, The Marshall Project, discovered recurring quality-control issues with the federal data, largely owing to noncompliance by local authorities and a lack of federal enforcement.[118] After journalists sued the Justice Department to dislodge five years' worth of backlogged data encompassing 25,000 cases, Marshall Project reporters identified at least 681 known cases missing from the data – including 450 just in Louisiana alone.[119] The findings came despite a chewing-out administered by senators in 2022, after Senate committee investigators found 990 deaths missing from the DOJ's data just in fiscal year 2021 alone.[120]

The common denominator across many of the faltering attempts at generating reliable nationwide data is the federal government's limited ability to impose sanctions on uncooperative state and local agencies. Principles of federalism are understood to preclude imposing penalties

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[115] *Id.* at 1034-35. *See also* Cook & Fortunato, *supra* note 71, at 285 (noting that many law enforcement agencies choose not to participate in UCR, and that "the DOJ does not audit these data or sanction individual agencies for nonparticipation," making the records "inadequate for assessing patterns of crime").
[116] 34 U.S.C. §§ 60105–06.
[117] CONG. RES. SERV., DEATH IN CUSTODY REPORTING ACT: BACKGROUND AND LEGISLATIVE CONSIDERATIONS (May 17, 2023), https://www.congress.gov/crs-product/R47559.
[118] Ilica Mahajan, Anna Flagg & Aaron Sankin, *Why Doesn't the U.S. Government Know How Many People Die in Custody?*, MARSHALL PROJ. (Aug. 7, 2025) https://www.themarshallproject.org/2025/08/07/deaths-in-custody-reporting-act-problems.
[119] *Id.*
[120] PRISON LEGAL NEWS, *Senators Spank DOJ for Failure to Implement Death-in-Custody Reporting Act* (Aug. 15, 2023), https://www.prisonlegalnews.org/news/2023/aug/15/senators-spank-doj-failure-implement-death-custody-reporting-act/.

to coerce compliance with federal policy priorities.[121] This "anti-commandeering" principle was set forth most thoroughly in the Supreme Court's 1992 decision, *New York v. United States*, in which the justices struck down a federal statute compelling states to take measures to dispose of radioactive waste generated within their borders.[122] The Court found that the statute crossed the line from encouragement into impermissible compulsion: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[123] Lacking a "stick" to compel compliance directly, Congress has instead sought to bring about policy change by dangling the "carrot" of federal financial benefits that come with substantive policy conditions, such as conditioning receipt of federal highway funding on taking measures to curb drunk driving.[124]

But neither the "carrot" nor the "stick" has proven particularly effective at ameliorating data deserts. The Clery Act contemplates federal fines of more than $71,000 for each failure to report a campus crime,[125] yet underreporting remains commonplace,[126] perhaps because colleges

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[121] *See* Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351, 354-55 (2020) (explaining how Supreme Court's "commandeering" doctrine evolved).
[122] 505 U.S. 144.
[123] *Id.* at 166.
[124] *See* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that, even though Congress could not directly compel states to raise their legal age for alcohol consumption, Congress can do so indirectly by using its spending power to condition eligibility for federal highway grants on raising the drinking age).
[125] 34 C.F.R. § 668.84(a)(1).
[126] *See, e.g.*, Molly Gibbs, *State finds UC Santa Cruz and 5 other colleges underreported violent campus crimes*, SANTA CRUZ SENTINEL (Aug. 1, 2024), https://www.santacruzsentinel.com/2024/08/01/state-finds-uc-santa-cruz-and-5-other-colleges-underreported-violent-campus-crimes/; Vanessa Miller, *Audit finds University of Iowa has 'serious' shortcomings in reporting crimes, doing fire drills*, CEDAR RAPIDS GAZETTE (Feb. 16, 2022), https://www.thegazette.com/higher-education/audit-university-of-iowa-serious-shortcomings-in-clery-act-compliance/; Shannon Najmabadi, *Texas State dramatically under-reported the number of sexual assaults on campus in 2016 and 2017*, TEXAS TRIB. (Sept. 30, 2019), https://www.texastribune.org/2019/09/30/texas-state-dramatically-under-reported-number-sexual-assaults-campus/; Matt Mencarini & David Jesse, *MSU cited for 'serious noncompliance' with Clery Act related to Nassar, crime reporting*, LANSING ST. J.-DET. FREE PRESS (Jan. 30, 2019),

prefer the uncertain risk of getting caught and fined over the certainty that disclosing large crime totals will damage the institution's image.

And while the commandeering doctrine does not come into play when Congress imposes duties on federal as opposed to state agencies, other considerations weigh against legislating a "duty to document" at the federal level – including the cost of compliance as well as the risk of unflattering disclosures. Predictably, the administration and party in power believe themselves to be trustworthy without oversight, so there is an existential challenge convincing officials to, in effect, curb their own discretion by volunteering for greater scrutiny.

V. THE PUNCHLESS FEDERAL "DUTY TO DOCUMENT"

Nominally, a "duty to document" already exists under federal law. But the largely unsuccessful attempts to compel federal agencies to comply indicate just how fiercely government officials will resist being forced to document their activities – and how feeble the remedies are for noncompliance. The Federal Records Act ("FRA") provides that:

> The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.[127]

As promising as that may sound – "functions, policies, decisions, procedures, and essential transactions" would seem to encompass quite a bit of what FOIA requesters are after – the FRA turns out to be a toothless tiger. Courts have repeatedly held that the Act provides only limited recourse for disappointed requesters.

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https://www.lansingstatejournal.com/story/news/2019/01/30/msu-cited-violations-clery-act-related-larry-nassar/2725326002/.

[127] 44 U.S.C. § 3101.

The ineffectiveness of the FRA played out in a series of cases brought by a good-government watchdog group, Citizens for Responsibility and Ethics in Washington ("CREW"), challenging actions of the first Trump administration, in particular the failure of Cabinet-level agencies to maintain records adequate for the public to perform effective oversight.

Joined by another nonprofit advocacy organization, Public Employees for Environmental Responsibility ("PEER"), CREW sued the Trump-appointed head of the Environmental Protection Agency, Scott Pruitt, alleging that Pruitt maintained "extensive secrecy" that included spending $25,000 of agency money to install a soundproof phone booth in his office.[128] The plaintiffs' legal theory focused on Pruitt's practice of purposefully refusing to document important agency matters, including forbidding his employees from taking notes during meetings, to frustrate the intent of the FRA.[129] In addition to Pruitt, the plaintiffs sued the National Archives and Records Administration ("NARA"), alleging that NARA neglected its statutory duty to bring the EPA into compliance with the records act.[130]

The government moved to dismiss in reliance on the D.C. Circuit's opinion in *Armstrong v. Bush*, which held that the FRA offered no private right of action to redress claims that agency employees destroyed documents in contravention of mandatory records retention schedules – a matter committed to the enforcement discretion of NARA, which has the authority to refer improper destructions to the attorney general.[131] But the *CREW I* court distinguished that holding and found that the complaint stated a triable claim.[132] The existence of an internal administrative

[128] Brandi Buchman, *Environmentalists Say Too Much Secrecy in EPA*, COURTHOUSE NEWS (Feb. 23, 2018), https://www.courthousenews.com/environmentalists-say-too-much-secrecy-in-epa/.
[129] Citizens for Responsibility & Ethics in Wash. v. Pruitt, 319 F.Supp.3d 252, 255 (D.D.C. 2018). Adopting the convention of the district court, this case will hereinafter be referred to as "*CREW I*."
[130] *Id.*
[131] *Id.* at 258, citing Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991).
[132] *Id.* at 259-60.

remedy for unlawful destruction – which was decisive in *Armstrong* – did not foreclose judicial review of claims that agencies violated other FRA provisions, the court held.[133] But the plaintiffs' victory was fleeting. Just a few months later, the judge dismissed their case on mootness grounds, after Pruitt had left office and the new EPA administration took corrective steps including reminding agency employees of their obligation to follow the FRA.[134]

Whatever avenue for forcing agencies to document their work might have appeared promising after *CREW I* largely disappeared in subsequent CREW cases. In 2018, CREW sued the Department of Homeland Security ("DHS") in relation to the agency's failure to keep careful track of immigrants held in federal detention centers.[135] The lawsuit revolved around a controversial "family separation" program enforced by the first Trump administration, under which the DHS purposefully incarcerated migrant parents and children in separate facilities when they were apprehended together.[136] Implementation of the program was widely viewed as "botched,"[137] and a series of inspector general's and auditors' reports confirmed that the department did not maintain adequate records enabling them to track the whereabouts of children separated from their families, which would be necessary to reunite the families.[138] Following these revelations, CREW sued under the Administrative Procedures Act ("APA"), arguing that the department neglected its legal duty under the FRA to document its policies and decisions.[139]

A federal district court found that CREW stated no actionable claim under the APA, because the APA is a vehicle for challenging only a specific agency action taken or not taken,

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[133] *Id.*
[134] Citizens for Responsibility & Ethics in Wash. v. Wheeler, 352 F.Supp.3d 1, 10-11 (D.D.C. 2019).
[135] Citizens for Responsibility & Ethics in Wash. v. United States Dept. of Homeland Sec., 387 F.Supp.3d 33, 42 (D.D.C. 2019).
[136] *Id.* at 36-37.
[137] *Id.* at 37.
[138] *Id.* at 41-42.
[139] *Id.* at 42.

not for broadly attacking the agency's programs, priorities or legal compliance.[140] Rather than challenging a "discrete agency action," the judge wrote, CREW was attempting to "force compliance with a broad statutory mandate, a prospect which is outside the purview of the APA."[141]

CREW amended and re-filed the complaint in 2019 – only to lose on the merits.[142] In the second go-round, the court found that, even though the DHS' recordkeeping policies lacked detail, they were not so skeletal as to flunk deferential scrutiny under the FRA, which delegates considerable authority to each component unit of each agency to develop suitable records creation and retention protocols.[143]

For good measure, CREW lost again in a subsequent case against Trump's first-term Secretary of Defense, Mike Pompeo, alleging that Pompeo and his leadership team practiced "off-the-books" diplomacy in contravention of their FRA duty to keep records.[144] The plaintiffs cited several instances in which Trump administration authorities failed to document foreign-policy interactions, including an infamous call involving Trump's energy secretary and the president of Ukraine, part of the basis for the first of Trump's congressional impeachments.[145] Relying on *Pruitt*, the court dismissed CREW's complaint, saying it was an impermissible

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[140] *Id.* at 49.
[141] *Id.* at 51.
[142] Citizens for Responsibility & Ethics in Wash. v. United States Dept. of Homeland Sec., 507 F.Supp.3d 228 (D.D.C. 2020).
[143] *Id.* at 247-48. Applying the APA, the court applied the most relaxed level of scrutiny, and determined that the pleadings did not establish that DHS' policies were arbitrary or capricious. *Id.* at 248.
[144] Citizens for Responsibility & Ethics in Wash. v. Pompeo, No. 19-3324, 2020 WL 1667638 (D.D.C. Apr. 3, 2020) at *2 (hereinafter, "*Pompeo I*").
[145] *Id. See also* Matthew Yglesias and Andrew Prokop, *The ultimate guide to Donald Trump's first impeachment*, VOX NEWS (Nov. 29, 2021), https://www.vox.com/c/2020/2/6/20914280/impeachment-trump-explained (explaining that impeachment arose out of Trump's apparent linkage of U.S. aid to Ukraine to the quid-pro-quo of Ukraine assisting in investigating Hunter Biden, the son of Trump's political opponent).

attempt to attack specific instances of recordkeeping noncompliance that are reviewable only by NARA, not by the courts.[146]

Upon re-filing, CREW's amended complaint fared no better. Even fortified with additional examples of purposeful avoidance of recordkeeping, the court found the amended complaint to be vulnerable to dismissal on the same grounds, "various isolated violations of Department guidelines governing records creation, rather than an agency-wide policy running afoul of the FRA."[147] While the complaint specified two instances in which Trump administration authorities directed their subordinates not to take notes of meetings, those instances did not establish the "policy-and-practice" necessary to sustain a claim.[148]

The collective takeaway from the CREW line of cases is a discouraging one for those aggrieved by agencies' failure to document their activities. Under *Pruitt*, it is impossible to broadly challenge agency programs or priorities, and under *Pompeo*, it is impossible to attack specific instances of noncompliance with FRA record-creation duties. Though the D.C. federal courts seem to believe there is some navigable "Goldilocks" pathway between these cases – a complaint that is neither overly general nor overly specific – experience indicates that the pathway, if it exists at all, is vanishingly narrow.

VI. PUBLIC DUTIES IN THE PRIVATE SECTOR

Perhaps counterintuitively, private entities – which, unlike government agencies, are not subject to FOI laws – are under rigorous disclosure obligations that in many ways exceed the obligations that government policymakers have been willing to impose on themselves. It is widely recognized that mandatory data reporting – and the adverse publicity that can accompany

[146] *Pompeo*, 2020 WL 1667638 at *5.
[147] Citizens for Responsibility & Ethics in Wash. v. Pompeo, No. 19-3324, 2020 WL 5748105 (Sept. 25, 2020) at *6.
[148] *Id.* at *7.

being exposed as an outlier – is one of the most effective tools in the arsenal of regulators to incentivize industries to operate more safely.[149]

Federal statutes and regulations, as well as their state analogs, frequently require private-sector employers to compile and report data about safety conditions, including work-related deaths, injuries and illnesses.[150] Employers also must submit data to the federal Equal Employment Opportunity Commission each year about the demographic composition of their workforces, among other datapoints.[151] And federal contractors are required to track and report the number of annual hires who are veterans.[152]

Similarly, private industry is under a regimen of federal and state environmental laws that require keeping track of how toxic substances are handled, when they are mishandled, and with what consequences.[153] For example, the Emergency Planning and Community Right-to-Know Act (EPCRA), requires facilities that handle certain hazardous chemicals above specified quantities to report on chemical inventories, releases, and storage to the Environmental Protection Agency and to state and local emergency-response authorities.[154] Transporters of

[149] *See* Annie Brett, *Rethinking Environmental Disclosure*, 112 CALIF. L. REV. 1535, 1555 (2025) (discussing how disclosure of companies' environmental transgressions can have marketplace impacts, including depressing stock prices and causing consumers to take their business elsewhere); Sidney M. Wolf, *Fear And Loathing About the Public Right To Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act,* 11 J. LAND USE & ENVTL. L. 217, 281 (1996) (quoting commentator who described EPA's Toxic Release Inventory disclosure system as "regulation by embarrassment").
[150] 29 U.S.C. § 657(c); 29 C.F.R. §§ 1904.4-1904.7. *See also* CAL. LABOR CODE § 6409.1 (requiring California employers to file reports of any occupational injury or illness with state regulators)
[151] 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.
[152] 38 U.S.C. § 4212(d).
[153] *See, e.g.*, 15 U.S.C. § 2607 (providing that manufacturers or processors of chemicals must retain and report certain information, including the makeup of their products, the quantities handled, and the known environmental health and safety effects, among other data).
[154] 42 U.S.C. §§ 11001–11050.

hazardous materials are required to keep records about everything from employee training to accidental spills.[155]

Companies that manufacture or sell consumer products – from toys to pharmaceuticals – are obligated to maintain and publish information about hazards associated with their products.[156] Telecommunications carriers must keep records of consumer complaints, submit maps of their broadband service areas to the Federal Communications Commission,[157] and file reports of the duration, scope and cause of service outages, which the FCC releases in aggregate form.[158]

Publicly traded companies are subject to especially rigorous reporting requirements, on the theory that disclosure protects investors and the integrity of the financial markets generally.[159] Banks and other financial institutions are governed by additional recordkeeping and disclosure requirements, including the duty to track and report suspicious currency transactions.[160] Federally insured lenders must maintain detailed records about their accountholders accessible to federal auditors, including the identities of each accountholder and

[155] 49 C.F.R. §§ 171.15–171.16.
[156] *See generally* Timothy D. Zick, *Reporting Substantial Product Safety Hazards Under the Consumer Product Safety Act*, 80 GEO. L.J. 387 (1991) (describing how federal product-safety law imposes reporting requirements on manufacturers and distributors, including duty to notify federal government of any known defect that has caused or could cause death or serious injury); *see also* 16 CFR § 1115.27 (specifying information that must be included in notices of product recalls, including detailed description of the product, number of units produced or distributed, identity of all manufacturers, identity of all significant retailers, and more).
[157] 47 U.S.C § 642.
[158] 47 C.F.R. §§ 4.2 *et seq.*
[159] *See* Jennifer Alewelt, *Follow the Yellow Brick Road: The Legislative Path to Finding a Heart for Securities Regulations*, 40 CAL. W. INT'L L.J. 1, 10-13 (2009) (detailing disclosure requirements imposed by federal statute and Securities and Exchange Commission regulation). See also SEC Div. of Enforcement, 2019 Annual Report 2, https://www.sec.gov/files/enforcement-annual-report-2019.pdf (explaining SEC's enforcement priorities and stating that "accurate financial and other disclosures are the bedrock of our capital markets").
[160] *See* 12 C.F.R. § 21.11 (setting forth procedures for banks to file reports of suspicious financial transactions with Treasury Department and specifying what qualifies as a suspect transaction).

those authorized to sign checks on their accounts.[161] Tax laws require non-U.S.-based banking institutions to collect and report information about American account holders.[162]

To be sure, private industry has not placidly accepted government-mandated disclosure. Business interests have lobbied and litigated aggressively to secure broad relief from scrutiny by way of "trade secret" protections that are, increasingly, understood to give government regulators license to keep confidential just about anything that a regulated business considers to be nonpublic information of competitive value.[163] There is a rich and growing body of First Amendment caselaw addressing "compelled disclosures," in which business interests resist publishing government-ordered warnings about their products.[164] Critics object to imposing disclosure mandates on private industry for many reasons, including concern that the government may be ideologically motivated in a way that distorts the information marketplace rather than clarifying it (such as by requiring abortion providers to make disclosures calculated to discourage abortions).[165] So far, courts have generally sided with government regulators when the disclosures are purely factual, reasoning that additional facts are a net enhancement to the

[161] 12 U.S.C. § 1829b.
[162] 26 U.S.C. §§ 1471–1474.
[163] *See generally* 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(1) J. CIVIC INFO. 1 (2019) (discussing how courts have broadly interpreted trade-secret exemptions in state and federal FOI laws, most prominently in Supreme Court's *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427 (2019)).
[164] *See generally* Carolina Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014); *see also* Erin Murphy, *The Impossibility of Corporate Political Ideology: Upholding SEC Climate Disclosures Against Compelled Commercial Speech Challenges*, 118 NW. U. L. REV. 1703, 1708-09 (2024) (citing example of industry resistance and legal challenges to EPA regulation requiring annual reports and registration statements describing how risks relating to climate change affect the businesses' financial projections and what they are doing to mitigate risk).
[165] Corbin, *supra* note 164, at 1326-28.

information marketplace, but have been more skeptical when the government requires warnings of an opinionated nature, such as attempting to frighten people away from smoking.[166]

Concededly, there is no shortage of examples of private entities evading statutory disclosure mandates. But when they are caught violating their recordkeeping and disclosure requirements, private industries typically can face substantial civil and criminal penalties, both as a result of government enforcement action and as a result of citizen suits.[167] There is no analog in the government sector, where public employees routinely fail to create, retain or produce records without incurring any sanction.[168] Even in the rare event that penalties are imposed, the expense is typically absorbed by the taxpayers rather than the wrongdoing public official – what one open-government litigator has likened to "playing poker with other people's money."[169]

VII. PUTTING THE "INFORMATION" INTO "FREEDOM OF INFORMATION"

[166] *See* Murphy, *supra* note 164, at 1716-17 (explaining that, in the context of requiring advertisements to contain factual consumer-protection disclaimers, courts have regarded the compulsion of speech as "increasing the flow and availability of information"). But notably, in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018), the Supreme Court seemed to limit its tolerance for compelled commercial disclosures to "factual, noncontroversial information" as opposed to disclosures about which there is political disagreement).

[167] *See, e.g.*, Hiroko Tabuchi, *Toyota to Pay a Record Fine for a Decade of Clean Air Act Violations*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/14/climate/toyota-emissions-fine.html (reporting that Toyota agreed to $180 million settlement with environmental regulators to settle civil claims that it failed to report defects in its emission-control systems as required by federal law).

[168] *See* Katrina G. Hull, *Disappearing Fee Awards and Civil Enforcement of Public Records Laws*, 52 U. KAN. L. REV. 721, 722-23 (2004) (lamenting that "[c]riminal enforcement of access laws is nearly nonexistent" and that, despite state statutes that authorize judges to award fees to prevailing parties in federal and state open-records litigation, fee-shifting is the rare exception and not the norm). *See also generally* Frank D. LoMonte, *The Race to Erase: Destruction of Government Documents Undermines Freedom-of-Information Laws*, 48 SEATTLE L. REV. 865 (2025) (identifying weaknesses in federal and state records-retention laws that enable custodians to destroy records – sometimes even with knowledge that the records are wanted by requesters – without penalty).

[169] WASH. COAL. FOR OPEN GOV'T, YOUR RIGHT TO KNOW (Feb. 2024) 68, https://static1.squarespace.com/static/60ef3943f0a342333daf1fb0/t/66a6d0baa5098c7c5dc11b60/1722208456224/WashCOG-Special-Report-2024.pdf

The right of access to public records invariably is phrased as a "right to know" – as in, a right to know what the government is up to.[170] Illinois' FOI statute, for instance, presents the entitlement to information in expansive terms: "[T]he people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people."[171] This principle – "full disclosure of information" – says nothing about whether the information has been memorialized in a written compilation. The animating principle behind FOI law is one of skepticism that, left to its own devices, the government will volunteer the information that citizens need to exercise their oversight role.[172] It defies logic, then, that the public's entitlement to information should be limited to the information that government authorities choose to organize neatly – or that the hallowed "right to know" must give way in the face of inconvenience.

Outside of the United States, FOI laws do not always treat the distinction between "information" and "documents" as decisively as U.S. law does. India's Right to Information Act, widely regarded as one of the strongest globally, gives every citizen the right to access information held by public authorities, subject only to narrow exemptions.[173] It directs public

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[170] *See* National Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004) ("FOIA is often explained as a means for citizens to know what their Government is up to.") (quotes and citation omitted).
[171] ILL. COMP. STAT. § 140/1.
[172] *See* Kwoka, *supra* note 25, at 199 (stating that the modern iteration of FOIA was enacted in 1974, by a Congress "particularly energized by the Watergate scandal and the public's deep distrust of government power"); John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 118 (2006) (stating that FOIA emerged from "distrust in the power of administrative agencies" that became increasingly powerful during the Cold War, to the alarm of reformers in Congress). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (stating that FOIA's "basic purpose" is to help an informed citizenry serve as a "check against corruption and to hold the governors accountable to the governed.").
[173] Right to Receive Information Act, No. 22 of 2005. *See* Jeannine E Relly & Rajdeep Pakanati, *Freedom of Information Lessons from India: Collaboration, Co-Production and Rights-Based Agenda Building*, 22(4) Journalism 974, 975 (2021) (stating that India's statute is "ranked in the top 5 of most progressive national-level FOI laws").

bodies to affirmatively provide the citizenry with information "at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information."[174] The act contemplates a "duty to document" in Sec. 4(1)(c), which provides that agencies must "publish all relevant facts while formulating important policies or announcing the decisions which affect the public."

South Africa's FOIA code, the Promotion of Access to Information Act, implements the constitutional right of access to "any information held by the State," which extends even to private bodies where that information is required to exercise or protect rights.[175] Commentators have suggested that the obligation goes beyond just information reduced to document form and extends to information held by authorities in any form.[176] The right is regarded as especially forceful because it is memorialized in South Africa's constitution, not just in statute.[177]

FOI law in Mexico likewise speaks expansively of a right to obtain "all information" in the hands of government authorities.[178] Notably, a 2025 decree – the General Law on Transparency and Access to Public Information – contemplates what appears to be the most demanding "duty to document" in any suite of transparency laws.[179] It provides that covered

[174] Right to Information Act, No. 22 of 2005, § 4(2) (India), *available at* https://www.indiacode.nic.in/bitstream/123456789/15691/1/rti_act_2005.pdf
[175] Promotion of Access to Information Act 2 of 2000 §§ 11(1), 50(1) (S. Afr.).
[176] Omosede A Osawe, A *comparative analysis of the right of access to information under the Nigerian Freedom of Information Act 2011 and the South African Promotion of Access to Information Act 2001*, 22(2) AFR. HUM. RTS. L.J. 476, 481-82 (2022), https://www.scielo.org.za/scielo.php?pid=S1996-20962022000200008&script=sci_arttext.
[177] Wilhelm Peekhaus, *South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence*, 4 J. INFO. POL'Y 570, 570-71 (2014). Court interpretations have put something of a limiting gloss on the scope of the constitutional entitlement, however, holding that it applies only where the requester demonstrates that access to the information will assist in the exercise of other rights, such as the right to vote or participate in politics. *Id.* at 579.
[178] *See* Gen'l Law on Transparency art. 4 ("All information in the possession of obligated subjects is considered public information.").
[179] LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR, *Mexico: New Transparency and Data Protection Laws Enacted* (June 9, 2025), https://www.loc.gov/item/global-legal-monitor/2025-06-09/mexico-new-transparency-and-data-protection-laws-enacted/?loclr=bloglaw.

agencies must "document every act arising from the exercise of their powers, authorities, or functions."[180] It will be intriguing to follow how this new affirmative obligation to create records will interact with a right-to-know regime that took a significant step back in 2024 with the dissolution of what was once heralded as the strongest FOI enforcement body in the world.[181]

There is some limited precedent in U.S. FOI law for affirmatively requiring disclosure not just of records but of information. New Jersey's Open Public Records Act, in exempting "investigatory" records pertaining to ongoing criminal cases, instructs law enforcement agencies that they must make specified "information" about crimes available to the public within 24 hours of a request, such as the type of crime and its location – without reference to whether that information appears in an existing record or requires creating a new one.[182] At least one New Jersey court has recognized that the legislature's choice of "information" – as opposed to "records" – was a decisive distinction: "[T]he word 'information," as used in the statute, is not synonymous with tangible records(.) … Conceivably, the information could be provided in a public oral announcement."[183] Notably, New Jersey's statutory right to information about crimes is derived from a 1997 gubernatorial executive order, which provides in part that "there is no duty to release or obtain information that is not in the possession of the law enforcement agency at the time of request."[184] This is a sensible narrowing gloss on the principle that agencies have

[180] Fernando García Gómez et al., *Mexico Enacts New Data Protection Regime*, WHITE & CASE ALERT (Mar. 27, 2025), https://www.whitecase.com/insight-alert/mexico-enacts-new-data-protection-regime.
[181] Mary Beth Sheridan & Valentina Muñoz Castillo, *Mexico shuts watchdog agencies, intensifying fears for its democracy*, WASH. POST (Nov, 29, 2024), https://www.washingtonpost.com/world/2024/11/29/mexico-sheinbaum-democracy-institutions/.
[182] N.J. STAT. ANN. 47:1A-3(b).
[183] N. Jersey Media Grp., Inc., v. Twp. of Lyndhurst, 116 A.3d 570, 596 (N.J. Super. 2015).
[184] *See id.* (recognizing provenance of statutory right); N.J. EXEC. ORDER NO. 69, RECORDS OF POLICE DEPARTMENTS (May 1997), https://nj.gov/infobank/circular/eow69.shtml#:~:text=Each%20prosecutor%20shall%20consult%20with,Office%20of%20the%20Attorney%20General.

no duty to create new records, properly putting the focus on what *information* is within the agency's possession, not its medium of storage. New Jersey's crime-information provision could be the basis for using FOI law as a vehicle to recognize affirmative rights to essential information – giving effect to the long-recognized, but largely inchoate, "right to receive information" that the Supreme Court has developed only skeletally.[185]

The government does not accept "I never bothered to find out" from its citizens. "I wasn't looking at the speedometer" is not a defense to a traffic ticket. "I didn't keep track of how much money I made" does not excuse compliance with tax laws.[186] Indeed, the trigger point for liability under many criminal statutes is something short of intent to break the law; often, simply being reckless as to the harmful consequences of one's actions will suffice to justify imprisonment.[187] Some regulatory statutes are even understood to impose "strict liability," meaning that simply discharging toxic waste is so bad that the government need not prove the discharge was knowing or intentional.[188] We refuse to accept disregard of reality – or willful blindness – from our fellow citizens. Why do we accept it from our government?

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[185] *See* Thomas M. Cassaro, *A Student's First Amendment Right to Receive Information in the Age of Anti-CRT and "Don't Say Gay" Laws*, 99 N.Y.U. L. REV. 280, 286 (2024) (observing that "the First Amendment theory of a 'right to receive information' is underdeveloped in the law and in scholarship. … Currently, there is no binding precedent that guides lower courts in assessing a right to receive information claim."); Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 790 (2004) (commenting that "the parameters of the right to receive information have never been fully articulated, and the Court has never given the right full support.").

[186] *See* Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675, 676-77 (2011) (making the point that individuals are subject to a wide variety of mandatory disclosures to government, including through laws against child and spousal abuse, tax evasion and insurance fraud).

[187] *See* Counterman v. Colorado, 600 U.S. 66 (2023) (holding that the Constitution requires proof of recklessness to sustain a conviction for engaging in threatening speech).

[188] *See* Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1, 60 (1993) (stating that "in most environmental tort cases, courts have adhered to a strict liability standard"). Strict liability has been applied to cases brought under, for instance, the Comprehensive Environmental Response, Compensation, and Liability Act (the "Superfund" program), 42 U.S.C. §9601(32), so that responsible parties may be compelled to pay cleanup costs regardless of proof of any culpable mental state. Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 608 (2009).

Legal frameworks already exist to support expanding the concept of what is obtainable by way of FOI request. The law of classification makes no distinction between disclosing a classified *document* versus disclosing classified *information* – either is equally proscribed – so Congress and the courts are fully capable of giving "information" a broad application, when breadth accrues to the benefit of the government's secrecy interests.[189] Moreover, FOI laws already incorporate a diligence requirement; an agency can be held liable for failing to conduct a diligent search to locate responsive records.[190] The obligation to search diligently could be extended – borrowing from the aforementioned body of criminal law – to records that exist or that the agency has been reckless (or worse) in failing to create.

VII. CONCLUSION

It is legitimate to question whether FOI law is the proper place to locate a "duty to document," which speaks not just to the public's right of access, but more broadly to the competency of government agencies to do their everyday jobs. The rejoinder is that FOIA has always been bound-up in larger concerns going to the substance and quality of government

[189] *See* Snepp v. United States, 444 U.S. 50 (1980) (holding that former CIA employee could constitutionally be held to his agreement not to publish "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment, [without] specific prior approval by the Agency."). So, it is accepted as constitutional for an intelligence agency to compel a former employee to submit a manuscript for pre-publication review to screen for the disclosure of classified *information* – not just for whether classified *documents* are themselves being reproduced in the book. Edgar v. Haines, 2 F.4th 298 (4th Cir. 2021) (applying *Snepp* in upholding prepublication review regime and dismissing challenge on vagueness and overbreadth grounds). Federal law also restricts the ability of defense counsel to disclose classified information – not just documents – in the course of a criminal trial. 18 U.S.C. APP. 3 §§ 1–16.

[190] *See* Cantu v. Yakima Sch. Dist. No. 7, 514 P. 3d 661, 676 (Wash. App. 2022) (explaining that Washington law "requires an adequate search that is reasonably calculated to uncover all relevant records" and finding that school district should be penalized for using overly narrow email search query in responding to parent's FOI request); Weisberg v. United States Dept. of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (holding that federal FOIA puts burden on agency to "show beyond material doubt … that it has conducted a search reasonably calculated to uncover all relevant documents").

decisions – it did, after all, originate as part of the Administrative Procedure Act.[191] The APA was enacted in 1946 not just to require agencies to show the public how they had been making decisions, but to actually make decisions in a different way, following standardized best practices.[192] The APA, it might be said, provides a sturdy foundation upon which a broader "duty to document" can logically be erected. To skeptics who would argue that a duty to document would force government agencies to substantively change the way that they do business, the response is: We had that argument 80 years ago, and you lost.

Locating the "duty to document" in FOI law would address the threshold legal standing question presented by imposing recordkeeping duties on agencies: Who is the injured plaintiff with standing to sue if the recordkeeping duty is violated? FOI law supplies that answer: The person who requests the information is aggrieved. And this is not a novel theory: Some FOI laws already recognize standing to challenge the premature destruction of records that agencies were legally required to retain.[193] It seems to exalt form over substance to say that a citizen is injured if a government official creates a record, retains it for 30 seconds and erases it, but is not injured if the government official purposefully avoids creating the record at all. To the frustrated requester, the scenarios are no different.

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[191] *See* Susan B. Long & Harry Hammitt, *Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media So Long*, 63 VILL. L. REV. 895, 898 (2019) (explaining history of FOIA's enactment and its interaction with the APA).

[192] *See* Saint Francis Memorial Hospital v. Weinberger, 413 F.Supp. 323 331-32 (N.D. Cal. 1975) (stating that "the underlying purpose of the Administrative Procedure Act is to guard the rights of interested members of the public who do not constantly monitor the administrative agencies that affect them."); Bell Lines, Inc. v. United States, 263 F.Supp. 40, 45 (S.D.W.V. 1967) (explaining that "the Administrative Procedure Act's purpose [is] to offer a degree of protection from unrestrained and unwarranted bureaucratic action."); United States ex rel. Di Dente v. Ault, 101 F.Supp. 496, 497 (N.D. Ohio 1951) ("The basic purpose of the Administrative Procedure Act is to restrict and eliminate the practice of combining in one person or agency the duties of prosecuting and deciding cases.").

[193] *See* OHIO REV. CODE § 149.351(B) (entitling persons aggrieved by agencies' authorized destruction of public records to sue to obtain injunctive relief, attorney fees, and civil penalties); *see also* WASH. REV. CODE § 42.56.100 (providing a cause of action for destroying public records that are the subject of a pending records request); TENN. CODE ANN. § 10-7-503(h)(2)–(3) (same).

Concededly, building a better "documentation culture" will require managerial as well as legal solutions. It would be burdensome, and indeed likely counterproductive, to impose an across-the-board obligation to document every conversation in the government workplace. Nevertheless, the critical steps toward reaching decisions should be retraceable for the interests of both internal and external stakeholders alike. It is manifestly in the government's own self-interest to be able to document its activities.[194] As journalist Matt Ford has written: "Statistics are more than just numbers: They focus the attention of politicians, drive the allocation of resources, and define the public debate."[195] As illustrated by the failed attempts at holding the Department of Homeland Security civilly liable for failing to adhere to Federal Records Act standards in tracking the placement of migrant children,[196] failure to document agency activities can have disastrous human costs. Even where the stakes are not so high, well-managed agencies should be able to explain how they made decisions, if for no other reason than for defensive purposes if they are audited or sued – to say nothing of the good-government imperative of being able to defend the legitimacy of decisions to a skeptical public. When data is incomplete and untrustworthy – as we are experiencing in the case of crime statistics – the numbers can be distorted and weaponized opportunistically to score political points, with no means of fact-checking even the most dubious claims.[197] If most government agencies and officials are in fact

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[194] *See* Cook & Fortunato, *supra* note 71, at 280 ("Accurate information is necessary for effective agency management, enabling representatives to evaluate agent behavior, access outcomes, and update legislation."). *See also* Seacrest & Snider, *supra* note 74 (making that argument in the context of managing law enforcement agencies: "[D]ata-driven culture is also crucial for agencies internally, as it can better inform decisions on procedures, training, tactics, equipment, and strategies for keeping officers safe. In addition, it can help identify problematic trends before they become systemic(.)").

[195] Ford, *supra* note 84.

[196] *See supra* notes 135-143 and accompanying text.

[197] Steve Benen, *White House's Stephen Miller claims inconvenient crime statistics are 'fake,'* MSNOW (Aug. 13, 2025), https://www.ms.now/rachel-maddow-show/maddowblog/white-houses-stephen-miller-claims-inconvenient-crime-statistics-are-f-rcna224722.

doing their jobs honestly and effectively, they should gratefully welcome a "duty to document" as a means of proving it.

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