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I've Got a Secret

Government Information Availability and Secrecy

Rhonda E. Fowler

"The United States has the most open government in the world, but it also has the most secretive government in the world, if you measure it by the production of new secrets."—Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists¹

Secrets and information, what do they have in common? A secret is something you don't want anyone to know, something you keep to yourself or those you trust. "Knowledge obtained from investigation" is the definition of information, according to *Webster's Dictionary*. As a new government documents librarian, my interest was piqued by the subject of secrecy. As I looked for information on this topic, I thought information that exposed the vulnerabilities of the United States to a terrorist attack or gave away our technology secrets would be classified. I didn't know that something could be classified at first, declassified, and then classified at a later time. In this article I will discuss the types of material that are unavailable to the public and how that type of information has grown over the years.

While looking at information from databases as well as popular search engines, I found there are many groups who watch what goes on in the information-availability world. In theory, I would think that any American citizen would be able to request government information and have that information sent to him or her. However, what the information is will determine whether you get it. There is sometimes the runaround you receive before finding out that the report you want falls under one of the nine exception rules that the Freedom of Information Act (FOIA) has established (5 U.S.C.552). What are those nine exemptions? They are: information "'properly classified' in the interest of national defense or foreign policy"; "information related solely to the agency's 'internal personnel rules and practices'"; "information that is specifically exempted from disclosure by separate statute"; "'trade secrets' or other confidential commercial or financial information"; "inter- or intra-agency memorandums or letters not subject to discovery in court"; "personnel, medical and similar files, compiled for law enforcement purposes that would constitute a 'clearly unwarranted invasion of personal privacy' among other similar types of information"; "reports prepared by or for use by agencies regulating financial institutions; and geological and geophysical information and data concerning wells, including maps."²

We depend on the media to be able to research the information and get it to us. When the information is not

accessible, the public's right to know is jeopardized. But just how concerned is the public? A poll conducted in 2000 by the Center for Survey Research and Analysis at the University of Connecticut asked the question: "Government secrecy—Are you very concerned, somewhat concerned, not too concerned, or not at all concerned about the issue?" Of the participants, 38 percent were "very concerned," 34 percent "somewhat concerned," 17 percent "not too concerned," 8 percent "not at all concerned," and 4 percent responded "don't know/no answer." This poll was taken in 2000, so the results are dated, and in my opinion the public might be even more concerned if they participated in a poll this year. The participants' political opinions might also weigh in the results. It does show, however, that a very small percentage of people polled have no opinion of the question.³

What occurs when those efforts to bring us this information are threatened and the information that we seek is denied or disappears from the airwaves? Is the government withholding information to protect the American public? How long has this secrecy been going on, and what effect does this have on the freedom of the press?

I found that the more I looked for information, the more questions I had about the availability of government information. There are often roadblocks to the information becoming public. For example, in 2006, U.S. Attorney General Alberto Gonzales threatened to prosecute journalists for writing about the National Security Agency's clandestine and illegal monitoring of U.S. overseas telephone calls. His basis for this threat was the 1917 Espionage Act (40 Stat. 217), an act making it illegal for unauthorized personnel to receive and transmit national defense information.⁴ This act, signed by President Woodrow Wilson at the end of World War I, helped create the twentieth-century "culture of secrecy."⁵ The act also made it a crime to obtain or to disclose national defense information to a foreign government, especially if it was information that could hurt the United States. It seems as if the attorney general was stretching the definition of this act to be able to justify trying to prosecute those journalists.

As early as the 1950s, the media tried to tackle govern-

ment secrecy by forming the Freedom of Information Committee within the American Society of Newspaper Editors (ASNE). They found out that basic information was being denied to the press and therefore the American people.⁶ Their legal counsel Harold Cross also found that the government disclosure was “unsystematic and often biased against disclosure to newspapers.”⁷

How hard a time are journalists having when it comes to obtaining information that they need in order to publish an article? According to Charles Lewis, it took twenty researchers, writers, and editors at the Center for Public Integrity six months and seventy-three FOIA requests, including successful litigation in federal court against the Army and State Department, to begin to discern which companies were getting the Iraq and Afghanistan contracts and for how much.⁸ This might be an extreme example of how long and how difficult it is for information to be made public, but unless you have tried to gain access to something and been constantly denied despite your best efforts, then it probably does not mean that much. Do most Americans realize that some of the information they want is unavailable? Or do they trust the government enough to assume that if they don't tell us about something, then it is for the safety of all involved?

An earlier case that went all the way to the Supreme Court was *New York Times v. United States*, where in a 6-3 vote, the court found that the *New York Times* was within its constitutional rights when it published stories on the Pentagon Papers (403 U.S. 713). Is that information somehow covered under the nine exemptions of the classification of documents? Can that information be seen as a threat to the national security of the United States?

According to *Issues & Controversies on File*, supporters of the media feel they have a duty to report on what goes on in the U.S. government as truthfully and completely as possible. Many support the notion that the public has a right to know what the officials they elected are doing and if those actions are illegal or in violation of the Constitution.⁹

Critics of the media believe that the government needs a certain amount of secrecy so that it can protect the U.S. effectively. They go further to state that the media puts innocent Americans in danger by exposing government secrets.¹⁰ Responsible journalists are not trying to hurt the country but feel that it is in the best interest of the U.S. citizen to know certain facts.

Secrecy began once the U.S. became a major world power in the twentieth century, according to *CQ Researcher*.¹¹ Most of the information read for this article pointed to 9/11 as a pivotal time when secrecy and withholding information grew greatly in the interest of national security. After 9/11, the Department of Homeland Security was established. At that time three other agencies—the Department of Health and Human Services, the Department of Agriculture, and the Environmental Protection Agency—were given unprecedented power to classify their own documents as secret if needed in the interest of national security.¹² Reading further on information that could be a threat to national security

and what would happen if that information was given to the public, I found an article that stated the three questions that should be asked about disseminating information needed to keep the public informed.¹³ These three questions are: (1) “Does the information fall within a class that should presumptively be kept secret? This would include operational plans, troop movements, technological methods of surveillance, and advanced weapons designs.” (2) “Does the information's important public value outweigh any risk of harm from public disclosure? In the Clinton administration information from the EPA's Toxic Release Inventory was released, including emergency evacuation plans. It was felt that the public receiving important public safety information was not of any value to terrorists. Also the disclosing of the capabilities of our oldest spy satellite systems caused no harm to our security, while the information proved to be of great value to scholars, as well as to the natural resource and environmental communities.” (3) “Does the release of the information inform the public of security vulnerabilities that, if known, could be corrected by individuals or public action? Without openness, people would lose trust in their government and government would lose its ability to do its work.”¹⁴ I would add a fourth question: when can it be safe to assume that the information will no longer be a threat to the national security of the U.S. and can be declassified?

When the information becomes declassified, how long does it take to get it ready for the public? Well, first you have to look at how much information you are talking about. On December 31, 2006, according to the *Washington Post*, the paradigm of secrecy shifted. Seven hundred million pages of secret documents became unsecret. They became declassified; of those, 400 million had been classified at the National Archives, 270 million at the Federal Bureau of Investigation, and 30 million elsewhere.¹⁵ As stated, this would seem like a victory for freedom of information, as envisioned by President Bill Clinton when he signed Executive Order 12958 in 1995, and affirmed by President Bush in 2003, which mandated that twenty-five-year-old documents be automatically declassified unless exempted for national security or other reasons. Now for those who think they can rush down to the National Archives to check them out like a newly delivered government document, think again. They still remain secreted away, according to the *Washington Post*, which also states that it could be years before these public documents can be viewed by the public.¹⁶ Why, you might ask? As many librarians know, there is the technical processing of any material that comes in. We understand that material does not just appear on the shelves, but it takes effort to get it there. At the National Archives, fifty archivists can process 40 million pages in a year, but they are now facing 400 million!¹⁷ This backlog measures 160,000 cubic feet inside a vault with special lighting and climate control. Not only are the archivists faced with an overwhelming amount of documents to go through, they are also faced with competing declassification instructions from various agencies.¹⁸ The agencies have different dialects, different set of codes for

communicating what they want done with the material by the National Archives. As an example, one agency might use “R” to mean release, and another might use an “R” to mean retain.¹⁹ Trying to decipher these codes can take up time with phone calls to agencies to understand their systems.

Managing all this secrecy—to store it, secure it, process it—cost the country \$7.7 billion in 2005 according to J. William Leonard, director of the Information Security Oversight Office, which reports to both to the National Archives as well as the White House.²⁰ When should information be removed from public disclosure and kept secret? Most people would probably agree that when the Office of Pipeline Safety removed maps, coordinates, and emergency response plans from their sites that it was a smart thing to do, or that. Preventing access to the coordinates of our nuclear reactors is in the interest of national security.²¹

The Internet has given the public the ability to find information on just about every topic imaginable. So, there is a high expectation of what should be available for public viewing. If something happens that is of interest to the American public, then we expect to be able to read about it in the paper or surf the Internet to find information. We would not expect to surf the Internet and come up empty if we were looking for information on the war or some type of disaster that happened in the United States, or globally for that matter. According to Barb Palser, the U.S. Judicial Conference, which is the body that sets federal court policy, decided that federal criminal case filings will no longer be available on the Internet through a system called PACER (Public Access to Court Electronic Records). Palser further states that many government entities have yet to catch up with the digital age, let alone the Internet age.²² Could this be part of the problem? Perhaps government officials are uncomfortable with how easy it is to find information electronically. If you had to go through print indices to find information and then go to the source, this would take time that you might not want to devote to this endeavor. On the other hand, now that information is available electronically with some keystrokes, you might not even have to leave your home to search for the information. Even if the actual document is not on the Internet, you get an idea of what the document is about.

Why all of the secrecy? Don't people have a right to know what is going on in the government, and where the government stands on issues that concern the American public? One reason of concern perhaps could be because President Clinton, in 1995 through an executive order, stated that all documents under National Archives' purview and more than twenty-five years old be made public, unless they met strict national security requirements.²³ Unfortunately, four years later there was a leak of U.S. nuclear secrets to China, and the reaction of Congress was to pass a congressional amendment to severely limit declassification. President Bush decided to “further amend Clinton's executive order and delay the declassification of Reagan-era documents.”²⁴ Originally the intent was to protect military

secrets; however between 2000 and 2006 the executive order that President Bush signed expanded what was declassified to include “anything embarrassing to the government including information on unsanctioned Central Intelligence Agency programs and military intelligence blunders that occurred more than forty years ago.”²⁵ Another form of secrecy is in the difficulty of placing a (FOIA) request for certain documents. With all of the availability of information online, the public expects to find the information they are looking for right away. They are somewhat skeptical when they are told the information is not available.

I'm not talking about classified information that is dangerous to our national security as stated above, but information that you should be able to gather with a FOIA request. Many have heard that if you want information, you submit a FOIA request. Sounds simple enough; however, in October 2001 Attorney General John Ashcroft advised federal agencies “to make broader use of the FOIA's exemptions to withhold materials requested under the law.”²⁶ The public's right to access government information is protected by FOIA, which is supposed to stop the increase and tendency by federal agencies to cover their actions in secrecy. The Senate Committee on the Judiciary, which was charged with reporting on the bill introducing FOIA, concluded “A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.”²⁷ With all of the runaround that people are getting when they submit a FOIA request, it does breed mistrust, as if all of the information that is needed is a threat to national security.

Citizens are more informed than ever, especially with cable television and the Internet. Computer prices have come down, making it easier for people to get online. Many public libraries have computers available for their patrons to use for surfing the web as well as doing research. With just a few keystrokes into a search engine, information comes on the screen. But, is the information that is found accurate and current? Who put the information online, and can it be trusted? Citizens need to be informed, especially about information that is helpful to their way of life. Medical information, information about the latest scam being investigated by the government, is what people are interested in. FOIA was passed in 1966.²⁸ According to the *Freedom of Information Act Guide*, “the Freedom of Information Act generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.”²⁹ It's the nine exemptions or one of three special law enforcement record exclusions that are puzzling to most. Are these exemptions or record exclusions really that important to the security of the United States? Is the government being especially cautious post-9/11?

Since 9/11 there have been many more restrictions on the documents that are being made available to the public.

According to the *Secrecy Report Card 2005* on OpentheGovernment.org, there were 15.6 million secret documents in 2004, or 81 percent more than in 2000. Nick Schwellenbach, who refers to the *Secrecy Report Card*, states that 14 million new classification decisions were made in 2003, up 60 percent from 2001. For this same period of time taxpayer dollars that were spent on classification increased nearly two billion dollars to six billion dollars annually.³⁰ He further states restrictions to government data have serious consequences. He cites the *9/11 Commission Report*, which states that “the biggest impediment” to getting the analysis needed to combat terrorism “is the human or system resistance to sharing information.”³¹ Information is kept under wraps by the agencies instead of being shared so that it gets in the right hands. What this restriction has done is increased the number of FOIA requests over the past six years.³²

When books are banned and you look at some of the reasons for the banning, if it were a book that was banned twenty years ago it might seem quite irrelevant at this time. Is that the same with government information? If something is classified and then many years later is thought not to have been that dangerous in the first place, does this mean that the government was too quick to classify some documents in the first place? It is better to be safe than to be sorry, many may believe. After all, does it really hurt the public not to know something? That depends on what information it is that you don't know.

Executive Order 13292, dated March 25, 2003, amends Executive Order 12958, and seeks to prescribe a uniform system for classifying, safeguarding, and declassifying national security, including information relating to defense against transnational terrorism. It further states that our democratic principles require that the American people be informed of the activities of their government. Our nation's progress depends on the free flow of information. What does it mean when the information does not seem to be free flowing? If the American people have a right to know what their government is doing, why is it becoming more difficult to find this information out?³³ If our nation's progress depends on this free flow, does it mean that we are not progressing as well as we should be? When it comes to the information from the government, if it is classified then it must fit into one of three levels. They are: Top Secret, Secret, and Confidential.³⁴ The definitions for all three begin the same way, the information would cause “grave damage to the national security that the original classification authority is able to identify or describe.”³⁵ The difference in the three is that Top Secret means “the information would cause grave damage, Secret would cause serious damage, and Confidential would cause damage to the national security that the original classification authority is able to identify or describe.”³⁶ The question I have is, what determines when information can cause grave damage or just damage to the national security of the country? According to this Executive Order 13292, the only people who can classify information in the first place are the president in the performance of duties and the vice-president,

agency heads, and officials designated by the president in the *Federal Register*, and U.S. government officials delegated this authority pursuant to paragraph 3 of Sec. 1.3. Classification Authority as written in Executive Order 13292. Except for agency heads, there don't seem to be a lot of people deciding what should or should not be classified and seen by the American public.³⁷ It is not explained fully what constitutes what type of information for what category, except to say intelligence activities, military plans, scientific, technological, or economic matters relating to national security and other examples similar to this. If you had a broad scope, almost anything coming from the government could fit into one of the categories necessary for classification.

If you were writing a paper or an article about a topic of controversial interest, how can you be sure that the information you are researching is complete? If you come across roadblocks when you are looking for information, the curious researcher might want to know what they don't want me to know about x. We all know that the more you make something inaccessible, the more people want to access it.

So what is an information seeker to do with all of these stipulations on what can be found and used? As mentioned above, submitting a FOIA request is in order, but what happens when your requests go unheard? Do you spend money to go to court to fight for what you believe you are entitled to read? Do you form a group or create a web site to publicize the fact that information from the government is hard to come by?

According to the *Secrecy Report Card*, \$134 is spent creating new secrets for every \$1 spent releasing old secrets. The good news, as they state, is that this is a \$14 drop from 2004.³⁸ When you look at such web sites as OpenTheGovernment.org, it makes you wonder just what do we know? Do you have the attitude of what I don't know won't hurt me? Or, do you wonder what they are keeping from me?

When did information get to the point that it was necessary to withhold from the public? Just what is the fear of people knowing what is going on? The American public might feel that it is important that information that might cause safety vulnerability to the country be kept under wraps. But, how is the decision made as to what might cause harm to the national security of the country? According to the *Secrecy Report Card*, the recent growth of secrecy started in the Clinton administration, and has continued into the Bush administration. For example, the federal government spent \$6.5 billion in 2003 creating 14 million new classified documents, more than in the past decade.³⁹ What are they, and who decided to make them a secret? Also, according to the *Progressive Librarian*, there were more than 3 million FOIA requests for information from the government agencies.⁴⁰ According to Matt Welch's article in *Reason* magazine, during the current president's first term the number of classified documents nearly doubled from 8.7 million to 15.7 million.⁴¹ Verifying this information with other sources comes up with similar figures on the amount spent and the amount classified. What has been removed? There are examples of

documents removed from agency web sites and databases; however, there is not a complete list, inventory, or catalog of what has been removed. If there was a list available, then at least before you took the time to submit a FOIA request you would know that document you want is not available. On the other hand, if there was a list, then it might pique a person's interest in what they can't get.

OpenThe Government.org found that the government is keeping other sensitive information from public inspection by placing it in a growing number of new categories known as "pseudo classification"—information that is sensitive but not classified. In 2005 there were fifty of these categories; in 2006 there were sixty of these categories.⁴²

If we can't get the information from those who seek to report it to us, then how can we stay aware of what is going on around us? Think about the times there have been reports of an epidemic or pandemic of some sort, and it was not disclosed to the public. Did the government intentionally decide not to make public information that could have helped the residents of New Orleans make better decisions, or at least know that there was a possibility that the levee would not withstand that type of hurricane? That is a question that has no answer. It really depends on where you stand on open government and whether you think that the government is being honest and upfront on what is being disclosed to the public by the media, or if they are keeping the American public in the dark.

As stated above, this subject has brought on more questions than answers on the topic of government information being available and the secrets surrounding that information.

The desire not to start a panic is well noted, but it also should be noted that people have a right to know what will impact their lives, and the media has a responsibility to report that information to us in an honest fashion. ■

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