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The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

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Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
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Introduction

Freedom of Information Laws

Freedom of information laws permit individuals and organizations to obtain government documents and records as well as other information. Although these laws have a long lineage in some Scandinavian countries,[1] in the United States, Canada and Australia, freedom of information provisions of general applicability are features of the later third of the Twentieth Century. In the United States, the federal Freedom of Information Act[2] (FOIA) dates from 1966, although some states passed laws before that date and some common-law access to public documents dated from the formation of the country. Now, every US state as well as the federal government has a freedom of information provision giving access to government documents and records. Canada[3] and Australia[4] joined the United States in 1982.

These laws, however, are becoming more common. Recently Great Britain[5] has considered and Japan[6] has enacted broadly applicable laws. European Union provisions provide access to the documents of EU institutions[7] and one directs national governments to make available certain types of government documents and records regarding the environment.[8] The structure and content of this latter directive is reminiscent of the US FOIA. The advocates of transparency in international organizations, such as the World Bank, propose reforms incorporating principles contained in national freedom of information laws. Thus, freedom of information laws now affect the world's major industrial nations and increasingly are given international scope. Most of the literature in English describing and analyzing these laws addresses the United States, Canada and Australia but this literature suggests methods for examining and evaluating freedom of information laws generally.

Freedom of information provisions address similar issues. This similarity reflects the commonality of the problems that any such law must consider. These common issues concern the scope and coverage of the law, exemptions from disclosure, the obligations of government officials, the methods of enforcement and the rights of those persons and groups that submit information to the government. The federal Freedom of Information Act in the United States provides one example of the resolution of these common issues.

Under that law *any person* may request government documents and records; a person need not give a reason for a request because government documents and records are presumed to be available to any requester. Moreover, certain types of documents and records, such as agency rules and regulations, opinions resolving agency adjudications, and portions of manuals and guides that affect members of the public must be made available, without request, in public reading rooms. Not every government agency, however, is necessarily subject to the law. For example, in the United States, the Executive Office of the President, including the National Security Council, are not agencies covered by the law.

Because the law applies to *government* documents and records, it does not cover private records of government officials, narrowly defined. Recently, Congress has proposed a law that would expand the federal FOIA to include the documents and records of government contractors

relating to government contracts performed by them.[9] This expansion would bring a substantial number of organizations within the ambit of the law.

All access laws must address exemptions from disclosure, including the substance and generality of the exemptions. These exemptions can be mandatory, requiring withholding of the indicated documents, or discretionary, authorizing but not requiring an agency to claim an exemption. The exemptions can be very broad – as in the EU code of conduct regarding the European Commission providing that its documents may be withheld in 'the public interest'[10] – or they can be quite specific, detailing dozens of specific exemptions – as is the case in the freedom of information law of the State of Virginia in the United States.[11]

The federal FOIA contains nine exemptions. These include ones for documents:

1. properly classified in the interests of national defense or foreign policy,
2. that are internal guides or directives discussing enforcement strategies, the release of which would risk evasion of the law,
3. the disclosure of which is specifically prohibited by other laws,
4. containing confidential or privileged commercial or financial information,
5. protected by certain litigation privileges, including the attorney–client, work product and deliberative process privileges,
6. the release of which would constitute a clearly unwarranted invasion of personal privacy,
7. complied for law enforcement purposes, the release of which would, or in some instances could reasonably be expected to, create the risk of certain harms,
8. contained in or related to oversight of financial institutions by an agency charged with regulation or supervision of such institutions,
9. containing geophysical and geological information regarding oil wells.[12]

Just because a document contains information which would be exempted from disclosure is an insufficient basis for an agency to withhold the entire document. The federal FOIA obligates the agency to release all portions of the document that can be reasonably segregated from those portions of the documents that are exempt. Thus, a requester is not automatically denied a document because part of it would be exempt.

Generally, the exemptions only authorize, but do not require the withholding of documents by an agency. Some of the exemptions, however, do address types of documents which may not be disclosed. The two principal examples are the exemptions protecting properly classified national security information and personal privacy. The mandatory character of these exemptions results from related laws that restrict the discretion provided by the FOIA. The personal privacy exemption and a similar one in the exemption regarding law enforcement records are the only ones that require a balancing of the interests harmed by disclosure against the interests served by access.

Freedom of information statutes articulate administrative procedures for requests, including periods for response and agency obligations to provide reasons for the denial of a request. The federal FOIA specifies these administrative procedures and several amendments to the law have concerned them. Many statutes place enforcement on administrative officials, such as ombudspersons, with the courts playing a limited or complementary role. The federal FOIA relies upon judicial enforcement through the federal courts in which the requester may sue for redress from a denial. In this suit, no deference is given to the agency's decision or to the

agency's findings of facts. Rather, the court conducts a *de novo* review of the agency's decision. In that review, the agency has the burden of persuasion to demonstrate that its withholding of the requested documents is authorized by law.

Much of the information contained in government documents is not generated by the government but rather provided to the government by third persons. Increasingly, the rights of these persons have become an important part of the debate regarding freedom of information laws. In 1987, President Reagan issued an Executive Order giving to those who submit information certain procedural rights, including the right to be informed that a request has been made for documents submitted by such a person, and the right to be heard prior to the release of the documents.[13]

Laws Protecting Whistleblowers

In the United States, open government laws or 'sunshine laws' are closely connected to the justifications for freedom of information provisions. (The term, 'sunshine laws' comes from an often repeated statement of Supreme Court Justice Louis Brandeis, 'Sunlight is said to be the best of disinfectants...'[14]) These laws, enacted in many of the states as well as by the federal government, include open-meeting laws,[15] laws providing public review of boards advising government agencies,[16] access to litigation materials,[17] and protection of whistleblowers. This essay will focus on one of these, whistleblower protection laws.

Whistleblower protection provisions illustrate how the rationale of the freedom of information statutes apply to these other laws. These whistleblower provisions protect employees who disclose certain types of wrongdoing by government officials. Most states in the United States have laws that protect public employees who disclose wrongdoing by government officials. The best known of the whistleblower laws is the Whistleblower Protection Act of 1989[18] applicable to federal employees. This Act was itself an expansion of the ground-breaking protection for federal employee whistleblowers in the Civil Service Reform Act of 1978.[19] As with freedom of information provisions, whistleblower protection can now be found in many countries.[20]

The remainder of this essay explores the unifying themes of freedom of information laws and the relationship of these themes to other open government laws, such as whistleblower protection. This exploration begins with an analysis of the relationship between the federal FOIA and administrative and constitutional theory in the United States and with the current discussions about the regulation of information generally. It moves to a discussion of the effects of the computer and internet revolutions on these laws. The analysis of these themes in the midst of the computer revolution provides a way of viewing the 'internationalization' of freedom of information and other open government laws. It also allows speculation regarding the future of these provisions.

The Federal Freedom of Information Act and Administrative and Constitutional Theory in the United States

Freedom of information provisions can appear to be insular bodies of specialized laws. They seem to form a body of technical, almost esoteric, rules and principles. Despite these appearances,

freedom of information laws are deeply embedded in US administrative theory and partake of the general debate regarding administrative theory and practice. In turn, US administrative theory is closely linked to liberal thought. Recognition of these relationships offers several advantages. It provides a way of organizing and examining these laws; it exposes the inconsistencies and paradoxes besetting arguments supporting these provisions; and it allows prediction regarding the difficulties inherent in specific proposals.

Freedom of information laws in the United States cannot be fully understood without examining the relationship between these laws and the First Amendment which in the US guarantees, among other rights, the rights of free speech, free association and a free press. Freedom of information laws fill gaps in interpretations of the First Amendment. Similarly, the theories supporting First Amendment protection have been imported into discussions of freedom of information laws. Again, the federal FOIA provides a convenient example to explore these relationships.

Current discussions about the regulation of information are also helpful in understanding freedom of information laws. These discussions have focused on information more generally, but offer methods of analysis and insights which emphasize similarities between government information laws and more general attempts to regulate information. These similarities have been highlighted by the challenges which electronic technology have posed to the accepted principles of law applicable to information.

The reader not from the United States is asked to bear with what may at times seem like a parochial exercise, but I write about what I know best. This exploration should prove useful in the subsequent discussion of whistleblower protection laws and in speculation about the future of freedom of information provisions. It is no accident that the grounding of US administrative theory on liberal political thought exposes a constellation of ideas beneath freedom of information laws, many of which are of immediate currency outside the context of their creation. This currency and the ascendancy of liberal thought as exemplified in democracy and capitalism provide one explanation for the recent and rapid growth of open government provisions.

The Federal Freedom of Information Act and Administrative Theory

Freedom of information laws are logically part of administrative law. They share with administrative law the attempt to control administrative discretion. Like administrative law, they seek to regulate public bureaucracies. They also share with administrative law the differing and often conflicting justifications for such regulation. These differences and the conflicts inherent in them can be traced to different visions of the appropriate or 'ideal' administrative process.

To frame this discussion, I have chosen Thomas Sargentich's 'The Reform of the American Administrative Process: The Contemporary Debate' (Chapter 1) in part because his essay organizes and critiques proposals for administrative reform, including open government provisions. He does this through references to competing ideals of administrative law. To him, these ideals are not merely categories which facilitate description, but are competing visions based on conflicting and inconsistent answers to a fundamental question of administrative law – 'On what general normative principles may the use of often substantial public power by unelected agency officials in our political system be justified and, at least for the system as a

whole, legitimated?' These ideals of administrative law, the Rule of Law Ideal, the Public Purposes Ideal and the Democratic Process Ideal, arise from different strains of liberal political thought. Each represents a vision that conflicts with competing visions of the administrative process. Each contains a core embodiment which represents a pure vision of the administrative process, but which confronts both the reality of the administrative process preventing its application, and an internal paradox that undermines its operative principles. The core embodiments are respectively: formalism, instrumentalism, and participation.

As a result, each ideal also contains an alternative expression that is less true to the ideal, but more likely of implementation. These alternative expressions of the three ideals are respectively: proceduralism, protection of the market, and political oversight. Although each alternative expression is consistent with the vision of administration underlying each ideal, it falls short of full implementation of that vision. As a result, it supports arguments that can be melded with those supporting some of the other ideals.

The history of the federal Freedom of Information Act demonstrates how that statute is related to these fundamental conceptions of administration contained in liberal political thought. The Rule of Law Ideal in its core embodiment requires that all exercises of public authority come from legal standards enacted by legislative bodies. Thus, it seeks to limit and confine administrative discretion. The alternative expression focuses instead on the importance of procedure in ensuring the proper exercise of that discretion although it fails to provide any substantive limitation on it.

If legal standards are to limit administrative discretion, those standards must be known. Without knowledge of these standards, it is difficult to believe that they will meaningfully limit administrative action. At the time of the enactment of the federal FOIA in 1966, a central concern of Congress was that public access to agency documents was necessary to protect against the application of secret law.[21] The FOIA's requirement that certain documents – rules and regulations, adjudicatory opinions, and relevant guides and manuals – be available without request seeks to ensure that the standards controlling the agency's exercise of public power are available to the public.

The concept of any-person access also implements that Rule of Law Ideal. Congress intended that this concept, by eliminating the need to explain the reasons why a requester sought information, would reduce agency discretion in evaluating individual requests. If the requested documents did not fall under an exemption claimed by an agency, any person, regardless of the reasons for which they sought the documents, was entitled to receive them.

The structure of the FOIA, however, is inconsistent with the Rule of Law Ideal for it grants considerable discretion to individual agencies in applying the exemptions to disclosure. Not only do agencies have discretion whether to claim an exemption or not, but these agencies also have discretion in initially interpreting the meaning of these broad exemptions. Because of the breadth of the exemptions and the discretion entailed in their application, the bulk of the litigation under the law has addressed their meaning. Despite extensive judicial interpretations of the exemptions, considerable discretion in their interpretation remains. Moreover, agencies also enjoy discretion in applying these standards to new categories of documents. Judicial interpretations, particularly regarding the exemption for properly classified documents, have conceded considerable agency discretion in the application of the exemptions.

Sargentich's articulation of the paradox or self-defeating characteristic of formalism, the core embodiment of the Rule of Law Ideal, resonates with the history of the federal FOIA.

Sargentich believes that the attempt to subject all administrative action to restraint by norms leads to norms of such indeterminancy that they fail to provide sufficient restraint.

Proceduralism is the response to the limitations of formalism. It seeks to channel administrative discretion by requiring that officials follow fair procedures in exercising their discretion. It seeks to regulate not the substance of decisions, but rather the process by which they are made.

Given the practical and theoretical restrictions on the core embodiment of formalism, reforms of the 1966 Freedom of Information Act have emphasized procedural rather than substantive reform. Although the 1974 amendments to the FOIA modified some of the exemptions, the thrust of the amendments was procedural. These amendments prescribed a number of procedures, including time limits for agency responses, provisions for administrative appeals, and criteria for charging fees for complying with requests. Similarly, a substantial portion of the Electronic Freedom of Information Act of 1996 addresses procedural issues. Michael Tankersley's essay, 'How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age' (Chapter 2), examines these changes and places them in the context of previous procedural reforms.

The core embodiment of the Public Purposes Ideal, instrumentalism, stresses the role of administrative agencies in accomplishing important public tasks. In so doing, agencies rely on rational analysis in carrying out the affirmative obligations of government. Rather than fearing discretion, instrumentalism exalts it.

Unlike the Rule of Law Ideal, the Public Purposes Ideal conflicts with the concept of openness incorporated into the FOIA. An agency needs secrecy to examine alternative courses of action; frank discussions are necessary to apply rational criteria, and openness may create risks that such rational analysis will yield to political or social pressures.

The Public Purposes Ideal was not central to the enactment of the FOIA although at the time of its enactment, FOIA was seen as a way of improving agency decision-making. For example, information provisions encourage better articulation of the rationale for decisions, and, by making available the techniques of analysis, the law opens that analysis to challenge and refinement. The law, however, did consider the role of government in strengthening private decision-making, a goal that looks more to the alternative expression of this ideal of protecting the market.

From inception of the FOIA, Congress was aware that the FOIA would be used for purposes other than evaluating the performance of government officials. Government would hold great amounts of information useful to citizens, consumers, scientists, businesses and researchers. In this sense, the government would become a clearing house of information for commercial enterprises and for consumers. By the time of the 1974 amendments, the clearing-house function of the FOIA was seen by Congress as a central purpose of the law.[22] This clearing-house function, by providing information to commercial enterprises and to consumers, uses the market and private decision-making to accomplish the public good and principally views agencies as sources of the relevant information.

James O'Reilly's essay, 'Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy?' (Chapter 3), describes the expansion of this clearing-house function under the Electronic Freedom of Information Act of 1996 and questions whether this expansion will significantly harm personal privacy and the commercial interests of those enterprises submitting information to the government. The expansion of the clearing-house

function can in fact weaken rather than support private decision-making and the market. He contrasts the more limited function of ensuring government legality, basic to the Rule of Law Ideal, with the broader view that the government be a provider of information, a view more consistent with the alternative expression of the Public Purposes Ideal.

Two developments point, however, to instrumentalism and clear adoption of the basic premises of the Public Purposes Ideal. These developments, a concern with information management and the electronic dissemination of information, share much with instrumentalism. Information management focuses on the expertise of agencies and their ability through the application of rational criteria to manage information in the best interests of the public. Several information laws related to the FOIA emphasize information management. These include the Privacy Act of 1974,[23] the Paperwork Reduction Act,[24] the Computer Matching Act and Protection Privacy Act of 1988[25] and the Computer Security Act,[26] all of which address information management issues and mandate the development of management strategies. In so doing, they increasingly rely on agency expertise in accomplishing the management goals set out in these pieces of legislation. The future of the FOIA is likewise more closely linked to agency expertise in management and administration.

The electronic revolution has reinforced the importance of the management of information. The Electronic Freedom of Information Act shifts in many areas from an access model based on requests for information to a dissemination model based on affirmative obligations of government to provide a wide variety of information. This shift combines easily with the clearing-house function to make agency expertise increasingly important. This reorientation of federal information policy and of the FOIA shares much with instrumentalism.

This reorientation fails to consider the limitations of instrumentalism. Sargentich argues that instrumentalism's attempt to reach the optimal solution requires that virtually all factors be taken into account, thus depriving analysis of any content and leading to indeterminacy in outcome. Moreover, this reorientation fails to recognize the conflict between instrumentalism and the assumptions of openness supporting freedom of information provisions.

The Democratic Process Ideal rests on a participatory and representative decision-making process in which agency officials consider the views of those affected by administrative decisions. The administrative process is primarily political. The core embodiment of the Ideal, participation, seeks to transform the administrative process into a political one in which citizens directly participate.

Although the rhetoric of the federal FOIA has been strongly anti-bureaucratic, and thus shares with participation a disapproval of bureaucratic organization and function, the FOIA has not adopted the tenets of participation. The FOIA does not require participation in any administrative process or in any administrative decision. Rather, it only seeks to give persons access to government documents and records.

This role of the FOIA is more consistent with the alternative expression of the Democratic Process Ideal – political oversight. Citizens are given the information necessary to participate in the political process. By appealing to elected officials – Congress and the President, who oversee the bureaucracy – citizens are able to affect bureaucratic decisions and to protect their interests.

This relationship between the FOIA and the oversight function of politically responsible bodies connects the FOIA with the First Amendment. Access to information is necessary to effective participation in the political process which may be used to make agency officials democratically accountable for their decisions.

In this regard, the FOIA can also be seen to provide for a type of 'information equity' between interests groups who clash in these political arenas. Highly organized interests, subject to agency regulation, with close ties to the agency are likely to possess considerable information about bureaucratic action without freedom of information provisions. The FOIA gives less organized groups a way to obtain information necessary to contend with their more highly organized adversaries. Indeed, the history of the FOIA demonstrates how consumers and other groups have used the law to acquire important information about government policies and practices as the basis for political and public response.[27]

Provisions of the FOIA, such as those providing for fee waivers and for the payment of attorney fees to requesters who succeed in a judicial action to require agency compliance with the Act, incorporate this concept of 'information equity' underlying oversight. Portions of the fee waiver provisions of the 1974 amendments, the Electronic Freedom of Information Act of 1996, and other proposals which distinguish between groups of requesters seek, in part, to implement the goal of equality of access to government documents and records.

Although debate regarding creation of rights in persons who submit information to the government has often been viewed as a conflict between privacy and access, that debate can also be viewed as a part of the concern regarding 'information equity'. In particular, when the persons who submit information are large commercial enterprises who already enjoy close ties with administrative agencies, rules that make access to agency information more difficult can impede the ability of other groups to acquire sufficient information to address agency decisions that affect the interest of those commercial enterprises as well as those of less well organized groups.

Although perceived as an insular body of law, the FOIA is firmly embedded in administrative theory. Conflicts regarding information policy necessarily are part of the major debates about administrative legitimacy and decision-making.

Some conservative critics, however, see the FOIA as a misguided venture in regulation. Like many such ventures, its benefits are outweighed by its substantial costs to political and economic life. It is misguided because the unintended consequences of the law have overwhelmed any justifications supporting it. One of the best known (and bombastic) of these critiques is that by Antonin Scalia, now a Justice of the United States Supreme Court. His essay, 'The Freedom of Information Act Has No Clothes' (Chapter 4), captures the content and tone of some of these attacks.

The Freedom of Information Act and the First Amendment

The importance of the federal FOIA to the First Amendment follows from the emphasis of First Amendment precedent on the right to speak. Less developed is a First Amendment right of access to information. Although a combination of common law rights, the First Amendment, and other constitutional rights mandate open civil and criminal trials and, less clearly, access to court documents supporting dispositive orders, the First Amendment provides little ground for access to other types of government documents and records.

Indeed, one of the justifications for the enactment of freedom of information provisions rested on the need for such access as support for the First Amendment. This need is illustrated by a personal experience. When I lived in England, like many American tourists, I visited Hyde Park Corner to hear a variety of speakers rant and otherwise expostulate with the crowd

regarding a range of government actions. Rather than an illustration of free speech, the visit was, for me, a demonstration that without access to information, the right of free speech is significantly diminished. The speakers could say what they wished but little attention was paid to their arguments not only because of the context of these speeches but also because of their content. Most of the speakers simply 'did not know what they were talking about'. In particular, in the case of political speech, the lack of information about the government conduct at issue reduced the credibility of the speaker and diminished the value of the right to speak. In the United States, this empowerment of the First Amendment right of free speech has been seen as an important justification of freedom of information.[28]

As the previous discussion of the Democratic Process Ideal suggested, the federal FOIA also supported the First Amendment right of free association. Without information about government decisions *and* the implications of these decisions for different groups, the need to associate and the impetus to do so is undermined. The right without the motivation or means of encouraging association can render that right empty and insignificant.

In the federal government and in the states, media interests were the earliest supporters of freedom of information provisions as well as the most politically potent group advocating such laws. The media, particularly the print media, played this role in the enactment and in subsequent amendments to the federal FOIA. The media remain ardent supporters of the law. Their support was particularly important in the passage of the 1974 amendments to the law over the veto of President Gerald Ford and in the successful defense of the law against significant restrictions on access sought by the Reagan administration.

Of course, the media's support correlates with their commercial interests. Their support also rests on the close connection between the First Amendment protections of a free press and access to information. Although the press are not among the groups most frequently using the law (delays in acquiring information may discourage such use when time is of the essence), the Act has provided the basis for a number of important exposés of government misconduct.[29]

Electronically Held Information and the Federal Freedom of Information Act

My colleague, James Boyle, in a yet unpublished work, has proposed the 'telephone test' for the seemingly ubiquitous discussions of the implications of the internet for almost any conceivable topic. The telephone test requires that you substitute the word telephone (or some analogous and relevant existing technology, such as television or radio) for the internet in any of these discussions. If the telephone fits as well as the internet, the author may be addressing an important topic, but it is unlikely to be intertwined with the internet or the computer revolution.

The link between electronically held information and the federal FOIA passes this telephone test. The shift from paper records to electronically held ones represented a change in technology and posed questions that were not addressed by the Act, which was drafted at a time when almost all government documents and records were in paper form. The technology of electronically held records raised issues that required interpretation of the law in light of this new technology. For example, the Act only applies to existing documents and records; the government is not required to create a document which did not previously exist. If the government uses a computer program to extract the requested document from a database, has it created a new document? Does it do so if it extracts information from a database in a way

different from the way in which it does so for government purposes? How much programing is required before the government can legitimately argue that it is creating something new? These questions illustrate how electronically held documents challenge the concept of a document inherited from an age of paper records. The subtle shift in the second question above from document to information shows how the concept of document can be altered when *information* in a database can be retrieved in many different ways.

The change in technology also raised questions regarding other agency obligations under the law. Should a requester be able to obtain the document in the format that best serves the interest of the requester? Should the government be required to provide access to the software that it uses to manipulate the database?

Another issue requires slightly more explanation. Under the FOIA, an agency is required to segregate exempt portions of a document from non-exempt portions. When the requester receives a paper record with the segregated exempt portions removed, the requester is able to see word by word, or line by line, or page by page what has been removed and is able to judge the magnitude of deletions in light of the length of the document itself. With electronically held records, it is *much* easier than with a paper record to reformat the document so that the exempted portions simply disappear. The requester may find it difficult to determine how much has been deleted, and in some cases, where in the document the deletions have been made. Does this change in practice permitted by the change in technology significantly alter the rights provided by the FOIA?

These questions arise directly from the change in technology. The verification of this statement is that the arguments about these issues were based upon analogies to previous technology, with adversaries drawing on different aspects of that technology to form their analogies. The essay by Michael Tankersley in Chapter 2 describes how the Electronic Information Act of 1996 addresses these issues as well as long-standing ones in the administration of the Act.

The technological revolution regarding electronically held information has animated recent discussions of the regulation of information. These discussions are relevant to information held by the government and therefore to freedom of information provisions.

James Boyle in his essay, 'A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading' (Chapter 5), approaches the regulation of information more generally. In my use of his essay as with Sargentich's, I do not pretend to capture in this essay the subtlety or nuance of the analysis. The conceptual richness of these works is another reason that I have included them so that a reader can appreciate the organization of this essay and has the material from which to draw conclusions different from the ones that I emphasize.

Like Sargentich, Boyle sees regulation of information as closely tied to the ways in which liberal theory envisions the role of the state. Liberal political thought limits the role of the state by separating the public and private spheres. This distinction plays an important role in the regulation of information; private activities are ones identified with property and with privacy and the ability to withhold information. In the public sphere, information should be freely available to all. To accomplish this division, law must regulate information differently in the public and private spheres.

In the private sphere, information is conceived of as property. This conception of information as property changes the legal entitlements of the holder of information. The conception of information as property poses significant obstacles to regulation of information and redistribution of the entitlements attached to its control.