GOVERNMENT TRANSPARENCY

Congress should

- pass meaningful, comprehensive national security whistleblower protection legislation that
  - forbids misuse of the classification system to conceal waste, fraud, abuse, mismanagement, or criminal conduct and mandates that any document found to be so misclassified be deemed unclassified and releasable by anyone with access to it;
  - allows prospective intelligence community whistleblowers to make disclosures to any House or Senate member, relevant committee, or the Government Accountability Office;
  - forbids any federal official (elected, appointed, or career civil service) to publicly expose an intelligence community whistleblower who has, in good faith, filed a complaint lawfully; and
  - provides cleared, private counsel to represent the whistleblower in any administrative or legal proceedings; and
- reform the Freedom of Information Act to eliminate broad, unreviewable anti-transparency exemption carve-outs by specifically
  - making a "foreseeable harm" standard review by a court-appointed special master mandatory for all (b)(3) statutes;
  - reevaluating the necessity and rationale for all existing (b)(3) statutes; and
  - mandating a "foreseeable harm" standard review by a court-appointed special master for all agency and department (b)(5) invocations not involving sensitive treaty negotiations.

Whistleblower Protections

American history over the past two centuries has demonstrated repeatedly that executive branch officials would often prefer that U.S. citizens *not*

know what they are up to, particularly in the areas of national security and law enforcement. Our knowledge of major episodes of executive branch misconduct—the lies about our policy in Vietnam, the infamous FBI Counterintelligence Program's domestic surveillance and political repression operation, warrantless mass surveillance by the NSA—all came from whistleblowers who risked prosecution to bring the truth to their fellow citizens.

The current patchwork of federal whistleblower protection laws is inadequate to shield government employees and contractors from retaliation for exposing waste, fraud, abuse, mismanagement, or even criminal conduct.

It was only in 1998 that Congress passed the first law to specifically deal with intelligence community (IC) whistleblower complaints: the Intelligence Community Whistleblower Protection Act (ICWPA). The ICWPA applied only to CIA employees. It required those seeking to report an "urgent concern" to go through the CIA inspector general (IG) *first*; if dissatisfied with the IG's response, they could go to Congress only after telling the director of the CIA that they intended to do so. Such a system guaranteed the exposure of the whistleblower, thus inviting potential reprisals by those accused.

More than a decade passed before Congress would enact any meaningful protections for IC whistleblowers generally.

The fiscal year 2010 Intelligence Authorization Act (Public Law 111-259) created the Office of the Inspector General of the Intelligence Community to investigate whistleblower complaints. But the statute bars only the IC inspector general from revealing a whistleblower's identity—it does not prohibit another official (such as the president) from doing so. That loophole creates the threat of a whistleblower's being involuntarily exposed and thus vulnerable to retaliation. Other issues that affect whistleblower safety from reprisal are generally constrained congressional reporting channels (i.e., limited to specific committees) and the lack of a private right of action to seek civil damages from those who engage in retaliation.

Congress has the power to fix these problems.

Providing prospective IC whistleblowers with multiple, protected pathways to make disclosures is a critical first step. IC whistleblowers should have the option of reporting complaints to any relevant committee, any House or Senate member, or the Government Accountability Office if they believe the committee of jurisdiction is too partisan or politicized to safely make their disclosures.

The current practices of forcing IC whistleblowers to initially go through the IG of the agency or department where they work or of requiring "agency notification" of IC whistleblower complaints to Congress in advance should be expressly forbidden. These mechanisms not only discourage whistleblowing but also affirmatively put prospective whistleblowers at risk of discovery and retaliation by their parent agency or department.

No federal official (elected, appointed, or career civil service) should be free to publicly expose an IC whistleblower who has, in good faith, filed a lawful complaint. Criminalizing IC whistleblower "outing" with assured mandatory minimum prison time and hefty fines is the best way to disincentivize whistleblower retaliation by executive branch officials at all levels.

One other problem routinely encountered by IC whistleblowers is the need to retain a lawyer with appropriate security clearances to represent them in any administrative or legal proceedings. By mandating expedited security clearance processing for the attorney (no more than 30 days from the date of the request), Congress could ensure that IC whistleblowers get proper representation promptly.

If enacted as a package, the reforms outlined here would protect future IC whistleblowers and make the IC as a whole more accountable to Congress and American taxpayers.

Freedom of Information Act Reform

Since its enactment over President Lyndon B. Johnson's objections in 1966, the federal Freedom of Information Act (FOIA) has become a major government transparency tool, employed by individual citizens and organizations across the political spectrum. Federal agency and department resistance to FOIA, however, has forced Congress to amend the law seven times, the last being in 2016.

In 2020, the Reporters Committee for Freedom of the Press, using Justice Department data, found that *nearly half* of FOIA requests are denied either partially or fully. Of the nine specific exemptions that agencies and departments are permitted to invoke, two are particularly problematic: the (b)(3) "other statutes" exemption (i.e., information that is prohibited from disclosure by another federal law) and the (b)(5) "deliberative process" exemption.

At present, there are 39 (b)(3) exemption carve-outs covering 13 U.S. Code titles and other specific laws, as well as the Federal Rules of Criminal Procedure. Some national security–related examples and their negative impacts on government transparency are worth citing.

First is 50 U.S.C. § 3605, or Public Law 86-36, the National Security Agency Act of 1959. Section 6 of that statute states, in relevant part, that "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency."

Such sweeping language allows the NSA to refuse to release information from the prosaic (whether the NSA has an employee cafeteria) to the profound

(whether NSA officials have spied illegally on Americans). Similar language exists at 10 U.S.C. § 424, which allows the withholding of information on the "organization or any function of, and certain information pertaining to, employees of the Defense Intelligence Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency."

Most people would agree that the protection of *current* human sources and cryptographic methods is a necessity; however, wide-ranging (b)(3) FOIA carve-outs vitiate the very concept of government transparency.

The so-called deliberative process exemption—(b)(5)—is, in the view of many open government proponents, perhaps the most anti-transparency provision in FOIA.

Government advocates defend the (b)(5) exemption on the grounds that making predecisional government policy or legal deliberations subject to FOIA would have a "chilling effect" on government personnel with regard to providing candid advice and recommendations. Yet in the 50-plus years FOIA has been law, no evidence has surfaced to support that position. In fact, it is precisely when executive branch officials are *considering* potentially controversial—or perhaps even legally questionable—policies that the public and Congress most need to be aware of those potential plans and actions. Even so, Congress has only exempted records older than 25 years from (b)(5) invocation by agencies or departments.

The 2016 update to FOIA included the creation of what is known as the "foreseeable harm" standard for application to most, but not all, of the existing FOIA exemptions. The intent was to force agencies and departments that are seeking to invoke the (b)(5) exemption to articulate one or more specific, real-life harms that would result from disclosing the material at issue. A 2021 ruling by the U.S. Court of Appeals for the D.C. Circuit took exactly that position, denying FBI attempts to withhold allegedly predecisional materials—including draft IG reports—on FBI guidance to agents on impersonating journalists. Although that ruling was an important victory for opponents of the (b)(5) exemption, a permanent statutory fix would be a preferable long-term solution.

Congress has the power to improve FOIA and address these and other issues with the statute.

Revising FOIA to mandate a "foreseeable harm" standard review by a court-appointed special master for all (b)(3) statutory invocations in FOIA cases in litigation would be an important improvement over current law. But Congress should go further and direct the relevant committees of jurisdiction to reevaluate the necessity and rationale for all existing (b)(3) statutes and, where deemed appropriate, repeal (b)(3) statutes that have been abused to conceal federal government misconduct.

Another key change needed is reining in agency and department misuse of the "deliberative process" privilege via FOIA (b)(5) invocations. This is another area in which mandating a "foreseeable harm" standard review by a court-appointed special master for such invocations in FOIA litigation would likewise deter abuse of the (b)(5) exemption. A reasonable exception would be excluding documents involving sensitive treaty negotiations from such a review pending final Senate action on any such treaty.

These changes to FOIA would dramatically improve executive branch agency and department transparency without in any way harming the ability of federal officials to do their jobs. Indeed, additional public and congressional insights into proposed agency and department actions might well prevent bad policies or regulations from ever being enacted.

Suggested Readings

Eddington, Patrick, Jesselyn Radack, and Christopher Coyne. "What Protections Do Whistleblowers Deserve?," *Cato Unbound*, December 2019.

Kwoka, Margaret B. *Saving the Freedom of Information Act*. Cambridge: Cambridge University Press, 2021.

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