

CHAPTER ONE

Sunlight Is the Best Disinfectant

People care about what goes on inside government. But why *do* people care so much?

History shows us that all forms, and all levels of government, sometimes do things that are morally reprehensible. Examples include the Tuskegee experiments, which started in 1930s and continued until the early 1970s, in which poor black men in the South were not told they had syphilis and were given no treatment. Penicillin, which became available in 1947, would have cured the disease.¹ Whole books have been written on the subject of unethical behavior by governments.² Sometimes the people working for government may not go so far as doing something that could be considered evil but may be just a bit odd. Remember the memorable picture of President Richard Nixon and Elvis Presley shaking hands? Elvis Presley wrote to Richard Nixon and asked to be made a “Federal Agent-at-Large” in the Bureau of Narcotics and Dangerous Drugs. Nixon met with Presley on December 21, 1970, in the White House to discuss what both men saw as a drug epidemic affecting the country’s young people. The Nixon–Presley picture and accompanying memos are the most requested documents from the National Archives.³ We just want to know what our government is up to.

But our desire for an open government is driven by more than the evidence of past unethical or bizarre behavior. People feel that as taxpayers we have a right to know what we are paying for and what is being done in our stead. A 2002 First Amendment Center/American Journalism Review poll found that 48 percent of Americans feel that they have too little access to government documents (Paulson 2002). (See Box 1.1 for more findings from this questionnaire.) The topic has gained so much attention lately that in the 2004 presidential Democratic primaries two candidates issued statements supporting a more open federal government (Clark 2004, Lieberman 2004). There is an obligation of government, and those who work for it, to serve our best interest. By gaining insight into what is going on inside government, we can begin to discover if that obligation is being met. Yet, the usefulness of open government

goes even further. Former Supreme Court Justice Louis D. Brandeis wrote that “sunlight is said to be the best of disinfectants; electric light the most efficient policeman”(Brandeis 1933, 62). He was referring to the banking business, but the argument holds for government as well. Not only does transparency give us a better understanding of what government is doing, but it encourages those who work for government to better meet their obligation to us.

This book focuses on this important aspect of modern governance—transparency. Governmental transparency equates to open government through avenues such as access to government records, open meetings, and whistleblower protections. The core issue addressed in this book is the impact of major contemporary administrative reforms on transparency. The federal government’s major transparency statute, the Freedom of Information Act, is implemented in an administrative environment that increasingly favors the cost-effective achievement of results and views procedurally oriented public administration with skepticism. This skepticism applies even when those procedures have been adopted to promote democratic accountability and open government. The Freedom of Information Act clearly is not a self-administering statute. While the FOIA is a statute that deals with a procedural and administrative function, it needs to be implemented like all policy initiatives. The FOIA is implemented in an environment characterized by limited resources, competing concerns, and policy trade-offs. The specific central question of this book is how open government measures are likely to fare in an administrative environment that is overwhelmingly concerned with the achievement of programmatic and policy results?

DEMOCRACY AND THE FOIA

Emmette Redford defines democratic morality in his 1969 book, *Democracy in the Administrative State*. Democratic morality addresses the individual’s relationship to the administrative state. A central component of this relationship is universal participation. “Democratic morality posits that on all matters where social action is substituted for individual action, liberty exists only through *participation either in decision making or in control of leaders who make the decisions*” (emphasis in original; Redford 1969, 6). According to Redford, meaningful participation has multiple requirements, including “access to information, based on education, open government, free communication, and open discussion” (Redford 1969, 8). To have democratic morality, a society must have participation. Open government and the free exchange of information are central aspects of participation. Redford concludes that only if we have an open society can we have a humane society. The desire to have an open government, specifically open executive departments and agencies, is exactly why the Freedom of Information Act was passed.

The FOIA is a tool that can be used to gain accountability. There are many different definitions of accountability. Accountability is associated with such

Box 1.1 First Amendment Center/AJR 2002 Poll

The First Amendment Center/AJR Poll on the First Amendment was conducted by the Center for Survey Research and Analysis at the University of Connecticut. A random national sample of 1,000 adults eighteen and over were interviewed between June 12 and July 5. Sampling error is + or - 3 percent at the 95 percent confidence level. For smaller groups the sampling error is slightly higher. Weights were assigned to reflect characteristics of the population. Totals may not equal 100 percent due to rounding. Not all questions are asked every year.

Do you think Americans have too much, too little, or just about the right amount of access to government records?

	2001	2002
Too much	7%	8%
Too little	48%	48%
Just about the right amount	30%	38%
Don't know/refused	15%	5%

Do you think Americans have too much, too little, or just about the right amount of access to information about the federal government's war on terrorism?

	2002
Too much	16%
Too little	40%
Just about the right amount	38%
Don't know/refused	6%

Source: <http://www.ajr.org/article.asp?id=2621>

divergent terms as “fairness” and “punishment.” Holding someone accountable generally translates into making individuals, groups, or organizations answerable for their work performance and actions. There is an enormous body of literature⁴ on accountability of public organizations, including recent works focusing on accountability and leadership (Radin 2002) and accountability and performance (Behn 2001, Gormley and Balla 2003).

Barbra Romzek and Melvin Dubnik argue that there is a typology of accountability which breaks executive branch accountability into four possibilities: hierarchical accountability, professional accountability, legal accountability, and political accountability (Romzek and Dubnick 1998).

The Freedom of Information Act is not a type of accountability, but a tool to achieve different dimensions of accountability. It bridges different classifications of accountability. The FOIA is used to access documents produced by agencies. These documents may further one or more type of accountability. For example, a public interest group may file a FOIA request with the Environmental Protection Agency (EPA) to find out about the status of a brown-field in their neighborhood. After the citizens get the documents from the

EPA concerning the brownfield, they write letters to the EPA as well as their congressperson about their concerns. This is a political form of accountability. Citizens will hold their elected and appointed officials accountable for how they have dealt with brownfield contamination.

FREEDOM OF INFORMATION AND GOVERNMENTAL TRANSPARENCY

The desire and need for access to government information have a history in the public administration literature. Freedom of information and democratic accountability are two interrelated tenets of governance. The demand for democratic accountability is largely met by the principle and implementation of an information policy of full disclosure. Lotte Feinberg aptly stated: "For democracy to work, citizens must have access to information about what their government is doing and how decisions have been reached" (Feinberg 1997, 377). The U.S. federal Freedom of Information Act was initially passed in 1966⁵ but the debate revolving around access to government information predates the FOIA. In 1960, Francis Rourke stated that "nothing could be more axiomatic for a democracy than the principle of exposing the processes of government to relentless public criticism and scrutiny" (Rourke 1960, 691). It is clear that the principle of democratic accountability rests, in large part, on freedom of information.

Transparency is increasingly becoming an international issue for countries and international organizations, such as the World Trade Organization (Roberts 2004a). According to a publication by the Bow Group, a research organization of the Conservative Party in England, fifteen of the approximately forty truly democratic countries had freedom of information laws in 2000. The United States is joined with Australia, Canada, New Zealand, Sweden, Denmark, Norway, Holland, France, Hungary, Ireland, Thailand, Korea, Israel, and Japan (Marsh 2000, 11). A world survey completed in September 2003 found fifty-three countries have some form of law to facilitate access to government records (Banisar 2003). A book advocating more expansive transparency laws in the United Kingdom defines freedom of information: "If we believe that government is there as a servant of the public, to provide us with services, to meet our needs and to represent the British people to the world at large, surely we have a right to know how government operates and that it best meets those needs?" (Marsh 2000, 9).

Later the same piece enunciates that improving the democratic process is an advantage of freedom of information laws. "Freedom of Information is in the interest of the political process. If dishonesty, duplicity and poor performance can be readily exposed and rooted out and the opportunity for such behaviour minimised it will rekindle faith in government" (Marsh 2000, 10). In January 2005, the United Kingdom began implementation, for the first time, of a freedom of information law. It is as part of the political process that freedom of information leads to democratic accountability.

Undoubtedly, many scholars, legislators, and administrators have agreed with Rourke's contention that "the tradition of disclosure might wither in the shade of the administrative evasion or inertia were it not for the continued exercise of outside vigilance" (Rourke 1960, 694). In 1995, John Cain, a former premier of Victoria, Australia, made the same point with a modern reference.⁶

FOI is a bit like compulsory random breath test on our roads. Motorists are aware of its presence and the ever-present likelihood of a check. Governments, likewise, are aware of the prospect of examination of a comprehensive list of documents on which a decision is based. Because of that the Act has had significant impact on the quality of decision making. It has improved the public sector's professionalism and the capacity of its officers to develop, analyse, and articulate policy that stands up to scrutiny. (John Cain quoted in Marsh 2000, 9)

Since 1946, when Congress enacted the Administrative Procedure Act (APA) and the Legislative Reorganization Act, a series of U.S. federal statutes have been passed in the spirit of Rourke and Cain's words (Rosenbloom 2000). The premier open government statute in the United States is the FOIA, which was originally passed in 1966. It was subsequently amended in 1974, 1976, 1986, and 1996. Chapter 2 presents a brief history of the development of the FOIA.

The Freedom of Information Act amended the APA, replacing the APA Section 3 on public information. As explained earlier, the reinventing government movement largely favors the reduction of such regulation. Alasdair Roberts (2000) states that the reinventing government movement is much more than a reform to make government work better. "It also represents an attempt to adjust the institutional arrangements that regulate policymaking in ways that favor political executives, senior officials, and some well-organized sectors of industry" (Roberts 2000, 309). In the early 1990s, it was not widely recognized "that public sector restructuring might undermine FOI laws" (Roberts 2000, 315). With regards to regulation, it therefore appears that the reinventing government movement and democratic accountability are frequently at odds with each other.

It is less clear how the reinvention values of performance, customer service, privatizing, and entrepreneurship comport with democratic accountability. While some work has looked at the implication of privatizing government services on the FOIA (Bunker and Davis 2000, Roberts 2000), little has been done to systematically review how the push for performance, customer service, and entrepreneurship interact with FOI activities. Access to government information is a topic that political theorists and government practitioners have spent a great deal of time thinking about. Considering all the theoretical and practical consequences of accessing government information, there is a paucity of empirical research in the field. A 1989 book chapter

titled “Government Information: A Field in Need of Research and Analytical Studies” makes this point clearly (Hernon 1989). There is still a need for more research on the specific impact of major administrative reforms on governmental transparency policy. The focus of this book is to analyze the dynamic relationship between the reinventing government movement and democratic accountability, embodied in the FOIA, with regards to performance, customer service, privatizing, and employee empowerment.

REINVENTING GOVERNMENT

In the same way that Dwight Waldo (1948) clearly saw that the orthodox view of public administration was a political theory, public administration scholars are recognizing that the reinventing movement is also a political theory. Like the public administration orthodoxy, many proponents of the reinventing movement do not see themselves as purporting a unified political theory. That the advocates of reinventing government, and the administrators implementing reinvention proposals, may not be conscious of the political theory does not negate its existence.

Reinventing government is a political theory and, as such, advocates a particular value set. George Frederickson argues that: “Reinventing government is currently popular politics, while claiming to have little to do with politics. Because so much of contemporary politics is conservative, one should not be surprised that elected officials use reinvention to achieve conservative purposes” (1996, 269). De Leon and Denhardt (2000) concisely state many of the major themes promoted by this political theory.

The reinvention movement speaks clearly to the political theory of our time. In its use of the market model, in its emphasis on customers rather than citizens, and in its glorification of entrepreneurial management, the movement contributes to a political theory based on the idea that the public interest can be approximated through the accumulation of narrowly defined self-interests of many individuals. (de Leon and Denhardt 2000, 96)

Reinventors focus on individuals’ self-interest, customer service, performance, competition, and mission-driven government. They believe strongly in, and rely heavily on, phrases such as public entrepreneur, steering rather than rowing, and results-oriented government. David Osborne and Ted Gaebler’s best-selling book, *Reinventing Government*, gave the reinvention movement its name and largely codified its central principles. Osborne and Gaebler’s (1992) ten principles for massive government reform are:

1. Catalytic government: steering rather than rowing
2. Community-owned government: empowering rather than serving
3. Competitive government: injecting competition into service delivery

4. Mission-driven government: transforming rule-driven organizations
5. Results-oriented government: funding outcomes, not inputs
6. Customer-driven government: meeting the needs of the customer, not the bureaucracy
7. Enterprising government: earning rather than spending
8. Anticipatory government: prevention rather than cure
9. Decentralized government: from hierarchy to participation and teamwork
10. Market-oriented government: leveraging change through the market

Proponents of the reinventing government movement speak frequently about the need for accountability, and through “transforming rule-driven organizations,” deregulation.

Again, the premier treatise for this movement, Osborne and Gaebler’s *Reinventing Government*, calls for “a new accountability system” (136). This system of accountability is focused on results. Governments should be entrepreneurial and concentrate on mission-driven budget and personnel systems. These entrepreneurial organizations are encouraged to “rely on information about the results of government spending—the cost and quality of government programs—to detect fraud and abuse” (Osborne and Gaebler 1992, 137). By focusing on results, accountability will be ensured.

Reinventors frequently advocate utilizing market forces and privatizing government services. “It makes sense to put the delivery of many public services in private hands (whether for-profit or nonprofit), if by doing so a government can get more effectiveness, efficiency, equity, or accountability” (Osborne and Gaebler 1992, 47). Accountability with respect to privatizing is determined if the contractors are “accountable for their results” (Osborne and Gaebler 1992, 47). Accountability is based on a final outcome or product. If final expectations are met, or a contractor is penalized for failing to meet them, accountability is achieved.

The reinventing government movement also places a strong emphasis on customer service. Customers of government agencies should not only be identified as such, but also given choices. They should have a choice of service providers (i.e. schools, recreation facilities, etc.). Osborne and Gaebler see this as an advantage; “This takes competition a step further: rather than government managers choosing service providers in a competitive bidding process, it lets each *citizen* choose his or her service provider” (emphasis in original). They conclude that being able to choose between service providers “establishes accountability to customers” (169). Since customers can take their business elsewhere, service providers must stay responsive to the needs of their customers. Later in *Reinventing Government*, the authors reiterate that “customer-driven systems force service providers to be accountable to their customers”

(Osborne and Gaebler 1992, 181). It is clear that to Osborne and Gaebler accountability is directly tied to satisfying individual customers.

The reinventing government movement acknowledges that “voters demand some accountability.” Their terms of accountability are clear. In their ideal decentralized organization, “accountability for inputs gives way to accountability for outcomes” (Osborne and Gaebler 1992, 254). Accountability to the “voters” does not take place at the beginning (inputs), or throughout a process, but at the end (outcomes). Accountability is determined by performance to meet specified goals.

Reinventors believe that government organizations are too rule-driven and that these rules, or regulations, are a detriment to these organizations.

We embrace our rules and red tape to prevent bad things from happening, of course. But those same rules prevent good things from happening. They slow government to a snail's pace. They make it impossible to respond to rapidly changing environments. They build wasted time and effort into the very fabric of the organization. (Osborne and Gaebler 1992, 111)

Osborne and Gaebler contend that mission-driven organizations are more efficient, effective, innovative, flexible, and have higher morale than rule-driven organizations (114). They see these attributes as positive and believe that removing rules and regulations will contribute to these organizations and, as such, more “good things” will take place.

Rule-driven organizations can be transformed one system at a time. By altering personnel and budgeting systems, an organization's focus will shift to its mission. Removing regulations will improve performance, customer service, and accountability. Proponents of reinvention clearly favor deregulation over rules as a means of achieving their goal of an efficient, effective, and customer-service-driven government.

Al Gore lists the principles of the National Performance Review in *Creating a Government that Works Better & Costs Less: Report of the National Performance Review* (1993a). These principles are:

We will invent a government that puts people first, by:

- Cutting unnecessary spending
- Serving its customers
- Empowering its employees
- Helping communities solve their own problems
- Fostering excellence

Here's how. We will:

- Create a clear sense of mission
- Steer more, row less
- Delegate authority and responsibility

- Replace regulations with incentives
- Develop budgets based on outcomes
- Expose federal operations to competition
- Search for market, not administrative, solutions
- Measure our success by customer satisfaction (Gore 1993a, page xl-xli, emphasis in original)

The language of the NPR mirrors that of Osborne and Gaebler's *Reinventing Government*.

The extent to which the NPR was implemented in the federal government is unclear. Preliminary assessments of NPR reforms throughout the federal government led to mixed conclusions. One study breaks NPR initiatives down into three tiers (Thompson 2000). First-order initiatives are to downsize, reduce administrative costs, and reform administrative systems. First order objectives need to be met in order to achieve second-tier reforms (decentralize authority within agencies, empower frontline workers, and implement cultural change). Similarly, meeting second-tier goals leads to fulfillment of third-order objectives: improve quality of service and improve efficiency of agency practices (Thompson 2000, 509).

A broad conclusion is that while some success has been achieved with regard to lower, first-order goals, only limited progress has been made toward critical, higher, second- and third-order reinvention objectives. Thus, downsizing and cost reduction objectives have been substantially achieved. The partnership initiative appears to have met with some success, but there is no evidence of any significant, systematic improvement in quality of service or culture. Even where the data is somewhat favorable, such as with improved work efficiency, it is not apparent whether the improvement is attributable simply to a reduction in "slack," as employees are made to work harder, or to a redesign of work processes as recommended in the NPR report. (Thompson 2000, 510)

The extent to which the NPR initiatives have been implemented has been studied at length. The GAO found that the effects of the NPR reforms could not be isolated from other critical contributions by the agencies and Congress in the 1990s to reform the federal administration. In a report on implementation of NPR initiatives at ten federal agencies, the GAO found that thirty-three of the NPR initiatives were fully implemented, thirty were partially implemented, eight were not implemented, but some action was taken to implement the recommendation, and one initiative was not implemented and no action was taken to that end (GAO 2000, 9). A 2000 survey completed by the National Partnership for Reinventing Government of federal employees found that only 36 percent of respondents regarded reinvention favorably (Kauffman 2000, 3). Not only did different initiatives meet with different ends, but individual departments also had dissimilar outcomes. Not all aspects

of federal administration were included in the series of NPR reports published during the Clinton–Gore administration.

A review of the NPR reports shows little direct mention of the FOIA and few references to related transparency concepts. Gore's 1993 status report on NPR made no direct mention of the Freedom of Information Act. Appendix A of the 1993 report lists the "National Performance Review Major Recommendations by Agency." The Department of Justice, which acts as the policy center for the FOIA governmentwide, was not even included. Appendix C of the same report lists the "National Performance Review Major Recommendations Affecting Governmental Systems." One recommendation under this section did touch on access to government documents.

Recommendation SUP02, *Assure Public Access to Federal Information*, is included under the "Reinventing Support Services" section of the 1993 NPR status report. *Support services are by definition not the focus of an organization but a means to meet the primary goals of that organization.* "Reinventing such services means improving the quality, expediting the delivery, and reducing the costs of goods and services that directly support federal agencies' missions and programs" (Gore 1993b, 1). Recommendation SUP02, which looks to ensure access to public information, is listed as a support service along with the Government Printing Office, real property, mail management, and logistics, such as supply delivery systems, travel, vehicle fleet management, and personal property disposal (Gore 1993b, 1).

The explanation for recommendation SUP02 states: "Give the executive branch agencies responsibility for distributing printed federal information to depository libraries. Require agencies to inventory the federal information they hold, and make it accessible to the public" (Gore 1993a, 312). While this recommendation does *not* specifically refer to the FOIA, it does embody the spirit of open government and would appear to have implications not only for implementation of the FOIA but also the Federal Advisory Committee Act, Government in the Sunshine Act, and the Presidential Records Act.

It is clear that while there is theoretical overlap between recommendation SUP02 and these legislative statutes, the authors of the National Performance Review were not thinking about them. In "Reinventing Support Services: Accompanying Report of the National Performance Review" (Gore 1993b), recommendation SUP02 is expanded upon:

Information means power, and government information is power available to every American. Government-generated information provides citizens with knowledge of their government, ensures the government's accountability to its citizenry, and is a commodity often with great economic value in the marketplace. (Gore 1993b, 11)

Again, this introduction relates directly to the idea of democratic accountability. The recommendation goes on without any mention of the FOIA or the other related transparency statutes. Recommendation SUP02 focuses on depository

libraries, the use of technology to disseminate information, and the sale of federal documents. The action points listed under this recommendation are:

1. Give the executive branch responsibility for the distribution of printed federal information to depository libraries.
2. Disseminate federal information effectively and efficiently to depository libraries.
3. Develop agency locators for public access to federal information.
4. Create one-stop shopping for the sale of federal documents. (Gore 1993b, 12)

These action points relate to the active dissemination of information, not the current requester-based model embodied by the FOIA. Recommendation SUP02 was included in the report appendix and received little attention in subsequent NPR reports.

This NPR recommendation, *Assure Public Access to Federal Information*, was found to have little direct relationship to FOIA implementation. The implications of the recommendation are relevant for the proactive release of information through the federal depository libraries program and e-government initiatives. E-government avenues include GPOAccess.gov, the U.S. Government Printing Office's website; Firstgov.gov, the U.S. Government's Official Web Portal; and Archives.gov, the National Archives website. All these websites make large amounts of government information available online. The proactive posting of information on these and other websites significantly enhances federal transparency and openness.

Follow-ups to the NPR track specific individual initiatives. The 1994, 1995, and 1996 reports make no mention of the FOIA with regard to recommendation SUP02 (Gore 1994a, Gore 1995, Gore 1996). A few agencies did include the FOIA in their customer service standards (Clinton and Gore 1995). The idea of FOIA requesters as customers is potentially problematic. The relationship between a FOIA requester and an agency can evolve into an adversarial one. If an individual or entity is denied their initial request, they have the right to appeal the denial and the adversarial relationship is formalized as the appeal proceeds to trial. The relationship between the FOIA and customer service is discussed at length in chapter 4.

To summarize, the NPR reports include access to government information, but marginalize the function by placing it in the general support category. Improving FOIA processes itself is not a priority. Recommendation SUP02, ensuring public access to federal information, is presented as a necessary procedure, not a fundamental right. Again, the idea of depository libraries relies on the dissemination model of information distribution as opposed to the requester model, of which the FOIA is the main variant.⁷ Also notable is that the recommendations focus on access to information not documents. Conversely, the FOIA relies on the release of specific documents or files.

APPROACH TO THE PROBLEM

To address the multiple research questions posed, a case study design is employed. Data were gathered for the project in four distinct ways. First, a questionnaire was developed and sent to members of the access community. The access community includes federal FOIA officers, government attorneys specializing in FOIA requests, public interest group members, and academics. The survey was developed to ascertain how the access community perceived the NPR initiatives affected FOIA policy. In-depth interviews were completed with members of the access community, individuals responsible for implementing the NPR, and people who had an extensive history dealing with FOIA policy. A content analysis of the Department of Justice publication, *FOIA Post*, was completed. The analysis was conducted to determine if the NPR reform language made its way into formal FOIA policy. A historical document analysis focused on material not covered in *FOIA Post* such as legislation, newspaper articles, government reports, and historical commentaries. Multiple data sources were used to confirm findings and strengthen arguments. For a more detailed explanation of the methods employed, see the Appendix.