

DUE PROCESS, DATA ACCESS, AND INFORMATION COMMISSIONS

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CITE AS: 6 GEO. L. TECH. REV. 446 (2022)

TABLE OF CONTENTS

I. Introduction.....	446
I. Access to Personal Data Under FOIA	448
II. FOIA Compliance and Oversight Mechanisms	451
III. Conclusion	453

I. INTRODUCTION

The collection of personal data by private companies has received widespread attention both in the media and in popular discourse, and it is increasingly focused on the way that personal data may be used to the detriment of concerned individuals without much recourse.¹ But governmental

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¹ See, e.g., Jennifer Schlesinger & Andrea Day, *Most People Just Click and Accept Privacy Policies Without Reading Them — You Might Be Surprised at What They Allow Companies to Do*, CNBC (Mar. 15, 2019, 1:49 PM), www.cnbc.com/2019/02/07/privacy-policies-give-companies-lots-of-room-to-collect-share-data.html [<https://perma.cc/96BE-FRHK>] (detailing ways in which private company data collection may be shared to the detriment of users); See also Joe Toscano, *Data Privacy Issues Are the Root of Our Big Tech Monopoly*

entities have also collected vast amounts of personal information,² and agencies increasingly rely on large-scale databases for decision-making about individual benefits or enforcement decisions. Sometimes these decisions draw on increasingly detailed record sets maintained by the agency in question; other times agencies rely on algorithmic decision-making,³ including algorithms that incorporate privately maintained databanks.⁴

When government agencies make decisions that impact important interests of individuals—sometimes critically important interests ranging from disaster relief awards to deportation from the United States—the bases of those decisions may rely on information the government has already collected, such as tax submissions or law enforcement surveillance data, about which the affected individual is unaware. The less transparent the basis for the decision, the more likely that individuals are subject to incorrect or arbitrary government actions. Individuals often need access to the government’s files to contest underlying facts or make their best case, but in many administrative contexts, there is no process akin to discovery to obtain the government’s records.

Instead, individuals make requests under the Freedom of Information Act (FOIA) by the hundreds of thousands as a stop-gap measure to access their own data held by government agencies.⁵ Although FOIA’s access provisions are some help for these individuals, FOIA does not provide requesting individuals with the kind of procedural protections usually associated with the adjudication of important rights. In fact, an independent adjudication of the right to access one’s own file is only available if they file an entirely separate civil lawsuit in federal court.⁶ This Essay proposes that the due process

Dilemma, Forbes (Dec. 1, 2021, 12:19 PM), www.forbes.com/sites/joetoscano1/2021/12/01/data-privacy-issues-are-the-root-of-our-big-tech-monopoly-dilemma/?sh=1042d5ce3cfd [<https://perma.cc/Z6Q8-5YDQ>] (explaining how privacy policies may be at the root of market power concentration in tech industries).

² See, e.g., Margo Anderson, 6 GEO. L. TECH. REV. 408 (describing the history of the U.S. Census data practices).

³ The use of AI in individual adjudications was comprehensively documented by a recent ACUS report, which found a variety of agencies had incorporated AI into their hearing processes including Social Security Administration, Internal Revenue Services, and Centers for Medicare and Medicaid Services. See DAVID FREEMAN ENGSTROM, ET. AL., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 82 (noting the due process concerns raised at those agencies) (2020) <https://law.stanford.edu/education/only-at-sls/law-policy-lab/practicums-2018-2019/administering-by-algorithm-artificial-intelligence-in-the-regulatory-state/acus-report-for-administering-by-algorithm-artificial-intelligence-in-the-regulatory-state/> [<https://perma.cc/TSN2-UDMN>].

⁴ For example, U.S. Customs and Border Protection utilizes facial recognition software from private vendors as part of its biometric screening at ports of entry. *Id.* at 32.

⁵ See MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 71-74 (2021).

⁶ See 5 U.S.C. §§ 552(a)(4) (providing a federal cause of action for violations of FOIA).

interests of individuals seeking to access their own records would be best served by an information commission model, under which an independent agency would be empowered to adjudicate transparency disputes between members of the public and government agencies.

I. ACCESS TO PERSONAL DATA UNDER FOIA

The government holds vast quantities of personal data. Most of this data is unstructured, consisting of files reflecting required paperwork submitted by individuals, documenting interactions between a government official and an individual or keeping track of individuals' status vis-à-vis a government benefit or program. These important records include our interactions with the criminal justice system, our tax filings, our medical records, our family immigration histories, and more.

Unlike other government databases, which could potentially be affirmatively published for the world to consume,⁷ these kinds of personal records are never going to be publicly available for all to see because the information in them implicates key privacy concerns with respect to our health, our finances, and our families. But the fact that they are not public does not mean that the government cannot use them. The government, of course, relies on these databases to make all sorts of important decisions about eligibility for certain kinds of government benefits, tax liabilities owed, whether to bring a removal or deportation case against a noncitizen, and more.

In those instances, access to the government records held in these vast sets of largely unstructured data is crucial to the individual trying to make their best case in the face of an impending government decision. Individuals' abilities to access their own files, which are housed in these huge government databanks, is not only essential to the fundamental fairness of the process but also to ensuring the accuracy of the outcome. Fairness and accuracy in adjudication are the fundamental concerns of due process protections.⁸ Unlike criminal proceedings, in which individuals have a right to access information to be used against them, in administrative proceedings, the Due Process Clause, as a formal matter, does not grant individuals the right to access their file.⁹

⁷ For an example of such datasets, see data.gov, an Obama-era initiative that pushed agencies to publish "high-value" datasets affirmatively, without the need for a FOIA request or resulting lawsuit.

⁸ David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1137 (2017).

⁹ See *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 741 (8th Cir. 1999); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857–58 (2d Cir. 1970).

Rather, when people need access to their own files housed in vast government databanks, often the only option for retrieval is to make a FOIA request. FOIA provides individuals with the right to request any records from any federal agency—without the need to justify the purposes—and requires the federal government to respond, subject to an enumerated list of exemptions.¹⁰ While privacy is one of the bases for withholding records from the public, if the privacy interests are the requester's own interests, the requester can certify their own identity to access their own information.¹¹

This phenomenon is strikingly common. I provided an empirical account of who makes requests under FOIA and what kinds of records they are seeking.¹² The data show that overwhelmingly the most frequent kind of request across the federal government are first-person requests, constituting about two-thirds of the government's total request volume.¹³ Although there are a variety of animating concerns that lead individuals to use FOIA to seek their own records, some dominant themes emerge relating to individuals' interactions with agency decision-making processes.

To begin, it is difficult to overstate the degree to which immigration related requesting is driving FOIA numbers government-wide. The Department of Homeland Security (DHS) now receives just over half of all federal FOIA requests—almost 400,000 requests a year.¹⁴ And of those, around ninety-six percent of all DHS requests are first-person immigration requests.¹⁵ But DHS is not the only agency receiving first-person immigration requests in droves. The Executive Office for Immigration Review, a division of the Department of Justice (DOJ) that adjudicates immigration cases, now gets around 50,000 requests a year, constituting more than half of all DOJ requests; nearly all of these are believed to be first-person immigration requests.¹⁶ Around two-thirds of the requests received by the State Department appear to be first-person immigration requests,¹⁷ the numbers of which have fluctuated greatly in more recent years, ranging from almost 30,000 requests

¹⁰ 5 U.S.C. §§ 552(a)(3), (b).

¹¹ See, e.g., Certification of Identity Form DOJ-361, U.S. DEP'T JUST., <http://www.fbi.gov/file-repository/u-s-department-of-justice-form-361-certification-of-identity.pdf/view> [<https://perma.cc/4Y5Z-3Y5S>].

¹² KWOKA, *supra* note 5, at 59–89 (covering the author's previous research on who makes requests under FOIA and what kinds of records they are seeking).

¹³ *Id.* at 71–74.

¹⁴ U.S. DEP'T JUST., *Summary of Annual FOIA Reports for FY 2020*, at 5, <https://www.justice.gov/oip/page/file/1436261/download> [<https://perma.cc/7C8M-4BUP>].

¹⁵ KWOKA, *supra* note 5, at 81–82.

¹⁶ The numbers have fluctuated a bit over time, but for the most recent fiscal year reported, See U.S. DEP'T JUST., *Annual FOIA Report for FY 2020*, at 20–21, <https://www.justice.gov/oip/page/file/1371846/download> [<https://perma.cc/8F8T-W326>].

¹⁷ KWOKA, *supra* note 5, at 83.

a year¹⁸ to shy of 10,000 other years.¹⁹ Additionally, smaller numbers of such requests show up at the Departments of Labor and Health and Human Services.²⁰

My series of interviews with immigration attorneys reveals that these records are needed for two essential reasons. First, individuals in removal proceedings have no right to administrative discovery, so they are using FOIA in lieu of discovery in their pending enforcement case.²¹ In these requests, the lawyers ask for their client's own immigration records, which will contain crucial items such as any prior statements the client made to immigration authorities, previously filed applications, or any criminal records the government may be using as the basis for a deportation decision.²² Without these records, noncitizens and their attorneys cannot prepare their cases.

Second, individuals who want to apply for a new or different kind of visa or for citizenship need their immigration histories and documents to do so.²³ Although these immigration requests outnumber any other category of first-person requesters, analogous first-person use of FOIA can be found in a wide variety of agencies.

One area of frequent first-person requesting, as with immigration, is instances where agencies act in an enforcement capacity. This is true at the Equal Employment Opportunity Commission (EEOC), where ninety-five percent of all requests relate to the investigative file associated with a particular charge of discrimination.²⁴ Employment attorneys explain that in many employment discrimination cases, there is no other way of obtaining a copy of the materials filed by the employer in response to the charge, so there is no way to know the employer's position on the case, let alone how to respond to it.²⁵

Agencies that administer individual benefits also see substantial first-person requests filed by people who are trying to best position themselves to apply for or appeal the denial of benefits. For some time, FEMA directed people who had been denied FEMA benefits to file a FOIA request for their file before they appeal.

Another category of first-person requests arises at agencies that provide direct health care services. The Veterans Health Administration and

¹⁸ U.S. DEP'T OF STATE, *Freedom of Information Act Annual Report Fiscal Year 2020*, at p. 13, <https://perma.cc/SLS8-SM3Z>.

¹⁹ *Id.*

²⁰ KWOKA, *supra* note 5, at 84–85.

²¹ See Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brook. L. Rev. 1569, 1622–24 (2014).

²² See Margaret G. Kwoka, *First-Person FOIA*, 127 YALE L. J. 2204, 2228 (2018) .

²³ *Id.* at 2229–30.

²⁴ Kwoka, *supra* note 5, at 105.

²⁵ *Id.*

the Bureau of Prisons both receive high volumes of first-person requests for medical records. Oftentimes, individuals need these records for continuity of care.

The volume of first-person requests, as well as the variety of important individual interests it serves, demonstrates the critical nature of FOIA for ensuring non-arbitrary government decision-making and the protection of individual rights. This is true across a wide variety of contexts in benefits administration, enforcement actions, and provision of critical services. As such, FOIA's efficacy in this regard is of utmost importance.

II. FOIA COMPLIANCE AND OVERSIGHT MECHANISMS

Although FOIA may be the best option many people have for accessing their own personal data, it is far from ideal. Often, FOIA fails to adequately protect the important interests that individuals have in their own records.

David Pozen has described this type of FOIA request as conferring “due process benefits” because access to one’s own file promotes fairness and accuracy in the underlying agency proceeding.²⁶ Yet, Pozen notes that “FOIA itself is ill-suited to the task” of protecting due process interests.²⁷ My research has detailed many of the ways that is true.²⁸ Uniformly, requesters and their attorneys who are making first-person FOIA requests report that they almost never receive responses in a timely manner—sometimes with responses too late to make a difference—and that they often receive responses with information the requester believes they are entitled to withheld. To be clear, that means that people may be deported before they get the records that the agency used against them, or their benefits may be finally denied before they have the records they needed to make their best case. It also means that individuals’ strategies to approaching their dealings with the agency might be different if they had access to the records in a timely fashion.

But as FOIA currently stands, the principal remedy to a violation—whether it is a missed deadline or a wrongly withheld record—is to file a federal lawsuit.²⁹ However, litigating a separate federal civil case over records is almost always too time consuming and resource intensive for individuals to pursue. Most people cannot pay a lawyer to file a FOIA case on top of paying a lawyer to defend against deportation, if they can even do the latter.

Federal litigation is also extremely slow. The Transactional Records Access Clearinghouse reported recently that at the end of 2020, “the backlog

²⁶ Pozen, *supra* note **Error! Bookmark not defined.**, at 1137.

²⁷ *Id.*

²⁸ See Kwoka, *supra* note **Error! Bookmark not defined.** at 2244-49 (detailing the interview data supporting these points).

²⁹ 5 U.S.C. § 552(a)(4).

of pending FOIA court cases is growing much faster than the increase in litigation because judges are failing to rule in a timely manner and allowing cases to drag on for years.”³⁰ For example, in just one year’s time, the number of FOIA cases that had been pending for more than four years grew forty-six percent.³¹ If the initial lawsuit was prompted by a failure to respond in a timely manner, a federal lawsuit that takes years is not an effective remedy for the requester.

As such, for both time and cost reasons, remedies that lie in the federal courts simply do not address the needs of first-person requesters or the due process benefits that they turn to FOIA to obtain. Alternatives to civil lawsuits are imperative to ensure that people are able to vindicate their rights before agencies and access their own records in a reasonable and timely manner.

An information commission model provides such an alternative. As Michael Karanicolas and I detailed elsewhere, this model has been increasingly adopted in other countries; at base, it involves the creation of an independent agency empowered to review agency responses and provide recourse to unsatisfied requesters.³² There are currently 129 countries in the world with a freedom of information law in effect, and of these, 82 allow the public to file appeals with an external oversight body, the majority of which report directly to the legislature rather than the executive branch to support independence.³³ Some of these commissions have been operating for decades.

There are many reasons an information commission model would be a salutary reform. A well-designed information commission would be of great service to journalists and watchdog groups seeking government information, could improve agency compliance with the law before disputes arise, and would have expertise and binding authority over government transparency policy. As is relevant here, an information commission would also provide better procedural protections for individuals whose important rights are at stake in agency decision-making and who are trying to obtain the government’s file on their case.

Many in the transparency community hoped that the Office of Government Information Services (OGIS), created in the 2007 amendments to FOIA, would serve this sort of role. Unfortunately, despite some strengthening of that institution over time, it fails to have either true

³⁰ FOIA Project Staff, *Justice Delayed Is Justice Denied: Judges Fail To Rule in a Timely Manner on FOIA Cases*, THE FOIA PROJECT (Feb. 3, 2021), <https://foiaproject.org/2021/02/03/justice-delayed-is-justice-denied/> [<https://perma.cc/48SH-3W3A>].

³¹ *Id.*

³² See Michael Karanicolas & Margaret Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655, 694 (2022).

³³ *Id.* at 681.

independence from the executive branch or the power to issue binding orders—two features critical for its success.³⁴ In particular, if individuals who need their own records are going to go through an alternative process, they will need assurance that their success will result in the production of the information they have requested. However, OGIS cannot provide this assurance. It has never been given the power to issue binding orders, and it rarely invokes its authority even to make recommendations.³⁵ Rather, it mostly offers mediation services,³⁶ and as such, has no power to compel agency compliance with the law.

Some of the key advantages of information commissions from the requester's perspective are that their case will be reviewed by experts in transparency laws and that the process is designed to be navigable without a lawyer. Because the decisionmaker has the expertise, it is less important that the requester have a legal advocate to formulate arguments and perform legal research. Moreover, the procedures for filing a complaint with these commissions are intended to be used by laypeople. Finally, information commissions typically process complaints very quickly, within a matter of weeks, unlike federal litigation which can take years.³⁷

III. CONCLUSION

A quick and accessible remedy for FOIA violations would greatly improve the process of conferring due process-type benefits of individuals dealing with agency benefits or enforcement and better achieve the due process goal of fair and accurate agency administration. When we reveal just how much of FOIA operations are serving these sorts of due process adjacent aims, we should ensure that the remedies available under FOIA actually achieve those goals. An information commission model would go a long way in alleviating the justice gap that exists as FOIA currently stands.

³⁴ See *id.* at 688-89 (identifying these two features as the ones that are most critical).

³⁵ *Advisory Opinions, Office of Government Information Services*, NATIONAL ARCHIVES, <https://www.archives.gov/ogis/advisory-opinions> [<https://perma.cc/C7FR-H6TC>] (last visited Aug. 15, 2021).

³⁶ OFF. OF GOV'T INFO. SERVS., *The Freedom of Information Act Ombudsman: 2021 Report for Fiscal Year 2020* (2021).

³⁷ OGIS's extant mediation process is illustrative, where most cases are resolved within the target 90 days. *Fiscal Year 2021, 3rd Quarter Performance, Office of Government Information Services*, NATIONAL ARCHIVES, www.archives.gov/ogis/mediation-program/fy-2021-q3-performance [<https://perma.cc/3NWC-JXXQ>] (last visited Aug. 15, 2021).