Indiana Law Review

Volume 48 **2014** **Number 1**

SYMPOSIUM

THE OPEN GOVERNMENT CLINIC: TEACHING THE BASICS OF LAWYERING

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INTRODUCTION

At a time when law schools are looking to provide students with lawyering skills that provide the basis for practice, a clinic devoted to the Freedom of Information Act (FOIA) provides an excellent model. Our class emerged from a rigorous curriculum we developed that broke the FOIA down into discrete modules that tied together theory and practice. Key to our technique for teaching FOIA to law school students is the emphasis on extensive research and analysis in the early stages of the FOIA request. We require careful consideration of the reasons to pursue the request, an assessment of the strategy to obtain the documents sought, a comprehensive FOIA request, and a well-organized and carefully argued administrative appeal. The administrative appeal provides students an opportunity to develop substantial legal arguments. In the vast majority of cases, students should be able to obtain a meaningful response from a federal agency within a single semester without ever going to court.

Over the course of many years, we have developed a structured approach for teaching open government litigation to law school students and young lawyers. The purpose of this Article is to describe the practices and philosophy that guided the development of this model. As law schools turn increasingly to opportunities for students to gain practical experience and to develop lawyering skills, the

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FOIA may provide a useful framework to teach basic lawyering skills.

The strategy set out in this Article aims to teach students a broad range of FOIA related skills, and to obtain favorable outcomes in specific FOIA matters, while placing a minimal burden on federal agencies and the courts. Central to this approach is to encourage students to do as much research as possible at every stage of a matter, to understand deeply the significance of the various phases of a FOIA case, and to appreciate the underlying purpose of the law – to promote open government.

This strategy may not work as well for those in private practice or for more experienced FOIA litigators who may, for example, have a very specific reason for pursuing certain documents or may not care as much about the publication of documents obtained. Still, there is little formal literature about the pedagogy of open government law and litigation.

This Article is divided into four parts. In Part I, we discuss the significance of the FOIA, its purpose and history, as well as the role it is has played in significant policy debates. In Part II, we outline the stages of pursuing a FOIA request, focusing both on the formal requirements of the law, as well as the litigation tactics and teaching strategies we have developed. Part III looks at three sample FOIA cases in which we have obtained significant results pursuing the model we have outlined. Part IV discusses assessment, broader theories of clinic education, and includes recommendations for future work.

I. BACKGROUND ON THE LAW

The FOIA was enacted in 1966.[1] The fundamental purpose of the FOIA was to reverse a presumption that had existed in the Administrative Procedure Act—that records in federal agencies could be made available only on a need to know basis.[2] FOIA is considered a milestone in the development of open government laws and has been widely copied around the world.[3]

Of course, there have long been laws that establish affirmative disclosure obligation for the federal government. For example, the Constitution requires that Congress publish a public journal of its activities.[4] Congress established the Government Printing Office in the early nineteenth century to make the activities of the federal government routinely available to the general public, [5] and many local towns have emphasized the importance of transparency in government decision-making through the tradition of Town Hall meetings. But there was no presumption that information in the possession of federal agencies was a public

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1. *See generally* 5 U.S.C. § 552 (1966).

2. Stephen J. Kaczynski, *"Reversing" the Freedom of Information Act: Congressional Intention or Judicial Intervention*, 51 ST. JOHN'S L. REV. 734, 734 n.3 (2012).

3. DAVID BANISAR, THE FREEDOMINFO.ORG GLOBAL SURVEY FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 3 (2004).

4. U.S. CONST. art I, § 5.

5. *The History of the Government Printing Office*, U.S. GOVERNMENT PRINTING OFFICE, http://www.gpo.gov/about/gpohistory/ (last visited Aug. 12, 2014).

record, subject to disclosure upon request.[6]

That changed in 1966 with the passage of the federal FOIA.[7] The law set out a fundamental commitment to make the information of the government available to the public.[8] Under the FOIA, agencies were obligated by law to provide records in their possession to those who requested them.[9] The law did not require requesters to state the basis for the request or how the records will be used.[10] Information held by federal agencies would be presumptively available to all who requested.[11] There were exemptions set out in the law that would allow agencies to withhold information, but the expectation was that the exemptions would be narrowly applied.[12]

However, there were problems. Requesters in the early days quickly found that the law did not work in practice.[13] Agencies were slow to respond.[14] There were few incentives for compliance.[15] Agencies interpreted exemptions broadly.[16] There was little judicial oversight.[17]

The 1974 amendments to the FOIA sought to remedy these problems.[18] New provisions limited the fees that agencies could charge requesters, imposed deadlines by which FOIA requests must be processed, created procedures for the expedited processing of requests, allowed requesters to obtain attorneys' fees and costs when they had "substantially prevailed,"[19] and imposed sanctions against agency officials for arbitrary and capricious withholding of materials.[20] When FOIA requesters today pursue FOIA requests, they are typically relying on the provisions added in the 1974 amendments.[21]

Since the 1974 amendments, there have been further changes to the law, typically with the goal of removing obstacles for requesters.[22] For example, an amendment in 1976 narrowed the circumstances when an agency could exempt

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6. *See* Kaczynski, *supra* note 2.
7. *See generally* 5 U.S.C. § 552 (1966).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Sam Archibald, *The Early Years of the Freedom of Information Act 1955 to 1974*, 26 PS: POL. SCI. & POL. 726, 730 (1993) (discussing the difficulties of obtaining information under FOIA).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 5 U.S.C. § 552(a)(4)(E) (2014).
20. *Id.* § 522(a)(4)(F)(i).
21. *See* Archibald, *supra* note 13.
22. Maria H. Benecki, *Developments Under the Freedom of Information Act: 1987*, 1988 DUKE L.J. 566, 591 nn.193-94.

materials for disclosure by statute.[23] A series of amendments in 1986 addressed exemptions for law enforcement records and fee determinations.[24] Later amendments in 2007 limited agencies' abilities to charge fees for requests that were not processed by the statutory deadline.[25]

As the statute has evolved over forty years, so too has the case law. There is now an extensive body of law, much of it focused in the D.C. Circuit Court of Appeals, where most FOIA appeals are brought. The U.S. Supreme Court has issued opinions in many cases since passage of the FOIA Amendments in 1974.[26] The Court has addressed such questions as whether companies may assert the "personal privacy" exemption,[27] whether certain records are "agency records" for the purposes of FOIA,[28] whether agencies could use a court-created exemption to withhold information,[29] and the obligation of agencies to promptly process requests for information sought under the FOIA.[30]

It is not the aim of this article to review the current state of FOIA law, though the authors hope that students pursuing a FOIA request will take the opportunity to engage in the research that is necessary to successfully pursue their request. Our point is simply that the FOIA is a vital area of administrative law, of significant interest to the Congress and the courts, and a good subject area for young lawyers to develop research and litigation skills.

A. The FOIA in Action

The FOIA has played a significant role in uncovering waste, fraud, and abuse in the federal government. The FOIA has also contributed substantially to developing health law and policy. For instance, in *Natural Resources Defense Council v. Food and Drug Administration*, the Natural Resources Defense Council (NDRC) submitted a FOIA request asking for records related to Food and Drug Administration (FDA) approval of antibiotics for livestock.[31] After the FDA did not initially respond, the NRDC filed a FOIA lawsuit, compelling the agency to produce the requested documents.[32] The documents showed that the FDA tested thirty antibiotics that are regularly administered to livestock and

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23. *Id.*

24. *See generally id.*

25. Patrice McDermott, *Building Open Government*, 27 GOV'T INFO. Q. 401, 410 (2010).

26. *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); *see also* John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).

27. *See generally* FCC v. AT&T, 131 S. Ct. 1177 (2011).

28. *See generally* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980).

29. *See generally* Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011).

30. *See generally* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980).

31. *See generally* Natural Res. Def. Council, Inc. v FDA, 884 F. Supp. 2d 127 (S.D.N.Y. 2012).

32. *Id*. at 131.

determined that eighteen of them posed a high safety risk for human consumption, and the remaining twelve would fail the FDA's animal additive inspections.[33] However, the FDA chose not to act upon the test results, allowing livestock facilities to continue administering unsafe antibiotics to the animals that are eventually sold to humans as food.[34] This information has allowed the NRDC to launch a campaign urging the FDA to act upon its own findings and curtail the use of hazardous antibiotic additives.[35] The campaign resulted in twenty-five animal health companies agreeing to new FDA guidelines that will limit antibiotic use.[36]

Documents obtained under the FOIA from the FDA in 1982 helped to lead to mandatory warning labels on children's aspirin.[37] The documents showed that the agency had substantial evidence that children's aspirin could cause Reye's Syndrome, a dangerous and sometimes deadly condition.[38] This evidence added support to a public campaign to require mandatory warning labels.[39] In 1974, after a lawsuit compelled the release of Department of Transportation documents under the FOIA detailing the risks of the Ford Pinto, the exploding car was recalled.[40]

The FOIA has also helped the public to understand our government's approach to international aid and foreign policy. In a recent case, the Center for Effective Government sought disclosure of a secret communication from the president discussing changes in "the way we do business" with regard to foreign aid and development.[41] Although the White House had posted a fact sheet about the Presidential Policy Directive on its website, the State Department withheld the document under the FOIA.[42] The Center for Effective Government filed a FOIA lawsuit to force the State Department to release PPD-6, and the court ruled that the State Department must disclose the document.[43] As of the publication of this article, PPD-6 is being prepared for release by the State Department. As a result of the FOIA, not only will the public gain access to documents detailing the

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33. *Id*. at 135-36.

34. *Id.* at 136.

35. Arlene Weintrau, *Drugmakers Agree to New FDA Rules Restricting Antibiotic Use in Livestock,* FIERCE PHARMA (Mar. 27, 2014), http://www.fiercepharma.com/story/drugmakers-agree-new-fda-rules-restricting-antibiotic-use-livestock/2014-03-27.

36. *Id.*

37. Michael deCourcy Hinds, *Aspirin Linked to Children's Disease*, N. Y. TIMES, Apr. 28, 1982, http://www.nytimes.com/1982/04/28/garden/aspirin-linked-to-children-s-disease.html.

38. *Id.*

39. *Id.*

40. Aviva Shen, *Happy 46th Birthday, Freedom of Information Act*, THINK PROGRESS (July 5, 2012), http://thinkprogress.org/justice/2012/07/05/511271/happy-46th-birthday-freedom-of-information-act/.

41. Ctr. for Effective Gov't v. U.S. Dep't of State, No. 13-0414 (ESH), 2013 WL 6641262, at *1 (D. D.C. Dec. 17, 2013).

42. *Id.*

43. *Id*.

White House's changes in foreign policy and aid, but also the decision will set a good precedent for FOIA requesters who want access to future presidential policy directives.

B. The FOIA and American Culture

The modern Freedom of Information Act has become an important part of American culture. The law is celebrated every year on the birthday of James Madison, because it was the fourth President of the United States who wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[44]

The FOIA establishes a legal right for individuals to obtain records in the possession of government agencies.[45] The FOIA is critical for the functioning of democratic government because it helps ensure that the public is fully informed about matters of public concern.[46] The FOIA has helped uncover fraud, waste, and abuse in the federal government.[47] It has become particularly important in the last few years as the government has tried to keep more of its activities secret.[48]

A hallmark of the new surveillance measures proposed by various government agencies is their disregard for public accountability. As the government seeks to expand its power to collect information about individuals, it increasingly hides that surveillance power behind a wall of secrecy.[49] Congress has long recognized this tendency in the Executive Branch, and sought to limit government secrecy by creating legal obligations of openness under the FOIA and the Privacy Act of 1974.[50] EPIC has used these open government laws aggressively to enable public oversight of potentially invasive surveillance initiatives.[51]

Public access through the FOIA not only allows for a more informed public debate over new surveillance proposals, but also ensures accountability for

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44. Letter from James Madison, former President of the United States, to W. T. Barry, Lieutenant Governor of Kentucky (Aug. 4, 1822) (on file with the Library of Congress).

45. *See generally* 5 U.S.C. § 552 (2014).

46. Benecki, *supra* note 22, at 600, 605 (recognizing that public interests are served by disclosure).

47. Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM U. L. REV. 261, 263 (2003) (explaining "[p]ublic access to government information is one of our nation's most cherished and established principles").

48. *Id.* at 263-64.

49. *Id.* at 264-65.

50. 5 U.S.C. § 552(a) (2014).

51. *About EPIC*, ELEC. PRIVACY INFO. CTR., epic.org/epic/about.html (last visited August 23, 2014) (explaining what EPIC does).

government officials. Public debate fosters the development of more robust policy and leads to solutions that better respect the nation's democratic values.

In the post 9/11 era, the FOIA has also played an important role in the effort to assess and understand the scope of government surveillance power.[52] In several cases discussed below, we describe examples of how effective FOIA requests reveal not only government misconduct but also Congressional hearings and changes in agency practices.

C. The Scope of FOIA Activity in the Federal Government

Each federal agency is required to submit an annual FOIA Report to the Office of Information Policy (OIP) in the Justice Department.[53] The OIP website explains, "These reports contain detailed statistics on the numbers of requests received and processed by each agency, the time taken to respond, and the outcome of each request, as well as many other vital statistics regarding the administration of the FOIA at federal departments and agencies."[54] The reports provide an overview of the scope of FOIA activity in the federal government.[55]

According to the most recent Reports, the Department of Homeland Security (DHS) received the most FOIA requests of any federal department or agency in 2013, with 231,534 requests received.[56] DHS also had the largest backlog of any department or agency, with 51,761 pending requests.[57] DHS reported that it categorized requests as "simple," "complex," or "expedited."[58] The FOIA requires that agencies issue a response to requests within twenty days.[59] However, DHS reported that the respective average response times for its three categories were about thirty-seven days, about thirty-eight days, and about forty-four days.[60] This is just one example of the type of information that is now available.[61]

As FOIA teachers and litigators, the reports prepared by the OIP are of particular interest to us. We use the OIP reports to help students understand the scope of FOIA activity across the federal government, to identify those agencies that are most responsive to requests as well as those that are most likely to delay.

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52. *See generally* Uhl, *supra* note 47 (discussing the role of the FIOA after September 11, 2001).

53. Exec. Order No. 13392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

54. *Reports*, OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/reports.html (last visited Sept. 12, 2014).

55. *See generally id.*

56. PRIVACY OFFICE, DEP'T OF HOMELAND SEC., 2013 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES, at ii (2014), *available at* http://www.dhs.gov/sites/default/files/publications/privacy-foia-annual-report-fy-2013-dhs_1.pdf.

57. *Id.*

58. *Id.* at iv.

59. 5 U.S.C. § 552(a)(6)(A) (2014).

60. PRIVACY OFFICE, DEP'T OF HOMELAND SEC., *supra* note 56, at 10.

61. *See generally id.*

The OIP reports can also provide useful data for agency appeals and litigation. For example, we may be able to cite past agency practices to emphasize an argument that the current delays cannot be justified. In the specific context of an "Open America Motion," in which an agency cites its own backlog in support of delay, the OIP reports can provide useful information to rebut such claims. The OIP reports, as well as reports provided by open government organizations, provide a context for the study of FOIA.[62]

II. THE STRUCTURE OF A SUCCESSFUL FOIA MATTER

The vast majority of FOIA requests that are submitted to federal agencies are likely poorly drafted, likely misdirected, and unlikely to produce meaningful results. The reasons are many: (1) the law is complex, (2) identifying the correct component within the agency takes a lot of work, (3) drafting a good request takes time and insight, and (4) it takes time and perseverance to obtain successful results in a FOIA matter. Even in the best of circumstances, requests can take months if not years to pursue.[63] It is essential that students learn how to craft an effective FOIA request and then how to follow-up. This section explores the strategy we have developed for the successful pursuit of FOIA requests.

A. Developing an Appropriate Request

Central to the successful FOIA project is the need to identify an appropriate FOIA request. Students should be encouraged to carefully research their proposed request before drafting a letter to the agency. There are many factors that should be considered before pursuing a FOIA request. As with other areas of FOIA, we have developed a structured approach that helps guide students.

1. The Case Memo.—At EPIC and at the Georgetown University Law Center, we have encouraged students to write case memos that answer five questions: (1) What are the documents you are seeking? (2) What is the significance of these documents? (3) At which federal agency do you believe the documents will found? (4) Have we or others made similar requests in the past? (5) Are there additional issues we may need to consider before pursuing the request, such as the possibility of running headfirst into one of the FOIA exemptions? Each of these questions is intended to help students establish the foundation for a good FOIA request, a successful appeal, and ultimately perhaps favorable litigation.

As a general matter, students should be encouraged to pursue a request where there is good reason to believe that the documents sought actually exist. We have disfavored the use of the FOIA as a general purpose research tool, though of course for historians and scholars, the FOIA is often an effective way to uncover

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62. *See Annual FOIA Reports Submitted by Federal Departments and Agencies*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/fy13.html (last visited Mar. 21, 2014) (collecting all annual FOIA reports).

63. *Frequently Asked Questions*, FOIA.GOV, www.foia.gov/faq.html#answer (last updated Feb. 2011).

critical historical documents. But the processing of these kinds of large, complex requests often requires extensive time and delays, which are not conducive to a three month course. As a result, we much prefer the targeted request.

We encourage students to look for references to documents that are important but have not been disclosed to the public. A newspaper report might mention a classified report. A government official may refer to an internal agency report. The explicit reference to the document by a reliable source is a good basis for pursuing a request; speculation that a document may exist is not. Only in rare circumstances would we allow students to use the FOIA to try to locate documents that they themselves do not know to exist.

We also ask students to devote considerable attention to the significance of the request they are making. There is no question that it will take time to pursue a FOIA request. We want the student to persuade us that the request will be worth the effort. For a public interest organization, such as EPIC, we will make the determination based on the alignment with our mission, the timeliness of the request, and the benefit that may be obtained if the document is disclosed. Other public interest organizations are likely to make determinations about the value of a FOIA request considering a similar set of criteria. In the academic context, a slightly different set of criteria may apply.

Identifying the appropriate component within the agency to direct the request is also a critical part of the planning. While many agencies have catch-all addresses to receive FOIA requests, such requests will almost certainly take more time to process than a request that is directed to the correct component. In addition, students who take the time to find the right component have likely done a better job determining the location where the documents they are seeking are likely to be found.

To be sure, it is not easy to identify the correct component within an agency to direct a FOIA request. Some agencies, such as the Department of Justice, may have more than thirty components that could be the appropriate target for a FOIA request.[64] It is not uncommon for a request to go to several components within the same agency if there may be overlapping authority for a program concerning the record sought.

We also expect students to determine whether others have made similar requests for the documents they are seeking. There are two fairly easy ways to answer the question. The first is to do an Internet search for key terms associated with the document sought. This can help uncover related information. The second strategy is to look at the agency website. Some agencies are proactively posting documents that they generate.[65] Certainly, if an agency has already

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64. *See generally DOJ Reference Guide: Attachment B*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/doj-reference-guide-attachment-b-listing-and-descriptions-department-justice-components-foia (last visited Aug. 23, 2014).

65. *See, e.g.*, *FOIA Proactive Disclosures*, IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/foia/proactive.htm (last visited Mar. 21, 2014); *see also FOIA Library*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/foia-library (last visited Mar. 21, 2014); *Steps Taken to Increase Proactive Disclosures*, DEP'T OF HEALTH AND HUMAN SERVS., http://www.hhs.gov/

released the records that are sought, there is no point in pursuing a FOIA request.

Both of the examples above assume that the documents sought have already been disclosed. It is possible that the students will seek documents that others have sought but have not yet been disclosed. It is not necessarily the case that such requests should not be pursued. The student's request may be more effectively framed than another's request. Multiple requests may be more likely to dislodge the documents that are sought. Still, students should be aware of this dimension of FOIA requests.

Our final consideration will be the possibility that the request will raise challenges because of certain FOIA exemptions or other practical considerations. For example, the National Security Agency is able to take advantage of a broad "(b)(3)" exemption set out in statute that effectively puts most of the agency's activities beyond the reach of the FOIA.[66] Because of this, we must consider carefully whether to pursue FOIA requests to the National Security Agency. The fact that an exemption exists does not mean we will not pursue the request. Like good lawyers, we will assess the prospects of success for the request in light of our assessment of the relevant law. For a FOIA requester, anticipating how exemptions may be asserted is a critical part of the calculation.

At the same time, a careful understanding of the law can also produce surprisingly successful requests. In one case pursued by EPIC, we were able to obtain documents from the Central Intelligence Agency (CIA), another agency with a broad (b)(3) exemption by focusing specifically on a provision in the FOIA, which explicitly set aside reports of the Inspector General.[67] Thus, an effective FOIA request to the CIA about its role in the surveillance of Muslim Americans in New York City was made possible by first recognizing a favorable provision in the Act.[68]

2. Drafting the Request.—There are many models for drafting a FOIA request. At a minimum, a FOIA request should include all of the requirements set out in the statute and the regulations appropriate for the agency to which the

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foia/reference/2013_section3.html (last visited Mar. 21, 2014).

66. Wolf v. CIA, 473 F.3d 370, 377-78 (D.C. Cir. 2007); *see also* The National Security Act, 50 U.S.C. § 403-1(i)(1) (2012) (current version at 50 U.S.C.A. § 3024 (2014)). The National Security Act exempts from disclosure information related to the organization or function of the National Security Agency. This statute has been interpreted broadly to include almost any NSA activity, including confirming or denying the *existence* of certain NSA activities. The D.C. Circuit has ruled, "Congress certainly had rational grounds to enact for the NSA a protective statute broader than the CIA's" and found the "plain wording of the statute conclusive" in authorizing withholding NSA materials that are "integrally related" to NSA activities. Hayden v. NSA, 608 F.2d 1381, 1389-90 (D.C. Cir. 1979). *See also* People for the Am. Way v. NSA, 462 F. Supp. 2d 21 (D.D.C. 2006); Wilner v. NSA, 592 F.3d 60 (2d Cir. 2009).

67. *See* EPIC v. CIA, Case No. 1:12-cv-02053 (D.D.C. filed Dec. 20, 2012). Matt Sledge, *CIA Sued to Release NYPD Spying Report*, HUFFINGTON POST (Dec. 31, 2012, 4:05 PM), http://www.huffingtonpost.com/2012/12/31/cia-nypd-spying-report_n_2389364.html?utm_hp_ref=mostpopular; *see also* 5 U.S.C. § 552(b)(3) (2014).

68. Sledge, *supra* note 67.

request is directed.[69] These would include: the appropriate agency and agency address, a reasonably specific description of the documents sought, a request for expedited processing, if sought, a request for a fee waiver if appropriate, and contact information for the requester.[70] We ensure that all of these elements are included in FOIA requests before they are approved, but we also believe that there is much more to a good FOIA request.

For us, a good FOIA request proceeds from the issues identified in the case memo: a clear description of the documents that are sought, clear reasons to believe that they are in possession of the agency, and some discussion of the significance of the materials. Each one of these elements is aligned with underlying legal claims that will provide the foundation for the subsequent appeal, if necessary. They are also intended to help sharpen the student's understanding of administrative law and the specific requirements of the FOIA.

Describing the significance of the request in detail, in the request itself, may be one of the most important techniques we have developed to make an effective FOIA request. Our aim is to use the FOIA request to build a record in support of subsequent determination concerning the "public interest" standards set out in the statute that will determine whether the requester is entitled to the waiver of fees, to expedited processing, and eventually to eligibility and entitlement for attorney's fees if we choose to litigate.[71] Beyond this litigation 'tactic,' we are seeking to promote broader public interest in the material being sought. The FOIA request thus becomes a way to educate the public and the press not simply about the fact of the request but more broadly the policy issues that the request seeks to answer. All of this must be considered before we will allow a FOIA request to go out the door.

We will also ask students to request media fee status and a fee waiver for any costs that might otherwise be imposed. In one respect, the text is pro forma and should be routinely granted to any request that arises from an educational or media organization. In another respect, the inclusion of the fee status and the fee waiver text provides an opportunity for the students to research the relevant legal standard, to make the assertion as to fee determination, to include the relevant citation, and then to defend the argument, if necessary, in the context of the administrative appeal. In this regard, no element of an assignment in a FOIA clinic should be treated as a cut and paste operation. Each decision should be made purposefully and with full consideration of the relevant statutory provision and how it aids the requester in the matter.

Similarly, we will ask students to make a determination as to expediting processing based on the relevant standard and with consideration of the specific records being sought from the agency. This issue should also be addressed in the case memo. The aim is to encourage students to make a reasoned determination as to whether there is a good claim for expedited processing and then to be prepared to defend it to the agency on appeal, if necessary.

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69. 5 U.S.C. § 552 (2014).

70. 5 U.S.C. § 552(a)(3)(A)(i) (2012).

71. 5 U.S.C. § 552(a)(4)(A)(iii) (2014).

Each of these tasks will help improve the student's understanding act of the FOIA and sharpen the student's lawyering skills. We strongly encourage those teaching a FOIA clinic to help students understand the application of the standards for fee waivers and expedited processing to their specific requests. If they do not, the subsequent appeal will likely be much more difficult.

3. Creating the Case File.—Because FOIA involves many deadlines for both requesters and agencies and because litigation requires evidentiary support,[72] it is especially important for requesters to keep comprehensive records of the request, subsequent appeals, agency responses, and other communications with the agency. EPIC has developed a standardized FOIA request filing system, including a form that includes a summary of the requested documents, the date the request was sent, the method it was sent, a record of all agency responses and interactions, and a record of all follow-up actions by EPIC (administrative appeals, phone calls with the agency, and modifications of requests).

B. Interacting with the Agency

Successful resolution of a FOIA request almost always requires several communications with the agency. In an ideal world, the FOIA requester would send a request to an agency for certain records, and the agency would respond within twenty working days with the records sought, perhaps with some material withheld or redacted. The requester would then have the opportunity to promptly decide whether to appeal the agency's processing of the request. That almost never happens.

The more typical process is: (1) the requester sends FOIA request to the agency; (2) the agency responds with an acknowledgement which notes that the agency has received the request and assigns an identification number to the request; (3) the agency eventually responds with a determination, although rarely within the twenty days required by the statute, including either documents or a denial, as well as explanations for any withholdings and information about how the requester can appeal any denials or withholdings; (4) the requester reviews the agency's response and appeals, if necessary.[73]

The actual process of pursuing a FOIA request is far more complicated and vexing than it should be. Agencies issue responses that are late, incomplete, or insufficient. Increasingly, agencies contact requesters and threaten to close FOIA requests permanently if the requester does not narrow or clarify the request within a specified number of days.[74] Often, requesters have to follow up with the agency multiples times on the phone or email to obtain information about the status of a request.

These hurdles routinely frustrate most FOIA requesters and are often the focus of litigation, reports, and Congressional hearings. But for students pursuing FOIA requests they also provide the opportunity to hone lawyering skills, to

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72. *See generally id.* § 552.

73. *Frequently Asked Questions*, *supra* note 63.

74. *Id.*

develop strategies to obtain concrete outcomes. For example, students could follow-up with the agency by phone and email, filing an appeal for non-responsiveness, or seeking out the assistance of the Office of Government Information Services.

For communications with the agency, we encourage students to be polite, professional, and purposeful, and to document all such interactions. It is a useful class exercise to play out the roles of FOIA requester and agency official to help students better understand the reality of FOIA processing. To be sure, requesters should understand that they have certain rights under the statute that they would rightfully expect the agency to fulfill. But the practical challenge of responding to FOIA requests is very real, particularly when the request is complex or likely to trigger one of the statutory exemptions that would provide a basis for agency withholding.

1. Reviewing the Agency Response.—We emphasize to the students that once a requester does obtain a substantive response from an agency, the requester should review that response and disseminate the information to the public as quickly as possible. EPIC teaches students how to review documents with an eye to items of potential public interest and how to publicize the documents in the most effective way. There are many different ways to promote the release of documents obtained under the FOIA. Among the most simple is to simply scan the documents and post them on a website with a brief explanation. That will immediately make the documents available to the public and provide some context so that their significance can be understood. In our Internet Age, once the documents are readily accessible online (with a good URL), it is easy to post, blog, tweet, and even Instagram the outcome.[75]

Outreach to the press is another effective strategy that also becomes important in later determinations if the case is litigated. There is no obvious outlet for any particular documents obtained under the FOIA. But law schools are becoming savvier in promoting the work of their faculty and the success of their students. Students (and their excellent professors) who obtained significant documents from a federal agency as a result of a FOIA request should consider contacting the press office of the law school to see if there might be opportunities for a public release. But in the enthusiasm to inform the public, it will become clear whether requester has sufficiently researched the topic and understands the value of the documents obtained.

2. Preparing the Administrative Appeal.—Under the FOIA, a requester must first exhaust administrative remedies before filing a lawsuit.[76] This means that if an agency makes an unfavorable fee status determination, rejects a fee waiver or expedited processing request, denies or withholds documents, the requester

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75. If people post pictures of what they had for lunch on Instagram, why not post picture of what they obtained by means of a FOIA request?

76. THE DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: LITIGATION CONSIDERATIONS 29 (2013) [hereinafter LITIGATION CONSIDERATIONS], *available at* http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf.

must file an appeal with the agency.[77] Typically agency regulations require that appeals are filed within either thirty or sixty days.[78]

While a FOIA appeal can be quite short and simple, EPIC has learned that the most effective FOIA appeals require time and research. In many respects, the FOIA agency appeal provides an opportunity to teach students essential lawyering skills and to apply these skills in an exercise that has concrete and measureable outcomes.

We encourage students to begin with their case file, the initial memo, and the FOIA request that they prepared. Students are taught to assess the documents they received, take note of withholdings asserted by the agency, and then research the relevant case law to craft an effective appeal. We encourage students to think of the agency appeal as their argument to a court, respecting the expertise of the decision-maker and the need to prepare a comprehensive and well-founded argument. Agencies are reluctant to reverse earlier determinations in FOIA matters. In those instances where agencies do reverse an earlier decision, however, a well-formulated appeal is typically the key. We work with students to draft a comprehensive appeal that lays out the legal case for why the agency should reconsider its decision. This appeal also lays the groundwork for a future lawsuit, should the agency fail to comply.

3. Assessing Documents Received.—Although a significant part of time in a FOIA clinic can be devoted to the review of documents received as a result of a FOIA request, it should be understood that this is not a simple task. Documents sought under the FOIA are typically highly technical materials, reflecting careful consideration of a complex policy issue. The proverbial "smoking gun" is rarely found. Aside from the substantive assessment of the documents obtained, students must also look carefully at documents to assess the agency's assertion of its various legal claims in support of withholding. On the agency side, these determinations have typically undergone significant legal analysis, and the claims are not made randomly. Students should anticipate that the arguments in support of withholding documents in whole or in part have a reasonable legal basis.

Students should begin a review of documents with a focus on two distinct questions: First, has the agency provided information that is significant and should be disclosed to the public? Second, has the agency fulfilled its statutory obligations? These two questions point in two very different directions.

To assess whether the agency has fully complied with its obligations under the Act is rarely a simple problem, except in the unusual circumstance where an agency provides everything requested in a timely fashion. That has happened to us several times, but it remains the exception. More likely, the agency will withhold some documents in full and other documents in part. The agency may also conduct an inadequate search for documents in response to the request. The agency may also provide a Vaughn index, which is a summary of the documents withheld and is required by statute, that is insufficient to determine whether the

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77. *Id.*

78. *Appeals*, U.S. DEP'T OF JUSTICE, www.justice.gov/open/appeals.html (last modified Sept. 2013).

agency has fulfilled its obligations under the Act. It is possible that all of the above will occur.

The clinic instructor will need to make some determination as to how many issues to pursue on administrative appeal in light of the range of issues presented and the prospects for success. As there is little downside in the administrative appeal process to pursuing a wide range of issues, we generally favor more extensive appeals. The administrative appeal also provides the main opportunity for students to engage in actual legal research and an analysis on a FOIA matter and should therefore be considered the primary assignment in a FOIA clinic.

4. Publicizing and Posting Materials to the Internet.—Once documents have been received and reviewed, it is very important to disseminate them as quickly as possible and to as wide an audience as possible. Documents often lose public interest value as time passes. Information about the Foreign Intelligence Surveillance Court, for instance, may be much more useful in the weeks before legislative consideration of Foreign Intelligence Surveillance Act renewal than they will be after a vote occurs.

In an effort to disseminate information to the public and to preserve a record of EPIC's FOIA work, EPIC also publishes all the documents it obtains on epic.org, typically as part of a larger informational webpage describing the background and a shorter, more concise home page item summarizing the request and documents obtained.[79]

C. Litigation

The decision to undertake litigation in a FOIA matter is a significant decision and should not be undertaken lightly. It is certainly possible to give students a substantial exposure to the FOIA without filing a formal complaint in district court. Law schools typically require clinic professors to follow specific rules about representing clients, initiating lawsuits, and, most critically, keeping the law school itself outside the role of litigant. A well-designed FOIA clinic could end with the completion of the administrative appeal, some discussion of the case law, and perhaps an examination of key FOIA concepts.

The opportunity to initiate and pursue a legal complaint, based on the student's prior work, particularly one that is relatively easy to manage, presents little downside and no real costs. The opportunity should not be ignored. As FOIA cases typically do not require discovery, depositions, or trials, a matter can be fairly litigated without ever leaving the law school or speaking with a client. Nonetheless, it is critical to determine on whose behalf the case will be brought and to treat all decisions as the litigation progresses as requiring the highest duty of care to a client and to the court where the matter will be brought.

In the clinic at Georgetown Law Center, we brought FOIA cases on behalf of EPIC, thus allowing the law school students to have the full experience of litigating a FOIA matter without entangling the school in specific cases. Other

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79. *See*, *e.g.*, *Air Travel Privacy*, ELEC. PRIVACY INFO. CTR., epic.org/privacy/airtravel#foia (last visited Aug. 27, 2014).

schools may welcome the opportunity to have students initiate cases on their behalf, particularly if there are specific programs or centers within the law school that have an interest in the subject matter of the FOIA request. Law schools will also likely be granted favorable fee status and fee waivers, avoiding concerns about the costs typically imposed in FOIA matters.

In this section, we do not intend to provide a comprehensive review of FOIA litigation strategy. There are several helpful books and guides on this topic.[80] Our aim is to outline how clinic-based FOIA litigation is likely to unfold, identify some of the key lessons we have learned, and make certain general recommendations. Our experience is also shaped by the specific rules of the D.C. Circuit Court of Appeals and the various practices we have developed in relations with federal agencies. Other jurisdictions may follow other practices.

In filing the complaint, we must also consider several factors, including our prospects for success, the current state of the matter, the duty to our clients, and the costs and any possible downside. Typically we will engage the students in this strategic discussion, asking them to consider how they would weigh these various factors based on the matter, the client, and the prospects for remuneration. If time permits, we will ask students who are considering litigating a FOIA matter to write a memo answering these questions. While this may be a substantial undertaking for a law school student who has never litigated a case, if the student has prepared a good case memo, a substantial request, and a well-argued appeal, the student is likely to produce a quality memo. This helps illustrate our point that a well-managed FOIA clinic can provide the basis for excellent lawyering skills.

1. The Complaint.—The beginning of a lawsuit is the filing of a complaint in federal district court. In the FOIA context, there are two ways to think of the initial complaint. The first is to ensure that it includes all of the necessary elements and sets out all of the necessary claims, so that it provides a basis upon which relief may be granted. The second is to provide a more comprehensive overview of the matter, to include facts that will be relevant for determinations at each stage of the litigation process, such as the public interest in the disclosure of the documents sought.

While many private litigants are often satisfied to provide the minimum necessary for filing the complaint, we have come to believe that the more comprehensive filing is a better choice. As explained above, there is rarely discovery in FOIA matters, which means that all favorable facts must be established through formal communications with the agency—the request, and the administrative appeal—and filings with the court. Also, as the public interest FOIA requester must make a showing as to the public significance of the request

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80. *See Litigation Under the Federal Open Government Laws 2010: Covering the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act* (Harry A. Hammitt et al. eds., 25th ed. 2010); Freedom of Information Advocates Network, *Freedom of Information Guides and Resources*, *available at* www.foiadvocates.net/resources.php; Council of Europe, *Access to Official Documents Guide (2004)*, *available at* www.coe.int/t/e/integrated_projects/democracy/DocAccess_Guide_en/pdf.

pursued, references to news stories, Congressional hearings, and other developments related to the FOIA serve to both educate the court as to the significance of the request and assist with subsequent determinations concerning expedition, fee waivers, and attorneys' fees.

2. Motions.—FOIA cases are typically resolved on cross motions for summary judgment. A FOIA case follows a fixed procedure: Complaint, Answer, Scheduling Order, Defendant's Motion for Summary Judgment, Plaintiff's Cross Motion for Summary Judgment and Reply, Defendant's Reply and Opposition, and Plaintiff's Opposition. The government and the plaintiff typically agree on the schedule order, which sets out a schedule for motions and document disclosures.

Before the parties move for summary judgment, the agency must either disclose documents in full, partially disclose documents and account for its withholdings in a Vaughn Index, or fully deny the request and account for that denial in a Vaughn Index.[81] The Vaughn Index gives the plaintiff a basis to challenge withholdings or a full denial.[82] In the Vaughn Index, the agency must describe the documents, identify the exemption under which it is withholding the documents, and explain why that exemption applies.[83]

In their motions for summary judgment and replies, the parties assert legal arguments for either withholding or disclosing documents, covering a range of topics including document search and duplication fees, exemption use, and sufficiency of search.[84]

We have often provided opportunities for students who are pursuing their own FOIA requests to work with us on the motions we are drafting. In this respect, students are given an opportunity to see ahead in the development of a FOIA matter.

3. Delay.—The process above represents the ideal, simple FOIA case. Too often, though, agencies will seek to delay responding to a requester, even after a complaint is filed.[85] The agency tactics might include refusing to assent to a reasonable scheduling order, asking for unreasonably long timelines for production of documents (often two years or more), and filing multiple motions for extensions.[86]

Because the FOIA requester is the party seeking disclosure of documents, often with the additional request for expedited processing, it is nearly always against the FOIA litigator's interest to agree to an extension of time for the filing of a motion or the production of documents. Delay is the enemy of open government. As discussed above, documents often lose value as they lose

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81. *See*, *e.g.*, U.S. DEP'T OF JUSTICE, VAUGHN INDEX (2010), *available at* www.justice.gov/usao/reading_room/data/info/VAUGHN_INDEX_FINAL_08_21_2010.pdf.

82. *See id.*

83. *See id.*

84. *See* LITIGATION CONSIDERATIONS, *supra* note 76, at 107-10.

85. *Frequently Asked Questions*, *supra* note 63.

86. LITIGATION CONSIDERATIONS, *supra* note 76, at 36 n.121 (explaining that extensions will be granted if an agency needs additional time).

timeliness.

Therefore, clinics choosing to litigate FOIA matters must respect the underlying purpose of the statute and seek to move the matter forward as quickly as possible. Courts in the D.C. Circuit typically favor this approach and do, for example, disfavor motions for delay that are filed without cause. If a clinic is unable or unwilling to pursue these matters in such a spirit, it is probably best not to initiate litigation.

4. Fees.—The successful public interest FOIA litigator can obtain financial compensation from the government for the time spent litigating the matter.[87] Before a court may award attorneys' fees in FOIA cases, it must first determine whether the plaintiff is eligible for a fee award.[88] FOIA provides that in a lawsuit "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."[89] FOIA defines "substantially prevailed" as when "the complainant has obtained relief through either (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[90]

If a plaintiff is eligible, the court must then determine whether the plaintiff is entitled to recover fees.[91] The D.C. Circuit employs a four-factor balancing test to determine a plaintiff's entitlement to attorney's fees.[92] The four factors cited by the court are "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding."[93]

We have obtained fees in a wide variety of cases against federal agencies, though cases typically take more than a year to litigate fully. The fee determination, which is made either by settlement or cross-motions, can take several additional months. We believe it is worthwhile to teach students about the opportunities to obtain fees in FOIA matters, though it is almost certain that the opportunity for fees will only arise long after the student's request is submitted, and even then fees will only be available to the attorneys who actually litigated the matter.

D. Amicus Briefs and Coalition Strategies

In the course of pursuing FOIA cases in the D.C. Circuit, we have also had several opportunities to write amicus briefs in support of other colleagues who are pursuing their own FOIA appeals. We have also had opportunities to obtain

87. 5 U.S.C. § 552(a)(4)(e)(i) (2014).

88. Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521, 524 (D.C. Cir. 2011).

89. 5 U.S.C. § 552(a)(4)(E)(i) (2014).

90. *Id.* § 552(a)(4)(E)(ii).

91. *Id.*

92. Judicial Watch, Inc. v. U.S. Dep't of Commerce, 470 F.3d 363, 369 (D.C. Cir. 2006).

93. *Id.* (citing Davy v. C.I.A., 456 F.3d 162, 166 (D.C. Cir. 2006)).

amicus briefs in support of our own appeals. For students in a FOIA class, the purpose and role of amicus briefs is worth some discussion particularly, as almost every FOIA case on appeal is likely to attract amici.

E. Class Dynamics

A typical practicum course should contain between eight and fifteen students in order to allow the supervising attorneys to really focus on helping students develop legal research, writing, and advocacy skills. The smaller class size also allows more opportunities for each student to participate in class discussions, litigation projects, and regulatory comment drafting assignments.

We encourage students to prepare written work for each class, to discuss the current status of their case, and to solicit opinions from others. Students that work in teams of two on FOIA requests can also have the experience of collaborative research and drafting.

In a typical class, we will divide the time between the substantive pedagogy of FOIA law and a review of the various matters being pursued by the student. In the beginning of the semester in particular, there is a real rush to teach enough about the history and purpose of the FOIA in order for the students to be able write a substantial case memo and draft a request so that the request can be finalized and submitted to a federal agency early in the semester. Once the request is out the door, there is more time to go into the statutory exemptions and tactics for pursuing the request, though such topics as fee status, fee waivers, and expedited processing must be addressed early in the course so that the FOIA request can properly reflect these claims.

1. Evaluation.—We based student grades on several aspects of the course: participation in classes, the FOIA request, the agency appeal, and assistance with FOIA litigation and regulatory comments. Our evaluation of written work was largely based on the student's demonstrated ability to research and draft a comprehensive, well-organized, factually supported document. We looked at both the quality of the initial draft and the quality of the final, revised draft.

2. Working in Teams.—In an effort to increase the quality of each student's work, we assigned students to work in pairs or small groups. This also mirrors the collaborative environment within EPIC, other non-profits, and law firms. We encouraged students to rigorously review each other's work and offer substantive criticism, edits, and recommendations. The work produced by a team of students will invariably be better than the work produced by a single student.

III. SAMPLE FOIA CASES

We have selected three cases from our experience to demonstrate how our approach to FOIA litigation works and also the significant role that students and young lawyers can achieve in pursuing these results.

Several of EPIC's FOIA cases were used as examples for our course on the Law of Open Government. Among them were two FOIA cases against the Department of Homeland Security (DHS). The first case involved requests for documents about airport body scanners, which produced front-page news stories

and led the agency to remove the devices from U.S. airports.[94] The other case concerned the DHS monitoring of Twitter and other social media.[95] In that case, EPIC obtained documents that revealed the agency's surveillance practices. This disclosure led to a Congressional hearing and a change in agency practice. A third matter demonstrated how significant outcomes were possible simply with a well-drafted and timely FOIA request.[96] In that case one of our students sought information about the "No Fly List."[97] When responsive documents were obtained, several press organizations ran front-page stories.[98]

These cases were used to illustrate effective use of the FOIA, FOIA procedures, and how FOIA requests can inform public debate and create policy changes within government. These cases were also used to teach students how a FOIA request can lay the foundation for further policy work and litigation.

A. EPIC v. TSA: Airport Body Scanners as FOIA and Then Administrative Relief

In 2007, the Transportation Security Administration (TSA) began using a new surveillance technology in American airports.[99] The body scanners allowed agency officials to see through travelers' clothing.[100] As each passenger walked through the scanning machine, a TSA agent would look on.[101] Another agent, stationed in the remote viewing area, would receive the machine-generated image and inspect it for "anomalies."[102] In practice, TSA officials were able to view the naked images of travelers absent any suspicion that would justify a search.[103]

There was considerable public debate about the use of the airport body scanners in US airports, particularly after the agency decided unilaterally to make the devices the primary screening technique.[104]

EPIC wrote one of the first articles about the risks to privacy posed by airport body scanners.[105] However, without more information about the actual operation

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94. EPIC v. Dep't of Homeland Sec., 926 F. Supp. 2d 311 (D.C. Cir. 2013).

95. EPIC v. Dep't of Homeland Sec., 653 F.3d 1 (D.C. 2011).

96. *See generally* Elec. Privacy Info. Ctr., *FBI Watch List*, http://epic.org/foia/fbi_watchlist.html (last visited Apr. 1, 2014).

97. *Id.*

98. *Id.*

99. *Advanced Imaging Technology (AIT)*, TRANSP. SEC. ADMIN., www.tsa.gov/traveler-information/advanced-imaging-technology-ait (last modified Feb. 12, 2014).

100. Carol Kuruvilla, *TSA Has Completely Removed Revealing X-Ray Scanners from America's Airports: Rep*, NEW YORK DAILY NEWS (May 31, 2013, 6:25 PM), http://www.nydailynews.com/news/national/tsa-completely-removed-full-body-scanners-rep-article-1.1360143.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Whole Body Imaging Technology and Body Scanners ("Backscatter" X-Ray and Millimeter Wave Screening)*, ELEC. PRIVACY INFO. CTR., http://epic.org/privacy/airtravel/

of the devices, it was difficult to assess the privacy impact or effectiveness of the devices. EPIC filed two extensive FOIA requests with DHS, the parent agency of TSA, in April and July 2009, requesting technical specifications, contracts, details of the machines' privacy features, traveler complaints, training materials for machine operators, records of data breaches, and images captured by the machines.[106] When the agency failed to comply with statutory deadlines and issue a determination regarding EPIC's request, EPIC filed an appeal with DHS challenging the agency's failure to respond.[107] After the agency failed to respond to EPIC's administrative appeal, EPIC filed suit in Federal District Court for the District of Columbia in November 2009.[108]

In January 2010, EPIC successfully obtained documents from DHS detailing the capabilities of the machines.[109] The disclosed documents included TSA Procurement Specifications for body scanners, TSA Operational Requirements for the machines, a TSA contract with L3, a company that manufactures whole body imaging devices, and two TSA contracts with Rapiscan, another body scanner manufacturer.[110] EPIC carefully examined the documents and discovered several important details, which EPIC included in a memo that was disseminated internally and to several media groups.[111] The TSA documents indicated that the TSA had explicitly required that the machines be able to record, store, and transfer the graphic images produced by the machines.[112] In addition, the privacy filters could be turned off; and the machines may not have been designed to detect powdered explosives, which was a significant security threat at the time.[113] EPIC released the documents to the media, where the documents received extensive coverage.[114] Later, EPIC received hundreds of pages of traveler

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backscatter/#topnews (last visited Aug. 27, 2014) [hereinafter *Whole Imaging Technology*].

106. *See EPIC v. Department of Homeland Security-Body Scanners*, ELEC. PRIVACY INFO. CTR., http://epic.org/privacy/airtravel/backscatter/epic_v_dhs.html#foia (last visited Aug. 27, 2014) (listing actions taken by EPIC regarding body scanners).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Memorandum from the Elec. Privacy Info. Ctr., on Documents obtained from Department of Homeland Security Concerning Body Scanners (Jan. 11, 2010), *available at* http://epic.org/privacy/body_scanners/EPIC_WBI_Memo_Final_Edit.pdf.

112. *Id.*

113. *Id.*

114. *See, e.g.*, Joel Tiller, *Scanners Can Store Images, Group Says*, GLOBE & MAIL (UK) (Jan. 12, 2010), http://www.theglobeandmail.com/news/national/scanners-can-store-images-group-says/article1207208/; *see also* Chris Mellor, *US Airport Body Scanners Can Store and Export Images*, REGISTER (Jan. 12, 2010), http://www.theregister.co.uk/2010/01/12/tsa_body_scanners/; *see also* Barbara E. Hernandez, *TSA Admits Body Scanners Store and Transmit Body Images*, CBS NEWS (Jan. 12, 2010), http://www.cbsnews.com/news/tsa-admits-body-scanners-store-and-transmit-body-images/; Jeanne Meserve & Mike M. Ahlers, *Body Scanners Can Store, Send Images, Group Says* CNN (Jan. 11, 2010), http://www.cnn.com/2010/TRAVEL/01/11/body.scanners/; Matthew

complaints regarding the machines, which EPIC also promptly publicized, leading to further public debate about the controversial agency program.[115]

These documents helped support a successful movement against the machines and provided the factual underpinning for several follow-up FOIA requests, petitions, and lawsuits, as well as EPIC's later lawsuit to suspend the use of the machines.[116] Based on the materials that EPIC received through the FOIA, such as the technical specification and passenger complaints, on July 2, 2010, EPIC filed suit in D.C. Circuit Court of Appeals, asking the Court to suspend the use of body scanner machines in American airports.[117] EPIC successfully claimed that TSA had violated the Administrative Procedure Act when the agency began using the body scanners as primary screening tools without first undergoing a public notice and comment rulemaking.[118] The D. C. Circuit Court of Appeals held that "[i]n sum, the TSA has advanced no justification for having failed to conduct a notice-and-comment rulemaking. We therefore remand this matter to the agency for further proceedings."[119]

Not long after the D. C. Circuit decision in July 2011, the TSA began the process of removing the backscatter x-ray devices from U.S. airports.[120] No longer would it be possible for public officials to routinely view the naked bodies of air travelers.[121] The FOIA lawsuit led to a successful legal challenge against an agency practice and a subsequent change in agency activity.[122]

EPIC also used the information it obtained in the initial FOIA lawsuit to file several follow-up FOIA requests and lawsuits.[123] EPIC requested documents detailing radiation risks posed by the body scanner machines, as well as plans to expand use of body scanners to locations outside of airports.[124] The documents that EPIC received as a result of these requests generated substantial public debate and further promoted agency policy changes.[125] EPIC testified before

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L. Wald, *Mixed Signals on Airport Scanners,* N.Y. TIMES (Jan. 12, 2010), http://www.nytimes.com/2010/01/13/us/13scanners.html?_r=0.

115. Jaikumar Vijayan, *Travelers File Complaints Over TSA Body Scanners*, COMPUTER WORLD (Mar. 8, 2010), http://computerworld.com/s/article/9167618/Travelers_file_complaints_over_TSA_body_scanners.

116. *See generally* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

117. *Id.* at 3 (Because of an obscure procedural provision, the Circuit Court of Appeals was the proper venue for EPIC's lawsuit.).

118. *Id.* at 11.

119. *Id*. at 8.

120. Kuruvill, *supra* note 100.

121. *Id.*

122. *Id.*; *see also* Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

123. *See Whole Imaging Technology*, *supra* note 105.

124. *See id.*

125. *See id.*

Congress several times regarding the body scanner machines.[126] Members of Congress expressed skepticism regarding the privacy, safety, and cost implications of the machines.[127]

Because of widespread public and Congressional opposition to the machines fueled in part by the documents EPIC obtained under the FOIA, TSA has made several modifications to the machines.[128] The machines no longer display a graphic image.[129] Instead, the machines display a "gumby" or stick figure image, with areas containing anomalies highlighted.[130] A TSA agent then pats down the specific area where the anomaly has been located.[131] The agency has also ceased the use of backscatter body scanner machines, which dosed travelers with radiation, and has replaced them with millimeter wave machines, which do not emit radiation.[132]

B. EPIC v. DHS: Social Media Monitoring and Congressional Oversight

Another of EPIC's most successful FOIA requests involved government monitoring of social media. EPIC filed the original FOIA request in April 2011.[133] EPIC requested contracts, statements of work, technical specifications, communications and agreements, and security measures related to the Department of Homeland Security's (DHS) social media monitoring program.[134] The agency had previously undertaken monitoring of social media for specific events, gathering intelligence pertaining to the January 2010 earthquake in Haiti, the 2010 Winter Olympics in Canada, and the April 2010 BP Oil Spill response.[135]

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126. *See, e.g.*, *TSA Oversight Part 1: Whole Body Imaging: Hearing Before the H. Comm. On Oversight and Gov't Reform Subcommittee on Nat'l Sec.* (2011) (statement of Marc Rotenberg, President, EPIC), *available at* http://epic.org/privacy/body_scanners/EPIC_Body_Scanner_Testimony_03_16_11.pdf; *see also "An Assessment of Checkpoint Security: Are Our Airports Keeping Passengers Safe?" Hearing Before the House Homeland Security Committee, Subcommittee on Trans. Sec. & Infrastructure* (2010) (statement of Marc Rotenberg and Lillie Coney), *available at* http://epic.org/privacy/airtravel/03_17_10%20House_HSC_Testimony.pdf.

127. *TSA to Junk Naked Body Airport Scanners*, FOXNEWS.COM (Jan. 18, 2013), http://www.foxnews.com/politics/2013/01/18/tsa-junks-naked-body-airport-scanners/.

128. Kuruvill, *supra* note 100.

129. Mike M. Ahlers, *TSA Removing 'Virtual Strip Search' Body Scanners*, CNN (Jan. 19, 2013), http://www.cnn.com/2013/01/18/travel/tsa-body-scanners/.

130. Kuruvill, *supra* note 100.

131. *Id.*

132. *Id.*

133. *See EPIC v. Department of Homeland Security: Media Monitoring*, ELEC. PRIVACY INFO. CTR., http://epic.org/foia/epic-v-dhs-media-monitoring/ (last visited Aug. 27, 2014) [hereinafter *Media Monitoring*] (listing the actions taken by EPIC).

134. *See id.*

135. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OFFICE OF OPERATIONS COORDINATION AND PLANNING HAITI SOCIAL MEDIA DISASTER MONITORING INITIATIVE (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ops_haiti.

In a June 2010 Privacy Impact Assessment, DHS signaled its intention to pursue a permanent social media monitoring program.[136] Later, DHS publicly announced its intentions to monitor online media (including social media) in a February 2011 system of records notice.[137]

As a result of the FOIA request, in January 2012, EPIC received nearly 300 pages of documents from the DHS, including contracts, price estimates, a Privacy Impact Assessment, and communications concerning the media monitoring program.[138] The documents revealed that DHS was paying General Dynamics to monitor blogs, comment sections, and social media for "reports that reflect adversely on DHS, or prevent, protect, respond government activities."[139] General Dynamics was instructed by the agency to "capture public reaction to major government proposals" and generate "reports on DHS, Components, and other Federal Agencies: positive and negative reports on the Federal Emergency Management Agency, the Central Intelligence Agency, the Customs and Border Protections, Immigration and Customs Enforcement, etc. as well as organizations outside the DHS.[140]" The agency provided General Dynamics with several sample reports, including a report titled "Residents Voice Opposition Over Possible Plan to Bring Guantanamo Detainees to Local Prison-Standish MI."[141] This report summarizes dissent on blogs and social networking cities, quoting commenters.[142] DHS instructed General Dynamics to "Monitor public social communications on the Internet."[143] The records list the websites that will be monitored, including comment sections of the *New York Times*, *Los Angeles Times*, *Huffington Post*, *Drudge Report*, *Wired*, and ABC News.[144]

In February 2012, EPIC received an additional document, the DHS-authored "Analyst's Desktop Binder," which was designed to summarize policies and

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pdf; *see also* DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OFFICE OF OPERATIONS COORDINATION AND PLANNING 2010 WINTER OLYMPICS SOCIAL MEDIA EVENT MONITORING INITIATIVE (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ops_2010winterolympics.pdf; DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE OFFICE OF OPERATIONS COORDINATION AND PLANNING APRIL 2010 BP OIL SPILL RESPONSE SOCIAL MEDIA EVENT MONITORING INITIATIVE (2010), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ops_bpoilspill.pdf.

136. *See generally* U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT: THE PRIVACY OFFICE OFFICIAL GUIDANCE (2010).

137. Publicly Available Social Media Monitoring and Situational Awareness Initiative System of Records, 76 Fed. Reg. 5603 (Feb. 1, 2011).

138. *See Media Monitoring*, *supra* note 133.

139. Dep't OF HOMELAND SEC., JANUARY 2012 DISCLOSURE, *available at* http://epic.org/foia/epic-v-dhs-media-monitoring/EPIC-FOIA-DHS-Media-Monitoring-12-2012.pdf.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

instructions for government contractors.[145] The document revealed that the agency had been routinely monitoring communications on social media containing such common terms as "cloud," "ice," "wave," "worm," "exercise," "electric," "smart," "pork," and "police."[146]

The documents obtained by EPIC produced stories in the *Washington Post*, *New York Times*, and several other publications.[147] The wide list of DHS search terms inspired criticism—sometimes serious, sometimes humorous[148]—from many circles. It garnered the attention of Congress, and on February 16, 2012, the Subcommittee on Counterterrorism and Intelligence held a hearing on "DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy."[149] The documents that EPIC obtained were referred to numerous times in the hearing.[150] Representative Patrick Meehan (R-PA), Chairman of the Subcommittee, stated:

> A few weeks ago, it was reported that DHS had instituted a program to produce "short reports about threats and hazards." However, in something that may cross the line, these reports also revealed that DHS had tasked analysts with collecting intelligence on media reports that reflect adversely on the U.S. Government and the Department of Homeland Security. In one example, DHS used multiple social networking tools – including Facebook, Twitter, three different blogs, and reader comments in newspapers to capture residents' reactions to a possible plan to bring Guantanamo detainees to a local prison in Standish, Michigan. In my view, collecting, analyzing, and disseminating private citizens' comments could have a chilling effect on individual privacy rights and people's freedom of speech and dissent against their government.[151]

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145. DEP'T OF HOMELAND SEC., ANALYST'S DESKTOP BINDER (2011), *available at* http://epic.org/foia/epic-v-dhs-media-monitoring/Analyst-Desktop-Binder-REDACTED.pdf.

146. *Id.*

147. *See* Charlie Savage, *Federal Contractor Monitored Social Network Sites*, N.Y. TIMES, Jan. 13, 2012, http://www.nytimes.com/2012/01/14/us/federal-security-program-monitored-public-opinion.html?_r=0; *see also* Ellen Nakashima, *DHS Monitoring of Social Media Worries Civil Liberties Advocates*, WASH. POST, Jan. 13, 2012, http://www.washingtonpost.com/world/national-security/dhs-monitoring-of-social-media-worries-civil-liberties-advocates/2012/01/13/gIQANPO7wP_story.html.

148. Kevin Fogarty, *DHS List of Words You Should Never Ever Blog or Tweet. Ever.*, IT WORLD (May 31, 2012, 4:13 PM), http://www.itworld.com/security/279429/dhs-list-words-you-should-never-ever-blog-or-tweet-ever.

149. *Subcommittee Hearing: DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy*, COMM. ON HOMELAND SEC. (Feb. 16, 2012, 10:00 AM), http://homeland.house.gov/hearing/subcommittee-hearing-dhs-monitoring-social-networking-and-media-enhancing-intelligence.

150. *Id.*

151. *Enhancing Intelligence Gathering and Ensuring Privacy: Hearing on DHS Monitoring*

Representative Jackie Speier (D-CA), the Subcommittee's ranking member, stated:

> I am deeply troubled by the document that has just been put into the record by EPIC.org and while you have probably not had the opportunity yet to review it, Mr. Chairman, I would like to ask, after they do review it, to report back to this Committee, and to provide us with answers to the questions raised. So I'm going to start with a couple of them. They made a FOIA request back in April. DHS ignored it. And then EPIC filed a lawsuit on December 23, 2011 when the agency failed to comply with the FOIA deadlines. And as a result of the filing of the lawsuit DHS disclosed to EPIC 285 pages of documents. So I just want to make a note of that, that you shouldn't stonewall FOIA requests. You should comply with them within the deadlines. No entity should be required to file a lawsuit . . . . [b]ut what's interesting about what they have pointed out is that, while you say there's no personally identifiable information in this contract with General Dynamics in fact, they point out that there are some exceptions to the "No PII" rule . . . I find that outrageous. And I would like to ask you to amend the contract with General Dynamics to exempt that kind of information from being collected.[152]

In response to the public outrage and Congressional inquiries generated by the FOIA documents, DHS has instituted new safeguards, including audit trails to log the date and time of search, the analyst ID, and the character search term.[153] The agency also removed language from the new edition of the Analyst's Desktop Binder that allowed monitoring of First Amendment protected activities and public dissent, such as criticism of the agency's practices.[154] DHS instructed contractors to only collect information that is operationally relevant to DHS.[155]

C. A Student FOIA Request to TSA: A Washington Post Story About the No Fly List

Occasionally, a FOIA request is successfully resolved without litigation. In June 2011, a law school student, on behalf of EPIC, filed a request with the

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of Social Networking and Media Before the S. Comm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Security, 112th Cong. (2012) (statements of Patrick Meehan, Chairman of S. Comm. On Counterterrorism and Intelligence).

152. *Enhancing Intelligence Gathering and Ensuring Privacy: Hearing on DHS Monitoring of Social Networking and Media Before the S. Comm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Security*, 112th Cong. (2012) (statements of Jackie Speier, Ranking Member, S. Comm. On Counterterrorism and Intelligence).

153. DEP'T OF HOMELAND SEC., OFFICE OF OPERATIONS COORDINATION AND PLANNING, PUBLICLY AVAILABLE SOCIAL MEDIA MONITORING AND SITUATIONAL AWARENESS INITIATIVE UPDATE (2013).

154. *Id.*

155. *Id.*

Federal Bureau of Investigation (FBI) for records related to the No Fly List and Selectee List, subsets of the FBI Terrorist Screening Center's Terrorist Screening Database.[156] The Terrorist Screening Database, created in 2003, is a consolidated watch list administered by the Terrorist Screening Center and used by multiple agencies.[157] It contains the No Fly List, Selectee List, Interagency Border Inspection System, Violent Gang and Terrorist Organization File, Automated Biometric Identification System, Integrated Automated Fingerprint Identification System, and several other watch lists and screening systems.[158]

The No Fly List and Selectee List were created by the FBI after the September 11, 2001 terrorist attacks and has since been transferred to the purview of the Transportation Security Administration (TSA).[159] Individuals who are on the Selectee List are subjected to more intensive screening at airports; individuals on the No Fly List are not permitted to board a commercial aircraft for travel within, or into, the United States.[160]

The number of individuals on these lists and the criteria for inclusion and removal from the lists has been highly secret.[161] Agency officials have said simply that the No Fly List has its "own minimum substantive derogatory criteria requirements."[162] In the beginning of 2010, multiple news outlets reported that the criteria for inclusion on the list had been relaxed, making it easier for individuals to be placed on the No Fly List and Selectee List.[163]

An EPIC law clerk, following the procedure described above to identify a significant FOIA topic and to direct it to the appropriate agency, requested documents detailing criteria for inclusion on and removal from the No Fly List and Selectee List, as well as information about the current number of individuals

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156. Letter from Andrew Christy and John Verdi to David M. Hardy (June 7, 2011), *available at* http://epic.org/privacy/airtravel/EPIC_No_Fly_List_Criteria_FOIA_Request.pdf [hereinafter Christy Letter].

157. *Ten Years After: The FBI Since 9/11*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/ about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center (last visited July 15, 2014).

158. Federal Bureau of Investigation, *Criminal Justice Information Services,* FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis (last visited July 14, 2014).

159. TSIS TRANSPORTATION SECURITY INTELLIGENCE SERVICE, TSA WATCH LIST PRESENTATION, *available at* http://www.aclunc.org/cases/landmark_cases/asset_upload_file371_3549.pdf (released as part of a settlement in Gordon v. FBI, No. C – 03 - 1779 (N.D. Ca. Jan. 24, 2006)).

160. *Id.*

161. *Factsheet: The ACLU's Challenge to the U.S. Government's "No Fly List,"* ACLU.ORG, https://www.aclu.org/national-security/factsheet-aclus-challenge-us-governments-no-fly-list (last visited Aug. 27, 2014).

162. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GENERAL, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION 9 (2009), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIGr_09-64_Jul09.pdf.

163. Elise Labott, *U.S. Lowers Threshold for Inclusion on No-Fly Lists*, CNN (Jan. 6, 2010, 12:18 PM), http://www.cnn.com/2010/TRAVEL/01/05/terrorism.watch.list/.

and U.S. Citizens on the No Fly List and Selectee List.[164] When the agency failed to respond, EPIC followed up with an appeal in August 2011, and several contacts with the agency.[165] In September 2011, the agency responded, sending EPIC around 100 pages of documents.[166] The documents included the 2009 and 2010 guidelines for the No Fly List, FBI Terrorist Watch List Screening Procedures, an FBI report to Congress on the Terrorist Screening Center, and FBI Answers to questions from Congress on the Center.[167]

For the first time since the No Fly List was established, the public got to see the legal standard for inclusion on the list.[168] According to the documents sought by our summer clerk, in order for an individual to be included on the list, the FBI must have "reasonable suspicion" based on an objective factual basis.[169] "The objective factual basis linking a specific individual to terrorism or terrorist activities is also known as *particularized derogatory information*, which is the basis for adding the subject of an FBI investigation to the TSDB [Terrorist Screening Database]."[170]

The 2010 guidelines for the No Fly List revealed that law enforcement officers are expressly forbidden from indicating to an individual that he or she is on the No Fly List in any way.[171] The guidelines also revealed that even a successful acquittal in a court of law is not necessarily enough to remove a person from the No Fly List.[172]

These documents garnered attention in several national publications, including the *New York Times*.[173] The documents helped to inform the public about a very secret government program and gave the public the opportunity to scrutinize the justification for watch list placements.[174]

IV. CLINICAL EDUCATION, ASSESSMENT, RECOMMENDATIONS

The FOIA clinic we have described above arises within the larger context of

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164. Christy Letter, *supra* note 156.

165. *See EPIC-FOIA—FBI Watchlist*, ELEC. PRIVACY INFO. CTR., epic.org/foia/fbi_watchlist.html (last visited Aug. 27, 2014).

166. *See id.*

167. *See id.*

168. *See* Charlie Savage, *Even Those Cleared of Crimes Can Stay on F.B.I.'s Watch List*, N.Y. TIMES, Sept. 27, 2011, at A1, *available at* http://www.nytimes.com/2011/09/28/us/even-those-cleared-of-crimes-can-stay-on-fbis-terrorist-watch-list.html.

169. *See generally* COUNTERTERRORISM PROGRAM GUIDANCE WATCHLISTING ADMINISTRATIVE AND OPERATIONAL GUIDANCE, FEDERAL BUREAU OF INVESTIGATION (2010), *available at* http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance.pdf.

170. *See generally id.* (emphasis added).

171. *Id.*

172. *Id.*

173. *See* Savage, *supra* note 168.

174. *Id.*

American legal education. We have chosen this moment to draw attention to this particular class because we believe it follows an important evolution now taking place in American law schools. In this section, we review the history, theory, and development of clinical education.

A. History

Legal education in 19th century America was fractured and inconsistent.[175] Far from the standards and requirements provided by the American Bar Association (ABA) and state bars today, legal education before about 1870 consisted of a patchwork of methods and theories.[176] Some attorneys were trained in apprenticeships without classroom education.[177] Of those attorneys who attended law school, some were university graduates, and others had no prior education beyond grade school.[178] In addition, law curricula varied hugely between schools.[179] The legal education historian Charles R. McManis identifies three prevailing trends among law school methods in the 19th century: the applied skills method, similar to an apprenticeship; the European "general education" model, essentially a liberal arts curriculum that included legal studies; and the proprietary law school model, which Barry, Dubin, and Joy describe as "an analytical and systematized approach to the law as interconnected rational principles, taught primarily through lectures."[180]

The modern conception of legal education as a three-year, graduate-level law school began around the time that Christopher Columbus Langdell became the first Dean of Harvard Law School.[181] According to legal education lore, Langdell began the first meeting of his first Contracts not with the expected lecture typical of propriety schools, but by asking a student to recite the case history of *Payne v. Cave*.[182] It has been well-documented that Langdell was not the first law professor to introduce the case method into classroom teaching.[183] John Norton Pomeroy, a professor at the law school that later became New York University, notably taught using the case method in the 1860s.[184] Langdell, however,

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175. *Id.*

176. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 184 (2008).

177. Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429 (1981).

178. Renée M. Landers, *A Profession of Students, Practitioners, Professors, and Judges*, 47 BOSTON B. J. 2 (2003).

179. Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 8 (2000).

180. *Id.* at 5.

181. Thomas C. Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1 (1983).

182. *Id.*

183. Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 LAW & HIST. REV. 277, 336 (2004).

184. *Id*.

provided a theoretical rationale for his choice of method.[185]

Langdell equated law with science, and the case method with the scientific method.[186] In the scientific method, the scientist uses observation and raw data to derive basic governing principles.[187] This process not only results in the creation of a set of scientific laws, but also a tested methodology for discovering further principles.[188] Langdell believed that law operated in the same way.[189] The facts of a case were raw, observable data, from which law students could derive basic governing principles.[190] By deriving these principles, the law student would learn both the rules of law and the skill of inductive legal reasoning.[191] Langdell's "scientific method" philosophy caught on almost instantly, and Langdell's combination of case method and Socratic method are still the dominant pedagogical theory of law schools today.[192]

It was against this backdrop that the clinical method of teaching law began to emerge in the early twentieth century.[193] Despite the immediate acceptance of Langdell's method, there remained pockets of legal educators around the country who believed the "scientific method" was unjustifiably narrow.[194] Its critics believed that the case method inadequately trained students to practice law.[195] As a result, students at a few law schools began to develop "legal aid bureaus" and clinics, or volunteer opportunities for law students to contribute to public service causes in exchange for practicing their legal skills.[196] Some universities endorsed these clinics; at other universities, the clinics were purely extracurricular activities.[197]

Most universities resisted the development of legal aid clinics. Since Langdell's popularization of the law school as intellectual center rather than trade school, universities were hesitant to cede their growing reputation as serious academic institutions.[198] Law schools perceived legal aid clinics as a return to the

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185. Grey, *supra* note 181, at 18-19.

186. *Id.*

187. *Id.* at 5-6.

188. *Id.*

189. *Id.* at 19-20.

190. *Id.* at 43-44.

191. Nancy Cook, *Law as Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 27 (2012).

192. *See, e.g.,* Anthony Kronman, *The Socratic Method and the Development of the Moral Imagination*, 31 U. TOL. L. REV. 647, 647 (2000).

193. Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504 (1999).

194. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 72 (2007) (usually referred to as the "Best Practices Report").

195. *Id*.

196. John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174-75 (1930).

197. Barry, Dubin, & Joy, *supra* note 179, at 2.

198. Charles R. McManis, *The History of First Century American Legal Education: A*

era of apprenticeships and ad hoc self-instruction—the dark ages of legal education.[199] This "first wave" of clinical education—that is, institutionalized skills training, rather than default apprenticeships resulting from the lack of an academic alternative—was really little more than a ripple. Nevertheless, by the 1950s, most universities had agreed to some sort of practical skills requirement in their curricula, and at least thirty schools housed or affiliated with a legal aid clinic in which students could gain hands-on experience.[200]

The "second wave" of clinical education in the 1970s and 1980s provided the real momentum for the clinical methodology in use today.[201] The champion of second wave clinical legal education was Professor Gary Bellow, who sought to unify the various threads of clinical legal education theory and construct a common vocabulary.[202] Barry, Dubin, and Joy note, "Without a commonly understood pedagogy, clinical legal education was too amorphous to take firm root and spread to every law school."[203] Professor Bellow therefore began to examine the legal aid clinics and other skills-based practicum courses and to develop a cohesive rationale for the clinic methodology.[204]

As Professor Bellow and others continued to construct the academic basis for a unified discussion of clinical legal education, other forces continued to push for legal clinics in law schools.[205] One force was the perception among students, practitioners, and judges that recent law school graduates were underprepared to practice law.[206] Professor Mark Spiegel notes, "In the 1970's, pressure developed for additional skills training in law school. Chief Justice Burger began giving speeches about the inadequacy of trial advocacy."[207] As a result of these growing complaints, legal regulatory boards and law schools " developed a broader focus on lawyer competency which included skills in addition to trial advocacy," including interviewing skills, counseling skills, and negotiation skills.[208] To further these goals, the Council on Legal Education and Professional Responsibility (CLEPR) was formed, and began giving law schools grants to

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Revisionist Perspective, 59 WASH. U. L. REV. 597, 650 (1981).

199. Barry, Dubin, & Joy, *supra* note 179, at 8.

200. *Id.* at 9.

201. NEW YORK JUDICIAL INST., PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS, AND THE PRACTICING BAR, 12-13 (2005), *available at* https://www.nycourts.gov/ip/partnersinjustice/Clinical-Legal-Education.pdf.

202. Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, CLINICAL EDUC. FOR THE L. STUDENT 374 (1973).

203. Barry, Dubin, & Joy, *supra* note 179, at 16l.

204. *See generally* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

205. Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 590 (1987).

206. *Id.*

207. *Id.*

208. *Id*.

establish clinics.[209] The response from Congress was similarly prompt.[210]

Another major force behind the growth of clinical education was the wealth of academic writing that emerged from the late 1970s and 1980s.[211] By the 1990s, academic engagement was so strong among scholars of legal education theory that the *Clinical Law Review* was established in 1994.[212] The major contemporary clinical legal education scholars have identified the tenure of the "Millennial" generation in law school as the marker for the "third wave" of clinical legal education.[213] The "third wave" theories of clinical legal education provide the underpinnings for the EPIC Open Government litigation practicum, and the major trends are described below.

B. Current Theories

Clinical education supplied its own theoretical underpinnings; rather than conceptualized and then implemented, 20th century clinical education was implemented and then rationalized. Writing of clinical legal education at the beginning of the "second wave," Mark Spiegel notes: "Little thought was given to basic questions concerning what clinical education had to offer law students and law schools other than the opportunity for the earlier acquisition of real life experience. If there was an explicit rationale, it was related to some connection between providing service and learning."[214] Since then, much has been written about the theory and practice of clinical education. Generally, the theories advocating the use of clinical education fall into three camps, which we will call the practical, the ethical, and the sociological.

The practical theory of clinical education coalesced in the early 1990s, following the ABA's publication of a study on the gap between a student's success in legal education and his or her preparedness to practice law.[215] Subsequent follow-up reports converged on the consensus that law schools should

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209. *CLEPR: Origins and Program*, CLINICAL EDUC. FOR THE L. STUDENT 3, 8 (1973).

210. *See, e.g.*, *Qualification for Practice Before the United States Courts in the Second Circuit: Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159 (1975).

211. NEW YORK STATE JUDICIAL INST., PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS AND THE PRACTICING BAR: INTRODUCTION TO CLINICAL LEGAL EDUCATION 12 (2005), *available at* https://www.nycourts.gov/ip/partnershipinjustice/Clinical-Legal-Education.pdf.

212. The Association of American Law Schools, *Resources: The Clinical Law Review*, *available at* http://www.aals.org/resources_clinical.php.

213. Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. (2013).

214. Spiegel, *supra* note 205.

215. AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 3 (1992) (commonly known as the "MacCrate Report," after the then-chair of the ABA).

be responsible for imparting three basic categories of education (or "apprenticeships"): legal theory, legal skills, and legal values.[216] Many legal clinicians who adopted the conclusion of these reports agree that the casebook method can only teach the legal theory apprenticeship, and students must learn lawyering skills and values in a different setting.[217] By identifying "the necessary core competencies to become successful legal professionals," clinical professors can structure their courses and methods of assessment around a practical, skills-based theory of education.[218] In this way, clinical education is conceived as a means to complete law students' education in one or both of the remaining apprenticeships.

The ethical theory is closely tied to the practical theory of clinical education in that it is intended to fulfill the third apprenticeship – legal values – by requiring students to experience firsthand the consequences of their work.[219] This theory recognizes the importance of the modern clinic's roots in the "legal aid bureaus" of the late nineteenth century.[220] The ethical theory imagines clinics as what Professor Peter Joy calls the "model ethical law office."[221] It posits that law students cannot learn to be ethical lawyers by learning ethics rules; instead, ethical lawyers must be shaped through practice and implementation.[222] Thus, clinical professors are understood to be ethics professors, and law students' clinic experience is conceptualized as a monitored practice space to learn the principles of zealous advocacy while confronting the realities of the ethics rules.[223]

The sociological theory of clinical education is related to the practical and ethical in that clinical instructors often identify interpersonal skills and sense of professional ethics among the core competencies that clinical education should instill.[224] However, some clinical educators approach the sociological aspect of clinical work as the course's primary educational goal.[225] The sociological theory is an outward-facing theory, orienting the student's education toward the needs

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216. Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 337 (2010); *see also* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 191 (2007) (commonly known as the "Carnegie Report," after its sponsorship by the Carnegie Foundation).

217. Foxhoven, *supra* note 216.

218. *Id.* at 335.

219. Peter A. Joy, *The Law School Clinic As A Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35, 37 (2003).

220. *Id.* at 39 n.16.

221. *Id*. at 35.

222. *Id.* at 36-37; *see also* Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 111 (1996).

223. Joy, *supra* note 219, at 38.

224. Martha Minow, *Lawyering for Human Dignity*, 11 AM. U. J. GENDER SOC. POL'Y & L. 143, 156 (2002).

225. *Id.* at 155; *see also* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 353 (1997).

of the client, rather than an inward-facing theory, orienting the student's education toward the needs of the curriculum.[226]

Under the sociological theory, clinics are meant to teach students to interact with clients, with colleagues and supervisors, and with their own concept of the role of "lawyer."[227] Learning to work with and for clients is the sociological component that has persisted throughout the history of clinical education. [228] The early apprenticeships, the first wave legal aid clinics, the second wave university clinics, and clinical education today all share the common task of pairing law students with those in need of advocacy. Contemporary clinical theory has recognized that this "hands on lawyering" aspect of clinical education binds the student's engagement with the clinic experience with the success of the client's case.[229] The greater the students' involvement and participation in clinic work, the more successful the client is likely to be.[230] Under this theory, the student learns to gauge academic success by the real-world outcome of the legal work.[231]

Finally, the sociological theory expects that the student will use the clinic experience to define the socially constructed role of "lawyer," and explore the consequences of accepting or rejecting that construction.[232] The student compares her interactions with her clients, colleagues, and supervisors with her own expectations of lawyering.[233] She encounters the competing pressures on an attorney to advocate zealously while respecting the courts and the law; and the competing demands of supervisors, judges, and clients.[234] Under this theory, the clinic experience provides the student with the environment to adjust her idea of what constitutes a "lawyer," and to decide whether her employer and client are best served by conforming to that role or by defying it.[235]

C. Assessment

The history and contemporary theories of clinical legal education bear directly on the theory of assessment. Consciously or unconsciously, a clinic instructor beginning a new course faces the basic question of whether the clinic

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226. C. John Cicero, *The Classroom as Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117 (1995); *see also* Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 459 (2000); Jacobs, *supra* note 225, at 345.

227. *See* Minow, *supra* note 224.

228. Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555, 565 (1980).

229. Spiegel, *supra* note 205, at 592-93.

230. Ed Finkel, *Law School Clinics Provide Real World Training*, 41 STUDENT LAW. MAG. (2012).

231. *Id.*

232. *See* Minow, *supra* note 224.

233. *Id.* at 594.

234. *Id.*

235. *Id*.; *see generally* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

will be an alternative method by which the instructor teaches the traditional lecture courses, or whether the clinic is divorced from Langdell's scientific casebook theory altogether. These different conceptions of the purpose of a clinic will determine the metrics of success that the instructor will use.

If the clinic is conceived as a methodology for teaching traditional subjects—that is to say, a complement to the casebook method—the metrics of a student's success will likely mirror those of a student in a casebook-based course. The instructor will assess whether the student has learned the principles underlying the subject matter and is able to apply those principles to derive consistent results in different situations.[236] In such a clinic, the instructor could assign grades to filings with the court and interactions with the client.[237] If a student were responsible for filing a pleading with the court, for instance, the instructor could assign a grade to the motion based on its quality and the level to which it reflects the student's grasp of the relevant rules and principles underlying the pleading.[238] Assessment in such a clinic could also take the form of an exam or a paper, as in a casebook-based course.

If the clinic is conceived as an alternative to the casebook subjects, the metrics of assessment will likely correspond to the theory of the clinic.[239] For instance, a clinical professor whose primary goal for the clinical course is to teach the interpersonal skills underlying the sociological theory of clinic education will assess the student's ability to interact with clients, colleagues, and supervisors.[240] The clinical instructor can conduct a series of assessments to determine the student's performance in the clinic, including peer review, self-assessment, and supervisory reports.[241]

D. FOIA and Clinical Education

For all of the excellent scholarship that has developed around the pedagogy of clinical legal education, there has been no academic treatment of using the clinic model to teach the FOIA and open government litigation. The EPIC FOIA Practicum presents novel additions to the theory of clinical education, since EPIC has no clients. EPIC serves the public generally, using the FOIA to keep the public informed on the government's use of technology, personal data, and the Internet. As a result, the FOIA Practicum deviates from the trajectory of clinic development through the 20th century.

The EPIC FOIA Practicum, like many other clinics, incorporates elements of the practical, ethical, and sociological theories of clinical education. Assessment is based on a conception of the FOIA Practicum as both a method for teaching

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236. Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models In Clinical Legal Education*, 3 CLINICAL L. REV. 299, 306-08 (1997).

237. *Id.* at 306.

238. *Id*. at 306-08.

239. Benfer & Shanahan, *supra* note 213, at 327-31.

240. *Id.*

241. *Id.* at 329.

traditional case law and also an alternative to traditional case law. However, the main goal of the FOIA Practicum is largely practical: to train the next generation of FOIA litigators. As a result, the FOIA Practicum primarily targets the development of students' open government lawyering skills. The Practicum syllabus outlined four goals for the course: an overview of the federal open government law; training in FOIA requests, appeals, and litigation; experience pursuing actual FOIA matters in various stages of the litigation process; and practical tips and strategies to become an effective FOIA attorney.

Assessment was broken down according to a set of discrete tasks that are required in open government litigation. Each preparatory memo or filing is treated as an exam or a paper, and graded out of a certain percentage of 100. In the Practicum's last semester, the syllabus broke out five individual graded assignments: a written case memo, a case presentation to the class, a FOIA request, a FOIA appeal, and an "agency response" exercise, in which students responded to each other's FOIA requests as though they were agency FOIA officers. Each assignment contributed a specified percentage of the final grade, up to eighty percent. Class participation accounted for the remaining twenty percent, and included clinic attendance and completion of reading assignments.

Some of the goals for the course necessarily required that we conceive of the Practicum as an alternative to the casebook subjects. Experience pursuing actual FOIA matters, for example, is inherently practice-based and could not be taught from a casebook. In other areas of the course, the Practicum was explicitly conceived as a methodology. Law students can, and often do, learn open government laws in casebook-based classrooms. The FOIA Practicum used the clinical model to teach the same substance; by writing and pursuing the requests, law students were able to learn the open government laws, and experience their impact as they learned.

CONCLUSION

Pursuing a Freedom of Information Act request provides an ideal opportunity for law students and young lawyers to learn the basic skills of lawyering—defining a problem clearly, identifying a goal, writing with precision, developing a strategy, and assessing outcomes. The EPIC FOIA clinic combines these threads—helping students develop the practical tools to pursue FOIA requests and continuing to understand as lawyers the broader operation of the FOIA. Lectures focus on a key topic each week, providing students with the opportunity to discuss and assess the current status of their various FOIA requests. Clinic meetings at EPIC then provide opportunities for students to apply the skills they learn in class under the supervision of experienced FOIA attorneys.

Throughout the semester, students are encouraged to share their views about how they made certain decisions. Why did they decide to pursue a particular FOIA request? What requests did they choose not to pursue and what was the reason for the decision? How did their decision-making process affect the outcome of their requests? How can they change the way they think about the FOIA in order to achieve more desirable results?

Students share their insights either in class discussion or in brief reflection memos submitted for class. In this way, students can compare their own experience with those of other students and with those of EPIC attorneys. Through group discussion, individual conversations, and written reflection, students obtain additional insights about the FOIA process, the value of open government, and the process of practicing law.