



On the Public's Right to Proprietary Data

A Contribution to the SSRC Data Consortium for Media and Communications Policy

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Is there a public right to access proprietary information where the government uses public funds to purchase the information and relies on that information in its decision-making process? Specifically, can non-commercial researchers access proprietary information collected by media data companies that the FCC uses in its policy rulemakings?

Summary & Introduction

There is a general, stated policy in favor of broad disclosure and access of information that the government relies on. This policy, however, is constrained by statutes with limited reach as well as statutory exceptions and policy limitations.

In this research note, I describe and discuss four legislative and regulatory mechanisms for access – The Freedom of Information Act (FOIA), the Shelby Amendment, the Data Quality Act (DQA) and OMB Peer Review. I have also identified targeted filing, rule changes and coalition building as additional means of furthering public goals of access to data. While none of the identified means provide complete, unfettered access to information, the current state of the law provides the identified mechanisms that can be better and more creatively utilized to enhance the public's right to information—especially in an era of widespread privatization of formerly public data collection functions.

I. The Freedom Of Information Act

a. Background

The Freedom of Information Act (FOIA) was passed by Congress in 1966 and amended in 1974 with the purpose of improving the accountability and openness of the Federal government.¹ The plain language of FOIA describes a broad right for the public to access information that the government relies on in its rulemaking. Section (a) begins: “Each agency *shall* make available to the public information as follows...”² The remaining relevant sections of FOIA also use the mandatory language “shall” to describe the duties of agencies to produce documents when properly requested and any individual can request that a document relied upon by a Federal agency be disclosed and FOIA requires

¹ 5 U.S.C.A. § 552. FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local government agencies. Additionally, each state has its own public access laws to bolster and supplement federal disclosure requirements.

² 5 U.S.C. §552(a)(1) (emphasis added).

that all agency records be made available upon request to parties who go through the proper procedure.³ Not only does the statute, on its face, require broad disclosure, but the Supreme Court has also interpreted FOIA main purpose as “a general obligation ... to make information available to the public.”⁴ The Ninth Circuit also highlighted the function of FOIA as a commitment “to ‘the principle that a democracy cannot function unless the people are permitted to know what their government is up to.’ The statute’s ‘central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny.’”⁵ Additionally, some records are made available automatically and can be accessed at the FCC’s public reference rooms.⁶ Thus, the baseline policy, both on the face of the statute and as supported by the courts, is strongly in favor of disclosure.

However, many have documented problems with FOIA requests and the FOIA implementation mechanisms - particularly the slow response time.⁷ While FOIA requires an agency to respond to any request within 20 days of receiving it, as much as 31% of all requests go unanswered and those that are answered take much longer than 20 days.⁸ FOIA has also been impacted by post-Sept. 11 national security concerns. After 9/11, John Ashcroft sought to minimize FOIA’s emphasis on broad disclosure. He issued a memorandum changing the standard for judicial review of FOIA standards to “sound legal basis” from “foreseeable harm”, thus reducing the burden on an agency seeking to defend a FOIA denial and emphasized the need to adhere to the privacy rights as protected by FOIA exemptions.⁹

To help combat some of the problems with timeliness and agency resistance to disclosure, in September 2006, the Senate Judiciary committee approved a bill that would impose several changes to FOIA, affirming the principle of open access to agency records. By a vote of 308 to 117, the House passed the Freedom of Information Act Amendments of 2007 (H.R. 1309) on March 14, 2007. Significantly, the bill restates the 20-day response requirement and imposes penalties on agencies that fail to meet the requirement; it creates an ombudsman at the National Archives as a resource to the public and as an overseer of agency FOIA compliance; and it expands access to attorney’s fees for those whose FOIA requests are unjustly denied. Finally, the bill restores the presumption of disclosure under FOIA that was eliminated by the Ashcroft memorandum. Senator Patrick Leahy (D-Vt.), one of the bill’s cosponsors, said, “this bill advances one of the most fundamental rights of Americans, the public’s right to know what its government is doing.”¹⁰ These amendments may help to protect or even broaden

³ The procedures for filing a FOIA request are described at 47 C.F.R. §§ 0.441 - 0.470.

⁴ *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979).

⁵ *Favish v. Office of Independent Counsel*, 217 F.3d 1168 (9th Cir. 2000) quoting *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) (internal citations omitted).

⁶ For a list of the generally available records, see, 47 C.F.R. § 0.453.

⁷ The FCC issues a report every year with information regarding the number of requests received, average response time and reasons for denials. <http://www.fcc.gov/foia/2006foiareport.pdf>

⁸ See Coalition of Journalists for Open Government, *The Waiting Game: FOIA Performance Hits New Lows*, available http://www.cjog.net/documents/CX_FOIA_report_Part_1.pdf

⁹ See <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> (last visited April 3, 2007).

¹⁰ www.rcfp.or/news/2006/0921-foi-senate.html (last visited October 10, 2006).

the public's right to access information or, at the very least, provide additional, needed emphasis to effected agencies as to the fundamental requirements of FOIA.

b. The Limits of FOIA

While agencies must generally disclose the information and data they rely upon in decision making and rulemaking, there are explicit statutory exceptions, limitations and policy constraints on the public's right to access information.

i. Exemption 4

FOIA's Confidential Business Information (CBI)¹¹ exemption is especially relevant for communications and media policy. Despite FOIA's broad disclosure requirement, Federal Agencies, including the FCC, may withhold disclosure of information that pertains to "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."¹² Congress established this exemption (Exemption 4) to protect the interests of both the private entities who submit information and the government. The exemption is meant to encourage submitters to voluntarily furnish useful commercial or financial information to the government by ensuring that it will not be given to outsiders and it correspondingly provides the government with an assurance that such information will be reliable as submitters will not be tempted to falsify information knowing that it is being kept confidential. The exemption also affords protection to those submitters who the government requires to furnish commercial or financial information by safeguarding them from any competitive disadvantage that may result from disclosure.¹³ Exemption 4 covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information that is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.¹⁴

ii. Commercial Data submitted in FCC Proceedings Is Likely Exempt From FOIA Disclosure Requirements

Commercial data submitted to FCC Proceedings would likely be considered CBI under Exemption 4 and therefore exempt from disclosure requirements.¹⁵ Courts reviewing

¹¹ This is a term used in FOIA case law in defining what information is exempt from disclosure under exemption 4 of the Act, 5 U.S.C. § 552 (b)(4). *See, e.g., Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir 1992). Confidential business information is also referred to as confidential commercial information and is defined as "records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552 (b)(4), because disclosure could reasonably be expected to cause substantial competitive harm" 52 Fed. Reg. 23, 781 (1987).

¹² 5 U.S.C. § 552(b)(4).

¹³ *See* Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 21, 2001), *reprinted in FOIA Post* (posted 10/15/01)(recognizing fundamental societal value of "protecting sensitive business information").

¹⁴ For a discussion of the issue of whether commercial or financial information is privileged or confidential, see *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁵ In late 2006, The Institute for Public Representation at Georgetown University School of Law requested, through FOIA, studies, reports, assessments and factual data regarding the FCC's 2003 localism initiative

FOIA request denials on the basis of Exemption 4 have found that there are two threshold requirements for CBI status: the information must be (1) “obtained from a person” and (2) it must be “commercial or financial.” If both these requirements are met, the court will then determine whether the information is “privileged or confidential.”¹⁶ Under the first threshold question, corporations are unquestionably considered “persons” and therefore the media data providers would meet this requirement.¹⁷ As for the second threshold issue, a wide variety of information is considered “commercial or financial” including business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating cost information, information on financial situation, and personal financial information.¹⁸ Research data would most likely fall into this definition.

After the threshold questions are met, courts have looked to the test set forth in the 1974 case *National Parks & Conservation Association v. Morton* to determine whether the information at issue is “privileged or confidential.”¹⁹ According to this test, if the information at issue was compelled for submission by the agency, it will be considered “confidential” if disclosure (1) is likely to impair the Government’s ability to obtain necessary information in the future or (2) is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. If, however, the information was voluntarily submitted to the agency, it will be considered confidential if it is not “customarily disclosed to the public” by the submitter. If media data is compelled by the FCC, data providers can argue that they will be substantially harmed competitively if the data they submit is made available under FOIA for free where their business is derived primarily from charging for such data. This argument is made even stronger by the fact that actual competitive harm need not be demonstrated, but evidence of actual competition and the “likelihood of substantial competitive injury is all that need be shown.”²⁰ If the data is submitted voluntarily, because the media companies normally sell the underlying data and limit dissemination by restrictive contract, it would be considered not “customarily disclosed to the public”. Thus, whether media data providers are compelled to submit information or do so voluntarily, at least some of the data submitted would likely be considered CBI and thus not subject to FOIA disclosure requirements.

iii. Qualifying as an “Agency Record”

Another limitation on disclosure is that FOIA requires disclosure only for “agency records.” Agency records are “records that are (1) either created or obtained by an agency, and (2) the material must have come into the agency’s possession in the

and media ownership rules. While some of its request was granted, some of the requested data was denied based on this Exemption 4. Specifically, contracts entered into by the FCC with outsiders to conduct studies and provide data were denied based on Exemption 4.

¹⁶ *Washington Post Co. v. U.S. Dept. of Health and Human Services*, 690 F.2d 252 (C.A.D.C., 1982).

¹⁷ *Comstock International v. Export-Import Bank*, 464 F.Supp. 804, 806 (D.C.Cir.1979).

¹⁸ *Washington Post*, 690 F.2d 252 (C.A.D.C., 1982); *Landfair v. United States Dep’t of the Army*, 645 F.Supp. 325, 327 (D.D.C. 1986).

¹⁹ 498 F.2d 765 (D.C.Cir., 1974).

²⁰ *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (C.A.D.C., 1979) (emphasis added).

legitimate conduct of its official duties.”²¹ Determining whether specific data or information is an “agency record” is difficult. Generally, however, materials obtained by a Federal agency from a private party or corporation are considered agency records as long as the agency is in control of that record.²²

iv. The Data Sought May Not Qualify as an “Agency Record”

Often, an agency will rely on the results of a study rather than the data underlying the study. In such cases, the study is usually considered an “agency record” and therefore subject to disclosure, but the underlying data is not. For example, in *Ciba-Geigy*, a pharmaceuticals manufacturer moved for an order compelling production of raw data from a federally-funded study, arguing that the raw data constituted agency records subject to disclosure under FOIA.²³ The court held that the data could not be deemed agency records for the purposes of disclosure under the FOIA. It stated that, despite the government funding of, access to, and reliance upon the results, the research group that created the data functioned as a private organization, the raw data of the study was its own private property and not government property. They found that there was no adequate showing that the underlying data of the researchers was directly controlled or substantially utilized by a government agency in the performance of governmental operations, even though the agency did clearly rely on the results of the study.

A more recent case again addressed the distinction between reliance on the study results as distinct from reliance on the study’s underlying data. In *Echostar Satellite v. F.C.C.*,²⁴ the FCC conducted a rule making and adopted an improved version of its Individual Location Longley-Rice model for predicting strength of broadcast television signals. It based this rulemaking in part on a study submitted by the National Association of Broadcasters and the Association for Maximum Service Television, Inc. (NAB/AMST). The FCC made the results of the study available, but not the underlying data. Plaintiff EchoStar challenged the rule making arguing: “There has never been any meaningful way for interested parties to test the data and point out errors so as to prevent the Commission from using unreliable information as the basis for its final rule.”²⁵ The court found that EchoStar was not entitled to the raw data underlying the results of the study contained in the public comments because the Commission based its analysis only on the description, methodology and results of the study. While the court decided the case partly based on the fact that Echostar’s request was untimely (it was filed after the Commission had made its final decision), the court’s reasoning is indicative of the generally narrow interpretation of a right to access under existing law.

v. Policy Limitations

²¹ *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

²² *Weisberg v. U. S. Dept. of Justice*, 631 F.2d 824 (D.C. Cir. 1980), appeal after remand, 745 F.2d 1476 (D.C. Cir. 1984).

²³ *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977).

²⁴ 457 F.3d 31 (D.C. Cir. 2006).

²⁵ 457 F.3d at 38.

In addition to Exemption 4 and the limitations imposed by the “agency record” requirement, several policy considerations also limit or curtail disclosure by Federal Agencies, particularly concerns of efficiency and scientific independence. In *Whitman v. American Trucking Associations*, the court found that allowing overly broad disclosure would be inefficient: “[W]e agree with EPA that requiring agencies to obtain and publicize the data underlying all studies on which they rely “would be impractical and unnecessary.” As the EPA argued . . . : “If EPA and other governmental agencies could not rely on published studies without conducting an independent analysis of the enormous volume of raw data underlying them, then much plainly relevant scientific information would become unavailable to EPA for use in setting standards to protect public health and the environment...”²⁶ The court instead suggested that there should be a balance between disclosure and efficiency: “The court’s conclusions that nothing in conventional administrative law does, or should, require such hyper-analysis only serves as a counterpoint to the possibility that just such hyper-analysis in the name of “good science” is what will become *de rigeur* under the Shelby Amendment and the Data Quality Act.”²⁷ Another court commented on this same efficiency concern in the Notice & Comment process: “Were parties entitled to comment upon every observation an agency staff member draws from the record as it accrues, rulemaking proceedings would be interminable. The APA [Administrative Procedures Act] does not contemplate so exquisite a process.”²⁸ Under this logic, regulatory efficiency and rights of access are presented as conflicting values.

Concerns for scientific and research independence are also in tension with the public’s right to know. Scientists and researchers have argued that premature disclosure of research-related information, including raw data, could have detrimental consequences, such as exposing the scientific peer review process to political pressures, compromising intellectual property interests in contravention of federal laws mandating the patenting of federally funded inventions, jeopardizing university/industry research collaborations, and chilling the ability of scientists to formulate and pursue scientific research ideas freely.²⁹ This concern also provides a substantial limitation on the ability of researchers to access the information that Federal Agencies have relied on in their policymaking.

c. Using FOIA to Access Data

i. FOIA Requests

While much of the information that might interest communications researchers is likely to fall under the CBI exemption 4 or be excluded from FOIA disclosure requirements because it does not meet the “agency record” requirement, FOIA will provide researchers access to a potentially wide range of ‘non-exempt’ FCC data. Relatively little has been done to clarify the extent of this exemption at the FCC, despite the frequency of FOIA

²⁶ No. 97-1441 (D.C. Cir. 2001) (on Remand from the United States Supreme Court).

²⁷ *Hornstein*, at 236.

²⁸ *EchoStar*, 457 F.3d 31 at 40.

²⁹ Tammy L. Lewis & Lisa A. Vincler, *Storming the Ivory Tower: The Competing Interests of the Public’s Right to Know and Protecting the Integrity of University Research*, 20 J.C. & U.L. 417 (1994).

requests directed to the FCC.³⁰ Targeted FOIA requests may be a good way of pushing this process forward.

FOIA requests are relatively easy to file. Individuals or organizations can file online,³¹ surface mail,³² fax,³³ or email.³⁴ Under the FOIA, the FCC must then determine within 20 business days of receipt of the request by the FOIA Requester Service Center whether it is appropriate to grant or deny a FOIA request.³⁵ The FCC and other agencies are allowed to charge copying fees,³⁶ but educational institutions, representatives of the news media, and non-commercial scientific institution requesters must pay for duplication only, and are not charged for the first 100 pages. News media requesters are entitled to a reduced assessment when the request is for the purpose of disseminating information.³⁷

Even if a request is unsuccessful, the denying agency must still produce a Vaughn Index.³⁸ This requirement began in the D.C. Circuit and requires agencies to prepare an itemized index, correlating each withholding with a specific FOIA exemption and a justification for that exemption.³⁹ This has become standard in most FOIA cases and its purpose is to allow a reviewing court to decide if the agency's FOIA withholdings were proper (*see infra*, Judicial Review of FOIA Denials). Such an index can help determine what kinds of documents are being withheld and for what reasons, leading to a greater understanding of the FCC's practices.

ii. Judicial Review Of FOIA Denial

If a Federal Agency denies a FOIA request, the requester can seek judicial review of the denial in Federal Court.⁴⁰ Federal Courts have the power to enjoin the agency from

³⁰Of the 2241 FOIA requests processed between 2002 and 2005, the FCC denied 64 requests because of Exception 4. FOIA requests to the FCC are more typically denied or partially denied because of Exceptions 5, 6, or 7. The type of information most often withheld involves interagency and intra-agency pre-decisional deliberative communications (Exception 5) and information deemed unwarranted invasions of personal privacy (Exception 6 and 7(c)).

³¹ Online request form available at: <http://www.fcc.gov/foia/#reqform>

³² Requests should be sent to: Federal Communications Commission, 445 12th Street, S.W., Room 1-A836, Washington, D.C. 20554 and should include (a) the words "Freedom of Information Act Request" at the top of the letter and on the outside of the mailing envelope, (b) the date of the request, (c) requester's daytime telephone number and/or daytime e-mail contact address (d) provide as much information as possible regarding each document the requester is seeking (e) the maximum search fee that the requester is willing to pay for the request.

³³ 202-418-2826 or 202-418-0521.

³⁴ FOIA@fcc.gov.

³⁵ Note that even if the FCC *does* want to disclose requested CBI, it must (1) notify the submitter once it receives the FOIA request (2) afford "a reasonable period of time" when the submitter may object to the disclosure; and (3) provide the submitter with a "written statement explaining why it has determined to disclose" Exec. Order No. 12,600, 52 Fed. Reg. 23,781-82.

³⁶ 5 U.S.C (a)(4)(A)(i).

³⁷ 47 C.F.R. 47(a)(2).

³⁸ *Vaughn v. Rosen*, 484 F.2d 820 (C.A.D.C., 1973).

³⁹ *Vaughn*, at 827.

⁴⁰ As a prerequisite to suit under FOIA, the requester must not only make an FOIA request to the agency but also exhaust administrative avenues of appeal if the request is denied. *Brumley v. U.S. Dept. of Labor*, 767 F.2d 444 (8th Cir. 1985).

withholding agency records and to order the production of any agency records improperly withheld from the requester.⁴¹ This judicial review is triggered by denial of a request or even just the Agency's failure to respond to request in a timely manner – if an agency simply fails to respond to a FOIA request within twenty (20) days, that is sufficient grounds for a suit in Federal Court.⁴² For example, in the fall of 2006, The Center for Public Integrity (CPI) filed suit against the FCC for failure to provide a database of records regarding the current state of broadband requested under the FOIA.⁴³ At the time of writing, this suit is pending.

Such suits can serve at least two worthwhile purposes even though they are limited to review of one specific request and can result in extensive litigation costs. First, the suit may allow the requester to access the data it seeks and second, assuming that the court rules on the merits of the case, it will help to better define the contours of Exemption 4 within FCC.

II. The Shelby Amendment

Another potential means of access is the Shelby Amendment,⁴⁴ a one-sentence amendment introduced by Senator Richard Shelby (R-AL) to a 4000-page fiscal year 1999 appropriations bill.⁴⁵ This small amendment instituted an important change in OMB Circular A-110, which governs the conditions under which the federal government administers discretionary grants.⁴⁶ The amendment essentially overrides the Supreme Court's decision in *Forsham v. Harris*, where the Court found that data generated by a privately controlled organization which received grant funds from a federal agency were not 'agency records' accessible under the FOIA.⁴⁷ Under the Shelby Amendment, agencies awarding grants *must* compel the grantee to disclose the results of their research

⁴¹ 5 U.S.C § 552 (a)(4)(B).

⁴² The statute allows a requester to file a lawsuit when 20 days have passed without a reply from the agency, but this option lasts only up to the point that an agency responds. Once the agency responds, the requester may no longer exercise the option to go to court immediately, and can seek judicial review only after he or she has unsuccessfully appealed to the agency head as to any denial and thereby exhausted administrative remedies. *Taylor v. Appleton*, 30 F.3d 1365 (11th Cir. 1994).

⁴³ On January 8, 2007 AT&T, Verizon and United States Telecom Association intervened in the case and on the same day filed a motion for summary judgment against CPI claiming that the information CPI requests is protected by Exemption 4. For regular updates of this ongoing case, *see* <http://www.publicintegrity.org/telecom/report.aspx?aid=837#> (last visited February 3, 2007).

⁴⁴ P.L. No. 105-277.

⁴⁵ For a discussion of the purposes of the Act, *see* Senator Richard Shelby, *Accountability and Transparency: Public Access to Federally Funded Research Data*, 37 Harv. J. on Legis. 369 (2000)

⁴⁶ The amendment is sometimes referred to as "The Data Access Amendment."

⁴⁷ The Supreme Court specifically held that raw data developed by private group of physicians and scientists conducting studies of diabetes treatment were not "agency records" subject to disclosure under FOIA even though group had received study grants from the Secretary of Health, Education, and Welfare (HEW) and the Food and Drug Administration FDA to conduct the studies. This was true even though HEW had authority to obtain data had it chosen to do so, and the disputed data formed the basis of published reports which were relied upon by FDA in taking certain actions. *See also*, Donald T. Hornstein, *Accounting for Science: The Independence of Public Research in the New Subterranean Administrative Law*. 66-FALL Law & Contemp. Probs. 227 (2003) (describing the impact and relevance of the Shelby Amendment).

- grantees must make data that result in a published report or that are cited in a federal rule or regulation available to members of the public on request. This mandatory disclosure, however, applies only to recipients of federal grants, so that research done outside of the formerly structured federal grant process would not be available under the Shelby Amendment.⁴⁸ This creates a notable loophole for research conducted through consultancies, as with recent FCC-sponsored media ownership studies. These would not be subject to mandatory Shelby Amendment disclosure.

Data is accessed under the Shelby Amendment using the same process and procedures as FOIA.

III. The Data Quality Act

The Data Quality Act, also known as the Information Quality Act⁴⁹ describes mandatory procedures and processes for ensuring that the data that Federal agencies disseminate and may be a way to gain greater access to information. The stated purpose of the DQA is to “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies...”^{50, 51} While the DQA does not specifically mandate broad disclosure of data to the public, in contrast to FOIA and the Shelby Amendment, its emphasis on quality provides a foothold for those seeking to gain access to data disseminated by Federal agencies—typically with the intention of correcting erroneous information.⁵²

The DQA applies to all federal agencies. The FCC implemented it with its Internal Quality Guidelines in 2002, which set forth procedures that provide interested parties with the means of filing a petition to challenge the quality of information the FCC has used or disseminated.⁵³ These guidelines state that

The FCC is dedicated to ensuring that all data it disseminates reflect a level of quality commensurate with the nature and timeliness of the information.

⁴⁸Note that some commentators argue that the Shelby Amendment was motivated primarily by industry efforts to challenge university-based research, in cases where such work might support new regulatory initiatives. See <http://www.ombwatch.org/article/archive/231?TopicID=2> (last visited January 3, 2007).

⁴⁹ The Act passed through Congress in Sec. 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554; H.R. 5658).

⁵⁰ Federal Communications Commission, *Further Notice of Proposed Rulemaking* in Docket Number MB 06-121 at p. 11.

⁵¹ Note, however, that many have characterized the Data Quality Act as hindering disclosure by imposing too stringent quality requirements on dissemination. Alan B. Morrison, *Balancing Access to Government – Controlled Information*, 14 J.L. & Pol'y 115 (2006).

⁵² The DQA, though implemented by the FCC, does not appear to have been used frequently by parties seeking information – in the last three years only one request for correction of data has been submitted. Updated information on requests can be found at <http://www.fcc.gov/omd/dataquality/welcome.html#requests>.

⁵³ P.L. No. 105-554 (2002) available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-277A1.pdf (last visited, January 28, 2007).

Further, the FCC seeks to disseminate all its data as broadly and promptly as possible so that the public can benefit from the FCC's work of ensuring vital and innovative communication services are available to all Americans at reasonable prices.⁵⁴

The agency notes also that the guidelines and petitions or complaints regarding the DQA relate only to information released directly by the FCC. There is some ambiguity as to whether information released by the FCC based on reports from private companies would be subject to the DQA, however, requesting access to data or correction of incorrect data under the DQA would help resolve that question.⁵⁵ Any party can file a complaint regarding information disseminated by the FCC, and can later appeal the resolution of that complaint. Such complaints can be filed online through the FCC's website.⁵⁶

IV. **OMB Peer Review**

On January 14, 2005 the Office of Management and Budget (OMB) adopted peer review requirements for certain types of information products⁵⁷ as part of its implementation of the DQA. The stated purpose of the requirements is to “enhance the quality and credibility of the government’s scientific information” by requiring peer review by qualified specialists of “important scientific information.”⁵⁸ These requirements are applicable to the FCC and the requirements became effective beginning on June 16, 2005. However, the agency itself has a substantial amount of discretion in selecting what information is reviewed as “influential scientific information” and in the selection of the individual reviewers.

Another potentially useful requirement of Peer Review is that each agency must provide a regularly-updated online list of forthcoming important scientific studies or reports (called an “agenda”). The purpose of making such lists publicly available is for agencies to “gauge the extent of public interest in the peer review process” with regards to a given study.⁵⁹ This provides a potential opening for researchers or other interested parties to pressure the FCC to conduct peer review of a particular study.

The OMB Peer Review process has recently come under much scrutiny and has been criticized by scientists, public interest groups and government officials who argue that the policy is a threat to the timely development of objective scientific information.

⁵⁴Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554, FCC 20-277 (October 4, 2002) (final guidelines) Available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-277A1.pdf

⁵⁵ It should be noted, that the DQA applies does not apply to information disseminated in the context of a rulemaking proceeding as such concerns should be raised as comments in the rulemaking process. P.L. No. 105-554 (2002).

⁵⁶ <http://www.fcc.gov/omd/dataquality/complaint>.

⁵⁷70 F.R. 10 (2005). The text of the OMB requirements are available at <http://www.fcc.gov/omd/dataquality/peer-omb-reqs.pdf> (last visited, March 31, 2007).

⁵⁸ Id.

⁵⁹ OMB Final Information Quality Bulletin for Peer Review 70 F.R. 10 § 5 (2005).

According to OMBWatch, non-profit research and advocacy organization, Reps. Henry Waxman (D-CA) and Bart Gordon (D-TN) introduced the Restore Scientific Integrity to Federal Research and Policymaking Act (H.R. 839) on February 16, 2007 in response to concerns about politicization of science in the executive branch under the current administration.⁶⁰ While these concerns are primarily centered around research in the more traditional sciences (medical, environment etc..) rather than social sciences, changes to the requirements would impact the FCC as well. This bill would move authority for federal peer review standards away from the Office of Management and Budget (OMB) and addresses scientific advisory committees by barring appointments based on political views and strengthening conflict of interest provisions. The bill would also increase whistleblower protections for federal employees who uncover political interference with science and requires the White House Science Advisor to report annually to Congress on scientific integrity in the federal agencies.

V. Other Options

The regulatory options listed above are by no means exhaustive and other stakeholders have demonstrated a creative approach to the data access issue.

a. Targeted Filing

In December 2006, the Smaller Market Broadcasters Coalition filed a “Coalition Request For Underlying Data” with the FCC requesting that the data underlying independently-submitted studies cited in comments be made available for examination. While this request has been criticized as placing a potentially unmeetable burden on researchers, who may themselves be constrained by data licenses, a well thought out, targeted filing modeled after this one might be effective. At the time of writing, the results of the Smaller Marker Broadcaster’s request are unknown. Requests and petitions to the FCC can take any form and can, at the very least, generate discussion on a particular issue.

b. Petition for Rulemaking

The FCC’s internal rules implementing FOIA are found at 47 C.F.R. §§ 0.441 - 0.470. Petitioning for changes to rules could be a valuable part of a long term strategy to make data the FCC relies on more accessible.

One potential target for a petition for rulemaking would be 47 C.F.R. § 0.459 governs requests that materials or information submitted to the Commission be withheld from public inspection. Under this rule, the FCC endorses CBI and allows a person who is submitting information or materials to the Commission to request that such information

⁶⁰ The Union of Concerned Scientists has expressed concern about the level of “political interference” in government science. http://www.ucsusa.org/scientific_integrity/. See also “Investing in Tomorrow.” Editorial. *US News and World Report*, September 26, 2006; “‘Sound Science’ sometimes isn’t.” Editorial. *Seattle Spokesman-Review*; February 22, 2005; “Uses and Abuses of Science.” Editorial. *New York Times*. February 23, 2004;

not be made routinely available for public inspection.⁶¹ The FCC also returns voluntarily-submitted information to the submitter if the submitter's confidentiality request has been denied.⁶² Additionally, persons or entities submitting what they believe to be CBI may also file a "reverse" FOIA case in federal court to prevent disclosure of the information to a third party that has made an FOIA request.⁶³ The combination of withholding requests and the reverse FOIA action give submitting entities substantial protections without public policy exceptions.

Agencies have substantial discretion in how to handle CBI and practices differ widely. For example, when issuing new regulations, the IRS does not accept any comments containing CBI during the notice and comment period for rulemaking.⁶⁴ Other agencies such as the Department of the Interior, Federal Maritime Commission, and National Highway Traffic Safety Administration (NHTSA) require submission of both a non-public and a public version of the documents to ensure a fair balance of transparency and privacy interests.⁶⁵

Promoting changes to the FCC's rule regarding such information could help further researcher's access to data. Public-interest efforts of this kind have been directed at other agencies.⁶⁶

c. Coalition Building for Legislative Activity

Another option is to build coalitions and engage other interested parties in legislative change. In December, 2006, Congressman Maurice Hinchey and six other house Democrats wrote a letter to the FCC Chairman requesting details of FCC commissioned economic studies on media ownership.⁶⁷ Reps Henry Waxman and Bart Gordon who have been active in OMB peer review issues and Senator Patrick Leahy might also be interested in SSRC's mission. Senators John Cornyn (R-TX) and Joe Lieberman (D-CT)

⁶¹ The text of the rule is available online at http://www.access.gpo.gov/nara/cfr/waisidx_03/47cfr0_03.html (last visited January 28, 2007).

⁶² 47 C.F.R. § 0.459.

⁶³ See e.g., *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1133 (D.C. Cir. 1987) (describing a reverse-FOIA case as where a submitter of information seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request); *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162 (C.A.D.C. (1995)) (Government contractor sued Air Force and Secretary of Department of the Air Force seeking temporary restraining order (TRO) and preliminary injunction against Air Force's planned releases of prices of satellite launch services it purchased from contractor).

⁶⁴ IRS Rules and Regulations, 26 C.F.R. § 601.601(b)(1) (2003) (stating the IRS policy that "[d]esignations of material as confidential or not to be disclosed, contained in such comments, will not be accepted..."); see *Parkridge Hosp., Inc. v. Califano*, 625 F.2d 719 (6th Cir. 1980). *Parkridge Hosp., Inc. v. Califano*, 625 F.2d 719 (6th Cir. 1980).

⁶⁵ 43 C.F.R. § 4.31 (DOI); 46 C.F.R. § 502.119(b) (FMC); 49 C.F.R. § 512.5 (NHTSA).

⁶⁶ For example, Public Citizen and the Freedom of Information Clearinghouse requested that the Attorney General repeal a provision in the Department of Justice (DOJ) regulations implementing FOIA in a letter to the Attorney General. Available online at:

http://www.citizen.org/litigation/free_info/foic_rep/articles.cfm?ID=6354

⁶⁷ The text of the letter is available at

http://www.house.gov/hinchey/newsroom/press_2006/121106fccstudiesletter.html .

recently sponsored the Federal Research Public Access Act,⁶⁸ which would require government agencies with annual extramural research expenditures over \$100 million to make manuscripts of journal articles stemming from funded research publicly available via the internet. Although the act does not apply to the FCC and explicitly does not require release of underlying data (or other preliminary work), the sponsoring senators have clearly demonstrated an interest in the issue of broader access to information. A wide range of public interest advocacy groups support the Federal Research Public Access Act, including the Alliance for Taxpayer Access⁶⁹, Public Knowledge⁷⁰, U.S. Public Interest Research Group,⁷¹ Electronic Frontier Foundation⁷² and IP Justice.⁷³

Conclusion

Despite the general policy in favor of disclosure stated in FOIA, the Shelby Amendment, the DQA and OMB Peer Review process, there are substantial exceptions, limitations and restrictions on the public's right to access information used in policymaking. These create a substantial hurdle for researchers, public interest advocates, and other stakeholders. Despite these obstacles, there are creative means within the current legal landscape to achieve greater access, from creative use of FOIA to the exercise of existing transparency rules, to the potential for broader legislative change.

⁶⁸ The Federal Research Public Access Act of 2006 was introduced in May, 2006 a.

⁶⁹ www.taxpayeraccess.org (supporting open public access to taxpayer-funded research).

⁷⁰ www.publicknowledge.org (advocating fortification of an information commons).

⁷¹ www.uspirg.org (advocating the public interest).

⁷² www.eff.org (defending rights in the digital world).

⁷³ www.ipjustice.org (promoting balanced intellectual property laws).

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