

## NOTES

### FOIA'S GOT 99 PROBLEMS, AND CIRCUIT COURT DISAGREEMENT ABOUT AUTHORITY TO COMPEL AFFIRMATIVE DISCLOSURES IS DEFINITELY ONE

Emily Costantinou

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2021.795  
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

# NOTES

## FOIA’S GOT 99 PROBLEMS, AND CIRCUIT COURT DISAGREEMENT ABOUT AUTHORITY TO COMPEL AFFIRMATIVE DISCLOSURES IS DEFINITELY ONE

Emily Costantinou\*

### INTRODUCTION

Imagine that you work for a nonprofit organization, and your job routinely requires you to review records from a federal government agency. You discover that the information you need falls under the Freedom of Information Act (FOIA), which requires federal agencies to make such information freely available to the public for inspection.<sup>1</sup> Fortunately, a searchable online collection of records exists that allows you to find all the information you need in one place—without having to make repeated requests to the government for each document.<sup>2</sup> However, there’s a catch: this collection is behind a paywall.<sup>3</sup>

---

\* Candidate for J.D., 2021, University of Pittsburgh School of Law; B.A. English Literature, 2013, *summa cum laude*, University of Pittsburgh.

<sup>1</sup> Freedom of Information Act, 5 U.S.C. § 552 (2018).

<sup>2</sup> See generally Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) (explaining how private corporations compile information for customer use).

<sup>3</sup> See, e.g., *id.* at 1385, 1389–91, 1402.

This collection of government records is not maintained by the federal government.<sup>4</sup> Nor is this cache of high-demand records openly available to the public by government agencies—as FOIA’s drafters envisioned and the statute *requires*.<sup>5</sup> Rather, it is provided by private companies on a subscription basis, for a steep fee.<sup>6</sup> As such, an entire industry has developed where private companies use FOIA’s request provision to request thousands of government records, compile the acquired information into databases, and then sell access to this compilation to consumers.<sup>7</sup> These companies are not part of, or affiliated with, the federal government, and their work is not authorized or verified by the federal government or the agencies whose records they distribute.

The very fact that this industry exists reveals a significant failure by federal agencies to voluntarily provide information in compliance with FOIA, which dictates that such information should be made freely available online *by the federal government itself* through FOIA’s requirement for “proactive disclosures” of records likely to receive at least three requests.<sup>8</sup>

While the administration of FOIA has been problematic since its enactment,<sup>9</sup> recent attention has focused on the widespread problem of agency under-utilization of FOIA’s proactive disclosures, which has been a growing concern at the forefront of discussions about FOIA’s future.<sup>10</sup> Scholars have even begun to question the role of the judiciary in holding agencies accountable for their FOIA duties.<sup>11</sup>

This Note looks at two recent cases from the United States Courts of Appeals for the Ninth and D.C. Circuits that address the issue of judicial authority to compel

---

<sup>4</sup> See generally *id.* (explaining how private corporations compile information for customer use).

<sup>5</sup> See *id.* at 1367–71, 1414–15.

<sup>6</sup> E.g., *id.* at 1385 (revealing that a one-year subscription to a particular database service costs \$9,500).

<sup>7</sup> *Id.* at 1361.

<sup>8</sup> 5 U.S.C. § 552(a)(2) (2018).

<sup>9</sup> See generally Tyler Prime & Joseph Russomanno, *The Future of FOIA: Course Corrections for the Digital Age*, 23 COMM. L. & POL’Y 267, 267 (2018) (discussing longstanding problems with putting FOIA into practice).

<sup>10</sup> See Kwoka, *supra* note 2; Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 577 (2009); Alina M. Semo & Sheela Portonovo, *OGIS—Creating a FOIA Process That Works for All*, 63 VILL. L. REV. 959 (2018).

<sup>11</sup> See Delcianna J. Winders, *Fulfilling the Promise of EFOIA’s Affirmative Disclosure Mandate*, 95 DENV. L. REV. 909, 912–18 (2018).

disclosure of government records under Section 552(a)(2) of FOIA.<sup>12</sup> These cases are notable because they establish a current circuit split, as the courts have arrived at opposite conclusions.

In *Animal Legal Defense Fund v. United States Department of Agriculture (ALDF)*,<sup>13</sup> the Ninth Circuit was asked if federal courts have the authority to order a federal agency to provide certain commonly-requested agency records in an online format in a FOIA-created “electronic reading room.”<sup>14</sup> Through statutory analysis, the Ninth Circuit held that FOIA *does* allow courts to order agencies to do so.<sup>15</sup> However, just four months earlier, the D.C. Circuit, in *Citizens for Responsibility Ethics in Washington v. United States Department of Justice (CREW II)*, reached the opposite conclusion.<sup>16</sup>

Part I of this Note offers a brief explanation and history of FOIA sections most relevant to this issue. Part II examines the circuit split cases—focusing on the differences between how the Ninth and D.C. Circuits consider the ability of Article III courts, under the authority of FOIA’s judicial remedy provision,<sup>17</sup> to compel a federal agency to provide records in an electronic reading room, in accordance with FOIA’s affirmative disclosure provision.<sup>18</sup>

In Part III, this Note discusses how the virtual nature of the reading rooms makes the circuit split particularly problematic for agency operation and forum choice, emphasizing the need for the circuits to speak with a unified voice. Part IV offers a prediction based on existing circuit court decisions as to how the United States Supreme Court might resolve this split, if and when it reaches the nation’s highest court.

Ultimately in Part V, this Note argues that the Supreme Court should embrace the holding in *ALDF*, so as to achieve the greatest fidelity to the purpose and motivation of FOIA—government transparency. Further, adopting the *ALDF* holding would facilitate the proper functioning of Section 552(a)(2)’s electronic

---

<sup>12</sup> 5 U.S.C. § 552(a)(2).

<sup>13</sup> 935 F.3d 858 (9th Cir. 2019).

<sup>14</sup> *Id.*

<sup>15</sup> *ALDF*, 935 F.3d at 877.

<sup>16</sup> 922 F.3d 480, 490 (D.C. Cir. 2019).

<sup>17</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>18</sup> *Id.* § 552(a)(2).

reading rooms as a built-in “pressure valve” to reduce the strain on government resources caused by the ever-increasing volume of FOIA requests, which is a problem that has crippled effective implementation of FOIA for decades.

## I. A BRIEF HISTORY OF THE FREEDOM OF INFORMATION ACT

Enacted in 1966, FOIA requires federal agencies to share their records with the public.<sup>19</sup> FOIA was the product of cooperation between journalists and legislators to encourage transparency within the agency process—“to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”<sup>20</sup> Since its start, FOIA has been a central mechanism in the push for an open government and “an informed citizenry.”<sup>21</sup> The early efforts of FOIA allowed the United States to lead the charge in government transparency and free information laws that have since spread across the world.<sup>22</sup>

FOIA’s comprehensive statutory scheme contains several key operational components, which must work in conjunction to achieve its aims: (1) it provides the methods by which agencies are required to disclose information to the public;<sup>23</sup> (2) it specifies exceptions for the types of documents and circumstances when agencies do not have to disclose records;<sup>24</sup> and (3) it provides for judicial enforcement and review of agency decisions about record disclosures.<sup>25</sup>

FOIA provides, in Sections 552(a)(1), (2), & (3), that agencies must make documents available in three different ways: (1) mandatory publishing of certain

---

<sup>19</sup> OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: INTRODUCTION 1 (2020), <https://www.justice.gov/oip/page/file/1248371/download> [hereinafter DOJ GUIDE TO FOIA].

<sup>20</sup> Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976) (discussing the history of journalists in forming FOIA).

<sup>21</sup> DOJ GUIDE TO FOIA, *supra* note 19, at 1 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).

<sup>22</sup> See Kwoka, *supra* note 2, at 1367.

<sup>23</sup> 5 U.S.C. § 552(A) (2018).

<sup>24</sup> *Id.* § 552(b).

<sup>25</sup> *Id.* § 552(a)(4)(B).

documents in the Federal Register; (2) making some documents available to the public online; and (3) providing documents to individuals upon specific request.<sup>26</sup>

Generally, people are most familiar with the third provision, which allows individuals to make FOIA requests for records from federal agencies.<sup>27</sup> Under Section 552(a)(3), any citizen can request a copy of an agency record; the agency must consider the request regardless of the person's identity and respond to the request within twenty days.<sup>28</sup> From 2011–2019, federal agencies collectively received an average of 750,770 requests per year.<sup>29</sup> From 2017–2019, federal agencies saw over 800,000 requests per year.<sup>30</sup>

Due in part to the large volume of requests compared to the limited resources of agencies, requesters often wait longer than the twenty days required by statute.<sup>31</sup> For example, in 2019, the average wait time across agencies for simple requests was 39.30 days.<sup>32</sup> This was a new record high, and a significant increase from the 30.22 day average in 2018.<sup>33</sup> Additionally, the number of backlogged requests remaining

---

<sup>26</sup> *Id.* § 552(a)(1)–(3). The statute delineates the following three requirements:

- (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— . . .
- (2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format— . . .
- (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

*Id.*

<sup>27</sup> *Id.* § 552(a)(3).

<sup>28</sup> *Id.* § 552(a)(6)(A)(i) (“(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request. . . .”).

<sup>29</sup> OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2019, at 2 (2019), <https://www.justice.gov/oip/page/file/1282001/download> [hereinafter ANNUAL FOIA SUMMARY].

<sup>30</sup> *Id.*

<sup>31</sup> *See id.* at 9, 12.

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.*

at the end of the fiscal year in 2019 was 120,436, the sixth consecutive year with over 100,000 unanswered requests.<sup>34</sup>

Luckily, with the problem of request backlogs in mind, FOIA has a built-in “pressure release valve” to lessen the strain of an overwhelming number of requests: FOIA’s proactive disclosure requirements of Sections 552(a)(1) & (2). The Department of Justice (DOJ) acknowledges that “[p]roactive disclosures—where agencies make their records publicly available without waiting for specific requests from the public—are an integral part of the Freedom of Information Act.”<sup>35</sup> The first, Section 552(a)(1), requires agencies to “publish in the Federal Register for the guidance of the public” certain useful information about the agency and its functions.<sup>36</sup> The second, Section 552(a)(2), requires that some records shall be “ma[de] available for public inspection” automatically.<sup>37</sup>

---

<sup>34</sup> *Id.* at 9.

<sup>35</sup> OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 9 (2009), [https://www.justice.gov/archive/oip/foia\\_guide09/proactive-disclosures.pdf](https://www.justice.gov/archive/oip/foia_guide09/proactive-disclosures.pdf) [hereinafter DOJ GUIDE: PROACTIVE DISCLOSURES 2009].

<sup>36</sup> OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 2 (2019), [https://www.justice.gov/oip/foia-guide/proactive\\_disclosures/download](https://www.justice.gov/oip/foia-guide/proactive_disclosures/download) [hereinafter DOJ GUIDE: PROACTIVE DISCLOSURES 2019].

<sup>37</sup> 5 U.S.C. § 552(a)(2) (2018). FOIA requires that each agency “make available for public inspection and copying for public inspection in an electronic format” the following:

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and copies of all records, regardless of form or format—
  - (i) that have been released to any person under paragraph (3); and
  - (ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or
  - (II) that have been requested 3 or more times; and
- (E) a general index of the records referred to under subparagraph (D); . . .

*Id.*

Section 552(a)(2), often colloquially referred to as the “reading-room provision,” was originally enacted in 1966 when the records included in its purview were housed in print form in a physical reading room at an agency’s office in the nation’s capital.<sup>38</sup> With the advent of the internet, Congress passed the Electronic Freedom of Information Amendments of 1996 (E-FOIA), moving the “reading rooms” online.<sup>39</sup> E-FOIA also added a new category—“frequently requested” records—to types of records subject to Section 552(a)(2)’s mandatory affirmative disclosures.<sup>40</sup> Frequently requested records are records that have been requested at least three previous times and are likely to be requested again.<sup>41</sup>

The proactive disclosure requirements of Sections 552(a)(2) & (3) are designed to make it easier for citizens to hold our government politically accountable, while also reducing strain on agency resources. Automatic releases will preempt requests for those documents which are likely to be subject to many requests and which would otherwise bog down the FOIA request system, increase wait times, and drain agency resources. Recent data indicates that the “pressure release valve” is working in practice. In 2019, agencies across the federal government posted online a reported 114,200,536 records that qualified under Section 552(a)(2),<sup>42</sup> records that otherwise could have been the subject of multiple individual requests under Section 552(a)(3).

FOIA contains an avenue for judicial review of certain agency actions.<sup>43</sup> Under the FOIA, members of the public can bring challenges to agency decisions about disclosure in Article III district courts.<sup>44</sup> The court is permitted to grant limited relief

---

<sup>38</sup> DOJ GUIDE: PROACTIVE DISCLOSURES 2019, *supra* note 36, at 6.

<sup>39</sup> Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (explaining that the purpose of the amendment is “to provide for public access to information in an electronic format, and for other purposes.”).

<sup>40</sup> 5 U.S.C. § 552(a)(2)(D) (requiring agencies to make available to the public “copies of all records . . . (i) that have been released to any person under paragraph (3); and (ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or (II) that have been requested 3 or more times . . .”).

<sup>41</sup> *Id.*

<sup>42</sup> ANNUAL FOIA SUMMARY, *supra* note 29, at 21.

<sup>43</sup> 5 U.S.C. § 552(a)(6)(A)(i).

<sup>44</sup> *Id.* § 552(a)(4)(B). Parties may challenge an agency’s decision both to withhold and to disclose information. *Id.*

in a FOIA lawsuit, such as ordering production of records, enjoining an agency from withholding records, and awarding reasonable attorney's fees to prevailing parties.<sup>45</sup>

## II. THE CIRCUIT SPLIT: JUDICIAL AUTHORITY TO COMPEL AGENCY AFFIRMATIVE DISCLOSURE TO THE PUBLIC

Interpretation of FOIA has been the subject of litigation since it was enacted.<sup>46</sup> The United States Courts of Appeals often disagree about how FOIA's provisions should be interpreted and applied in practice. This Note examines the D.C. Circuit's established decisions concerning the extent to which the judicial branch can compel agencies to comply with FOIA's proactive disclosure requirements, and a recent Ninth Circuit case that notably rejects that position.<sup>47</sup>

### A. *The D.C. Circuit: Citizens for Responsibility & Ethics in Washington v. United States Department of Justice*

The D.C. Circuit first addressed the issue of compelling agencies to comply with FOIA's affirmative disclosure mandate in *Kennecott Utah Copper Corp. v. United States Department of the Interior*.<sup>48</sup> At issue in *Kennecott* was the Department of Interior's alleged failure to publish a regulation in the Federal Register.<sup>49</sup> The plaintiff argued that publication was required by Section 552(a)(1) and that the district court was obligated under FOIA's judicial enforcement provisions to compel publication by the agency.<sup>50</sup>

The D.C. Circuit rejected the plaintiff's argument, holding that FOIA did not authorize such relief.<sup>51</sup> Finding ambiguity in Section 552(a)(4)(B)—FOIA's enforcement arm, which states that courts “ha[ve] jurisdiction to enjoin the agency from withholding agency records and to order the *production* of any agency records improperly withheld from the complainant”<sup>52</sup>—the D.C. Circuit drew a distinction

---

<sup>45</sup> See *id.* § 552(a)(4)(B) & (E)(i).

<sup>46</sup> See *FOIA Update: FOIA Supreme Court History*, U.S. DEP'T OF JUSTICE (Jan. 1, 1985), <https://www.justice.gov/oip/blog/foia-update-foia-supreme-court-history>.

<sup>47</sup> See *Animal Legal Def. Fund v. U.S. Dep't of Agric. (ALDF)*, 935 F.3d 858 (9th Cir. 2019).

<sup>48</sup> 88 F.3d 1191 (D.C. Cir. 1996).

<sup>49</sup> *Id.* at 1201.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1203.

<sup>52</sup> 5 U.S.C. § 552(a)(4)(B) (emphasis added).

between the statute's use of the term "*production*" rather than "*publication*."<sup>53</sup> Production, the court said, could be interpreted either to include providing records to an individual person or to the public, while publication is more clearly understood to mean providing to the public.<sup>54</sup> The court's narrow interpretation of "production" in Section 552(a)(4)(B) favored the government; it held that courts can only entertain challenges to improperly withheld records from a *particular requester*.<sup>55</sup> Thus, the court found that it lacked authority to order an agency to publish in the Federal Register.<sup>56</sup>

Later, in *Citizens for Responsibility & Ethics in Washington v. United States Department of Justice (CREW I)*, the requesters sought to challenge *Kennecott's* holding as applied to the second of FOIA's affirmative disclosure mandates under Section 552(a)(2).<sup>57</sup> In the first of two challenge attempts, Citizens for Responsibility and Ethics in Washington (CREW), a non-profit formed to "protect[] the rights of citizens to be informed about the activities of government officials," asked the district court to compel the DOJ's Office of Legal Counsel (OLC)—the authoritative legal counsel for the Executive Branch—to publicly post its opinions.<sup>58</sup> Specifically, in *CREW I*, the plaintiff organization invoked the enforcement arm of the Administrative Procedure Act (APA), which generally dictates the standards for agency behavior and accountability.<sup>59</sup> CREW argued that, under the APA, courts have the power to hold agencies accountable to their statutorily required duties.<sup>60</sup> Thus, CREW urged the court to find that OLC's denial of their request was "arbitrary

---

<sup>53</sup> *Kennecott Utah Copper Corp.*, 88 F.3d at 1202–03 (emphasis added).

<sup>54</sup> *Id.*

<sup>55</sup> OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: LITIGATION CONSIDERATIONS 15 n.46 (2019), <https://www.justice.gov/oip/page/file/1205066/download#page=15> [hereinafter DOJ GUIDE TO THE FOIA: LITIGATION CONSIDERATIONS]. "Specifically, the Court of Appeals for the District of Columbia Circuit has held that the statutory language of the FOIA limits relief to the disclosure of improperly withheld records to a *particular requester*." *Id.* at 15 (emphasis added).

<sup>56</sup> *Kennecott Utah Copper Corp.*, 88 F.3d at 1199.

<sup>57</sup> 846 F.3d 1235, 1243–44 (D.C. Cir. 2017).

<sup>58</sup> *Id.* at 1239, 1243–44.

<sup>59</sup> *Id.* at 1240.

<sup>60</sup> *Id.*

and capricious” under the APA and that OLC should be compelled to comply with Section 552(a)(2) of FOIA by posting the requested records online.<sup>61</sup>

The D.C. Circuit rejected this argument, in large part because it believed that using the APA to seek judicial review was improper.<sup>62</sup> Rather, the D.C. Circuit held that the proper channel for the type of judicial review CREW sought was contained within FOIA, under Section 552(a)(4)(B).<sup>63</sup> The APA, the D.C. Circuit said, limits judicial review to agency actions that have no other adequate remedy,<sup>64</sup> and because FOIA provides for its own remedy, CREW was barred from pursuing a claim under the APA.<sup>65</sup>

The D.C. Circuit went on to note that while the FOIA was the proper channel for the claim, the court was not making a determination on the merits of CREW’s claim.<sup>66</sup> Accordingly, the underlying question of the court’s authority to compel agencies to disclose documents under the “reading-room” provision of the FOIA would “await[] a different day and a different case.”<sup>67</sup>

The court did not have to wait long. CREW immediately renewed its request that OLC disclose its unpublished formal written opinions to the general public in *CREW II*.<sup>68</sup> When the agency failed to respond, CREW again asked the district court to compel disclosure of OLC’s opinions under Section 552(a)(2)’s “reading-room” provision, this time invoking the court’s authority under FOIA instead of the APA.<sup>69</sup> With the issue now presented within the proper vehicle, the D.C. Circuit addressed the merits and held that CREW’s claim failed as a matter of law.<sup>70</sup>

---

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1246.

<sup>63</sup> *Id.* at 1245.

<sup>64</sup> Administrative Procedure Act, 5 U.S.C. § 704 (2018).

<sup>65</sup> *CREW I*, 846 F.3d at 1245–46.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice (*CREW II*), 922 F.3d 480 (D.C. Cir. 2019).

<sup>69</sup> *Id.* at 483.

<sup>70</sup> *Id.* at 487.

The D.C. Circuit found that CREW's claim failed because CREW did not provide enough factual support to state a plausible claim that the requested OLC opinions were binding law subject to FOIA's mandate to disclose "final opinions . . . in the adjudication of cases" and "statements of policy and interpretations which have been adopted by the agency."<sup>71</sup> Further, CREW's request for publication of *all* OLC opinions was overbroad, as some would meet at least one of FOIA's articulated exemptions and would not qualify for mandatory release under FOIA's "reading-room" provision.<sup>72</sup> In order to be considered appropriate for release under Section 552(a)(2)'s "reading-room" provision, the D.C. Circuit held that a plaintiff's request for judicial review required identification of a subset of non-exempt records.<sup>73</sup> The D.C. Circuit thus erected a "significant hurdle" to disclosure under the reading room provision by "requiring plaintiffs to plead for the publication of specific subsets of opinions that agencies have adopted as their working law without the benefit of discovery."<sup>74</sup>

Taken together, these cases demonstrate the D.C. Circuit's reluctance to apply FOIA to order the "publication" of information, even information arguably required to be made available for public inspection under Section 552(a)(2), preferring instead to read FOIA to order "production" of the information to the individual FOIA plaintiff.<sup>75</sup>

*B. The Ninth Circuit: Animal Legal Defense Fund v. United States Department of Agriculture*

In the Ninth Circuit, the issue of reading-room mandates has played out differently. In *ALDF*, the Animal Legal Defense Fund and other animal rights organizations brought a claim against the Animal and Plant Health Inspection Service (APHIS), a subsidiary of the United States Department of Agriculture, for removing various compliance and enforcement records from its website.<sup>76</sup> The agency indicated that while some of the records would be re-posted after review,

---

<sup>71</sup> 5 U.S.C. § 552(a)(2)(A)–(B). *Crew II*, 922 F.3d at 486.

<sup>72</sup> *Crew II*, 922 F.3d at 488.

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., *Freedom of Information Act—Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice—D.C. Circuit Holds that OLC is Not Required to Publish Its Formal Opinions*, 133 HARV. L. REV. 1113, 1117 (2020) [hereinafter *Freedom of Information Act—Article*].

<sup>75</sup> See *id.* at 489.

<sup>76</sup> *Animal Legal Def. Fund v. U.S. Dep't of Agric. (ALDF)*, 935 F.3d 858, 864–65 (9th Cir. 2019).

others would no longer be made available online.<sup>77</sup> The records had previously been made available by the agency in compliance with FOIA’s “reading-room” provision.<sup>78</sup>

The plaintiffs alleged that the removal was unwarranted, unexplained, and in violation of Section 552(a)(2).<sup>79</sup> As such, they sought to enjoin the agency from withholding the records and to compel their production online where they would be accessible to the public as before.<sup>80</sup> Accordingly, the plaintiffs argued that FOIA’s “reading-room” provision required APHIS to post all of the removed documents, because they were “frequently requested” under Section 552(a)(2)(D).<sup>81</sup>

Unlike its sister circuit in *Crew II*, the Ninth Circuit entertained the challenge and held that the court *did* have the authority to issue an order to make records “available for inspection in an electronic format” under Section 552(a)(2).<sup>82</sup> APHIS’s argument mirrored that of the D.C. Circuit—that FOIA’s judicial review provision<sup>83</sup> did not permit courts to order the posting of records to public reading rooms, and thus the provision’s application was restricted to only ordering agencies to release copies to individual plaintiffs.<sup>84</sup>

The Ninth Circuit rejected this argument, stating that “this reading collapses an agency’s affirmative responsibility to post certain records (identified in the statute by Congress) into an agency’s responsibility to respond to requests for copies of documents under § 552(a)(3).”<sup>85</sup> The court went on to note that restricting the enforcement arm of FOIA to only addressing improper refusals of requests—the reactive disclosures only—would impermissibly cut off the first two categories of affirmative disclosures from FOIA’s only avenue for relief.<sup>86</sup> Furthermore, refusing to remedy improper withholdings of records under the affirmative disclosure

---

<sup>77</sup> *Id.* at 864.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 865.

<sup>81</sup> *Id.* at 864.

<sup>82</sup> *Id.* at 861.

<sup>83</sup> 5 U.S.C. § 552(a)(4)(B) (2018).

<sup>84</sup> *ALDF*, 935 F.3d at 872.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

requirements would, in effect, force many individuals seeking access to the “frequently requested” records to make repeated requests under Section 552(a)(3).<sup>87</sup> In turn, this would also increase the backlog of requests, an issue Congress sought to remedy by creating the affirmative disclosures under Section 552(a)(2) in the first place.<sup>88</sup>

Accordingly, the Ninth Circuit takes the position that “FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online.”<sup>89</sup>

### C. Summary—The Courts in Comparison

Under *CREW II*, the D.C. Circuit interprets a district court’s power under FOIA’s judicial review provision to exclude the ability to compel the “publication” of documents to the public under Section 552(a)(2).<sup>90</sup> Consequently, the D.C. Circuit takes the position that judicial enforcement of FOIA’s disclosure requirements is limited to ordering “production” to a particular requester and/or plaintiff.<sup>91</sup>

While still a fairly recent decision, *CREW II* has already received notable criticism for threatening to undercut the overall purpose of FOIA by denying judicial review of proactive disclosures under Section 552(a)(2).<sup>92</sup> For example, one article notes that “*CREW II* deals a strong blow to efforts to ensure transparency and accountability in executive decision-making by reinforcing a trend away from disclosure under FOIA’s reading room provision.”<sup>93</sup>

In contrast, the Ninth Circuit decision in *ALDF* does not so restrict the potential for courts to enforce FOIA’s proactive disclosures mandate. The Ninth Circuit’s position takes a more permissive approach by allowing courts to enjoin federal

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 869.

<sup>90</sup> See *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice (CREW II)*, 922 F.3d 480 (D.C. Cir. 2019).

<sup>91</sup> DOJ GUIDE TO THE FOIA: LITIGATION CONSIDERATIONS, *supra* note 55, at 15 (“District of Columbia Circuit has held that the statutory language of the FOIA limits relief to the disclosure of improperly withheld records to a particular requester.”).

<sup>92</sup> See, e.g., *Freedom of Information Act—Article*, *supra* note 74, at 1117.

<sup>93</sup> *Id.*

agencies from withholding records that qualify for a Section 552(a)(2) posting.<sup>94</sup> Thus, while the D.C. Circuit relies heavily on statutory interpretation and particular word choice in its reasoning, the Ninth Circuit furthers the purposes underlying FOIA generally and the Section 552(a)(2) disclosures specifically.<sup>95</sup>

### III. PROBLEMATIC CIRCUIT SPLIT: THE ONLINE NATURE OF E-FOIA PROACTIVE DISCLOSURES

While any disagreement between the circuit courts creates disharmony, this split between the D.C. and the Ninth Circuits is particularly problematic. The virtual and thus forum-agnostic nature of online record publication, combined with the ability for litigants to forum-shop, threatens to allow the circuits to undercut each other in an irreversible way.

The E-FOIA amendments required agencies to make available by electronic means all records created on or after November 1, 1996, in all four categories of FOIA's proactive disclosure provision.<sup>96</sup> The shift to online posting promised, and has accomplished, a new era of greater public access by removing the geographical and temporal limits. Records seekers no longer have to travel to the brick-and-mortar reading rooms in the nation's capital; they now are able to review records from any place where they have internet access. Online posting also allows for more than one individual to access the records at a time.

However, this ease of access and elimination of geographical boundaries undermines the D.C. Circuit holdings in *Crew I* and *II*, refusing to order proactive disclosure releases. While a litigant currently cannot compel agency disclosure in the D.C. Circuit, she may still seek the public release of records by traveling across the country and bringing her suit in the Ninth Circuit. Once she secures a mandate to release from the Ninth Circuit, and the agency complies with the order by releasing the documents online, the records become publicly available. Once available on the internet, the information will be nearly inexpungible; any individual in any jurisdiction, including D.C., will have access to the record.<sup>97</sup> As such, *any* ruling in the Ninth Circuit to compel FOIA proactive disclosure under Section 552(a)(2) necessarily undercuts the D.C. Circuit's restriction.

---

<sup>94</sup> *ALDF*, 935 F.3d at 858.

<sup>95</sup> *Id.* at 873.

<sup>96</sup> DOJ GUIDE: PROACTIVE DISCLOSURES 2009, *supra* note 35, at 20; 5 U.S.C. § 552(a)(2)(A)–(D).

<sup>97</sup> *See, e.g.*, BAHAMEN, WHO LET THE DOGS OUT (S-Curve Records 2000).

#### IV. HOW THE NINTH CIRCUIT AND D.C. CIRCUIT COMPARE AT THE SUPREME COURT: RATES OF REVERSAL AND GRANTING CERTIORARI

Comparing trends from past Supreme Court rulings on cases from the Ninth and D.C. circuits is one way to predict how the split might be resolved if the Court chooses to weigh in. The Ninth and D.C. Circuits are standouts on the Supreme Court's docket<sup>98</sup> and have been the subject of much discussion.<sup>99</sup> Even President Trump weighed in, taking to Twitter to claim that the Ninth Circuit has the highest overturn rate of all—and that it is a “complete & total disaster.”<sup>100</sup> While this dramatic statement makes for an attention-grabbing tweet, it misconstrues the history of Ninth Circuit cases and oversimplifies the issue to the point of error. Thus, a more detailed analysis is needed to determine how the Supreme Court may decide this issue.

##### A. Comparing the Ninth and D.C. Circuits

When comparing the two circuits, it is important to clarify two points. First, the Ninth Circuit—the largest of all by far—sends more cases to the Supreme Court than any other circuit.<sup>101</sup> From 1986 to 2018, the Ninth Circuit sent 544 cases to the Supreme Court; while in comparison, the D.C. Circuit sent only 115 cases to the Supreme Court during the same time frame.<sup>102</sup> Second, regardless of where the case originated, the Supreme Court has reversed a majority of cases that it has heard.<sup>103</sup> The Supreme Court's overall reversal rate during this time period is 64 percent.<sup>104</sup>

---

<sup>98</sup> “The Supreme Court heard nearly twice as many cases from the D.C. Circuit than from the U.S. Court of Appeals for the 1st Circuit [from 1986–2018], but only about a fifth as many cases as it heard from the U.S. Court of Appeals for the 9th Circuit.” Adam Feldman, *Empirical SCOTUS: The Singular Relationship Between the D.C. Circuit and the Supreme Court*, SCOTUSBLOG (Oct. 3, 2019, 10:44 AM), <https://www.scotusblog.com/2019/10/empirical-scotus-the-singular-relationship-between-the-d-c-circuit-and-the-supreme-court/>.

<sup>99</sup> See, e.g., *infra* notes 100–01.

<sup>100</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 7:21 AM), [https://twitter.com/realDonaldTrump/status/1065581119242940416?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1065581119242940416%7Ctwgr%5Eshare\\_3&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2018%2F11%2F26%2Fus%2Fpolitics%2Ffact-check-trump-ninth-circuit.html](https://twitter.com/realDonaldTrump/status/1065581119242940416?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1065581119242940416%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2018%2F11%2F26%2Fus%2Fpolitics%2Ffact-check-trump-ninth-circuit.html).

<sup>101</sup> Feldman, *supra* note 98.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

That being said, the Ninth Circuit is reversed at a higher rate than the D.C. Circuit: 75 percent as opposed to 52 percent.<sup>105</sup> Data also demonstrates that the Ninth Circuit is reversed roughly 10 percent *more frequently* than the national average, while the D.C. Circuit is reversed roughly 10 percent *less frequently* than the national average.<sup>106</sup>

Moreover, the Supreme Court is more likely to choose a case from the D.C. Circuit to address questions of judicial power. The Supreme Court has selected nearly 30 percent of the judicial power cases it has heard from the D.C. Circuit alone, while only about 14 percent have come from the Ninth Circuit.<sup>107</sup> Moreover, the D.C. Circuit originates the most judicial power cases of all circuits—5 percent more than any other.<sup>108</sup> While not a definitive predictor, this makes it more likely that the Supreme Court would choose a D.C. Circuit case as the vehicle to hear a future question of judicial power, such as the ability to compel the production of records under FOIA.

The above data suggests that the Court would choose *Crew II* or a similar case from the D.C. Circuit to address the issue of judicial power to compel agency action, specifically as it has been discussed in this Note, rather than a case from the Ninth Circuit. If this were the case, this author believes the Supreme Court would be more inclined to uphold *CREW II*'s holding than it would be to affirm a similar case from the Ninth Circuit, in part because of the D.C. Circuit's lower-than-average reversal rate.

### B. *The D.C. Circuit on Government and Agency Issues*

Supreme Court watchers know that the D.C. Circuit is unique among the U.S. Courts of Appeals.<sup>109</sup> Even Chief Justice Roberts, writing as a newly appointed jurist for the D.C. Circuit, recognized the court's distinction.<sup>110</sup> One of the highlights of that distinction—as noted by Chief Justice Roberts in his article—is the high

---

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> John G. Roberts, Jr., *What Makes the D.C. Circuit Different?: A Historical View*, 92 VA. L. REV. 375, 376 (2006).

proportion of government issues heard by the D.C. Circuit.<sup>111</sup> Specifically, he noted that, at the time, one-third of the D.C. Circuit's cases were appeals from agency decisions.<sup>112</sup>

The D.C. Circuit's expertise with agency issues has only grown since Chief Justice Roberts's elevation to the Supreme Court. The D.C. Circuit hears more agency cases than any other circuit, and that is reflected by the number of agency cases reviewed by the Supreme Court.<sup>113</sup> Recent data shows that 48 percent of the agency review cases heard by the Supreme Court have come from the D.C. Circuit.<sup>114</sup> On the other hand, only 20 percent of such cases come from the Ninth Circuit.<sup>115</sup>

While the above-mentioned data gives the impression that more agency cases originate in the D.C. Circuit as opposed to the Ninth Circuit, this is not the case. Between 1986 and 2019, about twice as many agency cases have originated in the Ninth Circuit as the D.C. Circuit—107 cases compared to 55 cases.<sup>116</sup> However, the comparative percentage of agency cases accepted by the Supreme Court for review suggests a bias toward granting certiorari to cases originating in the D.C. Circuit.

Perhaps the Supreme Court sees the issues presented by the D.C. Circuit to be more substantial and in need of guidance. Or perhaps the acceptance trend indicates more of a personal bias, as three of the nine current sitting Justices on the Supreme Court ascended from the D.C. Circuit.<sup>117</sup>

---

<sup>111</sup> *Id.* at 377.

<sup>112</sup> *Id.* at 376.

<sup>113</sup> Feldman, *supra* note 98.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* This Note was written before the passing of Justice Ruth Bader Ginsburg and the appointment of Justice Amy Coney Barrett. The author makes no argument about how Justice Barrett would vote or how Justice Kavanaugh would vote.

*C. How the Supreme Court Justices Have Ruled on Prior D.C. Circuit Cases*

In addition to the data discussed above, the Justices' majority opinions from cases originating in the D.C. Circuit may also offer an indication on how the Supreme Court would rule:<sup>118</sup>

- Chief Justice Roberts: 63% Reverse<sup>119</sup>
- Justice Thomas: 63% Affirm<sup>120</sup>
- Justice Breyer: 55% Affirm<sup>121</sup>
- Justice Alito: 100% Affirm<sup>122</sup>
- Justice Sotomayor: 50% Affirm/Reverse<sup>123</sup>
- Justice Kagan: 67% Reverse<sup>124</sup>
- Justice Gorsuch: 100% Affirm<sup>125</sup>

Four of the sitting Justices have affirmed D.C. cases more often, while only two have a history favoring reversal.<sup>126</sup> Should Justice Kavanaugh or Justice Barrett side with Justices Gorsuch, Thomas, and Alito to affirm, the Court would have an affirming majority.

*D. Anticipating the Court's Ruling in a FOIA Judicial Power Case*

Based on the reversal rates of cases from the Ninth and D.C. Circuits and the number of judicial control cases taken from each, it is more likely that the Supreme Court would choose to hear the issue in a vehicle from the D.C. Circuit. In the event that the Court chooses a D.C. Circuit case, such as *Crew II*, the voting history of the

---

<sup>118</sup> *Id.* (excluding Justice Kavanaugh and Justice Barrett, for whom data was not yet available at the time of this note's publication).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

sitting Justices suggests that it is more likely that the case would be affirmed. On the other hand, if the Court chooses to hear a case like the Ninth Circuit's *ALDF* case on appeal, it is more likely to be overturned than upheld. Overall, solely based on the reversal rates, there is a greater likelihood of a Supreme Court holding which states that courts do *not* have the authority to compel agencies to comply with Section 552(a)(2) of FOIA.

## V. GETTING FOIA BACK ON TRACK: THE NINTH CIRCUIT'S JURISPRUDENCE OFFERS THE BEST PATH FORWARD

Allowing judicial enforcement of FOIA's proactive disclosure requirements better aligns with the purpose of FOIA, better captures the intent of FOIA's drafters and recent presidential statements, and offers the best chance of achieving FOIA's goals efficiently. As such, FOIA would be better served by the Supreme Court adopting a rule similar to the Ninth Circuit's approach.

When addressing judicial intervention in FOIA's affirmative disclosures, the Court should consider how its resolution will align with the purpose and modern needs of FOIA. One observer, commenting recently on how FOIA has been treated across the government, noted that “[o]n a bipartisan basis, the Supreme Court and past Presidents have endorsed FOIA’s goal of transparency: the Court has established a ‘strong presumption in favor of disclosure’ of agency documents, and both President Obama and President George W. Bush directed federal agencies to increase transparency through FOIA.”<sup>127</sup>

In a 2009 Memorandum for the Heads of Executive Departments and Agencies, President Obama emphasized the importance of a strong FOIA to the operation of our modern democracy, declaring that “[a] democracy requires accountability, and accountability requires transparency.”<sup>128</sup> In that statement, President Obama directed federal agencies to lean into proactive disclosures and to “take affirmative steps” to make information available to the public.<sup>129</sup> Following his directive, the DOJ similarly stressed the importance of proactive disclosures in its 2009 FOIA Guidelines, encouraging agencies to “engage in an on-going effort to identify records of interest to the public and to post them online.”<sup>130</sup> However, despite this strong

---

<sup>127</sup> *Freedom of Information Act—Article*, *supra* note 74, at 1114.

<sup>128</sup> Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 15 (Jan. 21, 2009).

<sup>129</sup> *Id.*

<sup>130</sup> OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, PROACTIVE DISCLOSURE PILOT ASSESSMENT 1 (2016), [https://www.justice.gov/oip/reports/proactive\\_disclosure\\_pilot\\_assessment/download](https://www.justice.gov/oip/reports/proactive_disclosure_pilot_assessment/download).

presidential support and seeming coherence of mission between the components of the executive branch, some critics believe the efforts made thus far to fulfill that presidential promise have fallen short.<sup>131</sup>

Further chilling the arguably lukewarm efforts of the executive branch to reinvigorate FOIA is the fact that Presidents have been silent since President Obama's initial bold proclamation. President Obama's statement was the last official presidential statement; President Trump made no similar memorandum or direction for his administration on FOIA. Some critics even believed that the Trump Administration would swing the pendulum back toward encouraging privacy, as statements made by President Trump during his campaign prompted one commenter to label him the "least transparent presidential candidate in modern history."<sup>132</sup>

In light of such presidential silence, if the judiciary could shoulder some of the responsibility for enforcing the proactive disclosures, it could help to get FOIA back on track. Allowing courts to compel agencies to disclose records that are legally required to be made available by FOIA's proactive disclosures Section 552(a)(2) is critical to ensuring that FOIA's requirements and purposes are met.

In 2019, the number of FOIA requests was staggeringly high—858,952 recorded requests across federal agencies.<sup>133</sup> While this total decreased by 4,777 from 2018's record high, FOIA requests have been steadily climbing for the past ten

---

<sup>131</sup> See, e.g., Ted Bridis, *In Obama's Final Year, U.S. Spent \$36 Million in FOIA Lawsuits*, PBS (Mar. 14, 2017, 10:08 AM), <https://www.pbs.org/newshour/nation/obamas-final-year-u-s-spent-36-million-foia-lawsuits> (discussing the over \$36 million spent in litigation expenses defending FOIA request refusals during the Obama Administration, and criticizing the failure to live up to President Obama's assertion that the administration was "the most transparent administration in history."); Ted Bridis, *Obama Administration Sets New Record for Withholding FOIA Requests*, PBS (Mar. 18, 2015, 3:43 PM), <https://www.pbs.org/newshour/nation/obama-administration-sets-new-record-withholding-foia-requests> (noting that the Obama Administration hit a record high for request denials in 2015, and that the Administration admitted withholding was improper in 1 of 3 challenged FOIA request denials); Jason Leopold, *It Took a FOIA Lawsuit to Uncover How the Obama Administration Killed FOIA Reform*, VICE (Mar. 9, 2016, 9:50 AM), <https://www.vice.com/en/article/7xamnz/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform> (accusing the Obama White House of working behind the scenes to stifle FOIA reform bills.)

<sup>132</sup> Jason Koebler, *How Will Trump Deal with FOIA?*, VICE (Nov. 17, 2016, 9:00 AM), [https://www.vice.com/en\\_us/article/nz7knz/foia-under-trump](https://www.vice.com/en_us/article/nz7knz/foia-under-trump). Indeed, the Trump campaign's reticence previewed a presidency characterized by a fundamental lack of transparency. See Philip Eil, *What the Trump Administration Meant for Freedom of Information Requests*, COLUM. JOURNALISM REV. (Feb. 15, 2021), <https://www.cjr.org/analysis/what-the-trump-administration-meant-for-freedom-of-information-requests.php>.

<sup>133</sup> ANNUAL FOIA SUMMARY, *supra* note 29, at 2.

years, and 2019 marked the third consecutive year of over 800,000 FOIA requests.<sup>134</sup> Additionally, the backlog of unanswered requests in 2019 remained bloated at 120,436, showing only a slight decline from 2018's 130,718 backlogged requests.<sup>135</sup> The response time for a simple request also increased to a record high of 39.30 days in 2019—almost *double* the statutory maximum.<sup>136</sup>

This is especially problematic because as the number of FOIA requests rises, so too does the cost of administering FOIA. In 2019, federal agencies collectively spent \$524.9 million on FOIA-related activities,<sup>137</sup> down only slightly from 2018's record high of \$545.5 million.<sup>138</sup> The high cost comes largely from staffing costs: in 2019, the government employed about 5,000 “full-time [equivalent] FOIA staff” who administered and litigated FOIA provisions across the various federal agencies.<sup>139</sup> Of the total expenditures on FOIA for the year, the overwhelming majority, over 92 percent, was attributed to processing requests and appeals within the agencies.<sup>140</sup> Of the roughly \$524.9 million spent by federal agencies on FOIA-related activities in 2019, about \$486.19 million was spent on processing the 877,964 individual record requests.<sup>141</sup> Broken down to a per-record cost, the federal government spent an average of \$553.77 to respond to each individual FOIA request.<sup>142</sup>

While the majority of FOIA administration costs is consistently spent on individual FOIA requests under Section 552(a)(3), it could be easy to lose sight of FOIA's other production methods under Section 552(a)(2). The remaining approximately 8 percent of costs for FOIA activities in 2019—approximately \$38.7 million—includes the cost of making Section 552(a)(2) proactive disclosures.<sup>143</sup> In contrast to the 877,964 individual Section 552(a)(3) requests, federal agencies

---

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 9.

<sup>136</sup> *Id.* at 12.

<sup>137</sup> *Id.* at 20.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 4, 20.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 20.

proactively released over 114 million FOIA Section 552(a)(2) documents online in 2019.<sup>144</sup> A cost of roughly 33 cents per proactive disclosure.<sup>145</sup> With the high cost of responding to individual FOIA requests and the number of requests remaining staggeringly high, it is increasingly important for federal agencies to make serious efforts to provide information to the public through a less costly method, such as the use of proactive disclosures.

There is hope that the shift to Section 552(a)(2) proactive disclosures has already begun. From 2018 to 2019, there was a more than four-fold increase in the total number of proactive disclosures of records—from 28 million in 2018 to 114 million in 2019.<sup>146</sup> To relieve the stress that individual requests place on federal agencies and their budgets, this trend must continue. Encouraging agencies to utilize proactive disclosures to the fullest extent of their statutory authority will shift some of the requests to proactive disclosures and likely lower the costs of administering FOIA. For example, every individual Section 552(a)(3) request that is rendered unnecessary by a timely 552(a)(2) proactive disclosure could save government employee labor and the cost of over \$500 per record.<sup>147</sup>

A ruling from the Court that favors enforcement of Section 552(a)(2) proactive disclosures would help to alleviate the sheer volume of requests, a number that is likely to continue to rise, making the administration of FOIA quicker and more cost-efficient overall. Judicial support for proactive disclosures also promises a drastic decrease in the cost of responding to FOIA requests, as more online records means fewer requests for those documents and potential savings of over \$500 for every request rendered unnecessary.

## VI. CONCLUSION

To achieve the promise of FOIA in our digital age, the circuit courts must be consistent in their interpretation of the judiciary's authority under FOIA. In *ALDF*, the Ninth Circuit set the course for how courts may legitimately find the authority to order proactive disclosures under FOIA. Recognizing the authority of the judicial branch to compel federal agencies to comply with their statutory duty under FOIA's proactive disclosures would do much to reduce the ever-increasing regulatory burden—allowing courts the authority to compel the release of records that otherwise

---

<sup>144</sup> *Id.* at 21.

<sup>145</sup> *Id.*

<sup>146</sup> OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2018, at 21 (2018), <https://www.justice.gov/oip/page/file/1282001/download>.

<sup>147</sup> *Id.*

would be subject to repeated, and expensive, individual requests. But perhaps more importantly, it is only with a clear mandate for judicial authority that we will see FOIA's promise of government transparency become a reality.

