Comment on *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*

by Mark A. Cohen

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Prof. David Vladeck's article, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*,[1] provides a powerful case for strengthening existing environmental right-to-know laws such as the Freedom of Information Act (FOIA) and other enabling statues that require firms to report—and the government to provide public access to—environmental information. He focuses on two examples where almost by default, due to procedural burdens and the ability to claim proprietary business information, the government can withhold and/or delay release of data. Instead of focusing on the legal aspects of right-to-know laws, this brief comment argues that information provides an important social value—but one that must be weighed against the potential costs of information provision. Clearly identifying these costs and benefits helps to shed light on the appropriate legal thresholds for disclosure.

The costs of disclosure are well articulated by both firms and government regulators. From a company's perspective, there is both the physical cost of disclosure (e.g. filling out Toxics Release Inventory reports) and the potential cost of losing proprietary information. The first cost is not particularly relevant to Vladeck's article, since he focuses primarily on data that has already been provided to the government or information that the government itself has either collected or generated. Certainly, the issue of firm proprietary data needs to be taken seriously—but it is also one that can be dealt with through judicial oversight without much difficulty. Courts know how to weigh the private interest of proprietary information against the public interest of disclosure. Even if there is a legitimate concern about proprietary data being released, if the potential social benefit is high enough that disclosure is warranted, adequate safeguards can often be provided so that the data can be selectively disclosed without fear disclosure to a competitor.

The costs to the government of disclosure are threefold. First, there are the physical costs of disclosure, which can be substantial when records must be searched and carefully reviewed for legitimate concerns of non-disclosure. Second, concerns have been raised that disclosure might stifle the free flow of internal deliberations that come with transparency. Of course, many people would argue that government should be transparent in its deliberations, and the latter argument is not valid, even if the matter involves settlement negotiations with a defendant. The extent to which more transparency on these deliberations would reduce settlements is an empirical issue to assess. Thus, there might need to be clear legal rules that attempt to protect the settlement process but otherwise allow for government transparency. Third, there have been calls for less disclosure due to national security concerns, especially following 9/11. While potentially a serious cost, there is also evidence that immediately following 9/11, this provided cover for significant reductions in public data provision that provided little or no such threat.[2]

The benefits of increased transparency accrue to both private parties and to society at large. Individuals who are harmed by chemical releases, for example, might require access to government data in order to both establish liability and to estimate damages. The potential benefits from this information disclosure are significant, and since this is largely compensation for harm caused by one party against another, this compensation is not a social cost at all. Instead, it is a classic instance of internalizing externalities and thus provides a net positive social benefit.

Not all requests for information disclosure are for purposes of litigation. Even if this information is not to be used for litigation, it could provide local residents with important knowledge about the risks they face, and prompt them to alter their behavior in ways that will improve their welfare—whether it be to keep children from playing in certain areas, pressuring local agency regulators to enforce existing laws, lobbying political leaders to tighten environmental laws, or

1. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 39 ELR (Envtl. L. & Pol'y Ann. Rev.) 10773 (Aug. 2009) (a longer version of this Article was originally published at 86 Tex. L. Rev. 1787 (2008)).

2. *See* Mark A. Cohen. *Transparency After 9/11: Balancing the "Right-to-Know" With the Need for Security,* 9 Corp. Envtl. Strategy 368, 368-74 (2002).

pressuring companies directly to voluntarily reduce pollution. Instead, information disclosure has been shown to be a powerful mechanism that may affect firm behavior and reduce potential social harms that are not otherwise regulated.

Information disclosure programs have been characterized as the third wave of environmental regulation, following the original regulatory approach and the subsequent introduction of market-based incentives.[3] Perhaps the best-known example of the third wave is the Toxic Release Inventory (TRI) program in the U.S., whereby firms are required to disclose legally emitted chemical releases. TRI has brought about significant reductions in chemical emissions. For example, total on-site and off-site releases of toxic emissions are reportedly down by 59% between 1988 and 2006.[4] The effect of TRI disclosure on both firm behavior and firm value has been empirically demonstrated.[5] Other disclosure programs have focused on drinking water safety and risk management plans for chemical releases.[6]

In addition to government dissemination of this information, environmental organizations have utilized this information to provide user-friendly, community-based information sources.[7] Some caution must be noted, as it is possible that information disclosure programs can have unintended consequences. For example, an information disclosure program might focus firms on pollutants that are less important than others that are not subject to disclosure, or it might cause them to offshore to another country or smaller facility that is not subject to reporting requirements. Indeed, one of the shortcomings of information disclosure programs is that to date, they have not been subject to rigorous cost-benefit tests. Notwithstanding these concerns, it is likely that information programs will yield significant benefits and generally small costs; hence they are likely to be a cost effective mechanism to shed light on environmental exposure and risks. For example, as Vladeck points out,[8] EPA has recently reduced the availability of TRI data by increasing threshold reporting limits. While no explicit cost-benefit analysis was conducted, EPA noted that the estimated cost savings to firms from reduced reporting was $1.8 million for 1,800, or $1,000 per firm.[9] So, the real question is whether on average, providing information on TRI releases under the older threshold limits provides more or less than $1,000 in social benefits.

While the cost-benefit framework set out above is admittedly theoretical and is largely void of actual data, it does provide a starting point for thinking about appropriate policies. Further study might shed light on the magnitude of these costs and benefits, but for now simply considering them carefully is a first step. For example, Vladeck demonstrated that the current burden of proof standards effectively allow government regulators to withhold documents for years based on procedural delays without clearly justifying an exemption.[10] This power to delay appears to have high costs—not only in legal and judicial costs, but also in raising the cost to potential FOIA requesters so much that they are deterred from requesting information in the first place. This is especially true since, as Vladeck demonstrates, legal standards have made it virtually impossible for plaintiffs to collect attorney's fees in FOIA litigation if the government ultimately "voluntarily discloses" prior to being ordered by a court.[11] Thus, the benefits of "speedy" disclosure are likely to be very high.

From a research and public policy perspective, one of the most important aspects of Vladeck's paper is his call for more "pro-disclosure mandates" from Congress. Indeed, the call should go beyond simply requiring that environmental data routinely be made available to the public—unless there are substantial risks as discussed earlier. Because information is a valuable public good, providing more data in ways that are accessible will expand the use of those data by researchers. Currently, even TRI data that are made public are not made available in a format that allows for ease of use by researchers. For example, it is difficult to aggregate facility level TRI data to the corporate owner level and toxicity weights are not provided. Linking TRI data to other facility level enforcement data is tedious, and enforcement data themselves are incomplete and not user friendly. Not only does this mean that the high cost of using these data deters many researchers from utilizing them, but each researcher makes their own independent judgments about how to recode, combine, and otherwise build a useable dataset. As a result, fewer studies are conducted, and the studies that are published oftentimes have conflicting conclusions—which might simply be attributable to differences in the datasets they ultimately used. These shortcomings are not simply of academic concern. Studies of environmental enforcement as well as information disclosure programs can help inform policymakers about who to regulate, how to design appropriate disclosure or enforcement policies, and which firms to target for enforcement. Thus, accurate and readily available data can help inform the policy process in ways that will provide the most bang for the government's buck.

Information disclosure can be a powerful tool for changing firm behavior—but at its core, information is simply an imperative in a free market economy. Well functioning markets depend upon informed buyers and sellers. Thus, consumers, homeowners, and residents need to know about

3. Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 Envtl. & Resource Econ., 587 (1998).
4. U.S. EPA, 2006 Toxic Release Inventory (TRI) Public Data Release Brochure, *available at* http://www.epa.gov/tri/tridata/tri06/brochure/brochure.htm (last visited Mar. 9, 2009).
5. *See* Mark A. Cohen, *Information as a Policy Instrument in Protecting the Environment: What Have We Learned?*, 31 ELR 10425-31 (Apr. 2001); Shameek Konar & Mark A. Cohen, *Does the Market Value Environmental Performance?* 83 Rev. Econ. & Stat. 281, 281-89 (2001); Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions*, 32 J. Envtl. Econ. & Mgmt. 109, 109-24 (1997).
6. For example, §1414(c)(4) of the Safe Drinking Water Act Amendments of 1996 requires community water sources to issue "consumer confidence reports" on the safety of their local water supply. 42 U.S.C. §300g-3(c)(4), ELR Stat. SDWA §1414(c)(4). Under §112(r) of the Clean Air Act Amendments of 1990, businesses must publicly disclose "risk management plans" (RPMs) for accidental chemical releases. 42 U.S.C. §7412(r)(7)(B), ELR Stat. CAA §112(r)(7)(B).
7. *See in general* Scorecard, www.scorecard.org.
8. Vladeck, *supra* note 1, at 10773-74.
9. EPA Toxics Release Inventory Burden Reduction Final Rule, 71 Fed. Reg. 76932, 76938 (Dec. 22, 2006).
10. Vladeck, *supra* note 1, at 10774.
11. *Id.* at 10774 n.11.

the risks and hazards they face in order to make informed judgments about their purchase decisions, where they live and work, where their children play, etc. Without this information, the public themselves will make decisions that are less than optimal. While there are costs to providing information, information itself is valuable—and withholding it is costly. While information disclosure policy should fully take into account these costs and benefits, providing accurate information to the public is unlikely to be too costly relative to benefits, and should become a priority of government regulatory agencies.