

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

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Openness is an American bedrock principle, with secrecy being disdained except where absolutely necessary. As former Sen. Daniel Patrick Moynihan (D-N.Y.) said, “Secrecy is for losers.”¹ If information is the lifeblood of democracy, then public access to information would be the arteries that keep democracy healthy. Yet, despite the clear importance of transparency to an effective and accountable government, we continue to fall short of the openness we need and have often been promised. David Vladeck’s article, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*,² lays out a clear case for how and why our federal efforts to establish the public’s right to information, especially environmental information, have not yet succeeded and what next steps would be most helpful in correcting that failure.

We as a nation have made repeated attempts to make our government open and accountable to the people. And while progress has been made, in some areas more progress than others, we continue to struggle with the responsibilities of our often longstanding right-to-know laws, such as the Freedom of Information Act (FOIA)³ and the Federal Advisory Committee Act (FACA).⁴ Vladeck appropriately spreads the blame for these shortcomings across all three branches of government. Congress’ right-to-know laws have become outdated and fail to keep pace with the reality of what can and should be accomplished in the Internet age. Executive agencies, fearing criticism and oversight of their actions, continue to be resistant to transparency, causing excessive delays and often requiring those seeking information to go the expensive route of hiring a lawyer and going to court. And the

courts have often, though not always, acted with excessive deference to the federal government.

The growth in government secrecy, especially for environmental and health data, has had profound and negative impacts on the United States. It makes the public and communities less safe. It hinders public participation in policy issues that effect their health and well-being. It contributes to near-record lows in trust of the executive branch. With the growth of the Internet, it would seem a no-brainer that government transparency should be at its strongest point—and, accordingly, our democracy very healthy. Yet the opposite is happening; the public disclosure arteries are seriously clogged, jeopardizing our democratic health. As Vladeck notes in his numerous examples, attempts to get information about issues affecting public health are met with intense long-term resistance making the disclosure of the information take longer and cost more. Given this type of government reaction, it is not surprising that a 2009 survey of American adults found 73% think the federal government is secretive, and 44% think state government is secretive.⁵ The trend line is not good: in 2006, 62% thought the federal government was secretive.⁶

There are three intertwining problems that influence government secrecy concerning environmental information. First, today’s laws and policies on public access are inadequate for today’s 24-hour, 7-day-a-week Internet world. Too often the burden is on the public to request information; and there are far too many loopholes to allow agencies to withhold information. These policies need radical overhaul. Second, the federal government’s use of interactive technology is largely grounded in the 20th century. The use of Web 2.0 thinking is only starting to make its way into government via the incoming Obama Administration, but the hardware, software, and capacity of public employees needs significant upgrade. Finally, even with the best technology and policies, there is an underlying

1. THE HONORABLE DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 227 (Yale Univ. Press 1998).

2. 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)).

3. 5 U.S.C. §552.

4. Pub. L. No. 92-463, §15, 86 Stat. 770, 776 (1972) (codified at 5 U.S.C. app. 2 (2000)).

5. Press Release, Sunshine Week, Federal Govt. Still Viewed as Secretive; President’s FOI Orders Get High Marks (Mar. 13, 2009), at http://www.sunshineweek.org/sunshineweek/secracy_poll_09 (last visited June 1, 2009). The poll was conducted by the Scripps Howard News Service and Ohio University in a study commissioned by the American Society of Newspaper Editors.

6. *Id.*

culture of secrecy that pervades government. No civil servant gets rewarded for improving public access, but they sure get attention if they give out information that could be misused. Disincentives for openness are built into the way agencies and government operates. Civil servants need to be given the freedom to disclose information and the rewards for doing so.

Probably the most vexing policy problem is FOIA, the venerable, core right-to-know law. Vladeck explores the repeated attempts to update and fix FOIA.⁷ The latest fix, the Open Government Act of 2007,⁸ may still help as agencies implement the required changes. While the law's basic purpose—establishing the fundamental responsibility of government to disclose information to anyone—is laudable, Vladeck concludes that “FOIA’s file-a-request-and-wait-for-a-response approach is also an anachronism.”⁹ In this context the Open Government Act is nothing more than a palliative or a band-aid to fix a more profound problem. Congress has not yet realized that the laws itself needs a fundamental overhaul. The ultimate goals should be to have a national standard that affirmatively requires federal agencies to disclose information to the public in a timely manner and in ways that make the information findable and useable.

Even within the current FOIA framework there are major implementation failures. The federal government has been implementing FOIA for more than 40 years and the reality is they have never done a particularly good job at it. A primary reason is that administrations often do not welcome the openness that FOIA promises. Requesters are typically researching governmental problems and failures of management. The temptation to overuse some of the broader exemptions to hide embarrassing information is often too great for agency officials, and corporations, to resist. As Vladeck notes, some of the most problematic exemptions over the years have been Exemption 5, which applies to inter-agency and intra-agency materials that would not be available under litigation, and Exemption 4, for trade secrets and confidential business information.¹⁰ Without creating some clearer definitions or establishing some checks and balances for the use of these exemptions, enormous amounts of information will never be disclosed.

No single policy change or action will suddenly make government completely transparent. The solution is not as simple as instituting guidance to agencies to disclose as much information as possible under FOIA requests, although most certainly that must be done. Vladeck lists in his article three proposals for reform.¹¹ He describes them as ‘modest,’ but these are the type of bold thinking that is needed today. Certainly each contains the possibility of major improvement in the implementation of FOIA and FACA.

The boldest change Vladeck proposes is to establish a new requirement on the executive branch “to use Internet technology to make environmental information accessible to the public without routinely having to use FOIA’s request-and-wait procedures.”¹² This would represent a major shift in the government’s disclosure responsibility. Rather than reviewing documents responsive to an information request attempting to determine which met requirements to be withheld, agencies would proactively review environmental data seeking to determine which information needed to be released. Indeed, such an approach would be welcome in other areas beyond the environment.

FOIA already mandates affirmative electronic disclosure of agency final opinions and orders, policy statements, staff manuals that affect the public, and frequently requested information.¹³ So, the Vladeck approach can be implemented immediately by the Obama Administration. If federal environmental and health agencies recognize that much of the information they house is subject to “frequently requested information,” FOIA’s current legal authority can be broadly used. In this context, it would be helpful to include a requirement that agencies also disclose a list of all material not being released to the public with an explanation for each withholding decision. Such a list would allow those still using the FOIA request process to address the government’s argument for withholding the initial request, rather than delaying that discussion to the appeal or a court trial.

Attempting to address the continual overuse of confidential business information (CBI) claims (FOIA exemption 4), Vladeck’s second proposal is directed more at the implementation process of FOIA, but is no less important. The proposal seeks legislative action containing three intertwined parts. First, requirements that companies claiming confidential business information submit detailed justifications to support these claims.¹⁴ Second, empower federal agencies to levy fines against false claims.¹⁵ And third, provide sufficient agency funding to properly review such claims.¹⁶

Recently, the U.S. Government Accountability Office (GAO) addressed the problem of CBI claims in relation to the Toxic Substances Control Act (TSCA). According to GAO, “EPA’s ability to provide the public with information on chemical production and risk has been hindered by strict confidential business information provisions of TSCA, which generally prohibits the disclosure of confidential business information.”¹⁷

7. Vladeck, *supra* note 2, at 10773.

8. OPEN Government Act of 2007 §6(a)(1), 5 U.S.C. §552(a)(6)(A)(ii) (2008).

9. Vladeck, *supra* note 2, at 10779.

10. *Id.* at 10776, 10777.

11. *See id.* at 10774.

12. *Id.* at 10779.

13. 5 U.S.C. §552(a)(2).

14. Vladeck, *supra* note 2, at 10774.

15. *Id.*

16. *Id.*

17. JOHN STEPHENSON, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-428T, CHEMICAL REGULATION: OPTIONS FOR ENHANCING THE EFFECTIVENESS OF THE TOXIC SUBSTANCES CONTROL ACT 3 (2009), available at http://energy-commerce.house.gov/Press_111/20090226/testimony_gao.pdf (last visited June 1, 2009).

The undisclosed information is needed for various activities, including “developing contingency plans to alert emergency response personnel to the presence of highly toxic substances at manufacturing facilities,” according to GAO.¹⁸ GAO reports about 95% of TSCA premanufacture notices are submitted containing some information labeled “confidential.”¹⁹ These notices contain basic health and safety information and are required before a company can manufacture a new chemical. While health and safety studies and associated data are not eligible for CBI protection, chemical and company identity can be eligible. According to Richard Denison, a senior scientist at the Environmental Defense Fund, “[t]his allowance can lead to perverse outcomes, such as that a chemical’s adverse effects on mammalian reproduction must be disclosed, but identification of which chemical causes the effect may be kept a secret.”²⁰

Vladeck’s model for up-front substantiation is already used for the Toxics Release Inventory (TRI). Under TRI, a company cannot claim trade secrecy if: (1) it has already disclosed the information (other than in limited circumstances) or failed to take reasonable precautions to protect it; (2) another law already requires the company to disclose the information; (3) the information is already easy to find out using reverse engineering; or (4) disclosure is not likely to harm the firm’s competitive position.²¹ The result is that less than 2% of TRI submissions claim CBI exemptions.²²

The final reform proposal advanced by Vladeck in his article seeks to improve the courts’ interpretation of right-to-know laws.²³ He believes Congress should establish a higher burden of justification on the federal government when it seeks to withhold environmental data.²⁴ Additionally, he believes a special provision should be added to FOIA that empowers courts to use a balancing test to weigh the public benefit of disclosure against the private interest of secrecy.²⁵ Once again, Vladeck offers practical and useful solutions. There is no reason not to empower courts to use such a balancing test for any disclosure question from the spending of government funds to homeland security. If the public benefit of disclosure is more important than the interests in withholding, the information should be released.

Vladeck appropriately notes that many immediate changes can and should be made by the Obama Administration, which has promised unprecedented levels of transpar-

18. *Id.*

19. *Id.* at 13.

20. Richard A. Denison, *Ten Essential Elements in TSCA Reform*, 39 ELR 10020, 10027 (Jan. 2009).

21. 42 U.S.C. §11023, ELR STAT. EPCRA §322(b).

22. WORKING GROUP ON COMMUNITY RIGHT-TO-KNOW, *Trade Secret Claims Under Right-to-Know Laws*, in WORKING NOTES ON COMMUNITY RIGHT-TO-KNOW 2 (1997).

23. Vladeck, *supra* note 2, at 10781.

24. *Id.*

25. *Id.*

ency.²⁶ At the same time, congressional action is also needed to ensure that the new emphasis on transparency is maintained by future administrations.²⁷ The solution is multi-dimensional: it requires changing the mindset and climate within government to emphasize transparency, as well as establishing the proper policy framework and building the technology capacity of government to seize the potential of the Internet.

Three final points build on Vladeck’s argument for greater disclosure. First, the public’s right to know is a tool to enable greater health, safety, and accountability. Thus, right-to-know is not the ultimate goal; it is the vehicle to achieve a particular purpose. The corollary to this point is that right-to-know is not a substitute for regulation or enforcement. Disclosure provides the ammunition for knowing where regulation is needed.

Second, federal environmental and health agencies need to establish new approaches for assuring the public it is collecting the right information and that what is collected is of high quality. For example, for several years, the TRI was modified to collect less information. The loss of these data is now irreversible. Fortunately, through the FY 2009 omnibus appropriations bill, Congress instructed EPA to restore the data that is no longer collected so that the problem is rectified going forward in time.²⁸ Similarly, on March 10 EPA announced that it will propose a new rule to require greenhouse gas emissions reporting from thousands of businesses nationwide.²⁹ A greenhouse gas registry would be created as a database for collecting, verifying, and tracking emissions from specific industrial sources. These are but two examples of the need to have a system of public input about information collection gaps that must be addressed by government.

Third, Vladeck places an emphasis on the use of the Internet as a means for disclosure. While laudable it raises two challenges. First, the Internet should never become the sole vehicle for disclosure. Too many people—low-income, rural residents, and others—still lack high-speed access to the Internet or even any access. Thus, federal agencies must continue to protect print and other forms of dissemination. Second, the emergence of newer interactive technologies provides a call for new ways of bringing policy and technology experts together to work hand-in-hand. Simply putting more data on the Internet is not a solution; it must be done in a thoughtful, coordinated manner that employs open standards and open source programming in all right to know activities.

26. *Id.* at 10782.

27. *Id.*

28. 2009 Omnibus Appropriations Act, Pub. L. No. 111-008, §425 (2009).

29. See Press Release, EPA Proposes First National Reporting on Greenhouse Gas Emissions (Mar. 10, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/4bd0e6c514ec1075852575750053e7c0%21OpenDocument> (last visited June 1, 2009).