Spring 2014

The myth of freedom of information.

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Original Publication Information
This article was originally published in *Kentucky Libraries*, volume 78, issue 2, in Spring 2014.

THE MYTH OF FREEDOM OF INFORMATION IN THE UNITED STATES

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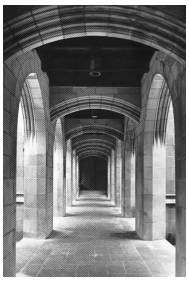

"A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."
— James Madison, 1822

Are the purported owners of the U.S. Government, the citizens of the United States, also the owners of government information? If so, are they entitled to unfettered access to data, information, and documents created or collected by government agencies and officials? Is the idea of "freedom of information" embedded in the framework of the U.S. Constitution and Bill of Rights? Or is it one of the myths of a questionably "free" nation whose founding was circumscribed and tainted by the legalization and institutionalization of racial slavery and other forms of social inequality? These questions provide the backdrop against which this article will examine a pervasive idea in U.S. culture: that U.S. citizens historically have had the right to information created by their government in the course of conducting the people's business. What is briefly argued herein is that federal laws passed in the 1960s and 1970s, and political and technological trends and developments that occurred during the latter half of the twentieth century, especially in the 1990s, may give the public a false view of how the government historically has treated government documents and regarded the people's right to know.

The quote cited above from founding father James Madison contributes to a grand myth about American freedom that has echoed across the centuries. Madison, who is known by the nickname "Father of the Constitution," was the fourth President of the United States (March 4, 1809 to March 3, 1817). His birthday, March 16, is marked each year by an annual event sponsored by the American Library Association (ALA). ALA's "Freedom of Information Day" recognizes individuals and groups for championing access to government information and the "people's right to know" with the presentation of the James Madison Award (American Library Association). The quote from Madison cited above appeared on the ALA "Freedom of Information Day" web page as recently as 2006. However, on an undetermined date shortly thereafter, the quote was removed from view. It apparently no longer serves as part of ALA's awareness campaign, perhaps because it was misused as discussed below.

It is not difficult to understand the evolution of the Madison icon and its association with the idea of freedom of information and all it represents in contemporary discourse. As a rebel and revolutionary, Madison was acutely concerned about protecting citizens' rights to free speech, freedom of assembly, and freedom of the press. As the "Father of the Constitution," he conceived and included those freedoms in the Bill of Rights because he viewed constitutionally guaranteed liberties, especially a free press, as bulwarks against an oppressive monarchy or government. But Madison makes no mention of freedom of information in the nation's founding documents. The oft-quoted statement on "popular information" cited above is a comment made more than two decades after the ratification of the U.S. Constitution. Moreover the quote, when used as a statement to advocate freedom of information, is taken out of context. The opening sentence of Madison's remark has been omitted to make it congruent with the use to which it has been applied. The entire paragraph, which opens a letter dated August 4,

1822 from Madison to William T. Barry, the Lieutenant Governor of the State of Kentucky, reads as follows:

> *The liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded* [emphasis added]. A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives (Madison "James Madison to W. T. Barry").

Madison goes on to express his fond regard for the Commonwealth of Kentucky and its people, and to note the value and benefit of Kentucky's State Plan of Education for its citizens. Nowhere in its contents does Madison ever discuss freedom of information or the role and responsibility of the government to its citizens as a creator, collector or provider of information. Thus the view of Madison as an advocate of "freedom of information" as we understand that term today, especially in reference to the Freedom of Information Act (FOIA) and access to government documents, has been conjured out of thin air by an act of omission. This editorial sleight-of-hand achieves its credibility due to the broad public regard for Madison as the founder of American freedoms. The false ideas that flow from it – that Madison's notion of "popular information" and the people's right to know is somehow embedded in the founding of the nation and its founding documents – are the byproducts of a hagiographic construction of U.S. history that intentionally ignores the contradictions inherent in the establishment of the republic. The truth that rarely surfaces in public education and in the public square is that the "land of the free" was built on the genocide of Amerindians, the foundation of chattel slavery, and the enactment of voting regulations that excluded the majority of its population from the franchise (women, indentured servants, Native Americans, and most so-called free "Negroes") by restricting the right to vote mainly to property-owning "white" males. The master narrative of the nation's founding therefore is blind by design to its own omissions and historicist fallacies. The whitewashed, sanitized, and sanctified past it serves up for public consumption remains popular, nonetheless, in a society conditioned to prefer historical amnesia and selective memory to inconvenient truths. Is this judgment too harsh and too critical of the popular national narrative of American freedom? Let us briefly examine this point from another perspective.

Like many of his co-founding fathers, Madison spoke eloquently about liberty and the rights of man and did so fully cognizant of the contradictions between his rhetoric and the reality of his ownership of human beings. Among his several notable remarks on the subject of slavery is the following excerpt from a speech he gave on December 2nd at the Virginia State Convention of 1829-30:

> It is due to justice; due to humanity; due to truth; due to the sympathies of our nature; in fine, to our character as a people, both abroad and at home, that they [enslaved Africans] should be considered, as much as possible, in the light of human beings, and not as mere property. As such, they are acted on by our laws, and have an interest in our laws. They may be considered as making a part, though a degraded part, of the families to which they belong (Madison "Question of the Ratio of Representation in the Two Branches of the Legislature").

Historians and Madison scholars have used such quotes to argue that Madison was a benign and enlightened slave master. Dr. Devin Bent, founder of the James Madison Center at James Madison University, offers this typical assessment of Madison's character in the matter of owning human beings: "To his credit, Madison was more troubled than most by slavery and by the hubris of the great slave owners. He never seems as overtly racist as Jefferson at his worst" (Bent). Bent buttresses his opinion with the following testimony from Paul Jennings, a man once owned by Madison, and who served as his body servant:

> Mr. Madison, I think, was one of the best men that ever lived. I never saw him in a passion, and never knew him to strike a slave, although he had over one hundred; neither would he allow an overseer to do it. Whenever any slaves were reported to him as stealing or "cutting up" badly, he would send for them and admonish them privately, and never mortify them by doing it before others (Bent).

Madison never struck a slave, but he never freed one either. He inherited more than one hundred slaves from his father in 1801, and in 1809 he even purchased an indentured servant from Thomas Jefferson named John

Freeman. Freeman's name suggests he may have been a free African American. The transaction was unusual in that the use of indentured servants at that time in U.S. history had significantly declined (James Madison Center). The purchase also illustrates that Madison's personal antipathy to the institution of slavery did not preclude him from taking full advantage of its demonstrated economic benefits.

Madison's role as the chief author of the U.S. Constitution, and his adoption by modern scholars as an icon of the concept of "freedom of information," provides the context for the attention he has received in this discussion thus far. Equally important, Madison has served as a focal point through which to examine the general inability of many U.S. citizens to view the past except through the lens of a highly selective and subjective national memory. If not selective in nature, if not inscribing a hagiographic narrative while erasing or effacing the possibilities and perspectives of contradictory and counter narratives, by what other means can we account for the master narrative's blatant disregard for actual events that illustrate the denial of American freedoms, real or imaginary, to so many Americans?

While this discussion of Madison and slavery has diverged somewhat from the topic of freedom of information, it does so to establish basic facts about freedom in the U.S. that often are obscured, overlooked or dismissed. It confronts the question of the people's right to know through its assertion that American freedoms were not conceived for or available to all Americans. Any careful examination of the facts surrounding the nation's founding and the drafting and ratification of its founding documents reveals a government for the people, but a government by propertied white males. A question implicit in this discussion is: how much of the status quo has changed over the course of two centuries? Arguably, the wealthy elite continues to dominate government, and the lack of access to public and government resources, including government documents and information, continues to be a major factor in the lives of the nation's poor and its so-called minorities.

If contemporary notions of "freedom of information" are grounded, in part, in American mythology, what does an objective examination of the facts reveal about how and when the government began to address the need of the citizenry for access to government information? Law Professor James O'Reilly offers some guidance in that direction in an address he delivered in Lawrence, Kansas in 2002. O'Reilly opened his speech to the University of Kansas Law & Public Policy forum with the following remarks:

> The right of broad public access to government documents is a relatively recent American invention, a phenomenon that has spread on the world stage in fits and starts. The momentum supporting the "freedom of information" concept has been flowing in only one direction, toward greater transparency and greater dissemination of more government information, and this flow has been accelerated by the inexpensive technology for internet web posting of government documents. While it has never achieved constitutional status, the right of access to most types of government records has been a part of our national consensus from July 4, 1966, when the Freedom of Information Act was adopted, to September 11, 2001 – but since then, some things may have changed (O'Reilly 166).

O'Reilly's comment confirms the fact that U.S. citizens have not always had the legal right to government information, and that a constitutional right currently does not exist. O'Reilly traces the "right of access" to the passage of the 1966 Freedom of Information Act, but then questions whether events subsequent to 9/11 may have effectively ended the national consensus regarding the people's right to know. Before examining O'Reilly's supposition that the 1966 Freedom of Information Act fostered "the right of broad public access to government information," it is important to note briefly several precedents dealing with the organization and dissemination of government information.

In the 1930s, under the auspices of President Franklin D. Roosevelt, two events helped to usher the government into the modern information era: the founding of the National Archives and Records Administration Agency (NARA) in 1934, and the establishment of the *Federal Register* the following year. Before the advent of NARA, individual federal agencies bore the responsibility of maintaining their own records. Many agencies, however, did not take appropriate measures to preserve and protect documents, and valuable records were lost due to fire, water damage, and neg-

lect. The mission of NARA, which had its roots in the efforts of the Taft, Wilson, and Hoover administrations, is to keep for posterity the estimated 1%-3% of government documents that are important for legal or historical reasons (National Archives and Records Administration Agency). The next important step to improve records management and the flow of government information occurred in 1935 when Congress passed the Federal Register Act and authorized "the Archivist of the United States to establish a division within the National Archives to be responsible, with the Government Printing Office (GPO), for the publication of a daily *Federal Register* under the authority of a newly established Administrative Committee of the *Federal Register*" (McKinney). The *Federal Register* came about to bring an end to the chaos and confusion regarding federal rules and regulations. Prior to its enactment, the profusion of gazettes, notices, codes, digests, and other publications containing the regulations of Executive Branch agencies made it nearly impossible for the public to know where regulations could be found, or if they were current.

The establishment of NARA in the 1930s occurred in response to growing problems federal agencies faced in dealing with government information and documents. It has been asserted that during the prior 140 years of the nation's history "access to government information does not appear to have been a major issue among the three branches [of government] or for the citizenry" (Relyea). The accuracy of this claim is difficult to verify. Prior to the passage of the Administrative Procedure Act of 1946 (the precursor of the 1966 Freedom of Information Act), a housekeeping statute passed by the 1st Congress in 1789 provided the primary statutory authority regarding the custody, use and preservation of executive branch documents. Thus, for the first century-and-a-half of the nation's history, the heads of individual government agencies determined the availability and accessibility of government documents. While the record from this period indicates few instances where the Executive Branch refused to comply with information requests, little is known regarding how the refusal of government agencies to hand over documents may have impacted the public (Relyea).

The Administrative Procedure Act (APA) was authorized in 1946 in the immediate aftermath of World War II and the related upsurge in information restrictions and government secrecy that occurred during wartime. Among its provisions to address the content, form and timing of federal agency rulemaking and adjudication, the act also required agencies to "publish descriptions of their organization and methods of operations in the *Federal Register*" (Feinberg 440). One element of the APA addressed the need of making agency records available to the public. But provisions within the legislation used statutory language that prescribed releasing records only to "persons directly and properly concerned," and were often interpreted in a manner that led to the withholding of documents rather than their release. This section of the statute was amended in 1966 to create the Freedom of Information Act (National Security Archives).

Since its authorization and signing into law by a reluctant President Lyndon Johnson on July 4, 1966, the Freedom of Information Act has been regarded as establishing a firm legal foundation for the public right to government information. But as soon as the new law took effect, government records managers raised a number of barriers to impede public access to government documents. The law itself enacts nine categories of information that are exempt from disclosure. Numerous other means for effectively blocking the release of information also emerged. A study conducted by the Library of Congress during the first four years of operation of FOIA identified six such procedures: *Secrecy by delay* (on average it took more than a month for federal agencies to respond to requests); *Secrecy by dollars* (fees for getting information varied by agency and could be exorbitant); *Secrecy by description* (materials had to be described in detail before the request would be processed); *Secrecy by filing* (if a small part of a file qualified for withholding the entire file was withheld); *Secrecy by superiority* (Pentagon officials claimed only they could decide the classification of document; Judges, despite hearing appeals under the Act, were not qualified to reverse such decisions); and *Secrecy by investigation* (if a case had been investigated, regardless of the outcome, it could be hidden forever) [Archibald, 1993, p. 730].

It also should be noted that FOIA did not arise out of a sudden recognition by the government of the people's right to know. Thomas Blanton, the Director of the National Security Archive at George Washington

University provides the following insight into how the Act came about:

> […] the U.S. FOIA, which has emerged as a model for reformers worldwide, was not the product of democratic enlightenment, but rather Democratic partisanship. The legislation emerged from 10 years of congressional hearings (1955-65) as the Democratic majority sought access to deliberations of the Republican executive branch under former President Dwight D. Eisenhower. The U.S. FOIA as it exists today – with broad coverage, narrow exemptions, and powerful court reviews of government decisions to withhold information – is actually an amended version of the 1966 act, revised in 1974 by a Democratic Congress over a veto by then Republican President Gerald Ford (Blanton 52).

Sam Archibald, a former staff director of the Special Subcommittee on Government Information, a position he held from FOIA's conception in 1955 until its enactment into law in 1966, provides an eye-opening chronicle of the political maneuverings, machinations and deals that eventually led to FOIA's passage. He also notes that the override of Ford's veto in 1974 "was an overwhelming 371 to 31 in the House of Representatives but only 65 to 27 in the Senate, just three votes more than the two-thirds necessary to override a presidential veto" (Archibald 731). Blanton's comment and Archibald's article underscore the political hypocrisy surrounding the issue of freedom of information. Moreover, as Relyea shows in his CRS Report, historically, agencies of the Executive Branch of government have been the most resistant to the implementation and administration of FOIA rules and regulations (Relyea).

Despite these inauspicious beginnings, however, use of FOIA has grown exponentially since its passage. Moreover, since first enacted by the Congress in 1966, the concepts of "sunshine laws" and open government have spread nationally and internationally. Today all fifty states and the District of Columbia have passed legislation authorizing some form of open records and freedom of information laws, and at least ninety other countries around the world have adopted similar policies (Hazell and Worthy; Supreme Court Debates).

In recent decades two events fostered a massive increase in the availability of government information and expanded public access to government documents: the enactment of a set of policies by President Bill Clinton that favored declassifying and disclosing government documents over withholding them, and the advent of the Internet. In 1993, Janet Reno, Clinton's Attorney General, rescinded "a 1981 rule that encouraged federal agencies to withhold information whenever there was a substantial legal reason for doing so" (Martorella 114). Reno's memo reversed previous Justice Department policy by encouraging the release of information to the public as the rule rather than the exception. The results were immediate: "From 1996 to 2000, the Clinton administration declassified and released 795 million pages of government information under the new FOIA standard" (Martorella 114). These developments, coupled with the passage of the Paperwork Reduction Act of 1995 and the Electronic Freedom of Information Act (E-FOIA) of 1998, dramatically increased the flow of information from the government to the public, as cited above. The E-FOIA, in particular, is noteworthy for mandating the following progressive policy and procedural changes:

> It expanded the definition of a record to include electronic records and documents, databases, word-processed documents, and e-mail. E-FOIA effectively broadened the scope of FOIA and allowed the public access to a wider selection of government information. The law required the development of agency e-reading rooms, the creation of electronic FOIA reference guides, and publication of an annual FOIA report (Martorella 114).

With the arrival of the Bush Administration in 2000, the Clinton-era polices were systematically reversed. President Bush made it clear to the nation from the outset that his administration would significantly restrict the disclosure of information from the Executive Branch. This policy was tested early in his administration when he refused to release the deliberations of an Energy Task Force (headed by Vice President Dick Cheney) that held a series of secret meetings with representatives from the energy industries. The Bush position of non-disclosure ultimately prevailed when the courts decided against a suit brought by environmental watchdog groups to force the release of the documents. After 9/11, the shift to withholding government records went into overdrive. Attorney General John Ashcroft told agencies in a memorandum distributed in October 2001 that they could withhold infor-

mation with the full backing of the Justice Department if they had a "sound legal basis" (O'Keefe 8). The policies and practices of the Bush Administration decisively ended the brief era of open government and public access. As Feinberg notes:

> The most striking point in assessing "federal information policy" in the aftermath of the September 11 attacks on the U.S. is the almost complete absence of any integrated or coherent government policy that responds to changing needs to balance access, privacy, and secrecy. The Freedom of Information Act (FOIA), the centerpiece of access policy since 1966, no longer holds this position (Feinberg 439).

Instead of seeking to balance the need to protect the nation from terrorism with the rights of citizens to know what their government is doing, Bush and Ashcroft used national security and privacy issues to impede the flow of information to the public. Accordingly, the Bush administration exited the political stage in 2008 with a well-deserved reputation of being the most secretive in U.S. history. This brings the discussion to Barack Obama, the current president, and his polices.

During his first presidential campaign, Barack Obama indicated his full support of government transparency and pledged to reverse his predecessor's practices of secrecy and withholding information. After taking his oath of office on January 21, 2008, Obama directed Attorney General Eric Holder to "issue new guidelines governing the FOIA to the heads of executive agencies and departments" (Obama 4683). The basis for those guidelines would be an affirmative policy and practice of making government information available without waiting for requests from the public for the release of documents. Obama's directive to Holder was contained in a memorandum published in the *Federal Register* on January 26. The key passage quoted below briefly outlines his philosophy about government information and the policy agenda of his administration:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public (Obama 4683).

Despite this full-throated embrace of government transparency, many observers see little difference between Obama's policies and actions and those of his immediate predecessor in terms of the withholding of massive amounts of government information under the guise of protecting national security. Recent scandals involving domestic spying by federal intelligence agencies have added fuel to the fire of criticism about the government's collection and maintenance of information, especially as these practices pertain to U.S. citizens. Yet once again citizens are told that national security trumps all other concerns, especially the people's right to know what their government is doing. Additionally, despite reasonable attempts to mandate changes that will increase access to government records, some administrators in the Executive Branch appear just as determined as in the past to obstruct and delay the implementation of FOIA policies. This culture of withholding information has prevailed through every presidential administration since the passage of the first FOIA act in 1966. Proof of this can be seen in two recent surveys conducted by the Knight Foundation that marked the 45th anniversary of the FOIA. In 2010, the "Sunshine and Shadows" survey "revealed that only 13 of 90 agencies had implemented concrete changes in response to Obama and Attorney General Eric Holder's early memorandums calling for FOIA reform" (Anonymous 18). A follow-up survey conducted in 2011 – "Glass Half Full" – found the situation has improved with 49 of 90 agencies indicating progress in following "specific tasks mandated by the White House to improve their FOIA performance" (Anonymous 18). Nevertheless, these same studies noted that fourteen agencies actually lost ground during the survey period. The Knight Foundation request to the top-35 agencies for copies of their ten oldest record requests also netted some troubling data. The single oldest record request they uncovered dated twenty years earlier to 1991, and pertained to U.S. State Department files held by NARA about nuclear research from the

1950s. Other examples of unfulfilled requests are equally eye-opening:

> Other long-standing requests include those to presidential libraries, which typically need clearance from federal agencies. They include a 1995 request to the Reagan Presidential Library about "whether American POWs and MIAs were left in Southeast Asia;" a 1998 request to the George H. W. Bush Library for documents related to the December 1988 bombing of Pan Am flight 103; and a 2000 request to the Kennedy Presidential Library for documents about "politics and the Internal Revenue Service." Also outstanding is a 2005 "urgent request" to the Transportation Department for whistleblower complaints to be used in an Occupational Safety and Health Administration hearing (Anonymous 18).

Last year the White House announced plans to implement a single, government-wide web portal to permit journalists, researchers, and citizens to go to one location to file their requests for information. On February 25, 2014 the U.S. House unanimously passed H.R. 211, the "FOIA Implementation and Oversight Act" to facilitate the President's agenda (Kasperowicz). This recent development offers hope for much-needed improvements to the FOIA process and the possibility of a significant reduction in time and costs incurred for the service. But given the patterns of evasion and obstruction in the past, the public and watchdog groups need to remain vigilant.

This article began by citing a previously misused quote by James Madison to discuss the myths surrounding the nation's founding, and the freedoms purportedly conferred by its founders in the drafting and ratification of the U.S. Constitution. The argument put forth here is that the public's right to know is not part of the U.S. Bill of Rights, and like the right of all citizens to vote (universal suffrage), is a work-in-progress that requires constant efforts by the public to monitor, expand, and protect. Those who drafted and ratified the U.S. Constitution recognized their limits as the architects of a new republic and a new experiment in democracy, and thus created the provisions whereby the contract that bound the nation together could be amended as the changing times and political circumstances required. Too often, however, the public has assumed that the freedoms delineated and mandated by the founders were far more comprehensive, inclusive and democratic than reality shows.

"Information is the currency of democracy" is an axiom that has been attributed to another founding father – Thomas Jefferson. As this nation moves further into the "age of information" – as this post-industrial era has been dubbed – documents should be allowed to flow unimpeded from the government to its citizens. Libraries have been in the forefront of efforts to defend the public's right to know. They also have led efforts to inform and instruct the public about the importance of openness in government. The annual "Freedom of Information Day" held by the ALA, and the James Madison Award conferred every year to commend the activities of individuals and organizations that raise national awareness of these vital issues, reflect the broad and deep commitment of librarians nationwide to defend intellectual freedom, civil liberties and the First Amendment. The misuse of the quote by James Madison, although unfortunate at the time, is indicative of the zeal with which the ALA has pursued its mission of protecting and educating the public. Such passion is still needed to avoid the "farce or tragedy; or both" predicted by Madison, if the government refuses to be responsive to the information needs of its true owners – the citizens of the United States.

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