FIRST-PERSON FOIA

Margaret B. Kwoka
University of Denver Sturm College of Law
Congress should “legislate freedom of information for itself, the public, and the press.”
NEWS MEDIA REQUESTERS

- 1978 study of 2,515 requests: 21%
- 2001 study, select agencies: 1.2% - 5%
- 2006 study of 6,439 requests: 6%
- 2017 study of 229,000 requests: 7.6%
AGENCY CASE STUDIES

- Department of Homeland Security
  - U.S. Citizenship and Immigration Services
  - Immigration and Customs Enforcement
  - Customs and Border Protection
- Department of Veterans Affairs
  - Veterans Health Administration
- Social Security Administration
- Equal Employment Opportunity Commission
- Other agencies
FIRST-PERSON REQUESTS (FY 2015)

- Series 1: 98%, 97%, 99%
- Series 2: 77%, 69%, 96%
DHS REQUESTS (FY 2015)

Total Requests: 281,138

- 165,233
- 100,762
- 53,917
- 5,868

Legend:
- 1
- 2
- 3
- 4
FOIA AND IMMIGRATION

- Discovery in removal proceedings
- Applications for immigration benefits, such as new visas or naturalization
  - Verification of immigration and criminal history to avoid risk and ensure consistency
  - Obtain a record required to be submitted with the application
VHA REQUESTS (FY 2015)

Total Requests: 26,395
SSA REQUESTS (FY 2015)

Total Requests: 22,365

- Category 1: 4448
- Category 2: 2930
- Category 3: 1724
- Category 4: 2183
- Category 5: 11,080
EEOC REQUESTS

- FY 2015 Total: 17,025
- 95% of requests for "charge file"
- Charge file contains:
  - Respondent’s Position Statement
  - Exhibits attached to the Position Statement
  - Investigator’s notes
THE FIRST-PERSON FOIA MISMATCH

Due Process Failures

Agency Inefficiency

Undermining Transparency
"[T]here’s been times where guys have been removed and then a FOIA result comes back and my strategy would have been different."

"They got a notice of right to sue and they want to file a lawsuit and then basically I won’t consider it unless I can review the EEOC’s file."

"[L]awyers can’t afford to take the time and energy to litigate [FOIA] issues."

“How in God’s name are we supposed to substantively respond to something that we’ve only gotten a percentage of?”
THE FIRST-PERSON FOIA MISMATCH

Due Process Failures

Agency Inefficiency

Undermining Transparency
ALTERNATIVE REGIMES

- Administrative Discovery
- Eliminate Request and Return
- Affirmative Disclosure
- Specialized Procedures