THE PEOPLE'S RIGHT TO KNOW: COMPARING HAROLD L. CROSS' PRE- FOIA WORLD TO POST-FOIA TODAY

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Journalists and politicians often disagree over whether the state of freedom of information is better or worse since the passage of the Freedom of Information Act in 1966. This study attempts to provide some historical context by comparing the state of access in 1953 as outlined in detail in The People's Right to Know by Harold L. Cross, the first comprehensive review of case law and statutes in the United States regarding access to public records at local, state and federal agencies. Analysis indicates that the legal right to information, particularly for police records and federal documents, is better today than it was in 1953, but challenges persist regarding compliance, enforcement and the prevalence of exemptions. Recommendations are provided for the next fifty years, including renewal of Cross' urging for a First Amendment right to know.

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*“Public business is the public’s business. The people have a right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.”*¹

These words opened the 1953 book by Harold L. Cross that fueled the twentieth century transparency movement in the United States² and “became the Bible of the press

¹ HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* xiii (1953).

² See HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT* 17 (1999) (noting that Cross’ systematic assessment of government policies and practices confirmed journalists’ feelings that secrecy inhibited information getting to the public); SHANNON E. MARTIN, *FREEDOM OF INFORMATION: THE NEWS THE MEDIA USE* 52 (2008) (writing that “[m]uch of the text is a legal roadmap to case law and statutes that guided the discourse on public records and ‘a right to know’ about government activities”); MICHAEL SCHUDSON *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975*, 42 (2016) (referring to the work as “the much-cited bible of the freedom-of-information movement”); Sam Archibald, *The Early Years of the Freedom of Information Act – 1955 to 1974*, 26 POL. SCI. & POL. 727 (1993) (writing that Cross’ book highlighted the fact that federal laws were being co-opted as tools of secrecy); Bernard Botein, *Book Notes*, 67 HARV. L. REV. 920 (1954) (The review of Cross’ book noted that it is “an excellent handbook which is an essential for editors and which will be useful to lawyers”).

and ultimately a roadmap for the Congress regarding freedom of information.”³ In the more than six decades since the publication of Cross’ book, citizen access to government documents has been codified through the federal Freedom of Information Act,⁴ enshrined in dozens of states through modernized public record laws, and interpreted by state and federal courts. The United States is regarded as a world leader in freedom of information,⁵ and the legal right to access government documents is touted as fundamental to democracy,⁶ and essential for the press’ ability to provide citizens the information they need to self-govern.⁷

³ MICHAEL R. LEMOV, *PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 49 (2011).

⁴ 5 U.S.C. § 552 (2016).

⁵ See David Banisar, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws*, in *PRIVACY INTERNATIONAL* 5 (2006), available at http://www.freedominfo.org/documents/global_survey2006.pdf (last visited July 16, 2016) (explaining that while not the first FOIA law to be enacted in the world, the U.S. FOIA was a milestone that other countries have modeled).

⁶ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that access to information is essential for self-government); Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 *LAW & SOC. INQUIRY* 521 (1977) (arguing that “the First Amendment may require that journalists have access as a general matter to some records”).

⁷ See, e.g., Barbara A. Almanza, Joseph Ismail & Juline E. Mills, *The Impact of Publishing Foodservice Inspection Scores*, 5 *J. FOODSERVICE BUS. RES.* 45-62 (2002)

Journalists and public officials, however, disagree over whether freedom of information is actually better today than in the past. President Barack Obama declared his administration the most transparent in the nation's history,⁸ yet, journalists say the

(showing that publicized food safety inspections decrease consumer complaints); Lori S. Benneer & Sheila M. Olmstead, *The Impacts of the "Right to Know": Information Disclosure and the Violation of Drinking Water Standards*, 56 J. ENVTL. ECON. & MGMT. 117-30 (2008) (requiring disclosure of drinking water contaminants reduces health violations); Society of Professional Journalists, *Open Doors Survey* (2002), <http://www.spj.org/opendoors5.asp> (last visited July 13, 2016) (outlining the prevalence of public records in news stories based on a content-analysis of more than 3,000 stories). In addition, the Sunshine in Government Initiative's FOIA Files is a database of more than 700 news stories made possible through FOIA, <http://sunshineingovernment.org/wordpress/the-foia-files/> (last visited July 13, 2016).

⁸ Exec. Order No. 13,489, 36 C.F.R. 1270 (2009), reprinted in 44 U.S.C. § 2204 (2009). President Barrack Obama signed an executive order and two memoranda his first day of office, Jan. 21, 2009, calling for a new era of openness. White House Executive Order, *Presidential Records*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/presidential-records>; White House Executive Order, *Ethics Commitments by Executive Branch Personnel*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel> (last visited July 16, 2016). Later the president would declare his administration the most transparent in U.S. history. See Jonathan Easley, *Obama Says his is "Most Transparent Administration" Ever*, THE HILL, Feb. 14, 2013, available at <http://thehill.com/blogs/blog-briefing->

Obama administration has been the most secretive.⁹ In 2015, the Society of Professional Journalists and fifty-two other journalism organizations sent a letter to the White House

room/news/283335-obama-this-is-the-most-transparent-administration-in-history (last visited July 18, 2016).

⁹ See Jason Ross Arnold, *Has Obama Delivered the “Most Transparent” Administration in History?* WASH. POST, Mar. 16, 2015, available at <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/16/has-obama-delivered-the-most-transparent-administration-in-history/> (last visited July 16, 2016) (examination of Obama’s pros and cons in transparency); Kenneth T. Walsh, *Reporters Say Obama White House “Most Secretive” Ever*, U.S. NEWS & WORLD REPORT, May 1, 2014, available at <http://www.usnews.com/news/blogs/ken-walshs-washington/2014/05/01/reporters-say-obama-white-house-most-secretive-ever> (last visited July 16, 2016) (survey of sixty-one White House correspondents by *Politico Magazine* found that 42% agreed Obama is the most secretive they’ve ever covered); Ted Bridis & Jack Gillum, *U.S. Government Sets Record for Failures to Find Files When Asked*, ASSOCIATED PRESS, Mar. 18, 2016, <http://bigstory.ap.org/article/697e3523003049cdb0847ecf828afd62/us-govt-sets-record-failures-find-files-when-asked> (study by the Associated Press showed that 77% of FOIA requests in 2015 resulted in blacked out files or no records); Dylan Byers, *Jill Abramson: “This is the Most Secretive White House I Have Ever Dealt With,”* POLITICO, Jan. 23, 2014, available at <http://www.politico.com/blogs/media/2014/01/jill-abramson-this-is-the-most-secretive-white-house-i-have-ever-dealt-with-181742> (last visited July 18, 2016).

urging an end to excessive information controls by public information officers, “essentially forms of censorship – that have surged at all levels of government in the past few decades.”¹⁰ Investigative reporter Ted Gupp wrote in 2007: “Today America is a nation of secrets, an increasingly furtive land where closed doors outnumber open ones and where it is no longer ‘the right to know’ but ‘the need to know’ that is the measure against which access is determined.”¹¹

Access advocates also point to the relative weakness of U.S. FOIA, at least on paper, in relation to the more than 100 other countries that have adopted freedom of information laws. According to one international assessment, U.S. FOIA’s provisions as written place the strength of the law at forty-sixth in the world, below, among others,

¹⁰ *Letter to President Obama*, SOC’Y. PROF. JOURNALISTS, Aug. 10, 2015, available at <http://spj.org/pdf/news/obama-letter-final-08102015.pdf> (last visited July 16, 2016). This letter followed a similar one sent July 8, 2014, on behalf of thirty-eight journalism organizations. See <http://www.spj.org/news.asp?ref=1253>, (last visited July 16, 2016). In full disclosure, the author of this article was president of the Society of Professional Journalists at the time of the first letter, and SPJ Freedom of Information Committee chairman at the time of the second letter.

¹¹ TED GUPP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* 9 (2007) (outlining the prevalence of efforts to thwart journalists’ access to information). Also see Robert McClure, *SEJ Study Finds FOIA Little Used, Plagued by Delays*, 15 SEJ J. 5 (2005) (interviews of fifty-five environmental journalists indicated that two-thirds didn’t use FOIA because of perceptions that it does not work).

Mexico, Russia and Kyrgyzstan.¹² In some parts of the globe, unlike in the United States, the right to know is not just a statutory right but also a constitutional right,¹³ and in some cases, a fundamental human right.¹⁴

This disconnect begs the question: Since passage of FOIA in 1966 and its subsequent amendments, including those in 2016,¹⁵ as well as the adoption of modern

¹² Access Info Europe and the Centre for Law and Democracy rated 105 nations' FOIA laws by various categories for their Global Right to Information Rating, placing the U.S. FOIA at forty-sixth in the world, <https://www.rti-rating.org/country-data> (last visited July 16, 2016). While the ratings assess provisions in the law, they do not account for actual implementation.

¹³ Some nations that recognize access to government information as a constitutional right are Argentina, Brazil, Colombia, El Salvador, Finland, Guatemala, Indonesia, Mexico, South Africa, South Sudan and Uganda. For a breakdown of all national FOIA laws in the world, *see* the Global Right to Information Rating by Access Info Europe and the Centre for Law and Democracy, *supra* note 12. *See also* Toby Mendel, *Freedom of Information: A Comparative Legal Survey* 20-21, 43-126 (2008), http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf (last visited July 16, 2016).

¹⁴ *See* CHERYL ANN BISHOP, ACCESS TO INFORMATION AS A HUMAN RIGHT 21-24 (2012) (explaining the legal reasoning international courts have put forth to determine that access to government information is a human right).

¹⁵ FOIA Improvement Act of 2016, Pub. L. No. 114-185 (2016) (provisions include codifying the presumption of openness, greater independence for the Office of

state public record laws, do citizens and the press have more or less access to government information? Are citizens better or worse off than they were before Congress enacted FOIA fifty years ago?

Some argue that passage of a law is irrelevant, and that statutes have little causal effect on the actual ability for a citizen or journalist to acquire government information; that the mood of the citizenry and times dictate cultural norms and practices; and that transparency and secrecy ebb and flow depending on societal forces, such as war and attitudes toward privacy.¹⁶ Michael Schudson suggests a change in culture occurred between 1960 and 1980 in the United States toward information openness, a shift in opinion, beliefs and “structures of feeling,” which led to creation of FOIA laws – not caused by the laws.¹⁷

Government Information Services, and mandate for a single online FOIA portal for requesters).

¹⁶ See Jeannine E. Relly & Meghna Sabharwal, *Perceptions of Transparency of Government Policymaking: A Cross-National Study*, 26 GOV'T. INFO. Q. 155 (2009) (analysis of nations' FOIA laws indicates that democratic governance has little to do with actual transparency and that many FOIA laws may be merely cosmetic); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L. REV. 6 (2012) (writing, “The extent to which government recognizes the right of access to information depends on society's view of citizenship and on the strength of its commitment to that view”).

¹⁷ SCHUDSON, *supra* note 2, at 16.

David Banisar points out that despite the flood of FOIA laws enacted around the world in the early 2000s:

The culture of secrecy remains strong in many countries. Many of the laws are not adequate and promote access in name only. In some countries, the laws lie dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions and fees are abused by governments... New laws promoting secrecy in the global war on terror have undercut access.¹⁸

Some studies suggest that FOIA laws actually *hinder* access by providing public officials legal rationales for delays, excessive copy fees, and denial. For example, Camaj Lindita interviewed journalists in Kosovo regarding their experience in accessing information since the country adopted FOIA in 2003. Journalists reported that the law was little use to them because of long delays and that public officials co-opted the law to obstruct access, not facilitate it.¹⁹

Researchers are limited in their ability to compare the state of access before FOIA to the state of transparency today. Surveys of journalists and public officials who were working in the 1950s are not possible – those individuals would be a minimum of 85 to 100 years old today, unlikely still employed and unable to compare the state of access. Today's public access audits and empirical studies examining agency transparency

¹⁸ Banisar, *supra* note 5, at 6.

¹⁹ Camaj Lindita, *Gatekeeping the Gatekeepers: International Community and Freedom of Information in Kosovo*, 10 GLOBAL MEDIA J. 15 (2010).

provide good snapshots of access today, but were unheard of then. Scholars can examine the development of statutes and case law over time, as legal scholars conduct for specific access issues,²⁰ but these studies generally do not address actual access on the streets, nor do they examine freedom of information in a broad sense.

Given the relatively little research comparing pre-FOIA access to modern times, this study seeks to provide at least some glimpses through the examination of a written artifact from 1953 that offers a window into the state of access before Congress enacted

²⁰ See, e.g., Matthew D. Bunker & Charles N. Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464 (1998) (discussing the practice by government to hide records through privatization of services); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006) (discussing the history and law of the role of courts in freedom of information); Jonathan Peters & Edson C. Tandoc Jr., “People Who Aren’t Really Reporters at all, Who Have No Professional Qualifications”: Defining a Journalist and Deciding Who May Claim the Privileges, 34 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 40-42 (2013) (a historical and legal analysis of how to define a “journalist” in regard to the law); Jeannine E. Relly & Carol B. Schwalbe, *How Business Lobby Networks Shaped the U.S. Freedom of Information Act: An Examination of 60 Years of Congressional Testimony*, GOV. INFO. Q. in press, available online July 6, 2016, at <http://www.sciencedirect.com/science/article/pii/S0740624X1630048X> (last visited July 18, 2016) (an analysis of congressional testimony since the 1950s by business interests to influence FOIA).

FOIA: *The People's Right to Know* by Cross. The 405-page book, commissioned by the American Society of Newspaper Editors, was intended to lay out the state of access at all levels of government in the United States, including the statutes, case law and actual practice, as it existed in the early 1950s. Cross examined hundreds of court decisions regarding access,²¹ studied the two dozen states that had some form of public record law at the time, and discussed the state of access to federal records. He also noted what journalists told him worked and what didn't work in practice.

This article begins by providing background for the post-World War II access movement and how Cross embarked on the study. Then the article describes the state of public record access law in the 1950s at the state and federal level, as laid out by Cross, and compares his description to today's legal landscape. The discussion summarizes overall themes of how, based on Cross' report, transparency in the United States is stronger since the 1950s, how it is weaker, areas that have remained the same, and what journalists, access advocates and government officials can learn from the passage of time.

This study cannot determine causation – whether transparency laws have hindered or advanced one's ability to access government records. It also cannot determine whether access in practice is undeniably better or worse today than it was sixty years ago. This study can, however, provide some context for how the freedom of information landscape in the United States has evolved – legally and otherwise – since the beginning of the

²¹ CROSS, *supra* note 1, at 11.

transparency movement and adoption of FOIA, by focusing on one significant historical artifact: the 1953 FOI “bible.”²²

THE PEOPLE’S RIGHT TO KNOW

Citizens’ right to be informed about their government has been valued for millennia, at least as far back as the Athenians in 330 B.C.²³ Chinese Emperor T’ai-tsung, who ruled in A.D. 627-649, espoused the virtues of government transparency and expected leaders to “admit their own imperfection as a proof for their love of the truth and in fear of ignorance and darkness.”²⁴ These general principles began to take shape in the West in the 1700s, including passage December 2, 1766, of the world’s first federal freedom of information and press rights legislation by what was then Sweden and Finland.²⁵

²² SCHUDSON, *supra* note 2, at 42 (referring to the work as “the much-cited bible of the freedom-of-information movement”).

²³ See Shannon E. Martin & Gerry Lanosga, *The Historical Legal Underpinnings of Access to Public Documents*, 104 L. LIBR J. 614 (2010) (discussing historical background of how different governments approached transparency).

²⁴ Stephen Lamble, *Freedom of Information, a Finnish Clergyman’s Gift to Democracy*, 97 FREEDOM OF INFO. REV. 3 (2002) (explaining how Anders Chydenius, the father of Sweden’s FOIA law, referenced T’ai-tsung in his writings).

²⁵ The Freedom of the Press Act (1766) celebrates its 250th anniversary Dec. 2, 2016, as U.S. FOIA celebrated its 50th anniversary July 4, 2016. For translated text of Sweden’s law, see http://www.chydenius.net/pdf/worlds_first_foia.pdf (last visited July 13, 2016).

American colonialists took up the right to know in their resistance against the British. However, freedom of information was not explicitly stated in the U.S. Constitution, and even the practices of the founders sometimes contradicted the ideals of transparency.²⁶ Through the years, access to government information in the United States was dictated primarily by routine practices and common law, although glimpses into congressional intent for informing the public could be seen through such legislation as the Printing Act of 1895 and Federal Depository Library Act of 1962.²⁷

²⁶ See, e.g., Martin E. Halstuk, *Policy of Secrecy – Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794-98*, 7 COMM. L. & POL'Y 51 (2002) (examining how the founding fathers operated in secrecy soon after the creation of the nation); Paul H. Gates Jr. & Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, 13 AM. JOURNALISM 38 (1996) (explaining how James Madison's quote about government without popular information as a "prologue to a farce or a tragedy" is often taken out of context); Martin & Lanosga, *supra* note 23, at 618 (discussing how Congress acted in secrecy in its early sessions, including the use of secret votes).

²⁷ See SHANNON E. MARTIN, *FREEDOM OF INFORMATION: THE NEWS THE MEDIA USE* 10 (2008) (explaining the early underpinnings of Congress to inform the public of its governance); Aimee C. Quinn, *Keeping the Citizenry Informed: Early Congressional Printing and 21st Century Information Policy*, 20 GOV. INFO. Q. 281 (2003) (providing a history of congressional intent on informing the public through dissemination of documents).

The Supreme Court of the United States has been reluctant to acknowledge a constitutional right to know, and it wasn't until 1943 that it created a constitutional right to *receive* information through *Martin v. City of Struthers*.²⁸ By the mid-1900s, about half the states had adopted minimalistic statutes addressing document retention, and the federal government had enacted the Administrative Procedure Act in 1946,²⁹ ostensibly to help organize a growing bureaucracy, but often used to hide information.³⁰

World War II noticeably affected the practice of accessing government information. Secrecy and censorship were seen as necessary in a mortal struggle for survival, where “loose lips sink ships.” After the war ended in 1945, any hopes secrecy would be lifted were unfulfilled as anti-Communist fears continued to fuel national security measures. President Harry S. Truman exacerbated the situation by issuing an executive order in peace time to classify even more records as secret. Journalists began voicing their concerns in earnest.³¹

Sigma Delta Chi (now the Society of Professional Journalists) and the American Society of Newspaper Editors (now the American Society of News Editors) began receiving more and more requests for help from newspapers stymied by government roadblocks. ASNE FOI Committee Chairman James S. Pope, managing editor of the

²⁸ 319 U.S. 141 (1943).

²⁹ 5 U.S.C. 1002, 60 Stat. 238 (1946).

³⁰ CROSS, *supra* note 1, at 223-28; SCHUDSON, *supra* note 2, at 34, 57.

³¹ See SCHUDSON, *supra* note 2, at 42.

Louisville Courier-Journal, was baffled at what to tell fellow journalists. “We knew it was all wrong, but we didn’t know how to start the battle for reformation,”³² he said.

The ASNE FOI Committee initially started with a focus on international freedom of information but within a year of its founding in 1949 switched gears, noting in its report to members of the “growing tendency” of domestic bureaucrats high and low “to forget they are stewards of the people and to act instead as though taxpayers were their servants.”³³ The committee aided, for example, an editor from Moose Lake, Minnesota, who requested vital statistics records from his county, was denied, objected in print, and then faced a libel suit filed by the county clerk. The editor won the suit with the help of ASNE.³⁴

Frustrated at what he was seeing nationally, Pope felt stymied. “The mystery of the law had us fogbound,” he said. “Who could pierce it?”³⁵ He reached out to Cross, an attorney for the *New York Herald Tribune* and professor at Columbia University’s School of Journalism. The organization commissioned Cross to publish a report on the legal state of access to public records at all levels of government. Specifically, the organization wanted more information about the state of the law, what battles had been waged, who

³² FOERSTEL, *supra* note 2, at 16.

³³ George Kennedy, *Advocates of Openness: The Freedom of Information Movement* 24 (August 1978) (unpublished Ph.D. dissertation, University of Missouri) (on file with University Microfilms International).

³⁴ *Id.* at 25.

³⁵ *Id.* at 30.

won, and how they won.³⁶ At their annual meeting in April 1951, ASNE leaders authorized Cross to conduct a “comprehensive report on customs, laws and court decisions affecting our free access to public information whether it is recorded on police blotters or in the files of the national government.”³⁷

The report would be the first of its kind. Previously, *Hartford Courant* Editor Herbert Brucker had published *Freedom of Information*,³⁸ in 1949, a book espousing the need for a vibrant and free press, and Kent Cooper was credited by *The New York Times* as coining the phrase “right to know” in 1945, although Cooper primarily focused on propaganda and news suppression in other countries.³⁹ Nobody had yet outlined in detail

³⁶ See CROSS, *supra* note 1, at xv.

³⁷ *Id.*

³⁸ HERBERT BRUCKER, *FREEDOM OF INFORMATION* 276 (1949) (This book did not focus on freedom of information in the sense that the term is used today – regarding access to government records or proceedings. Brucker was more concerned about the press censorship he saw around the world and during World War II in the United States. He defines freedom of information as freedom for an independent and vibrant press – freedom from government control, or any attachment to any class, political party, economic group or other fraction of society.)

³⁹ See Kent Cooper's remarks from a speech, as executive director of *The Associated Press*, cited in Editorial, *The Right to Know*, N.Y. TIMES, January 23, 1945, at 18. Cooper elaborated on his thoughts in his book 11 years later, KENT COOPER, *THE RIGHT TO KNOW: AN EXPOSITION OF THE EVILS OF NEWS SUPPRESSION AND PROPAGANDA* (1956).

the state of government access, legal or otherwise, in the United States. The undertaking was perhaps as daunting as the work of media law scholars today who painstakingly scour court decisions and statutes to describe the state of freedom of information law.⁴⁰

Cross intended the report to serve newspaper editors, college students, media law attorneys and scholars, so he wrote for a broad audience.⁴¹ His work resulted in a 405-page book that included an introduction to general access law provisions (that is, fees, enforcement), and chapters on the right of inspection, access to state and local records, police records, judicial records, judicial proceedings, administrative proceedings, and federal records. He included appendices to list court cases litigated by newspapers, the text of state open record laws, relevant court cases, attorneys general opinions, and federal regulations. He examined the statutes, constitutions, case law, attorneys general opinions, and regulations for the federal government, the forty-eight states, and the District of Columbia.

Because of the report, Cross became known as a national expert on freedom of information, providing testimony and written assistance at least twenty-six times to the Moss Committee charged with drafting a legislative amendment to the Administrative Practices Act. Cross, who died in 1959 at age 69, did not live to see that amendment,

⁴⁰ See, e.g., RICHARD J. PELTZ-STEELE, *THE LAW OF ACCESS TO GOVERNMENT* (2012).

⁴¹ CROSS, *supra* note 1, at xvi.

what is now called the Freedom of Information Act, signed into law, but Cross is credited with inspiring Moss to sponsor the legislation.⁴²

METHOD

This study is based on an examination of each page of *The People's Right to Know* for all mentions of the state of access at the time – legally or in practice. It excluded two chapters regarding access to judicial proceedings and public meetings because of the focus on access to government records. In some cases the resulting data listed specific records that were considered open or closed at the time. In other cases, the data reflected the general landscape in records access, such as the definition of public records or legal limitations on the type of people permitted to request records.

Data were combined into similar groupings and then compared to the current state of access in the United States, based on published research and the “state compare” function of the Reporters Committee for Freedom of the Press fifty-state open government guide.⁴³ Conclusions are noted for areas that appear to have experienced

⁴² See SCHUDSON, *supra* note 2, at 43 (based on a letter between Moss and the American Society of Newspaper Editors, Moss traced the origins of the Freedom of Information Act to a conversation he had with Cross in 1954, when Cross suggested amending the Administrative Procedure Act of 1946).

⁴³ The *Open Government Guide* by the Reporters Committee for Freedom of the Press provides an online compare function for various elements of all states' public record laws, <https://www.rcfp.org/open-government-guide> (last visited July 13, 2016).

increased access since the 1950s, areas that appear less transparent, and areas that appear the same.

FOI LANDSCAPE OF 1953

As described by Cross, the legal landscape in 1953 for freedom of information was nascent, relying upon an amalgamation of young state laws, common law, case law, attorneys general opinions and agency regulations. About half the states at the time had general public record statutes providing a general right of inspection of records, according to Cross.⁴⁴ He wrote that there also were hundreds of other provisions sprinkled throughout state laws regarding specific records, similar to today, but that he would focus just on statutes that provided an overall right of inspection.⁴⁵

Cross wrote that in England, courts had declared that there was no general common law right for all persons to inspect public records. There was support for the right of inspection for use in litigation, and that migrated to the United States. Over time, courts started acknowledging purposes for public records other than just litigation.⁴⁶ He wrote that there was no general common law right for just anyone to inspect records –

⁴⁴ CROSS, *supra* note 1, at 337-47. States were Alabama, Arizona, California, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Utah, Virginia, West Virginia and Wisconsin.

⁴⁵ *Id.* at 48-59.

⁴⁶ *Id.* at 26.

typically only those who had a valid reason to see the information – although he noted that was changing in some states. Newspaper suits before 1900 generally were few and unsuccessful, but that was changing in the twentieth century.

Cross broke the states into three groups: (1) general inspection states (23) with laws creating a right to access records in general except for those records deemed secret;⁴⁷ (2) specific statute states (15) that specified what records would be public,⁴⁸ and (3) common law states (10) that had no laws and left it to common law practice.⁴⁹ Today all of the states would fit into the first category. Cross noted that the common law states were the least favorable toward journalists' access to records because they relied on the whims of agencies and trial judges. The District of Columbia had no general statute, but provided that certain records were public, such as property records and police logs.⁵⁰

⁴⁷ *Id.* at 51. States were Alabama, Arizona, California, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Utah and Wisconsin.

⁴⁸ *Id.* at 53. States were Colorado, Connecticut, Illinois, Indiana, Kansas, Mississippi, Missouri, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, Virginia, Washington and Wyoming.

⁴⁹ *Id.* at 54. States were Arkansas, Delaware, Maryland, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont and West Virginia.

⁵⁰ *Id.* at 55.

Louisiana had the nation's most specific and comprehensive statute, Cross wrote,⁵¹ although Florida had the strongest worded statute, even if shorter and more concise.

Cross suggested that new legislation should remove “moldy common law restrictions” concerning status, interest, motives and purposes of requesters, and limit judicial discretion to deny enforcement writs.⁵² The right of inspection, in general, at that time had been applied by statute to specific records, such as those related to elections, fees, salaries, revenues, title to property, judicial proceedings, and other areas where any member of a community would have a legitimate interest in them.⁵³

Also, at the time, newspapers were still fighting for fundamental press freedoms, such as the battles against prior restraint and criminal libel. For example, Cross notes, some states still employed “You Can't Print That” statutes, which allowed access to records but prohibited the publication of certain information. Wisconsin had a statute, for example, prohibiting publication of the names of female rape victims that were available in public records.⁵⁴ Also, most state courts did not consider all public records as privileged in the case of libel lawsuits, such as judicial records that had been filed but not yet the subject of judicial action or disposition. Some states were beginning to move away from that, Cross noted, considering all public records as privileged documents in libel cases.⁵⁵

⁵¹ *Id.* at 8.

⁵² *Id.* at 58.

⁵³ *Id.* at 65.

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 17-18.

In general, Cross found what he perceived as a shift toward secrecy at all levels of government. For example, income tax records had been considered open to public inspection in some cases, but were being closed. He also noted an increased shift toward secrecy in judicial records and documents regarding family relationships – divorce, juvenile court, domestic relations, family, youthful offender, wayward minor, marriage and support of dependents.

However, he found a general improvement in access developing through statutes, such as broadening the definition of “public records,” which previously had been restricted to those specifically made public by law, or those records having specific relevance to an individual requester. Cross wrote that there were two kinds of court decisions: (1) rulings interpreting statutes, which often did not go well for requesters because the statutes were not well-developed – “The applicant might have been better off at common law. A statute is not always a help.”⁵⁶ (2) Rulings applying common law where statutes did not exist.

Without many statutes to guide agencies, journalists or the courts, Cross noted that a growing type of access law was in “official regulations,” where agencies created their own processes and policies, particularly at the federal level. Many state statutes granted officials authority to issue regulations on access to records.⁵⁷ This, he says, is where journalists were running into problems.

Definition of “Public Record”

⁵⁶ *Id.* at 22.

⁵⁷ *Id.* at 23.

Cross listed fifteen states that had outlined in statute the definition of a “public record,” although the laws were generally vague and tended to focus on the creation and retention of “writings.”⁵⁸ Louisiana’s statute was most detailed, and included a list of records to be made available and kept secret.⁵⁹ Cross described Louisiana’s lengthy law as “useful, convenient, and liberal,” and “well-liked by newsmen.”⁶⁰ In states that did not provide a statutory definition, courts created their own interpretation through case law, some better than others.⁶¹ For example, Indiana’s Supreme Court defined a “public record” as a document *required by law* “to be kept,”⁶² which created problems for requesters. Legally, a record would not be public unless specifically mentioned by statute, court rule, or attorney general opinion to be maintained by the government. This excluded the bulk of documents.⁶³ Cross noted a better approach: Wisconsin’s courts creating the broadest definition of a public record as anything created and held by government,⁶⁴ which is more representative of definitions today.

⁵⁸ *Id.* at 38-47. States with statutes defining public records were California, Delaware, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Montana, New Jersey, North Carolina, Oregon, Tennessee, Texas and Utah.

⁵⁹ *Id.* at 328-36.

⁶⁰ *Id.* at 39.

⁶¹ *Id.* at 21.

⁶² *Id.* at 43.

⁶³ *Id.* at 33.

⁶⁴ *Id.* at 44.

Cross also noted that there were thousands of state statutes regarding access to specific records sprinkled throughout state laws, such as access to juvenile court records or auto registration records. He chose to focus on the records most relevant to newspapers.⁶⁵ Also, he noted that someone needed to look at all the statutes to find exemptions, given the growing legal terminology that records would be public “except as otherwise provided by statute.”⁶⁶ Ultimately, Cross wrote that the definition of public record was a problem in most states – dependent on accident of statute or the intent with which the record was made. “The right should depend on the status of the document as a record of exercise of official functions,”⁶⁷ he wrote.

Today the definitions of “public records” at the federal and state levels have more clarity, in line with what Cross had suggested, typically including any recorded materials, including video, audio or electronic, created or held by a government agency.⁶⁸ In this respect, citizen access has improved since 1953. Still, issues continue to arise, including

⁶⁵ *Id.* at 21.

⁶⁶ *Id.* at 34.

⁶⁷ *Id.* at 47.

⁶⁸ For example, the definition of a record in U.S. FOIA is, “Any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.” 5 U.S.C. § 552(f)(2) (2016).

the myriad of exemptions for specific types of records,⁶⁹ and emerging technological issues, such as whether records sent from officials' private cell phones or email accounts are subject to public record laws.⁷⁰

Who can Inspect Records

Cross noted that in 1953 that most jurisdictions factored into their record release the type of person asking to see a record and the purpose of the request. This was based

⁶⁹ Exemption b(3) in the Freedom of Information Act allows for records to be kept secret under individual statutes passed by Congress; therefore, hundreds of exemptions have been added throughout federal statutes. Access advocates identify this exemption as one of the most difficult to control because secrecy provisions find themselves in any bill. *See, e.g.,* Jennifer LaFleur, Al Shaw & Jeff Larson, *FOIA b(3) Exemptions*, PRO PUBLICA, <http://projects.propublica.org/foia-exemptions/> (last visited July 13, 2016) (showing prevalence of different exemptions by agency, including making secret information about watermelon handlers, avocado importers and caves).

⁷⁰ *See, e.g.,* Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?* 19 COMM. L. & POL'Y 293 (2014) (examining how the states, through statute and case law, view access to public officials work-related communications *via* personal phone or email); Kyu Ho Youm, *Access to Email and the Right of Privacy in the Workplace*, in DAXTON STEWART ED., *SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSIONALS* 97 (2012) (examining case law concerning access to government officials' email communications).

on the common law notion, Cross wrote, that records were provided only for purposes that were “lawful, proper or legitimate.”⁷¹ Some people not allowed to see public records included those “with a destructive or other unlawful purpose.”⁷² In addition, some state statutes limited requesters to certain legal standing. For example, New York limited access to “taxpayers,” Florida to “citizens,” and Louisiana to “elector or taxpayer.”⁷³

New statutes, however, were beginning to broaden who had a right to inspect records, Cross wrote.⁷⁴ This broadening was pushed by commercial interests who wanted access to records, particularly title records, for doing business. Colorado and Kansas, for example, provided special access to title companies for records and nobody else.⁷⁵ He noted that Pennsylvania courts ruled that no particular reason was needed to see a record, and the right may be exercised even out of “idle curiosity.”⁷⁶ Tennessee courts ruled that political hostility to the government is no excuse for refusing inspection.⁷⁷

Journalists were generally seen as favored requesters in the 1950s, and often received better service than other citizens. Cross made a case that journalists should be treated differently than others, particularly in a chapter he dedicated to “Newspapers as

⁷¹ CROSS, *supra* note 1, at 36.

⁷² *Id.* at 14.

⁷³ *Id.* at 15.

⁷⁴ *Id.* at 16.

⁷⁵ *Id.* at 53.

⁷⁶ *Id.* at 36.

⁷⁷ *Id.* at 36.

Litigants.”⁷⁸ He argued that newspapers had been generally successful in winning lawsuits because the news function has a “sufficient special interest.”⁷⁹ Also, he argued that newspapers do not act out of idle curiosity, do not sell records to disadvantage agencies, do not clutter up records offices, rarely demand sweeping inspection of all records, and do not harass. “In short, in general the newspaper purpose is lawful.”⁸⁰ Further, Cross noted lower court rulings that suggested the press had a First Amendment right to access public records and attend government proceedings, and he expressed hope the U.S. Supreme Court would enshrine such a constitutional right to accessing public records.⁸¹ That has yet to come to pass.

Today, the state of access is better in this area as few states distinguish between requesters or purpose, or impose limitations on citizenry, let alone voting status or tax-paying status.⁸² Some states impose restrictions on prison inmates,⁸³ and those who are

⁷⁸ *Id.* at 122-132.

⁷⁹ *Id.* at 123.

⁸⁰ *Id.* at 123.

⁸¹ *Id.* at 10.

⁸² Arizona Public Records Law gives “any person” the right inspect public records. ARIZ. REV. STAT. ANN. § 39-121 (2016). Similar wording is present in public record statutes of California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming.

not citizens of the state or the United States.⁸⁴ Also, as a sign that *all* citizens should be treated equally, today for the most part journalists have no special legal treatment in accessing records, except for expedited processing and lower fees in federal FOIA.⁸⁵

Penalties for Agency Noncompliance

Cross lamented that the only recourse journalists and citizens had when denied records was granted through common law: writ of mandamus. He provided several examples of how this put the citizen at a disadvantage, forcing a person to hire an

⁸³ Washington State's statute imposes restrictions on inmates, including the courts' ability to impose injunctions preventing inmates from submitting public record requests. REV. CODE WASH. § 42.56.565 (2016) was upheld in *Franklin County Sheriff's Office v. Parmelee*, 285 P. 3d 67 (Wash. 2012). Arkansas, as well, prohibits incarcerated felons from obtaining records from the Department of Corrections. *See* ARK. CODE ANN. § 25-19-105(a)(1) (2016).

⁸⁴ *See, e.g.,* *McBurney v. Young*, 122 S. Ct. 1709 (2013) (U.S. Supreme Court unanimously upheld the Virginia public record law that limited requests to citizens of the state, saying non-citizens don't foot the bill for records and do not have an interest in scrutinizing governments they do not live under. Justice Alito wrote: "This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." at 1718).

⁸⁵ *See* 5 U.S.C. § 552 (2016), specifically, *see* 4(A) ii. II dictating reasonable fees for the news media, scientific research, and other noncommercial uses, and *see* 6(E) regarding expedited processing for those who can demonstrate a "compelling need."

attorney and take the time to sue civilly, and, therefore, that the right of access was “absolute in theory” but “qualified in practice.”⁸⁶

Five state statutes included criminal penalties against public officials who did not follow the law. North Carolina and West Virginia declared a violation a misdemeanor.⁸⁷ Alabama provided for a fine of not less than \$50 for any public officer not allowing any person to examine a record free of charge.⁸⁸ Florida made officials subject to removal or impeachment and guilty of a misdemeanor punishable by fine or imprisonment.⁸⁹ Louisiana made it a misdemeanor punishable by fine or imprisonment, or for willful destruction or concealment a crime punishable “by imprisonment at hard labor in the penitentiary.”⁹⁰ Cross noted no punishment at the federal level, or for judicial records.

In an examination of access law enforcement provisions in 2010, Daxton “Chip” Stewart found that nearly every jurisdiction had some form of enforcement mechanism today. All but sixteen states provided for some kind of civil or criminal penalty, including jail time in some cases. Many allowed for award of attorney fees for successful plaintiffs, and sometimes punitive damages.⁹¹ Stewart wrote, echoing Cross, “However, the

⁸⁶ CROSS, *supra* note 1, at 31.

⁸⁷ *Id.* at 344.

⁸⁸ *Id.* at 337.

⁸⁹ *Id.* at 338.

⁹⁰ *Id.* at 333.

⁹¹ Washington State, for example, allows judges to award up to \$100 per day for each day the requester was denied the record, *see* REV. CODE WASH. § 42.56.505(4) (2016). In 2003, the former mayor of Mesa, Washington, sued over denial of records and

practical availability of these remedies makes them problematic.”⁹² Citizens face the same issues today as they did in 1953: Hiring a lawyer to take on City Hall can be expensive, time-consuming and intimidating. Even news organizations are less likely to sue for public records today because of time and resource constraints.⁹³ The system remains stacked against the requester, as it was in 1953.

won a judgment of \$353,000 in penalties, reduced in 2016 to \$175,000, the judge citing a concern that the payout would bankrupt the farm town of 500 people. *See* Wendy Culverwell, *Judge Slashes Penalty in Mesa Public Records Case*, TRI-CITY HERALD, July 1, 2016, *available at* <http://www.tri-cityherald.com/news/local/article86976727.html> (last visited July 18, 2016).

⁹² Daxton “Chip” Stewart, *Let the Sunshine In, or Else: An Examination of the ‘Teeth’ of State and Federal Open Meetings and Open Records Laws* 15 COMM. L. & POL’Y 298 (2010).

⁹³ In a Knight Foundation survey of 66 news editors in 2016, two-thirds said news organizations were less likely to sue for First Amendment issues than they were ten years ago. *See* In Defense of the First Amendment: U.S. News Leaders Feel Less Able to Confront Issues in Court in the Digital Age, *available at* <http://www.knightfoundation.org/press-room/press-release/news-organizations-ability-champion-first-amendmen/> (last visited July 18, 2016). Also, similar findings were reported in a 2009 Open Government Survey by the Media Law Research Center and National Freedom of Information Coalition, *available at* http://www.nfoic.org/uploads/foi_pdfs/MLRC-NFOIC-Open-Govt-Survey.pdf (last visited July 13, 2016).

Fees and the Right to Copy

In general, statutes and common law were broad enough to allow anyone to copy, extract or photograph records that they inspected, Cross noted. However, he did not specify whether the laws addressed copy fees.⁹⁴ In parts of the book, he wrote that some agencies earned revenue from record copies, but did not note that fees were a barrier for the press or citizens, perhaps because machine copies were relatively new in 1953 (the first Xerox machine was introduced in 1949). Today excessive fees, particularly for search and redaction time, can be problematic for requesters, more so than in 1953.⁹⁵

⁹⁴ CROSS, *supra* note 1, at 34-35.

⁹⁵ See Tae Ho Lee, *Public Records Fees Hidden in the Law: A Study of Conflicting Judicial Approaches to the Determination of the Scope of Imposable Public Records Fees*, 21 COMM. L. & POL'Y 251 (2016) (pointing out that laws are inconsistent and agencies often vague in what they charge to requesters); Emily Grannis, *Paying for Public Access: FOI Fees Add Up For Journalists Trying to Explain Government Activities*, NEWS MEDIA & L. 3 (2014), available at <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2014/paying-public-access> (last visited July 13, 2016) (noting problems of growing fees as barriers to obtaining records); Anna Clark, *How 'The Public is Priced Out of Public Records' By Michigan Universities*, COLUM. JOURNALISM R., Apr. 5, 2016, available at http://www.cjr.org/united_states_project/how_the_public_is_priced_out_of_public_records_by_michigan_universities.php (last visited July 13, 2016) (discussing universities that wanted to charge more than \$20,000 to students requesting public records for an FOI

Access to Specific Record Categories

Cross listed throughout his book different types of records and whether they were generally deemed public or secret. In addition to addressing specific records in the chapters, he provided a list of eighty-two types of records and their status as opened or closed, in Appendix 4.⁹⁶ For the most part they mirrored the laws and practices of today, but in some cases certain types of records were open that aren't open today, and in other cases records were more restrictive than today.

Similarities to Today

Records deemed secret then, as today, included those involving national security, diplomatic correspondence, and communications by government informants.⁹⁷ Others included records of heads of states (that is, president or governors),⁹⁸ and catch-all exemptions where release would be detrimental to the public interest.⁹⁹ Some records were considered inherently secret because they contained information deemed private,

audit); Nick Grube, *Many States Charge Insane Fees For Access To Public Records*, HUFFINGTON POST, Oct. 17, 2013, http://www.huffingtonpost.com/2013/10/17/fees-for-public-records_n_4119049.html (last visited July 13, 2016) (points out examples of exorbitant fees charged to journalists).

⁹⁶ CROSS, *supra* note 1, at 348-354.

⁹⁷ *Id.* at 6.

⁹⁸ *Id.* at 80.

⁹⁹ *Id.* at 81.

including medical and mental records in state institutions, tax records, “correspondence between officials in certain circumstances,” and certain vital statistics.¹⁰⁰ Records that were routinely available then, as today, included county board of supervisor records, salary books, jail records, budgets, alcohol sale licenses and state fire marshal findings.¹⁰¹

More Restrictive in 1953

Records deemed closed in 1953 that would likely be available today in most jurisdictions included automobile accident reports, which were available only to those involved in the accident. Hearings and records involving juvenile courts were generally

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.* at 66. (Cross lists dozens of records deemed public by various agencies' statutes or case law, including auditor bills (Vermont, 1906), tax collection records (Alabama, 1882), expenditures of public funds for entertainment of conference of governors (Michigan, 1928), dental examiners board examination papers (Florida, 1940), city tax records (Tennessee, 1903), public works records (New York, 1933), financial records of a county (Texas, 1915), meeting minutes, ordinances (Missouri, 1936, Connecticut, 1950), death records except strong trend toward increased secrecy (New York, 1892), contracts (Alabama, 1895), action by smoke control board, with complainant names redacted (New York, 1951), health department final reports, but not investigative reports (California, 1951), marriage licenses with some exceptions toward trend in secrecy (Michigan, 1907), jail records (Alabama, 1941), and property assessment records (Illinois, 1943)).

considered secret, or open only to those who involved.¹⁰² In many states today that information is public. Records under common law that generally were not regarded as important to the public or journalists, and therefore kept secret, included real estate deeds, mortgages, probated wills, and money judgments rendered in courts,¹⁰³ which are routinely made public today. Some states in 1953 withheld records that would compete with the revenue of an agency.¹⁰⁴

Simple communications in writing passing between officials could be kept secret and there was no general right of inspection of records of executive departments that were kept merely as evidence of transactions in departments.¹⁰⁵ This speaks to what many jurisdictions consider today as the “deliberative” exemption (that is, Exemption 5 in FOIA), to allow for free and open exchanges in private before final actions are considered. However, in many jurisdictions today requesters have had success, for example, in acquiring routine email communications among city council members.

Vital statistics regarding marriage, birth, death and divorce, were being increasingly restricted to those who had a particular status or need, Cross wrote.¹⁰⁶ Some sixteen states had adopted the Uniform Vital Statistics Act policies to limit disclosure of these records to those with a “direct interest in the matter.”¹⁰⁷ He saw this as a growing

¹⁰² *Id.* at 7.

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 78.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 93.

trend toward closure, and that the press largely was apathetic in pushing back. These restrictions continue today in some states, but not all. Divorce records are generally available to the public in most jurisdictions today through the courts.

Health department records were all secret, except for statistics, which made it difficult to verify the statistics, Cross noted.¹⁰⁸ While medical and private information pertaining to individuals might be kept secret today, other health department information often is released, such as restaurant inspection reports.

Some records were kept secret if they were not officially required by statute to be kept, even if the agency maintained the records. That was the case in Washington State, Kentucky and New Jersey. For example, a report on the conditions of a police department was held non-public because no statute required it to be filed or recorded.¹⁰⁹ Other records deemed secret by court or statute, often because there was no law saying they had to be kept, included applications for grazing (Montana, 1921), probate indices (Ohio, 1946), redemption of lands from tax sales (Washington, 1905), city engineer records (Kentucky, 1913), and a report by the attorney general to governor regarding an investigation of the state land commissioner (Arizona, 1951).¹¹⁰

Cross devoted an entire chapter to the problems in acquiring police records – the only chapter focused on a specific type of record.¹¹¹ He noted that the key to getting this sort of information rested with good sourcing between journalists and police officials:

¹⁰⁸ *Id.* at 87.

¹⁰⁹ *Id.* at 77.

¹¹⁰ *Id.* at 81-83.

¹¹¹ *Id.* at 95-121 (Chapter 8: Police Records).

“Sugar, plus judicious admixtures of strength and determination, catches more ‘police news’ than vinegar.”¹¹² Cross wrote, however, that the law should be better. He described it as divergent, restrictive, obscure and nonexistent. Few court decisions and an excess of dicta in judicial opinions and loose definitions were causing mass confusion. New York City, for example, considered all police records secret, including blotter information – leaving reporters to rely on relationships with officers to get information. Meanwhile, in other parts of the state journalists could get full access to police records. Louisiana state law explicitly directed police to explain the cause of jailing and make that open to anyone. Other jurisdictions fell somewhere between New York City and Louisiana.¹¹³ Much case law indicated that records could be kept secret until the matter was settled in open court, or until the police were done with their investigation and it entered the courts (typical of today’s “investigatory” exemptions in most state laws).

Cross advocated that specific well-defined instructions be adopted by statute to clear up the confusion. Barring better statutes, Cross urged news companies to sue for access, highlighting the fact the long custom of providing the information informally. He also suggested more specificity in police record definitions so routine crime descriptions would not be deemed secret as investigatory evidence or informant records.¹¹⁴

More Open in 1953

¹¹² *Id.* at 96.

¹¹³ *Id.* at 98.

¹¹⁴ *Id.* at 121.

Records considered open in 1953 but generally secret in today's world included motor vehicle registration and, in some states, drivers' licenses.¹¹⁵ Cross noted a general trend toward secrecy with these records, mainly because officials saw the requests as a nuisance.¹¹⁶ Eventually these records would become private because of the Driver's Privacy Protection Act of 1994¹¹⁷ and its backing by the Supreme Court in *Reno v. Condon*.¹¹⁸ Other open records included school census records, which are often kept secret today because of the Family Educational Right to Privacy Act.¹¹⁹

Public assistance program¹²⁰ records were sometimes open for inspection, including the lists of vagrants lodged at city expense. Given the relative newness of federal and state social programs, agencies were working through the issues. The federal Bureau of Unemployment Security had started divvying out matching funds to states with the requirement that they keep the information secret. This spread to other programs, such as welfare relief records, Cross wrote. When journalists exposed fraud in the programs, states began repealing the secrecy laws to foster transparency and accountability. Congress passed the Jenner amendment, for example, to repeal mandatory secrecy provisions of the Social Security Act, leading to a better-run system in

¹¹⁵ *Id.* at 67-68.

¹¹⁶ *Id.* at 88.

¹¹⁷ 18 U.S. Code § 2721 (2016).

¹¹⁸ *Reno v. Condon*, 528 U.S. 141 (2000). *See also* Joey Senat, *Reno v. Condon Opens Door to More Access Limits*, 24 NEWSPAPER RES. J. 63 (2003).

¹¹⁹ 20 U.S. Code § 1232g; 34 CFR Part 99 (2016).

¹²⁰ CROSS, *supra* note 1, at 18.

eliminating unqualified recipients. Cross anticipated, though, secrecy would return, which it did.¹²¹

Judicial Records

Cross dedicated a chapter to judicial records and a chapter to judicial proceedings. This might seem odd today because judicial records are generally not subject to public record statutes; rather, most states allow courts to develop their own rules. However, at the time, Cross wrote, many states that had statutes regulating access to records had broad enough language to include court records.¹²² This was particularly true where county clerks were the legal custodians of judicial records.

Cross noted that the general philosophy at the time was that nearly all judicial records were open to anyone through common law, though some court definitions clarified that “this does not mean that inspection is for every one or mere pastime, whim or fancy.”¹²³ Cross expressed puzzlement by the courts’ fear of people reading through judicial records for salacious details about their co-workers, neighbors and family members. This mirrors a similar debate today of whether to post electronic court records

¹²¹ *Id.* at 89-90. The Social Security Act, 42 U.S.C. § 1397 (2016), provides confidentiality for those on public assistance.

¹²² *Id.* at 139 (states noted by Cross were Arizona, California, Idaho, Louisiana, Montana, Oregon and Utah, Tennessee, Illinois and Virginia).

¹²³ *Id.* at 136.

online, lest “jammie surfers” scour the Internet from the comfort of their basements for dirt on their friends and family.¹²⁴

Typical judicial records deemed public in 1953 included affidavits, lawsuits, court opinions, fee books, indictments, jury rolls, warrants, and records of proceedings, including witness testimony.¹²⁵ Records not deemed public involved adoptions, attachments in civil actions involving private information, attorney disbarment or suspension, coroners’ records (although inquests were open), divorce litigation (although it appeared to be opening up a little because of changes in societal norms),¹²⁶ domestic relations records, and juvenile court records. Courts were provided the ability to seal records as they deemed fit. Cross concluded that the right to access judicial records, with some exceptions, was clear, strong and dependable.

Not a lot has changed since 1953 regarding judicial records, other than the establishment of court rules to regulate judicial record access, and some opening of records previously deemed sensitive. For example, divorce records today are

¹²⁴ See Richard J. Peltz-Steele, *Electronic Court Record Access: Present Landscape, Neutral Principles, and the Looming Interloper of Contextual Privacy*, in CHARLES N. DAVIS & DAVID CUILLIER, *TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD* 70 (2014) (examining the courts’ reasoning for “practical obscurity,” where requesters are forced to physically go to courthouses to see court records rather than online to avoid casual snooping from jammie surfers).

¹²⁵ CROSS, *supra* note 1, at 142.

¹²⁶ *Id.* at 147-48.

predominantly open to public inspection unless sealed for special reasons. Also, in many states today, juvenile criminal records and proceedings are public.

Federal Records

Only fifty-three of the 247 pages of *The People's Right to Know* are dedicated to accessing federal records. The reason is made clear in the beginning of Chapter 8: “The dismaying, bewildering fact is that in the absence of a general or specific act of Congress creating a clear right to inspect – and such acts are not numerous – there is no enforceable legal right in public or press to inspect any federal non-judicial record.”¹²⁷ Basically, there wasn't much for Cross to write about because the access landscape at the federal level was bleak.

Records of the executive department were considered “quasi-confidential” and “privileged communications.”¹²⁸ Administrative agencies provided documents to the public only when it served their purposes. Departmental rules and regulations provided for some access to some records and hearings, but it was at the discretion of the agency head if he or she determined the information of “public interest” and “compatible with the welfare of society.”¹²⁹

Cross outlined the reasons for the lack of legal teeth for requesters to inspect federal records about the executive branch:

¹²⁷ *Id.* at 197.

¹²⁸ *Id.* at 198.

¹²⁹ *Id.* at 199.

1. Separation of powers prevented the courts from compelling the president or executive department heads to provide information. Examples of records kept secret included investigative reports of executive departments, and the president had refused to disclose to Congress numerous other records.¹³⁰ The courts also held that the question of whether records would be against the public interest should be up to the executive branch to decide, not for the courts. This power had not been fully tested, but Cross wrote, "It should be."¹³¹
2. A line of attorneys general opinions concluded that executive department records were privileged communications. Some records kept secret because of that included correspondence between officials concerning violations of internal revenue law.
3. The Administrative Procedure Act of 1946 specifically allowed departments to come up with their own rules, and provided a sweeping exception to disclosure for "any matter relating solely to the internal management of an agency."¹³² This is similar to Exemption 5 in FOIA and deliberative exemptions in state laws today, which remain problematic for requesters.
4. Other actions by Congress kept federal records secret, similar to Exemption b(3) in FOIA, adoption of the Driver's Privacy Protection Act, the Family Educational Right and Privacy Act, the Health Insurance Portability and

¹³⁰ *Id.* at 205.

¹³¹ *Id.* at 200.

¹³² *Id.* at 211.

Accountability Act, and the thousands of exemptions sprinkled throughout state laws.

5. A dearth of court decisions at the federal level.¹³³ Cross mentioned, as well, the use of the “state secrets” privilege by the president to keep records secret, even from the courts.

Cross noted the increasing congressional impatience with the growing secrecy in the executive branch. “Change must come, and the time is ripe to accept the challenge,” he wrote. “The primary forum is Congress. Relief in the courts is by no means hopeless.”¹³⁴ Cross noted that he found not a single lawsuit where a newspaper sued for access to federal records. Cross did not address secrecy in military censorship or in the field of atomic energy, a sensitive area of the time given the recent detonation of the atomic bomb and growing Cold War fears.

Cross outlined the broad scope of records specifically kept secret under the Administrative Procedure Act of 1946, listing seventy-nine examples, including diplomatic codes, trade secrets, cotton and tobacco data, census records, oil and natural gas records, tax returns, and investigations of investment companies. In general, many of the records, particularly those involving privacy and national security, would be considered exempt through common law, Cross wrote. On the other hand, the Administrative Procedure Act did provide for certain records to be made public, including the names and contributions of lobbyists, farm acreage allotments, Customs Court decisions, collective bargaining agreements and coal mine safety conditions.

¹³³ *Id.* at 201.

¹³⁴ *Id.* at 202.

The statutes, however, had relatively small impact on access, Cross argued, compared to departmental and agency regulations – the discretion of departments to essentially set their own disclosure rules. The Department of Justice regulations stated:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of the United States Attorneys, Federal Bureau of Investigation, United States Marshals and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential.¹³⁵

The regulations also instructed government employees to decline any subpoena for records.

Regarding the federal government, Cross provided these recommendations:

1. The access community should argue a First Amendment justification to access official information, and the Supreme Court should determine that access to government information is a First Amendment right.¹³⁶ The Supreme Court to this day has yet to acknowledge a constitutional right to access government documents.
2. Courts, not the executive branch, should have the power to determine whether information should be kept secret. Significant case law has since been established since 1953, although evidence suggests the courts still defer to the executive

¹³⁵ *Id.* at 240.

¹³⁶ *Id.* at 219.

branch and respect separation of powers, particularly in cases involving national security.¹³⁷

3. Congress should pass a new law, or at least amend the Administrative Procedure Act. This happened thirteen years after his book's publication, in 1966, with the APA amendment, referred to today as the Freedom of Information Act.

While not all of Cross' suggestions have come to fruition, particularly the affirmation of a First Amendment right to access public records, great strides have been made since 1953 in the ability for citizens to access information from federal executive agencies.

DISCUSSION

Freedom of information law was nascent in the 1950s as fledgling statutes, case law, attorney general opinions, agency regulations, and common practices swirled about in a bubbling pool, eventually evolving into what we have today. Cross provided the most comprehensive description at the time of the legal landscape for local, state and federal jurisdictions. His observations provide a basis for some comparison to the state of access today.

¹³⁷ See, e.g., Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL'Y 129 (2010) (analyzing Supreme Court cases involving free press, free expression, and transparency balanced with national security to find malleability in how justices reach their conclusions).

First, in many ways the state of access in 1953 was similar to what citizens and journalists experience today. Common law principles for what should be available and what should be secret in 1953 eventually became enshrined in court cases, FOIA in 1966, and a flurry of state public record laws in the early 1970s, following public discontent from Watergate, Vietnam and the civil rights movement.

For the most part, access is better today because of more defined laws and rules, particularly in the area of police reports, federal records, judicial records, and in the process of accessing public records – the definition of public records, the open nature of who can request records, and the breadth of government information available to the public. Some records, such as automobile accident reports, divorce records and public communications by officials, are easier to access today in many jurisdictions.

A key improvement in access over the past sixty years has been the shift toward a presumption of openness. Rather than dictating what records can be made public, as stipulated by common law and many statutes in 1953, current law assumes all government records are available to public inspection unless there are statutes that specify reasons for secrecy. That presumption was most recently codified at the federal level through the FOIA Improvement Act of 2016.¹³⁸

Further, state public record laws in 1953 were either nonexistent or vague, with more than half the states relying on common law, their own rules and regulations, or releasing records only if there was a law specifically saying the record should be public. Today, local and state agencies must follow state public record laws, and cannot create regulations that counter those laws.

¹³⁸ FOIA Improvement Act, S. 337, 114th Cong. (2016).

Interestingly, however, the detail and length of a state public record law might not be as important as the strength of its language. In 1953, Cross applauded Louisiana's public record law for its detail, yet today similar detailed laws are not always the strongest – often including elaborate and numerous exemptions for what should be kept secret. Florida, on the other hand, started with a succinct law that essentially dictated that all government records are presumed public, with some rare exceptions. This strong and concise wording could have led to what many consider the strongest public record law in the nation today.¹³⁹

Access to federal records, while often frustrating to journalists and other requesters today, is clearly better in the twenty-first century than it was in 1953, when very little federal information was available to the public unless an agency wished to divulge it proactively for its own purposes. Today, the federal government receives about

¹³⁹ Journalists often point to Florida as the gold standard in public record laws. *See, e.g.,* Susannah Nesmith, *Florida's Public Records Law is Strong: Here are 5 Ways Lawmakers*, COLUM. JOURNALISM REV., Mar. 19, 2015, *available at* http://www.cjr.org/united_states_project/florida_public_records_bills.php (last visited July 18, 2016). However, some national rankings of state transparency place Florida in the bottom half of the country. *See, e.g.,* The Center for Public Integrity 2015 rankings for public access to information, *available at* <https://www.publicintegrity.org/2015/11/03/18822/how-does-your-state-rank-integrity> (last visited July 13, 2016).

700,000 FOIA requests a year,¹⁴⁰ and information released because of FOIA has led to important public revelations.¹⁴¹

Despite improvements in freedom of information law, in some respects access has worsened over time, or remains at a state that frustrates journalists today as it did then. Increasing fees for record searches, retrieval, redaction, and copies – not mentioned at all by Cross in his book – hobble requesters today.¹⁴² A variety of records that were available in 1953, such as motor vehicle registration, public welfare rolls and vital records are secret today, primarily because of increased concern for personal privacy.

Lack of enforcement of public record laws remains as salient today as it was in 1953. A nation or state can have the best access provisions on the books, but they are useless if ignored. Government and the access community should continue to work through new and better ways of making the system work.

Also, Cross' dream of seeing the courts acknowledge a constitutional right to access records has not come to fruition. Meanwhile, some states and nations have incorporated a right to access government information in their constitutions. The U.S. Supreme Court has dipped its toes in those waters, such as acknowledging a

¹⁴⁰ Specifically, 713,168 FOIA requests were submitted to the federal government in 2015, according to the U.S. Department of Justice, <https://www.foia.gov/index.html> (last visited July 13, 2016).

¹⁴¹ Seven-hundred news stories benefited from FOIA requests, according to the Sunshine in Government Initiative's "FOIA Files" project, *available at* <http://sunshineingovernment.org/wordpress/the-foia-files/> (last visited July 13, 2016).

¹⁴² *See supra* note 95.

constitutional right for the press to attend some court proceedings,¹⁴³ but more remains to be done to make the constitutional right to know a reality.

Finally, fears expressed by Cross in 1953 of encroaching secrecy serve as relevant warnings for today. He surmised that government was becoming more secretive because of habits developed in government from World War II, a growing right of privacy as expounded by Samuel Warren and Louis Brandeis,¹⁴⁴ successful advocacy in legislatures by social workers to close vital records, and, “A tendency on the part of the press, under pressure of other problems, to let adverse trends go unchallenged.”¹⁴⁵

His observations resonate today. The United States experienced increased secrecy following the Iraq War, and national security measures furthered by former President George W. Bush.¹⁴⁶ Scholars and journalists have noted increased secrecy in the past 30

¹⁴³ *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986) (providing a First Amendment right for press to attend preliminary hearings in criminal cases); *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) (providing a First Amendment right for press to attend jury selection); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (acknowledging a First Amendment right for the press to attend criminal trials).

¹⁴⁴ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. R. 193 (1890).

¹⁴⁵ CROSS, *supra* note 1, at 12-13.

¹⁴⁶ See Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault of Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006) (outlining actions taken by the Bush administration to increase secrecy following the terrorist attacks of Sept. 11, 2001). See also Seth F. Kreimer, *Rays of Sunlight in a*

years because of public fears about privacy invasion,¹⁴⁷ and increased pressures by special interest groups to close records.¹⁴⁸

Further, the reduction of news organizations' resources today might have Cross rolling in his grave, based on his perception of a relatively apathetic press in 1953. For example, Cross wrote that newspapers had more success obtaining information through "sugar" of relationship-building and source development, rather than the "vinegar" of legal compulsion.¹⁴⁹ He encouraged journalists to continue this approach – to use diplomacy and public shaming rather than the law, when possible. Today, newsroom

Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency, 11 LEWIS & CLARK L. REV. 1141 (2007); Bradley Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. R. 815 (2004).

¹⁴⁷ See, e.g., David Cuillier, *Public Support for Press Access Declines as Personal Privacy Concerns Increase*, 25 NEWSPAPER RES. J. 95 (2007) (finding a correlation between fear of privacy invasion and reduced support for open records); Wendell Cochran & Jonathan Katz, *FOIA Requests Increasingly Denied for Privacy, not Security*, Grounds, paper presented at Investigative Reporters and Editors national conference, June 2003, Washington, D.C.

¹⁴⁸ See, e.g., Aaron Mackey, *In Wake of Journal News Publishing Gun Permit Holder Maps, Nation Sees Push to Limit Access to Gun Records*, 37 NEWS MEDIA & L. 4 (2014). (The National Rifle Association has successfully lobbied to close concealed weapon permits in most states); Relly & Schwalbe, *supra* note 20 (business interests lobbying to make records secret).

¹⁴⁹ CROSS, *supra* note 1, at 5.

staffs have been slashed,¹⁵⁰ making it more difficult for journalists to find the time to develop sources and pursue public record requests.¹⁵¹

Cross also noted that news organizations were successful when they sued for access, and he encouraged them to embark on more litigation to combat growing secrecy. Today, however, news editors say their organizations are less likely to sue for public records than they were ten years ago.¹⁵² Unless other constituencies, such as non-profit groups, rise up to fill the gaps left by a hamstrung press, freedom of information could be at risk.

¹⁵⁰ The news industry in 2015 suffered the worst year since the 2008 recession, with a 7% drop in newspaper circulation, an 8% decline in advertising, and a 10% reduction in staffing, according to the Pew Research Center State of the Media 2016, *available at* <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/> (last visited July 13, 2016). Daily newspapers supported 32,900 full-time newsroom employees in 2015, down from a high of 56,900 in 1990. *See* American Society of News Editors Newsroom Employment Diversity Survey, *available at* <http://asne.org/content.asp?pl=140&sl=129&contentid=129> (last visited July 13, 2016).

¹⁵¹ David Cuillier, *Pressed for Time: U.S. Journalists' Use of Public Records During Economic Crisis*, paper presented at the Global Conference on Transparency Research, May 19, 2011, Newark, N.J. (finding that half of U.S. journalists have never submitted a federal FOIA request, a quarter said they don't have time, a third that they don't know how, and a third perceive that their companies are less likely to sue for records than in past two years).

¹⁵² Knight Foundation survey, *supra* note 93.

Cross ultimately urged Congress to take action: “In a democracy such a state of affairs is a continuing challenge to public and press. Its growth has gone unchallenged too long. It stems largely from the philosophy of an official cult of secrecy... The condition cries aloud for abatement. Congress is the primary source for relief... The time is ripe for an end to ineffectual sputtering about executive refusals of access to official records and for Congress to begin exercising effectually its function to legislate freedom of information for itself, the public, and the press.”¹⁵³

Congress listened to Cross, and thirteen years later enacted such relief through the Freedom of Information Act.

CONCLUSION

In the fifty years since Congress passed FOIA, the legal landscape has matured and become more articulated through statute and court interpretation. This has resulted in benefits and drawbacks for journalists and the public seeking information about their government. Despite the more detailed articulation of access rights in the United States, requesters still call for more transparency and lament what they perceive to be a general movement toward secrecy, as Cross did in 1953.¹⁵⁴

¹⁵³ CROSS, *supra* note 1, at 246.

¹⁵⁴ See, e.g., *FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?* Hearing before the S. Comm. On the Judiciary, 114th Cong. (2016), available at <http://www.judiciary.senate.gov/meetings/foia-at-fifty-has-the-sunshine-laws-promise-been-fulfilled> (last visited July 13, 2016) (delineating testimony by panelists, including the author, discussing continued secrecy and the need for further fixes to FOIA).

Perhaps transparency and secrecy are cyclical, rising and falling due to societal pressures and global events. Patrice McDermott, director of Openthegovernment.org, suggests that transparency peaked by the early 1990s, calling the Bill Clinton administration the “golden age” of transparency.¹⁵⁵ While there were indications of increasing secrecy, the general presumption was openness and the Internet was fueling a feeling of openness. That changed quickly, McDermott wrote, when George W. Bush came to power.¹⁵⁶

Or, perhaps the tussle between transparency and secrecy is eternal. Mitchell Pearlman, director and counsel for the Connecticut Freedom of Information Committee from 1975 to 2005, noted the nature of the cycles of government transparency and the ongoing struggle that societies will need to work through;

“I believe that the fight for Freedom of Information will continue well into the future. Where and when the pendulum swings toward transparency, the fight will take on an offensive posture; where and when the pendulum swings in the other direction, the battle likely will be a defensive one... The fight for Freedom of Information will end only with the birth of a utopian society – a highly unlikely event, at least within my projected lifetime. If Utopia itself is unattainable, we

¹⁵⁵ PATRICE McDERMOTT, WHO NEEDS TO KNOW? THE STATE OF PUBLIC ACCESS TO FEDERAL GOVERNMENT INFORMATION 195 (2007).

¹⁵⁶ *Id.*

nonetheless can strive to make society 'a more perfect union' between government and governed.¹⁵⁷

Ultimately, while problems still exist and the struggle continues for maintaining open, accountable government, evidence from this study suggests that the people's right to know is, overall, stronger today than it was in 1953. More research needs to be done to identify the trajectory in transparency's evolution, where and when it rises and falls, and the influences on freedom of information that can guide policy makers today and in the future. The key, it seems, is to remain vigilant in moving ahead, as Cross emphasized:

Citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. To that end they must have the right to simple, speedy enforcement procedure geared to cope with the dynamic expansion of government activity. These rights must be elevated to a position of the highest sanction if the people are to enter into full enjoyment of their right to know.

Freedom of information is the very foundation for 202all those freedoms that the First Amendment of our Constitution was intended to guarantee.¹⁵⁸

¹⁵⁷ MITCHELL W. PEARLMAN, *PIERCING THE VEIL OF SECRECY: LESSONS IN THE FIGHT FOR FREEDOM OF INFORMATION* 136 (2010).

¹⁵⁸ CROSS, *supra* note 1, at xiii-xiv.