

“THE GOOD, THE BAD, AND THE UGLY”: E-GOVERNMENT AND THE PEOPLE’S RIGHT TO KNOW

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I am delighted to be here this morning to share my passion for the people’s right to know. The subject of access to government information in the era of “e-government” is of vital and growing importance.

A recent poll for the Council for Excellence in Government identified the four most important benefits of e-government anticipated by the public: (1) making government more accountable to its citizens; (2) helping agencies carry out their missions more efficiently and effectively; (3) bringing about more convenient government services; and (4) facilitating greater access to government information.

My focus today will be on access to information, and I will concentrate on access to government information at the federal level for two practical reasons. The first is personal: I was almost present at the creation – having had over 30 years exposure to government information issues in the Nation’s Capital. The second is more practical: the U.S. government is the world’s largest producer of information. That is perhaps reason enough to start there.

I want to start out by emphasizing why I think we should all care – and care a lot – about access to government information. It goes beyond the media’s desire to play watchdog, the lawyer’s interest in representing clients, the librarian’s need to be supportive of inquiring patrons, or the historian’s desire to learn more about the workings of government. It goes to the heart of our democracy.

Democracy and the Right to Know

The first and foremost reason for advancing the people’s right to know is contained in Founding Father James Madison’s oft-quoted lines:

A people who mean to be their own governors must arm themselves with the power that knowledge gives. 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.

By the way, Madison’s friend Thomas Jefferson agreed on this point, although he is not quoted quite as often:

If a Nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be If we are to guard against ignorance and remain free, it is the responsibility of every American to be informed.

History buffs will remember that the English utilitarian philosophers Jeremy Bentham and John Stuart Mill also believed that the power of publicity was the most important check against misrule. Other historians, philosophers, and politicians agreed, grounding in the concept of democracy itself the public's right to have information necessary for informed decisions.

Two years ago at Oxford economics professor Joseph Stiglitz started a speech entitled "The Role of Transparency in Public Life," with the following comments:

There is, in democratic societies, a basic right to know, to be informed about what the government is doing and why. . . . [S]ecrecy is corrosive: it is antithetical to democratic values, and it undermines democratic processes. It is based on a mistrust between those governing and those governed; and at the same time, it exacerbates that mistrust.

I agree with Stiglitz that the most compelling argument for openness is that "meaningful participation in democratic processes requires informed participants." I think the word "meaningful" should be underlined. Last fall, on a program for the State Department, I visited the formerly Soviet Republic of Turkmenistan to talk about the upcoming U.S. presidential election. In a country in which one man effectively decides what the public should know – or not know – about almost everything, surely everything relating to the government, I was chastised by a Turkmen official for talking about an "informed electorate": he asked how I could be so proud of my system, when less than half the people turn out for our presidential elections. "Why, in Turkmenistan, our President was voted into power in an election where over 90 percent of those eligible voted," he said. I could have pointed out that these voters owed their jobs, houses, education, health care, and even water supply to the personal decisions of the only candidate who was running for office, a candidate for whom percentage turnout was important because it would be compared, as a matter of national pride, with the turnout at the elections of those who ruled neighboring nations. I did not. Instead, I said that our voting percentages were low for contradictory reasons: Many Americans stay home because they know exactly what is at stake; many stay home because they have no idea. Let me explain.

The principal reason for low voter turnout is the basic satisfaction – not dissatisfaction – of most Americans with the way things are. Our personal well-being – our jobs, cars, houses, vacations, television programs – is not likely to turn on who wins the next election. And we have attained what we have through a system that is not at stake in the election: we do not see any of the ideologies that could threaten our free markets or the Bill of Rights to be knocking at the door. Liberal Democrats survived Nixon and Reagan; Conservative Republicans have flourished after Clinton. It is the very strength of our open system that allows us comfortably to sit out elections.

On the other hand, all too many Americans are ignorant about our system of government and those who govern. They don't know what rights are protected by the First Amendment,

can't name their local congressional representative, haven't the foggiest idea how government works. Would greater public access to government information better inform them? Maybe not. But voters are more likely to vote, and to believe that their vote will count, if they are informed.

But, you may observe that we had lots of elections before we had access to government information. Is open government really that relevant to most of us once we get passed the "meaningful participation" argument? Absolutely. Let me touch on some of the other reasons for open government.

A second way that access to information serves the interests of our citizens is by helping keep government honest and worthy of our participation. We all recall Justice Brandeis' observation that sunlight is the best disinfectant. Whether we like it or not, government affects most aspects of our daily lives. Safe streets and safe food, clean air and equal opportunity, school lunches and health care, economic indicators and weather forecasts, scientific and technical information – the list is endless. The best protection we have against our protectors, the best way of knowing our laws are enforced honestly, evenhandedly, and efficiently, is freedom of information. It is more than symbolic that the nongovernmental organization best known for its work to fight government corruption in developing democracies is called Transparency International.

Secrecy has always been corruption's fellow-traveler. That is why we have responded to concern over special-interest influence in our political and legislative processes by enacting laws directing disclosure of campaign contributors and lobbyists. The same notion applies to corporate governance, as the disclosure requirements of our securities laws attest.

Third, openness helps government do its own business better, too. A few years ago I was trying to explain freedom of information to a class of Chinese government officials in Qing Tao as part of a course on U.S. administrative law. But how do you justify some of the most fundamental American administrative law requirements like notice-and-comment rulemaking for those who have no First Amendment, whose government and culture are grounded in secrecy, not openness? I found two explanations. One was that those affected by regulations or orders will be more apt to understand and obey them if they were accessible and had been developed through a public process. Chinese officials agreed with this reason. The other was that the quality of government decisions usually would be better if they admitted of public input along the way. This was a bit harder sell in China. I think it unassailable here.

Fourth, there is the simple fact – at least I think it's simple – that just as government lands and buildings are called "public" lands and buildings because they belong to the public, so does government information. It is gathered or created, maintained and used, with taxpayer dollars, by public officials, for public purposes. Of course there can be limits to the public's right to obtain government information – even if it belongs to us – just as there are limits on how fast we can drive our "own" cars, or what structures we can erect on our "own" lands. We need to respect both public and governmental interests, and we do so by affording protection to privacy, trade secrets, law enforcement and national security information. But, unless disclosure will cause a specific harm, the material must be accessible to the public.

Fifth, access to government information can assist Americans to improve our lives in many ways. We need to know about air and water pollution, new drugs and medical technologies, floods and storms, tainted meat and faulty tires. We may be able to make use of the latest travelers' advisory in Asia, the complete plans to a federal construction project, the map of the human genome. Farmers, students, historians, the elderly, veterans, small business owners, inventors – the list of citizens who benefit from government information is inexhaustible

A sixth reason supporting access to government information is pragmatic: more information means more efficient resource allocation. One aspect of this reason relates back to the “disinfectant” process I mentioned earlier; corruption in government invariably carries adverse economic consequences for the populace, and secrecy allows corruption to flourish. Another aspect lies in what economists take as gospel: information affects both output and distribution decisions. And that goes not just for government policy-making, and the public's ability to influence it, but for business decisions as well. Government information plays a basic role in the proper functioning of the marketplace by assisting economic actors to make better informed decisions.

That goes not just for government policy-making, and the public's ability to influence it, but to business decisions as well. A European Commission “Green Paper on Public Sector Information in the Information Society” puts it nicely:

Public sector information plays a fundamental role in the proper functioning of the internal market and the free circulation of goods, services and people. Without user-friendly and readily available administrative, legislative, financial or other public information, economic actors cannot make fully informed decisions.

There are other reasons for condemning secrecy and advancing openness in government, but I want to move on to “The Good” category of the title of my talk, then to “The Bad,” and finally to a discussion of “The Ugly.”

Now: “The Good”

I have met with officials and scholars from Japan, India, China, and Mexico over the last few months to talk about this mainstay of our modern democracy, our Freedom of Information Act. They react in amazement to the three principal characteristics that imbue this statute with such awesome power.

First, there is a statutory presumption that all government records are open to the public. Only those specifically exempted by the Act or other statute may be withheld. Think about the might of this presumption. No matter how embarrassing or inconvenient disclosure might be, an agency can withhold information from the public only if Congress has anticipated that, for some public policy reason already embodied in statute, some reason besides embarrassment or inconvenience, the information should be kept confidential.

Second, there is no need to show individualized need for the information requested. The curious retiree, historian, serious journalist, UFO enthusiast, environmental advocate – even the incarcerated felon and foreign government official – as well the research librarian, all have equal rights to invoke the power of this great law.

Third, the public right to information can be enforced. Any disappointed requester may invoke the injunctive powers of a life-tenured federal district judge to disgorge information wrongfully withheld by a federal official.

I can attest to the power of this statute. I have represented clients in their efforts to use the Freedom of Information Act for all sorts of purposes: access to government contract information, regulatory enforcement data, health and safety reports, and even CIA historical materials. Earlier this year I filed a lawsuit against the U.S. Census Bureau on behalf of two Oregon state senators seeking the adjusted data from the 2000 Census. I have also used The Act for more personal purposes: This law provided me with access to the only source of information on the early Justice Department legal career of my father, who died when I was very young.

Why do I dwell on the Freedom of Information Act? This is why. If you recall nothing else from these comments, please remember this: We cannot take the concepts of freedom of information and the public's right to know for granted. They are not embedded in our Constitution. They are relatively recent developments in this nation. They are not shared by very many nations, even many other democracies, worldwide.

We all know that desegregation and equal rights for women are modern notions, etched as part of our rule of law only in the lifetimes of most of those in this room. Likewise, although our depository library program dates back over 100 years, the people's right of access to government information in a modern sense is a young concept, and one over which we must remain vigilant lest it be eroded or undermined.

We've Come a Long Way

Before the Freedom of Information Act was enacted 35 years ago, of course, we still had access to government information – but it was only information that the government wanted us to get. Sure, there were plenty of publications sent out to depository libraries, loads of press releases and reports and statements from government officials, and the panoply of rules and opinions and orders and manuals that were made available either through the Federal Register or in public reading rooms. Even so, access was still limited to what the government wanted us to have. Now, government information is literally there for the asking.

As we begin the 21st Century, it is useful to reflect on the light-years we've traveled on the path of access to government information. Let me highlight a few developments that I think are most important; as you might predict, technology has been a driving force, but some of the progress has nothing to do with the concept of e-government; before I turn to technology, I'd like to begin with those developments.

Human Resources. The most significant non-technological development affecting access to government information since 1967 has been the development of information professionals at all levels of government. After the FOIA and Privacy Acts uncloaked records systems throughout government, records managers began to receive financial support and professional recognition for their work. Public affairs people in agencies were no longer just political flacks; they became key implementers of open government laws and important sources for media and public information on current topics. The American Society of Access Professionals offered professional recognition and opportunities for training and networking for even the lowest GS level involved in information-access activities. I emphasize the human factor because, as all librarians know, it is of irreplaceable significance in facilitating public access to information, even in the era of e-government.

Perhaps in some ways the human factor has become even more important in light of, not despite, the incredible technological developments we have witnessed in the past decade and a half. Those technological developments gained nurture with the computing power of the microchip, were diffused through the availability of the personal computer, and became ubiquitous with the Internet and the World Wide Web. While we're far from a paperless society, no question that paper-based data and a tangible-document orientation is fast giving way to electronic images, online databases, and worldwide interconnectivity.

Technology. As the "e-government" in the title of my talk today suggests, technological advancement has become the key for change in how we access information. Many may not realize how recent is the phenomenon of accessing public information electronically. Before the 1995 Electronic Freedom of Information Act Amendments – a mere 6 years ago – access to government information was still operating in at least the twilight, if no Dark Ages; access to government databases, requester choice of format, and programming to search for requested material were not viewed by most agencies as mandated by the FOIA.

The E-FOIA changed all that, just as the "GPO Access" bill changed the way the public accesses the Congressional Record, Federal Register, and other basic government materials. But GPO Access and E-FOIA are both based on the traditional paradigm of "ask and ye might receive." It is hardly surprising government information policies and practices are not keeping up with the advances in technology.

In any event, we can easily agree about the "Good" part: Improved human resources, coupled with advanced information technology that is efficient, time-saving, convenient, and even fun. Doesn't this clearly mean more access to more information from the government? What's the problem, anyway? Well, it's time for the "Bad" news.

"The Bad"

I turn now to what I see as the most significant challenges to the fullest realization of the people's right to know; maybe "The Bad" is a bit too strong a characterization. Some of these admit to obvious solutions; others will prove more intractable. Either way, we must be prepared to understand, debate, and ultimately address these challenges if we expect to use technology as an effective tool for citizen access to e-government in this new millennium.

□ # 1: *Official Secrets Act*. I want to start with a near-miss last year involving a bill that threatened to deal a mortal blow to the principles open government. By this I mean congressional enactment of an Official Secrets Act as part of the Intelligence Authorization bill. If President Clinton had signed this measure – and his military and intelligence agencies were strongly urging him to do so – we would have turned back the clock on access to government information to the days of the Alien and Sedition Acts. The proposal would have made publication of classified information a federal crime. As we celebrate this year the 30th anniversary of the Pentagon Papers and related cases in the Supreme Court – cases where the Court refused the Nixon Administration’s importuning to hold the New York Times and Washington Post and Daniel Ellsberg and Senator Mike Gravel liable for getting into the public’s hands the government’s highly secret and brutally honest assessment of the Vietnam War – we can thank our lucky stars that in between granting pardons, signing recess appointments, and declaring national monuments the President had the courage to veto this pernicious legislation. Don’t believe for a minute, however, that it will not be back again.

□ # 2: *The Digital Divide*. Not so stark, but equally challenging, is the Digital Divide. We have all grown up taking for granted what President Lincoln said about our national government being of the people, by the people, and for the people. Does that mean that e-government is of, by, and for only people with computers hooked into the Internet? That certainly is how it might be if government information is only accessible online. Just remember: More than one in three adults in the U.S. do not use the Internet. Almost 50 percent of the nation’s households do not have computers. Racial and ethnic minorities, rural residents, the elderly, and the disabled tend to be on the other side of this digital divide. The federal initiative to provide Universal Service to schools and libraries is an important bridge across the chasm that all of you understand, but even that program is not fully funded and lives under recurring threats of funding cuts. We need this program to remain healthy, and we need to develop others, as well.

□ # 3: *Inadequacy of Resources*. Many in Congress – and the same goes for state and local governments – believe that funding for information dissemination and management should be reduced as we move more government materials onto the Web. Over the past few years, funding for the National Technological Information Service and the Superintendent of Documents has been cut. Big mistakes! In fact, during the transition period, agency costs for migrating from one medium to another should be expected to go up. And the fact that costs may be shifted from the government to the user – including costs for telecommunications, computers, software, and printing supplies – cannot be seen as a net saving for the public. In short, resources for e-government must be increased, not cut – at least for now.

□ # 4: *Profit Motive*. While I’m talking about costs, I want to align myself with the principal conclusion of the recent National Commission on Library and Information Science Report: Providing government information to the public should be part of the mission of every government agency, and should be funded as an integral part of that mission. User fees can be the kiss of death to public access. “Privatization” of government information to raise or save money is an equally bad idea. State efforts to turn a profit on the sale of judicial opinions or real estate conveyance records betray a public trust and will do inestimable harm in the long run to the concept of public access. Government records are, and should remain, as much a part of

public education as are primary and secondary schools. We pay to create government information with our tax dollars, and we should not have to pay again to reap the benefits.

□ # 5: *Loss of Public Access*. A *New Yorker Magazine* article on the National Archives from a couple years back starkly observed that “while the late twentieth century will undoubtedly record more data than have been recorded at any other time in history, it will almost certainly lose more information than has been lost in any previous era.” While fires and aging paper posed the greatest threats to the stores of information in the distant past, technology has brought new scourges. There’s the problem of computer technology itself, whose half-life is somewhere between three and five years. Next, there’re the medium: magnetic tape is an extremely short-lived medium – it stretches, becomes brittle, and separates, not to mention is subject to instant death by magnetization; optical disks may last up to a hundred years, but like Beta video and 8-track tapes, they may become unreadable in less than five. Additionally, we have not even begun to experience the full effects of the archivist’s worst nightmare – encryption. Not only will we need to preserve access to each medium, but we will also have to preserve the decryption keys so that the information will be readable in the future.

Unfortunately, irreplaceable government data are already wholly inaccessible. Some public information posted to agency Web sites on a current basis disappears within days or weeks. How many of us have *not* had the experience of typing a Web address for a government document, only to hit a dead end? If paper copies have not been maintained, that information is already lost to the public. Preservation and accessibility must, therefore, be an indispensable aspect of our use of the Internet and other electronic media to disseminate government information.

“The Ugly”

Now I turn to the final part of my talk – “The Ugly.” This is the place I discuss those tensions and competing interests that weaken the foundations of open government.

□ # 1: *Privacy*. As the public becomes more and more committed to protecting individual privacy, more and more Americans experience first-hand an increased vulnerability because of the Internet. The Supreme Court denied the Reporters’ Committee access to computerized police docket material that was readily available at the local level because it wanted to maintain the privacy protection that “practical obscurity” provides to paper records --- protection that does not exist when the information is digitized. States are experiencing unprecedented public outcries when traditionally “public” records like drivers licenses, real estate records, and local court proceedings are made available electronically.

Despite the strong tradition of a free press in our nation, a recent survey by the American Society of Newspaper Editors recently found that “Americans are unsettled by emerging technologies and have increasing concerns about their personal privacy” – so much so that they are “willing to handcuff the news media if that’s the price to be paid for shoring up personal privacy.” The message that government must be vigilant to protect individual privacy in the Internet age could not be louder; however, the need to ensure that privacy does not leave freedom of information as roadkill on the Information Superhighway is equally strong.

□ # 2: *Public Participation*. Chinese officials may not understand the value of public participation to government decisionmaking, but we do. Some government agencies are embracing use of the Web in rulemaking and other agency activities. So far, however, this field remains mostly unplowed. Some federal agencies still do not allow electronic comments for rulemakings; most do not maintain electronic docket rooms. I can think of no good reason why they should not. Notice and comment rulemaking, like freedom of information, must be made compatible with e-government. The same goes for Capitol Hill and state legislatures. Earlier this spring I heard a former member of Congress discount the importance of e-mail messages in congressional offices because “it’s too easy to send them.” What a perverse view! Our goal should be to ease, not encumber, public input to our lawmakers in the Internet age.

□ # 3: *Data Quality*. Agency dissemination of information electronically unquestionably allows individuals to make wiser choices – to purchase safer or more energy efficient products, to work in safer places or live in cleaner neighborhoods. It also allows agencies to spur more socially responsible behavior by releasing information about business behavior, perhaps best illustrated by EPA programs like the Toxic Release Inventory. But traditional due process safeguards to insure agency accountability are so far missing in this arena. If information empowers government agencies, and the Internet magnifies that power, then agency programs that use disclosure of information as a regulatory tool must be subject to the same kinds of checks as is traditional command-and-control regulation.

There are other issues that I could discuss if I had the rest of the morning to do so. But I want to end now with one final “uglitude” – one that may be the reason that most librarians – in fact, most people involved in information management – work overtime: information overload.

□ # 4: *Too Much Information*. Two years ago the Washington Post ran an article headlined “The Too-Much-Information Age,” spelling out the challenge for government and citizens alike to find and manage information we already can access: the books, journals, CDs, movies, and Web sites, both government and non-, that proliferate daily. As the NCLIS “Comprehensive Assessment of Public Information Dissemination” described it earlier this year, the current situation in the United States is not a pretty one: government information is fragmented, dispersed, compartmentalized, and unfocused.

The FBI provided us with an infamous illustration early this spring when it discovered it had failed to turn over to Timothy McVeigh’s lawyer thousands of documents that had been ordered disclosed by the court. An additional 900 documents that were mistakenly withheld from the defense surfaced three weeks later. The world’s greatest law enforcement agency experienced first hand an incredible embarrassment because it could not find important information in a timely manner. Later Judge Maiche ruled that the untimely disclosure of these documents would not affect McVeigh’s conviction, and they did not stop his execution. But how much confidence do we have that this failure to find and disclose relevant documents has not happened before? And are we sure that it did not affect the verdicts in other cases?

A letter to *The Washington Post* on May 26 was designated by the Missouri School of Journalism as posing the “Question of the Year” when it asked:

If 46 of 56 FBI offices did not fully comply with at least 16 official FBI headquarter requests for materials in the Oklahoma City bombing case, what is the likelihood that private individuals who make Freedom of Information Act and Privacy Act requests to the FBI receive all the records to which they are entitled?

As we work to move e-governments away from the more passive concept of access to information and toward the more dynamic principle of “diffusion” of government information, the challenges will increase. So will the need for inventories, locators, greater standardization, and authoritative information managers.

Here, then, is the ultimate challenge for all of us, led by the library community, who are committed to enhancing access to government information in the Internet Age: In the last analysis, the most significant information – whatever its content or format – becomes worse than trivial if it cannot be found, retrieved, authenticated, and put to use. Perhaps part of the answer lies on the “human resources side” -- in training, funding, and empowering librarians and records managers to work more effectively in the Internet Age. Perhaps the answer lies in technology – as a recent *Scientific American* article observes, in the development of a “Semantic Web” where computers conduct automated reasoning using “knowledge representation,” a technology that is still in its nascent state. The answer is probably both.

We can never fully respond to the challenges and ease the tensions that affect access to e-government information. But while we are making our best efforts to do so, we cannot take for granted the people’s right to know. We must remain vigilant to safeguard this young and sometimes fragile right.