

Freedom of Information and National Security: A Legislative Analysis

Carolina R. Lumetta

Kalamazoo Valley Community College

### Abstract

American democracy was founded upon an emphasis on certain rights outlined in the Declaration of Independence and protected in the Constitution of the United States. Over the past two centuries of the nation's existence, one of those rights has been in a state of flux: the right to information. Freedom of information is directly correlated with freedom of speech, so this right is included in the First Amendment, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" (Legal Information Institute, 2017). As civilization and technology have advanced, so has the need for legislation specifically addressing this freedom of public access to government information to ensure national security. As periods of war during the United States' history have restricted this access and allowed greater government secrecy, the public has become more dissatisfied with government performance (see appendix). Based on public interest and congressional focus over decades of historical events, the balance between freedom of information and national security rests on the cooperation between the public and their elected official.

*Keywords: First Amendment, Freedom of Information Act, Government secrecy, right to information, public access, government records*

The First Amendment of the U.S. Constitution grandly guarantees certain freedoms in three main clauses, one of which is the freedom of expression clause (Legal Information Institute, 2017). This clause safeguards free speech and free press, and many link it to the right of information as well. In order to better preserve this, the Freedom of Information Act was passed in 1966. This relatively recent development “establishes for any person - corporate or individual, regardless of nationality - presumptive access to existing, unpublished agency records on any topic” (Congressional Digest Corp, 2013). This was the first act which required the Executive Branch to be forthcoming with information for public consumption, resulting from widespread public dissatisfaction with post-World War II secrecy (Coyle, 2017, p. 44). Samuel Ragan, a news editor in the 1960s, frequently used the phrase “right to know” to advocate for the Freedom of Information Act, and this has been used as a slogan for journalists ever since (Coyle, 2017, p. 44). The Act exempts certain information from public disclosure, including “[matters] specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” (Department of Justice, 2016, sec. b.1.A). This exemption has raised controversy over whether the government takes advantage of withholding information under the mantle of national security. Public access to government information, privacy rights, national security, and the First Amendment are all intertwined, so the courts have struggled with how to interpret the constitutionality of different cases regarding freedom of information. Typically, when it comes to national security, the courts take the side of the government and err on withholding information rather than risk international attacks. The rise of terrorism has also contributed to this hesitance to make all information accessible to the public at large. Paraphrasing a political science scholar, Coyle (2017) lays the groundwork that “a right to know, as a corollary to the right to communicate, is part of the system of freedom of expression”

(p. 46). This right to information can seem to conflict with a right to safety which is the responsibility of the government as a whole, so the courts play a major role in determining the line between constitutional promotions of this freedom of expression and necessary secrecy to improve the country's safety.

The most scandalous example of unconstitutional government secrecy was revealed when the New York Times exposed classified documents stating several lies told the the American public regarding the Vietnam War. Certain journalists stole these documents, which were soon called The Pentagon Papers, and the newspaper published the contents, despite federal orders to cease. The issue quickly sped to the Supreme Court, which ruled that the government had no grounds to issue prior restraint on The New York Times. Chief Justices Black and Brennan concurred saying that a brief excuse of national security was not sufficient to warrant secrecy and that because the documents were already several years old, they did not reveal current military secrets (*New York Times Co. v. United States*, 1971). At the time, public trust in government was quickly dropping (see Figure 1) due to the prolonged conflict in Vietnam, and Chief Justice Black vocalized this saying, "These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press... Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors" (*New York Times Co. v. United States*, 1971).

In 1993, as the world began to enter the technology age, Senator Patrick Leahy (1993) from Vermont vehemently protested any suggestion of restricting the Freedom of Information Act, asserting "The act is no more and no less than a codification of the democratic principle that the public has the 'right to know'" (p. 22-23). Leahy (1993) points to disclosures of government error in multiple field including healthcare, fraud, federal abuses, international affairs, and more

(p. 23). He cites these FOIA successes as motivation to keep technology from slowing progress in revealing the government's mistakes (Leahy, 1993, p. 24). Ragan agreed, gaining a reputation as a man of the press and of press freedom. When testifying before a subcommittee, he proclaimed, "The right of the public to know the public's business, which is government in all its aspects, has long been recognized, indeed, since the beginning of the Republic, as one of the first bulwarks of American democracy. An informed public is, in fact, a necessity if our form of government is to survive" (Coyle, 2017, p. 48).

National policy changed dramatically after the 9/11 terrorist attacks. One of the evidences of this is the USA Patriot Act which granted the Executive Branch greater security enforcement powers. It allows for greater surveillance oversight into investigating phone records and monetary transactions with suspected terrorist organizations. Another important stipulation the Act enforces is that the Attorney General and other agency conducting an investigation to report all findings to the CIA director who in turn must inform Congress of all foreign surveillance findings (USA Patriot Act, 2001). This is another step in which the government is kept accountable yet still keeps information from the general public. It requires trust from the public that this accountability method is not being abused, but citizen trust both in elected officials and in the rest of voters has been steadily declining (see Figure 2 and 3) (Pew Research Center, 2018).

Modern terrorism is a distinct threat to national security. In 1994, a debate raged on whether the CIA's budget should be included in the public report. Historically, the CIA budget had been classified due to security purposes, but critics such as Senator Metzenbaum claimed there was no viable justification for retaining this information (Hernandez, 1994, p. 14). Since the 9/11 attacks, security and secrecy have increased and few have dissented until recently. From

the preservation perspective, Martin Garner (2018) writes that information has been disappearing from online White House sources during every administration change and that this loss of information is detrimental to the public right to information (p. 193). Although some websites work on preserving and organizing the official record, some are nonprofit and therefore have no guarantee that it will continue to be of service in the future, and others require a subscription, thus circumventing complete public accessibility (Garner, 2018, p. 194). Terrorism encompasses multiple actions such as mass shootings, school shootings, airplane hijacking such as was seen at 9/11, and now the recent threat of internet hacking as well. Increased networking made available through the internet attracts terrorist groups because they, too, can reach widespread crowds through social media (Congressional Digest, 2018b, p. 7). Although Congress advocates freedom of speech, this influence is a danger to national security, especially by groups such as ISIS which proclaim fierce anti-American sentiments. In the past, the Supreme Court has upheld the elimination of restrictions in various types of media such as in *FCC v. Pacifica Foundation* (1978), proposing that all types of communication involve First Amendment free speech rights (Congressional Digest, 2018b, p. 8). However, foreign terrorist organizations (FTOs) fall under greater scrutiny with Section 2339A of Title 18, which states that any information given with an intent to incite violence is illegal (Legal Information Institute, “18 U.S. Code § 2339A”). In writing the opinion for *Holder v. Humanitarian Law Project* (2010), Chief Justice Roberts stipulated that even if a FTO has other purposes, any kind of speech blatantly calling for violence against the country falls under restricted speech and is punishable (Holder v. Humanitarian Law Project, 2010). In these cases, public access to certain information was prohibited and given the justification of protecting the public at large. However, this line is a difficult one to define

because it can easily lead to lawmakers using public safety as a convenient excuse rather than a legitimate rationale.

A more recent example of government information retention was given in 2013 when Edward Snowden, a computer security consultant, spied on the government and claimed that the NSA was collecting private phone records of citizens unconstitutionally. Snowden quickly became a wanted man and traveled all across the world to escape U.S. jurisdiction, but his words opened what many feared would be a reprise of the Pentagon Paper debacle. In response, President Obama initiated a revision of the Patriot Act. The new USA Freedom Act (2015) addresses several of the concerns Snowden raised, including the process by which the government may acquire internet personal information and the channels it must travel to do so constitutionally. In this case, the government ruled more in favor of increased public access, though it still maintained strict guidelines which can prohibit certain types of information deemed dangerous (USA Freedom Act, 2015).

Public access to government has long been a controversial interest. The Freedom of Information Act of 1966 was one of the first to enstate this type of access as an American right, and it was amended in 2007 to encompass recent technology advancements (Congressional Digest Corp, 2013, p. 8). Again in 1972, the Federal Advisory Committee Act (FACA) was created to allow various such committees working for the Executive Branch to be open to the public, thus creating the required transparency (Congressional Digest Corp, 2013, p. 8). Relyea and Ginsberg (2008) note that easy access to government information was not a large issue for the first century and a half of the country (1). They say this is because “The Constitution of the United States makes no specific allowance for any one of the co-equal branches to have access to information held by others and contains no provision expressly establishing a procedure for, or a

right of, public access to government information” (Relyea & Ginsberg, 2008, p. 1). The reason for the increase of public outcry against limited information stemmed from post-World War II fear of Cold War spies (Coyle, 2017, p. 45; Relyea & Ginsberg, 2008, p. 2). The federal government presented no way to access their documents, and any agency could prohibit public view if they determine such restriction would be for “a good cause” or “in the public interest” (Relyea & Ginsberg, 2008, p. 2). As public opinion waned and distrust grew, the need for clear legislation allowing public access became evident. The trend for greater government transparency is clear through data compiled by the Office of Information Policy (OIP) which shows a 10% increase in information access requests from 2015 to 2016 [see Figure 5] (Office of Information Policy, 2017, p. 2). Of the 759,842 requests processed, 5.7% were fully denied based on exemptions and 36.8% were partially denied also based on FOIA exemptions (Office of Information Policy, 2017, p. 3).

The relationship between the press and the government is one of the primary avenues through which the public receives federal information, so maintaining communication between these two sources is vital to democracy. Ragan admitted that the news media also had to make adjustments or risk impeding justice through ineffective journalism (Coyle, 2017, p. 47-49). After Lee Harvey Oswald was assassinated, a report titled The Warren Commission was released, and it criticized the press for irresponsible and prejudicial reporting which led to Oswald’s death (Coyle, 2017, p. 47; “Report of the Warren commission,” 2017, p. 20). Ragan defended the news outlets, but also rendered a warning to other editors that the commission’s suggestion of creating standards between law enforcement and the government for the purposes of correctly covering such events would be beneficial (Coyle, 2017, p. 48; “Report of the Warren commission,” 2017, p. 27).



Lincoln Caplan (2015), a Yale Law researcher, shows that the Supreme Court prefers to take an issue-by-issue approach to freedom of information and freedom of speech (para. 31). The trend seems to be that whenever a crisis hits the country, the government recedes into more secrecy, and whether this wrongfully keeps information from the public is hotly debated. Caplan (2015) writes, “The crisis effect comes into play when the United States is threatened or its leaders feel vulnerable” (para. 34). However, he also notes that the Supreme Court has generally ruled in favor of the public, thus holding the government to a very high standard if considering secrecy (Caplan, 2015, para. 34-35).

The authority on who gets to decide what should be classified is part of what lends controversy to the freedom of information issue. This is also why the controversy surrounding Hillary Clinton’s emails was so noteworthy during the 2016 presidential campaign. Clinton, rather than keeping a separate email account for government business, incorporated that information with her personal account, and thus became the decider of classification status (Naftali, 2016). Gerstein (2017) relates that an investigation into these documents will soon be continued by a grand jury, which shows that the question regarding whether Clinton illegally revealed classified information has yet to be answered. Specific definitions for information classification were outlined in Executive Order 12356 in 1982 (Federal Register, 2016). Quist (1993), an analyst, wrote that the Department of Defense uses those stipulations to classify documents as either safe for the public record, confidential, secret, or top-secret (ch. 7, para. 2).

Through an analysis of the history of the right to public access of government information and an examination of current legislation, it is clear to see that the United States has made numerous, in-depth alterations to allow for greater public access in accordance with First Amendment rights. The newest challenge for the government is a continued exercise in balance

on a precarious ledge. With the advent of hacking attacks on the U.S., new legislation must be created to prevent such attempts from jeopardizing national security. On the other hand, legislation must also avoid restricting free speech and freedom of information in the process. The National Conference of State Legislatures (2017) reveals that localized state governments are working towards achieving just such a balance. The battle over whether safeguarding freedom of information in this way should be a state or federal issue will be left to other political analysts. Although the public values truth, statistics indicate that freedom of information (which ties in to freedom of speech) is more valued by American society than government restrictions on information [see Figures] (Mitchell, Grieco, & Numida, 2018).

While public opinion can be fickle, the data reveals that this issue is important not only to American citizens but also democracy. The fact that the courts have wrestled with this issue for so long, creating legislation, amending act, and improving enforcement, is a heartening example of dedication to democratic values. The multiple acts, committees, and laws formed testify to lessons learned from ineffective governmental procedures and unconstitutional cover-ups in the past. Greater freedom of speech is available through the enforcement of both the freedom of information and national security interests. The area in which the country needs to work on and improve still is authority and accountability within the government so that repeat episodes of Watergate, Snowden, and confusion over the legality of official email correspondence can be avoided. The freedom of information is an evolving doctrine in American politics, one which deserves great attention and recognition.

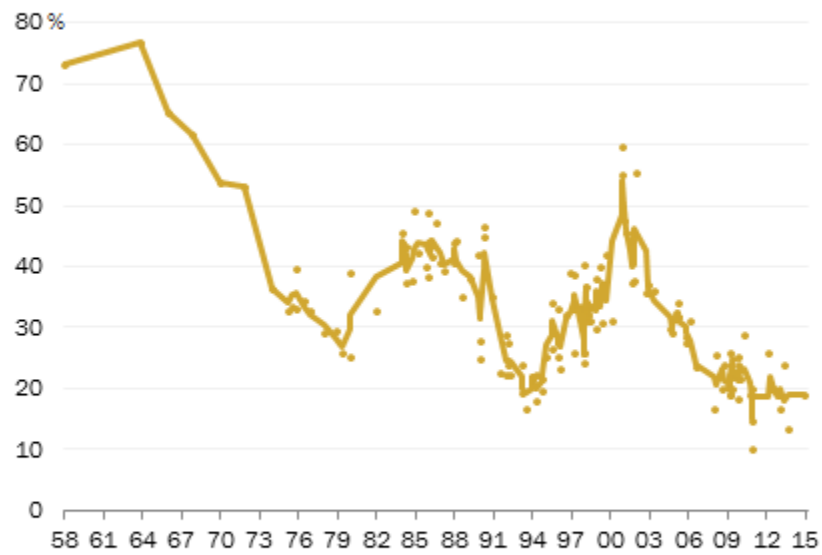
## Appendix

Figure 1

---

**Public trust in government: 1958-2015**

*Trust the federal government to do what is right just about always/most of the time ...*



Survey conducted Aug. 27-Oct. 4, 2015. Q15. Trend sources: Pew Research Center, National Election Studies, Gallup, ABC/Washington Post, CBS/New York Times, and CNN Polls. From 1976-2014 the trend line represents a three-survey moving average.

**PEW RESEARCH CENTER**

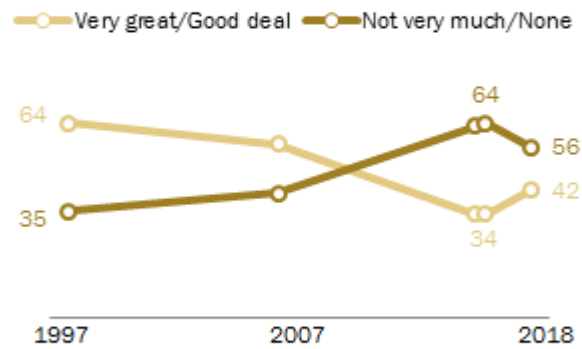
---

Figure 2

---

**Most have little or no confidence in political wisdom of the American people**

*% saying they have \_\_\_\_ of trust and confidence in the wisdom of American people in making political decisions*



Note: Don't know responses not shown.

Source: Survey of U.S. adults conducted March 7-14, 2018.

PEW RESEARCH CENTER

---

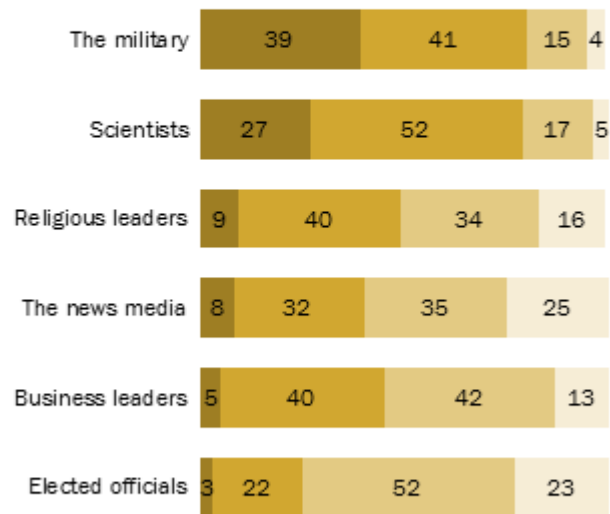
Figure 3

---

**Elected officials draw less confidence than other institutions and leaders**

*% who say they have \_\_\_\_ confidence in each to act in the best interests of the public*

■ Great deal ■ Fair amount ■ Not too much ■ None at all



Note: No answer not shown.

Source: Survey of U.S. adults conducted Jan. 29-Feb. 13, 2018.

PEW RESEARCH CENTER

---

Figure 4

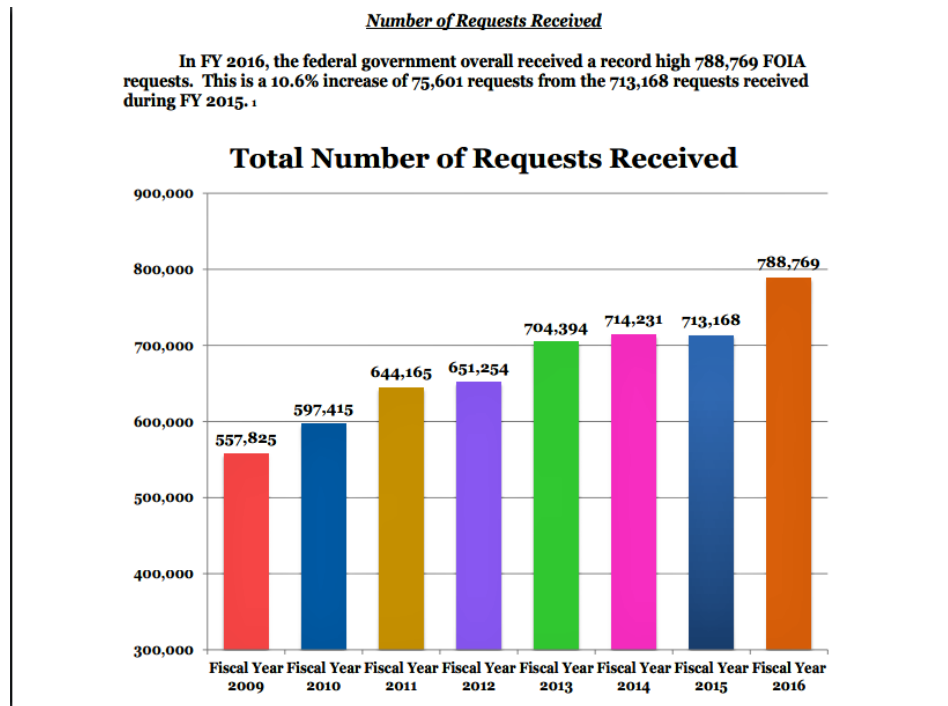


Figure 5

---

### Most Americans resist U.S. government taking steps against misinformation online that could limit freedoms

*% of U.S. adults who say ...*

**U.S. govt. should take steps to restrict false info online, even if it limits freedom of info**

**Freedom of info should be protected, even if it means false info can be published**

39%

58%

### But more are open to tech companies taking action than the government

*% of U.S. adults who say ...*

**Tech companies should take steps to restrict false info online, even if it limits freedom of info**

**Freedom of info should be protected, even if it means false info can be published**

56%

42%

Note: Respondents who did not give an answer are not shown.

Source: Survey conducted Feb. 26-March 11, 2018.

"Americans Favor Protecting Information Freedoms Over Government Steps to Restrict False News Online"

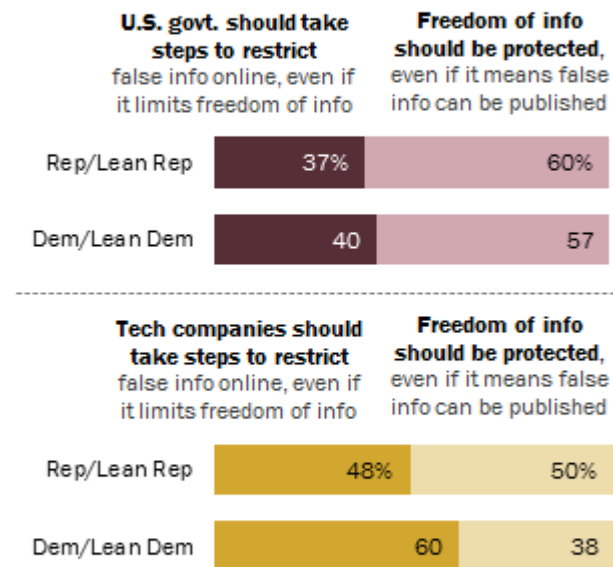
PEW RESEARCH CENTER

---

Figure 6

### Democrats and Republicans equally resistant to government action against false news that could limit freedoms

*% of U.S. adults who say ...*



Note: Respondents who did not give an answer are not shown.

Source: Survey conducted Feb. 26-March 11, 2018.

"Americans Favor Protecting Information Freedoms Over Government Steps to Restrict False News Online"

PEW RESEARCH CENTER



## References

- Caplan, L. (2015). The embattled 1st amendment. *The American Scholar*, (18-30). Retrieved from <https://theamericanscholar.org/the-embattled-first-amendment/#.WudPhIjwY2w>.
- Congressional Digest Corp. (2013). Public access to government information: Overview of federal open-records laws. *Supreme Court Debates, a Pro & Con Monthly*, 16(3), 7-9.
- (2018). Legislative background on social media infiltration. Retrieved from <http://congressionaldigest.com/issue/social-media-and-national-security/legislative-background-on-social-media-infiltration/>.
- (2018). Terrorism and social media: Freedom of speech issues. *Congressional Digest*, 97(3), 7-8. Retrieved from <http://congressionaldigest.com/issue/social-media-and-national-security/terrorism-and-social-media/>
- Coyle, E. K. (2017). Press freedom and the citizens' right to know in the 1960s. *Journalism History*, 43(1), 44-55.
- Chen, A.K., & Marceau, J. (2015). High value lies, ugly truths, and the first amendment. *Vanderbilt Law Review*, 68(6), 1435-1507.
- Department of Justice. (2016, August 2). The freedom of information act, 5 U.S.C. § 552 | OIP. Retrieved from <https://www.justice.gov/oip/freedom-information-act-5-usc-552>.
- Federal Register. (2016, August 15). *Executive Order 12356*. Retrieved from National Archives website: <https://www.archives.gov/federal-register/codification/executive-order/12356>.html.

Garnar, M. (2018). Silencing marginalized voices: The fragmentation of the official record.

*Reference & User Services Quarterly*, 57(3), 193-195. Retrieved from

<https://journals.ala.org/index.php/rusq/article/view/6604/8824>.

Gerstein, J. (2017, April 27). FBI confirms grand jury subpoenas used in Clinton email probe.

Retrieved from [https://www.politico.com/blogs/under-the-radar/2017/04/27/](https://www.politico.com/blogs/under-the-radar/2017/04/27/hillary-clinton-emails-subpoenas-fbi-237712)

[hillary-clinton-emails-subpoenas-fbi-237712](https://www.politico.com/blogs/under-the-radar/2017/04/27/hillary-clinton-emails-subpoenas-fbi-237712).

Hernandez, D. (1994). National security vs. the public's right to know. *Editor & Publisher*,

127(10), 12-14.

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). (2010, June 21). Retrieved from

<https://supreme.justia.com/cases/federal/us/561/1/opinion.html>.

Kelmor, K. M. (2016). Legal formulations of a human right to information: Defining a global

consensus. *Journal of Information Ethics*, 25(1), 101-113.

Leahy, P. (1993). The freedom of information act: Public access in the computer age. *Journal of*

*Information Ethics*, 2(1), 22-25.

Legal Information Institute. (n.d.). New York Times Co. v. United States. Retrieved from

<https://www.law.cornell.edu/supremecourt/text/403/713>.

--(2017, October 10). First amendment. Retrieved from

[https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment).

--(n.d.). 18 U.S. Code § 2339A - Providing material support to terrorists. Retrieved from

<https://www.law.cornell.edu/uscode/text/18/2339A>.

Mitchell, A., Grieco, E., & Sumida, N. (2018, April 19). Americans favor protecting information

freedoms over government steps to restrict false news online. Retrieved from <http://>

[www.journalism.org/2018/04/19/americans-favor-protecting-information-freedoms-over-government-steps-to-restrict-false-news-online/](http://www.journalism.org/2018/04/19/americans-favor-protecting-information-freedoms-over-government-steps-to-restrict-false-news-online/).

Naftali, T. (2016, October 31). Opinion | Why Clinton's emails matter. Retrieved from <https://www.nytimes.com/2016/10/31/opinion/why-clintons-emails-matter.html>.

National Conference of State Legislatures. (2017, December 29). Cybersecurity Legislation. Retrieved from <http://www.ncsl.org/research/telecommunications-and-information-technology/cybersecurity-legislation-2017.aspx>.

New York Times Co. v. United States, 403 U.S. 713 (1971). (1971, June 30). Retrieved from <https://supreme.justia.com/cases/federal/us/403/713/#annotation>.

Office of Information Policy. (2017). *Summary of annual FOIA reports for fiscal year 2016*. Retrieved from U.S. Department of Justice website: [https://www.justice.gov/oip/reports/fy\\_2016\\_annual\\_report\\_summary.pdf/download](https://www.justice.gov/oip/reports/fy_2016_annual_report_summary.pdf/download).

Pew Research Center. (2015, November 23). 1. Trust in government: 1958-2015. Retrieved from <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>.  
-- (2018, April 26). The public, the political system, and American democracy. Retrieved from <http://www.people-press.org/2018/04/26/1-democracy-and-government-the-u-s-political-system-elected-officials-and-governmental-institutions/>.

Quist, A. S. (1993). Chapter 7: Classification levels. In *Security classification of information*. Retrieved from [https://fas.org/sgp/library/quist2/chap\\_7.html#2](https://fas.org/sgp/library/quist2/chap_7.html#2).

Relyea, H. C., & Ginsberg, W. (2008). *Access to government information in the United States* (Order Code 97-71). CRS Report for Congress.

*Report of the Warren commission on the assassination of President Kennedy.* (2018, February 5).

Retrieved from National Archives website:

<https://www.archives.gov/research/jfk/warren-commission-report/chapter-1#conclusions>.

*USA Freedom Act of 2015* (HR 2048). (2015). Retrieved from

<https://www.congress.gov/114/bills/hr2048/BILLS-114hr2048eh.pdf>.

*USA Patriot Act* (HR 3162). (2001). Retrieved from

<https://www.congress.gov/bill/107th-congress/house-bill/3162>.

Zarek, C.J., Leslie, G. P., Cullinan, K., Bergman, H., Albright, S., Laskin, S., & Wiederin, J.

(2009). *Federal open government guide* (10th ed.). Retrieved from Reporters Committee

for Freedom of the Press website: <https://www.rcfporg/rcfp/orders/docs/HOW2FOI.pdf>.