

FRINGE SPITTING

* A biweekly journal with freedom of information news for specialists and researchers*

* Editor: Roger Vleugels - roger.vleugels@planet.nl *

* Donations are very welcome, see colophon *

* Year 11 - No. 200 – December 1 2012 *

Content minus The Netherlands

- 02▶ Classification is Reviewable - 2
- 02▶ Royal Family under Scottish FOIA
- 03▶ Suit over Olsen Case
- 04▶ Classification is Reviewable - 1
- 05▶ Docs on Commercial Satellite Imagery
- 05▶ RTI Is Scaring away Politicians
*
- 06▶ Exceptionally grave Damage
- 07▶ US Vulnerabilities through the 1970s
- 07▶ **Beyond WikiLeaks - 2**
- 14▶ **Beyond WikiLeaks - 1**
- 42▶ Thirty years in deep freeze
- 44▶ ATI Litigation in Bulgaria
- 46▶ The Kissinger Transcripts

Content on The Netherlands

- 47▶ Raad van State kritisch over Nieuwe Wob
- 48▶ **Advies Raad van State over Nieuwe Wob**
- 64▶ Wob War Log
- 67▶ Fringe Toolbox – FOIA / Wob
- 71▶ Fringe Toolbox – Intelligence
- 72▶ Fringe Shop
- 73▶ Fringe Colophon



FRINGE FOIA worldwide

Interested in this topic, in debate and in contacts? Consider joining the Linked In group:
FOIA specialists

CLASSIFICATION IS REVIEWABLE - 2

Federal courts have power to review classification decisions, government brief confirms

► www.rcfp.org/browse-media-law-resources/news/federal-courts-have-power-review-classification-decisions-government

► RCFP / by Monika Fidler

Nov 30 2012 ► Nov 28. Government attorneys confirmed on Tuesday that federal courts have the right under the federal Freedom of Information Act to review agency decisions to classify documents when invoking the law's national security exemption.

The government's reply [brief](#) in Center for International Environmental Law v. Office of the United States Trade Representative, filed in the U.S. Court of Appeals in Washington, D.C., clarifies its earlier argument regarding the power of courts to substantively review agency classification claims.

"We agree that the district courts (and the court of appeals) play an important role in evaluating the government's compliance with its obligation under FOIA, in Exemption 1 cases as well as others," the brief stated.

The clarification responds to arguments made by the plaintiff in the case and The Reporters Committee for Freedom of the Press, which along with 32 other media organizations filed a [friend-of-the-court brief](#) arguing that executive branch decisions to classify documents can be scrutinized by federal courts.

The Reporters Committee's brief was filed after statements in the government's opening brief appeared to suggest that executive branch agencies could classify documents and withhold them under FOIA's national security exemption without a high level of judicial review.

"The district court's refusal to accept the government's plausible and detailed explanation was improper second-guessing in an area outside the judiciary's expertise," the government's initial brief stated.

The Reporters Committee's friend-of-the-court brief noted that courts have a "congressionally mandated role to review classification decisions that form the basis of an agency determination to withhold a document under FOIA."

The case began when the Center for International Environmental Law made a FOIA request to obtain records regarding trade negotiations between the United States and 33 countries.

The government withheld one document under Exemption 1, arguing that its release would harm national security and foreign policy interests. After the trial court gave the government three attempts to justify its classification withholdings, it ordered the release of the document.

In its latest brief, the government agrees that courts should review federal agency classification decisions, but argues that the court in this particular case exceeded its authority. The brief emphasizes that substantial weight should be given to the government's classification decisions in national security cases. In this case, the government is arguing that the court overstepped its role.

"The Executive is uniquely positioned to assess the prospects of damage to foreign relations and national security," the government stated in its reply brief. "Because courts lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case, we must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."

ROYAL FAMILY UNDER SCOTTISH FOIA

Scottish Government Backs Off FOI Exemption for Royals

► <http://www.freedominfo.org/2012/11/scottish-government-backs-off-foi-exemption-for-royals/>

► FreedomInfo

Nov 30 2012 ► Nov 30. The Scottish Government has retreated from its proposal to exempt the royal family from the Scottish Freedom of Information law.

The proposal, similar to a protection approved for the United Kingdom FOI law, was criticized recently by a Scottish legislative committee considering a government-proposed [bill](#) to amend the law in a variety of ways. Critics also have said the proposal does not go far enough, particularly by not covering public-private bodies. ([See previous FreedomInfo.org report.](#))

Deputy First Minister Nicola Sturgeon said in a [letter](#), "Having carefully considered the report of the Finance Committee, we have concluded that the principle of public interest as regards Royal communications should be maintained."

"We remain firmly of the view that communications between Her Majesty and other members of the Royal Family with Scottish Ministers – and other public authorities – should be handled sensitively and confidentially, with strict and appropriate application of the exemptions contained within the current Freedom of Information Act," she said Nov. 27, according to a [report](#) in The Scotsman.

Her letter also touches on other topics, indicating that she will make further comments on the issue of extending the act's reach.

The bill is due to be considered by the committee at Stage 2 on Dec. 5. In advance of this, the Deputy First Minister lodged amendments to the Bill, which included the removal of the provision which introduced the absolute exemption and concerning the scope of FOI.

The final stage, the stage 3 debate, is likely to take place mid-January.

Research materials: The committee's [pages](#) on the bill. The Deputy First Minister's [proposed amendments](#). The Scottish Government's [news release](#) re. the proposed amendments: Elaine Murray MSP's [proposed amendments](#).

British Law on Royals Amended in 2010

An amendment to the British FOI law to provide an absolute exemption for information relating to communications with Her Majesty, the heir and second in line to the throne was passed in 2010 and came into force in 2011. See a [posting](#) on the UK Freedom of Information Blog of the Campaign for Freedom of Information.

The amendment is not retrospective so requests made before Jan.19, 2011, must be dealt with under the old regime. The Guardian's requests for Prince Charles' letters, which were made back in 2005, were recently ordered to be disclosed on public interest grounds by the Upper Tribunal. The government vetoed the Tribunal's decision.

See the UK FOI Blog [post.](#) (Also see [previous FreedomInfo.org report.](#))

SUIT OVER OLSEN CASE

Suit Planned Over Death of Man C.I.A. Drugged

► www.nytimes.com/2012/11/27/us/family-of-frank-olson-man-drugged-by-cia-plans-suit.html?_r=1&

► The New York Times / by James Risén

► **Stringer:** Kees Kalkman / VDAmok / Utrecht NL / kees@amok.antenna.nl

Nov 29 2012 ► Nov 26. Nearly 60 years after the death of a government scientist who had been given LSD by the Central Intelligence Agency without his knowledge, his family says it plans to sue the government, alleging that he was murdered and did not commit suicide as the C.I.A. has long maintained.

Eric and Nils Olson, whose father, Frank Olson, was the scientist, said they plan to file a lawsuit in United States District Court here on Wednesday accusing the C.I.A. of covering up the truth about Mr. Olson's death in 1953, one of the most infamous cases in the agency's history.

During the intelligence reforms in the 1970s, the government gave the Olson family a financial settlement after the C.I.A. was forced to acknowledge that Mr. Olson had been given the hallucinogenic drug nine days before his death. President Gerald R. Ford met with the Olson family at the White House and apologized.

At the time, the government said Mr. Olson had killed himself by jumping out of a hotel window in Manhattan. But the Olsons came to believe that he had been murdered to keep him from talking about disturbing C.I.A. operations that he had uncovered.

Mr. Olson's sons said that their past efforts to persuade the agency to open its files and provide them with more information had failed, and that a court challenge is the only way to find out the truth.

"The evidence points to a murder, and not a drug-induced suicide," said Eric Olson, Frank Olson's older son, who has devoted much of his life to investigating his father's death. When the government told his family that his father had committed suicide, "one set of lies was replaced with another set of lies," he said.

Jennifer Youngblood, a C.I.A. spokeswoman, said the agency does not comment on pending court cases, but she noted that the C.I.A.'s most controversial episodes from the early cold war years, like

Mr. Olson's death, "have been thoroughly investigated over the years, and the agency cooperated with each of those investigations."

The Olson case was one of the most explosive revelations about the C.I.A. during the post-Watergate investigations of the United States intelligence community in the mid-1970s, and was part of a series of disclosures about a C.I.A. program known as MK-Ultra, which included brainwashing, mind control and other human behavioral control experiments during the early days of the cold war.

Over the decades, the Olson case has gained a kind of pop culture status as one of the signature examples of government secrecy and abuse, and references to the death have been made in television, film, books and music.

"The C.I.A.'s wrongful conduct in this case continues under the present administration," said Scott Gilbert, a Washington lawyer representing the Olson brothers. "I have met personally with senior agency officials who still refuse to acknowledge the truth and to provide us with all documents relevant to this matter."

Frank Olson was a bioweapons expert working at the special operations division of the Army's Biological Laboratory at Fort Detrick in Maryland. The C.I.A. worked jointly with the special operations division, researching biological agents and toxic substances.

In 1953, Mr. Olson traveled to Europe and visited biological and chemical weapons research facilities. The Olson family lawsuit alleges that during that trip, Mr. Olson witnessed extreme interrogations, some resulting in deaths, in which the C.I.A. experimented with biological agents that he had helped develop. Intelligence officials became suspicious of him when he seemed to have misgivings about what he had seen, the lawsuit contends. Eric Olson said Frank Olson also appeared to have deep misgivings about the use of biological weapons that was alleged in the Korean War.

A few months later, he attended a meeting with officials from both the special operations division and the C.I.A. at Deep Creek Lake, Md. Sometime during the meeting on Nov. 19, 1953, he was given a drink of Cointreau that had been secretly spiked with LSD by C.I.A. officials.

Mr. Olson returned home, and over the following weekend told his wife that he wanted to leave his job. Eric Olson said his mother later recalled that Frank Olson did not seem suicidal or psychotic that weekend, but was reflective about his work.

On Nov. 24, Mr. Olson told a colleague that he wanted to resign, according to the lawsuit. Instead, he and several C.I.A. officials traveled to New York, supposedly for a psychiatric evaluation. On Nov. 28, Mr. Olson fell to his death from his room in the Statler Hotel. His sons now express skepticism about the government's official story that he had committed suicide because he was given LSD more than a week earlier.

In the 1990s, the family had Mr. Olson's body exhumed and an autopsy performed, and the New York district attorney's office later conducted an inconclusive investigation into the death.

Eric Olson says that his father's death and its aftermath had devastating consequences for his family. He said his mother, who is now dead, suffered from alcoholism. "We want justice," Mr. Olson said. "This has cost me an immense amount of time and years of my life."

CLASSIFICATION IS REVIEWABLE - 1

Classification Decisions Are Reviewable By Courts, Govt Admits

► **Source:** Steven Aftergood / Secrecy News / FAS / Washington / www.fas.org

Nov 28 2012 ► Nov 28. Executive branch decisions to classify national security information are subject to judicial review in Freedom of Information Act cases, government attorneys acknowledged in a [brief](#) filed yesterday.

That potentially explosive question arose following an extraordinary ruling by a federal judge ordering the U.S. Trade Representative to release a one-page classified document that had been [requested](#) under the FOIA by the Center for International Environmental Law. The document's classification was not "logical," said DC District Judge Richard W. Roberts [last March](#), and therefore it was not exempt from public disclosure.

The government [appealed](#) that ruling in September, but stopped short of asserting that the court had no authority to order release of the document.

Yesterday, in response to arguments presented in an [amicus brief](#) from [media organizations](#), government attorneys made their acceptance of judicial review explicit in a final [reply brief](#).

"We agree that district courts (and courts of appeals) play an important role in evaluating the government's compliance with its obligations under FOIA, in Exemption 1 cases [involving national security classification] as well as others...."

"We have not sought to diminish the role of courts in FOIA Exemption 1 cases, nor have we suggested that the Executive's determination that a document is classified should be conclusive or unreviewable," attorneys wrote in [the November 27 brief](#) (at p. 8).

In other words, the government did not assert that the executive has some kind of transcendent Article II classification power, nor did government attorneys contend (à la Egyptian President Morsy) that the judicial review provisions of FOIA are an unconstitutional infringement on executive authority.

This was the crucial information policy question that was raised by the move to appeal Judge Roberts' highly unusual disclosure order, and the government has more or less resolved it by submitting to the discipline of judicial review.

What remains is a bona fide dispute: Was the decision to classify the USTR document well-founded and plausible, as the government insists, and therefore entitled to judicial deference? Or was it illogical, as the lower court ruled, nullifying the document's exemption from FOIA?

Oral arguments in the case are scheduled for February of next year.

DOCS ON COMMERCIAL SATELLITE IMAGERY

Declassified Docs Trace US Policy Shifts on Use of Commercial Satellite Imagery

Recent U.S. Concerns Include Terrorists' Use of Google Earth

► <http://www.nsarchive.org>

► <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB404>

National Security Archive / by Jeffrey T. Richelson

Nov 27 2012 ► Nov 27. In the forty years since the first launch of a commercial imagery satellite -- LANDSAT -- in 1972, U.S. official policy has shifted dramatically from imposing significant limits on their capabilities to permitting U.S. firms to orbit high-resolution satellites with significant intelligence-gathering capacities. According to declassified documents posted today by the National Security Archive, internal debates within the government have focused both on the risks of adversaries exploiting such commercial platforms and on the potential benefits for the U.S. of having access to unclassified imagery.

The risks in recent years include the use of Google Earth by terrorist groups to identify targets for attack; the benefits range from being able to observe foreign nuclear sites to monitoring human rights violations.

Over time, U.S. presidents have come to recognize that they cannot prevent foreign entities from developing extremely high-resolution satellite equipment. This realization has contributed to drastic swings in U.S. policies, aimed not only at enhancing the national security but at promoting the commercial competitiveness of American companies abroad.

The 39 documents posted today were obtained via Freedom of Information Act requests, archival research and a variety of websites. They focus on virtually every issue associated with commercial satellite imagery over the last four decades.

RTI IS SCARING AWAY POLITICIANS

Attorney-General considering change to Right To Information law to keep politicians safe

► The Courier Mail / by Alison Sandy

► www.theaustralian.com.au/news/attorney-general-considering-change-to-right-to-information-law-to-keep-politicians-safe/story-e6frq6n6-1226518140699

► The Australian

Nov 27 2012 ► Nov 16. The state's top lawmaker is reviewing Right to Information legislation, saying too much public scrutiny is scaring people away from becoming politicians.

Attorney-General Jarrod Bleijie was critical of the way the situation involving his former Cabinet colleague Bruce Flegg played out this week, warning it would diminish the calibre of future leaders.

"What all this has done over the last few days, it's going to be a challenge in the future if this is the way we're going to get people to actually want to be politicians," he said.

"If this is the public scrutiny that people and their families go under, and we saw it in the election campaign, people are not going to be interested in becoming politicians any more."

[Dr Flegg this week resigned after his former media adviser Graeme Hallett leaked emails from private email accounts between the former minister and his son Jonathon, a lobbyist for Rowland.](#)

Mr Bleijie denied the use of private emails was a tactic to avoid having them released under the RTI Act, but said he used private email at home because he didn't have access to his work email.

"I wouldn't envisage that's a systemic problem, no," he said.

"Everyone should be careful what they put in writing no matter what communication you use."

Mr Bleijie said abolishing the Right to Information Act, which was introduced in 2009 by former premier Anna Bligh, was "highly unlikely" but changes would be introduced as part of his review.

Mr Bleijie said Premier Campbell Newman's plan for an open government website posting all non-confidential documents would greatly reduce the need for RTI.

He said he also was investigating the cost and scope of the RTI Act, and extending it to capture information within the Office of the Opposition.

A discussion paper will be publicly released for comment.

"We'll certainly be canvassing the options of whether the current Act in its form can actually be broadened with the open government and, rather than using an RTI for basis, people can go straight on to government website and get the information themselves," he said.

"We're intending that most of the information will be available on the government website.

"Some of the information, if it's not statistics per se, there might have to be the mechanism remaining that people can still access that information."

When asked about ongoing allegations of nepotism and favouritism within the Government, he said: "I just think people are getting too carried away with these matters."

Lobbyist firm Rowland has announced a review into its internal processes.

EXCEPTIONALLY GRAVE DAMAGE

NSA refuses to declassify Obama's cybersecurity directive

► <http://rt.com/usa/news/nsa-directive-epic-foia-192/>

► Reuters / by Adrees Latif

► **Stringer:** Frank Slijper / Campaign Against Arms Trade / Groningen NL / frank.slijper@hetnet.nl

Nov 21 2012 ► Nov 21. The National Security Agency has shot down a Freedom of Information Act request for details about an elusive presidential order that may allow the government to deploy the military within the United States for the supposed sake of cybersecurity.

The Electronic Privacy Information Center (EPIC) reports on Tuesday that their recent FOIA request for information about a top-secret [memo](#) signed last month by US President Barack Obama has been rejected [[PDF](#)]. Now attorneys for EPIC say they plan to file an appeal to get to the bottom of Presidential Policy Directive 20.

Although the executive order has been on the books for a month now, only last week did details emerge about the order after the Washington Post reported that Pres. Obama's signature to the top-secret directive could allow the White House to send in recruits from the Pentagon to protect America's cyber-infrastructure.

Because Presidential Policy Directive 20 is classified, the exact wording of the elusive document has been a secret kept only by those with first-hand knowledge of the memo. For their November 14 article, the Post spoke with sources that saw the document to report that the directive "effectively enables the military to act more aggressively to thwart cyberattacks on the nation's web of government and private computer networks."

In response to the Post's report, EPIC filed a FOIA request to find out if the policy directive could mean military deployment within the United States, especially since the sources who have seen the memo say it allows the Pentagon to pursue actions against adversaries within a vaguely described terrain known only as "cyberspace."

"What it does, really for the first time, is it explicitly talks about how we will use cyber-operations," a senior administration official told the Post. "Network defense is what you're doing inside your own networks. . . . Cyber-operations is stuff outside that space, and recognizing that you could be doing that for what might be called defensive purposes."

"We'd like to see what the language says and see what power is given," EPIC attorney Amie Stepanovich told RT this week a matter that will now have to be appealed before any details can be determined.

News of the directive comes just as lawmakers in Congress failed once again to approve a cybersecurity legislation that would provide new connections between the federal government and the private sector in order to supposedly ramp up the United States' protection from foreign hackers. With the defeat of that bill, though, members of both the House and Senate now say they expect Pres. Obama to sign a separate executive order that will lay down the groundwork for a more thorough cybersecurity plan to be established.

Meanwhile, the commander-in-chief has already signed a secret order, Presidential Policy Directive 20, that might remain classified unless EPIC can win in court.

"We believe that the public hasn't been able to involve themselves in the cybersecurity debate, and the reason they can't involve themselves is because they don't have the right amount of information," Stepanovich tells RT.

Responding to the FOIA request, the NSA says releasing information on the directive cannot occur because "disclosure could reasonably be expected to cause exceptionally grave damage to the national security."

"Because the document is currently and properly classified, it is exempt from disclosure," the NSA writes.

US VULNERABILITIES THROUGH THE 1970S

Hair-Raising Scenarios of US Vulnerabilities to Nuclear Attack through 1970s

Study Addresses US Strategic Command-Control-and-Communications [C3] Systems

President Could Try to Survive Attack by Escaping or Try to Command - But Not Both

Reagan Spent Billions on C3 Upgrades But Kept Secret Its Top Priority

► <http://www.gwu.edu/~nsarchiv/nukevault/ebb403/>

► <http://www.nsarchive.org>

► National Security Archive / by William Burr

Nov 20 2012 ► Nov 19. For decades, U.S. command-control-and-communications (C3) systems were deeply vulnerable to nuclear attack, according to a recently declassified Pentagon study. The document, a top secret internal history of the highly complex procedures that connected the White House and senior civilian and military leaders with local commanders awaiting orders to launch bombers and missiles, details sometimes harrowing reports about systemic weaknesses that could have jeopardized U.S. readiness to respond to a nuclear attack.

According to the report, A Historical Study of Strategic Connectivity 1950-1981, prepared by the Joint Chiefs of Staff Historical Division, earlier top-secret analyses had concluded that despite the presence of counter-measures installed over the years, high altitude bursts and electromagnetic pulses could still paralyze communications links and cut warning time of an attack to as little as seven minutes.

Furthermore, nuclear detonations could destroy presidential helicopters along with the vital National Emergency Airborne Command Post (NEACP), putting in question whether the U.S. would be capable of delivering a nuclear response - the essence of deterrence.

A 1978 Defense Science Board report cited by the JCS history found that the "provisions for National Command Authority survival were critically deficient." If the President happened to be in Washington, D.C. at the time of a nuclear attack, "it would be possible ... for the President either to command the forces until the attack hit Washington and he was killed or to try to escape and survive, but not both." The National Security Archive obtained this JCS historical study through a Freedom of Information Act appeal to the Defense Department. The Pentagon had previously released the document but in massively excised form. This briefing book is one of a series of occasional postings aimed at disseminating new documentation on a variety of nuclear issues as it becomes available through U.S. government declassification processes.

BEYOND WIKILEAKS - 2

WikiLeaks as a Transparency Hard-Case

► http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Peled.pdf

► IoWa Law Review / by Roy Peled [Associate-in-Law, Columbia Law School; JSD Candidate, Tel-Aviv University; former head of the Movement for Freedom of Information in Israel. I wish to thank Mark Fenster for inviting me to write this note and David Banisar and David Goldberg for reading its draft]

► **Source:** Roy Peled / FOIANet / Madrid / www.foiadvocates.net

Nov 19 2012 ► Transparency is a winning chip in almost any political debate during the past twenty years. Rarely, if at all, will politicians in a democratic country be caught speaking against transparency per se, even if their conduct in terms of implementation of transparency laws might vary greatly. While the support for transparency laws crosses party lines, it starkly divides along position lines. The following could have become famous last words of a political career, had they been uttered by a politician: Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible

nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it . . . [f]or political leaders, it's like saying to someone who is hitting you over the head with a stick, 'Hey, try this instead,' and handing them a mallet.

But instead, they were included by an ex-politician, former British premier, Tony Blair, in his memoirs.¹ Blair reports protesting to civil servants under him that they should have prevented this legislation "knowing what [they] know."² But if "everybody" knows the evils of Freedom of Information ("FOI"), how has it gained so much popularity across the world? There is doubtfully a legislative pandemic similar to FOI. In the past twenty years approximately eighty countries have joined the fifteen who have older FOI laws,³ and there are very few democracies without a FOI-like law. What is the magic power of the Freedom of Information Act ("FOIA") that unites legislatures and brings them to set aside what their Sir Humphries might have told them and bestow the perils of transparency upon their legislatures? It is likely the beneficial outcomes attributed to transparency. Louis Brandeis' famous quote about sunlight being "the best of disinfectants"⁴ gave FOIA legislation its name.⁵ The notion is so widespread and so deeply rooted that a few politicians dare express their reluctance. The conviction is so deep that it has swept up large academic circles and civil society in numerous countries and the international arena.

It is against this backdrop that I believe Mark Fenster's eye-opening article Disclosure's Effects: WikiLeaks and Transparency⁶ should be read and its contribution assessed. In an unfairly crude nutshell, I believe Fenster's argument can be summed as the following: The alleged benefits of transparency serve as a moral basis of a large international civic, academic, legal, and political movement supporting transparency legislation. The recent, massive disclosure of classified documents by WikiLeaks is the most significant experiment in transparency we have witnessed. These releases had minimal beneficial (or hazardous) effect. Thus, the rug is pulled from under the utilitarian moral basis. If there is any use in weighing the expected impact of disclosure, such effects need to be assessed not by courts but by experts in the matters relevant for each case.

Any idea and any movement that becomes too popular and is left unquestioned risks stagnating and losing sight of its original justifications. This is why I believe Fenster's article does an important service to the transparency movement. If nothing else, it should leave proponents of transparency, a group I hope to be worthy of being included in, more modest in their statements and more sincere in their discourse.

Nevertheless, if such proponents finish reading the article with a sense of disempowerment or helplessness, I shall attempt in this note to show that these are unwarranted.

Wikileaks—A Trial in Mega-Disclosure

During the second half of 2010, WikiLeaks, by now largely embodied in the persona of Julian Assange, began releasing massive stockpiles of classified U.S. documents pertaining to the Iraq and Afghanistan wars and later diplomatic correspondence between Washington and its representatives around the globe. These disclosures sent transparency advocates across the globe on an emotional roller coaster ride. WikiLeaks was an organization with a short history of leaking information of public importance, most notably the "collateral murder" video. Many, myself included, viewed the release of this video as the epitome of much-justified leaks.⁷ Human lives were taken by what seemed to be a trigger-happy or negligent team of pilots. Inquiry findings were being concealed from the public at large, as well as from the loved ones of those killed in the incident.⁸

The video uploaded to YouTube was viewed over twelve million times.⁹ The story made headlines across the globe.¹⁰ While no disciplinary action has been taken to this day against any of those involved, the video shed an important light on the specific incident and raised questions in regard to the conduct of U.S. forces in far-away war zones. Consequently, it also highlighted doubts about the self-handled investigations of U.S. forces and their public statements on this and possibly other matters.¹¹

Following the "collateral murder" video leak and other similarly striking releases in their portfolio, WikiLeaks struck the imagination of transparency advocates. When the world was waiting for the release of tens, and then hundreds, of thousands of documents, one could not but think to herself, if one video caused such outrage, what would disclosure thousands of folds more extensive do? The expectations were high, extremely high.¹²

These expectations were the source of what can be fairly described as a disappointment among transparency circles. In spite of the first impression made by the sheer volume of disclosed materials, few will dispute Fenster's main observation—these mega-leaks did not do a whole lot, and what they may have done (namely, according to Fenster, inspire uprising in Tunisia) could not have been predicted and hence could not have been included in the cost-benefit calculation of the disclosure. Comments such as, "[b]oosters of WikiLeaks have overestimated the scale and significance of the leaks"¹³ and "many of the cables . . . tell us much about the private thoughts of dining diplomats, and

rather less about duplicity in policy,”¹⁴ delivered in the aftermath of the first wave of excitement following the WikiLeaks disclosure, seem to project a widely held sentiment.

So, does this mean that transparency has failed in its most important test to date? I argue not. The nature of the organization and the nature of the disclosed information make it a hard case, and the theories based on it questionable.

One of Fenster’s important contributions is identifying, defining and distinguishing between two very different goals of WikiLeaks and Julian Assange. The first—to “enforce the human right to know”;¹⁵ the second—to “[d]estroy the regime’s ability to communicate with itself or degrade the quality of the information that the regime processes.”¹⁶ There is some evidence that for Assange and his organization, the real goal is the latter, putting into question his intention to contribute to transparency per se.

Take for instance WikiLeaks’ approach towards transparency in its own operation: it has shown outrage at newspapers printing files leaked to it without its authorization.¹⁷ It has made its employees sign draconic confidentiality agreements.¹⁸ To host his talk show, Assange has chosen a TV channel strongly identified with a regime that is far from a model of openness,¹⁹ and as his first interviewee, the head of a radical Islamic militant organization.²⁰ It does not talk or walk like an organization committed to transparency, but very much like one committed to “radical resistance” as Fenster puts it, employing methods of radical underground organizations (and some of their characteristics, including some level of a personality cult). This is not to say that the organization cannot contribute to promoting transparency or that the information it disclosed lacks public significance, but it does imply that the public significance of the information or of the information’s disclosure may not be on the top of its agenda.

The focus on quantity is another characteristic of the State Department cables disclosure that makes it a questionable candidate upon which to examine transparency’s impact. It was rightfully noted that much of the public attention initially drawn by the 2010–2011 WikiLeaks disclosure was a result of the mind-boggling masses of leaked documents²¹: ninety thousand in one case, four hundred thousand in another and two hundred fifty thousand in yet a third disclosure.²² This message was amplified by the newspapers cooperating with WikiLeaks²³ who must have known that the headline potential of the cables’ subject matter was rather limited, so they preferred to focus on what may have seemed to be the larger implication of such a massive leak. With some quality, but not enough to meet expectations, the focus remained on the quantity of the documents leaked. Three quarters of a million documents! Wow! Or is the quantity that impressive?

The truth is that for information to give meaningful insight into government operations, or even merely those of just one government agency, it would have not only to be numerous times larger, but it would also have to be a volume no human being or team of human beings can grasp or process. The National Archives and Records Administration (“NARA”) receives an estimated seventy-two million print document pages a year, which account for 2% of overall government-produced print documents. Therefore, the number of government document pages printed per year is approximately 3.6 billion, and 21.6 billion over the six-year period covered by the WikiLeaks leaked cables—this is an underestimate, as the figures are taken from a 2003 study, and the figures have likely risen since.²⁴ Thus, the released cables do not amount to more than 0.0025% of the total volume of government documents. Looking at the file sizes produces even starker outcomes. The two hundred fifty thousand cables disclosed in one CSV file mount to 1.73 gigabytes. The Bush White House alone, a single government organization, transferred seventy-seven thousand gigabytes to the NARA in 2009, upon termination of President Bush’s presidency. The cables are less than 0.0025% of this figure, and this is just one of approximately one hundred federal government organs. The State Department cables, therefore are not a very wide window through which to view government. Such calculations would have been totally immaterial if the disclosure’s claim to fame focused on content of the information, but where quantity was chosen as the name of the game, WikiLeaks also fails. Much can be learned from the “cablegate” affair. The government will likely change much of its cross-agency information-sharing protocol, as well as its restrictions on access to confidential information. Diplomats will likely be more cautious when putting their thoughts in writing. These are responses more to the perceived threats of future leaks than to actual harm caused by the recent ones. Does the public stand to gain significantly from this windfall of unmediated, unprocessed incidental information? Fenster seems successful in showing that it is doubtful.

Many have compared the Wikileaks’ disclosures to the Pentagon Papers affair. Not only Fenster, but Daniel Ellsberg himself, the hero of the Pentagon Papers, as well as Julian Assange, have promoted the comparison. However, the two incidents are worlds apart. The Pentagon papers were indeed a leak of official documents of unprecedented magnitude: seven thousand pages, including four thousand classified documents, were brought to daylight. Yet, they were not incidental files one

individual happened to have access to. They were leaked by a person innately involved in their collection and processing. These documents were part of the Pentagon Papers because they were found to contribute to the understanding of U.S. involvement in Vietnam. This leak had a significant effect. Unlike WikiLeaks' disclosures, the Pentagon Papers revealed to the public information that dramatically departed from what was common knowledge at the time. People were surprised. People were outraged. Polls from 1971 showed that a vast majority of the public thought The New York Times and other newspapers did the right thing by publishing the papers, which many believed to "show that the Johnson Administration deceived the public regarding the escalation of the war."²⁵ Support for the war had been declining for years, and it is hard to assess the contribution made to this process by the publication of the Pentagon Papers. Yet, there seems to be no question they contributed significantly to disillusionment among the American public in regard to its government.

It is not difficult to come up with other examples where transparency had clear-cut effects. A recent example could be the Members of Parliament Expense Scandal in United Kingdom's House of Commons. At the least it had a life-changing effect on the speaker of the house, six cabinet members, and no fewer than thirteen house members, who had their political career come to an end over the scandal.²⁶ In this affair, millions of expense claims and relevant correspondence were published following a Freedom of Information campaign and a leak to the press.²⁷ It caused profound changes in the way the House handles expense claims and one cannot question that it will have a serious effect on the future expense claiming by Members of Parliament. Furthermore, public trust in U.K. politicians, low to begin with, plummeted following the scandal.²⁸ It is important to mention that one of the arguments against disclosure of expense claims, albeit awkward, was that "any allegations made that MPs claim excessive levels of allowances can damage the trust in which the public holds Parliament, politicians and public office-holders in general."²⁹ This prophecy was realized. Transparency in this case had far-reaching, but also predictable, effects.

The Errors of Mega-Disclosure

The "Torture Memos"³⁰ and the Abu Ghraib photos³¹ are just two other examples of disclosures that had and still have a substantial effect on public affairs. Disclosure required by the U.S. Securities and Exchange Commission from public corporations have clear effects on their practice and it is unthinkable, some eighty years after they have become law in the U.S., to give up on them. Consumer disclosure acts³² affected behavior of both consumers and producers, and the list goes on. Is this to say that the modest effects of WikiLeaks, relative to the expected effects, have nothing to teach us? Not at all.

WikiLeaks was not just another disclosure. It was an event, which transparency advocates and the media together turned into a transparency litmus test, and as Fenster shows, it did not live up to the expectations surrounding the hype around its publication, which is a massive rebuttal to the above examples. While I believe we have shown that at times transparency has profound and publicly beneficial effects, this is not always the case. A short description of another telling story is necessary before we reach some conclusions.

The Data.gov website "is a flagship Administration initiative intended to allow the public to easily find, access, understand, and use data that are generated by the Federal government."³³ It is one of the major steps taken by the Obama Administration to demonstrate its commitment to transparency in government. It is a central government repository for agencies' data.³⁴ When launched in May 2009, it received loud applause and stirred excitement among transparency advocates that declared it to be no less than "a dramatic breakthrough in the role of government."³⁵ The site initiators believed it "ha[d] the potential to generate public value by driving better governance through greater accountability, effectiveness, and efficiency in Federal government operations."³⁶ The site sees "[p]ublic participation and collaboration [as] key to the success of Data.gov."³⁷ To reach these noble goals through Data.gov and other transparency focused sites,³⁸ the government allocated as much as thirty-four million dollars in 2010 to the cause.³⁹ It was so proud of its new effort that it also launched an international initiative to spread the Data.gov message.⁴⁰ And indeed it took no more than two years for transparency enthusiasts around the globe to push thirty governments to create similar sites,⁴¹ and the number is on the rise.⁴² Data.gov itself grew at an impressive pace from forty-seven datasets on the day of its launch to nearly four hundred thousand in two years.⁴³ All the apparent differences aside, the hype around Data.gov among transparency proponents resembled that around WikiLeaks. But sadly, the initial excitement over Data.gov is not supported by, well, the data. In the past year, the site enjoyed a surprisingly low number of unique visitors, averaging less than thirty thousand per month.⁴⁴ During the same time Britain's Data.gov.uk suffered a miserable usage of less than two thousand unique visitors per month. They seem to have been "ignored by all but a small minority of interested groups and individuals."⁴⁵ Thirty-four million dollars were spent on Data.gov and a handful of other transparency sites in fiscal year 2010.⁴⁶ Is making the government accountable to a few tens

of thousands of people worth that much? These numbers were among the reasons that brought Congress to consider turning the lights off on these sites.⁴⁷ Although this never happened,⁴⁸ more and more people feel comfortable raising doubts as to the usefulness of open-government efforts.⁴⁹ In spite of apparent differences, there are many similarities between WikiLeaks and Data.gov websites. Both generated a lot of excitement, which at least in part was a result of their use of modern technologies and the massive amount of information they shed light on. Both happily engaged in a numbers game to create this excitement. Both depart from the more traditional approach to transparency that developed through the implementation of FOIA. Both created a challenge and a significant burden for government agencies—Wikileaks by forcing them to invest more in data security, Data.gov sites by requiring investments of millions of dollars in data management and IT infrastructure. Unlike WikiLeaks, the efforts of the people behind Data.gov are geared towards bettering the Government and not putting sticks in the wheels of its policy. Yet like WikiLeaks, the open-government data movement has a hard time showing any measurable proof it fulfills transparency proponents' hopes.

Thus, Mark Fenster's argument is again proven valid, even in a more normative environment than that offered by WikiLeaks. While some disclosures of carefully picked documents can reasonably be expected to have certain effects, large-scale transparency has not proven to have any significant effect. Are transparency advocates thus ripped off in their most powerful campaign ammunition? I think this is an erred conclusion, for three reasons.

First, intended or not, Fenster actually provides us with a strong legal argument in favor of transparency. As he notes, the inability to predict transparency's effects applies to beneficial, as well as hazardous, effects.⁵⁰ This may or may not mean that courts are ill-fitted to balance the interests raised in any FOIA case,⁵¹ but it surely means that the cases in which such balancing is required are much less common than is perceived. FOIA and practically all similar laws around the world are based on an assumption of openness. The claimed beneficial effects of disclosure need not be balanced at all, unless alleged threats of disclosure can be proven. Balancing should take place only where the "catastrophic consequences" of disclosure are probable and inevitable.⁵² If WikiLeaks, the Pentagon Papers, and scores of other cases have shown us anything, it is that the government resorts to presenting such threatening scenarios as a matter of convenience, but again and again, when its position is rejected by the court, its predictions are proven groundless.⁵³

Second, and more importantly, mega-disclosures like those practiced by WikiLeaks and, by very different means, the various Data.gov sites are a new phenomenon. It is too early to judge their effect not only because not enough time has passed, but also because we are all still in the process of learning how to make the most out of them. Never in the past had the press, civil society, corporations, and individuals had to cope with such a torrent of information. This new reality requires information consumers to acquire and practice a whole new set of skills. It requires information distributors to implement new policies. WikiLeaks and Data.gov have made it clear that simply dumping information in the public commons does not achieve transparency. "In addition to access to information, you need an ability to process the information, and the ability and incentives to act on the processed information."⁵⁴

Third, and most importantly, the beneficial effects of transparency are far from its only claim to fame. They are often seen as the most effective argument in convincing politicians and other decision-makers to move ahead with transparency plans, but they are not necessarily the primary or the morally strongest reasons to promote transparency in a democratic society. Information generated by the government is public property. It is created with the public's funds and assumingly for the public's benefit. Members of the public as owners of the information should have access to it, just as any owner may access his property, unless other compelling interests prevent such access. Transparency is seen as a branch of freedom of expression. People often choose to speak without expecting to succeed in making any beneficial impact. They are still practicing their right to freedom of expression, and they may well require information to be able to express themselves. Information is required for an individual to understand the world in which she operates. This is an aspect of her personal autonomy and her ability to operate freely within society and interact with it.⁵⁵

Concluding Remarks

Transparency's popularity among civic groups and engaged citizens has turned it into a valuable political token. It has also shallowed much of the discussion on the subject, hushed critics, and created a false impression that transparency in itself is a magic cure to many of society's diseases. It might have inadvertently delayed the development of policies, tools, and approaches that are necessary to complement transparency if transparency is to fulfill the high hopes we put in it. If WikiLeaks was a trial in information dumping and its effect, it failed. Merely dumping masses of information does not do

much. It was an error to think it would. But with more sophisticated and well-educated information analysts, mediators, and consumers, the results can be very different.

Mark Fenster rightly argues that much of what transparency was said to be, it is not, or at least we cannot prove it is. He serves transparency advocates well by calling on them to justify transparency, sending us to look back at its moral basis regardless of its effects. We should, however, insist on existing evidence of its positive effects and on the development of the complementary tools and skills needed to harvest its potential.

As I have attempted to show, transparency is not untouched by Fenster's challenge, but it rises to it. It remains a pillar of democracy without which no human rights system is complete, and no society can be considered free.

Notes

1. TONY BLAIR, A JOURNEY: MY POLITICAL LIFE 511–12 (2010)
2. *Id.* at 511.
3. For a map of the global coverage of FOI laws, see David Banisar, National Right to Information Laws, Regulations and Bills 2011 Map (Nov. 22, 2011), <http://dx.doi.org/10.2139/ssrn.1857498>. For a list of national FOIAs by chronological order, see ROGER VLEUGELS, FRINGE SPECIAL, OVERVIEW OF ALL FOI LAWS, at 6–7 (2012), available at http://right2info.org/resources/publications/laws-1/ati-laws_fringe-special_roger-vleugels_2011-oct.
4. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914), available at http://books.google.com/books/about/other_people_s_money.html?id=uCpMAAAAIAAJ. Interestingly, Brandeis did not have government in mind while making this statement about the hidden ways of bankers.
5. Government in the Sunshine Act, 5 U.S.C. § 552b (2006).
6. Mark Fenster, Disclosure's Effects: WikiLeaks and Transparency, 97 IOWA L. REV. 753 (2012).
7. Although interestingly, and little noticed, much of what was shown in the video was already in the public domain for some time. See Clint Hender, WaPo Denies Allegation It Sat on WikiLeaks Video, COLUM. JOURNALISM REV. (June 7, 2010, 5:05 PM), http://www.cjr.org/the_kicker/wapo_denies_allegation_it_sat.php.
8. Reuters futilely applied to receive the tapes before their leakage through the U.S. Freedom of Information Act. See Elisabeth Bumiller, Video Shows U.S. Killing of Reuters Employees, N.Y. TIMES (Apr. 5, 2010), http://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html?_r=1.
9. Sunshinepress, Collateral Murder–WikiLeaks–Iraq, YOUTUBE (Apr. 3, 2010), <http://www.youtube.com/watch?v=5rXPfnU3G0>.
10. See, e.g., Noam Cohen & Brian Stelter, Iraq Video Brings Notice to a Web Site, N.Y. TIMES (Apr. 6, 2010), <http://www.nytimes.com/2010/04/07/world/07wikileaks.html>; Chris McGreal, Wikileaks Reveals Video Showing US Air Crew Shooting Down Iraqi Civilians, GUARDIAN (London) (Apr. 5, 2010, 3:52 PM), <http://www.guardian.co.uk/world/2010/apr/05/wikileaks-us-armyiraq-attack>.
11. One such example of doubts raised is a statement given to The New York Times and quoted in the video, where a U.S. Army officer tells the newspaper that the Army does not know how children were wounded in the incident and that the Army did its best to help them. To the contrary, the video clearly shows that the children were wounded by U.S. helicopter gunfire and that a request to evacuate them to receive medical treatment in an American facility was denied, and they were to be handed to Iraqi Police to be taken to a local hospital.
12. To the extent that some commentators spoke of a “new world,” see Dan Amira, WikiLeaks Is Going To ‘Redefine Global History’, NYMAG.COM (Nov. 22, 2010, 4:20 PM), http://nymag.com/daily/intel/2010/11/wikileaks_is_going_to_redefine.html (internal quotation marks omitted). See also John W. Daly, Global History To Change Sunday, 22.30 CET. Thanks to Wikileaksywiki, TECHEYE.NET (Nov. 27, 2010, 6:55 PM), <http://news.techeye.net/internet/global-history-to-change-sunday-22-30-cet> (documenting WikiLeaks' claim that an upcoming leak will redefine global history).
13. Alasdair Roberts, WikiLeaks: The Illusion of Transparency, 78 INT'L REV. ADMIN. SCI. 116, 117 (2012), available at <http://ras.sagepub.com/content/78/1/116.full.pdf+html>.
14. Kevin Marsh, The Illusion of Transparency, 82 POL. Q. 531, 532 (2011), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-923X.2011.02247.x/pdf>.
15. Fenster, *supra* note 6, at 773 (quoting Mark Fenster, The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State, U. PITT. L. REV. (forthcoming 2012) (manuscript at 51 n.218), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918154).
16. *Id.* at 775–76.
17. Dov Alfon, Editor-in-Chief of the Israeli daily Haaretz, described the following situation when accepting the “Peace Through Media” award in London: “Haaretz has been getting calls all morning from an angry man named Julian Assange, who claims that someone leaked us the Israel file of WikiLeaks without his knowledge or authorization. This is truly unprecedented, a leak without authorization.” Dov Alfon, In the Name of Courageous, Inquisitive Reporting, HAARETZ (Tel Aviv) (May 9, 2011, 10:54 AM), <http://www.haaretz.com/weekend/week-s-end/in-thename-of-courageous-inquisitive-reporting-1.360702>.
18. James Ball, WikiLeaks, Get Out of the Gagging Game, GUARDIAN (London) (May 12, 2011, 12:43 PM), <http://www.guardian.co.uk/commentisfree/2011/may/12/wikileaks-confidentialityagreement-julian-assange>.
19. Julia Loffe, What Is Russia Today?, COLUM. JOURNALISM REV., http://www.cjr.org/feature/what_is_russia_today.php?page=1. To view episodes of Assange's show, see The Julian Assange Show, RT.COM (last visited Oct. 4, 2012) <http://assange.rt.com/>.
20. See Luke Harding, The World Tomorrow: Julian Assange Proves a Useful Idiot, GUARDIAN (London) (Apr. 17, 2012), <http://www.guardian.co.uk/media/2012/apr/17/world-tomorrowjulian-assange-wikileaks>.
21. See Roberts, *supra* note 13, at 118.
22. *Id.* at 119.
23. Interestingly these were five of the world's most prestigious papers: the British Guardian, the American The New York Times, the German Der Spiegel, the French Le Monde, and the Spanish El Pais, none of which partook in WikiLeaks' more recent disclosure efforts. WikiLeaks' current partners are newspapers of much lower prestige.
24. PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 19 (2003), available at http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf.
25. iPOLL DATABANK, Nixon Poll June 1971, in THE ROPER CENTER FOR PUBLIC OPINION RESEARCH, UNIV. OF CONN. (retrieved Oct. 5, 2012), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

26. For a list of the minister and Members of Parliament, see Timeline of Westminster Exodus: The Politicians Who Quit Since Expenses Scandal Hit Last Month, MAIL ONLINE (June 17, 2009, 5:20 PM), <http://www.dailymail.co.uk/news/article-1191042/Westminster-exodus-timeline-Politicians-announced-quitting-expenses-scandal-hit-month.html>.

27. The campaign was launched by freelance journalist Heather Brooke, who led a five-year-long legal battle. Eventually, after winning the case in Britain's High Court, while the files were being prepared for publication and the necessary redactions made in fulfillment of the court order, the files were leaked to The Telegraph newspaper and published there with no redactions. For a detailed timeline of events, see COMM. ON STANDARDS IN PUB. LIFE, REVIEW OF MPS' EXPENSES AND ALLOWANCES (2009), available at http://www.public-standards.gov.uk/Library/Background_Paper_No_2___Timeline_of_Events.pdf.

28. See IPSOS MORI, EXPENSES POLL FOR THE BBC (June 2, 2009), available at http://www.ipsos-mori.com/Assets/Docs/SRI_Politics_BBCExpenses_Topline.PDF. 29. COMM. ON STANDARDS IN PUB. LIFE, supra note 27, at 2 (quoting COMM. ON STANDARDS IN PUB. LIFE, ANNUAL REPORT OF THE COMMITTEE ON STANDARDS OF PUBLIC LIFE 2006, at 9 (2006)).

30. Internal Department of Justice memoranda provided legal analysis as grounds for application of allegedly illegal interrogation methods against terror suspects. These memos became public following an ACLU-led FOI campaign. For the memos and information on the FOIA battle, see Accountability for Torture: The Bush Admin's Secret OLC Memos, ALCU.ORG, <http://www.aclu.org/accountability/olc.html> (last visited Sept. 18, 2012).

31. Several hundreds of photos were collected during an investigation of allegations of detainees' abuse in Abu-Ghraib prison in Iraq. The photos were leaked to CBS, and even after this, the government refused an ACLU FOIA request to obtain them, until ordered to do so by court. See *ACLU v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008), cert. granted, judgment vacated, 130 S. Ct. 777 (2009). For an overview of the affairs, see CHRISTOPHER GRAVELINE & MICHAEL CLEMENS, THE SECRETS OF ABU GHRAIB REVEALED: AMERICAN SOLDIERS ON TRIAL (2010).

32. See, e.g., Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–2810 (2006); Fair Packaging and Labeling Program, 15 U.S.C. §§ 1451–1461 (2006); Consumer Credit Cost Disclosure Law, 15 U.S.C. §§ 1601–1667f (2006); Consumer Product Safety Act, 15 U.S.C. §§ 2051–2085 (2006); Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301–399 (2006); Nutrition Labeling and Education Act of 1990, Pub. L. No. 101–535, 104 Stat. 2353 (1990).

33. OFFICE OF E-GOV'T AND IT & OFFICE OF MGMT. AND BUDGET, DATA.GOV CONCEPT OF OPERATIONS: DRAFT 4 (v.0.7, 2009), available at <http://datagov.ideascale.com/userimages/sub-1/736312/ConOpsFinal.pdf>.

34. See Memorandum from Barack Obama, President, U.S., to Heads of Executive Departments and Agencies, Transparency and Open Government (Jan 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>; Memorandum from Peter R. Orszag, Director, Exec. Office of the President, to Heads of Executive Departments and Agencies, Open Government Directive (Dec. 8, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

35. Alexis Madrigal, Data.gov Launches to Mixed Reviews, WIRED (May 21, 2009, 6:05 PM), <http://www.wired.com/wiredscience/2009/05/datagov-launches-to-mixed-reviews/>.

36. OFFICE OF E-GOV'T AND IT & OFFICE OF MGMT. AND BUDGET, DATA.GOV CONCEPT OF OPERATIONS 4 (v.1.0, 2010), available at <http://www.scribd.com/doc/42664156/Data-gov-Concept-of-Operations-v-1-0>.

37. About, DATA.GOV, <http://www.data.gov/about> (last visited Sept. 18, 2012).

38. E.g., USASPENDING.GOV, <http://usaspending.gov> (last visited Sept. 18, 2012).

39. See Consolidated Appropriations Act of 2010, Pub. L. No. 111–117, § 4, 123 Stat. 3034, 3190 (2009).

40. See OPEN GOVERNMENT PARTNERSHIP, <http://www.opengovpartnership.org> (last visited Sept. 18, 2012).

41. The government's glee at its initiative's international success is apparent in the title given to the blog post by its Chief Information Officer, Vivek Kundra, on the occasion of the launching of U.K.'s version of Data.gov. Vivek Kundra, They Gave Us the Beatles, We Gave Them Data.gov, WHITEHOUSE.GOV (Jan. 21, 2010, 12:28 PM), <http://www.whitehouse.gov/blog/2010/01/21/they-gave-us-beatles-we-gave-then-datagov>.

42. For links to these sites, see International Open Data Sites, DATA.GOV, <http://www.data.gov/opendatasites#mapanchor> (last visited Sept. 18, 2012).

43. Vivek Kundra, From Data to Apps: Putting Government Information to Work for You, WHITEHOUSE.GOV (May 20, 2011, 3:08 PM), <http://www.whitehouse.gov/blog/2011/05/20/data-apps-putting-government-information-work-you>.

44. These figures were obtained using a site analytics tool. See Site Analytics: Data.gov, COMPETE.COM, <http://siteanalytics.compete.com/data.gov/> (last visited Oct. 4, 2012).

45. Fenster, supra note 6, at 757 (arguing that government information is often largely ignored).

46. See supra note 39 and accompanying text.

47. This would be the practical outcome of the proposed cutting of their budget by approximately ninety-four percent down to two million dollars for 2011. See Full-Year Continuing Appropriations for Fiscal Year 2011, H.R. 1, 112th Cong. § 1561 (2011).

48. At the end of the budget debate, the cut was a "mere" seventy-six percent and the budget was set at eight million dollars. See Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112–10, § 1552, 125 Stat. 38, 136 (2011). The sum was raised a year later to over twelve million dollars. See Consolidated Appropriations Act of 2012, Pub. L. No. 112–74, § 5, 125 Stat. 786, 913 (2011).

49. See, e.g., Andrea Di Maio, Yawning or Waking Up to Open Data, GARTNER.COM (Dec. 2, 2011), http://blogs.gartner.com/andrea_dimaio/2011/12/02/yawning-or-waking-up-to-opendata/; Tony Roberts, The Problem with Open Data, COMPUTERWEEKLY.COM (Feb. 2012), <http://www.computerweekly.com/opinion/The-problem-with-Open-Data>; Tom Slee, Why the "Open Data Movement" Is a Joke, WHIMSLEY (May 1, 2012), <http://whimsley.typepad.com/whimsley/2012/05/why-the-open-data-movement-is-a-joke.html>. For a rebuttal by prominent Canadian open-government activist, David Eaves, see David Eaves, Open Data Movement Is a Joke?, EAVES.CA (May 2, 2012), <http://eaves.ca/2012/05/02/open-data-movement-is-a-joke/>.

50. "Nor is there any guarantee that disclosure will endanger the nation or adversely affect the government's ability to deliberate or operate." Fenster, supra note 6, at 757.

51. See id. at 806–07.

52. Id. at 807.

53. The Pentagon Papers included four thousand classified documents. But twenty years after the government vehemently and unsuccessfully fought to prevent their disclosure, solicitor Erwin Griswold, who represented the government in its legal battle, admitted as follows: I have never seen it even suggested that there was . . . an actual threat [to National Security]. . . . It quickly becomes apparent to any person who has considerable experience with classified material that there is massive over-classification and that the principal concern of the classifiers is not with national security, but rather with governmental

embarrassment of one sort or another. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

54. Ivar Kolstad & Arne Wiig, *Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?*, 37 WORLD DEV. 521, 524 (2009).

55. For an overview of the theoretical justifications to the "Right to Information," see Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUM. HUM. RTS. L. REV. 357, 360–70 (2011).

BEYOND WIKILEAKS - 1

Disclosure's Effects: WikiLeaks and Transparency

► http://www.uiowa.edu/~ilr/issues/ILR_97-3_Fenster.pdf

► Iowa Law Review / by Mark Fenster [UF Research Foundation Professor, Samuel T. Dell Research Scholar, Levin College of Law, University of Florida. Thanks for comments to Steven Aftergood, David Fontana, Lyrisa Lidsky, and Trysh Travis, and especially David Pozen. Thanks also to excellent, timely research assistance from Ariane Assadoghli and Stephen Bagge. This Article concerns a still-developing story and fast-evolving institution as it existed in December 2011 and will not reflect developments that occurred after that date]

► **Source:** Roy Peled / FOIANet / Madrid / www.foiadvocates.net

Nov 19 2012 ► Dec 2011 [!] **Abstract**

Constitutional, criminal, and administrative laws regulating government transparency, and the theories that support them, rest on the assumption that the disclosure of information has transformative effects: disclosure can inform, enlighten, and energize the public, or it can create great harm and stymie government operations. To resolve disputes over difficult cases, transparency laws and theories typically balance disclosure's beneficial effects against its harmful ones—what I have described as transparency's balance. WikiLeaks and its vigilante approach to massive document leaks challenge the underlying assumption about disclosure's effects in two ways. First, WikiLeaks' ability to receive and distribute leaked information cheaply, quickly, and seemingly unstoppably enables it to bypass the legal framework that would otherwise allow courts and officials to consider and balance disclosure's effects. For this reason, WikiLeaks threatens to make transparency's balance irrelevant. Second, its recent massive disclosures of U.S. military and diplomatic documents allow us to reconsider and test the assumption that disclosure produces certain effects that can serve as the basis for judicial and administrative prediction, calculation, and balancing. For this reason, WikiLeaks threatens transparency's balance by disproving its assumption that disclosure necessarily has predictable, identifiable consequences that can be estimated *ex ante* or even *ex post*.

This Article studies WikiLeaks in order to test prevailing laws and theories of transparency that build on the assumption that disclosure's effects are predictable, calculable, and capable of serving as the basis for adjudicating difficult cases. Tracing WikiLeaks' development, operations, theories, and effects, it demonstrates the incoherence and conceptual poverty of an effects model for evaluating and understanding transparency.

Introduction

The disclosure of government information must surely make a difference. Myriad laws¹ and a large international community of transparency advocates² presume so, as does most academic commentary on the subject.³ Consider the following description of transparency's promise: "Publishing [leaked material] improves transparency, and this transparency creates a better society for all people. Better scrutiny leads to reduced corruption and stronger democracies in all society's institutions, including government, corporations and other organisations. A healthy, vibrant and inquisitive journalistic media plays a vital role in achieving these goals."⁴ This declaration appears on the About page of WikiLeaks, the website whose project of leaking secret documents has recently brought it international fame and notoriety. Asserting that it is "part of that media" that spreads transparency, WikiLeaks contends that its publication of authentic documents leaked from governments and powerful private entities will expose "otherwise unaccountable and secretive institutions" that engage in unethical acts, and thereby help establish "good government and a healthy society," "alter the course of history in the present, and . . . lead us to a better future."⁵ This sequential narrative, in which information disclosure leads to a more engaged public, more democratic politics, and a more efficient state, forms a core tenet of the transparency ideal. Information transforms; therefore, it must be disclosed.

A similar narrative plays the same role in concerns about the unauthorized disclosure of classified information. The laws and regulations that govern classification assume the state knows—or at least can confidently predict—disclosure's ill effects. The classification system, for example, is premised upon anticipating risk by sorting documents into the categories of "confidential," "secret," or "top secret," based on the conclusion that the information these documents contain "reasonably could be expected to cause," respectively, "damage," "serious damage," or "exceptionally grave damage" to

national security.⁶ The Freedom of Information Act (“FOIA”) explicitly exempts properly classified information from disclosure, protecting any document properly classified from release in response to a public request.⁷ The Espionage Act criminalizes, among other things, classified information’s unauthorized disclosure, again by presuming that authorized officials have reasonably anticipated disclosure’s danger in classifying documents.⁸ Constitutional executive-privilege and state-secret doctrines rest on the parallel presumption that the threat of disclosure will affect the executive’s ability to protect the nation and perform his delegated duties.⁹ This sequential narrative, in which information disclosure impairs the state’s operations and endangers the nation, forms a core tenet of the transparency ideal’s limitations.¹⁰ Information transforms; therefore, it must be controlled. Faith in information’s transformative power thus sustains efforts both to reveal and to control government information. It demands that both democratic theory and contemporary laws of transparency recognize a presumption of disclosure. It also demands exceptions from disclosure that allow for greater state control in certain circumstances. This Article argues that such assumptions about information’s essential, predictable effects rely on a mistaken understanding of what is a complicated administrative, political, and communicative process.

Government information frequently has no obvious meaning. Its significance often creates significant political and social contest. It is sometimes misinterpreted; it is often ignored by all but a small minority of interested groups and individuals. There is no guarantee that a government document or meeting, when made public, will enlighten the public that sees it. And the reverse is equally true—there is no guarantee that government secrecy shuts down the flow of information or even conceals knowledge about government action. Nor is there any guarantee that disclosure will endanger the nation or adversely affect the government’s ability to deliberate or operate. In a complex democratic state and civil society, secrecy and disclosure rarely exist in pure forms, and they seldom have diametrically opposed effects. Information-disclosure law and the theory that supports it rely upon the ability to predict and ascertain disclosure’s effects.

But if we cannot predict them in advance, how can we hypothesize about—much less base laws upon—disclosure’s benefits and risks? This Article uses the recent events and controversies surrounding WikiLeaks to question the meaning and effects of the suppression and disclosure of government information. Doing so makes plain the frequently unexamined and undertheorized complexity of disclosure’s effects. WikiLeaks promises to allow its readers access to “evidence of the truth,”¹¹ and to that end has released largely unredacted, classified documents that would not have been released for years or decades—if they were released at all. It did so without the typical delays that attend public requests or declassification processes. Although it is of course far too soon to evaluate the full effects of WikiLeaks’ disclosures, it is possible to sketch out how this episode illustrates the conceptual poverty of prevailing legal doctrines and theories of transparency. WikiLeaks demonstrates that disclosure’s effects are in fact unpredictable and contingent upon existing political, legal, and social conditions in the political units and among the publics affected by disclosures. The Article begins in Part I with a brief narrative of WikiLeaks and its emergence as an agent of and model for a radical form of transparency. Part II then describes and analyzes the theories of transparency and disclosure that WikiLeaks’ public leader, Julian Assange, has articulated to explain and justify the project. Part III places WikiLeaks’ project in the broader context of existing open-government laws and theories of transparency as well as in the specific legal context in which WikiLeaks may be prosecuted. The prevailing law requires courts to weigh disclosure’s dangerous effects alongside its benefits. The Article then sketches what we know or can ascertain thus far of WikiLeaks’ uneven and unpredictable short-term effects—effects that are relatively insubstantial in the U.S., at least according to available open-source materials, but arguably more significant elsewhere.

I. WikiLeaks’ Disclosures

WikiLeaks’ 2010–11 release of multiple large caches of classified documents stolen from the U.S. government constitutes the most radical form of unauthorized disclosure since the leak of the Pentagon Papers forty years ago.¹² Its model of anonymously provided, unedited or barely edited documents promises its readers complete transparency in unexpurgated form, made available via a self-proclaimed “scientific journalism” that grants the public full access to the state’s internal workings.¹³ The site’s most prominent figure, Julian Assange, has offered in his writings and interviews a well-articulated—if somewhat conflicted—theory of political information and power, which asserts that disclosure can both create an enlightened public and discipline those corrupt and authoritarian state actors whose nefarious ways depend upon their ability to keep their activities secret.¹⁴ To a proponent like Daniel Ellsberg (of Pentagon Papers fame), WikiLeaks “is serving our democracy and serving our rule of law precisely by challenging the secrecy regulations, which are not laws in most cases, in this country”;¹⁵ to Yochai Benkler, the site represents the emerging “networked fourth estate” that fundamentally challenges incumbent media institutions¹⁶ and that “mark[s] the

emergence of a new decentralized, global, and networked model of the watchdog function.”¹⁷ It also plays a prominent role in what one commentator has termed the “Age of Transparency”: an era of networked communication in which social media and so-called crowdsourced information are inexorably changing the shape of the government and its relationship to its citizens.¹⁸ The WikiLeaks story, in this account, is one in which the site’s disclosures will necessarily change what the state does and how it performs. To its most vociferous critics, however, WikiLeaks constitutes a dangerous, illegal disruption to state security and operations that must be stopped by any means possible.¹⁹ The WikiLeaks narrative, in sum, presents a struggle over the promise and limits of transparency and disclosure’s presumed effects.

WikiLeaks was created in late 2006 by what was then described as an anonymous “team” of open-source computer engineers (i.e., hackers) and political activists who sought to expose corrupt and oppressive regimes throughout the world.²⁰ Prior to its most famous (at least to American and Western European politics) releases, which began in mid-2010, WikiLeaks had gained international attention by posting a mix of raw documents concerning diverse newsworthy public figures and governments in the United States, Africa, and Western Europe.²¹ In all of these releases, one or more sources who obtained apparently authentic documents (through legal or other means) sent the digital files to WikiLeaks. The organization then globally distributed the electronic files—without, it has claimed, filtering or editing the documents.²² The site’s increasing notoriety, along with its zealous protection of its sources’ identities,²³ has given it worldwide prominence as a preeminent channel for whistle-blowers.²⁴ WikiLeaks thereby established a powerful brand identity as a technologically sophisticated service capable of distributing purloined data anonymously and publicizing its release. Its success has in turn inspired other similar sites to open, all patterned on the WikiLeaks model.²⁵ Julian Assange, much of whose earlier life had been spent as a prominent hacker and participant in the so-called cypherpunk community, orchestrated and oversaw the site’s creation.²⁶ It exists only as an ephemeral noncommercial venture, thereby distinguishing itself from traditional placebased journalistic authorities that operate either commercially, under state ownership, or with state subsidies. It also prizes and attempts to keep secret details about its internal operations and management.²⁷ Its absence of physical grounding extends to its operations: it is not “housed” anywhere but in servers in multiple countries, and it makes its content available via hundreds of domain names.²⁸ It represents itself as an institution without a home, a populist news medium for an online world. Hence, its name and brand: Wiki conjoined with Leaks.²⁹

As WikiLeaks reached the current peak of its influence and celebrity in 2010, Assange emerged as the previously anonymous site’s spokesperson and leader, and quickly came to embody WikiLeaks.³⁰ He gave it at least the potential for a material grounding in a legal and jurisdictional sense.³¹ Like the site, Assange seems to have no permanent national residence, and in mid-2010, he claimed to feel secure only in four “different bases in different places” where his project has strong political support.³² His criminal indictment in late 2010 in Sweden for rape has both complicated his jurisdictional association and defined him even further as a nearly stateless person, an Australian national without a permanent address.³³ But his existence as an individual figure subject to identification and prosecution—indeed, his omnipresence in news conferences, television interviews, and dead-tree media reportage—transfigured WikiLeaks’ public image as a semianonymous hacker collective³⁴ into that of a more traditional organization and website. WikiLeaks’ most celebrated U.S. military- and diplomatic-document releases from U.S. government sources began in April 2010 with the uploading of a video (which it titled *Collateral Murder*) showing a lethal 2007 U.S. Army Apache helicopter attack on a group of men in Baghdad.³⁵ The video was allegedly part of a large cache of digital files the site had received from Bradley Manning, a young army intelligence officer with the rank of private first class who leveraged his level of security clearance and access to two classified databases to download data from a military server.³⁶ More traditional documentary releases followed: in July 2010, tens of thousands of classified documents from the war in Afghanistan;³⁷ in late October 2010, hundreds of thousands of documents about the Iraq war;³⁸ from late November 2010 through early 2011, diplomatic cables between the U.S. State Department and its diplomatic missions around the world;³⁹ and in April 2011, files concerning detainees held as suspected terrorists at the Guantanamo Bay military prison.⁴⁰ In September 2011, all of the State Department cables were made publicly available in unredacted form after reporters for the Guardian newspaper inadvertently disclosed the encryption key for the files, copies of which were accessible on the Internet.⁴¹ Many of the documents, but by no means all, were classified, and none was classified above “secret.”⁴² Nevertheless, these documents were unavailable to the public, and likely would have remained so for years—if not forever.⁴³ After granting preview access to major Western newspapers that independently reviewed and reported on the documents, WikiLeaks posted the raw documentary sources—with minimal redactions to protect the anonymity of sources and other individuals who might face reprisal if their identities were

revealed—on its site simultaneously with the newspapers’ reports.⁴⁴ The so-called “War Logs” from Iraq and Afghanistan generally revealed unflattering, and at times damning, information about the conduct of the American military during two wars, including evidence of civilian deaths, abuse, and torture by local militias friendly to the United States, military reliance on private contractors, and the difficulty that American forces faced both on the ground and in managing complex internal and international political alliances (for example, with Pakistan in Afghanistan).⁴⁵ The diplomatic cables revealed a broad range of information about how U.S. diplomats viewed foreign leaders and the political and economic conditions in countries and regions around the world.⁴⁶ The Guantanamo files revealed that many of the detainees held as terrorists were low-risk, and some of the intelligence relied on in capturing and holding them was flawed.⁴⁷ U.S. government agencies have responded to rumors that WikiLeaks is about to release potentially damaging documents by scrambling to identify a means to prevent the release or mitigate the expected damage.⁴⁸ But they have found no simple solution.⁴⁹ In the wake of the first release of Afghanistan war documents, the Department of Justice considered filing criminal indictments against the WikiLeaks principals for, among other charges, encouraging their sources to steal government property and classified information.⁵⁰ Establishing that those who attempt to disclose stolen classified documents will face criminal punishment could not only shut down WikiLeaks but also deter others’ efforts to open new, similar sites.⁵¹ A legal solution may not be an effective or attractive one, however.

Assange is not a U.S. citizen, which does not necessarily make him immune from prosecution.⁵² However, because he has traveled only occasionally to the United States (and is even less likely to do so of his own volition now), his arrest will depend upon the U.S. government’s ability to have him extradited.⁵³ Moreover, as the Pentagon Papers episode demonstrated, a state that punishes a whistle-blower and the media that circulates purloined documents only assists the whistle-blower and his cause by escalating the whistle’s sound and range and making the government vulnerable to charges of a cover-up.⁵⁴

An earlier episode in which a wealthy banking firm sought to stifle a WikiLeaks release illustrates the difficulty, perhaps even futility, of fighting the site’s high-tech vigilante transparency through legal means. In 2008, Bank Julius Baer, a Swiss firm, and its Cayman Island sister company sought to enjoin the site after it had posted documents—some of which the firms claimed were fraudulent—that apparently showed that the bank was helping its clients launder money and avoid taxes.⁵⁵ After issuing a temporary restraining order when WikiLeaks failed to appear at a preliminary hearing, a U.S. district court judge was forced to conclude that the plaintiffs’ interests in stopping the disclosure could not support an injunction against WikiLeaks, given the strength of First Amendment protections against prior restraint.⁵⁶ But constitutional doctrine was not the court’s sole concern. The plaintiffs’ complaint against WikiLeaks raised complex geographical issues—Assange is an Australian citizen who was living in Kenya at the time—that limited the extent of the court’s jurisdiction over the case.⁵⁷ Even more significantly, the court could not confidently impose any judgment on the website, given the fact that the information had already been circulated globally and the site could simply evade any order to take down the documents by mirroring its site on servers around the world.⁵⁸ Soon after the court lifted the temporary restraining order, Bank Julius Baer abandoned the lawsuit.⁵⁹

Alternative, nonlegal strategies seem equally likely to prove ineffective as a long-term strategy to end the WikiLeaks threat. To consider the means available to stop or answer WikiLeaks, the U.S. Army Counterintelligence Center commissioned a secret 2008 report on the site;⁶⁰ ironically and perhaps unsurprisingly, WikiLeaks obtained the report in March 2010 and swiftly posted it on the Web.⁶¹ The report’s conclusions and tepid prescriptions likely disappointed and depressed military officials. Employing aggressive tactics would, if made public, risk generating public attention and outrage and thereby magnify the original embarrassment that the disclosures caused. Recognizing the military’s vulnerability and impotence, the report takes an almost elegiac tone in its exceptionally accurate predictions of what would occur only two years after the report was written.

WikiLeaks has or will receive classified documents, the report warned, and disclosure websites like WikiLeaks posed a permanent threat to the military’s efforts to secure information from disclosure.⁶² The report concluded that the only effective response would be to secure classified information and punish leakers—a strategy it concluded was unlikely to deter those “insiders” who “believe [that it] is their obligation to expose alleged wrongdoing within [the Department of Defense] through inappropriate venues.”⁶³ In his preface to WikiLeaks’ posting of the report, Assange proudly and dramatically claimed that U.S. intelligence planned to “destroy” WikiLeaks.⁶⁴

But the WikiLeaks model of decentralized digital distribution of illegally obtained classified information thus appears resistant—if not impervious—to efforts to contain it. The threat of prosecution and disruption may be real, but the state appears to be as powerless and frustrated with WikiLeaks as the site is with the state.

This situation—in which an array of potential whistle-blowers enjoys access to huge caches of documents and can threaten to expose military and diplomatic decisions during a relatively unpopular war—parallels the legendary role that Daniel Ellsberg and his coconspirators played during the Vietnam War, when they used photocopy machines to distribute the purloined documents that became known as the Pentagon Papers.⁶⁵ Ellsberg himself quickly trumpeted the analogy, especially after WikiLeaks gained worldwide notoriety from its 2010 releases. Although Ellsberg had initially turned down WikiLeaks' initial recruitment to serve on its advisory board,⁶⁶ after the Collateral Murder video release he declared: "The Internet is there to bring out this evidence, when a terribly wrongful, reckless criminal act is being prepared. . . . [T]he anger of the government over this leak suggests that [WikiLeaks has] been successful so far."⁶⁷ Assange's celebrity status and his well-earned paranoia about efforts to discredit him, along with actual press reports that seemed to discredit him (that may or may not have been slanderous, as his supporters argued),⁶⁸ strengthen the analogy to Ellsberg, who was the target of illegal and frightening efforts by the White House to destroy him.⁶⁹

Although law and technology may not impose clear limitations on WikiLeaks, the site does not have unlimited capacity. As Assange has conceded, WikiLeaks is "completely source-dependent" and must wait for and then sort through the submissions it receives, which vary in quality and relevance.⁷⁰ The enormous Iraq, Afghanistan, and State Department leaks required the site's contributors to expend significant time and effort in preparing for their release, especially as the site began to spend more time evaluating the material and working with mainstream news organizations.⁷¹ Meanwhile, it has been forced to wage numerous collateral battles: with the companies on whom it relies for document storage, servers, and donated funds; with governments in legal forums; with detractors and critics in the press; and with government entities and others who have attempted to take WikiLeaks and its mirror sites down through denial-of-service attacks.⁷²

The battle is not an entirely losing one; the disembodied, transnational, data-driven universe that WikiLeaks inhabits allows clever workarounds and David-against-Goliath battles that can sometimes reward technical virtuosity and tactics over the brute force of state authority and capitalist logic.⁷³ Such is the anarchic spirit of the hacker and cypherpunk subculture from which Assange emerged;⁷⁴ as John Perry Barlow, cofounder of the Electronic Freedom Foundation and longtime theorist of the Internet's libertarian possibilities, tweeted in December 2010: "The first serious infowar is now engaged. The field of battle is WikiLeaks. You are the troops."⁷⁵

This, then, is the somewhat contested understanding of WikiLeaks as an institution as of January 2012: secretive and hidden behind a veil of encryption and technological sophistication; righteously committed to the cause of whistle-blowing, with the purpose of informing the wired world—which is to say the whole world—of secret, prevaricating, and corrupt authorities; a model for other websites and distribution channels to follow; and outside the normal channels of either a nation or of a commercial or nonprofit enterprise; but led by a perhaps flawed individual who serves as its public face. The WikiLeaks narrative presents the strange, at least temporary triumph of a small, thoroughly independent, underdog medium of disclosure over enormously powerful state actors. The WikiLeaks disclosures both represent and portend enormous changes in how secret documents become public and in the meaning and extent of transparency in a wired, digital age. Their celebrity suggests that disclosure matters—that to some degree, the documents have enlightened the public, affected the ability of state actors to perform their jobs, and created risks for the ongoing efforts that the documents revealed.

II. WikiLeaks' Theories

In different venues, Assange has identified two related but quite distinct purposes for the WikiLeaks project, each of which builds upon a theory of disclosure's effects. The more conventional explanation, which he has frequently offered in interviews, adopts the reformist ideal underlying the disclosure of government information as it is understood by transparency advocates: disclosure will lead to a more knowledgeable public and ultimately to a more accountable, responsive, and effective state.⁷⁶ The alternative explanation, which Assange developed most fully in essays he posted on the Internet as he was building WikiLeaks, proposes that leaks can perform a more radical, revolutionary function by disabling what he views as authoritarian, illegitimate governments.⁷⁷ These explanations may not be mutually exclusive, and as explained below, Assange's strategic deployment of them in different forums may not entirely be a duplicitous effort to mask a secret, radical intent. Their dual character suggests, however, that WikiLeaks hopes to provide more than simply a conventional means to further the widely shared goal of liberal democratic governance to which the more mainstream elements of the transparency movement aspire. In doing so, WikiLeaks aspires to serve as a far-reaching and original model for disclosure and for the relationship between states and their publics, and among citizens across nations in a networked world.

A. Disclosure as Liberal Reform

Many advocates of transparency have not fully embraced WikiLeaks.⁷⁸ This is, in part, because the site provoked widespread outrage among elected officials and conservative commentators against unauthorized disclosures.⁷⁹ It also inadvertently assisted legislative efforts to tighten control on classified information, as it helped Republican opponents to stall efforts to reform the Whistleblower Protection Act at the end of the 112th Congress, and it provoked a potentially overbroad proposal to extend criminal liability under the Espionage Act to sites like WikiLeaks.⁸⁰ Besides harming advocates' reform efforts, open-government proponents also found that the site's disclosures conflicted with their own attempts to advocate legal and administrative reform. In the wake of the Collateral Murder video's release, Steven Aftergood, who runs the Federation of American Scientists' widely respected Project on Government Secrecy, argued that the site's penchant for mass, mostly unedited disclosures of secret documents constituted a refusal to respect both the rule of law and the rights of private individuals to privacy and security.⁸¹ Although he later softened his criticism as WikiLeaks began to redact personal information and collaborate with mainstream news organizations that were willing to consult with government agencies prior to disclosure, Aftergood continued to criticize the site for appearing more interested in defeating rather than fixing the classification system.⁸² Like the transparency advocates with whom they frequently work on open-government issues, journalists and their advocacy organizations have also failed to embrace the site as one of their own.⁸³ At the same time, however, some members of the open-government community viewed WikiLeaks' success as a necessary response and counterweight to excessive government secrecy.⁸⁴ For Thomas Blanton, director of the National Security Archive at George Washington University, "[t]he only remedies that will genuinely curb leaks are ones that force the government to disgorge most of the information it holds rather than hold more information more tightly."⁸⁵ But whether defending or criticizing WikiLeaks, transparency advocates have viewed the site as something decidedly unconventional and distinct from their own reformist efforts.

Nevertheless, in widely broadcasted or published interviews, Assange has frequently portrayed the site as a conventional, journalistic endeavor to make major public institutions, especially governments, more visible to the public.⁸⁶ In an opinion piece he published in a leading Australian newspaper at the height of the public controversy over the diplomatic-cable leaks, Assange offered a recognizably reformist explanation for the site's work and its disclosure of government documents. The WikiLeaks method is essentially journalistic, he claimed—a form of "scientific journalism" that represents an advance over traditional media reporting.⁸⁷ As Assange wrote: We work with other media outlets to bring people the news, but also to prove it is true. Scientific journalism allows you to read a news story, then to click online to see the original document it is based on. That way you can judge for yourself: Is the story true? Did the journalist report it accurately?⁸⁸

In this telling, WikiLeaks' essential goal is to reveal the state and other key institutions to the world—not only to the citizens who can hold public institutions directly accountable, but to everyone who is able to "see evidence of the truth."⁸⁹ "[I]f we maximize the reliable, verified information about how the world is working," Assange told an interviewer, "then we start to produce more sophisticated and intelligent structures that respond to the abuses in societies and also the opportunities there may be in society."⁹⁰ The only limitation that WikiLeaks places on disclosure—one that it shares with most mainstream news outlets—is that it attempts to redact information or delay disclosure so as to minimize any harm that might foreseeably result from publication.⁹¹

Viewed this way, WikiLeaks' effort to cast itself as a journalistic enterprise does not appear to be simply a ruse to gain First Amendment protection.⁹² The site wants to act, and to be seen as acting, as a medium of disclosure similar to the conventional legacy newspapers with whom it explicitly partnered in the diplomatic-cable disclosures. More pointedly, Assange describes WikiLeaks as part of the long-standing tradition of radical, truth-telling journalists, hearkening back to the English Civil War.⁹³ It aspires—at least in part—to perform what Assange describes as the essential role of the "Fourth Estate" within a liberal democracy:⁹⁴ investigator of fact, provider of scientific, true data to an inquiring public that will act on the truth it is presented, and compiler of the true historical record.⁹⁵ The public would thereby have access to authentic facts.⁹⁶ Deploying the classical, pervasive discourse of transparency advocacy, Assange's claims amount to an assertion that "WikiLeaks can enforce the human right to know, the right to speak, and, above all, the right to communicate information."⁹⁷

B. Disclosure as Radical Resistance

The conventional narrative is not the only one Assange relates, however—it is only the more public one. As he developed the WikiLeaks site, Assange wrote several short posts and posted longer essays on his publicly available blog that offered a more radical understanding of transparency's potential and the political consequences of a major, never-ending series of leaks.⁹⁸ In this forum and others, Assange has elaborated an alternative theory of political information and a series of political

positions that extend well beyond the liberal democratic theories upon which conventional transparency advocates rely and that traditional journalism has deployed.

In his most fully developed essay, *Conspiracy as Governance*, Assange writes that to “radically shift regime behavior . . . [w]e must understand the key generative structure of bad governance.”⁹⁹ Here, “regime” need not refer to a government entity, as “governance” is a broad enough term to encompass operational control and management practices of corporate as well as state entities.¹⁰⁰ He appears to intend the term to include anything from a superpower to an arm of the state and from a multinational financial firm to a small company or even a collective endeavor—any institution through which power flows and can be exercised against an individual.¹⁰¹

The generative structure of bad governance, Assange argues, is “conspiratorial interactions among the political elite” that allow them to communicate means to maintain and strengthen their “authoritarian power.”¹⁰² Conspiracies are “cognitive devices,” he explains, that operate by accumulating, processing, and acting upon information.¹⁰³ They keep their strategies and plans secret from the public to avoid creating popular resistance and only allow them to be revealed when resistance is futile or incapable of overcoming “the efficiencies of naked power.”¹⁰⁴ Secrecy thus plays a necessary and central role in bad governance.

While concealing itself to those outside, a conspiratorial regime must nevertheless communicate internally. Each conspirator operates at a distinct position within the conspiratorial structure, with some more powerful and knowledgeable about the entire structure than others.¹⁰⁵ This dispersal of authority has the advantage of hindering attempts to destroy the state through the targeted removal of particular conspirators, whether by violent, legal, or political means; unless either all of the conspirators are removed or the links among all of the conspirators are severed, the conspiracy itself can survive.¹⁰⁶ Decentralization makes information exchange among members both more essential and more difficult. In order for the conspiracy to operate, those with more authority must be able to command those beneath them; but to the extent that the multiple lines of authority are complex and obscure, those commands cannot simply be spoken in face-to-face meetings.¹⁰⁷ A regime’s reliance on concealed communication is thus both a source of power and an unavoidable vulnerability. A conspiracy can devise and execute secret plans and orders, but its channels must be functional and secure.

For Assange, this vulnerability represents the best hope for resisting and ending the regime’s rule and its “bad governance.”¹⁰⁸ He calls for “throttling the conspiracy” by “constricting (reducing the weight of) the most significant links (which he terms “high weight”) that “bridge regions” of the conspiratorial system.¹⁰⁹ A revolutionary movement—and indeed, Assange is calling here for overturning existing state apparatuses—may thus succeed through efforts to “deceive or blind a conspiracy by distorting or restricting the information available to it,” or through “unstructured attacks on links or through throttling and separating” the conspiratorial structure.¹¹⁰ Destroy the regime’s ability to communicate with itself or degrade the quality of the information that the regime processes and passes along, and the regime will no longer be able to rule as effectively and efficiently. Assange uses a metaphor that brings the “conspiratorial” state to life: “When we look at an authoritarian conspiracy as a whole, we see a system of interacting organs, a beast with arteries and veins whose blood may be thickened and slowed until it falls, stupefied; unable to sufficiently comprehend and control the forces in its environment.”¹¹¹ He has mixed his metaphors almost beyond intelligibility—shifting from removing links to thickening blood—but his basic point is clear: leaking is not merely a tool for reform but a weapon for resistance and a way to deprive authoritative institutions of their means to control their communications and subjugate their populations. In a now unavailable blog post written soon after he posted the *Conspiracy as Governance* essay, he explained:

The more secretive or unjust an organization is, the more leaks induce fear and paranoia in its leadership and planning coterie. This must result in minimization of efficient internal communications mechanisms (an increase in cognitive “secrecy tax”) and consequent system-wide cognitive decline resulting in decreased ability to hold onto power as the environment demands adaptation.

Hence in a world where leaking is easy, secretive or unjust systems are nonlinearly hit relative to open, just systems. Since unjust systems, by their nature induce opponents, and in many places barely have the upper hand, mass leaking leaves them exquisitely vulnerable to those who seek to replace them with more open forms of governance [sic].¹¹²

Stripped of its ability to control information, and therefore to operate as a conspiracy, the regime can no longer suppress the resistance it creates through its actions.¹¹³ It will fall, and the people will finally be able to rule themselves.

Viewed in this light, the question of whether WikiLeaks’ disclosures revealed anything meaningful or new about geopolitical or military strategy—part of the debate that has pervaded the aftermath of the

Afghanistan, Iraq, and diplomatic-cable releases¹¹⁴—is less important than the fact that diplomats, military leaders, and other mid- to high-level government officials can no longer assume that their off-record, secretive communications among themselves can remain confidential.¹¹⁵ The quality of the information leaked proves less significant, in other words, than the quantity of the documents leaked. At the height of their threat thus far, the WikiLeaks releases have appeared as the first wave of an oncoming disclosure torrent, with their breathtaking number of leaked documents coupled with the ongoing threat of more documents to be released in the near future and more leaks to come, and the possibility that yet more sites will be created that will provide safe harbor for even more leaks. The content of disclosed documents still matters—leaking the doodles of lowlevel functionaries would not shake the conspiracy’s communicative capabilities—but only as a means to the larger end of regime change, which occurs as a result of the act of torrential disclosure. Disclosure’s effects, for Assange, constitute a mortal threat to conspiratorial, institutional authority. Given the radical nature of these arguments, it is certainly possible that Assange’s reformist statements were a rhetorical strategy for public consumption. They may have been intended to persuade mainstream media to collaborate with WikiLeaks and to assure charitable foundations and other potential sources of funding that the site was no more radical than any emerging idea or technology. The site’s self-portrayal as a truth-telling, journalistic medium might also have been a clever legal strategy—a way of appearing to function like a traditional news outlet worthy of traditional First Amendment protections. There is evidence that Assange was partially motivated by those concerns, and a recent profile suggests that many of his, and the site’s, well-calculated, domesticated statements were more strategic than heartfelt.¹¹⁶ Nevertheless, Assange occasionally has explained his seemingly disparate and conflicting goals in two ways that reconcile the tension between these approaches. First, in a 2009 interview, he noted three separate audiences for the documents that WikiLeaks exposes: (1) the general public, who, should they notice, understand, and respond to the document, can influence or animate legal reform; (2) those with expertise in the issues raised by the documents, such as law enforcement or competitors who can hold accountable any illegal or immoral behavior; and (3) the organization and individuals creating the documents, whose conspiracy will collapse as a result of the distrust and fear that disclosure will create.¹¹⁷ Assange’s different theories, in other words, are not mutually exclusive but instead predict different responses to information.

Second, and related, his theories also predict different potential effects. As he explained to an editor at Time, if the behavior of organizations which are abusive and need to be [in] the public eye . . . is revealed to the public, they have one of two choices: one is to reform in such a way that they can be proud of their endeavors, and proud to display them to the public. Or the other is to lock down internally and to balkanize, and as a result, of course, cease to be as efficient as they were. To me, that is a very good outcome, because organizations can either be efficient, open and honest, or they can be closed, conspiratorial and inefficient.¹¹⁸

Faced with total disclosure, the state has two choices: reform or face public upheaval. A state must operate as an optimal, open liberal democracy, or else WikiLeaks and its colleagues and competitors will create the conditions for regime change by imposing the total transparency that will destroy the state’s ability to conspire—and therefore to exist. Characterized this way, Assange’s seemingly conflicting theories constitute what Finn Brunton has called a “two-tier strategy” that combines a Habermasian ideal of the public’s capacity to engage in rational action and logical speech with a more radical, technological threat to disrupt the authoritarian state.¹¹⁹ Disclosure and its effects serve as the catalyst for both approaches.

Assange has somewhat complicated this model of disclosure’s direct effects, however, by recognizing that the political and social conditions within which disclosure occurs inevitably shape its effects. This is true of both the process by which the public is enlightened and the context in which a political regime can change or be changed.

He has first cautioned against a simple understanding of disclosure by recognizing the difficult task he has faced in reaching the public with his disclosures and method. Frustrated with the emerging media with which WikiLeaks is frequently associated, Assange has condemned blogs and other forms of social media for their failure to procure or produce significant information or add value or insight to the information on which they comment. He learned from WikiLeaks’ earlier releases that he could not depend solely on the radical possibility of crowd-sourcing and amateur bloggers to process and make sense of the site’s authentically sourced documents.¹²⁰ The “scientific journalism” that WikiLeaks produces demands the objective truth of fact and authentic documents; social media merely produces and reiterates opinion within closed circles of the like-minded.¹²¹

Having reached this conclusion, Assange decided to work closely with the mainstream media that could contextualize, explain, and publicize the documents’ complex content, while WikiLeaks made the raw documents available on the WikiLeaks site and its mirror sites.¹²² In an ironic twist, then, the

revolutionary project that sought to expose the conspiratorial state could not rely upon the online cognoscenti and multitudes to inform themselves and the mass, nascent public. Instead, WikiLeaks chose to collaborate with the traditional Fourth Estate, itself a set of institutions that constitute, in Assange's view, part of a broader network of linked conspirators governing the people, often undemocratically and unaccountably. This reformist move represented either a sellout, something of which Assange and WikiLeaks have been accused,¹²³ or a brilliant tactic of turning a tool of power into a weapon of the weak. Assange's relationship with the institutional press, which was never collegial, has since eroded to the point at which he appeared, by the fall of 2011, to embrace unredacted, mass disclosures and the crowd-sourcing and unorganized investigative follow-up that he had eschewed less than two years earlier.¹²⁴ Either way, Assange had learned that raw disclosure by itself could not directly affect the public.¹²⁵ To have effects, and especially to have specific, desired effects, disclosures require context and background, as well as wide distribution.

Assange's second cautionary note to his otherwise optimistic theory of disclosure's potential to affect democracy and the state is his recognition that disclosure will affect different states and publics differently. Western societies, Assange argues, have been "fiscalised"—a term he fails to define precisely, but which seems to imply a fairly traditional leftist critique of neoliberalism.¹²⁶ The critique views Western democracies as offering formal political and economic freedom with a minimal state whose narrow focus on the protection of property and contract rights, free markets, and free trade allows large multinational corporations and enterprises to make most significant economic and social decisions.¹²⁷ It also views the mass public as largely disengaged from a putatively democratic state, both because the locus of power has shifted away from politically accountable institutions and because the public has been seduced by the material pleasures of a consumer economy and the empty sensations of popular entertainment.¹²⁸

"In such an environment," Assange has argued, "it is easy for speech to be 'free' because a change in political will rarely leads to any change in the[] basic instruments [of power]."¹²⁹ In authoritarian states like China, by contrast, disclosure is more likely to affect the state and its citizens. In this environment, the disclosure of state actions might spur citizens to revolt; indeed, these states' active censorship betrays their fear of dissenting political speech, especially if buoyed by disclosure of their secrets.¹³⁰ The stakes of disclosure's effects rise, in other words, for states that are less "fiscalized" and more explicitly authoritarian and secretive.¹³¹ This distinction matters to both of Assange's theories: reform and radical change will each be more difficult to accomplish in Western democracies, where political change seems not to affect the underlying political economy, than, for example, in China, where a challenge to state authority can lead both to state reforms and revolution.¹³² Disclosure will still have effects, in other words, but these effects will vary across nations and across time.

III. Disclosure's Effects: Wikileaks In Law And Action

Laws regulating public access to government information rely upon a balance between the presumed necessity that the state may keep some information secret and the equally presumed necessity that the public must have access to government information.¹³³ WikiLeaks, whose theories of disclosure are based on the latter and ignore the former, profoundly challenges this balance. As the Bank Julius Baer episode illustrated,¹³⁴

WikiLeaks' vigilante disclosures—released via immediate, relatively costless, and seemingly unstoppable digital distribution, and made more formidable by the threat that they will serve as a model for others—strain the hold that the U.S. (and all nation states) has over the flow of classified government information. The state can criminally prosecute WikiLeaks' members and others postdisclosure, but in doing so it must suffer disclosure's effects—effects that transparency as a concept and set of legal doctrines assumes can be at least roughly predicted and measured.

That assumption, one that WikiLeaks itself shares, is the subject of this Part. The first section proceeds by describing the balancing test in general, and the second section briefly summarizes the most prominent law that would apply to WikiLeaks—prosecution under the Espionage Act for the release of classified national-security information and a First Amendment claim in defense.

Transparency's balance requires courts to presume both the executive branch's ability to manage and classify information correctly and courts' ability to fairly and accurately weigh the competing interests between secrecy and disclosure. The third section sketches out what we know, at the time of this writing, about the effects that WikiLeaks' disclosures have had. Neither of this Part's latter two sections is intended as an authoritative statement of a complex set of laws and events relating to WikiLeaks; rather, the two sections work together to deduce the legal standards that our prevailing theory of transparency has established and to note the extent to which those standards' incoherence and the impossibility of a meaningful application are revealed by the challenge WikiLeaks presents.

A. Transparency's Balance

As a theoretical concept, "transparency" weighs two sets of opposing, mutually exclusive interests. On

the one hand, theories of transparency emphasize the normative democratic ideal of a deliberative, engaged public and the consequentialist ideal of a responsible, accountable government that will result from a visible state;¹³⁵ on the other hand, transparency theories in the American context also recognize the normative constitutional ideal of a tripartite system in which a semiautonomous President can perform his delegated duties without the interference of Congress and the judiciary (who are themselves free from executive branch interference), as well as the consequentialist ideal of an effective, efficient state that can protect the nation and public from external and internal threats by controlling access to its own deliberations and to sensitive information.¹³⁶ Easy cases raise few issues to balance: the disclosure of advanced military technologies, current troop movements and similar operative war plans, and the identities of intelligence sources all pose such clear and immediate dangers to the state that the law requires no balancing.

In difficult cases, however, the resulting dualism between transparency's costs and benefits invites an endless struggle over transparency and its limitations, as the thrust of powerful arguments in favor of broad disclosure requirements continually meet the parry of powerful counterclaims for limitations on disclosure.

The laws that flow from this conceptual coupling recognize broad rights and duties for openness and limit them with exceptions from disclosure that are frequently read broadly by the executive branch and judiciary, especially when the government can make a plausible claim that disclosure would place national security, law enforcement, or individual privacy at risk. The constitutional doctrine of executive privilege, for example, protects communications between the President and his advisers from disclosure, but courts must balance that privilege against competing political, legal, and social concerns that require the release of information.¹³⁷ Statutory disclosure requirements share this approach. In enacting FOIA, Congress attempted to establish a "general" or "broad" philosophy of openness while respecting "certain equally important rights" and "opposing interests" that are difficult but "not . . . impossible" to balance.¹³⁸ It tried to set a framework for courts to achieve this balance by establishing a series of enumerated exemptions to disclosure requirements that would allow some types of information to remain outside of the public's view.¹³⁹ Conflicts between disclosure and secrecy are thus resolved in difficult cases by the administrative and judicial application of statutory provisions or regulations that call for adjudicators either to explicitly balance the two interests or to enforce statutes that incorporate this balance in their structure.

Like all efforts to balance abstract ideals and goals in constitutional and public law, laws regulating the disclosure of public information attempt to require the state to evaluate these competing interests carefully and weigh them comparatively. Critics complain that balancing tests applied by courts constitute an adjudicatory evasion—a judicial "method" that refuses principled rules in favor of an inappropriate and unprincipled weighing of abstract, indeterminate interests that are fundamentally incommensurable. ¹⁴⁰ Their ad hoc nature makes them vulnerable to the whim and ideology of the judiciary; the results that they produce can seem precarious, random, and even idiosyncratic. They transform the judiciary into an explicitly political actor that resolves fundamental and contested questions of social policy.¹⁴¹ At the same time, as they age, balancing tests appear to become routine and even mindless—a rote process by which interests are invoked but rarely considered in any meaningful way.¹⁴² Such complaints assert that balancing tests operate without clear conceptual grounding. They are inadequate efforts to resolve foundational metaphysical disputes.

But they exist for a reason. In areas of law where no consensus exists among legislators, courts, and the public about a preferable rule, a reasonably effective balancing test may at least correctly identify the interests for courts to balance and the means to evaluate those interests, even if it remains imperfect and imprecise.¹⁴³ In some instances, those who interpret constitutional provisions or draft laws or regulations may understandably prefer to devise a balancing test than to construct clear-sounding, mechanical-seeming doctrines. Viewed this way, balancing tests' imprecision and "ad hockery" may either be an optimal method or the best of a series of unsatisfactory approaches to resolve difficult disputes.

The arguments in balancing tests' favor explain why the various constitutional and statutory legal regimes that regulate disclosure of government information seem inevitably to balance the contested normative and consequential elements of transparency theory. If these elements cannot be resolved in the abstract, then a doctrine needed to adjudicate complex disputes must at least appear as though it can do so, even if it fails to satisfy those who lose an individual case as well as those who long for a permanent solution consistent with their preferences. As explained in the next section by using the example of legal efforts to stop WikiLeaks, the measure that transparency laws most typically use to weigh interests considers disclosure's anticipated effects. The issue in this context, then, is whether balancing tests' logic as a means to resolve contested political issues can be satisfactorily applied

when reduced and made operational through the method of anticipating and evaluating disclosure's effects as a means to determine legal outcomes.

B. The Classification System, The Espionage Act, and Disclosure's Effects

The classification system provides the taxonomic logic for the federal government's protection of highly sensitive information. It works merely as an administrative organizational process, rather than as a basis for criminal or civil liability,¹⁴⁴ although any prosecution of individuals who misuse or disclose such classified information without authority will inevitably build on the information's classification. The potential liability for disclosure agents like WikiLeaks thus begins with the classification system and the implicit assumptions it makes about information's inherent power to harm. The government has long sought to restrict access to particular types of information, especially those related to national security.¹⁴⁵ The current bureaucratic system, with its various levels of classification and employee access to it, dates to the Cold War-era expansion of the military, the intelligence agencies, and those agencies overseeing the production and regulation of nuclear energy.¹⁴⁶ Beginning in 1940, nearly every President has issued an executive order that establishes the somewhat different approach each administration has taken to classification.¹⁴⁷ The classification system works by a relatively simple logic and process. A document is "classified" by level based on the anticipated effects of its unauthorized disclosure. The three levels are defined in the current executive order as follows: "'Top Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security"; "[s]ecret" information could reasonably be expected to "cause serious damage" if disclosed without authorization; and "[c]onfidential" information could reasonably be expected simply to "cause damage" if disclosed without authorization.¹⁴⁸

Individuals are sorted in two ways: first, by their authority to classify, based upon a direct delegation of such authority or their location within the organizational chart of the agency in which they are located;¹⁴⁹ and second, by the extent of their access to particular levels of classified documents, based on their authorization (or "clearance") to have access and their need to know the information.¹⁵⁰ Those with the authority to classify must be trained to evaluate the effects of disclosure;¹⁵¹ those with access to classified information are those whom the government has decided will not endanger the national security as a result of their access.¹⁵²

The system thus appears to offer a mechanical means to segregate communicative documents both within the federal bureaucracy and from those outside it. It quarantines the most threatening information through measures that increase security as the classification level proceeds upward toward "Top Secret."¹⁵³ FOIA, in turn, secures classified documents from disclosure to the public until such time as they are declassified.¹⁵⁴ As the Director of Classification Management for the Department of Defense declared in the first article in the first issue of the journal *Classification Management* (the publication of the then-newly formed National Classification Management Society) in 1965, "[t]he single most important function of central management is considered to be to achieve uniform, consistent, and correct classifications in the first instance."¹⁵⁵

It is unclear if the new class of professional information managers of the journal ever met such lofty goals. But there is broad consensus that the classification system is currently a mess and has been for decades.¹⁵⁶ Too many documents are classified, securing those documents is too costly, and the classification system resists reform; at the same time, various military and intelligence agencies, and the presidential administrations that oversee them, allow—or even encourage—the expansion of classification authority throughout the bureaucracy and an increase in the number of classified documents.¹⁵⁷ A full accounting of the system's history and operations, as well as the efforts to reform it, is well beyond the scope of this Article.¹⁵⁸

Instead, I simply want to note that the classification system constitutes a form of information control—or, as Daniel Moynihan characterized it, informational regulation¹⁵⁹—through which the executive branch and its myriad agencies with classification authority attempt to keep documents secret. Using their loosely delegated authority to classify, agency bureaucracies operate within a system of secret production that Edward Shils described as "the compulsory withholding of knowledge, reinforced by the prospect of sanctions for disclosure."¹⁶⁰ Significantly, the withholding of knowledge (as well as, derivatively, sanctions for willfully revealing that information) is based upon the prediction, by duly authorized government employees, of disclosure's effects.

The most prominent criminal law prohibiting the dissemination of classified information is the Espionage Act of 1917,¹⁶¹ which criminalizes or prohibits dissemination by those with or without lawful possession and access to the information.¹⁶² The statute appears to sweep broadly to impose criminal sanctions on disclosure,¹⁶³ but it is inherently limited in its application by First Amendment protections for free speech and a free press.¹⁶⁴ Together, the broad criminal sanctions against disclosure and the broad constitutional protections against state efforts to limit speech require courts

to ask whether, in the words of Geoffrey Stone's recent restatement of the law, "the value of the disclosure to informed public deliberation outweigh[s] its danger to the national security."¹⁶⁵ Stone's balance metaphor/method reflects the general judicial approach.¹⁶⁶ He undertakes a heroic effort to sort the fine grains that belong on each side of the scale, providing a roadmap that purports to bring a somewhat complicated order to an unwieldy and underdeveloped set of doctrines.¹⁶⁷ Nevertheless, balancing two utterly vague, incommensurate legal standards is at best a speculative undertaking—as the seminal scholarly treatment of the Espionage Act published nearly forty years ago described the effort, "[A]d hoc evaluations of executive claims of risk are not easily balanced against first amendment language and gloss."¹⁶⁸

Nevertheless, courts must try. The balancing approach requires courts to evaluate and balance claims about national security dangers, the unknown consequences of censoring the defendant (including chilling investigative journalism and whistle-blowing), and the risk to a democratic system of an uninformed public. They must comprehend and anticipate the risks created by the defendant's disclosure and imagine a counterfactual world in which the disclosure did not exist. They must, in sum, estimate disclosure's unknowable effects without the omnipotence either to isolate the effects that have occurred or to predict future ones.

C. WikiLeaks' Uncertain Effects

The complex nature of the WikiLeaks disclosures, as well as the international geopolitical world through which they have flowed, demonstrates the impossibility of exercising such omniscience in determining their effects in hard cases. It is difficult, if not impossible, to find any clear or meaningful pattern of effects caused by such a broad set of documents that would help determine whether the balance of interests tips in favor of secrecy or disclosure. In addition, the presence or absence now of relatively short-term effects does not preclude the later manifestation of long-term effects or the disappearance of earlier impacts. Below, I briefly identify and evaluate five potential effects that have been discussed extensively by government officials and commentators and reported on by the press and in other open sources. Three concern the state's interest, as recognized in the transparency balancing test, in limiting the adverse effects of disclosure: (1) the claim that the disclosures cost the lives of American military personnel and of their allies in Iraq and Afghanistan; (2) the claim that they will affect diplomatic relations between the U.S. and other nations; and (3) the claim that they will harm the flow of information among units of the American military, intelligence agencies, and State Department. The other two potential effects concern the public interest in disclosure: (4) the claim—rarely made explicitly, interestingly enough—that the disclosures have enlightened and enlivened the American public; and (5) the claim that they have played significant roles in inspiring or encouraging the democratic movements in North Africa and the Middle East to overthrow long-standing corrupt and authoritarian rulers. I consider these in turn. One final note: It is quite possible that what follows excludes evidence that would lead to a certain conclusion; it is equally possible that it does not account for effects that themselves have been classified for some strategic or military purpose.¹⁶⁹ My goal, however, is not to persuade the reader that my own uncertain conclusions about these effects are correct. Rather, it is to persuade you that any conclusion about disclosure's strong effects, whether good or bad, is likely to be—and ought to be—contentious. The government can and will claim that disclosure is dangerous, and transparency advocates can and will claim that disclosure is beneficial. At least to date, based on a review of open sources, both claims about WikiLeaks appear tendentious at best.

1. WikiLeaks' Direct Effects on Military Operations

Military officials made numerous allegations in the aftermath of the Afghanistan releases about the immediate and likely future effects of the disclosures on American military operations.¹⁷⁰ The allegations seemed reasonable after a Taliban spokesman announced that the organization would be using WikiLeaks documents to identify collaborators.¹⁷¹ Then, in a joint statement e-mailed to WikiLeaks, five human-rights groups, including Amnesty International and the International Crisis Group, complained that the release of uncensored Afghanistan documents would endanger their operations by disclosing the names of those with whom they worked.¹⁷² Such claims, which seem to demonstrate that disclosure is creating grave danger to innocent human life and to the nation's military operations, constitute the strongest evidence that the state can marshal to demonstrate that particular documents must remain secret and that any unauthorized disclosure of them must result in criminal prosecution.¹⁷³

To date, however, no corroborated incident has come to light demonstrating that a document that WikiLeaks released caused significant physical damage to American military or diplomatic interests.¹⁷⁴ Defense Secretary Robert Gates, who complained in July 2010 that WikiLeaks would have "potentially dramatic and grievously harmful consequences,"¹⁷⁵ concluded less than three months later that the disclosures did not reveal any sensitive intelligence methods or sources.¹⁷⁶

Although Gates at that time continued to warn about attacks against individuals named in the documents, a NATO official interviewed at the same time denied that any such attacks happened.¹⁷⁷ Doubts about WikiLeaks' direct effects on military operations and individual lives cannot erase or remove the threat that such effects could occur in the future, but they suggest that the assumption that such effects would necessarily follow—assumptions made upon the documents' release by military officials and conservative political figures—was unwarranted.

Although I do not want to deny the significance of such threats, WikiLeaks at least suggests that the risk of disclosure is just that—a risk that should require the government to produce some evidence, and the courts to explicitly perform some predictive calculation, before they conclude that such threats indeed exist. If courts merely deferred to the state's bald claims, they would not engage in adjudicatory balancing—rather, they would be acquiescing to executive prerogative. It is instructive in this context to consider what we know about the Pentagon Papers disclosures nearly forty years ago. In an important 1981 article, Floyd Abrams interviewed the key military witness in the Pentagon Papers case, who had testified about the likely dangerous effects that disclosure of the classified documents would have on the American military campaign in Vietnam.¹⁷⁸ Ten years after the disclosures, Vice Admiral Francis J. Blouin, who was then Deputy Chief of Naval Operations for Plans and Policy, continued to complain of the disclosures' illegality and harm to the “will of our country” to fight the war, but concluded: “I don't think there was any great loss in substance.”¹⁷⁹ No matter how one views the suitability of drawing analogies between the circumstances surrounding the two events,¹⁸⁰ it seems, at present at least, as though their effects on military operations (or lack thereof) are fairly similar.

2. WikiLeaks' Direct and Indirect Effects on Diplomatic Relations

The claim that disclosures would affect the State Department and the United States' diplomatic relations with other nations exhibits a similar dynamic. On the eve of the diplomatic cables' release, Harold Koh, the State Department's Legal Adviser, warned Assange in a letter made public that WikiLeaks' planned disclosure violated U.S. law and complained of the certain increased danger that the disclosure of diplomatic cables would create for innocent civilians named in the documents, ongoing military operations, and cooperation and relations between the United States and other nations.¹⁸¹ The State Department also warned hundreds of humanrights activists, officials of foreign governments, and businesspeople who were identified in the diplomatic cables of the threats their identification might create for them.¹⁸²

Again, however, no clear evidence has come to light of any direct ill effects the disclosures have caused. Administration officials have not publicly identified any additional harassment that its sources experienced as a result of the WikiLeaks disclosures.¹⁸³ The U.S. ambassador to Mexico was forced to resign after the release of cables in which he criticized the Mexican government's efforts to fight drug trafficking,¹⁸⁴ but no direct harm has been traced to the cables, and it is unclear whether the disclosures will have any long-term effect on U.S.–Mexico relations.¹⁸⁵

Koh's letter to Assange also warned of the indirect effects that the disclosures would have on diplomatic confidences,¹⁸⁶ as did Secretary of State Hillary Clinton in a news conference immediately after the cable release began.¹⁸⁷ As a result, this claim also asserts that internal communications between U.S. diplomats and the State Department will be less forthright for fear of later exposure, and foreign sources will be less likely to disclose information or share opinions with American diplomats for fear that the U.S. will be unable to protect its statements and identities from disclosure.¹⁸⁸ This claim concerns marginal, though perhaps significant, effects on diplomatic discourse and deliberation as engaged in by participants; as such, it is not one for which evidence can easily be marshaled except through the statements of those who are current or former State Department employees.¹⁸⁹ Nevertheless, courts tend to defer to such claims made by the executive branch regarding information about national security and diplomatic efforts.¹⁹⁰

But to say that courts are willing to defer to claims of anticipated effects made by the executive branch is not the same as concluding that such effects in fact occur. This distinction is significant because later statements by cabinet secretaries have suggested that these effects may not have occurred and may not be expected to occur in the future. In a news conference soon after the start of the diplomatic-cable disclosures, Secretary Gates confidently declared that the releases would have little effect on diplomatic relations,¹⁹¹ and a few days later, Secretary Clinton also significantly downplayed her concerns after she attended an Organization for Security and Cooperation in Europe (“OSCE”) meeting where she spoke with foreign leaders who assured her that diplomatic relations would continue as before.¹⁹² Several commentators even hypothesized that the cables' release might in fact improve diplomatic relations, insofar as they revealed the similarity between the United States' public and private statements, increasing American diplomats' credibility¹⁹³—a sentiment echoed in part by Defense Secretary Gates.¹⁹⁴

If taken seriously, the interest in preventing the adverse “effects” on diplomacy makes little sense if it needs to be calibrated in any meaningful way. By their initial statements about disclosure’s certain effects, Secretary of State Clinton and Legal Advisor Koh made plain that they strongly preferred that the cables not be disclosed, at least in the manner and at the time that WikiLeaks disclosed them. But their preferences do not reveal whether those disclosures actually affected or will affect American diplomatic interests, nor do they prove, by themselves, that the risks of their disclosure outweigh the gain.¹⁹⁵ And again, to the extent that the Pentagon Papers provides any historical guide, the deputy under secretary of state who testified in the New York Times litigation that the disclosures made confidential diplomacy impossible ten years later conceded that the Court’s decision in the newspapers’ favor was “probably” correct and that abstract free-press values were more important than the harms to diplomatic efforts claimed by State Department officials.¹⁹⁶

3. WikiLeaks’ Effects on Intra-Governmental Information Sharing

After the WikiLeaks disclosures, government agencies reviewed their use of classified databases and began to implement various security measures to prevent future leaks.¹⁹⁷ The measures that drew the most attention were those involving information sharing between federal agencies.¹⁹⁸ The National Commission on Terrorist Attacks upon the United States (“Commission” or “9/11 Commission”) had denounced organizational stovepipes that had developed within units of agencies and across agencies— that is, bureaucratic and technological impediments to the flow of information going out of and coming into agencies, resulting in units that did not have current or sufficient information to perform their tasks—and, the Commission concluded, that contributed to the failure of counterterrorism agencies to prevent the 9/11 attacks.¹⁹⁹ Without access to documents obtained or developed by one agency, employees and units working on similar or related projects were uninformed about the development of the terrorist threat.²⁰⁰ In a post-9/11 response, agencies began to take concerted steps to make information relevant to counterterrorism efforts available throughout the federal government.²⁰¹ In the wake of the WikiLeaks disclosures, many both within and outside the government charged that the effort to share information had left data networks insecure and classified information vulnerable to theft and leaking.²⁰² WikiLeaks’ alleged source for its major U.S. leaks, Pfc. Bradley Manning, apparently downloaded the video and document caches that he passed along to WikiLeaks via the Department of Defense’s SIPRNet network, to which he had access.²⁰³ In response to the leaks, the State Department disconnected itself from Defense’s SIPRNet, thereby securing its information from potential leaks by non-State Department employees and removing the agency from at least part of its information-sharing commitment with Defense.²⁰⁴ By inhibiting diplomatic and military agencies’ ability to share data that one may gather but others may find useful, the State Department’s action appears to demonstrate an adverse effect on WikiLeaks’ disclosures of government functions.²⁰⁵ At the same time, however, numerous commentators have criticized the lax data-security and security-clearance measures that allegedly allowed Manning to copy the data he ultimately released to WikiLeaks.²⁰⁶ This criticism suggests that a combination of needed technological and administrative reforms can more securely and effectively enable information sharing than the systems that existed before WikiLeaks—steps that Secretary Gates claimed the Department of Defense was taking in response to the disclosures and that State Department representatives also claimed to be undertaking.²⁰⁷

4. WikiLeaks’ Effects on the American Public

Arguments about the beneficial effects of transparency begin with the assumption that the public will pay attention to, understand, and act or threaten to act on the government information they receive.²⁰⁸ When the public’s actions and the connection between those actions and disclosed information are clear, these effects are easy to identify. In the case of the WikiLeaks disclosures, however, even the precise nature of the disclosed information—and especially whether the disclosed documents reveal new, significant information—is deeply contested. To some American commentators, especially those on the left who were critical of the Bush administration and have grown increasingly wary of the Obama administration, the WikiLeaks disclosures have been exceptionally revelatory. In order to support their claim, a number of WikiLeaks advocates in late 2010 and early 2011 developed lists of the most important events and issues that the disclosures illuminated, lists too long and varied to recount here.²⁰⁹ The sheer number and breadth of these disclosures should prove WikiLeaks’ value and certain effect. Because these commentators generally assume that increased transparency causes or should cause increased public knowledge, popular political engagement, and better government, they concluded that the scale of the WikiLeaks disclosures and the sheer amount of information the disclosures revealed should make it more likely that the public will learn, act, and respond.²¹⁰ If disclosure’s effects are self-evident and guaranteed, the very existence of large disclosures of new, important information must create beneficial effects.

For WikiLeaks' skeptics and critics, however, the disclosures had limited informational value. The information WikiLeaks revealed may have provided additional details to general information widely known by engaged elites,²¹¹ such commentators argued, but it did not provide evidence of any significant government misconduct or abuses of power.²¹² Because of the likelihood that the disclosures had already, or would certainly, harm foreign policy and American interests, WikiLeaks failed the rough, intuitive balancing test those critics applied. The disclosures offered only a minimal gain in public knowledge, but they posed a significant risk to the state, diplomacy, and national security.²¹³

The opinions of elite commentators who are highly attentive to foreign policy, international events, and the current news cycle neither necessarily reflect nor shape American public opinion. The general public's response to WikiLeaks is difficult to gauge. But the limited and often flawed findings of public-opinion polls provide at least a glimpse of the extent of the public's interest in and understanding of the disclosures. These polls, which have trended downward over time, have found that the public is not especially interested in WikiLeaks and that a strong majority of the American public dislikes it.²¹⁴ Whereas at least one poll conducted in late July and early August 2010 (after the leak of documents from the Afghanistan conflict) showed a nearly even split in public opinion about the value of WikiLeaks and about the extent of the public's interest in its disclosure,²¹⁵ by the end of the year (following the diplomatic-cable releases), WikiLeaks' popularity and public interest in the site dropped considerably. Multiple polls taken in December 2010 showed strong majorities that both disapproved of the site and thought it did more harm than good to the public interest.²¹⁶ One poll that broke down its results by party and ideological affiliation found that Democrats and Republicans disapproved of the site in roughly equal numbers and that even 64% of self-identified "Liberals" expressed disapproval.²¹⁷ As a possible explanation for this disinterest, the Pew Center's study of news coverage and public interest in the major events and issues of 2010 found decreasing interest in and coverage of the wars in Afghanistan and Iraq in general.²¹⁸

Even conceding the limits of public-opinion polling, it is difficult to conclude based on this data that WikiLeaks has made a significant positive impact on the general public's engagement with and knowledge about the state and politics.²¹⁹ If we assume, with WikiLeaks' proponents, that the site has disclosed important and unknown information about outrageous American governmental policy and misconduct, and if we assume, with transparency proponents and according to WikiLeaks' reformist theory, that information disclosures increase public knowledge and political engagement, then one would expect to find widespread discontent organized around popular political movements in the U.S. as a result of WikiLeaks' disclosures. But the only insurgent movement in the November 2010 election cycle was the "Tea Party" faction of the Republican Party, which has focused more on the size and cost of government than on the wars in Iraq and Afghanistan or American foreign policy.²²⁰ To date, no popular political movement of any significant size has formed or been energized as a consequence of the disclosures.²²¹ The same assumptions about WikiLeaks' disclosures and their effects would lead one to predict that the general public would hold the government accountable for its apparent military and diplomatic misdeeds, or at least that the fear of such a response would lead the government to respond by changing or reforming its unpopular approaches to contested issues. And yet, again, there has been no significant or even discernible movement to change existing military engagements or foreign policy in the period following the WikiLeaks disclosures, except in terms of tightening classified-information controls.²²²

The end of the Iraq War in late 2011 appeared unrelated to WikiLeaks' disclosures about American conduct during the war;²²³ indeed, the troop withdrawal was consistent with a pledge President Obama made in February 2009, before the WikiLeaks disclosures began.²²⁴ President Obama seemed not to have changed his policy in either country in response to the WikiLeaks disclosures; it was not until June 2011, nearly a year after the Afghanistan "War Logs" were released, that he announced a withdrawal of troops in response to economic strains and a weakened al Qaeda leadership.²²⁵ The reformist claims favoring WikiLeaks thus seem unpersuasive.²²⁶

Assange's more radical claims about his site's revolutionary potential²²⁷ are similarly unpersuasive, at least thus far in the United States. There is no evidence of the American state's inability to function as a direct consequence of the WikiLeaks disclosures or from the threat that additional websites will adopt the WikiLeaks model. The government's dislike of WikiLeaks and its commitment to shutting it down and punishing its principals and collaborators make clear that it perceives the site as a threat. Nevertheless, the government's concern about its loss of control over information does not, by itself, suggest that the WikiLeaks disclosures have caused or hastened the American state's imminent collapse.

5. WikiLeaks' International Effects

While the American public and its relationship with the government have not shown much change as a

result of WikiLeaks' major disclosures, several autocratic regimes in the Middle East and North Africa have faced major popular uprisings, at least one of which arguably was effected by several diplomatic cables that WikiLeaks released. Some observers and commentators have claimed that WikiLeaks' disclosures directly affected Tunisia, whose president, Zine al-Abidine Ben Ali, fled the country in the face of widespread and increasingly violent protests against his corrupt, repressive regime.²²⁸ The WikiLeaks cables concerning Tunisia revealed American diplomats' contempt for Ben Ali's "system without checks" in a government whose kleptomania apparently began with the first family.²²⁹ The Tunisia-related cables were translated and made available to Tunisians via locally produced websites.²³⁰ According to various reports, the cables' distribution within Tunisia further radicalized an already angry and alienated citizenry, helped spur them to increasingly vehement dissent, and suggested that the U.S. would not intervene on Ben Ali's behalf.²³¹ This purported effect is a complex one, as the cables themselves revealed nothing new to protesters (who were already well aware of their government's corruption), while their influence would be difficult to isolate—indeed, their influence is contested by both Tunisians and Americans.²³² Rather, the cables' influence may have come from informing Tunisians of others' perceptions and knowledge about their corrupt government—information that enlightened and further energized protesters about the righteousness and likely success of their cause.²³³ If, as has been widely reported, the Tunisian revolt in turn inspired other popular uprisings in the region,²³⁴ and WikiLeaks in fact played some role in inspiring the Tunisian protesters, then the disclosures had significant direct and indirect effects (to whatever small degree) in setting potentially democratic change in motion.²³⁵ Even if one assumes that these uprisings constitute a positive development that is traceable in some material way to WikiLeaks, it is unclear how and whether one should factor such an effect into the prototypical transparency balancing test. American government-information-access law seems to take no consideration of spillover effects that take place outside American borders and affect only foreign governments.²³⁶ Instead, the public interest, as understood and accounted for in the prevailing balancing test, implicitly refers to an American public interest. The idea that such beneficial effects can occur, however, is inherent in the operations and ideals of data networks that recognize no national boundaries and can be used to actively resist them, as well as in international human-rights law, which recognizes a right to receive information "regardless of frontiers."²³⁷ It therefore seems only fair to consider these effects in calculating the value of WikiLeaks' disclosures. This conflict constitutes an additional aspect of the WikiLeaks case that confounds existing transparency laws and their limited conception of disclosure's effects. The relevant effects for such laws are strictly national in scope and jurisdiction and concern the prerogatives and security of the nation-state as balanced against the benefits of disclosure to the state's citizens.

Conclusion: The Consequences of Disclosure's Uncertain Effects

WikiLeaks and its model of massive, vigilante disclosure challenges transparency law and theory's underlying assumption about disclosure's necessary and predictable effects in two ways. First, WikiLeaks' ability to receive and distribute leaked information cheaply, quickly, and seemingly unstopably allows it to bypass the legal framework that would otherwise permit courts and officials to consider and balance disclosure's effects. For this reason, WikiLeaks threatens to make transparency's balance irrelevant.²³⁸ Second, its recent massive disclosures of U.S. military and diplomatic documents, and the uneven and unpredictable effects they have had to date, should force us to reconsider and test the assumption that disclosure produces effects that can serve as the basis for judicial and administrative prediction, calculation, and balancing. For this reason, WikiLeaks threatens transparency's balance by disproving its assumption that disclosure guarantees measurable consequences that can be estimated *ex ante*.

The effects discussed in Part III lend themselves to no simple conclusion. Government officials asserted immediately after the massive disclosures began that WikiLeaks would cause untold, incalculable damage to the nation's military personnel, national security, and diplomatic efforts. Their initial claims would clearly have tipped any balance against disclosure. They eventually retreated from that prediction, however, and besides the intuitive, subjective, and unprovable claim that disclosure harms internal deliberations and international diplomacy, open sources provide no clear evidence that WikiLeaks caused significant damage to the Department of Defense or the Department of State. The agencies have been forced to revise their information-sharing technology and protocols, but the source of the WikiLeaks leak seems to demonstrate that their protocols badly needed revision—in fact, better to have WikiLeaks do so than to have a terrorist group or competing intelligence service obtain this data without the government's knowledge.

At the same time, it is equally difficult to conclude that the disclosures even approach the claims typically made by advocates of transparency's beneficial effects to the nation whose information is disclosed. Neither of Julian Assange's stated goals for WikiLeaks' vigilante transparency seems to

have transpired: the United States has neither been reformed by an informed and energized public, nor has it collapsed under the weight of an insurgent popular movement. WikiLeaks does seem to have affected other nations, however, perhaps to some degree inspiring or assisting a popular uprising in Tunisia, and in so doing helping to spur broader democratic hopes and movements across North Africa and the Middle East. It is too soon to tell whether this historical development benefits those nations or the United States itself, but it appears at this time that, if true, it is WikiLeaks' most significant effect—an effect that no one could have predicted prior to WikiLeaks' disclosures and one that is not, and perhaps should not be, considered within a balancing test that an American administrator or court should use.

The implications of this conclusion are conceptually profound.²³⁹ If we cannot assume or predict the existence of effects from a massive disclosure of classified documents, then a core theoretical concept and assumption for the laws governing access to government information are incoherent and conceptually bankrupt. Courts can continue to rely upon the idea that they are “balancing” various “interests,” but all they do in such instances is make intuitive guesses as to what might happen in the wake of disclosure or its absence. In most instances where the state claims that disclosure will cause catastrophic consequences, courts will simply defer to the state.²⁴⁰ If courts continue to balance interests, they should require more than a worried, unsubstantiated prediction—an administrative version of an *ipse dixit*—before granting a request for secrecy. A more effective approach would be to strengthen and model new entities on permanent or temporary administrative bodies that more independently and expertly decide consequential claims about disclosure's dangerous effects—entities such as the Interagency Security Classification Appeals Panel (“ISCAP”) and the 9/11 Commission that, though imperfect, have been more effective than courts in making difficult decisions about information disclosure.²⁴¹ If disclosure laws must continue to rely upon the nearly impossible task of calculating effects, whenever possible they should vest authority to make that calculation in officials and institutions that can perform the task more competently than judges of general jurisdiction. At the same time—contrary to the celebratory rhetoric of some transparency advocates—disclosure will not necessarily transform the United States or any Western democracy into a model of popular deliberation, participatory decision making, and perfect governance.²⁴² In this respect, WikiLeaks has proven that Assange's complication of his theories of transparency's effects was entirely prescient.²⁴³ Western governments and societies are too complex and decentralized, their publics too dispersed, and their information environments too saturated for transparency, by itself, to have significant transformative potential. But one can remain committed to creating the conditions of a more transparent state and world without simply assuming and asserting transparency's utopian effects.

Notes

1. See, e.g., *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928 (D.C. Cir. 1982) (explaining that Congress's intent in enacting the Government in the Sunshine Act, 5 U.S.C. § 552b (2006), requiring open agency meetings, was to “enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people”); H.R. REP. NO. 89-1497, at 12 (1966), reprinted in 1966 U.S.C.A.N. 2418, 2429 (stating that the legislative purpose for enacting the Freedom of Information Act, 5 U.S.C. § 552, was that “[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies”).
2. See ALASDAIR ROBERTS, *BLACKED OUT* 107–11 (2006).
3. Some advocates make this claim in a direct and straightforward manner, asserting that disclosure produces public knowledge. See, e.g., GEOFFREY R. STONE, *TOP SECRET 2* (2007) (asserting that public disclosure alerts the public to poor government performance and allows citizens to press officials to remedy the situation); Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 920–21 (1986) (summarizing competing First Amendment theories of disclosure and finding that all of them assume that access to information necessarily allows public deliberation and self-government). More sophisticated treatments of the concept characterize the process in terms of access and potential. See, e.g., Peter Dennis Bathory & Wilson Carey McWilliams, *Political Theory and the People's Right To Know*, in *GOVERNMENT SECRECY IN DEMOCRACIES* 3, 8 (Itzhak Galnoor ed., 1977) (arguing that the “people's right to know” demands public access to “those facts necessary for public judgment about public things” and allows “the greatest possible opportunity [for the public] to learn and master the art of political judgment” (emphasis omitted)); Ann Florini, *Introduction: The Battle over Transparency*, in *THE RIGHT TO KNOW* 1, 5 (Ann Florini ed., 2007) (defining transparency as “the degree to which information is available to outsiders that enables them to have informed voice in decisions and/or to assess the decisions made by insiders”). In both approaches, information and its content either guarantee or necessarily allow for public enlightenment, knowledge, and action—all of which are likely to occur, or else the enterprise would be unnecessary.
4. About WikiLeaks, WIKILEAKS, <http://wikileaks.org/About.html#> (last visited Dec. 24, 2011).
5. *Id.*
6. Exec. Order No. 13,526, 3 C.F.R. 298, § 1.2(a)(1)–(3) (2010), available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13526.pdf>.
7. 5 U.S.C. § 552(b)(1) (2006).
8. See 18 U.S.C. § 793(d)–(e) (2006) (defining classified national security information subject to the act as “any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense”); see also *infra* notes 161–63 and accompanying text.

9. See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974) (recognizing the executive privilege doctrine for internal communications on the grounds that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process”); *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (establishing the state-secrets doctrine for cases in which the government can show “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”).
10. See GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* 21 (2010) (arguing that keeping information from the public is essential for government deliberation and national self-preservation).
11. About WikiLeaks, *supra* note 4.
12. As of this writing, for the most comprehensive account of the legal and institutional implications of WikiLeaks’ history and operations, see Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011). For other sources, see DAVID LEIGH & LUKE HARDING, *WIKILEAKS: INSIDE JULIAN ASSANGE’S WAR ON SECRECY* (2011); GREG MITCHELL, *THE AGE OF WIKILEAKS: FROM COLLATERAL MURDER TO CABLEGATE (AND BEYOND)* (2011); MICAH L. SIFRY, *WIKILEAKS AND THE AGE OF TRANSPARENCY* (2011); Alasdair S. Roberts, *WikiLeaks: The Illusion of Transparency* (Suffolk Univ. Law Sch. Research Paper No. 11-19, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801343; mollysauter, *Wikileaks FAQ, FUTUREOFTHEINTERNET.ORG* (Dec. 7, 2010), <http://futureoftheinternet.org/wikileaks-cable-faq>; and WikiLeaks, *WIKIPEDIA*, <http://en.wikipedia.org/wiki/WikiLeaks> (last visited Dec. 24, 2011). For an excellent resource for information about Assange and about the development of WikiLeaks, see Robert Manne, *Essay, The Cypherpunk Revolutionary: Julian Assange*, MONTHLY (Austl.), Mar. 2011, at 17. An abridged version of this essay is available at <http://www.themonthly.com.au/julian-assangecypherpunk-revolutionary-robert-manne-3081>; see also <http://cryptome.org/0003/assangemanne.htm>. A memoir by a disgruntled former member of the WikiLeaks collective is also informative, though the author’s close, fraught, and now embittered relationship with Assange renders it less than authoritative. See DANIEL DOMSCHEIT-BERG, *INSIDE WIKILEAKS* (Jefferson Chase trans., Crown Pubs. 2011). On the Pentagon Papers, see DANIEL ELLSBERG, *SECRETS* (2002); DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 33–47* (1996).
13. See *infra* text accompanying notes 86–89.
14. See *infra* Part II.B.
15. John Nichols, *Dan Ellsberg on WikiLeaks & the Essential Democratic Question: Who Will Tell the People?*, NATION (July 26, 2010, 7:19 PM), <http://www.thenation.com/blog/37949/danellsberg-wikileaks-essential-democratic-question-who-will-tell-people> (internal quotation marks omitted).
16. Benkler, *supra* note 12, at 311–12.
17. Yochai Benkler, *The Real Significance of WikiLeaks*, AM. PROSPECT, June 2011, at 31, 33, available at <http://prospect.org/article/real-significance-wikileaks> (book review).
18. SIFRY, *supra* note 12, at 137–68; see also Clay Shirky, *WikiLeaks and the Long Haul*, CLAY SHIRKY (Dec. 6, 2010, 12:03 PM), <http://www.shirky.com/weblog/2010/12/wikileaks-and-thelong-haul/> (praising WikiLeaks for allowing citizens to know what the state is doing and thereby creating “the democracy of citizens distrusting rather than legitimizing the actions of the state”).
19. See Benkler, *supra* note 12, at 331–33 (summarizing what he characterizes as the “political attack” on WikiLeaks).
20. Paul Marks, *How To Leak a Secret and Not Get Caught*, NEW SCIENTIST, Jan. 13, 2007, at 26, 26. The precise origins of the site’s initial cache of documents are contested, according to a prominent blog. See Kim Zetter, *WikiLeaks Was Launched with Documents Intercepted from Tor*, THREAT LEVEL (June 1, 2010, 4:28 PM), <http://www.wired.com/threatlevel/2010/06/wikileaks-documents>. An important predecessor to WikiLeaks as an anonymous host for leaked documents is Cryptome, whose founder, Paul Young, served briefly on the WikiLeaks advisory board. See Declan McCullagh, *WikiLeaks’ Estranged Co-Founder Becomes a Critic* (Q&A), CNET NEWS (July 20, 2010, 1:40 PM), http://news.cnet.com/8301-31921_3-20011106-281.html.
21. See LEIGH & HARDING, *supra* note 12, at 57–64 (describing WikiLeaks’ early releases). Among other things, these document caches exposed political corruption and violence in Kenya and other African political and environmental scandals; operations manuals of the Guantanamo Bay detention camp; secret manuals from the Church of Scientology; and self-dealing by the owners of Kaupthing Bank, the bank whose collapse hastened Iceland’s financial downfall. See Manfred Goetzke, *WikiLeaks Website Offers Promising Outlet for Fighting Corruption*, DEUTSCHE WELLE (Nov. 26, 2009), <http://www.dw-world.de/dw/article/0,,4930880,00.html>; Andy Greenberg, *WikiLeaks’ Julian Assange Wants To Spill Your Corporate Secrets*, FORBES (Nov. 29, 2010, 5:04 PM), <http://www.forbes.com/sites/andygreenberg/2010/11/29/wikileaks-julianassange-wants-to-spill-your-corporate-secrets/>.
22. About WikiLeaks, *supra* note 4.
23. For a nonspecialist’s description of the technological backbone of WikiLeaks’ capabilities of protecting the anonymity of its sources and of protecting itself from censorship, see LEIGH & HARDING, *supra* note 12, at 55–56.
24. See Joby Warrick, *WikiLeaks Works To Expose Government Secrets, but Web Site’s Sources Are a Mystery*, WASH. POST (May 19, 2010), www.washingtonpost.com/wp-dyn/content/article/2010/05/19/AR2010051905333.html.
25. A disgruntled former WikiLeaks member, Daniel Domscheit-Berg, has launched another rival site, while the New York Times, WikiLeaks’ U.S. journalistic collaborator (with whom it has a stormy relationship), may establish a competing site that would allow whistleblowers to anonymously pass documents to the newspaper. See Michael Calderone, *NY Times Considers Creating an “EZ Pass Lane for Leakers,”* YAHOO! NEWS (Jan. 25, 2011), <http://news.yahoo.com/blogs/cutline/ny-times-considers-creating-ez-pass-lane-leakers-20110125-053811-98.8.html>; Frank Jordans, *Openleaks, WikiLeaks Rival, Launches New Secret-Spilling Site*, HUFFINGTON POST (Jan. 28, 2011, 10:31 AM), http://www.huffingtonpost.com/2011/01/28/openleaks-wikileaks-rival_0_n_815309.html; A Swarm of Leaks: WikiLeaks’ Rivals Will Be Hard To Fight, ECONOMIST (Dec. 9, 2010), http://www.economist.com/node/17674089?story_id=17674089. WikiLeaks also inspired the Palestine Papers, hosted by the commercial Al Jazeera network, which leaked a large cache of recent documents relating to the Israeli-Palestinian conflict. See *FAQ: The Palestine Papers*, AL JAZEERA, <http://www.aljazeera.com/palestinepapers/2011/01/2011123114726552723.html> (last modified Jan. 23, 2011). The Wall Street Journal’s announcement of its own leaking site, SafeHouse, <https://www.wsjsafehouse.com/>, was roundly dismissed for alleged weaknesses in the technical and legal protection it would offer to any would-be leakers. See Josh Halliday, *Wall Street Journal Faces Backlash over WikiLeaks Rival*, GUARDIAN (May 6, 2011, 09:21 EDT), <http://www.guardian.co.uk/media/2011/may/06/wallstreet-journal-wikileaks-safehouse>; Paul Marks, *Absurd Rules Make WSJ’s New Leak Site a Non-Starter*, ONE PER CENT (May 6, 2011, 13:44),

<http://www.newscientist.com/blogs/onepercent/2011/05/phone-hacking-publishers-leak.html>. For a compelling discussion of the possibilities and limits of WikiLeaks as a model, see Geert Lovink & Patrice Riemsens, *Twelve Theses on WikiLeaks*, EUROZINE (Dec. 7, 2010), <http://www.eurozine.com/articles/2010-12-07-lovinkriemens-en.html>.

26. See Manne, *supra* note 12, at 21–31; Hans Ulrich Obrist, *In Conversation with Julian Assange, Part I*, E-FLUX (May 2011), www.e-flux.com/journal/view/232.

27. At least at one time, WikiLeaks required its staff to sign a confidentiality agreement recognizing that all information that staff is exposed to, including the existence of the agreement itself, belongs to WikiLeaks, and a staff member's significant breach would be subject not only to an injunction to prevent disclosure but would also cause damages to the organization "in the region of £12,000,000." WikiLeaks ITC, Ltd., Confidentiality Agreement, available at <http://images.newstatesman.com/wikileaks.pdf>. Compare David Allen Green, *The £12m Question: How WikiLeaks Gags Its Own Staff*, NEW STATESMAN (May 11, 2011, 3:31 PM), <http://www.newstatesman.com/blogs/david-allen-green/2011/05/wikileaks-information-legal> (criticizing the confidentiality agreement as "draconian and extraordinary"), with Kevin Gosztola, *2011-05-12 Leaked WikiLeaks Confidentiality Agreement: Neither "Draconian" Nor "Extraordinary," WL CENT.* (May 12, 2011, 13:08), <http://wlcenral.org/node/1763> (defending the agreement). The agreement was leaked by James Ball, who had worked for WikiLeaks and had refused to sign the agreement, characterizing it as "by orders of magnitude the most restrictive I have ever encountered" in the media industry. James Ball, *WikiLeaks, Get Out of the Gagging Game*, GUARDIAN (May 12, 2011, 12:43 EDT), <http://www.guardian.co.uk/commentisfree/2011/may/12/wikileaks-confidentiality-agreement-julian-assange>.

28. Raffi Khatchadourian, *No Secrets: Julian Assange's Mission for Total Transparency*, NEW YORKER, June 7, 2010, at 40, 40; see also Jay Rosen, *The Afghanistan War Logs Released by WikiLeaks, the World's First Stateless News Organization*, PRESSTHINK (July 26, 2010, 1:31 AM), <http://pressthink.org/2010/07/the-afghanistan-war-logs-released-by-wikileaks-the-worlds-firststateless-news-organization/>. Assange's British attorney has characterized the site's statelessness as, in part, a legal strategy to limit its susceptibility to the laws of individual states. See Emily Badger, *WikiLeaks and the Future of Whistle-Blowing*, MILLER-MCCUNE (May 2, 2011), <http://www.miller-mccune.com/media/wikileaks-and-the-future-of-whistle-blowing-30795/>.

29. See LEIGH & HARDING, *supra* note 12, at 52 (describing derivation of the WikiLeaks name and its relationship to Wikipedia). The decision to use Wiki as a prefix in the site's name seems in hindsight a mistake, given Assange's later criticism of crowd-sourcing for journalism. See *infra* text accompanying note 120. It seems best to understand the prefix now as signifying the demand-side prominence of Wikipedia as a freely available, collectively produced, antiauthoritarian source for the people.

30. Assange explains that his identity and role were revealed by others when journalists began to investigate WikiLeaks' inner workings. See Hans Ulrich Obrist, *In Conversation with Julian Assange, Part II*, E-FLUX (June 2011), <http://www.e-flux.com/journal/in-conversation-with-julian-assange-part-ii/>.

31. On Assange, see especially Manne, *supra* note 12, as well as John F. Burns & Ravi Somaiya, *WikiLeaks Founder on the Run, Trailed by Notoriety*, N.Y. TIMES (Oct. 23, 2010), <http://www.nytimes.com/2010/10/24/world/24assange.html?ref=wikileaks>; see also Eben Harrell, *Defending the Leaks: Q&A with WikiLeaks' Julian Assange*, TIME (July 27, 2010), <http://www.time.com/time/world/article/0,8599,2006789,00.html>; David Kushner, *Cloak and Dagger: Inside WikiLeaks' Leak Factory*, MOTHER JONES (June 2, 2010), <http://motherjones.com/politics/2010/07/click-and-dagger-wikileaks-julian-assange-iraq-video-updated>; Khatchadourian, *supra* note 28.

32. Harrell, *supra* note 31; see also Obrist, *supra* note 30.

33. On the rape charge, efforts by Swedish authorities to extradite Assange from England, and the effects of Assange's prosecution on WikiLeaks, see LEIGH & HARDING, *supra* note 12, at 145–63, 227–39; Benkler, *supra* note 12, at 345–47.

34. There are widely accepted rumors that at least some of WikiLeaks' early disclosures were based on data that it had hacked from the Tor network. See LEIGH & HARDING, *supra* note 12, at 53–56.

35. See WikiLeaks, *Collateral Murder*, COLLATERAL MURDER (Apr. 5, 2010), <http://collateralmurder.com/> (also available at <http://www.youtube.com/watch?v=3ALAZdsguO8&feature=dir>). A full account of the Collateral Murder video and its production appears in Khatchadourian, *supra* note 28, at 43–45, 49–51.

36. See Alex Altman, *Afghan Leaks: Is the U.S. Keeping Too Many Secrets?*, TIME (July 30, 2010), <http://www.time.com/time/nation/article/0,8599,2007224,00.html>; Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES (Aug. 8, 2010), <http://www.nytimes.com/2010/08/09/us/09manning.html?scp=1&sq=Early%20Struggles%20of%20Soldier%20Charged%20in%20Leak%20Case&st=cse>; see also LEIGH & HARDING, *supra* note 12, at 72–89; MITCHELL, *supra* note 12, at 38–50.

37. See LEIGH & HARDING, *supra* note 12, at 116–27; Benkler, *supra* note 12, at 323–24.

38. See LEIGH & HARDING, *supra* note 12, at 128–34; Benkler, *supra* note 12, at 325–26.

39. See LEIGH & HARDING, *supra* note 12, at 135–44; Benkler, *supra* note 12, at 326–30.

40. Tom Lasseter, *Guantanamo Secret Files Show U.S. Often Held Innocent Afghans*, MCCLATCHY (Apr. 26, 2011), <http://www.mcclatchydc.com/2011/04/26/112854/guantanamosecret-files-show-us.html#ixzz1QUV5GJcN>; Charlie Savage et al., *Classified Files Offer New Insights Into Detainees*, N.Y. TIMES (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/world/guantanamo-files-lives-in-an-american-limbo.html>.

41. See Paul Marks, *Assange: Why WikiLeaks Was Right To Release Raw Cables*, NEW SCIENTIST (Sept. 6, 2011), <http://www.newscientist.com/article/dn20869-assange-why-wikileaks-was-rightto-release-raw-cables.html>; Raphael G. Satter, *WikiLeaks Reveals All, Media Groups Criticize Move*, YAHOO! NEWS (Sept. 2, 2011), <http://news.yahoo.com/wikileaks-reveals-media-groups-criticizemove-44202957.html>; Christian Stöcker, *A Dispatch Disaster in Six Acts*, SPIEGEL ONLINE (Sept. 1, 2011), <http://www.spiegel.de/international/world/0,1518,783778,00.html>.

42. Most of the documents that composed the Afghanistan and Iraq "War Logs" were classified "secret." *A Note to Readers, Piecing Together the Reports, and Deciding What To Publish*, N.Y. TIMES (July 25, 2010), <http://www.nytimes.com/2010/07/26/world/26editors-note.htm>; Scott Stewart, *WikiLeaks and the Culture of Classification*, STRATFOR (Oct. 28, 2010), http://www.stratfor.com/weekly/20101027_wikileaks_and_culture_classification. Of the more than 250,000 diplomatic cables WikiLeaks obtained, approximately 11,000 were classified "secret," 4,000 were classified "secret" and "noform" (that is, not to be shared with a foreign government), and 9,000 were classified "noform." Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES (Nov. 28, 2010), <http://www.nytimes.com/2010/11/29/world/29cables.html>; see also *What Do the Diplomatic Cables Really Tell Us?*, SPIEGEL ONLINE (Nov. 28, 2010), <http://www.spiegel.de/international/world/0,1518,731441,00.html> (giving slightly different figures from the New York Times).

43. See Daniel W. Drezner, *Why WikiLeaks Is Bad for Scholars*, CHRON. HIGHER ED. (Dec. 5, 2010), <http://chronicle.com/article/Why-WikiLeaks-Is-Bad-for/125628/> (characterizing the diplomatic cables as documents that would have been unavailable to academics for decades); Dan Murphy, *WikiLeaks Releases Video Depicting US Forces Killing of Two*

Reuters Journalists in Iraq, CHRISTIAN SCI. MONITOR (Apr. 5, 2010), <http://www.csmonitor.com/World/Global-News/2010/0405/Wikileaks-releases-video-depicting-US-forces-killing-of-two-Reuters-journalists-in-Iraq> (noting that the Collateral Murder video showed an attack about which Reuters had unsuccessfully sought information through the Freedom of Information Act).

44. See LEIGH & HARDING, *supra* note 12, at 110–15 (describing the negotiated agreements between WikiLeaks and its newspaper partners to redact documents); Benkler, *supra* note 12, at 321–30 (summarizing the WikiLeaks releases and describing the site's relationship with the established print news media). WikiLeaks offered prerelease access to the "War Logs" documents to four news organizations: the New York Times, the Guardian (U.K.), Le Monde (France), and Der Spiegel (Germany). The Times' coverage appears at <http://www.nytimes.com/interactive/world/war-logs.html>, and the Guardian's at <http://www.guardian.co.uk/world/iraqwar-logs> and <http://www.guardian.co.uk/world/the-war-logs>. For an inside account of the relationship between WikiLeaks and one of the newspapers to whom it granted preview access, written from one of the newspapers' perspectives, see Sarah Ellison, *The Man Who Spilled the Secrets*, VANITY FAIR (Feb. 2011), <http://www.vanityfair.com/politics/features/2011/02/theguardian-201102> (based on interviews with editors from the Guardian); Bill Keller, *Dealing with Julian Assange and the WikiLeaks Secrets*, N.Y. TIMES (Jan. 26, 2011), <http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?scp=2&sq=%22the%20boy%20who%20kicked%20the%20hornet's%20nest%22&st=cse> (chronicling a New York Times editor's account); see also Javier Moreno, *Why El País Chose To Publish the Leaks*, EL PAÍS.COM (Dec. 23, 2010), http://www.elpais.com/articulo/english/Why/PAIS/chose/to/publish/the/leaks/elpepueng/20101223elpeng_3/Ten (describing Spanish newspaper's later role in working with WikiLeaks). By March 2011, WikiLeaks had relationships with "89 media organizations" in fifty countries. See Global—Media Currently Publishing, WIKILEAKS, <http://wikileaks.ch/Media-Currently-Publishing.html> (last visited Dec. 24, 2011).

45. The New York Times packaged the highlights of its reporting based on the "War Logs" in OPEN SECRETS: WIKILEAKS, WAR, AND AMERICAN DIPLOMACY 252–328 (Alexander Star ed., 2011) [hereinafter OPEN SECRETS]; see also LEIGH & HARDING, *supra* note 12, at 116–34 (providing the Guardian's perspective on the "War Logs").

46. LEIGH & HARDING, *supra* note 12, at 135–44; OPEN SECRETS, *supra* note 45, at 62–203. The State Department releases continued long after the initial wave of disclosures by the major newspapers. WikiLeaks continued to release thousands of documents relating to U.S. relations with other nations, frequently through news outlets in those countries. See Joshua E. Keating, *The WikiLeaks You Missed*, FOREIGN POL'Y (July 1, 2011), http://www.foreignpolicy.com/articles/2011/01/01/the_wikileaks_you_missed (describing releases about Thailand, Haiti, India, Pakistan, and other nations).

47. See Lasseter, *supra* note 40; Savage et al., *supra* note 40.

48. Tony Capaccio, *Pentagon Alerts House, Senate Panels to New Classified WikiLeaks Release*, BLOOMBERG (Nov. 24, 2010, 12:23 PM), <http://www.bloomberg.com/news/2010-11-24/pentagon-warns-house-senate-defense-panels-of-more-wikileaks-documents.html>; Philip Shenon, *Pentagon Manhunt*, DAILY BEAST (June 10, 2010), <http://www.thedailybeast.com/articles/2010/06/10/wikileaks-founder-julian-assange-hunted-by-pentagon-over-massive-leak.html>. The Obama administration has made a concerted effort to prosecute leaks, and its civil-prosecutorial efforts, like its military-prosecutorial efforts against Bradley Manning, appear to be part of this campaign. See Carrie Johnson, *Case Against WikiLeaks Part of Broader Campaign*, NPR (May 11, 2011), <http://www.npr.org/2011/05/11/136173262/case-against-wikileaks-part-ofbroader-campaign>.

49. This refers only to the criminal prosecution of Julian Assange and others involved with WikiLeaks. The criminal prosecution of Bradley Manning, who allegedly stole and passed along the documents, is quite simple, as he is currently in custody and likely has no constitutional protection.

50. Adam Entous & Evan Perez, *Prosecutors Eye WikiLeaks Charges*, WALL ST. J. (Aug. 21, 2010),

<http://online.wsj.com/article/SB10001424052748704488404575441673460880204.html>. 51. See Manne, *supra* note 12, at 34 (describing how at least one WikiLeaks volunteer dropped out of the group due to fear of criminal prosecution).

52. The federal Espionage Act criminalizes obtaining national-security information with the intent to use the information or reason to believe that the information is to be used to the injury of the United States or knowing that the person who obtained the information had such intent, and the Act does not limit its reach only to citizens. See 18 U.S.C. § 793(a)–(b) (2006); see also Julian Ku, *Can the U.S. Prosecute WikiLeaks' Founder? Sure, if They Can Catch Him*, OPINIO JURIS (Aug. 21, 2010, 12:11 AM), <http://opiniojuris.org/2010/08/21/can-the-us-prosecutewikileaks-founder-sure-if-they-can-catch-him/> (arguing that the Espionage Act could be applied to Assange). But see Lolita C. Baldor, *Can the Government Actually Plug the WikiLeaks?*, MIL. TIMES (Aug. 7, 2010), http://www.militarytimes.com/news/2010/08/ap_wikileaks_080710/ (citing expert opinion that "it's not clear" that U.S. law would apply to a foreign citizen).

53. I discuss in somewhat more detail the legal framework within which Assange could be prosecuted and his constitutional defenses, *infra* Part III.B. This Article does not, however, purport to offer a comprehensive legal analysis of criminal prosecution under the Espionage Act, nor of extradition. Yochoi Benkler's article does not either, but he does offer more details. See Benkler, *supra* note 12, at 337–38, 363–65.

54. See STANLEY I. KUTLER, *THE WARS OF WATERGATE* 110–11 (1990) (discussing how the Pentagon Papers' political impact was intensified by the Nixon administration's response to them; most significantly, the leak led to the creation of the White House "Plumbers," a secret group that engaged in illegal activity, including the break-in of the Democratic National Committee headquarters in the Watergate building); RUDENSTINE, *supra* note 12, at 5–6 (same); see also SCHOENFELD, *supra* note 10, at 183 (noting that efforts to suppress the Pentagon Papers actually increased attention to them).

55. An inside account of the Bank Julius Baer leak appears in DOMSCHEIT-BERG, *supra* note 12, at 17–33 (the author refers to the institution as the "Julius Bär Bank").

56. *Bank Julius Baer & Co. v. WikiLeaks*, 535 F. Supp. 2d 980, 984–85 (N.D. Cal. 2008).

57. *Id.* at 984.

58. *Id.* at 985.

59. Thomas Claburn, *Swiss Bank Abandons Lawsuit Against WikiLeaks*, INFORMATIONWEEK (Mar. 6, 2008), <http://www.informationweek.com/news/206902154>.

60. MICHAEL D. HORVATH, *CYBER COUNTERINTELLIGENCE ASSESSMENTS BRANCH, ARMY COUNTERINTELLIGENCE CTR., WIKILEAKS.ORG—AN ONLINE REFERENCE TO FOREIGN INTELLIGENCE SERVICES, INSURGENTS, OR TERRORIST GROUPS?* (2008), available at <http://mirror.wikileaks.info/leak/us-intel-wikileaks.pdf> (also available at http://www.wired.com/images_blogs/threatlevel/2010/03/wikithreat.pdf); see also Benkler, *supra* note 12, at 317–20 (summarizing the report).

61. Elizabeth Montalbano, *Army: Wikileaks a National Security Threat*, INFORMATIONWEEK (Mar. 16, 2010), <http://www.informationweek.com/news/government/security/223900094>; Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES (Mar. 17, 2010), <http://www.nytimes.com/2010/03/18/us/18wiki.html>.

62. HORVATH, *supra* note 60, at 21–22.
63. *Id.* at 21.
64. See Press Release, Wikileaks, U.S. Intelligence Planned To Destroy WikiLeaks (Mar. 15, 2010), available at http://www.wired.com/images_blogs/threatlevel/2010/03/wikithreat.pdf. At least one news story suggested that the military might have been considering launching “a cyber attack against the website” in the late summer and fall of 2010, the period between the release of the Afghanistan and Iraq documents. See Baldor, *supra* note 52.
65. But see Richard Tofel, Why WikiLeaks’ “War Logs” Are No Pentagon Papers, PROPUBLICA (July 26, 2010), <http://www.propublica.org/article/why-wikileaks-war-logs-are-no-pentagonpapers> (arguing that WikiLeaks’ Afghanistan disclosures lack the historical importance of the documents Ellsberg released).
66. Manne, *supra* note 12, at 30.
67. Noam Cohen, What Would Daniel Ellsberg Do With the Pentagon Papers Today?, N.Y. TIMES (Apr. 18, 2010), <http://www.nytimes.com/2010/04/19/business/media/19link.html> (internal quotation marks omitted).
68. See Burns & Somaiya, *supra* note 31 (describing internal dissent within WikiLeaks and disgruntled former members, and characterizing Assange in an unflattering light).
69. Glenn Greenwald, an outspoken critic of the Iraq and Afghanistan wars and of Obama’s continuation of some of the Bush administration’s policies regarding those wars (and of related issues like executive branch secrecy), berated a critical New York Times profile as “Nixonian” and a “sleazy hit piece” intended to “smear” Assange and compared the Times story to Nixon’s efforts to minimize the damage caused by the Pentagon Papers. Glenn Greenwald, The Nixonian Henchman of Today: At the NYT, SALON (Oct. 24, 2010, 10:25 AM), http://www.salon.com/2010/10/24/assange_2/ (criticizing Burns & Somaiya, *supra* note 31). On Nixon’s efforts to destroy Ellsberg by authorizing the Plumbers to leak private, stolen information from his psychiatrist, among other things, see RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 348–49, 368–69 (2001); BARRY WERTH, 31 DAYS: GERALD FORD, THE NIXON PARDON, AND A GOVERNMENT IN CRISIS 84–87 (2006); CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT’S MEN 312–13, 316 (1974).
70. Time’s Julian Assange Interview: Full Transcript/Audio, TIME (Dec. 1, 2010), <http://www.time.com/time/world/article/0,8599,2034040,00.html> [hereinafter Time’s Julian Assange Interview].
71. See Harrell, *supra* note 31.
72. See LEIGH & HARDING, *supra* note 12, at 203–07, 242; Benkler, *supra* note 12, at 337–47; Andy Greenberg, An Interview with WikiLeaks’ Julian Assange, FORBES (NOV. 29, 2010), <http://forbes.com/sites/andygreenberg/2010/11/29/an-interview-with-wikileaks-julian-assange/>.
73. See The War on WikiLeaks: Fingered, ECONOMIST (Dec. 9, 2010), <http://www.economist.com/node/17674107> (describing WikiLeaks’ technical and financial workarounds for efforts to block public access and donations to the site, as well as unaffiliated hackers’ attempts to disrupt corporations and websites that acted against WikiLeaks).
74. See Manne, *supra* note 12, at 21–22.
75. John Perry Barlow, @JPBarlow, TWITTER (Dec. 3, 2010), <http://twitter.com/#!/jpbarlow/status/10627544017534976>.
76. See *infra* Part II.A.
77. See *infra* Part II.B.
78. See, e.g., John F Moore, WikiLeaks Is a Blow to Open Government, GOV’T IN THE LAB (Nov. 28, 2010), <http://govinthelab.com/wikileaks-is-a-blow-to-open-government/> (fearing that the site would destroy the trust between government and its citizens and between different governments, which is necessary for transparency reform); WikiLeaks Shines a Light on the Limits of Techno-Politics, WHIMSLEY (Dec. 5, 2010), <http://whimsley.typepad.com/whimsley/2010/12/wikileaks-shines-a-light-on-the-limits-of-techno-politics.html> (discussing the difference in aims of transparency proponents, who seek to improve how government functions, and WikiLeaks, which seeks to make government operations more difficult); Anthony D. Williams, Could WikiLeaks Set Back Open Government?, ANTHONY D. WILLIAMS (Nov. 29, 2010), <http://anthonydwilliams.com/2010/11/29/could-wikileaks-set-back-open-government/> (worrying that the headway open-government advocates had made with government officials in terms of getting them to recognize the advantages of transparency might be lost as a result of WikiLeaks).
79. See Benkler, *supra* note 12, at 331–33.
80. See H.R. 6506, 111th Cong. (2010) (proposing to amend 18 U.S.C. § 798 (2006) to expand criminal liability for disseminating classified information); Robert Brodsky, Whistleblower Protection Bill Dies Again, on the 1-Yard Line, GOV’T EXECUTIVE (Dec. 23, 2010), <http://www.govexec.com/dailyfed/1210/122310rb1.htm>; Glenn Greenwald, WikiLeaks Reveals More Than Just Government Secrets, SALON (Nov. 30, 2010, 5:31 AM), http://www.salon.com/2010/11/30/wikileaks_10/singleton/ (discussing commentators who were outraged by WikiLeaks, some of whom called loudly for Assange’s assassination).
81. Steven Aftergood, WikiLeaks Fails “Due Diligence” Review, SECRECY NEWS (June 28, 2010, 11:19 AM), http://www.fas.org/blog/secrecy/2010/06/wikileaks_review.html.
82. From One Transparency Advocate to Another: Transcript, ON THE MEDIA (July 30, 2010), <http://www.onthemedialab.org/2010/jul/30/from-one-transparency-advocate-to-another/transcript/>.
83. Nancy A. Youssef, In WikiLeaks Fight, U.S. Journalists Take a Pass, MCCLATCHY (Jan. 9, 2011), <http://www.mcclatchydc.com/2011/01/09/106445/in-wikileaks-fight-us-journalists.html>.
84. See, e.g., Stephen Collins, Open Government in a WikiLeaks World, GOV’T TECH. REV. (Dec. 21, 2010), <http://www.govtechreview.com.au/news/open-government-in-a-wikileaks-world/> (“[P]henomena such as Wikileaks are a symptom, rather than the disease itself. Wikileaks exists because of the failure of governments around the world to operate openly.”); Ron Deibert, The Post-Cablegate Era, N.Y. TIMES (Dec. 11, 2010), <http://www.nytimes.com/roomfordebate/2010/12/09/what-has-wikileaks-started/after-wikileaks-a-new-era> (“WikiLeaks is only a symptom of a much larger phenomenon to which governments, businesses and individuals will all have to get accustomed. Our lives have been turned inside out by a digital world of our own spinning. We will need new rules, norms and principles to adjust to this new environment.”); Alex Howard, Is WikiLeaks Open Government?, GOV 2.0 (Nov. 28, 2010, 2:13 PM), <http://gov20.govfresh.com/is-wikileaks-open-government/>; Jeff Jarvis, WikiLeaks: Power Shifts from Secrecy to Transparency, BUZZMACHINE (Dec. 4, 2010, 2:40 PM), <http://www.buzzmachine.com/2010/12/04/wikileaks-power-shifts-from-secrecy-to-transparency/> (“[I]n the internet age, power shifts from those who hold secrets to those [who] create openness. That is our emerging reality.”).
85. Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 79 (2010) (statement of Thomas Blanton, Director, National Security Archive, George Washington University), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg63081/pdf/CHRG-111hrg63081.pdf>.
86. This is true as well for Bradley Manning’s motives, at least to the extent they have been disclosed. See LEIGH & HARDING, *supra* note 12, at 84–87.

87. Julian Assange, Don't Shoot Messenger for Revealing Uncomfortable Truths, AUSTRALIAN (Dec. 8, 2010, 12:00 AM), <http://www.theaustralian.com.au/in-depth/wikileaks/dont-shootmessenger-for-revealing-uncomfortable-truths/story-fn775xjq-1225967241332>.
88. Id.
89. About WikiLeaks, *supra* note 4.
90. Harrell, *supra* note 31; see also Julian Assange on WikiLeaks, War and Resisting Government Crackdown, DEMOCRACY NOW! (Dec. 31, 2010), http://www.democracynow.org/2010/12/31/julian_assange_on_wikileaks_war_and (transcript of interview in which Assange explains that WikiLeaks' "modus operandi . . . is to get out suppressed information into the public, where the press and the public and our nation's politics can work on it to produce better outcomes"); Time's Julian Assange Interview, *supra* note 70 (presenting Assange's claim that transparency can "achieve a more just society" by allowing a more knowledgeable, engaged public to oppose "abusive plans or behavior").
91. See Obrist, *supra* note 30; Richard Waters, Online Leaks: A Digital Deluge, FIN. TIMES (July 30, 2010, 10:06 PM), <http://www.ft.com/intl/cms/s/0/9098a06a-9c1c-11df-a7a4-00144feab49a.html#axzz1bkWjzeLA>.
92. On the question of whether the First Amendment applies to WikiLeaks, and the significance of this question, see Benkler, *supra* note 12, at 351–63; Mike Dorf, WikiLeaks and the First Amendment, DORF ON LAW (July 30, 2010, 12:47 AM), <http://www.dorfonlaw.org/2010/07/wikileaks-and-first-amendment.html>; see also Jack Goldsmith, Why the U.S. Shouldn't Try Julian Assange, WASH. POST (Feb. 11, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021006324.html>.
93. See Julian Assange, What's New About WikiLeaks?, NEW STATESMAN (Apr. 14, 2011), <http://www.newstatesman.com/digital/2011/04/civil-war-wikileaks-newspapers>.
94. See Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 634 (1975) (identifying the term's derivation in the British liberalism of Thomas Carlyle and Edmund Burke to refer to "fourth institution outside the Government as an additional check on the three official branches").
95. WikiLeaks Is the Method We Use Towards Our Goal of a More Just Society: Assange, HINDU (Apr. 13, 2011), <http://www.hindu.com/2011/04/13/stories/2011041357631300.htm>.
96. Ironically, Assange's popular-democratic vision of a scientific journalism free of interests and capable of appealing to public reason parallels that of the far more statist Progressive Era intellectual Walter Lippmann, who proposed creating independent intelligence bureaus to process information that would create a "valid picture" of the political environment. WALTER LIPPMANN, PUBLIC OPINION 379–97, 407–08 (Macmillan Co. 1949) (1922). Lippmann trusted experts far more than the radical democrat Assange, but both seek a fix that can provide the public access to the authentic truth of a knowable world. See WALTER LIPPMANN, LIBERTY AND THE NEWS 40 (Princeton Univ. Press 2008) (1920) ("[L]iberty is the name we give to measures by which we protect and increase the veracity of the information upon which we act.").
97. Mark Fenster, The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State, 73 U. PITT. L. REV. (forthcoming 2012) (manuscript at 51 n.218) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918154) (citing Obrist, *supra* note 30) (chronicling the "rights" approach to transparency advocacy, as enforceable by legal and technological means).
98. The best account of these writings is Julian Assange and the Computer Conspiracy; "To Destroy This Invisible Government," ZUNGUZUNGU (Nov. 29, 2010, 9:05 AM), <http://zunguzungu.wordpress.com/2010/11/29/julian-assange-and-the-computer-conspiracy--to-destroy-this-invisible-government/> [hereinafter Julian Assange and the Computer Conspiracy]. See also Peter Ludlow, Rethinking Conspiracy: The Political Philosophy of Julian Assange (2010) (unpublished essay), available at <http://commonsenseatheism.com/wp-content/uploads/2010/12/Ludlow-Rethinking-Conspiracy-the-Political-Philosophy-of-Julian-Assange.pdf>.
99. JULIAN ASSANGE, CONSPIRACY AS GOVERNANCE 1, 1 (Dec. 3, 2006) [hereinafter CONSPIRACY AS GOVERNANCE], available at <http://cryptome.org/0002/ja-conspiracies.pdf>. That essay and another, JULIAN ASSANGE, STATE AND TERRORIST CONSPIRACIES (Nov. 10, 2006), are available as part of the same file on the Cryptome website. The former essay is a revision of the latter, written less than a month later, and is a more authoritative version of Assange's argument.
100. Thus, the definition extends to WikiLeaks' rumored release (as of December 2011) of documents stolen from an as-yet unnamed bank (long presumed to be Bank of America) and leaked to the site. See The Leaky Corporation, ECONOMIST (Feb. 24, 2011), <http://www.economist.com/node/18226961>. The release, Assange told Forbes, "will give a true and representative insight into how banks behave at the executive level in a way that will stimulate investigations and reforms, I presume." Greenberg, *supra* note 72.
101. Julian Assange and the Computer Conspiracy, *supra* note 98.
102. CONSPIRACY AS GOVERNANCE, *supra* note 99, at 2.
103. Id. at 3.
104. Id. at 2.
105. Id. at 2–3.
106. Id. at 2–3.
107. As Assange explained in an interview with the BBC: There is a reason why people write things down. Yes, you can organise a small group of people to do something with just word of mouth. But if you want to enact policy, for example, to get Guantanamo Bay guards to do something, get the grunts to do something, you've got to write it down or it will not be followed. Transcript: The Assange Interview, BBC NEWS—TODAY (Dec. 21, 2010, 12:26 PM), http://news.bbc.co.uk/1/hi/today/newsid_9309000/9309320.stm.
108. CONSPIRACY AS GOVERNANCE, *supra* note 99, at 1.
109. Id. at 4.
110. Id. at 5.
111. Id.
112. Julian Assange, The Non Linear Effects of Leaks on Unjust Systems of Governance, IQ.ORG (Dec. 31, 2006). Assange apparently stopped posting at IQ.org in 2007, and the site is no longer operational. See <http://www.iq.org>. But this post is available at <http://cryptome.org/0002/ja-conspiracies.pdf>. For this and other posts from IQ.org, see also http://www.anorak.co.uk/wp-content/uploads/assange-IQ.org_.pdf.
113. See CONSPIRACY AS GOVERNANCE, *supra* note 99, at 5.
114. See *infra* Part III.C.1–2.
115. SLAVOJ ŽIŽEK, LIVING IN THE END TIMES 408–09 (rev. ed. 2011); Julian Assange and the Computer Conspiracy, *supra* note 98. In an essay intended to dismiss WikiLeaks' importance, Umberto Eco concedes this point, noting that even an "empty secret" whose content is widely known can cause "irreparable damage" to those who thought they controlled access to the

secret. Umberto Eco, Not Such Wicked Leaks, PRESSEUROPE (Eric Rosencrantz trans., Dec. 2, 2010), <http://www.presseurope.eu/en/content/article/414871-not-such-wicked-leaks>.

116. See WikiLeaks:Strategy, WIKILEAKS, <http://www.wikileaks.ch.nyu.edu/wiki/WikiLeaks:Strategy> (last visited Dec. 24, 2011) (declaring that the site should not “alienate” transparency and anticorruption groups and the organizations that fund them “without good cause,” even if those groups tend to be more conservative than WikiLeaks). See generally Manne, supra note 12, at 30 (quoting internal WikiLeaks documents in which Assange states that the site must disguise its radical nature).

117. See Becky Hogge, News of the World, Media Cartels and the Fiscalisation of Power: 2009 Interview with Julian Assange, BAREFOOT TECHNOLOGIST (July 27, 2011), http://barefootintocyberspace.com/2011/07/27/assange_transcript/.

118. Time’s Julian Assange Interview, supra note 70.

119. Finn Brunton, Keyspace: WikiLeaks and the Assange Papers, RADICAL PHIL., Mar./Apr. 2011, at 8, 13, available at <http://www.radicalphilosophy.com/commentary/keyspace-wikileaksand-the-assange-papers>.

120. See Julian Assange, The Hidden Curse of Thomas Paine, GUERNICA (Apr. 29, 2008), http://www.guernicamag.com/blog/571/the_hidden_curse_of_thomas_pai/; Obrist, supra note 26.

121. Manne, supra note 12, at 33; see also WikiLeaks:Big Picture, WIKILEAKS, http://wikileaks.ch.nyu.edu/wiki/WikiLeaks:Big_picture (last visited Dec. 24, 2011).

122. Julian Assange in Berkeley, ZUNGUZUNGU (Dec. 12, 2010, 5:53 PM), <http://zunguzungu.wordpress.com/2010/12/12/julian-assange-in-berkeley/> (transcript of Assange’s participation in an academic forum at Berkeley in which he complained that bloggers and the like write largely to gain status for themselves among their peer groups; as a result, they “don’t give a fuck about the material” and fail to perform follow-up investigations into the information the disclosed documents reveal); see also Time’s Julian Assange Interview, supra note 70 (describing the process by which social media merely amplify and publicize stories, while WikiLeaks and major newspapers perform the “bulk of the heavy lifting” on the documents).

123. McCullagh, supra note 20; John Young, Wikileaks Stoned Again, CRYPTOME (Feb. 18, 2011), <http://cryptome.org/0003/wikileaks-stoned.htm>.

124. Peter Finocchiaro, Breakdown: The New WikiLeaks Scoops, SALON (Sept. 1, 2011, 3:20 PM), http://www.salon.com/news/feature/2011/09/01/wikileaks_revelations; Greg Mitchell, The Return of the WikiLeaks News & Views Blog!, NATION (Sept. 2, 2011, 1:30 PM), <http://www.thenation.com/blog/163126/return-wikileaks-news-views-blog>. The new crowd-sourcing method, as of September 2011, relied on Twitter postings. See Finocchiaro, supra.

125. One means of avoiding this trap is to help build nonprofit investigative journalist networks, something that WikiLeaks has begun to establish in Brazil. See Tadeu Breda, “We Will Continue Working Even if Julian Assange Is in Jail”: Natalia Viana, Independent Collaborator of WikiLeaks in Brazil, Speaks on the Organization’s Ability To Transform the Core Principles of Journalism, NARCO NEWS BULL. (May 22, 2011), <http://www.narconews.com/Issue67/article4417.html>; Natalia Mazotte, WikiLeaks Announces Partnership with Brazilian Investigative Journalism Center, JOURNALISM AM. BLOG (June 24, 2011, 16:43), <http://knightcenter.utexas.edu/blog/wikileaksannounces-partnership-brazilian-investigative-journalism-center>.

126. See Julian Assange Answers Your Questions, GUARDIAN (Dec. 3, 2010, 08:45 EST), <http://www.guardian.co.uk/world/blog/2010/dec/03/julian-assange-wikileaks>; LEIGH & HARDING, supra note 12, at 56–57 (describing Assange’s ties to “anti-capitalist radicals” as well as to the “geeky hacker underground”).

127. Compare Julian Assange Answers Your Questions, supra note 126 (“The west has fiscalised its basic power relationships through a web of contracts, loans, shareholdings, bank holdings and so on.”), and Time’s Julian Assange Interview, supra note 70 (“[I]n the United States to a large degree, and in other Western countries, the basic elements of society have been so heavily fiscalized through contractual obligations . . .”), with DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (defining a neoliberal state and society as “an institutional framework characterized by strong private property rights, free markets, and free trade”).

128. See, e.g., WikiLeaks:Strategy, supra note 116 (dismissing the “merely superficial democracy” offered by American politics and “the US promise of neocorporatism (better shopping)”; see also Manne, supra note 12, at 27 (“[Assange] regards power in western society as belonging to political and economic elites offering a counterfeit conception of democracy and a soul-destroying consumption culture. He points out that when the American colonists waged their struggle for independence there was no talk of shopping or even democracy. Such shallow ideas could not stir the passions.”).

129. Julian Assange Answers Your Questions, supra note 126; see also Time’s Julian Assange Interview, supra note 70 (stating that in fiscalized countries like the United States, “political change doesn’t seem to result in economic change, which in other words means that political change doesn’t result in change”). The concept seems also to concern class and ownership of the means of production. See, e.g., Obrist, supra note 26 (“[I]t doesn’t matter what information is published. It’s not going to change who owns what or who controls what.”).

130. See Julian Assange Answers Your Questions, supra note 126 (“In states like China, there is pervasive censorship, because speech still has power and power is scared of it.”); Time’s Julian Assange Interview, supra note 70 (“[J]ournalism and writing are capable of achieving change [in China], and that is why Chinese authorities are so scared of it.”).

131. Julian Assange Answers Your Questions, supra note 126; Time’s Julian Assange Interview, supra note 70.

132. Time’s Julian Assange Interview, supra note 70 (“[J]ournalism and writing are capable of achieving change [in China], and that is why Chinese authorities are so scared of it.”).

133. See Mark Fenster, The Opacity of Transparency, 91 IOWA L. REV. 885, 910–14 (2006).

134. See supra text accompanying notes 55–59.

135. Fenster, supra note 133, at 895–902.

136. Id. at 902–10.

137. See, e.g., Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 452–53 (1977) (citing the need to realize the public benefits of preserving the former presidents’ archival materials for legitimate historical and government purposes); United States v. Nixon, 418 U.S. 683, 711–12 (1974) (citing the need for the “fair administration of . . . justice” to criminal defendants).

138. EPA v. Mink, 410 U.S. 73, 80 n.6 (1973) (quoting S. REP. NO. 89-813, at 3 (1965)).

139. 5 U.S.C. § 552(b)(1)–(7) (2006). Some exceptions to balancing exist, especially where Congress has universally exempted certain types of documents by rule. See § 552(b)(3) (exempting matter that is “specifically exempted from disclosure by statute” under certain conditions); Jennifer LaFleur et al., FOIA (b)(3) Exemptions, PROPUBLICA (Mar. 10, 2010), <http://projects.propublica.org/foia-exemptions/> (interactive list of (b)(3) exemptions, with information about how frequently agencies rely on them in refusing disclosure).

140. See Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); Paul W. Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 YALE L.J. 1, 4–5 (1987).

141. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 984–86 (1987).
142. See Pierre Schlag, *Commentary, The Aesthetics of American Law*, 115 *HARV. L. REV.* 1047, 1080 (2002).
143. See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 *HARV. L. REV.* 54, 82–83 (1997).
144. See, e.g., Exec. Order No. 13,526, *supra* note 6, § 4.1 (outlining the general restrictions on access to classified documents but providing no penalties for violations).
145. Richard C. Ehlke & Harold C. Relyea, *The Reagan Administration Order on Security Classification: A Critical Assessment*, 30 *FED. B. NEWS & J.* 91, 91–92 (1983).
146. See JAMES RUSSELL WIGGINS, *FREEDOM OR SECRECY* 99–103 (rev. ed. 1964); Ehlke & Relyea, *supra* note 145, at 92–93.
147. See ARVIN S. QUIST, *SECURITY CLASSIFICATION OF INFORMATION: INTRODUCTION, HISTORY, AND ADVERSE IMPACTS* ch. 3 (rev. ed. 2002), available at http://www.fas.org/sgp/library/quist/chap_3.html; see, e.g., Exec. Order No. 13,526, *supra* note 6 (currently applicable executive order issued by President Obama).
148. Exec. Order No. 13,526, *supra* note 6, § 1.2(a)(1)–(3) (emphasis added).
149. *Id.* § 1.3(a), (d) (defining classification authority); *id.* § 2.1 (defining “derivative” classification authority).
150. *Id.* § 4.1 (defining general restrictions on access to classified documents).
151. See *id.* § 1.3(d) (requiring training of those with original classification authority).
152. See *id.* §§ 1.3(a), 2.1.
153. See *id.* § 1.2(a).
154. 5 U.S.C. § 552(b)(1) (2006) (exempting from disclosure under FOIA documents that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order”); Exec. Order No. 13,526, *supra* note 6, § 1.5 (providing time limits for the duration of classification); *id.* §§ 3.1–7 (discussing the process of declassification). Information that is not classified (or declassified) does not fall within one exemption from disclosure under FOIA, 5 U.S.C. § 552(b)(1), although it may fall within another exemption or be made exempt from disclosure under another statute.
155. George MacClain, *The Road Ahead*, in 1 *CLASSIFICATION MGMT.* 6, 6 (1965), available at <http://www.fas.org/sgp/library/ncms/v1n1.pdf>.
156. See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL’Y REV.* 399, 399–401 (2009) (discussing the current state of the classification system).
157. S. DOC. NO. 105-2, at 1–2 (1997); *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats & Int’l Relations of the H. Comm. on Gov’t Reform, 108th Cong. 23* (2004), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108hrg98291/pdf/CHRG-108hrg98291.pdf> (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration) (conceding that “[i]t is no secret that the government classifies too much information” and complaining that “some individual agencies have no idea how much information they generate is classified”); see also Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 *ADMIN. L. REV.* 131, 133–34 (2006).
158. For fuller discussions, see Aftergood, *supra* note 156, at 401–11; Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 *IND. L.J.* 233, 240–43 (2008); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 *OHIO N.U. L. REV.* 451, 452–61 (2004).
159. DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 59 (1998).
160. EDWARD A. SHILS, *THE TORMENT OF SECRECY: THE BACKGROUND AND CONSEQUENCES OF AMERICAN SECURITY POLICIES* 26 (Ivan R. Dee 1996) (1956).
161. Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793–94 (2006)). Other statutes might also apply in individual cases. For comprehensive discussions of the full statutory framework, see Papandrea, *supra* note 158, at 274–77; Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 *HARV. L. & POL’Y REV.* 219, 228–31 (2007).
162. 18 U.S.C. § 793(d)–(e).
163. Sections 793(d) and (e) of the Espionage Act both create criminal liability for anyone who either lawfully possesses or otherwise obtains information related to the national defense and who willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it. § 793(d); § 793(e) (using nearly identical language).
164. U.S. CONST. amend. I, cl. 2.
165. STONE, *supra* note 3, at 2.
166. The balance metaphor appeared in the most recent reported decision in a criminal prosecution under the Espionage Act, where the court summarized the key issue in evaluating a First Amendment defense: Defendants’ First Amendment challenge exposes the inherent tension between the government transparency so essential to a democratic society and the government’s equally compelling need to protect from disclosure information that could be used by those who wish this nation harm. In addressing this tension, it is important to bear in mind that the question to be resolved here is not whether [the Espionage Act] is the optimal resolution of this tension, but whether Congress, in passing this statute, has struck a balance between these competing interests that falls within the range of constitutionally permissible outcomes. *United States v. Rosen*, 445 F. Supp. 2d 602, 629 (E.D. Va. 2006). As Justice Frankfurter characterized this balance more generally in an oft-cited passage: The demands of free speech in a democratic society as well as the interest in national security are better served by a candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved. *Dennis v. United States*, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).
167. STONE, *supra* note 3.
168. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 *COLUM. L. REV.* 929, 932 (1973).
169. See LEIGH & HARDING, *supra* note 12, at 8–10 (noting the complexity of evaluating the harms and benefits of WikiLeaks releases).
170. Immediately after the first major document release regarding Afghanistan, the Chairman of the Joint Chiefs of Staff declared that “Mr. Assange can say whatever he likes about the greater good he thinks he and his source are doing But the truth is they might already have on their hands the blood of some young soldier or that of an Afghan family.” Greg Jaffe & Joshua Partlow, *Joint Chiefs Chairman Mullen: WikiLeaks Release Endangers Troops, Afghans*, *WASH. POST* (July 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/29/AR2010072904900.html> (internal quotation marks omitted).

(quoting Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff). Less than a week later, the Pentagon press secretary stated in a press conference that WikiLeaks “has already threatened the safety of our troops, our allies and Afghan citizens who are working with us to help bring about peace and stability in that part of the world.” DOD News Briefing with Geoff Morrell from the Pentagon, U.S. DEP’T OF DEF. (Aug. 5, 2010), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=53001> (transcript of press conference by former Pentagon press secretary Geoff Morrell). Military officials continued to press such claims months later. Hearing To Consider the Nominations of: Honorable Michael G. Vickers To Be Under Sec’y of Def. for Intelligence; and Dr. Jo Ann Rooney To Be Principal Deputy Under Sec’y of Def. for Pers. and Readiness: Hearing Before the S. Comm. on Armed Servs., 112th Cong. (2011), available at <http://armed-services.senate.gov/Transcripts/2011/02%20February/11-03%20-%202-15-11.pdf> at 10–11 (testimony of acting Under Secretary of Defense for Intelligence Michael G. Vickers, agreeing that WikiLeaks’ disclosures endangered individuals who were cooperating with the American military and have damaged the military’s ability to recruit intelligence assets).

171. Ron Moreau & Sami Yousafzai, Taliban Seeks Vengeance in Wake of WikiLeaks, DAILY BEAST (Aug. 1, 2010), <http://www.newsweek.com/2010/08/02/taliban-seeks-vengeance-inwake-of-wikileaks.html>.

172. Jeanne Whalen, Rights Groups Join Criticism of WikiLeaks, WALL ST. J. (Aug. 9, 2010), <http://online.wsj.com/article/SB10001424052748703428604575419580947722558.html>.

173. See Haig v. Agee, 453 U.S. 280, 308–09 (1981) (refusing to extend First Amendment protection for disclosure of an intelligence operative’s identity); see also Near v. Minnesota, 283 U.S. 697, 716 (1931) (noting that the First Amendment would not protect disclosure of troop movements).

174. Robert Burns, Are Risks from WikiLeaks Overstated by Government?, BOSTON.COM (Aug. 17, 2010), http://www.boston.com/news/nation/washington/articles/2010/08/17/are_risks_from_wikileaks_overstated_by_government/; x7o, Debunked: “Wikileaks Has Blood on Its Hands,” WL CENT. (Nov. 21, 2010, 04:47), <http://wlcenral.org/node/278>; Bradley Klapper & Cassandra Vinograd, AP Review Finds No Threatened WikiLeaks Sources, YAHOO! NEWS (Sept. 10, 2011), <http://news.yahoo.com/ap-review-finds-no-threatened-wikileaks-sources-074530441.html>; Deb Riechmann, Coalition Informant Plays Both Sides of Afghan War, ABC NEWS (June 7, 2011), <http://abcnews.go.com/International/wireStory?id=13779423>.

175. Charlie Savage, Gates Assails WikiLeaks over Release of Reports, N.Y. TIMES (July 29, 2010), <http://www.nytimes.com/2010/07/30/world/asia/30wiki.html> (internal quotation marks omitted).

176. Adam Levine, Gates: Leaked Documents Don’t Reveal Key Intel, but Risks Remain, CNN (Oct. 17, 2010, 8:25 AM), <http://www.cnn.com/2010/US/10/16/wikileaks.assessment/index.html?hpt=T2>.

177. Id.

178. Floyd Abrams, The Pentagon Papers a Decade Later, N.Y. TIMES MAG., June 8, 1981, at 22, 25. See generally N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (popularly known as the Pentagon Papers case).

179. Abrams, supra note 178, at 25; see also John T. Correll, The Pentagon Papers, AIR FORCE MAG., Feb. 2007, at 50, 55, available at <http://www.airforce-magazine.com/MagazineArchive/Documents/2007/February%202007/0207pentagon.pdf> (observing that the Pentagon Papers provided North Vietnam with “rich insights into early US objectives, strategies, uncertainties, and degrees of commitment,” but conceding that “their publication appears to have had little or no effect on the remaining course of the war” because the documents were several years old and focused more on political machinations than on current military strategy).

180. See Tofel, supra note 65 (questioning the analogy).

181. See Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, to Jennifer Robinson, Att’y for Mr. Julian Assange (Nov. 27, 2010) [hereinafter Koh Letter], available at http://media.washingtonpost.com/wp-srv/politics/documents/Dept_of_State_Assange_Letter.pdf.

182. Mark Landler & Scott Shane, U.S. Sends Warning to People Named in Cable Leaks, N.Y. TIMES (Jan. 6, 2011), <http://www.nytimes.com/2011/01/07/world/07wiki.html>.

183. Id. One episode that commentators identified concerned a cable that indicated Zimbabwean opposition leader Morgan Tsvangirai secretly encouraged Western nations, through diplomatic channels, to impose sanctions on the Zimbabwean government, led by Robert Mugabe, with whom Tsvangirai’s party has a power-sharing arrangement. See Christopher R. Albon, How WikiLeaks Just Set Back Democracy in Zimbabwe, ATLANTIC (Dec. 28, 2010), <http://www.theatlantic.com/international/archive/2010/12/how-wikileaks-just-setback-democracy-in-zimbabwe/68598/>; James Richardson, US Cable Leaks’ Collateral Damage in Zimbabwe, GUARDIAN (Jan. 3, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jan/03/zimbabwe-morgan-tsvangirai>. In response to the disclosure, the Zimbabwean attorney general, whom Mugabe had appointed, announced that his office would investigate Tsvangirai on charges of treason, a crime for which he could be executed. See Richardson, supra. There are two weaknesses with an effort to describe this episode as a direct, adverse effect that WikiLeaks has inflicted upon American diplomatic efforts. First, the cable was published, in its entirety, by the Guardian newspaper before it was posted by WikiLeaks—although, but for WikiLeaks, the Guardian would not have had access to the cables, and WikiLeaks did publish it later. See x7o, 2011-01-04: James Richardson’s Collateral Damage in the Guardian: WikiLeaks & Tsvangirai, WL CENT. (Apr. 1, 2011, 02:57), <http://wlcenral.org/node/820>. Second, Mugabe has regularly accused his opposition of treason for years, using any convenient excuse, and has attempted to use his control of the country’s prosecutors and newspapers to press those charges. See Robert I. Rotberg, Mugabe Doesn’t Need an Excuse, FOREIGN POL’Y (Dec. 28, 2010), http://www.foreignpolicy.com/articles/2010/12/28/mugabe_doesnt_need_an_excuse; WikiLeaks in Zimbabwe, and in the Media, ZUNGUZUNGU (Jan. 5, 2011, 9:12 AM), <http://zunguzungu.wordpress.com/2011/01/05/wikileaks-in-zimbabwe-and-in-the-media/>. In July 2011, the Zimbabwean government announced that Tsvangirai would not be prosecuted. See Clemence Manyukwe, WikiLeaks: Tsvangirai Escapes Prosecution, FIN. GAZETTE (July 18, 2011, 10:57 AM), <http://www.financialgazette.co.zw/top-stories/9069-wikileaks-tsvangirai-escapesprosecution.html>.

184. See Jose de Cordoba, U.S. Ambassador to Mexico Resigns Following WikiLeaks Flap, WALL ST. J. (Mar. 19, 2011), <http://online.wsj.com/article/SB10001424052748704021504576211282543444242.html>. The U.S. ambassador to Mexico was not the only diplomat who was forced to resign or was reassigned as a result of leaked cables. See LEIGH & HARDING, supra note 12, at 225.

185. Mexican president Felipe Calderon pushed for the ambassador’s firing, claiming that the cables harmed U.S.–Mexico relations, but it is unclear whether his efforts reflected his sincere conclusion about the disclosure’s effects or if instead they were aimed at a domestic audience as he prepared for a contested reelection campaign in 2012. See de Cordoba, supra note 184; Mary Beth Sheridan, Calderon: WikiLeaks Caused Severe Damage to U.S.–Mexico Relations, WASH. POST (Mar. 3, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030302853.html>.

186. See Koh Letter, supra note 181.

187. See Remarks to the Press on Release of Purportedly Confidential Documents by WikiLeaks, U.S. DEP’T OF STATE (Nov. 29, 2010), <http://www.state.gov/secretary/rm/2010/11/152078.htm> (transcript of press conference by Secretary Clinton in which

she complains that WikiLeaks “undermines our efforts to work with other countries to solve shared problems” and characterizes the leaks as attacking “the international community—the alliances and partnerships, the conversations and negotiations, that safeguard global security and advance economic prosperity”); see also Clinton Condemns Leak as “Attack on International Community,” CNN (Nov. 29, 2010), http://articles.cnn.com/2010-11-29/us/wikileaks_1_julian-assange-wikileaksdisclosure?_s=PM:US (reporting on Secretary Clinton’s press conference).

188. See George Packer, *The Right to Secrecy*, NEW YORKER (Nov. 29, 2010), <http://www.newyorker.com/online/blogs/georgepacker/2010/11/the-right-to-secrecy.html>; James P. Rubin, *The Irony of WikiLeaks*, NEW REPUBLIC (Dec. 1, 2010), <http://www.tnr.com/article/politics/79531/the-irony-wikileaks-american-diplomacy-hard-left>.

189. See, e.g., Samuel Witten, *The Effects of WikiLeaks on Those Who Work at the State Department*, OPINIO JURIS (Dec. 18, 2010, 5:49 PM), <http://opiniojuris.org/2010/12/18/the-effects-ofwikileaks-on-those-who-work-at-the-state-department/> (providing an extensive discussion of the effects of WikiLeaks on State Department employees by a former deputy legal adviser and principal deputy assistant secretary of state for population, refugees, and migration).

190. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (stating that government can protect information under the state-secrets doctrine if it can show “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”). Under FOIA, courts give “substantial weight” to government officials’ affidavits regarding the threats to national security that agencies foresee if they are forced to disclose requested documents; under these circumstances, FOIA exemptions 1 (for properly classified information) and 3 (for information specifically exempted by Congress in other statutes) apply. See *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980). On judicial deference to executive branch claims of national security, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 304–05 (2010), and James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 452 (1993) (decrying the Supreme Court’s “reluctance to evaluate the factual basis of secrecy claims in foreign policy” and complaining that the Court “largely has withdrawn from any significant role in determining the proper limits of government secrecy”).

191. DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon, U.S. DEP’T OF DEF. (Nov. 30, 2010), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728> [hereinafter *Gates News Briefing*] (transcript of press conference). But see Marc Ambinder, *WikiLeaks Did “Significant Damage” to Diplomacy*, State Official Says, NAT’L J. (Dec. 1, 2010), <http://www.nationaljournal.com/whitehouse/wikileaks-did-significant-damage-to-diplomacy-stateofficial-says-20101201> (quoting an anonymous State Department official disagreeing with Secretary Gates’s statement, stating that the disclosures are “going to complicate U.S. diplomacy and international cooperation for a long time after the headlines stop”).

192. Clinton: WikiLeaks Won’t Hurt U.S. Diplomacy, CBS NEWS (Dec. 2, 2010), <http://www.cbsnews.com/stories/2010/12/01/world/main7105891.shtml> (quoting Secretary Clinton as saying that at the OSCE meeting, “I have not . . . had any concerns expressed about whether any nation will not continue to work with and discuss matters of importance to us both going forward”); see also LEIGH & HARDING, *supra* note 12, at 245–46 (describing the State Department’s retreat from its complaints about WikiLeaks’ dire effects).

193. See Hamish Barwick, *WikiLeaks a Boon for US Government: Former Obama Campaign Adviser*, COMPUTERWORLD (June 8, 2011), http://www.computerworld.com.au/article/389459/wikileaks_boon_us_government_former_obama_campaign_adviser/; Gideon Rachman, *America Should Give Assange a Medal*, FIN. TIMES (Dec. 13, 2010), http://www.ft.com/cms/s/0/621f8fab0-06f3-11e0-8c29-00144feabdc0_s01=1.html; James Traub, *The Sunshine Policy*, FOREIGN POL’Y (Dec. 10, 2010), http://www.foreignpolicy.com/articles/2010/12/10/the_sunshine_policy. This observation has been shared by at least one assistant secretary of state. See Internet Freedom: Promoting Human Rights in the Digital Age—A Panel Discussion, U.S. SEC’Y OF STATE (Mar. 4, 2011), <http://www.state.gov/g/drl/rls/rm/2011/162490.htm> (quoting Assistant Secretary of State Michael Posner, who, after complaining about the disclosures, proudly stated that “one of the salutary aspects [of the diplomaticable disclosures] is it does reveal the inner workings of a government that’s actually paying attention to human rights every day”).

194. *Gates News Briefing*, *supra* note 191.

195. See, e.g., Editorial, *WikiLeaks and the Diplomats*, N.Y. TIMES (Nov. 29, 2010), <http://www.nytimes.com/2010/11/30/opinion/30tue1.html> (noting the need for diplomatic privilege over communications but concluding that “[t]he documents are valuable because they illuminate American policy in a way that Americans and others deserve to see”).

196. Abrams, *supra* note 178, at 72.

197. Jim Garamone, *Officials Condemn Leaks, Detail Prevention Efforts*, U.S. DEP’T DEF. (Nov. 28, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=61861>; Adam Levine, *Previous WikiLeaks Release Forced Tighter Security for U.S. Military*, CNN (Nov. 28, 2010), http://articles.cnn.com/2010-11-28/us/wikileaks.security_1_documents-security-gaps-computer-system?_s=PM:US; Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Be Charged Under Espionage Act*, WASH. POST (Nov. 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html>; Roberts, *supra* note 12, at 21–24.

198. See, e.g., Christopher Beam, *Unfair Share*, SLATE (Nov. 29, 2010, 6:07 PM), <http://www.slate.com/id/2276188/>; Joseph Straw, *WikiLeaks’ Information-Sharing Fallout*, SECURITY MGMT., <http://www.securitymanagement.com/article/wikileaks-information-sharingfallout-008244> (last visited Dec. 24, 2011); Sean Reilly, *WikiLeaks Fallout Leads to an Info-Sharing Clampdown*, FED. TIMES (Dec. 5, 2010), <http://www.federaltimes.com/article/20101205/IT03/12050306/>.

199. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 419–23 (authorized ed. 2004).

200. Massimo Calabresi, *State Pulls the Plug on SIPRNet*, SWAMPLAND (Nov. 29, 2010), <http://swampland.time.com/2010/11/29/state-pulls-the-plug-on-siprnet/>; Felix Stalder, *Contain This! Leaks, Whistle-Blowers and the Networked News Ecology*, EUROZINE (Nov. 29, 2010), <http://www.eurozine.com/pdf/2010-11-29-stalder-en.pdf>; Joby Warrick, *WikiLeaks Cable Dump Reveals Flaws of State Department’s Information-Sharing Tool*, WASH. POST (Dec. 31, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004962.html>.

201. See, e.g., What Is ISE?, INFO. SHARING ENV’T, <http://ise.gov/what-ise> (last visited Dec. 24, 2011) (detailing organization built from defense, intelligence, homeland security, foreign affairs, and law enforcement agencies in order to “provide[] analysts, operators, and investigators with integrated and synthesized terrorism, weapons of mass destruction, and homeland security information needed to enhance national security and help keep our people safe”).

202. See, e.g., Phil Stewart, *Analysis: WikiLeaks May Set Back U.S. Intelligence Sharing*, REUTERS (Nov. 29, 2010), <http://www.reuters.com/article/2010/11/29/us-wikileaks-intelligenceidUSTRE6AS67F20101129> (“This is a colossal failure by our intel community, by our Department of Defense, to keep classified information secret. . . . This database should never have been created. Hundreds of thousands of people should not have been provided access to it.” (quoting then-U.S. Representative

Peter Hoekstra, who at the time was a member of the House Permanent Select Committee on Intelligence) (internal quotation marks omitted)).

203. Kevin Poulsen & Kim Zetter, U.S. Intelligence Analyst Arrested in WikiLeaks Video Probe, THREAT LEVEL (June 6, 2010, 9:31 PM), <http://www.wired.com/threatlevel/2010/06/leak/>.

204. Calabresi, *supra* note 200.

205. See, e.g., Beam, *supra* note 198 (“The scandal will probably have all kinds of chilling effects.”); Stewart, *supra* note 202 (“James Clapper, the director of national intelligence who is tasked with promoting greater cooperation within the U.S. intelligence community, hinted last month that leaks in Washington were already threatening sharing.”); Straw, *supra* note 198 (“Even so, the risk [of leaks] can be mitigated, and that’s likely to mean less sharing, observers acknowledge.”); Jaikumar Vijayan, WikiLeaks Incident Shouldn’t Chill Info-Sharing, Ex-CIA Chief Says, COMPUTERWORLD (Aug. 4, 2010), http://www.computerworld.com/s/article/9180130/WikiLeaks_incident_shouldn_t_chill_info_sharing_ex_CIA_chief_says (“What WikiLeaks did was very harmful’ and will likely lead to new dictates on how information is shared.” (quoting Robert Rodriguez, former Secret Service agent and founder of the Security Innovation Network)).

206. See, e.g., Aliya Sternstein, Countering WikiLeaks Could Stifle Information Sharing, NEXTGOV (Nov. 29, 2010), http://www.nextgov.com/nextgov/ng_20101129_9475.php; Straw, *supra* note 198; Vijayan, *supra* note 205.

207. See Information Sharing in the Era of WikiLeaks: Balancing Security and Collaboration: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 112th Cong. (2011) (forthcoming) (statement of Patrick F. Kennedy, Under Secretary of State for Management, U.S. Department of State), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=0c531692-c661-453a-bc97-654be6eb7d00; Terri Moon Cronk, DOD Takes Steps To Secure Classified Data, U.S. DEP’T DEF. (Mar. 11, 2011), <http://www.defense.gov/News/NewsArticle.aspx?ID=63142>; Gates News Briefing, *supra* note 191. For an argument that the information sharing that developed after the post-9/11 reforms was ineffective, see AMY B. ZEGART, SPYING BLIND 186–88 (2007).

208. See *supra* text accompanying notes 88–90.

209. See, e.g., Glenn Greenwald, What WikiLeaks Revealed to the World in 2010, SALON (Dec.24, 2010, 4:25 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/24/wikileaks (providing a list of disclosures and media coverage of them that shows “the breadth of the corruption, deceit, brutality and criminality on the part of the world’s most powerful factions”); Greg Mitchell, Why WikiLeaks Matters, NATION (Jan. 13, 2011), <http://www.thenation.com/article/157729/why-wikileaks-matters> (listing eighteen “revelations,” concerning events from all over the world); Joshua Norman, How WikiLeaks Enlightened Us in 2010, CBS NEWS (Dec. 31, 2010), http://www.cbsnews.com/8301-503543_162-20026591-503543.html (providing a list of “the more impactful WikiLeaks revelations . . . , grouped by region,” that the author describes as having “many major implications for world relations”); Rainey Reitman, The Best of Cablegate: Instances Where Public Discourse Benefited from the Leaks, ELECTRONIC FRONTIER FOUND. (Jan. 7, 2011), <https://www.eff.org/deeplinks/2011/01/cablegate-disclosures-have-furthered-investigative> (describing in detail five cables that “brought much-needed light to government operations and private actions which, while veiled in secrecy, profoundly affect the lives of people around the world and can play an important role in a democracy that chooses its leaders”).

210. See Greenwald, *supra* note 209 (expressing anger that “many citizens and, especially, ‘journalists’” responded with anger at WikiLeaks rather than at the culpable government officials whose misdeeds the site exposed); Mitchell, *supra* note 209 (noting the public’s mixed response to the WikiLeaks disclosures, based in part on the mainstream media’s characterization of them and WikiLeaks); Norman, *supra* note 209 (praising WikiLeaks and recounting its disclosures for teaching the public “about the hidden forces that drive our world”); Reitman, *supra* note 209 (praising WikiLeaks for “hav[ing] contributed significantly to public and political conversations all around the world”).

211. See, e.g., Peter Beinart, Why the WikiLeaks Drama Is Overblown, DAILY BEAST (Nov. 28, 2010, 9:03 PM), <http://www.thedailybeast.com/blogs-and-stories/2010-11-29/wikileaksdiplomatic-document-dump-is-banal-sabotage>; Leslie H. Gelb, What the WikiLeaks Documents Really Reveal, DAILY BEAST (July 25, 2010, 9:45 PM), <http://www.thedailybeast.com/blogs-and-stories/2010-07-26/wikileaks-what-the-documents-reveal/>; Andrew Sullivan, The Starr Report of American Foreign Policy?, ATLANTIC (Nov. 29, 2010, 1:57 AM), <http://www.theatlantic.com/dailydish/archive/2010/11/the-starr-report-of-american-foreign-policy/179234>.

212. Floyd Abrams, Why WikiLeaks Is Unlike the Pentagon Papers, WALL ST. J. (Dec. 29, 2010), <http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html>.

213. See *id.*; Beinart, *supra* note 211; Sullivan, *supra* note 211.

214. The polls have generally not asked about the public’s interest in and knowledge of the substance of the disclosures themselves. Instead, the questions are posed in a manner similar to much of the public debate surrounding the site—as a meta-conversation about WikiLeaks’ significance as an institution and idea.

215. Mixed Reactions to Leak of Afghanistan Documents, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Aug. 3, 2010), <http://people-press.org/report/641/> (finding 47% of those questioned believed that the release of the State Department cables harmed the public interest and 42% believed that it served the public interest, while 63% said they had heard a little or nothing at all about it).

216. See, e.g., 60 MINUTES & VANITY FAIR, 60 MINUTES/VANITY FAIR POLL 1 (conducted Dec. 17–20, 2010), available at http://www.cbsnews.com/htdocs/pdf/february_final_edition.pdf (finding that 42% of respondents were not sure what WikiLeaks was, while only 9% considered it a “good thing” as opposed to “[d]estructive, but legal” (23%) or “[t]reasonous” (22%)); Meredith Chaiken, Poll: Americans Say WikiLeaks Harmed Public Interest; Most Want Assange Arrested, WASH. POST (Dec. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121401650.html> (discussing poll in which 68% of respondents believed the disclosures harmed the public interest and 59% thought Assange should be prosecuted for releasing the diplomatic cables); CNN & OP. RESEARCH CORP., CNN/OPINION RESEARCH POLL 2 (conducted Dec. 17–19, 2010), available at <http://i2.cdn.turner.com/cnn/2010/images/12/30/rel17n.pdf> (finding that 77% disapproved all of the disclosures and only 20% approved); Most Say WikiLeaks Release Harms Public Interest, PEW RES. CTR. FOR THE PEOPLE & THE PRESS (Dec. 8, 2010), <http://people-press.org/report/682/> (finding that 60% believed the release of the State Department cables harmed the public interest); Steven Thomma, Poll: People Behind WikiLeaks Should Be Prosecuted, MCCLATCHY (Dec. 10, 2010), <http://www.mcclatchydc.com/2010/12/10/105106/poll-people-behind-wikileaks-should.html> (reporting that 70% of respondents thought the leaks had done more harm than good and 59% thought those responsible should be prosecuted).

217. CNN & OP. RESEARCH CORP., *supra* note 216, at 3. But see 60 MINUTES & VANITY FAIR, *supra* note 216, at 1 (finding that although more Republicans knew about WikiLeaks than Democrats or independents, more of them considered the site “[t]reasonous” and fewer of them considered it a “good thing” than Democrats or independents).

218. The Year in News 2010: Disaster, Economic Anxiety, but Little Interest in War, JOURNALISM.ORG (Jan. 11, 2011), http://www.journalism.org/analysis_report/year_news_2010.

219. See Roberts, *supra* note 12, at 15–19 (arguing that WikiLeaks has had and will have little effect on the public).

220. On the “Tea Party,” see JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010); KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* (2010).

221. To explain the minimal effects from these disclosures, one could claim that the media, government, and major corporate interests have actively and apparently successfully worked to distract attention from WikiLeaks and to destroy its credibility. See, e.g., Kevin Gosztola, *Reflecting on the Afghanistan War Logs Released by WikiLeaks One Year Ago*, DISSENTER (July 25, 2011, 11:54 AM), <http://dissenter.firedoglake.com/2011/07/25/reflecting-on-the-afghanistan-warlogs-released-by-wikileaks-one-year-ago> (alleging a government–media conspiracy to suppress the impact of the disclosures); Glenn Greenwald, *The Leaked Campaign To Attack WikiLeaks and Its Supporters*, SALON (Feb. 11, 2011, 4:12 AM), http://www.salon.com/2011/02/11/campaigns_4/ (identifying “a concerted, unified effort between government and the most powerful entities in the private sector” to destroy WikiLeaks and its supporters); Greenwald, *supra* note 69 (criticizing “a major, coordinated effort underway to smear WikiLeaks’ founder, Julian Assange, and to malign his mental health—all as a means of distracting attention away from these highly disturbing revelations and to impede the ability of WikiLeaks to further expose government secrets and wrongdoing with its leaks”). Evaluating this claim is beyond the scope of this Article, although the cruel conditions of Bradley Manning’s confinement during his pretrial detention (as of March 2011), as well as the disclosure that several private dataintelligence firms planned technical and public-relations attacks on WikiLeaks and its supporters complicate any effort to simply dismiss the claim as a conspiracy theory. See Steve Ragan, *Data Intelligence Firms Proposed a Systematic Attack Against WikiLeaks*, TECH HERALD (Feb. 9, 2011), <http://www.thetechherald.com/article.php/201106/6798/Data-intelligencefirms-proposed-a-systematic-attack-against-WikiLeaks>; Editorial, *The Abuse of Private Manning*, N.Y. TIMES (Mar. 14, 2011), <http://www.nytimes.com/2011/03/15/opinion/15tue3.html>. Yochai Benkler offers a nuanced version of this claim as part of his broader description of the incumbent mainstream media’s “battle” against the “networked fourth estate.” See Benkler, *supra* note 12, at 396–97 (criticizing “the ability of private infrastructure companies to restrict speech without being bound by the constraints of legality, and the possibility that government actors will take advantage of this affordance in an extralegal public–private partnership for censorship”).

222. See *supra* Part III.C.1–3.

223. See Mark Landler, *White House Memo, A Wartime Leader Ends a War He Never Wanted*, N.Y. TIMES (Dec. 8, 2011), <http://www.nytimes.com/2011/12/09/world/middleeast/president-obama-ends-a-war-he-never-wanted.html> (noting the political and policy-related reasons for troop withdrawal).

224. See Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES (Feb. 27, 2009), <http://www.nytimes.com/2009/02/28/washington/28troops.html>.

225. See Mark Landler & Helene Cooper, *Obama Will Speed Pullout from War in Afghanistan*, N.Y. TIMES (June 22, 2011), http://www.nytimes.com/2011/06/23/world/asia/23prexy.html?_r=2&pagewanted=all.

226. Indeed, to extend the analogy between the Pentagon Papers and WikiLeaks, see *supra* text accompanying notes 65–69, 178–80, some argue that the Pentagon Papers had little direct effect on broad public opinion or civilian and military policy regarding the Vietnam War. See, e.g., RUDENSTINE, *supra* note 12, at 329–30; Roberts, *supra* note 12, at 18–19; Tofel, *supra* note 65. Even those who claim that the Pentagon Papers caused or hastened the end of the war concede the contested nature of such a claim. See Abrams, *supra* note 178, at 24. Indeed, Daniel Ellsberg himself was reportedly disappointed by the minimal impact the Pentagon Papers had on public opinion and on the Nixon administration’s pursuit of the war. See TOM WELLS, *WILD MAN: THE LIFE AND TIMES OF DANIEL ELLSBERG* 340–41, 514 (2001).

227. See *supra* Part II.B.

228. Zine al-Abidine Ben Ali Forced To Flee Tunisia as Protesters Claim Victory, GUARDIAN (Jan. 14, 2011), <http://www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-countryprotests>.

229. Cable 08TUNIS679, *Corruption in Tunisia: What’s Yours Is Mine*, WIKILEAKS (Aug. 30, 2011, 01:44), <http://wikileaks.ch/cable/2008/06/08TUNIS679.html>.

230. Sofiane Ben Haj M’Hamed, *How WikiLeaks Rocked Tunisia*, INST. WAR & PEACE REPORTING (July 6, 2011), <http://iwpr.net/report-news/how-wikileaks-rocked-tunisia>. One of the sites, TUNILEAKS, <https://tunileaks.appspot.com/> (last visited Mar. 16, 2011), was published by Nawaat.org, a Tunisia-based blog collective that in March 2011 won a Google-sponsored prize awarded by the group Reporters Without Borders for its WikiLeaks coverage. See Matthew Campbell, *Tunisian Revolt Bloggers Win Google-Sponsored Web Freedom Prize*, BLOOMBERG (Mar. 11, 2011, 5:00 AM), <http://www.bloomberg.com/news/2011-03-11/tunisian-revolt-bloggers-win-google-sponsored-web-freedom-prize.html>.

231. See David D. Kirkpatrick, *Tunisia Leader Flees and Prime Minister Claims Power*, N.Y. TIMES (Jan. 14, 2011), <http://www.nytimes.com/2011/01/15/world/africa/15tunis.html?pagewanted=all> (stating that the protesters against Ben Ali “found grist for the complaints in leaked cables from the United States Embassy in Tunisia”); David Leigh & Luke Harding, *WikiLeaks: Tunisia Knew Its Rulers Were Debauched. But Leaks Still Had Impact*, GUARDIAN (Feb. 2, 2011), <http://www.guardian.co.uk/media/2011/feb/02/wikileaks-exclusive-bookextract> (describing a “genuinely extraordinary WikiLeaks effect” in which Tunisians’ respect for the U.S. grew because of the cables’ content, and helped give them confidence to oust a leader); see also Tom Malinowski, *Did WikiLeaks Take Down Tunisia’s Government?*, in *REVOLUTION IN THE ARAB WORLD: TUNISIA, EGYPT, AND THE UNMAKING OF AN ERA* 57, 57–58 (Marc Lynch et al. eds., 2011) [hereinafter *REVOLUTION IN THE ARAB WORLD*] (noting that according to Tunisian sources, the cables shamed Tunisians, suggested that the U.S. would not protect Ben Ali against a popular uprising, and delegitimized Ben Ali and boosted his opponents’ morale); Sami Ben Hassine, *Tunisia’s Youth Finally Has Revolution on Its Mind*, GUARDIAN (Jan. 13, 2011, 05:00 EST), <http://www.guardian.co.uk/commentisfree/2011/jan/13/tunisia-youthrevolution> (listing WikiLeaks’ revelation of “what everyone was whispering” as one among many causes of the uprising).

232. See, e.g., Robert Mackey, *Qaddafi Sees WikiLeaks Plot in Tunisia*, THE LEDE (Jan. 17, 2011, 12:30 PM), <http://thelede.blogs.nytimes.com/2011/01/17/qaddafi-sees-wikileaks-plotin-tunisia/> (summarizing arguments of those who deny or minimize WikiLeaks’ influence); Issandr El Amrani, *Twitter, WikiLeaks and Tunisia*, ARABIST (Jan. 15, 2011, 1:37 PM), <http://www.arabist.net/blog/2011/1/15/twitter-wikileaks-and-tunisia.html> (conceding only that WikiLeaks “may have played a minor atmospheric r[ole]” in the uprising). It is probably not helpful to those arguing in favor of WikiLeaks’ influence that Libyan president Muammar Qaddafi, in an effort to avoid Ben Ali’s fate, sought to scapegoat the site as a foreign influence in the Tunisian uprising. See Matthew Weaver, *Muammar Gaddafi Condemns Tunisia Uprising*, GUARDIAN (Jan. 16, 2011), <http://www.guardian.co.uk/world/2011/jan/16/muammargaddafi-condemns-tunisia-uprising>.

233. See LEIGH & HARDING, *supra* note 12, at 247–49.

234. See Introduction to Chapter 2 of *REVOLUTION IN THE ARAB WORLD*, *supra* note 231, at 41, 41 (“Tunisia was indeed a model for the region, but only in the sense that its young revolutionaries inspired others across the Arab world to launch their

own uprisings.”); Hamza Hendawi, Egyptians Denounce Mubarak, Clash with Riot Police, ABC NEWS (Jan. 25, 2011), <http://abcnews.go.com/International/wirestory?id=12754109> (characterizing Egyptian protests as “nationwide demonstrations inspired by Tunisia’s uprising”).

235. See LEIGH & HARDING, *supra* note 12, at 211–12 (arguing that WikiLeaks has produced positive democratic externalities throughout the world). Some commentators have identified more conventional effects that WikiLeaks could have on democratic elections in Kenya and Peru, predicting that the information some released cables contained, along with the opinions of the cables’ diplomatic authors, would persuade voters to vote against certain candidates. See Juan Arellano, Peru: WikiLeaks and the Presidential Campaign, GLOBAL VOICES (Mar. 5, 2011, 10:01 PM), <http://globalvoicesonline.org/2011/03/05/peru-wikileaks-usa-and-their-effect-on-the-presidential-campaign/> (Jen Fumero trans.); Murithi Mutiga, Leaked US Cables Likely To Shape 2012 Campaigns, DAILY NATION (Mar. 5, 2011), <http://www.nation.co.ke/News/politics/Leaked+US+cables+likely+to+shape+2012+campaigns+/-/1064/1119772/-/wedgtu/-/>. In addition, several days after the beginning of the crisis at several nuclear power reactors in northeastern Japan that followed the March 2011 earthquake and tsunami, WikiLeaks released diplomatic cables via British newspaper the Telegraph reporting warnings that Japan had received about significant safety problems at Japanese reactors, especially in the event of an earthquake. See Steven Swinford & Christopher Hope, Japan Earthquake: Japan Warned over Nuclear Plants, WikiLeaks Cables Show, TELEGRAPH (Mar. 15, 2011), <http://www.telegraph.co.uk/news/worldnews/wikileaks/8384059/Japan-earthquake-Japan-warned-over-nuclear-plants-WikiLeaks-cables-show.html>. This kind of disclosure is a classic whistle-blowing act that can allow the Japanese public to hold their national government, regulators, and industry actors accountable for their actions. Whether they will do so, or whether the disclosures were necessary to stir public dissatisfaction, is and will be difficult to prove. But the fact that WikiLeaks could supply these cables on a just-in-time basis illustrates the profound nature of the site as a resource for the public and as a threat to government secrecy. It is important to note, however, that WikiLeaks’ and its supporters’ claims about the site’s positive externalities are not uncontested. See, e.g., Dan Murphy, Julian Assange: The Man Who Came to Dinner, the Man Who Saved Egypt, CHRISTIAN SCI. MONITOR (July 5, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0705/Julian-Assange-The-man-who-came-to-dinner-the-man-who-saved-Egypt> (strenuously denying Assange’s claims about WikiLeaks’ role in the Egyptian uprising); Dan Murphy, Tunisia: That “WikiLeaks Revolution” Meme, CHRISTIAN SCI. MONITOR (Jan. 15, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0115/Tunisia-That-WikiLeaks-Revolution-meme> (questioning claims about WikiLeaks’ role in the Tunisian uprisings).

236. Indeed, American intelligence agencies are explicitly barred from disclosing documents to foreign governments or their representatives. 5 U.S.C. § 552(a)(3)(E) (2006).

237. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 19 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml> (“Everyone has the right to . . . seek, receive and impart information and ideas through any media and regardless of frontiers.”).

238. I use the term threaten with the caution the term implies. WikiLeaks and its progeny may never have as much success again—after all, nearly forty years passed between the Pentagon Papers and the major WikiLeaks releases. WikiLeaks’ technological innovations (to the extent that there were any) could prove only as successful as the material to which it had access, which required the luck and courage (if one sees it as such) of Bradley Manning. To the extent that the U.S. government can keep a future Bradley Manning from having access to or being able to download such a trove of digital files, WikiLeaks’ “threat” may not be so great. I thank Steven Aftergood for this insight.

239. One implication that lies beyond this Article’s scope is that WikiLeaks illustrates the limits of a consequentialist approach to secrecy and transparency. If we cannot predict disclosure’s consequences—or even predict whether it will have consequences at all—then a consequentialist or utilitarian basis for a legal regime or a legal or political theory will prove unsatisfactory, if not wholly inadequate. My thanks to David Pozen for identifying this point.

240. See Thomas S. Blanton, National Security and Open Government in the United States: Beyond the Balancing Test, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE 33, 66 (Bethany Walawender & Alyssa Colonna eds., 2003), available at <http://www.maxwell.syr.edu/uploadedFiles/campbell/events/NSOG.pdf> (“But we need to drop the idea of balancing this fundamental value [of open government] against national security. To admit the notion of balancing is to lose the debate over where to balance.”).

241. See Aftergood, *supra* note 156, at 407–09 (discussing ISCAP’s incremental successes); Mark Fenster, Designing Transparency: The 9/11 Commission and Institutional Form, 65 WASH. & LEE L. REV. 1239, 1313–17 (2008) (discussing the 9/11 Commission’s relatively successful efforts to force the Bush administration to disclose information). To clarify what I mean by “imperfect” here: while such institutions still perform the nearly impossible task of balancing impossibly abstract, conflicting goals, they do so with more expertise, input from more experienced officials, and may perform more informal negotiations than Article III courts.

242. See Fenster, *supra* note 133, at 914–36 (describing the failures of open-government laws in improving public knowledge and participation).

243. See *supra* text accompanying notes 126–32 (outlining Assange’s argument that Western governments are too “fiscalized” to change radically, but suggesting that in states like China, where pervasive censorship reigns, radical change can still be achieved).

THIRTY YEARS IN DEEP FREEZE

► <http://m.canberratimes.com.au/opinion/thirty-years-in-deep-freeze-20121117-29jir.html?rand=1353154806806>

► Canberra Times / by Jack Waterford

Nov 18 2012 Nov 18. This week I achieved an FOI record which is probably going to be difficult to beat. The Department of Prime Minister and Cabinet delivered up to me under the Freedom of Information Act a report I first asked for on December 2, 1982, 29 years, 11 months and about two weeks ago.

Four in every 10 people in Canberra weren’t born then, and five in every eight would have no personal memory of the events to which the report refers - perhaps one reason why the department, after recent cogitation that lasted 18 months, including multiple consultations with at least half a dozen

federal agencies and multiple agencies in the states, finally decided to release it and without any claims of exemption.

[How they fed us donkey burgers](#)

['Skippy meat' scandal became global joke](#)

I first asked for the document on December 2, 1982 - the first day of the FOI Act. The department, soon after, "deferred" giving me access, saying that doing so could compromise continuing police investigations and prosecutions.

The department did not reconsider access even after it became clear that a stage of desultory and usually ineffective police investigations and prosecutions was over. I reminded the department about this in August last year - and, even then, it took more than 16 months of consultations before the document was released.

The document is appendix H of the royal commission into meat substitution, prepared by Justice Ted Woodward - in effect the "brief" given to the Australian Federal Police and the Commonwealth Director of Prosecutions after a massive scandal in 1980-81 in which it was found that kangaroo, horse, donkey and sheep meat, and possibly meat from other animals, had been sold to meat buyers in the United States as prime quality Australian beef. The scandal led to a shutdown in the then \$600 million-a-year Australian beef trade to the US, and made life difficult for attempts to sell a further \$400 million worth to other countries such as Japan.

It became clear quickly that while some of the rorts which had led to substitution came from shonks on the edge of a low-margin meat industry, there were significant meat traders involved in the racket.

It was also evident that many meat inspectors, state and federal, had been bribed and compromised, and that AFP officers had been less than diligent and, at the least, compromised. The system of state and federal meat inspection and protection of the quality of the meat supply - including the domestic meat supply - was, in both the literal and metaphoric sense of the word, a shambles. (Justice Woodward was ultimately to use the phrase "insufficient, costly, poorly managed, and in some respects, corrupt".) Bureaucratic supervision had been a disgrace or worse - and newspapers openly alleged that on the night that a royal commission was announced in June 1981, thousands and thousands of documents were put through the shredders at the department's headquarters in Barton. This was, it was hinted, not only to conceal political involvement in a highly political industry, but also evidence that officials had ignored evidence and warnings of the scandal.

Some of those accused of being involved had links to significant figures in the Coalition, particularly in the National Party, and one important government backbencher, Bert Kelly from South Australia, was telling everyone who wanted to listen that he had long warned Peter Nixon, minister for primary industry, and his department how wide open they were to such a scandal.

There were also heavy hints that members of the Melbourne Smorgon family - a rich and philanthropic clan closely involved in the arts, but also running a steel, glass, plastics and recycling empire - would be implicated. The Smorgon fortune had begun in the meat business, and was still heavily involved in the export trade.

Around the world was a good deal of laughter at America's expense. Even five years later, the main hamburger chain customer would find itself still being accused of selling "Skippy burgers".

Malcolm Fraser made a host of quick decisions in an effort to get the trade resumed. Anyone fingered by early inspections was suspended from the trade. Much more rigorous inspection was provided and emergency legislation went through. The Americans were promised a searching investigation, and action.

Woodward, a former head of ASIO and a man who had advised Gough Whitlam on land rights, was pressed to report quickly - and did. He took the overview and was scathing of almost everyone. But it was up to a heavily criticised department, a heavily criticised and unenthusiastic AFP, and the DPP to follow through with prosecutions.

The effect was something like the much more recent commission into the wheat for oil scheme - the facts emerged, up to a point, at a public inquiry, but it was left to police and lawyers to follow through. Years afterwards, it becomes clear that the task has been taken up with little enthusiasm, and that hardly anyone - and certainly few of the major offenders - has been punished. Meat inspectors on the public payroll who were taking bribes are dealt with under internal disciplinary provisions.

Some of the inaction - which has long marked the aftermath of loud public inquiries in Australia - could have been predicted by the royal commissioner, who had complained about the lack of police zeal, want of investigative vigour and, indeed, seeming incapacity to regard dodgy practices in such a field as priority matters for cops preferring high profile, if almost unaccountable, actions against fraud, drugs and terrorism.

As criminologists later critically reviewing the AFP response commented, the problem is that police set their own priorities, and decide for themselves how many resources will be devoted to an investigation,

and on what timetable. In the years since, this is a problem honed by the increasingly political nature of the judgments made: put bluntly, the AFP hardly ever "solves" anything that could embarrass the government of the day, whatever protestations are made by ministers that they want a searching and thorough inquiry.

Woodward said that what characterised the problem was:

A general unwillingness of Commonwealth authorities to act decisively to investigate allegations;

An unhealthy relationship between the meat establishments and the inspectors and other public officials assigned to their premises and supposed to monitor them;

An attitude on the part of senior Canberra officers that not much could be done to detect malpractices, and that these were in any event matters for the police, not themselves;

A lack of expertise and, often, a marked lack of interest by police asked to investigate malpractice; and

A somewhat similar lack of enthusiasm from prosecutors, unless a case was absolutely airtight and guaranteed of success.

Perhaps we are lucky that nothing like this could occur today - in our beef trade or with any other attempt at fraud on the taxpayer.

The want of any police enthusiasm for making sure the law was being enforced was hardly resisted by the agriculture department of the day.

As Woodward put it, describing what happened before the inquiry, "Not enough cases were passed over to the police for action and those that were handed over were not conveyed with any sense of urgency, importance or great interest in the outcome."

Prosecutors showed a similar reluctance to get their hands bloody, or in pushing investigators to go further.

This was in contrast with some other scandals of the day, not least the so-called Greek Social Security Conspiracy, involving hundreds of police in raids upon Greek families in search of evidence of systemic attempts to defraud the Commonwealth of invalid pensions - allegedly by contriving to have sympathetic doctors agree they had bad backs or soft tissue injuries that were hard to disprove.

On day one, 83 Greek-Australians were arrested in simultaneous raids, and the head of the investigation described it as "the biggest breakthrough in the history of the police force". He predicted 1400 more arrests and the extradition of 300 people from Greece. Seven hundred pensions were abruptly cancelled.

Ultimately 180 people were charged with conspiracy. But there was never any conspiracy proved - a tiny handful of convictions - and soon, the beginning of dropped charges, heavy orders for costs against the Crown, restored pensions, and compensation payments by the department.

The affair - designed to stop what was said to be \$10 million a year in fraud - cost the Commonwealth more than \$100 million in court costs, legal aid and compensation.

Small wonder, perhaps that police, busy with such "real" police work would pay little attention to the integrity of a meat export trade worth a mere \$1 billion - or that a detective who had made desultory and inconclusive investigations into one allegation developed a habit afterwards of dropping around at the meatworks for free meat. Probably not kangaroo.

ATI LITIGATION IN BULGARIA

Access to Information Programme presents the fifth book of analyses and commentary on access to information litigation in Bulgaria: Litigation Under Access to Information Legislation

► <http://www.aip-bg.org/en/publications/books/>

► AIP / by Diana Bancheva

Nov 16 2012 ► Oct 31. On October 31, 2012, Access to Information Programme (AIP) presented its book Litigation Under Access to Information Legislation. The book is part of the continuous analyses which AIP has been making on the Access to Public Information Act litigation in Bulgaria and is the fifth from the series: <http://www.aip-bg.org/en/publications/books/>. Authors are the attorneys-at-law from AIP legal team Alexander Kashumov, head of the team, and Kiril Terziyski. The foreword is by Gergana Jouleva, AIP Executive Director.

"I was impressed by the content of the book. Not big, but containing thorough analysis of the case law under the Access to Public Information Act (APIA) and raising a lot of questions. Such systematization and commentary is necessary for the court practice," Supreme Administrative Court Judge Alexander Elenkov emphasized.

The title of the book – Litigation Under Access to Public Information Legislation – is different from the previous four in the series and indicates a different approach in the analysis. "We aimed to broaden the scope of the analyses, including not only case law under the Access to Public Information Act, but

also under other laws since the right of access to certain types of public information is guaranteed by other laws as well”, stated one of the authors Alexander Kashumov.

The purpose of the book, according to the authors, is to review the court practices from the point of view of the international and regional standards set forth by the Council of Europe Convention on Access to Official Documents (2008), the Aarhus Convention, etc., and to evaluate the consistency of these practices.

The focus of the analysis is the litigation related to the 2008 APIA amendments which introduced an extended scope of obliged bodies, the balance of interests test and the narrowed scope of the trade secret exemption.

The book consists of three parts: general issues; terms, scope and procedures under the APIA; and the restrictions to the right of access to information.

The first part gives a summary of the content of the APIA, the national and international context and identifies tendencies in the court practices accumulated during the twelve years of APIA implementation in Bulgaria.

The second part deals with the terms, scope and procedures under the APIA.

“The term public information has been widely discussed during the years. We have quoted court decisions which define the widest possible scope thus complying with the international standards, Art. 41 of the Constitution and the APIA. We have selected those decisions which have established new practices and served to unify contradicting litigation,” Alexander Kashumov emphasized.

Regarding the scope of the obliged bodies, the author added: “Despite its extension with the 2008 APIA amendments, the courts still prefer the narrow interpretation of the scope of the obliged bodies.” Other issues include the silent refusals, the time frames for appeal of administrative decisions for providing access or for refusals, and the litigation costs.

The third and most voluminous part analyzes the court practices regarding the access to information exemptions.

“The most difficult questions related to the application of the law are commented in that part. We have again referred to the applicable international standards and followed chronologically the case law related to certain types of exemptions. We have commented on decisions which make the balance of interests test introduced with the 2008 APIA amendments. We have emphasized the court practice on the applicability of different norms, i.e. the inapplicability of the preparatory documents exemption in terms of access to environmental information. Interesting is the question of balancing access to public information and the personal data protection. Constitutional Court decisions are quoted which affect the application of the legislation on these issues.”

The last part of the book contains annotations of 16 court cases by topic. They illustrate the issues contested in court and related to the analyzed problems.

“Our conclusion based on the review and analysis of the case law is that there is an undoubted tendency towards wider understanding of the right of access to public information and narrow interpretation of its exemptions. Some questions have not found final resolution yet and are subject to further development, like those related to the balance between the access to information and personal data protection. On other issues, we would expect positive development like those related to the extended scope of the obliged bodies. The courts function like an independent arbiter in access to information disputes and in a number of cases repeal access to information refusals.

At the same time, developments in Bulgaria should not fall behind the common European and Western context, where for example the access to public officials’ e-mails is discussed. More effort is required for the establishment and compliance of unified and consistent practices on similar cases.”

The book was presented in the Union of Bulgarian Jurists. More than 50 attended – journalists, lawyers, representatives of the authorities and the business, academics, AIP clients, partners and friends. Among the guests were the Chairperson of the Supreme Bar Council Ms. Daniela Dokovska, the Chairperson of the State Commission on Information Security Ms. Tsveta Markova, the Deputy Minister of the Interior Mr. Veselin Vuchkov, the Director of the National Institute of Justice Mr. Dragomir Yordanov, justices from the Supreme Administrative Court.

[The speech of AIP Executive Director Gergana Jouleva](#), the [review of SAC Judge Alexander Elenkov](#) and the [overview of Alexander Kashumov, Head of AIP legal team](#) are published in AIP October FOI Newsletter (In Bulgarian).

The English translation of the book Litigation Under Access to Information Legislation is to be released.

THE KISSINGER TRANSCRIPTS

Why the former secretary of state thought the CIA was blackmailing him

► http://www.foreignpolicy.com/articles/2012/11/14/the_kissinger_transcripts

► Foreign Policy Magazine / Tom Blanton

► **Stringer:** Kees Kalkman / VDAmok / Utrecht NL / kees@amok.antenna.nl

Nov 16 2012 ► Nov 14. The CIA director was blackmailing the secretary of state; a nuclear deal with Iran was in the works; and the U.S. president wanted to pursue Middle East peace. President Gerald Ford and Henry Kissinger -- then serving as both secretary of state and national security adviser -- discussed all of this and more on the morning of March 5, 1975. Loyal assistant Lt. Gen. Brent Scowcroft took notes to provide this practically verbatim Secret memorandum of conversation, published here for the first time, which the National Security Archive obtained through a Mandatory Declassification Review request to the Gerald R. Ford Library.

With this "memcon," the reader can be a fly on the wall in the Oval Office, as Ford and Kissinger review issues that are familiar even now: from stalled Middle East peace negotiations to congressional investigations of the CIA, from oil prices and our leverage with the Saudis to covert operations involving assassinations.

Even the opening lines, about a "screwed up" Iranian deal, resonate today -- the front page of that day's New York Times heralded Iran's commitment to spend \$15 billion in the United States over the next five years, as announced by Kissinger and the Iranian finance minister, including "as many as eight large nuclear power plants in the next decade." The Times story commented, "Iran has made a major policy decision to develop nuclear power, anticipating that her oil supply will decrease sharply in the next few decades. Iran has already agreed to buy two power plants from France and two from West Germany."

The next section of the conversation refers to Portugal -- although the country name has been redacted. It was no secret even in 1975 that the United States opposed communist participation in the Portuguese government and thought NATO was at risk from the Eurocommunism virus. Here, the debate was whether the CIA should covertly fund the non-communist press, just as the United States had in Chile. Kissinger was concerned that such aid would "leak and hurt the parties."

The president, who later that day would meet with the leaders of the special Senate committee investigating CIA illegalities, asks whether he should warn committee chair Sen. Frank Church (D-ID) about leaks. At this point, Kissinger makes perhaps the most remarkable remark of the whole conversation: "[CIA director William] Colby is now blackmailing me on the assassination stories."

Kissinger goes on to explain: "Nixon and I asked [then CIA director Richard] Helms to look into possibilities of a coup in Chile in 1970 [against the newly-elected Marxist president Salvador Allende]. Helms said it wouldn't work. Then later the people who it was discussed with tried to kidnap [army commander Gen. Rene] Schneider and killed him."

Multiple investigations and reports -- including an unsuccessful lawsuit by Schneider's family -- have tried to address this particular episode. The CIA's own report to Congress, compelled by then Rep. Maurice Hinchey (D-NY) in 2000, acknowledged that the CIA and the U.S. government as a whole (meaning Kissinger and President Nixon as well) agreed with multiple potential coup plotters in Chile that Schneider's devotion to the Chilean Constitution meant his "abduction... was an essential step in any coup plan." CIA claimed, "We have found no information, however, that the coup plotters' or CIA's intention was that the general be killed in any abduction effort." As Shakespeare wrote, methinks thou dost protest too much. After the fact, the CIA passed \$35,000 to the murderers.

But here, Kissinger quickly changes the subject, to OPEC and its difficulties in allocating production cuts to keep the world price of oil high enough to meet each producing country's income goals. He bemoans "this discrimination campaign of the Jews" for keeping the United States from getting a deal with the Saudis against cutting production (i.e., keeping oil prices lower).

Then they launch into the most extended part of the conversation, about the Middle East, the possibility of getting the parties to Geneva for negotiations, what Syrian dictator Assad would want, and how Israel's recalcitrance was holding up progress. Kissinger says, "we just can't go to Geneva as the lawyer for Israel." Ford asks for "a good faith effort," to which Kissinger responds, "A good faith effort is bound to fail.... Israel won't even look at it." Ford ups the ante: "A good faith effort to me is one where we put the screws on."

This candid memcon testifies to the extraordinary historical value and contemporary relevance of the documentary record of Henry Kissinger's years at the White House and the State Department, 1969 through 1976. The sheer volume of the Kissinger documentation qualifies for the Guinness Book -- no top presidential adviser before or since has maintained such an extensive and practically verbatim record of his every conversation and meeting. Kissinger's secretaries listened in on and memorialized in "telcons" more than 15,000 of his telephone calls from "dead key" lines, while his aides would stay

up into the wee hours of the morning after talks with foreign leaders -- or with the president himself -- writing up from their own (and the interpreters') notes the detailed memcons of the meetings, which number well into the thousands as well.

For 20 years after he left government, Kissinger succeeded in monopolizing access to these files, which he took with him in December 1976. He first sequestered these papers at the Rockefeller estate (in Pocantico Hills, New York) and only when reporters started asking questions and even filing Freedom of Information Act (FOIA) lawsuits, did he gift them as a closed collection to the Library of Congress -- Congress having conveniently exempted itself from the FOIA. In the 1990s, when State Department historians began preparing the Foreign Relations of the United States documentary volumes on the Nixon years, they asked for access to the collection, which Kissinger granted (with significant restrictions -- no photocopies, no note-taking), and in going through it, they found records that did not exist in the regular government files -- even though Kissinger had claimed he only took copies when he left office.

There was a happy ending to this story, but not until my own organization, the National Security Archive, threatened to bring legal action against the State Department and the National Archives for abdicating their duty under the records laws, did the government finally ask Kissinger to return copies of the records, which he did in 2001. Securocrats are still declassifying some of the juiciest items, like this one.

Tom Blanton is director of the independent non-governmental National Security Archive (at George Washington University), which has published 2,163 of Kissinger's "memcons" in *The Kissinger Transcripts: A Verbatim Record of U.S. Diplomacy, 1969-1977*, edited by William Burr (Ann Arbor, MI: ProQuest, 2005), and 15,502 of Kissinger's telcons, *The Kissinger Telephone Conversations*, also in the Digital National Security Archive series from ProQuest.



Interested in this topic, in debate and in contacts? Consider joining the **Linked In group: Wob specialists**

RAAD VAN STATE KRITISCH OVER NIEUWE WOB

► <http://www.nu.nl/politiek/2963635/raad-van-state-kritisch-nieuwe-wob.html>

► NU.nl / by Brenno de Winter

Nov 21 2012 ► Nov 21. De Raad van State is kritisch over de Nieuwe Wet openbaarheid van bestuur (Nieuwe Wob) van voormalig GroenLinks-Kamerlid Mariko Peters.

Er moet volgens het adviescollege wel iets veranderen, maar het wijzigen van het stelsel gaat te ver. Dat [schrijft](#) de Raad van State in een advies aan de Tweede Kamer in reactie op het [wetsvoorstel](#) 'de Nieuwe Wob' van Peters. Dat er problemen zijn met de huidige praktijk is in het advies wel duidelijk. Maar volgens de Raad van State liggen veel problemen in de uitvoering en niet in de wet zelf. Het wetsvoorstel zou niet voldoende hard maken waarom de huidige wet op de schop moet.

Geheim

Bovendien legt het [initiatiefwetsvoorstel](#) volgens de Raad van State er teveel de nadruk op dat overheden daadwerkelijk documenten openbaren.

Daarbij wordt voorbij gegaan aan redenen waarom bepaalde informatie juist niet publiek wordt gemaakt.

Als voorbeeld noemen de adviseurs het belang dat ambtenaren en bestuurders in het geheim kunnen overleggen zonder dat burgers erbij kunnen. Dat recht wordt wel erkend in het wetsvoorstel van Peters, maar de inperkingen gaan volgens de adviseurs te ver.

Publiek geld

Ook is de Raad van State tegen de gedachte dat alles dat met publiek geld wordt gefinancierd in principe openbaar is. Nu hoeven bedrijven als NS, Prorail, stichtingen en de Vereniging Nederlandse Gemeenten geen publieke verantwoording af te leggen en documenten beschikbaar te maken.

Volgens de Raad zou de onafhankelijkheid van die organisaties in het gedrang komen als dat wel zou gebeuren.

De Raad van State ziet ook niet veel in het idee dat adviezen van de eigen organisatie direct openbaar worden. "De toelichting gaat niet in op de reden waarom adviezen thans niet direct na vaststelling openbaar gemaakt worden. De reden hiervoor is dat het risico bestaat dat een weloverwogen reactie van de regering op de adviezen in gevaar komt", schrijft de Raad van State dan ook.

Informatiecommissaris

Verder loopt de Raad van State niet warm voor een [onafhankelijke informatiecommissaris](#). Dat nieuwe orgaan moet ervoor zorgen dat overheden zich beter inspannen om transparant te zijn. In landen als Engeland en Ierland bestaat zo'n functie al.

De adviseurs vrezen dat er ingewikkelde juridische procedures gaan ontstaan rond zo'n commissaris en dat de organisatie al snel groter wordt dan het kantoor van de Nationale Ombudsman.

Pers

Toch ziet de Raad van State wel dat er een roep is om meer transparantie en dat dit ook in het Europees Recht al vorm krijgt. Zo ziet de Raad dat het recht op vrije meningsuiting steeds meer ook betekent dat burgers het recht hebben om informatie op te vragen bij de overheid.

"De heersende opvatting thans is dat democratische rechten van burgers alleen naar behoren kunnen worden uitgeoefend als er toegang bestaat tot overheidsinformatie", schrijft de Raad van State.

"Ook de positie van de pers speelt in dit verband een rol. Om haar taak als 'public watchdog' in een democratische samenleving naar behoren te kunnen vervullen, geldt openbaarheid van overheidsinformatie als een belangrijke randvoorwaarde."

Onderbouwen

GroenLinks zegt in een reactie dat ze in het voorjaar zullen onderbouwen waarom verandering van de Wob noodzakelijk is. Kamerlid Linda Voortman, die het dossier van Peters heeft overgenomen, wijst erop dat het soms jaren kan duren voor informatie openbaar wordt.

"De Raad van State zegt in haar reactie dat de huidige wet voldoende ruimte biedt voor meer openbaarheid. Maar dit blijkt niet uit de praktijk", stelt ze.

"Ik zou graag zien dat we minder beredeneren vanuit de gevestigde orde, maar meer vanuit de burgers: geef hen het recht of informatie, ook als dat soms ingewikkeld is voor diegenen die in deze informatie moeten voorzien."

Donner

Het rommelt al langer rond de uitvoering van de Wet openbaarheid van bestuur. Journalisten, actiegroepen en burgers klagen vaak dat de toegang tot informatie moeizaam en traag gaat. Ook de Nationale Ombudsman vindt dat er iets moet veranderen. Met het wetsvoorstel wilde Peters daarom de toegang tot informatie vergroten.

Oud-minister Donner, die nu vice-president van de Raad van State is, hield in 2011 een pleidooi om juist sneller verzoeken van burgers te kunnen weigeren. Ook pleitte hij voor het verder uitbreiden van het recht om ambtenaren verder te beschermen bij het voorbereiden van beleid. "Wetten zijn net als worstjes, je kunt maar beter niet weten hoe ze gemaakt worden", stelde hij toen.

Binnenkort worden de plannen van Donner ook bij de Raad van State voor advies ingediend.

ADVIES RAAD VAN STATE OVER NIEUWE WOB

► Raad van State / No.W04.12.0249/I

► <http://www.bigwobber.nl/wp-content/uploads/2012/11/advies-W04.12.0249.pdf>

► Bigwobber

Nov 20 2012 ► Nov 5. Bij brief van de Voorzitter van de Tweede Kamer der Staten-Generaal van 6 juli 2012 heeft de Tweede Kamer bij de Afdeling advisering van de Raad van State ter overweging aanhangig gemaakt het voorstel van wet van het lid Peters houdende regels over de toegankelijkheid van informatie van publiek belang (Nieuwe Wet openbaarheid van bestuur), met memorie van toelichting.

Het doel van het wetsvoorstel is om overheden en semi-overheden transparanter te maken, om zo het belang van openbaarheid van publieke informatie voor de democratische rechtsstaat, de burger, het bestuur en economische ontwikkeling beter te dienen. Om deze doelen te bereiken verankert het voorstel de toegang tot publieke informatie en het hergebruik van die informatie als rechten van burgers. Daarnaast wordt de actieve openbaarheid versterkt door het verplicht stellen van openbaarmaking uit eigen beweging van bepaalde categorieën informatie. Overheidsorganen moeten voorts een online beschikbaar register gaan bijhouden van de documenten en datasets waarover zij beschikken. Daar-

naast wordt de reikwijdte van de Wet openbaarheid van bestuur (Wob) verbreed, waarbij alle overheidsorganen, met uitzondering van de rechterlijke macht en de Afdeling bestuursrechtspraak, en wat in de toelichting 'semipublieke' organen worden genoemd, onder de wet gaan vallen. De uitzonderingsgronden ten aanzien van de verplichting om informatie openbaar te maken worden aangescherpt, waarbij alle absolute weigeringsgronden omgezet worden in relatieve weigeringsgronden. Voorts wordt de mogelijkheid om een verzoek te weigeren bij kennelijk misbruik geopend. Het voorstel stelt tevens een Informatiecommissaris in, in de vorm van een Hoog College van Staat. Deze heeft een voorlichtende rol, maar beslist ook in administratief beroep in procedures tussen een orgaan en verzoeker. Daarnaast kan de Informatiecommissaris dwangsommen opleggen bij het niet naleven van de wet.

De Afdeling advisering gaat allereerst in op de voorgeschiedenis van de huidige openbaarheidswetgeving en op de ontwikkelingen die sindsdien hebben plaatsgevonden. Daarna geeft zij een algemene beschouwing over de relevante uitgangspunten inzake openbaarheid van overheidsinformatie. Vanuit het perspectief van deze algemene beschouwing gaat de Afdeling vervolgens in op de noodzaak en op enkele belangrijke onderdelen van het voorstel. De Afdeling maakt onder meer opmerkingen over de uitbreiding van de organen die onder het openbaar makings-regime komen te vallen, de regeling voor persoonlijke beleidsopvattingen, de uitvoerbaarheid en financiële gevolgen van het voorstel, instelling, taken en bevoegdheden van de Informatiecommissaris en de openbaarmaking van de adviezen van de Afdeling advisering van de Raad van State. Ten slotte maakt de Afdeling nog enkele overige opmerkingen, onder meer over de vertrouwelijke verstrekking.

1. Voorgeschiedenis

De Afdeling wijst erop dat de betekenis die thans aan het belang van openbaarheid van bestuur wordt toegekend een resultaat is van een langdurige ontwikkeling. Deze voltrok zich oorspronkelijk alleen op nationaal niveau. Tot de Tweede Wereldoorlog werd het begrip openbaarheid van overheidsinformatie in Nederland vooral gezien in het licht van de parlementaire inlichtingenplicht als bedoeld in artikel 68 van de Grondwet. Op grond van deze bepaling zijn ministers en staatssecretarissen verplicht beide kamers desgevraagd alle inlichtingen te verstrekken voor zover dat niet in strijd is met het belang van de staat. Daarnaast wordt een ongeschreven rechtsplicht aangenomen om uit eigen beweging inlichtingen aan beide kamers te verschaffen.¹

Binnen dit constitutionele kader² wordt in het verkeer tussen regering en parlement informatie uitgewisseld en in de openbaarheid gebracht waardoor deze ook voor burgers toegankelijk wordt.

Gaandeweg zijn de rechtsopvattingen in de tweede helft van de vorige eeuw zodanig geëvolueerd dat openbaarmaking van informatie uitsluitend via het parlement en het daaruit voortvloeiende politieke debat niet langer toereikend werd geacht. Vanaf de jaren zestig ontstond in toenemende mate discussie over de vraag of er niet daarnaast een door de burger afdwingbaar wettelijk recht op informatie van de overheid zou moeten bestaan.³ In 1970 verscheen het rapport 'Openbaarheid openheid' van de Commissie Heroriëntatie Overheidsvoorlichting waarin een voorontwerp van een wet openbaarheid van bestuur is opgenomen.⁴ Als belangrijk motief voor het invoeren van een dergelijke wet werd het belang van een goede en democratische bestuursvoering genoemd. In het voorontwerp werd onder meer voorgesteld dat ook interne ambtelijke stukken in beginsel openbaar gemaakt moesten worden. De regering en de Raad van State⁵ reageerden terughoudend. Het uiteindelijk ingediende wetsvoorstel had een beperktere reikwijdte dan het voorontwerp. De positie van het wetsvoorstel en het daaraan ten grondslag liggende beginsel van openbaarheid in ons staatsbestel werd in de toelichting als volgt samengevat: 'Openheid en openbaarheid zijn derhalve de doeleinden waarop dit wetsontwerp is gericht maar het zijn geen doeleinden op zichzelf. Zoals hiervoor is uiteengezet worden zij gehanteerd als middelen tot het bereiken van een verder gelegen doel: een betere en democratische bestuursvoering. De openbaarheid moet derhalve met andere middelen, die op datzelfde doel zijn gericht in verband worden gebracht en moet daartegen worden afgewogen. Bij deze afweging gaat het om de erkenning van de beslotenheid en openbaarheid als concurrerende beginselen van staatsrecht'.⁶

Op 1 mei 1980 trad de Wet openbaarheid van bestuur in werking. Intussen was ook een algehele grondwetsherziening in voorbereiding. Als gevolg hiervan is in 1983 in hoofdstuk 5 'Wetgeving en bestuur' van de Grondwet een nieuw artikel 110 opgenomen. Hierin wordt bepaald dat de overheid bij de uitvoering van haar taak openbaarheid betracht volgens regels bij de wet te stellen. Verdergaande voorstellen die nadien zijn gedaan en die strekten tot vastlegging in de Grondwet van een afdwingbaar grondrecht op toegang tot bij de overheid berustende informatie, zijn nooit in procedure gebracht.⁷ In 1983 vond een eerste evaluatie van de Wet openbaarheid van bestuur plaats. Dit leidde tot een kritisch rapport dat aanbevelingen bevatte om het openbaarheidsregime ruimhartiger te maken. Hierbij werd veel aandacht besteed aan de actieve openbaarmaking. In 1987 werd daarop een wetsvoorstel ingediend dat tot de huidige Wob heeft geleid. Deze trad in 1992 in werking. Blijkens de toelichting was de wijziging vooral technisch van aard. De regering beoogde met de vernieuwde tekst geen

wijziging aan te brengen in de aan de bestaande wet ten grondslag liggende beginselen.⁸ De kernbepalingen van de Wob zijn sindsdien niet meer wezenlijk veranderd.⁹

De maatschappelijke discussie over openbaarheid van bestuur heeft echter niet stilgestaan. De afgelopen jaren zijn diverse rapporten en evaluaties verschenen, waarin technologische ontwikkelingen en de gevolgen daarvan voor de regels omtrent de openbaarheid van bestuur centraal stonden.¹⁰ In enkele van deze rapporten werd gepleit voor het zoveel mogelijk actief openbaar maken van alle overheidsinformatie, bij voorkeur op elektronische wijze. In een recent advies heeft de Raad voor het openbaar bestuur (Rob) dit pleidooi nog eens herhaald.¹¹ Met het oog op de grotere nadruk op actieve openbaarmaking acht de Rob een grondige herziening van de Wob gewenst. Daarnaast is ook onderzoek gedaan naar bepaalde knelpunten in de toepassingspraktijk. Verschillende motieven blijken te kunnen leiden tot misbruik van openbaarheidsregels. In bepaalde landen zijn met het oog hierop wettelijke voorzieningen getroffen.¹²

De voortgezette maatschappelijke discussie is mede beïnvloed door de internationale ontwikkelingen die zich de afgelopen tien jaar hebben voorgedaan. Deze laten zien dat op internationaal en Europees niveau in toenemende mate belang wordt gehecht aan openbaarheid van overheidsinformatie. Nadat in 1990 reeds een richtlijn over de openbaarheid van milieu-informatie was aangenomen¹³, is binnen de EU in 2011 de Eurwob tot stand gekomen die in beginsel een recht geeft op openbaarheid van documenten die berusten bij EU-instellingen en de lidstaten voor zover zij EU-recht uitvoeren.¹⁴ Sinds 2009 wordt in artikel 15 VWEU bepaald dat teneinde goed bestuur te bevorderen instellingen, organen en instanties van de EU in een zo groot mogelijke openheid moeten werken en heeft artikel 42 van het Handvest van de grondrechten van de Europese Unie waarin het recht op toegang tot documenten van het Europees Parlement, de Raad en de Commissie is opgenomen, juridisch bindende kracht gekregen. Voorts wijst de Afdeling op de richtlijn over het hergebruik van overheidsinformatie uit 2003¹⁵ en op de in voorbereiding zijnde wijziging van deze richtlijn.¹⁶ Deze wijziging heeft tot doel hergebruik van overheidsinformatie gemakkelijker te maken door de voorwaarden die aan hergebruik kunnen worden gesteld te verminderen en de verstrekingskosten te maximeren.¹⁷ Buiten de EU is het Verdrag van Aarhus¹⁸ van belang dat voorziet in een regeling inzake toegang tot milieu-informatie.¹⁹ Daarnaast is in het kader van de Raad van Europa het Verdrag van Tromsø tot stand gekomen waarin algemene voorschriften omtrent openbaarheid van bestuur zijn opgenomen. Dit verdrag is weliswaar nog niet door Nederland geratificeerd, maar dit Verdrag wijst wel op een stevigere verankering van de openbaarheid van bestuur in internationaal verband.

De Afdeling wijst ten slotte op recente ontwikkelingen in de Straatsburgse rechtspraak inzake artikel 10 EVRM.²⁰ Artikel 10 EVRM bepaalt dat eenieder het recht heeft op vrijheid van meningsuiting. Het recht omvat mede de vrijheid om inlichtingen of denkbeelden te ontvangen of te verstrekken, zonder inmenging van enig openbaar gezag. Lange tijd is de lijn van het EHRM geweest en in overeenstemming daarmee die van de Hoge Raad dat aan dit artikel geen recht op inlichtingen jegens de overheid kan worden ontleend.²¹ In 2009 heeft het EHRM dit standpunt genuanceerd.²² Uit deze rechtspraak kan worden afgeleid dat onder bepaalde omstandigheden aan artikel 10 EVRM een algemeen recht op informatie jegens de overheid kan worden ontleend. De Afdeling bestuursrechtspraak heeft onlangs in lijn met deze rechtspraak de afwijzing van een Wob-verzoek voor het eerst aan artikel 10 EVRM getoetst. Uit die uitspraak lijkt te volgen dat de Afdeling bestuursrechtspraak in artikel 10 in beginsel wel een recht op het ontvangen van inlichtingen jegens de overheid leest, maar dat dit recht door de Wob op toelaatbare wijze wordt beperkt.²³

De Afdeling wijst naast de rechtspraak inzake artikel 10 EVRM ook op artikel 8 EVRM, waarin het recht op de bescherming van het privé-, familie- en gezinsleven is gewaarborgd. Uit de jurisprudentie van het EHRM vloeit voort dat daaruit onder bepaalde omstandigheden een recht op toegang tot informatie over milieuaangelegenheden kan worden afgeleid.²⁴

De hiervoor geschetste nationale en internationale ontwikkelingen zijn sinds de totstandkoming in 1992 van de Wob zoals deze thans luidt, geen aanleiding geweest voor een fundamentele koerswijziging in de wetgeving. In 2004 is op verzoek van de minister de Wob opnieuw geëvalueerd. Het evaluatierapport beschrijft een aantal knelpunten bij de uitvoering van de Wob.²⁵ Deze evaluatie heeft nog niet geleid tot een herziening van de Wob. Wel heeft de minister in 2012 ongeveer gelijktijdig met het onderhavige initiatiefvoorstel een wetsvoorstel opgesteld tot wijziging van de Wet openbaarheid van bestuur in verband met aanvullingen inzake onredelijke en omvangrijke verzoeken, inzake bijzondere verstrekkingen alsmede inzake hergebruik en het in rekening te brengen van vergoedingen (Wet aanpassing Wob). Dit voorstel ligt momenteel ter inzage in het kader van de internetconsultatie.

2. Algemene beschouwing

De hiervoor geschetste ontwikkelingen laten zien dat in het Nederlandse staatsbestel er een geleidelijke ontwikkeling is geweest die uiteindelijk heeft geleid tot een wettelijk recht op toegang tot overheidsinformatie. Deze ontwikkelingen zijn ingegeven door een wijziging van de maatschappelijke op-

vattingen. Openbaarheid van bestuur wordt tegenwoordig – ook los van de parlementaire inlichtingenplicht - gezien als een zelfstandige en noodzakelijke voorwaarde voor het functioneren van onze democratie.

De heersende opvatting thans is dat democratische rechten van burgers²⁶ alleen naar behoren kunnen worden uitgeoefend als er toegang bestaat tot overheidsinformatie.²⁷

Openbaarheid van overheidsinformatie biedt de mogelijkheid voor burgers en particuliere organisaties om deel te nemen aan besluitvormingsprocessen en vergroot de mogelijkheden tot het volgen en beoordelen van het handelen van de overheid.²⁸

Ook de positie van de pers speelt in dit verband een rol. Om haar taak als 'public watchdog' in een democratische samenleving naar behoren te kunnen vervullen, geldt openbaarheid van overheidsinformatie als een belangrijke randvoorwaarde.²⁹

De vele, ook recente, onderzoeken, publicaties en wetgevingsinitiatieven wijzen erop dat de maatschappelijke discussie over openbaarheid van bestuur ook in de nabije toekomst zal worden voortgezet. Een belangrijke oorzaak daarvan is gelegen in de snelle technologische ontwikkelingen. Sinds de invoering van de Wob zijn er verschillende nieuwe technologieën ontstaan die invloed hebben op de mate waarin en de wijze waarop openbaarheid van informatie wordt gerealiseerd. Met de komst van internet en de ontwikkeling van nieuwe communicatievormen kan overheidsinformatie veel sneller en gemakkelijker openbaar worden gemaakt dan voorheen. Informatie die eenmaal openbaar is gemaakt, heeft een bijna onbeperkt en onomkeerbaar bereik; het plaatsen van informatie op internet betekent dat binnen enkele seconden iedereen, waar ook ter wereld, over deze informatie kan beschikken. Voorts leidt de opkomst van email en nieuwe sociale media er toe dat informatie die beschikbaar is binnen een overheidsorganisatie, gemakkelijker en op een soms moeilijk beheersbare wijze naar buiten kan komen.³⁰

Deze ontwikkelingen die nog niet zijn voltooid, dwingen tot een nadere overdenking van de vraag op welke wijze dient te worden omgegaan met bij de overheid beschikbare informatie. Deze vraag betreft ook de doorwerking van de geschetste ontwikkelingen in het recht. Hiervoor is reeds gewezen op de recente Europese rechtspraak waarin in bepaalde gevallen is uitgegaan van een op grond van artikel 10 EVRM gebaseerd recht op toegang tot bij de overheid berustende informatie. Niet uitgesloten moet worden geacht dat het EHRM aan de hand van nieuwe casusposities de reikwijdte van een aldus geformuleerd recht stapsgewijs zal uitbreiden.³¹ De Afdeling stelt vast dat deze ontwikkeling nog niet is uitgekristalliseerd. Van een algemeen in de rechtspraak erkend grondrecht op toegang tot overheidsinformatie is op dit moment geen sprake. Voorstellen om een zodanig recht in aanvulling op artikel 110 in de Grondwet op te nemen, hebben tot dusverre niet op de daarvoor vereiste steun kunnen rekenen.

De Afdeling stelt vast dat – wat ook het precieze eindpunt van de hiervoor geschetste ontwikkelingen moge zijn – consensus bestaat over het algemene uitgangspunt dat de toegang tot overheidsinformatie niet onbegrensd kan zijn. Uit de bestaande praktijk blijkt dat er een spanning kan ontstaan tussen het belang van openbaarheid en andere legitieme belangen zoals bijvoorbeeld de veiligheid van de staat, de opsporing van strafbare feiten, de bescherming van de persoonlijke levenssfeer en de bescherming van bedrijfsgeheimen.³² Voorts wordt algemeen erkend dat er binnen de overheid ruimte dient te zijn voor een vrije interne gedachtewisseling. Dit hangt nauw samen met de aard van de besluitvorming en de fase waarin deze zich bevindt. In bepaalde gevallen zal men alleen succesvol tot gemeenschappelijke besluitvorming kunnen komen, indien vertrouwelijkheid in acht wordt genomen.³³ Gewezen kan bijvoorbeeld worden op de besluitvorming in de ministerraad, op de besprekingen in het kader van de kabinetsformatie³⁴ en op de besluitvorming voorafgaand aan de benoeming in een publiek ambt.³⁵

Bovenstaande overwegingen kunnen ertoe noodzaken dat aan de openbaarheid beperkingen worden gesteld. Beperkingen kunnen niet alleen gerechtvaardigd zijn omdat andere belangen zoals die hiervoor genoemd soms zwaarder wegen maar ook omdat vertrouwelijkheid onder omstandigheden kan bijdragen aan een kwalitatief betere besluitvorming.³⁶ Ook kan door informatie in bepaalde gevallen niet aan de openbaarheid prijs te geven worden bewerkstelligd, dat de overheid eenvoudiger op de hoogte wordt gesteld van allerlei voor de uitvoering van de overheidstaak noodzakelijke informatie. Daarom zal er op wettelijk niveau alsook in concrete gevallen voldoende ruimte moeten zijn om de verschillende randvoorwaarden en belangen voldoende tot hun recht te laten komen. Dit wordt zowel in de huidige Wob als in de thans voorgestelde regeling in algemene zin erkend. Ook de Europese rechtsregels zoals artikel 10 EVRM³⁷ en het Verdrag van Tromsø laten nadrukkelijk ruimte voor een zorgvuldige afweging.

Met betrekking tot het resultaat waartoe het voorgaande in concrete gevallen moet leiden, is verschil van opvatting mogelijk. Dit blijkt ook uit het eerder genoemde Tilburgse evaluatieonderzoek naar de

bestaande uitvoeringspraktijk. Daarin komt naar voren dat de perspectieven van de overheid en van degenen die een Wob-verzoek indienen, soms sterk uiteenlopen.

'Duidelijk is dat er in veel gevallen sprake is van wantrouwen tussen beide partijen, waarbij de intensiteit varieert naar gelang de publieke instantie en de persoon van de aanvrager van informatie. Bij menig ambtenaar leeft het idee dat 'het nooit goed is', journalisten hebben het idee dat veel ambtenaren niet bereid zijn informatie uit handen te geven.'³⁸

Hoewel de feitelijke perspectieven van betrokkenen bij nader inzien vaak minder ver uit elkaar liggen dan aanvankelijk verondersteld, kan deze situatie de uitvoeringspraktijk aanzienlijk bemoeilijken.

'Informatieverzoeken worden van beide kanten uit defensief benaderd, wat leidt tot juridisering. Met name dit laatste lijkt het karakter te hebben van een zelfvullende voorspelling: waar problemen worden verwacht, zal het gedrag zodanig worden aangepast dat de wederzijdse verwachtingen worden bewaarheid.'³⁹

Uit deze bevindingen blijkt dat de toepassingspraktijk soms sterk is gepolariseerd. Dit geeft aanleiding tot arbeidsintensieve geschillen en procedures die tot in hoogste instantie bij de rechter worden uitgevochten. De Afdeling is van oordeel dat dit – ook los van de vraag naar het juiste wettelijke kader – ongewenst is en van alle betrokken partijen nadrukkelijk aandacht behoeft.

De voorgaande beschouwing vormt voor de Afdeling de leidraad voor de beoordeling van het voorstel. Daarbij hanteert de Afdeling enerzijds als uitgangspunt dat de overheid in aansluiting op de hiervoor geschetste ontwikkelingen op een ruimhartige wijze uitvoering geeft aan de openbaarheidswetgeving. Openbaarheid van bestuur wordt in de huidige tijd gezien als een noodzakelijke voorwaarde voor het functioneren van onze democratie. Daarbij past niet een overheid die een defensieve basishouding aanneemt. Anderzijds dient voldoende oog te bestaan voor gerechtvaardigde belangen die aan openbaarheid van bestuur in de weg kunnen staan. Een te eenzijdige nadruk op toegang tot overheidsinformatie kan in bepaalde gevallen de kwaliteit van de besluitvorming en de effectieve werking van het openbaar bestuur aantasten. Tegen die achtergrond dient er voldoende ruimte te bestaan voor een zorgvuldige afweging ter zake van de vraag of bij de overheid berustende informatie al dan niet openbaar moet worden gemaakt.

Vanuit deze algemene gezichtspunten maakt de Afdeling over het voorstel de volgende opmerkingen.

3. Noodzaak van het voorstel

Ter onderbouwing van de noodzaak van het voorstel stelt de toelichting vast dat de afwegingen en ideeën uit de jaren 70 leidend zijn voor de huidige Wob en de daarop gebaseerde openbaarheidspraktijk. Daardoor wordt onder de huidige Wob te weinig informatie uit eigen beweging openbaar gemaakt, sluiten de uitzonderingsgronden teveel belangrijke informatie uit van publieke controle en kunnen verzoekers om informatie met hoge kosten worden geconfronteerd. Hiermee is Nederland volgens de toelichting achterop geraakt bij landen die recent een wet over openbaarheid van bestuur hebben aangenomen. De toelichting stelt dat in andere landen erkend wordt dat toegankelijkheid van publieke informatie vaak niet alleen een juridische aangelegenheid is, maar ook een praktisch probleem en een mentaliteitsprobleem.⁴⁰ In de toelichting wordt tevens verwezen naar de verschillende evaluaties waaruit blijkt dat de uitvoering van de Wob niet altijd optimaal verloopt.⁴¹

In de toelichting wordt terecht geconstateerd dat openbaarheid van bestuur geleidelijk een essentieel onderdeel is geworden van het hedendaagse democratische bestel.

Terecht ook wijst de toelichting op de maatschappelijke en technologische ontwikkelingen die de betekenis van het beginsel van openbaarheid van bestuur hebben versterkt. Vanuit dit perspectief onderschrijft de Afdeling de wens om de toepasselijke openbaarheidswetgeving te evalueren en kritisch tegen het licht te houden als dergelijke ontwikkelingen daartoe aanleiding geven. In dit licht bezien valt het de Afdeling op dat in de in de toelichting gegeven analyse van de huidige situatie sterk de nadruk wordt gelegd op tekorten in de huidige openbaarheidspraktijk. Blijkens de toelichting vormt de opvatting dat de ideeën over nut en noodzaak van openbaarheid onvoldoende weerklink vinden in de huidige Nederlandse praktijk, de belangrijkste aanleiding voor het wetsvoorstel.⁴²

Uitgaande van die opvatting is de Afdeling van oordeel dat de initiatiefnemer niet overtuigend aantoont dat een algehele herziening van de wet geïndiceerd is.

Onvoldoende duidelijk wordt waarom het bestaande wettelijke kader niet voldoet. Een systematische en voldoende grondige bespreking van de knelpunten in de wetgeving ontbreekt. In dat verband wijst de Afdeling er op dat de huidige Wob, mede door zijn open formuleringen en door de daarin geboden afwegingsruimte, een flexibel systeem kent dat niet in de weg hoeft te staan aan de hiervoor geschetste ontwikkelingen. Meer in het bijzonder acht de Afdeling van belang dat de plicht tot actieve openbaarmaking die in het voorstel gedetailleerder wordt geregeld en in de toelichting met kracht wordt bepleit, reeds in de huidige wet is neergelegd. Voorts maakt de toelichting niet aannemelijk dat een door de initiatiefnemer als onterecht aangemerkte weigering om informatie te verstrekken het gevolg

zou zijn van de huidige wet en niet van een in de ogen van de initiatiefnemer te ruime uitleg van de wettelijke uitzonderingsgronden.

Daar komt nog bij dat te gedetailleerde wetgeving met het oog op een goede uitvoering juist een verslechtering kan betekenen. De Afdeling wijst erop dat de huidige uitvoeringspraktijk van de Wob reeds gekenmerkt wordt door een grote mate van juridisering. Dit wordt onder meer veroorzaakt door het feit dat de Wob zo is ingericht dat per document, maar vaak ook per onderdeel of zelfs per alinea afgewogen moet worden of deze openbaar gemaakt kan worden. Daarnaast kent de Wob, anders dan de Algemene wet bestuursrecht, niet het vereiste dat een verzoeker om informatie belanghebbende hoeft te zijn. Het wetsvoorstel kent elementen die deze juridisering naar verwachting verder zullen versterken, zoals bijvoorbeeld het voorstel om alle absolute weigeringsgronden van de huidige wet om te zetten naar relatieve weigeringsgronden. Ook het gedetailleerde en gecompliceerde karakter van onderdelen van het voorstel, kan daaraan bijdragen. De Afdeling is daarom van oordeel dat het voorstel gemakkelijk kan leiden tot een nog verder gejuridiseerde uitvoeringspraktijk. Het belang van een goede en evenwichtige uitvoering wordt daarmee niet gediend.

Daarnaast merkt de Afdeling op dat, hoewel de huidige Wob historisch gezien uitgaat van een stelsel van documenten in papieren vorm, deze geen belemmering vormt voor openbaarmaking met behulp van moderne technologieën. Door de wijzigingen van de algemene regels op dit punt, zoals bijvoorbeeld de elektronische bekendmaking en de mogelijkheid om verzoeken langs elektronische weg in te dienen, is de huidige Wob met zijn open formuleringen voldoende toegerust om in de uitvoering nieuwe technologieën toe te passen. Voor zover op dit moment niet optimaal gebruik wordt gemaakt van de mogelijkheden die de nieuwe technologieën bieden, lijkt dit eerst en vooral gerealiseerd te moeten worden door verbeteringen in de uitvoering.⁴³ Met het oog daarop acht de Afdeling het binnen het huidige wettelijk stelsel goed denkbaar dat de overheid met behulp van nieuwe technieken informatie vaker en eerder op actieve wijze openbaar maakt. Daarmee wordt niet alleen aangesloten bij de bedoeling van de Wob op grond waarvan reeds de actieve openbaarmakingsplicht geldt, maar kan ook een zekere reductie van de uitvoeringskosten worden bereikt.

De Afdeling merkt ten slotte op dat de inhoudelijke keuzes die in het voorstel zijn gemaakt met het oog op een goede en democratische bestuursvoering, in meerdere opzichten verregaande gevolgen zullen hebben. In de toelichting wordt terecht ingegaan op de verhouding tussen het belang van openbaarheid van bestuur en andere gerechtvaardigde belangen en de wijze waarop deze belangen tegen elkaar moeten worden afgewogen.⁴⁴ Niettemin is de Afdeling van oordeel dat in het voorstel op belangrijke onderdelen te eenzijdig de nadruk is komen te liggen op waarborging van het recht op toegang tot overheidsinformatie als gevolg waarvan andere belangen in het gedrang kunnen komen.⁴⁵ In het voorstel manifesteert zich dit in het bijzonder in de als fundamenteel te beschouwen uitbreiding van de reikwijdte tot grote delen van de private sector, het voorgestelde recht op openbaarmaking van bepaalde ambtelijke documenten, de instelling van een geheel nieuw instituut, de Informatiecommissaris, met vergaande taken en bevoegdheden en in algemene zin de aanzienlijke uitvoeringsproblemen die het voorstel naar redelijke verwachting met zich zal brengen.⁴⁶ De Afdeling is van oordeel dat gelet op de thans gegeven toelichting een zodanig verstrekkende aanpassing van de openbaarheidswetgeving niet kan worden gerechtvaardigd.

Concluderend onderschrijft de Afdeling de wens om gegeven de maatschappelijke en technologische ontwikkelingen de toepasselijke openbaarheidswetgeving kritisch tegen het licht te houden. Zij is echter van oordeel dat in de toelichting een deugdelijke probleemanalyse met betrekking tot de knelpunten in het huidige wettelijke kader ontbreekt. Voor zover door de initiatiefnemer knelpunten worden gesignaleerd, liggen deze hoofdzakelijk op het terrein van de uitvoering, niet in de huidige wet zelf. In de toelichting wordt niet aannemelijk gemaakt dat een geheel nieuwe wet tot een betere uitvoering zal leiden. Voor zover een verandering van de praktijk wenselijk wordt geacht, lijken op die praktijk gerichte maatregelen eerder aangewezen. Daarnaast is de Afdeling van oordeel dat de manier waarop in het voorstel aan het belang van openbaarheid en het daarmee samenhangende recht op toegang tot overheidsinformatie vorm is gegeven, op bepaalde onderdelen te weinig rekening houdt met andere gerechtvaardigde belangen die in het geding zijn. De Afdeling acht het voorstel in die zin niet voldoende evenwichtig.

Gelet op het voorgaande is de Afdeling niet overtuigd van de noodzaak en evenmin van de evenwichtigheid van het voorstel en adviseert zij daarom het voorstel nader te bezien.

Onverminderd het voorgaande merkt de Afdeling het volgende op.

4. Uitbreiding reikwijdte organen

Het voorstel regelt dat diverse privaatrechtelijke organisaties onder de reikwijdte van de Wob gaan vallen. Daarbij gaat het niet alleen om de organisaties die in bijlage 1 bij het wetsvoorstel zijn genoemd. In artikel 2.2, eerste lid, onder c., 1^o worden tevens de publieke entiteiten uit de Wet naleving Europese regelgeving publieke entiteiten onder de Wob gebracht. Artikel 2.2., eerste lid, onder c., 2^o

bepaalt verder dat de Wob van toepassing is op rechtspersonen die zijn opgericht door een overheidsorgaan, rechtspersonen die een overheidsorgaan als aandeelhouder hebben, waarvan een of meer leden van het hoogste orgaan door een overheidsorgaan worden benoemd en rechtspersonen waarbij een overheidsorgaan op andere wijze overwegende invloed heeft op het beleid.⁴⁷ Uit de toelichting wordt niet duidelijk welke rechtspersonen dat precies zijn en welke informatie berustend bij instanties het daarbij precies betreft.⁴⁸

Onduidelijk is bijvoorbeeld of ook de politieke partijen onder het voorgestelde openbaarmakingsregime zullen vallen. Naar de letter van het voorstel lijkt dit niet het geval te zijn. Deze keuze komt de Afdeling arbitrair voor, nu andere instellingen die een overheidssubsidie ontvangen wel onder de uitgebreide reikwijdte van de wet zullen vallen. Het voorstel heeft voorts ook betrekking op organen die een publiek belang behartigen. Ook deze categorie is relatief onbepaald. De Afdeling heeft in het advies over de normering topfunctionarissen een kritische opmerking gemaakt over dit begrip 'publiek belang', omdat het in de praktijk moeilijk vast te stellen is wat hieronder valt.⁴⁹

De Afdeling constateert dat de uitbreiding van de Wob tot substantiële delen van de private sector samenhangt met het door de indiener gekozen perspectief op de verhouding tussen overheid en samenleving. In de toelichting wordt gesteld dat de klassieke wijze van controle op het bestuur, waarbij de burger afhankelijk is van de volksvertegenwoordiger niet meer voldoet.⁵⁰ Om die reden moet de burger rechtstreeks controle uit kunnen oefenen op de overheid en onder omstandigheden ook op instellingen in de 'semi-publieke' sfeer.⁵¹ De hier bedoelde "controle" wordt in de toelichting gelijkgesteld met de rechtstreekse verantwoordingsplicht van zowel overheidsorganen als private partijen richting de burgers.

De Afdeling is van oordeel dat aan deze benadering belangrijke bezwaren kleven. Door het onder de Wob brengen van verschillende private instellingen worden deze in de publieke sfeer getrokken als waren het bestuursorganen. Dit vormt een inbreuk op de autonomie van deze private instellingen. Kenmerk van deze autonomie is dat de instellingen de vrijheid hebben om hun organisatie naar eigen inzicht in te richten.

Hieronder valt ook de wijze waarop zij omgaan met de in de instelling aanwezige informatie.⁵² Vanuit dit gezichtspunt hebben private instellingen in staatsrechtelijke zin geen rechtstreekse verantwoordingsrelatie met de burger. Dat de private instelling voor bepaalde activiteiten subsidie ontvangt, doet daaraan niet af. In dat geval is er een verantwoordingsrelatie tussen de subsidieontvanger en de subsidieverstrekker. De subsidieverstrekker legt op zijn beurt verantwoording af aan de vertegenwoordigende organen. Door in een relatief groot aantal gevallen een rechtstreekse publiekrechtelijke verantwoordingsrelatie te veronderstellen tussen private instellingen en de burger komt, naar het oordeel van de Afdeling, een fundamentele breuk met de bestaande verhouding tussen de publieke en private sector tot stand.

Gelet op het voorgaande is de Afdeling van oordeel dat de voorgestelde invoering van een directe controle waarbij de burger de ontvanger van overheidsgeld om verantwoording vraagt, onwenselijk is. Indien daar toch voor wordt gekozen, merkt de Afdeling op dat de toelichting niet ingaat op de gevolgen indien er sprake is van problemen bij deze verantwoording. Ook in dat geval zal de burger uiteindelijk de politiek verantwoordelijke functionaris moeten aanspreken. De Afdeling wijst erop dat het proces van afleggen van publieke verantwoording hiermee waarschijnlijk juist diffuser wordt, omdat partijen naar elkaar kunnen gaan wijzen. Indien het een probleem zou zijn dat organisaties die uit publieke middelen gefinancierd worden, zich te zeer aan verantwoording zouden kunnen onttrekken, zou primair bezien moeten worden of de verplichting van de verstrekker van overheidsfinanciën om openbare verantwoording af te leggen over de juiste besteding van de verstrekte middelen aanscherping behoeft. Op die manier blijft de verantwoordingsrelatie in staatsrechtelijke zin duidelijk.

De Afdeling adviseert in het licht van het bovenstaande de uitbreiding van de reikwijdte van de Wob te heroverwegen.

5. Persoonlijke beleidsopvattingen

Artikel 11, eerste lid, van de huidige Wob bepaalt dat geen informatie verstrekt wordt over in documenten opgenomen persoonlijke beleidsopvattingen. Artikel 1 van de Wob definieert een persoonlijke beleidsopvatting als een opvatting, voorstel, aanbeveling of conclusie van een persoon over een bestuurlijke aangelegenheid en de daartoe aangevoerde argumenten. Achtergrond van deze bepaling is de vrijheid van gedachteswisseling bij de vormgeving van het beleid.⁵³ Deze vrijheid maakt het mogelijk dat de betrokkenen zich veilig voelen om onbelemmerd te spreken over verschillende beleidsalternatieven.

In de toelichting wordt het belang van vrije gedachtevorming onderschreven. Terecht wordt gesteld dat ambtenaren en bestuurders "vrijelijk met elkaar van gedachten [moeten] kunnen wisselen over een dossier, beleidsproces, ambtelijk advies of wetsontwerp." En verder: "Zij moeten hun persoonlijke beleidsopvattingen kunnen articuleren, zonder dat een dergelijk advies de volgende dag in de krant

staat, of onderwerp vormt van parlementair debat." Vertrouwelijkheid en beleidsintimiteit worden als cruciaal ervaren. Echter, zo stelt de toelichting,⁵⁴ de uitzonderingsgrond is uitgebreid en in de praktijk opgerekt. Daarom wordt in het voorstel bepaald dat relevante feiten, overwogen voordelen en nadelen, kansen en risico's en alternatieve beleidsoplossingen wel openbaar gemaakt moeten worden, tenzij dit ernstig nadeel toebrengt aan de bescherming van persoonlijke opvattingen.⁵⁵ Hierop kan een uitzondering worden gemaakt indien de betrokken persoon instemt met openbaarmaking. Beleidsalternatieven vallen niet langer onder de uitzonderingsgrond.

Als in stukken beleidsopvattingen en andere gegevens met elkaar vervlochten zijn, moet het bestuur een samenvatting geven, aldus het voorstel.

De Afdeling is om verschillende redenen van oordeel dat dit voorstel onevenwichtig is. Ten eerste merkt de Afdeling op dat, hoewel de toelichting het belang van de vrije gedachtewisseling onderstreept, het voorstel dit uitgangspunt in de uitwerking aanzienlijk beperkt. De toelichting suggereert dat de bestaande uitzondering op openbaarmaking waarbij persoonlijke beleidsopvattingen niet openbaar worden gemaakt, wordt gecontinueerd.⁵⁶ De Afdeling is van oordeel dat van een dergelijke continuering geen sprake is. Ingevolge het voorstel geldt immers een uitzondering op openbaarmaking alleen wanneer door openbaarmaking een ernstig nadeel wordt toegebracht aan de bescherming van persoonlijke opvattingen. Dit betekent dat in andere gevallen geen beroep kan worden gedaan op deze uitzonderingsgrond. Voorts geldt op grond van het voorgestelde artikel 5.1, eerste lid, onder g, dat interne documenten openbaar dienen te worden gemaakt indien deze in een niet tot de persoon herleidbare vorm kunnen worden verstrekt of de betrokken persoon instemt met openbaarmaking. Deze uitzonderingen doen tezamen aanzienlijk afbreuk aan het in de toelichting gekozen uitgangspunt van de vrije gedachtewisseling tussen ambtenaren en bestuurders.

Het voorgaande roept, volgens de Afdeling, voorts de vraag op welke gevolgen de voorgestelde regeling zal hebben voor de verhouding tussen ambtenaar en minister en voor het functioneren van de ministeriële verantwoordelijkheid. Aannemelijk is dat de voorgestelde regeling ertoe zal leiden dat interne verschillen van opvatting eerder in de openbaarheid zullen komen. Dit geldt te meer nu blijkens artikel 5.1, eerste lid, onder g, als het gaat om persoonlijke beleidsopvattingen, niet de minister maar de betrokken ambtenaar beslist over openbaarmaking.⁵⁷ Staatsrechtelijk echter zijn in het kader van de ministeriële verantwoordelijkheid niet de opvattingen van ambtenaren maar die van bewindspersonen relevant.⁵⁸ De voorgestelde regeling zal in het licht van dit staatsrechtelijke uitgangspunt tot het ongewenste resultaat kunnen leiden dat minister en ambtenaar in bepaalde gevallen tegen elkaar worden uitgespeeld. De betrokken ambtenaar kan als gevolg van het voorstel in een moeilijke situatie terecht komen: als hij geen toestemming geeft om de ambtelijke stukken openbaar te maken wordt hij verdacht van het achterhouden van informatie, als hij dat wel doet kan hij in een conflictueuze situatie terecht komen ten opzichte van de minister en zijn collegaambtenaren. De hiervoor genoemde bezwaren tegen openbaarmaking van persoonlijke beleidsopvattingen zijn reeds bij de totstandkoming van de huidige Wob onderkend en zorgvuldig afgewogen tegen het belang van de openbaarheid. De Afdeling is dan ook van oordeel dat hetgeen hieromtrent destijds is overwogen ook nu nog onverkort geldt.⁵⁹

Ten slotte wijst de Afdeling erop dat de voorgestelde regeling in de praktijk zeer complex en daarom moeilijk uitvoerbaar zal zijn. Zij kan leiden tot ongewenst risicomijdend gedrag. In bepaalde gevallen zullen ambtenaren de neiging hebben om zich in te dekken door onnodig veel op schrift te stellen en aan de minister voor te leggen. In andere gevallen zal juist worden vermeden om zaken aan het papier toe te vertrouwen. Voorts roept de regeling veel praktische interpretatievragen op. In de eerste plaats rijst bij de interpretatie van het voorgestelde artikel 5.1, eerste lid, onder g, de vraag naar de afbakening tussen persoonlijke beleidsopvattingen⁶⁰ enerzijds en feiten, beleidsalternatieven of de voor- en nadelen van een bepaald alternatief anderzijds en daarmee tevens de vraag naar de werkbaarheid van dit wettelijk voorgestelde onderscheid. De persoonlijke beleidsopvattingen en de hiervoor genoemde informatie zullen niet zelden door elkaar lopen.⁶¹ Voor het geval feiten, risico's, varianten en opvattingen met elkaar vervlochten zijn, is volgens de toelichting onder het nieuwe regime het bestuur gehouden een samenvatting te geven van de relevante feiten, risico's en alternatieven, zonder dat de persoonlijke beleidsopvattingen, overwegingen en adviezen van ambtenaren openbaar worden gemaakt.⁶² Dit wordt echter niet geregeld in het voorstel. Bovendien klemmt de vraag naar de proportionaliteit van een dergelijke verplichting tot het maken van samenvattingen, gelet op het, naar verwachting niet geringe, beslag op de tijd van de organen die een dergelijke samenvatting moeten gaan maken.⁶³

De Afdeling adviseert het voorgestelde openbaarmakingsregime met betrekking tot overwogen voordelen en nadelen, kansen en risico's en alternatieve beleidsoplossingen in het licht van het bovenstaande te heroverwegen.

6. Uitvoerbaarheid/financiële gevolgen

Het voorstel brengt nieuwe verplichtingen met zich voor organen die onder het bereik van het voorstel zullen vallen:

- het aantal organen dat onder de wet valt wordt aanzienlijk uitgebreid;
- overheidsorganen worden verplicht om een elektronisch toegankelijk openbaar register te maken en bij te houden. In dat register moeten in ieder geval de ter behandeling ontvangen documenten en de na behandeling verzonden of vastgestelde documenten worden opgenomen;⁶⁴
- daarnaast zal een uitgebreide actieve openbaarmakingsplicht gelden, waarbij allerlei soorten informatie uit eigen beweging openbaar zou moeten worden gemaakt binnen drie dagen na vaststelling of ontvangst van de informatie;⁶⁵
- verder wordt bepaald dat, indien een orgaan informatie openbaar maakt, dat in beginsel in een elektronische vorm, machineleesbaar en zodanig geschiedt dat de informatie geschikt is voor hergebruik;⁶⁶
- de huidige absolute uitzonderingsgronden worden relatief, hetgeen zwaardere belasting in tijd betekent wegens de verplichte afweging van belangen die daarvan het gevolg is;
- daarnaast wordt de regeling inzake openbaarheid van interne ambtelijke stukken aanzienlijk complexer.

De Afdeling onderkent dat er onder omstandigheden financiële voordelen kunnen zijn verbonden aan bepaalde door het voorstel beoogde wijzigingen van de openbaarheidspraktijk. Zo is aannemelijk dat, indien de overheid met behulp van moderne technieken snel en op een toegankelijke wijze overgaat tot actieve openbaarmaking, een zekere kostenbesparing kan worden gerealiseerd. Dat laat naar het oordeel van de Afdeling echter onverlet dat de toelichting van het voorstel te gemakkelijk voorbijgaat aan de vraag of elk afzonderlijk voorstel en het voorstel als geheel mede als gevolg van de uitbreiding van de voorgestelde verplichtingen, uitvoerbaar en proportioneel is. Zeker voor kleinere private organisaties waarop het voorstel van toepassing is, kan de vraag worden gesteld of het in de praktijk mogelijk zal zijn om aan de voorgestelde verplichtingen te voldoen zonder dat dit ten koste gaat van het uitvoeren van de primaire taken. Ook voor kleinere bestuursorganen kan deze vraag worden gesteld. Op dit punt mist de toelichting, naar het oordeel van de Afdeling, een zorgvuldige weging tussen het belang van openbaarheid en het beslag dat het voldoen hieraan zal leggen op de publieke middelen. Gelet op het feit dat er in de huidige financiële situatie veel druk ligt op het bestuur om in te krimpen en te besparen, ligt een dergelijke afweging te meer voor de hand.⁶⁷ Ook in de brief van de Minister van Binnenlandse Zaken aan de Tweede Kamer over het beleid inzake de Wet openbaarheid van bestuur wordt aandacht gevraagd voor deze afweging.⁶⁸

In algemene zin merkt de Afdeling op dat in de toelichting een onderbouwde paragraaf over de financiële gevolgen van het voorstel ontbreekt. Gelet op de stand van de overheidsfinanciën en de noodzaak tot het terugdringen van (de groei van) de overheidsuitgaven, kan een dergelijke paragraaf niet gemist worden, temeer niet daar aannemelijk is dat het voorstel tot aanzienlijke kostenstijgingen kan leiden. De aanname in de toelichting dat de positieve en negatieve financiële gevolgen van de wet voor organen met elkaar in balans zullen zijn omdat door het beter ontsluiten van de informatie deze ook intern beter beschikbaar is, is niet cijfermatig onderbouwd en naar het oordeel van de Afdeling, mede in het licht van het voorgaande, dan ook niet overtuigend. Daarbij worden overheidsorganen verplicht tot het maken van initiële kosten voor het opzetten van het digitale register. Ook hierbij is niet aangegeven aan welke bedragen gedacht moet worden.

De Afdeling adviseert in de toelichting specifiek in te gaan op de uitvoerbaarheid en de financiële gevolgen van het voorstel.

7. Informatiecommissaris

a. Noodzaak

Het voorstel stelt een nieuw bestuursorgaan in, te weten de Informatiecommissaris. De toelichting stelt ter onderbouwing van dit onderdeel van het voorstel dat het doel van de cultuuromslag van bestuurlijke geslotenheid naar openheid niet kan worden bereikt door alleen de wettelijke openbaarheidsverplichtingen die aan bestuursorganen worden opgelegd. De huidige cultuur van geslotenheid en het daarmee gepaard gaande informatiemonopolie van de overheid zou niet bevorderlijk zijn voor de burgerparticipatie in de politiek en in het beleid, zo blijkt uit de toelichting.⁶⁹ Daarnaast wordt erop gewezen dat de vele mogelijkheden die de ontwikkeling van de communicatie- en informatietechnologie met zich brengt (de digitale revolutie), onbenut zijn gebleven. Beoogd wordt met het voorstel een cultuurverandering in de publieke sector te faciliteren die past bij de gedigitaliseerde informatiesamenleving.⁷⁰

Ingevolge de toelichting zullen de verplichtingen tot het betrachten van actieve en passieve openbaarheid een zinvolle invulling moeten krijgen in de praktijk. Ook de Nationale ombudsman heeft eerder benadrukt dat het bij het contact tussen burger en overheid niet zozeer om een juridische strijd moet

gaan, als wel om het zich coöperatief opstellen van het orgaan. Om deze normalisering in de verhouding tussen burger en overheid te bewerkstelligen en de implementatie van deze wet te bevorderen, wordt de functie van Informatiecommissaris gecreëerd. Diens taak is om organen en burgers te ondersteunen en om conflicten op te lossen door belangen bij elkaar te brengen, niet slechts door de juridische geschillen te beslissen, aldus de toelichting.⁷¹

De Afdeling is er niet van overtuigd dat het instellen van een Informatiecommissaris de veronderstelde problemen gaat oplossen. Zij wijst erop dat in plaats van een groter bewustzijn bij het bestuur als het gaat om de noodzaak van openbaarheid, overheidsorganen vermoedelijk eerder zullen neigen naar het verschuiven van de verantwoordelijkheid voor de juiste uitvoering van de wet naar de Informatiecommissaris. De Informatiecommissaris gaat immers blijkens het wetsvoorstel een deel van de afwegingen die een orgaan moet maken bij het afhandelen van een Wob-verzoek overnemen. Zo moet het orgaan bijvoorbeeld op grond van artikel 4.6 toestemming hebben van de Informatiecommissaris om een verzoek af te wijzen op grond van misbruik van het recht op informatie. Voorts komt de procedure inzake administratief beroep bij de Informatiecommissaris in plaats van de bezwaarprocedure bij het bestuursorgaan dat de primaire beslissing heeft genomen.

Omdat de gewone rechtsgang blijft bestaan nadat de Informatiecommissaris heeft geoordeeld over de afhandeling van een verzoek door het orgaan, wordt de procedure ook niet sneller of korter. Tevens kan het neerleggen van het administratief beroep bij de Informatiecommissaris leiden tot gecompliceerde situaties in het geval tegen een besluit van de Informatiecommissaris beroep bij de rechter wordt ingesteld door de verzoeker, door het orgaan aan wie het oorspronkelijke verzoek gericht was of door een derde belanghebbende. In al deze gevallen is de Informatiecommissaris immers in het beroep de verwerende partij, terwijl het tegelijkertijd een instantie beoogt te zijn die juridisering zou dienen tegen te gaan en waartoe alle betrokken partijen zich in alle vertrouwen zouden kunnen wenden. De Afdeling is voorts van oordeel dat in de toelichting een deugdelijke afweging van kosten en baten van de instelling van een nieuw, als Hoog van College van Staat gepresenteerd instituut ontbreekt. Dit instituut zal een eigen ambtelijk apparaat krijgen met een eigen werkprogramma en eigen activiteiten. Het aantal taken en bevoegdheden dat de Informatiecommissaris krachtens het voorstel wordt toegerekend is, zoals hierna nog zal worden toegelicht, aanzienlijk. Mede in verband met het omvangrijke takenpakket zal er een sterke behoefte ontstaan aan overleg tussen dit instituut, de bestaande bestuursorganen binnen de diverse overheidslagen en andere belanghebbenden. De vraag is of de baten hiervan, zeker in een tijd waarin ook op de overheid bezuinigd wordt, voldoende opwegen tegen de extra kosten. De vraag is of in plaats daarvan niet beter geïnvesteerd kan worden in verbetering van de uitvoering binnen het bestaande institutionele kader.

De Afdeling adviseert de instelling van een Informatiecommissaris in het licht van het bovenstaande te heroverwegen.

Onverminderd het vorengaande merkt de Afdeling met betrekking tot de Informatiecommissaris het volgende op.

b. Taken van de Informatiecommissaris

De Informatiecommissaris krijgt zeer uiteenlopende taken. Deze taken staan ten dienste van de bevordering van de toepassing van de nieuwe Wob en houden het volgende in:

- het geven van voorlichting;
- het monitoren en onderzoeken van en rapporteren over de uitvoering van deze wet in algemene zin of door specifieke organen in het bijzonder;
- het opleiden van personen werkzaam bij organen belast met de uitvoering van de wet;
- het op verzoek of uit eigen beweging adviseren van organen over de uitvoering van de wet;
- het publiceren van richtsnoeren ter bevordering van de openbaarmaking uit eigen beweging en de toegankelijkheid van informatie;
- het adviseren over voorstellen van wet en ontwerpen van algemene maatregelen van bestuur die geheel of voor een belangrijk deel betrekking hebben op de toegankelijkheid en de openbaarmaking van informatie.⁷²

Daarnaast beslist de Informatiecommissaris op administratief beroep ingesteld tegen een besluit op grond van de nieuwe wet.⁷³ Daarbij geldt dat zijn beslissingen tot gegrond- of gedeeltelijke gegrondverklaring van het beroep een vergaande verantwoordelijkheidsverschuiving tot gevolg zal hebben. Zo verstrekt hij de betreffende informatie tegelijkertijd met een bekendmaking van een dergelijk positief besluit, tenzij naar verwachting het orgaan of een belanghebbende bezwaar daartegen heeft. Dat laatste staat ter beoordeling van de Informatiecommissaris, niet van het betrokken bestuursorgaan. Doet zich dat geval voor, dan wordt de informatie verstrekt twee weken nadat de beslissing is bekendgemaakt.⁷⁴

In de toelichting wordt de begroting van de Informatiecommissaris geschat op 10 miljoen euro per jaar. Deze schatting is gebaseerd op de huidige begroting van de Nationale ombudsman van 15,7 miljoen

en een vergelijking van de zwaarte van takenpakketten.⁷⁵ De Afdeling wijst erop dat de taken van de Nationale ombudsman betrekking hebben op een veel kleiner aantal organen, omdat deze uitsluitend zien op de bestuursorganen die limitatief in de wet worden geregeld.⁷⁶ Daarnaast moet, alvorens de Nationale ombudsman een onderzoek kan instellen, de klager eerst proberen om met het betreffende bestuursorgaan zelf tot overeenstemming te komen.⁷⁷ Ten slotte kennen de artikelen 9:22 tot en met 9:24 van de Algemene wet bestuursrecht (Awb) een aantal gevallen waarin de Nationale ombudsman ofwel geen onderzoek mag instellen, ofwel geen onderzoek hoeft in te stellen.

Mede gelet op het voorgaande merkt de Afdeling op dat het aantal taken dat de Informatiecommissaris moet verrichten, vooral gelet op de omvang daarvan, waarschijnlijk groter is dan dat van de Nationale ombudsman. Met name de taak van het nemen van besluiten op administratief beroep zal leiden tot een groot beslag op de ambtelijke capaciteit. De toelichting stelt dat het de bedoeling is dat de Informatiecommissaris hierbij niet de terughoudendheid van de bestuursrechter mag betrachten door zich te beperken tot een rechtmatigheidsstoetsing, maar het samenspel van belangen die bij de beslissing op een Wob-verzoek moeten worden betrokken, geheel opnieuw dient te wegen.⁷⁸ Dit betekent dat de Informatiecommissaris de besluitvorming van het bestuursorgaan opnieuw moet doen, wat met zich brengt dat elk afzonderlijk document opnieuw bekeken dient te worden om te bepalen of openbaarmaking terecht is afgewezen (bij een beroep door de verzoeker) of terecht is toegewezen (bij beroep door een derde belanghebbende). Nu de reikwijdte van de Wob wordt uitgebreid, zowel met betrekking tot de organen die onder de Wob gaan vallen, als met betrekking tot de uitzonderingsgronden die allemaal relatief worden, is het zeer de vraag of de Informatiecommissaris in staat zal zijn alle administratieve beroepen binnen de in het voorstel opgenomen termijn van 10 weken af te handelen.⁷⁹

De vraag is voorts of de Informatiecommissaris naast het afhandelen van de administratieve beroepen nog in voldoende mate kan toekomen aan het verrichten van de overige taken.

Daarnaast is de Afdeling van oordeel dat de cumulatie van taken de effectiviteit van de Informatiecommissaris in de weg staat. Indien de toegevoegde waarde van de Informatiecommissaris vooral zou moeten liggen in het bewerkstelligen van een omslag in de cultuur bij de organen die de Wob moeten uitvoeren, zoals de toelichting stelt,⁸⁰ kan het problematisch zijn dat de Informatiecommissaris ook besluiten neemt in administratief beroep en dwangsommen kan opleggen. Een bestuursorgaan dat geconfronteerd wordt met problemen bij het afhandelen van een Wob-verzoek zal wellicht minder geneigd zijn om de Informatiecommissaris om advies te vragen indien deze vervolgens in een latere fase het administratieve beroep over ditzelfde verzoek moet afhandelen. Ook de taken van het geven van richtsnoeren hoe omgegaan moet worden met het openbaar maken van informatie en het opleiden van ambtenaren op dit terrein verhouden zich slecht met de rol die de Informatiecommissaris krijgt bij de bestuursrechtelijke handhaving van de Wob. Uit het rechtsvergelijkende onderzoek naar de interventiebevoegdheden van de Informatiecommissaris komt ook naar voren dat de meeste andere landen uitsluitend een adviesbevoegdheid aan deze Informatiecommissaris toekennen.⁸¹

De Afdeling adviseert het takenpakket van de Informatiecommissaris gelet op het bovenstaande nader te bezien.

c. Bevoegdheden van de Informatiecommissaris

Om zijn taken zoals hiervoor beschreven te kunnen vervullen krijgt de Informatiecommissaris een groot aantal handhavende en toezichthoudende bevoegdheden.⁸²

Deze bevoegdheden die de Informatiecommissaris krijgt ten behoeve van de uitoefening van zijn taken zijn:

- het opleggen van een last onder dwangsom aan het orgaan voor het niet naleven van in feite alle verplichtingen die voor hem op grond van de wet gelden.⁸³
- inlichtingen verlangen van een orgaan over de uitvoering van de wet;
- toegang hebben tot alle bij een orgaan berustende informatie;
- toegang hebben tot alle plaatsen waar zich informatie van een orgaan bevindt, behalve een woning;
- aanwezige informatie kopiëren of voor korte tijd meenemen ten einde elders kopieën te maken;
- getuigen onder ede horen.⁸⁴

In de toelichting wordt niet ingegaan op de noodzaak voor het toekennen van al deze bevoegdheden. De Afdeling onderkent dat de bevoegdheden voor een deel overeenkomen met die van de Nationale ombudsman. De Afdeling wijst er echter op dat, zoals hierboven reeds is gesteld, de Nationale ombudsman deze bevoegdheden uitsluitend kan aanwenden jegens een limitatief aantal bestuursorganen. De Informatiecommissaris gaat echter ook toezien op private instellingen. Met name de bevoegdheden tot het binnentreden en het meenemen van informatie strekken zeer ver. Bij het toekennen van deze bevoegdheden moet de noodzaak en de proportionaliteit overtuigend worden aangetoond.

De Afdeling adviseert het voorstel op dit punt nader te motiveren en zo nodig aan te passen.

8. Openbaarmaking adviezen Raad van State

Het voorstel schrapt artikel 26 van de Wet op de Raad van State. Dit artikel bevat een eigen openbaarmakingsregime voor de adviezen en voorlichtingen van de Afdeling advisering van de Raad van State en gaat daarmee voor op de algemene regeling van de Wob. Door het schrappen van dit artikel ontstaat de verplichting om de adviezen binnen drie dagen na vaststelling openbaar te maken. Ook de adviesaanvragen moeten op grond van het voorstel binnen drie dagen na ontvangst openbaar worden gemaakt.

De toelichting vermeldt dat adviezen en de daarop betrekking hebbende regelingen ingevolge artikel 26 van de Wet op de Raad van State pas openbaar worden bij indiening in de Tweede Kamer of bij bekendmaking op grond van het argument dat advisering in alle rust en kalmte moet plaatsvinden.⁸⁵ Dit argument heeft volgens de toelichting zijn kracht verloren, onder meer omdat voorstellen ter consultatie op internet worden gezet. De Afdeling wijst erop dat dit argument echter alleen voor de voorstellen zelf geldt en niet voor de adviezen van de Afdeling advisering. De toelichting gaat niet in op de reden waarom adviezen thans niet direct na vaststelling openbaar gemaakt worden. De reden hiervoor is dat het risico bestaat dat een weloverwogen reactie van de regering op de adviezen in gevaar komt. Een advies van de Afdeling kan reden zijn tot aanpassing van een voorstel voordat dit wordt ingediend. De beslotenheid van de fase van advisering biedt het kabinet de mogelijkheid om naar aanleiding van het advies van de Afdeling tot een vrije heroverweging te komen, zo is de heersende opvatting.⁸⁶

De Afdeling is van oordeel dat bovenstaande overwegingen hun geldingskracht hebben behouden. Indien niettemin een wijziging zou worden overwogen, geeft de Afdeling in overweging om een regeling op te nemen die vergelijkbaar is met artikel 24 van de Kaderwet adviescolleges. Dit artikel bepaalt dat de minister de kamers binnen drie maanden na ontvangst van een advies in kennis stelt van zijn standpunt hierover of anders gemotiveerd aangeeft waarom deze termijn niet haalbaar is. Denkbaar is dat een vergelijkbare bepaling wordt opgenomen in de Wet op de Raad van State met een nader door de wetgever te bepalen termijn. Een dergelijke regeling doet recht aan zowel aan de doelstelling van het bevorderen van de vrije heroverweging als aan het belang van het tijdig openbaar worden van de adviezen van de Afdeling. Een dergelijke regeling zou ook een oplossing kunnen bieden voor die gevallen waarin een reactie van de regering of van de indiener lange tijd op zich laat wachten of zelfs geheel uitblijft. In het laatste geval wordt het advies nooit openbaar⁸⁷ hetgeen betekent dat het advies geen rol kan spelen in een eventuele latere (maatschappelijke) discussie over dat onderwerp.

De Afdeling wijst er overigens op dat artikel 21a, tweede lid, van deze wet, over de openbaarmaking van voorlichtingen die zijn gegeven aan een van beide kamers der Staten-Generaal, in het voorstel niet wordt aangepast. In de toelichting wordt ook geen aandacht besteed aan het tijdstip van openbaarmaking van dergelijke voorlichtingen.

De Afdeling adviseert in de toelichting op het bovenstaande in te gaan en zo nodig het voorstel aan te passen indien alsnog wijziging van de bestaande regeling zou worden overwogen.

9. Overige opmerkingen

a. Correctheid en volledigheid van de verstrekte informatie

In artikel 2.4, vierde lid, wordt geregeld dat, indien het orgaan niet kan instaan voor de juistheid of volledigheid van de verstrekte informatie, het uitdrukkelijk een daartoe strekkend voorbehoud maakt. De toelichting stelt hierover dat, wanneer een orgaan willens en wetens minder betrouwbare informatie naar buiten brengt als ware deze betrouwbaar, transparantie en voorlichting trekken van propaganda dreigen aan te nemen die niet passen in een democratische rechtsstaat.⁸⁸ De Afdeling wijst erop dat deze bepaling slecht past in de systematiek van de Wob. Immers, een verzoeker hoeft niet te specificeren welke documenten hij wenst te ontvangen, maar uitsluitend het onderwerp waarop deze zien. Dit betekent dat het, met name bij grotere verzoeken, ook voor het orgaan dat het verzoek ontvangt, bijna onmogelijk is om met zekerheid te zeggen of de verstrekte informatie volledig is, mede in het licht van de korte termijnen waarbinnen een verzoek behandeld dient te worden. Dit zal in de praktijk al snel betekenen dat een orgaan bij een verstrekking voor de zekerheid een disclaimer moet opnemen omtrent de volledigheid van de gegeven informatie.

Met betrekking tot de juistheid van de verstrekte informatie is de voorgestelde bepaling eveneens moeilijk in de Wob in te passen. Een orgaan moet immers niet alleen informatie verstrekken die het zelf heeft opgesteld, maar ook ontvangen informatie van derden. Een orgaan dat een rapport van een derde in bezit heeft dat betrekking heeft op het onderwerp van het Wob-verzoek, zal dit in veel gevallen moeten verstrekken zonder dat het orgaan daarbij kan instaan voor de juistheid van dit rapport. Hetzelfde geldt bijvoorbeeld voor door derden ingezonden brieven die onder de strekking van het Wob-verzoek vallen. Ook in dit geval zal het orgaan daarom in zeer veel situaties moeten aangeven niet te kunnen instaan voor de correctheid van de verstrekte informatie.

Mede in het licht van het voorgaande is de Afdeling van oordeel dat in beide hiervoor bedoelde gevallen er geen sprake hoeft te zijn van het willens en wetens verstrekken van minder betrouwbare informatie. Daarnaast wordt niet duidelijk wat het gevolg is van een aantekening van het orgaan dat de verstrekte informatie niet volledig of correct is. De Afdeling wijst erop dat de vaste rechtspraak over de juistheid en volledigheid van de verstrekte informatie inhoudt dat verstrekking van informatie door het bestuursorgaan niet de weg opent naar een beoordeling van de juistheid van de informatie door de rechter.⁸⁹ Het is daarmee niet duidelijk in hoeverre het wel of niet opnemen van de disclaimer dat de verstrekte informatie mogelijk onvolledig of onjuist is, rechtsgevolgen heeft.

De Afdeling adviseert in het licht van het bovenstaande artikel 2.4, vierde lid, te schrappen.

b. Vertrouwelijke verstrekking

In artikel 5.1 van het voorstel wordt geregeld in welke gevallen de openbaarmaking van de informatie achterwege kan blijven. Openbaarmaking van informatie blijft achterwege voor zover openbaarmaking ernstig nadeel wordt toegebracht aan één van de belangen genoemd in het eerste lid van dat artikel, waaronder de veiligheid van de staat, de eenheid van de Kroon of de betrekkingen van Nederland met andere landen en staten en met internationale organisaties. Ondanks dat er sprake kan zijn van ernstig nadeel ten aanzien van deze belangen, kan de gevraagde informatie op grond van artikel 5.1, vierde lid, vertrouwelijk worden verstrekt aan de aanvrager wanneer klemmende redenen deze verstrekking rechtvaardigen. Van deze situatie is volgens de toelichting sprake, als blijkt dat het achterwege blijven van openbaarmaking van informatie voor een bepaald individu onevenredig nadelig blijkt te zijn.⁹⁰ Een dergelijke vertrouwelijke verstrekking maakt een inbreuk op het uitgangspunt van de Wob dat informatie die aan één persoon wordt verstrekt daarna voor een ieder openbaar is. Uit de toelichting wordt niet duidelijk in welke gevallen een dergelijke vertrouwelijke verstrekking aan de orde zou moeten zijn. In de eerder genoemde evaluatie van de Universiteit van Tilburg wordt gewezen op de praktijk met betrekking tot verzoeken om inzage ten behoeve van wetenschappelijk onderzoek.⁹¹ Het artikel ziet in ieder geval niet op verzoeken om inzage in documenten die betrekking hebben op het dossier dat een orgaan over de verzoeker heeft. Hiervoor gelden specifieke regelingen die los staan van de Wob.⁹² Waar het persoonsgegevens betreft is daarnaast het inzagerecht van de Wet bescherming persoonsgegevens van toepassing.⁹³

In de toelichting wordt niet ingegaan op de vraag welke problemen de huidige regeling in de Wob oplevert met betrekking tot inzage in informatie voor wetenschappelijk onderzoek. De Afdeling is van oordeel dat, indien het de bedoeling is dat artikel 5.1, vierde lid, uitsluitend moet dienen voor het kunnen toestaan van inzage voor wetenschappelijk onderzoek, deze beperking in de wet moet worden geregeld. Indien er andere gevallen bestaan waarin vertrouwelijke verstrekking wenselijk zou kunnen zijn,⁹⁴ adviseert de Afdeling om in de toelichting specifiek aan te geven aan welke gevallen gedacht moet worden en waarom in die gevallen vertrouwelijke verstrekking noodzakelijk is. De Afdeling adviseert de toelichting aan te vullen en zo nodig het wetsvoorstel aan te passen.

c. Sancties overtreden van de voorwaarden aan vertrouwelijke verstrekking

Aan de zogenoemde selectieve verstrekking, besproken in punt b., kunnen voorwaarden worden verbonden. Een voorbeeld is dat de verzoeker de verstrekte informatie niet of slechts beperkt verder mag verspreiden.⁹⁵ De vraag die in het voorstel noch in de toelichting wordt beantwoord, is op welke manier het overtreden van een dergelijke voorwaarde van een sanctie kan worden voorzien. Een dreiging van een serieuze sanctie is wezenlijk, nu de schade aan de in het geding zijnde belangen die het overtreden van de gestelde voorwaarden kan veroorzaken, ernstig kan zijn. De Afdeling adviseert het voorstel aan te passen en een sanctie op te nemen voor het schenden van de voorwaarden aan vertrouwelijke verstrekking.

d. Openbaarmaking na vijf jaar

Artikel 5.1, derde lid, regelt dat informatie die niet openbaar is gemaakt vanwege een ernstig nadeel dat deze openbaarmaking zou toebrengen aan een van de belangen genoemd in artikel 5.1, eerste lid, alsnog openbaar gemaakt wordt, wanneer meer dan vijf jaren zijn verstreken sinds het ontstaan van het belang, tenzij het orgaan een besluit neemt waaruit blijkt dat hetzelfde belang zich nog steeds verzet tegen de openbaarmaking. De Afdeling wijst erop dat in de Archiefwet 1995 reeds bepalingen zijn opgenomen over de openbaarheid van in het verleden opgestelde documenten. De Archiefwet 1995 verplicht overheidsorganen om overheidsinformatie voor bepaalde tijd te bewaren en toegankelijk te maken. De wet bevat minder uitzonderingsgronden voor openbaarheid dan de Wob, waardoor een aantal weigeringsgronden uit de Wob door het verouderen van de betrokken informatie hun toepasselijkheid verliezen. Bij de totstandkoming van de Wob is hierover opgemerkt: 'De Archiefwet dient een nog grotere mate van openbaarheid van overheidsdocumenten te verzekeren dan aanwezig is in de fase waarin de stukken nog betrekking hebben op het actuele doen en laten van de overheid.'⁹⁶ De termijn voor het overbrengen van documenten naar een archiefbewaarpplaats is twintig jaar. Uit de

toelichting blijkt niet wat de verhouding is tussen de voorgestelde bepaling 5.1, derde lid en de Archiefwet 1995.

Daarnaast roept de voorgestelde bepaling 5.1, derde lid, verschillende vragen op. Ten eerste is niet duidelijk vanaf welk moment de termijn van vijf jaar begint te lopen, omdat bijvoorbeeld niet duidelijk is wanneer, volgens de terminologie van het voorstel, kan worden gesteld dat het belang van de eenheid van de Kroon is ontstaan. Ten tweede is niet duidelijk of de beslissing om de informatie na vijf jaar alsnog openbaar te maken, door het bestuursorgaan zelf moet worden genomen en op eigen initiatief of dat daartoe een verzoek moet worden gedaan. Indien het eerste het geval zou zijn acht de Afdeling de bepaling niet goed uitvoerbaar. De Afdeling adviseert daarom van deze bepaling af te zien.

e. De mogelijkheid om bij amvb bijlage I van de wet te wijzigen

In artikel 8.7 van het voorstel wordt bepaald dat bij algemene maatregel van bestuur bijlage 1, waarin de lijst van rechtspersonen of instellingen met een publieke taak is opgenomen, kan worden gewijzigd. De Afdeling wijst erop dat een bijlage bij een wet integraal onderdeel is van deze wet.⁹⁷ Dit betekent dat een dergelijke bijlage ook op het niveau van een formele wet dient te worden gewijzigd.⁹⁸ Het wijzigen van een formele wet door middel van een algemene maatregel van bestuur is onwenselijk, omdat dit vragen oproept over de status van de aldus gewijzigde bepaling.⁹⁹ De Afdeling adviseert daarom artikel 8.7 te schrappen.

Noten

1 Kamerstukken II 1985/86, 19 014, nr. 5, blz. 6. Later bevestigd in Kamerstukken II 2001/02, 28 362, nr. 2, blz. 3.

2 Als het gaat om openbaarheid in bredere zin kan ook nog worden gewezen op artikel 66, eerste lid (openbaarheid van de vergaderingen van de Staten-Generaal), artikel 80, eerste lid (openbaarheid van adviezen) en artikel 88 en 89, derde en vierde lid (bekendmaking van wetten en andere vanwege het Rijk vastgestelde algemeen verbindende voorschriften) van de Grondwet.

3 Hierbij speelde een rol dat de Hoge Raad in het Televisiearrest had beslist dat in het algemeen aan artikel 10 EVRM jegens overheidsorganen geen recht kan worden ontleend op verstrekking van onder de overheid berustende gegevens, HR 25 juni 1965, NJ 1966, 116.

4 Openbaarheid openheid, Rapport van Commissie Heroriëntatie Overheidsvoorlichting, Staatsuitgeverij 's- Gravenhage 1970.

5 De Raad onderkende dat het recht om goed en objectief geïnformeerd te worden behoort tot de rechten van burgers, maar dat het gezag der overheid betrokken dient te worden bij de bepaling van de wijze waarop dit recht kan worden uitgeoefend. Een algemeen recht op informatie werd daarom door de Raad afgewezen, een dergelijke verplichting was alleen nodig waar een democratische bestuursvoering dat wenselijk maakte, zie het advies van de Raad van State over de nota 'Openheid en openbaarheid van bestuur', Kamerstukken II 1970/71, 10 946, nr. 2.

6 Kamerstukken II 1974/75, 13 418, nrs. 1-4, blz. 8-9.

7 Zie het rapport 'Grondrechten in het digitale tijdperk' van de Commissie Franken. Na het kritische advies van de Raad van State is het regeringsvoorstel met deze strekking echter niet verder in procedure gebracht. Zie het advies van 24 januari 2002 betreffende het voorstel van wet houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot opnemning in de Grondwet van een bepaling inzake een recht op toegang tot en een zorgplicht voor de toegankelijkheid van de bij de overheid berustende informatie (W01.01.0464/l).

8 Kamerstukken II 1986/87, 19 859, nr. 3.

9 Gewijzigd is wel de wijze waarop bestuursorganen waarop de Wob van toepassing is, worden aangewezen. Voorts is in 2005 een aantal specifieke bepalingen over de openbaarheid van milieu-informatie in de wet opgenomen in verband met de implementatie van het Verdrag van Aarhus. In verband met de implementatie van EU-regelgeving is het hoofdstuk over hergebruik aan de Wob toegevoegd. Ten slotte zijn bij de invoering van de Wet dwangsom bij niet tijdig beslissen de beslistermijnen verruimd. 10 Zie ondermeer het rapport 'Wob en ICT' van de Vrije Universiteit uit 2000 en de adviezen van de Commissie Toekomst Overheidscommunicatie en de Commissie ICT en overheid uit 2001.

11 Gij zult openbaar maken. Naar een volwassen omgang met overheidsinformatie, Raad voor het openbaar bestuur, september 2012.

12 Het onderzoek naar het misbruik van openbaarheidsregels door de Universiteit Utrecht in 2010, "Vexatious requests: anti-misbruikregelingen van openbaarheidswetgeving. Een onderzoek naar de regeling in het Verenigd Koninkrijk en enkele andere landen die het Raad van Europa-verdrag inzake toegang tot documenten hebben ondertekend." 13 Richtlijn 90/313/EEG van de Raad van 7 juni 1990 inzake de vrije toegang tot milieu-informatie.

14 Verordening 1049/2001.

15 Richtlijn 2003/98/EG van het Europees Parlement en de Raad van 17 november 2003 inzake het hergebruik van overheidsinformatie (PbEG L345/90).

16 Voorstel voor een richtlijn van het Europees Parlement en de Raad tot wijziging van de Richtlijn 2003/98/ EG inzake het hergebruik van overheidsinformatie COM (2011) 877, 12 december 2011.

17 De regering heeft laten weten op hoofdlijnen positief te staan tegenover deze voorstellen, met uitzondering van de uitbreiding van de reikwijdte naar archieven, bibliotheken en musea en het instellen van een nationale toezichthouder. Zie Kamerstukken II 2011/12, 22 112, nr. 1338.

18 Dit verdrag is in 1998 tot stand gekomen en in 2004 geratificeerd door Nederland.

19 Reeds geïmplementeerd in de huidige Wob.

20 Daarnaast geldt artikel 19 IVBPR. Over dit artikel is in 2011 een General Comment verschenen waarin de Human Rights Committee stelde dat artikel 19 het recht omvat op toegang tot overheidsinformatie. Om dit recht effectief te maken hebben Staten de verplichting om zoveel mogelijk actieve openbaarmaking na te streven. Zie Human Rights Committee, General Comment No. 34, 2011, paragraaf 18-19.

21 EHRM 18 mei 2004, Eccleston vs. Verenigd Koninkrijk. Zo werd in 2004 door het Hof overwogen dat het artikel geen verplichting meebrengt voor anderen om informatie te verschaffen.

22 EHRM 14 april 2009, Társagág a Szabadágjogokért vs. Hongarije. In een zaak tegen Hongarije constateerde het Hof een schending van artikel 10 omdat een verzoek om informatie aan het Hongaarse Constitutionele Hof over een door een Hongaars parlementslid bij het Hof aanhangig gemaakte zaak was afgewezen. De hoedanigheid van de verzoeker (een

mensenrechtenorganisatie) en de aard van de gevraagde informatie speelden hierbij een rol. Ook in een latere zaak is een dergelijke lijn door het Hof gevolgd, zie EHRM 26 mei 2009, Kenedi vs. Hongarije.

23 ABRvS 19 januari 2011, LJN BP1316.

24 EHRM 19 februari 1998, Guerra vs. Italië. Zie in dit verband ook EHRM 19 oktober 2005, Roche vs. Verenigd Koninkrijk, EHRM 9 juni 1998, McGinley en Egan vs. Verenigd Koninkrijk en EHRM 30 november 2004, Öneriyildiz vs. Turkije (recht op toegang tot informatie over milieuaangelegenheden ook in het kader van artikel 2 EVRM, recht op leven).

25 S. van der Hof, J.E.J. Prins, G. Leenknecht, T. Brandsen en M. de Vries, Over wetten en praktische bezwaren, Een evaluatie en toekomstvisie op de Wet openbaarheid van bestuur. Universiteit van Tilburg, Tilburg 2004.

26 Daarbij gaat het niet alleen om het kiesrecht maar om de democratische burgerrechten in bredere zin zoals de vrijheid van meningsuiting in al zijn relevante aspecten.

27 Zie in dit verband ook J. Peters, Wie zijn zij? De ambtenaren: rede uitgesproken op 1 april 2011 bij het afscheid als hoogleraar Staatsrecht aan de Universiteit van Amsterdam, 2011, blz. 20-22.

28 E.J. Daalder, Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid, 2005, blz. 12.

29 Deze rol van de pers wordt ook onderstreept in de vaste rechtspraak van het EHRM. Hierover Jacobs, White & Ovey, The European Convention on Human Rights, Oxford University Press 2010, blz. 432 e.v.

30 Een voorbeeld hiervan is het op grote schaal openbaar maken van informatie over de Amerikaanse overheid door Wikileaks.

31 Op deze incrementele benadering wijst Gerards met verwijzing naar diverse voorbeelden uit de Straatsburgse rechtspraak. Zie J.H. Gerards, Het prisma van de grondrechten, Oratie RUN, Nijmegen 2011, blz. 8.

32 In dezelfde zin E.J. Daalder, Handboek openbaarheid van bestuur, 2011, blz. 13.

33 Deze randvoorwaarde komt in concrete zin tot uitdrukking in de wettelijke bepalingen inzake intern beraad en persoonlijke beleidsopvattingen. Zie voor een nadere uitwerking hierna par. 5.

34 De Afdeling wijst erop dat volgens de rechtspraak de documenten die ontstaan gedurende de kabinetsformatie niet automatisch onder de werkingssfeer van de huidige Wob vallen, aangezien een informateur geen bestuursorgaan is en ook geen onderdeel uitmaakt van het ministerie van Algemene Zaken. Zie ABRvS 6 mei 2004, Mediaforum 2004-6, nr. 25 m.nt. A.W. Hins en AB 2004, 200, m.nt. P.J. Stolk.

35 Hierbij kan ook worden gedacht aan de situatie dat een gemeente een contract wil sluiten met een private partij. Hierbij is het van belang dat deze private partij geen kennis heeft van bijvoorbeeld het maximum bod dat de gemeente kan doen.

36 Zie in dit verband H.R.B.M. Kummeling, Relatieve geheimhoudingsplichten, Deventer 1997.

37 Ervan uitgaande dat uit deze bepaling onder omstandigheden het recht op toegang tot overheidsinformatie inhoudt.

38 Over wetten en praktische bezwaren. Een evaluatie en toekomstvisie op de Wet openbaarheid van bestuur, Universiteit van Tilburg 2004, blz. 52.

39 Idem.

40 Toelichting, paragraaf 1.1, derde alinea.

41 Toelichting, paragraaf 2.4, negende alinea.

42 Toelichting, paragraaf 1.1, tweede alinea.

43 Zie ook het Rob rapport Gij zult openbaar maken. Naar een volwassen omgang met overheidsinformatie, september 2012, paragraaf 2.3.4.

44 Met name in de toelichting, paragraaf 4.6.

45 Toelichting, paragraaf 1.1, vijfde alinea.

46 Deze punten zullen in het vervolg van het advies nog nader worden toegelicht.

47 Kennelijk wordt ervan uitgegaan dat het enkel oprichten van een rechtspersoon door de overheid of het feit dat de overheid daarin aandelen heeft (om hoeveel aandelen het moet gaan blijkt niet uit het voorgestelde artikel 2.1, eerste lid, onderdeel c onder 2) gelijk is aan het hebben van overwegende invloed door de overheid op die rechtspersoon.

48 Het valt bijvoorbeeld op dat er een verschil is tussen de organen van artikel 2.2 onder b, waarbij het moet gaan om instellingen met jaarlijkse inkomsten van meer dan € 100.000 en organen van artikel 2.2 onder c, 2°, waarbij geen minimum financiële omvang wordt genoemd.

49 Advies van de Raad van State van 27 augustus 2010 over het voorstel van wet houdende regels inzake de normering van bezoldigingen bij organisaties die volledig of in aanzienlijke mate uit publieke middelen worden bekostigd (Wet normering uit publieke middelen bekostigde bezoldiging topfunctionarissen), W04.10.0178/l.

50 Toelichting, paragraaf 1.1.

51 Wat betreft de voorgestelde controle op semipublieke instellingen, dient te worden opgemerkt dat het begrip semipubliek in Nederland geen juridische betekenis heeft. Het onderscheid betreft slechts publieke en niet publieke, en dus private, organen.

52 In het verlengde hiervan rijst de vraag of de vergaande verplichtingen tot openbaarmaking die voor deze private organisaties op grond van het voorstel zullen gelden niet zo ver zullen reiken dat in sommige gevallen sprake kan zijn van inbreuk op het recht op eigendom zoals gegarandeerd in artikel 1, Eerste Protocol, EVRM. Het gaat hier immers om informatie die toebehoort aan private instellingen. Voor zover deze informatie op geld waardeerbaar is, is er sprake van eigendom in de zin van dat artikel. Volgens vaste jurisprudentie van het EHRM is het begrip eigendom in het EVRM namelijk niet beperkt tot fysieke zaken. Zie bijvoorbeeld EHRM, Anheuser-Busch Inc. t. Portugal, arrest van 11 januari 2007, nr. 73049/01, § 63." In dat arrest oordeelde het Hof: The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (...).

53 Kamerstukken II 1986/87, 19 859, nr. 3, blz. 38: "De beperking van de openbaarheid beoogt te bewerkstelligen dat bij de primaire vormgeving van het beleid de betrokkenen in alle vrijheid hun gedachten en opvattingen kunnen uiten."

54 Toelichting, paragraaf 4.6.2, onder g.

55 Artikel 5.1, onder g.

56 Toelichting, paragraaf 4.6.2, onder g.

57 Het huidige artikel 11, tweede lid, van de Wob bepaalt reeds dat de informatie over persoonlijke beleidsopvattingen kan worden verstrekt indien degene die deze opvattingen heeft geuit of zich erachter heeft gesteld, daarmee heeft ingestemd. In de memorie van toelichting is hierover destijds echter gesteld: "Daarnaast zal, gelet op de verantwoordelijkheid voor de bestuursvoering van het overheidsorgaan, ook na instemming van betrokkenen, het overheidsorgaan de vrijheid moeten hebben om de informatie niet te verschaffen." Kamerstukken II 1986/87, 19 859, nr. 3, blz. 38. Deze vrijheid van het bestuursorgaan om, ondanks toestemming van de betrokkene, niet tot verschaffing over te gaan is bevestigd in de rechtspraak. Zie onder meer ABRvS 17 februari 2010, nr. 200906298/1/H3.

58 Zie in dezelfde zin het regeringsstandpunt in de memorie van antwoord bij de huidige Wob, Kamerstukken II 1987/88, nr. 6, blz. 13-14. Zie ook hierna.

59 Kamerstukken II 1987/88, 19 859, nr. 6: "Ambtenaren [dienen] de vrijheid te hebben ongehinderd hun bijdrage te leveren aan de beleidsvoorbereiding of – uitvoering, en daarover te studeren, te brainstormen, anderszins te overleggen, nota's te schrijven etc. Zij moeten [...] in alle openhartigheid onderling functioneel kunnen communiceren, en ook openhartig met 'hun' bewindspersonen. Het is juist ter bescherming van hun rechtspositie, dat die communicatie niet a priori openbaar zou moeten zijn. Ambtenaren lopen dan het risico dat hun opvattingen in de politieke en publieke opinie tegen elkaar en tegen de opvattingen van 'hun' ministers uitgespeeld worden. Zij dreigen dan gemakkelijk betrokken te worden in een politieke discussie, terwijl in het kader van de ministeriële verantwoordelijkheid niet de opvattingen van ambtenaren staatsrechtelijk relevant zijn, maar juist de opvattingen van bewindspersonen." Overigens impliceert deze opvatting dat individuele ambtenaren er alleen aanspraak op kunnen maken dat zij niet betrokken worden in een politieke discussie, indien zij zelf zich in het openbaar terughoudend opstellen.

60 Hoewel in de toelichting slechts over de bescherming van persoonlijke opvattingen van de ambtenaar wordt gesproken, rijst voorts de vraag in hoeverre het voorgestelde artikel 5.1, eerste lid, onder g ook van toepassing is op semipublieke instellingen. Aandacht dient te worden besteed aan de arbeidsrechtelijke gevolgen die verstrekking van gegevens door een medewerker van een dergelijke instelling (buiten het bestuur om) voor hem kan hebben (verstoorde arbeidsrelatie of zelfs ontslag).

61 Zie E.J. Daalder, Toegang tot overheidsinformatie, 2005, blz. 168 e.v.

62 Toelichting, paragraaf 4.6.2, onder g.

63 Wat betreft de voorgestelde openbaarmaking van documenten waarin beleidsalternatieven aan de orde komen, wijst de Afdeling er overigens op dat op grond van Aanwijzing 212 van de Aanwijzingen voor de regelgeving als richtlijn geldt dat dergelijke alternatieven reeds in de toelichting bij de voorgenomen regeling worden beschreven. Het is de minister zelf die eindverantwoordelijkheid draagt voor het openbaar maken ofwel het naar buiten brengen van een dergelijke toelichting en daarmee de overwogen alternatieven. De beantwoording van de vraag of deze aanwijzing in de praktijk altijd wordt opgevolgd is voor het principe dat het de minister zelf eindverantwoordelijk is voor de openbaarmaking van beleidsalternatieven niet van belang.

64 Het voorgestelde artikel 3.2.

65 Het voorgestelde artikel 3.3.

66 Het voorgestelde artikel 2.4. Zie ook de uitzonderingen op de plicht om informatie in elektronische vorm openbaar te maken in het derde lid van het voorgestelde artikel 2.4.

67 In dit verband kan worden gewezen op de wetgeving van Groot-Brittannië vrij nauwkeurig is bepaald dat een orgaan een verzoek mag afwijzen indien het voldoen hieraan te hoge kosten met zich meebrengt. Zie artikel 12 van de Freedom of Information Act 2000 en The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

68 Kamerstukken II 2010/11, 32 802, nr. 1.

69 Toelichting, paragraaf 1.1.

70 Toelichting, paragraaf 4.7.1.

71 Toelichting, paragraaf 4.8, eerste alinea.

72 Het voorgestelde artikel 7.2.

73 Het voorgestelde artikel 7.3.

74 Het voorgestelde artikel 8.2, vierde lid.

75 Toelichting, paragraaf 5.2, vierde alinea.

76 Artikel 1a, eerste lid, Wet Nationale ombudsman.

77 Artikel 9:23 Awb.

78 Toelichting, paragraaf 4.8.2, vierde alinea.

79 Ter illustratie kan er op worden gewezen dat de Afdeling bestuursrechtspraak in de afgelopen jaren gemiddeld zo'n 60 uitspraken per jaar heeft gedaan in Wob-zaken. Aangenomen mag worden dat het aantal administratieve beroepen hoger zal zijn dan dit aantal omdat op grond van de huidige wet via de bezwaarprocedure een aantal zaken reeds in den minne worden afgehandeld en na de uitspraak van de rechtbank ook niet steeds hoger beroep wordt ingesteld.

80 Toelichting, paragraaf 4.8, eerste alinea.

81 Rapport 'De Informatiecommissaris', Rijksuniversiteit Groningen, 2007, blz. 8.

82 Deze bevoegdheden komen overeen met die van de Nationale Ombudsman.

83 Het voorgestelde artikel 7.5.

84 Het voorgestelde artikel 7.4.

85 Toelichting, paragraaf 4.3.1, Raad van State, tweede alinea.

86 Kamerstukken II 2000/01, 27 400 VII, nr. 17.

87 Zie bijvoorbeeld Kamerstukken II 2000/2001, 27 236 en Kamerstukken II 2000/01, 27 611.

88 Toelichting, Artikelsgewijs, artikel 2.4.

89 Zie onder meer ABRvS 25 februari 2000, nr. 199902378/1 (Gst. 2000, 7123, 5 C.P.J. Goorden) en ABRvS 1 juli 2009, nr. 200807557/1/H3 (AB 2009, 289 m.nt. P.J. Stolk).

90 De hier voorgestelde regeling over selectieve openbaarheid is gebaseerd op het voorstel gedaan in het Tilburgse rapport Over wetten en praktische bezwaren. Een evaluatie en toekomstvisie op de Wet openbaarheid van bestuur, Universiteit van Tilburg 2004, blz. 20 e.v.

91 Over wetten en praktische bezwaren. Een evaluatie en toekomstvisie op de Wet openbaarheid van bestuur, Universiteit van Tilburg 2004, blz. 21.

92 Toelichting, paragraaf 2.2, tweede alinea.

93 Artikel 35 Wbp.

94 Gedacht kan worden aan vertrouwelijke verstrekking van gegevens van een kind dat in een inrichting zelfmoord heeft gepleegd, aan zijn ouders. Deze gegevens zijn alleen voor de ouders van belang. Zie in dit verband ABRvS, 27 april 2011, LJN BQ2643.

95 Toelichting, paragraaf 4.6.1.

96 Kamerstukken II 1986/87, 19 859, nr. 3, p. 11-12.

97 Zie aanwijzing 94 van de Aanwijzingen voor de regelgeving.

98 Zie aanwijzing 34 van de Aanwijzingen voor de regelgeving.

99 Zie aanwijzing 223 van de Aanwijzingen voor de regelgeving.

- The archival mess has to be addressed and may not backfire on Wob-requesters
Most people present added that the exemptions have to be reformulated, more narrow and more in line with national and international jurisprudences and treaties like Aarhus and Tromsø.

- May 31 2011 Minister Donner publishes his 16 pages Wob letter. The two on Mar 3rd launched cutbacks are gone.
The Wob users won the first battle but alertness is needed.
- The week after May 3 Loads of reactions [press, civil society, academics, parliament] on Donner's speech. The uproar was louder and broader than expected at the ministry. Almost all reactions were negative. Two groups of exceptions:
- The lobby for charging for so-called 'commercial' requests.
 - The lobby organization of municipalities, the VNG, advises municipalities to charge for processing Wob-request. All courts and the high court [Hof Den Bosch] have ruled that this behavior is illegal.
- May 3 2011 On the Day of the Freedom of the Press minister Donner delivered his Declaration of War. Two key points:
- Narrowing down the scope of the Wob [a.o.: All documents regarding the decision making should be exempted / introducing: governance intimacy]
 - Introducing thresholds to limit the number and the size of Wob-requests
- Feb/Mar 2011 Updating the Wob changed suddenly in: Limits to the Wob.
At the same time the high ranking civil servant got a ban on public speaking.

STAGE 4 – 2000-2010 – OBSTRUCTION GROWING INTO A COLD WAR

- 2010 After the collapse of the Balkenende IV cabinet high ranking civil servants at the Constitutional department of the Ministry of Internal Affairs started working on updating the FOI information and are preparing a modernisation.
Open lines with practitioners and academics were re-established.
- 2009 Disaster year
1. The Fine law came into power. A govt body which does not meet decision deadlines has to pay a fine per day delay, mounting up to 1,260 euro. A stupid law which is very attractive for gold diggers [these are people who understand statistics and see that in 60% of all cases the govt body will not meet the deadline. It is quite easy to earn 20-50.000 euro a year using this law]. And of course the minister calls this misuse....
 2. The deadline for the first decision changes from 2x14 days into 2x28 days, which means that the Wob is now one of the slowest FOIAs worldwide.
 3. The Netherlands does not sign the Tromsø Treaty. A Council of Europe treaty years before initiated by..... the Netherlands
- 2007 Cold War; Cabinet Balkenende IV, the era with Minister Ter Horst.
- 2006 After the failed reform debate the imperious govt style took over and the obstruction changed into the making of a war. A whole range of strange, false and stupid accusations started to color the debate, among them:
- Lazy journalism, false
 - Wob causes a gigantic workload, false, but irrational = strong
 - Vexatious requests are a problem, false
 - Misuse, false
- 2005-2006 [The Wob reform debate starts with a wake up article in NRC Handelsblad and a parliament paper called: Open the Oyster.](#)
The minister in charge, Pechtold, suggested to parliament not to discuss the

Monitor and Open the Oyster. In his view these products contained very serious critics, so serious that he preferred a whole new Wob. The parliament supported the ministers decision.

This was an idiot and the Wob harming decision: A normal proceeding would have been: first debate, than criteria and at the end the draft making.

The result was a not usable draft for a new Wob [Awo] AND much more important: It killed the yearly parliamentary debates on the Wob.

- 2004 The newest edition of the Wob monitor made by the University Tilburg was never discussed in parliament. This Wob monitor appeared to be the last one. Minister Ter Horst stopped this every 5 year updated monitor.
- 2000-2002 During the cabinets Kok II and Balkenende I the government style changed into a more and more imperious one. Among others resulting in more control over government communication and more obstruction in the Wob.
- 2000-2010 For the first time requesting on a visible scale starts at lower govt. bodies. It grew from a couple of dozen for all municipalities, provinces, water bodies, etc. per year into a couple of thousand.

STAGE 3 – 1990-2000 – THE AWAKENING DECADE

- 1990-2000 The Dutch started to control their executive in this decade. As a result investigative journalism grew, the number of parliamentary inquiries rose and as a result of this awakening the number of Wob request rose also. The volume of Wob requests filed at national bodies grew via about 100 in 1990 and 1,000 per year in the mid-nineties to 1,400 in 2005.

STAGE 2 – 1980-1990 – THE SLEEPING DECADE

- 1980-1990 The Wob had a very slow start. In total on national level there were only a couple of hundred requests filed in ten years time. Lots of them were filed by José Toirkens of NRC Handelsblad. She and Arthur Maandag, of Haarlems Dagblad, are the founders of the, journalistic, use of the Wob.

STAGE 1 – 1970-1980 – 1ST DUTCH FREEDOM OF INFORMATION WAR

- May 1 1980 Wob in power
- 1978 Wob approved
- 1970-1978 A whole range of Wob drafts met obstruction in parliament and in cabinets. Two persons, both prime-minister, were very much opposed and used all kinds of obstruction. The Christian-democrat De Jong and the Labour-leader Den Uyl

►► Fringe Toolbox - FOIA & Wob

1. General FOI Overview Sites and Guides

Access Info Europe	[FOI Lobby Organisation / EU] www.access-info.org
The Access Initiative [TIA]	[A global coalition promoting access] www.accessinitiative.org/
Article 19	[Freedom of opinion and expression / UK] www.article19.org and www.article19.org/docimages/1112.htm [for a FOIA model]
Carter Center	[Access to information project / US] www.cartercenter.org/peace/americas/information.html
Centre for Law and Democracy	[research and legal work focussing on FOI / Canada] www.law-democracy.org
Charter 88	[Monitors a.o. openness and devolution / UK] www.charter88.org.uk/home.html
Commonwealth Human Rights Initiative	[Monitors the level of freedom of information] www.humanrightsinitiative.org/programs/ai/rti/rti.htm
Council of Europe	[The recommendation 2002-2 on FOIA's] www.coe.int
FOIANet	[Worldwide exchange of FOI information / Madrid based] www.foiadvocates.net
FOI Laws of the World	[FOI Lobby Organisation / OSJI / OSI] www.justiceinitiative.org/activities/foioe/foi/foilaws/index_html?start:int=20
FOI Resources	[National and foreign FOI law from Prof. Alasdair Roberts] http://faculty.maxwell.syr.edu/asroberts/foi/
FOIA Asia	[FOI in Asia] http://foi-asia.org/ and http://homepage1.nifty.com/clearinghouse/main.html
Freedominfo	[A one-stop Portal on FOI Worldwide] www.freedominfo.org
Knight Center	[Latin American media news, with good emphasis on FOIA] http://knightcenter.utexas.edu/blog/?q=en/blog
Legal Leaks	[A guide on access govt information / Access Info + N Ost] www.legalleaks.info/toolkit.html
Privacy International	[WatchDog on surveillance / site in liaison with EPIC / UK] www.privacyinternational.org/
Publish What You Pay	[Campaign founded by a.o. Transparency UK and OSI] www.publishwhatyoupay.org/english/
Right 2 Info	[FOIA Worldwide by OSI] www.right2info.org
Statewatch	[Superb Watchdog, a.o. on FOI in EU / UK] www.statewatch.org/foi.htm
Transparency International	www.transparency.org/global_priorities/access_information
Wobbing Europe	[European Freedom of Information / EU] www.wobbing.eu

2. Countries

Australia

All About Access	Rick Snell, senior law lecturer University of Tasmania] http://informationandaccess.blogspot.com/
Freedom of Information Review	[University of Tasmania, Australia] www.law.utas.edu.au/foi/foi_rev.html
Open and Shut	[Peter Timmins] http://foi-privacy.blogspot.com/

Bangladesh

Right to Information - CRTI [The blog of Campaign for Right to Information]
<http://lutfulhaq.wordpress.com/>

Bulgaria

AIP: Access to Information Programme [FOI NGO]
www.aip-bg.org

Canada

CAPA [Canadian Access and Privacy Association]
www.capa.ca

CAPAPA [Can Assn of Professional Access and Privacy Administrators]
www.capapa.org

CLD [Center for Law and Democracy]
www.law-democracy.org

FIPA [British Columbia's FOI and Privacy Association]
www.fipa.bc.ca

China

FOI China [Ben Weibing Xiao, ass. professor Shanghai University]
<http://foichina.blogspot.com/>

Germany

FOIA in Bundesländern [Bayern/Bavaria]
www.informationsfreiheit.org/ifg-start.html

[Brandenburg]
www.lda.brandenburg.de/sixcms/detail.php?id=68313&template=allgemein_lda

[Berlin]
www.datenschutz-berlin.de/recht/bln/ifg/ifg.htm

[Schleswig-Holstein]
www.datenschutzzentrum.de/material/recht/infofrei/infofrei.htm

[Nordrhein-Westfalen]
www.lfd.nrw.de/fachbereich/fach_0_komplett.html

FOIA in Germany [The German FOIA: IFG on the site of the Ministry of Justice]
www.gesetze-im-internet.de/ifg/BJNR272200005.html

Frag den Staat [FOIA portal]
<https://fragdenstaat.de/>

Informationsfreiheit [Blog on Implementation of FOI in Germany / Germany]
www.informationsfreiheitsgesetz.net/blog/

Transparency Int. - Deutschland [Comment on IFG]
www.transparency.de/Informationsfreiheit.85.0.html

India

India Right to Information
<http://indiarti.blogspot.com/>

Nat. Camp. For People's Right to Info [FOI in India]
www.righttoinformation.org/

RTI India
www.rtiindia.org

Ireland

FOI Law Page [Project of the Law Faculty of the University of Cork]
www.ucc.ie/law/lawonline/foi_links.shtml

The Story [Blog by Gavin Sheridan]
www.thestory.ie/

Netherlands

Big Wobber [Index of some successful Dutch FOIA requests]
www.bigwobber.nl

Fringe Spitting: FOIA and Wob [Free of charge biweekly email journal / in Dutch and English]
roger.vleugels@planet.nl
 De nieuwe Wob Wetsvoorstel voor een nieuwe Wob van juni 2012
www.nieuwewob.nl
 Woberator [Interactive Wob course / in Dutch]
www.woberator.nl
 Wobpagina Villa Media [FOI snippets of the NVJ: journalists trade union / in Dutch]
www.villamedia.nl/thema/wet-openbaarheid-van-bestuur/

Romania

Apador: Romanian Human Rights [FOI NGO / Romanian Helsinki Committee]
www.apador.org

Russia

Svoboda Info [The Institute for Information Freedom Development]
www.svobodainfo.org/en

South Africa

Open Democracy Advice Centre [FOI in South Africa]
www.opendemocracy.org.za/
 South African History Archive [FOI in South Africa]
www.saha.org.za

United Kingdom

BBC FOIA Guide
www.bbc.co.uk/dna/ican/A2515790
 Campaign for FOI in Scotland [The site for Scotland]
www.cfoi.org.uk/scotland.html
 Campaign for FOI in the UK [The site for the UK]
www.cfoi.org.uk
 CFOI FOIA Guide
www.cfoi.org.uk/pdf/foi_guide.pdf
 FOI in the UK
www.freedomofinformation.co.uk/
 FOI in Wales
www.foi-cymru.org/home.html
 FOIA
www.parliament.uk/commons/lib/research/rp2004/rp04-084.pdf
 FOIA Blog
<http://foia.blogspot.com/>
 FOIA Man {Anonymous practitioner}
<http://foiman.com/>
 FOIA News UK FOI news, edited by DataNews journalist Matthew Davis]
www.foinews.co.uk/
 Guardian - FOI
www.guardian.co.uk/politics/freedomofinformation
 Hawk Talk [Blog of FOI training company Amberhawk]
<http://amberhawk.typepad.com/>
 Information Request Generator
http://community.foe.co.uk/tools/right_to_know/request_generator.html
 Open Government [A Journal on Freedom of Information]
www.opengovjournal.org/
 Open Secrets [Blog by BBC journalist Martin Rosenbaum]
www.bbc.co.uk/blogs/opensecrets/
 Scottish Parliament on FOI
www.scottish.parliament.uk/cnPages/foi/index.htm
 The Silent State [Heather Brooke on govt surveillance, privacy, FOI, etc.]
<http://heatherbrooke.org/>
 Tracking UK FOIA Requests
<http://p10.hostingprod.com/@spyblog.org.uk/blog/foia/>

What do They Know [Make and Explore FOI Requests]
www.whatdotheyknow.com/

United States of America

Access Reports [Provides news and analysis on FOI from Harry Hammitt]
www.accessreports.com

ACLU: A Step-by-Step Guide [Guide by Using the US FOIA]
www.aclu.org/library/foia.html

The Art of Access [David Cuillier and Charles Davis]
<http://theartofaccess.com/>

ASAP [American Society of Access Professionals]
www.accesspro.org

The Brechner Center [Center for FOI of the Uni of Florida]
<http://brechner.org/>

Citizen's Guide on Using the FOIA [Made by the US House of Representatives]
www.fas.org/sgp/foia/citizen.html or <http://thomas.loc.gov/cgi-bin/cpquery>

Coalition of Journalists for Open Government [FOI and transparency in government]
www.cjog.net

EPIC and FOIA
www.epic.org/open_gov or www.epic.org/bookstore/foia2004/

FOI Advocate [The site of the National Freedom of Information Coalition]
<http://foiadvocate.blogspot.com/>

FOI Advocates [Project of attorneys David Bahr & Daniel Stotter]
www.foiadvocates.com/

FOI Case List by DoJ [For Attorneys and Access Professionals]
www.usdoj.gov/oip/04foia/ci-tofc.html

FOI Center [University of Missouri]
<http://foi.missouri.edu/laws.html> or <http://foi.missouri.edu/index.html>

FOI Center of the IRE [FOI tips and portal of Investigative Reporters and Editors]
www.ire.org/foi

FOIA Case Logs
www.thememoryhole.org/foi/caselogs/

FOIA Guide by DoJ [Online training]
www.usdoj.gov/oip/foia-act.htm

FOIA Guide / Federal FOIA by RCFP
www.rcfp.org/foiact/index.html

FOIA Letter Generator by RCFP [DIY: Just Fill in the Blanks]
www.rcfp.org/foi_lett.html

Guide to Declassified Docs for US Foreign Politics [By David N. Gibbs, University of Arizona]
www.gened.arizona.edu/dgibbs/declassified.htm

Local Open Government Blog [A site run by the Foster Pepper law firm]
www.localopengovernment.com/

Muckrock [Open Govt Tool powered by FOI Laws]
www.muckrock.com/

National Security Archive [Worldwide THE leading FOI requester]
www.nsarchive.org

National Freedom of Information Coalition
www.nfoic.org

OMB-Watch [Provides resources, news and analysis on the right to know]
www.ombwatch.org/info

Open The Government [A coalition to combating government secrecy & promoting foi]
<http://openthegovernment.org>

Open Government Journal
www.opengovjournal.org/

Public Citizen [A User's Guide to the FOIA]
www.citizen.org/litigation/free_info/articles.cfm?ID=5208

Project on Government Oversight [Independent investigations to promote openness / Watchdog]
www.pogo.org

Reporters Comm Freedom of the Press [a.o. specialised in FOIA]
www.rcfp.org

Resource Shelf	[Government information policy & links to source documents]
	www.resourceshelf.com
Secret no More	
	www.newstrench.com/01secret/01secret.htm
Society of Professional Journalists	[FOI Resources for Journalists]
	www.spj.org/foia_opendoors.asp
Sunlight Foundation	[A news-packed blog]
	http://sunlightfoundation.com/blog/
Sunshine Week	
	www.sunshineweek.org
Unredacted	[A FOI blog by the National Security Archive, Washington, DC]
	http://nsarchive.wordpress.com/

►► Fringe Toolbox - Intelligence

Africa Intelligence	
	http://www.africaintelligence.com/
BeSpacific	[List / Law, it, intel, foia and technology news]
	www.bespacific.com
CCISS	[Carleton University, Ottawa]
	www.carleton.ca/cciss
Centre for Terrorism & Counterterrorism	[part of the University of Leiden]
	http://campusdenhaag.nl/ctc/
Cicentre	[Counter-Intelligence]
	http://cicentre.com
Clingendael	[Netherlands Institute of International Relations]
	www.clingendael.nl/
Control Risks	[Risk consultancy]
	www.crg.com/
Cryptome	[Gigantic site: a.o. secret and classified documents]
	http://cryptome.org
EDRi: European Digital Rights	[List / Digital civil rights in Europe]
	www.edri.org
EPIC	[Electronic Privacy Information Center]
	www.epic.org/
Federation of American Scientists	[Gigantic site: Intel Resource Program]
	www.fas.org/irp
From the Wilderness	[A.o. detailed exposés of the CIA]
	www.fromthewilderness.com/index.html mirror: www.copvicia.com
Global Incident Map	
	www.globalincidentmap.com
Global Research	
	http://www.globalresearch.ca/index.php?context=home
Global Security	[Bottomless resources on all aspects of national security]
	www.globalsecurity.org
Global Terrorism Database	Uni Maryland
	http://www.start.umd.edu/gtd/about/GTDTeam.aspx
HCSS	[The Hague Centre for Strategic Studies]
	www.hcss.nl/en/home
Information Clearing House	[List / Site]
	www.informationclearinghouse.info/
InfoSec News	[List / Site]
	www.attrition.org/mailman/listinfo/isn

- Infowarrior [List]
<https://attrition.org/mailman/listinfo/infowarrior>
- Intelcenter [A company specialized studying terrorism and other threats]
www.intelcenter.com
- Intellibriefs
<http://intellibriefs.blogspot.com/>
- Intelligence ADI [List]
<http://perso.wanadoo.fr/intelligence-adi>
- Intelligence Center [Focuses on economic intelligence]
www.intelligence-center.com/
- Intelligence Forum [A forum dedicated to the study of intelligence]
www.intelforum.org
- Intelligence Journals and Sources
www.columbia.edu/cu/lweb/indiv/lehman/guides/intell.html#background
- Jane's [Influential source]
www.janes.com
- Lobster [The Journal of Parapolitics / 2x]
www.lobster-magazine.co.uk
- The Memory Hole [Censor Watch]
www.thememoryhole.org/
- National Security Archive [THE archive for intel researchers]
www.nsarchive.org or www.gwu.edu/~nsarchiv
- NISA [Netherlands Intelligence Study Association]
www.nisa-intelligence.nl/
- Quintessenz [List / Site]
www.quintessenz.at
- RIEAS [Open Source Intel, Greece]
www.rieas.gr/
- Secrecy News [Weekly, sometimes daily, intel newsletter]
www.fas.org/sqp/news/secrecy
- Small Wars Journal
<http://www.smallwarsjournal.com/>
- Spy News Mario Profaca [List / Gigantic site on intelligence information]
mprofaca.cro.net/spynews
- Statecraft [Counterinsurgency and Counterterrorism, 1940-1990]
www.statecraft.org/
- Statewatch [List / Watchdog specialised in EU, FOI, privacy and intel]
www.statewatch.org
- Stratfor: Global Intelligence
www.stratfor.com
- Target Brussels [by Kristof Clerix]
www.targetbrussels.be/about-target-brussels



FOIA/WOB ARTICLES

To order: mail the title

FOIA Communities and their growing Pains	2010	English	4 pages	Free
30 jaar wobben – 30 jaar tobben	2010	Dutch	3	Free
Zwartboek Wob	2010	Dutch	22	Free
Blinde en dove aanval op de Wob	2011	Dutch	2	Free

Minister Donner valt de Wob aan	2011	Dutch	3	Free
Minister Donner, schaam je	2011	Dutch	4	Free
Oproep aan Minister Donner: Pak oneigenlijk gebruik aan!	2011	Dutch	3	Free
Wobbing on the Rise in the Netherlands	2011	English	4	Free
Introduction to the New Wob [Dutch FOIA]	2012	English	4	Free
Opvragen van je AIVD dossier [modelverzoek]	2012	Dutch	4	Free

INTELLIGENCE ARTICLES

To order: mail the title

AIVD spioneert VIA en IN de pers	2012	Dutch	3	Free
----------------------------------	------	-------	---	------

FRINGE SPECIALS

To order: mail the title

Spying the Press	2006	English/German	42	Free
Index Dutch Intelligence	2007	English	25	Free
Overview of all FOI Laws - 93 countries	2012	English	28	Free
Hunting down WikiLeaks, Assange & others	2011	English	32	Free
De nieuwe Wob [voorstel voor debat]	2012	Dutch	53	Free
De nieuwe Wob [definitief voorstel]	2012	Dutch	40	Free

▶▶▶▶▶▶▶▶▶▶ *Fringe Colophon*

About the editor/publisher: Roger Vleugels

In 1986, I started my own office and began working as a legal advisor and lecturer specialized in freedom of information and intelligence. In 2001, I added the publishing of the two Fringe journals to my activities.

I lecture on freedom of information at journalism schools, universities and corporations. I have taught students in or from Argentina, Aruba, Belgium, Bulgaria, Denmark, Estonia, Finland, Germany, Hungary, Indonesia, Italy, Iran, Ireland, Macedonia, Mexico, Moldova, the Netherlands, Norway, Slovakia, South Africa, Sweden, Turkey and the United Kingdom.

Since 1988, I have as a legal advisor / acting lawyer filed for or with my clients more than 4,000 FOIA requests. Most of these clients are journalists in the Netherlands but also special interest groups, NGOs, researchers and private persons.

As an intelligence specialist, I research and lecture on this topic. I also comment in the press, brief members of parliament and advise journalists and lawyers.

The format of the Fringe journals

The main goal of the Fringe journals is: not being a regular magazine. The journals are purely a research tool. **Articles are not selected for their content but for the facts or trends within them. One of the consequences is that Fringe does not discriminate between information and disinformation.**

Other goals are trying to publish news in early stages, before the news is established with an overall focus on next to mainstream. After doing so Fringe will not cover such a topic further, unless there is again something special, and above all: Fringe hopes to be a bit wayward.

Surfing, searching, stringers and sources

Articles are gathered for Fringe by a small group of Dutch and foreign stringers, some of whom work covertly. Without the work of these stringers Fringe would not be possible. Additionally I do some of the gathering on my own, mainly by netsurfing and maintaining a range of subscriptions, feeds and alerts. Some of the more specialised sources are: Access Info Europe, AIP Bulgaria, Article 19, BeSpacific, Bigwobber, Bits of Freedom, Centre for Law & Democracy, Cryptogram, CFOI, Cryptome, EDRI-gram, EFF, EPIC, FOIANet, FreedomInfo, Geheim, Infowarrior, Intelforum, Intelligence Online, Memory Hole, Mother Jones, National Security Archive, NatoWatch, NISA, Privacy International, RCFP, Secrecy News, StateWatch, Terrorism Monitor and Wired.

Two Fringe journals

Fringe Intelligence gathers intelligence news from established media and outlets beyond the mainstream. The journal offers articles covering classical intelligence and counterintelligence, criminal and private espionage and more. The main focus is on forensic and operational information, and not on bureaucracy, politics and the formal/legal aspects of intelligence. *Fringe Intel-*

ligence does not concentrate on terrorism. Special sections highlight NARINT, or Natural Resources Intelligence [dealing with energy, rare earth, water and climate intelligence], and Intelligence 2.0 [IT sector-generated private intelligence]. These sections look beyond jihad, cyber and other previous or present threats.

Fringe Spitting publishes for freedom of information [FOI] specialists, investigative journalists and other researchers, with a special focus on FOI practitioners and requesters, news on caseload, jurisprudence, litigation, tools and trends. Space is also devoted to recently disclosed "old news" on intelligence, revealed by FOI requests.

Taken together, the two biweekly journals contain about 100 articles per month selected from a variety of media sources. Almost all articles are internet downloads. Over 90% are in English. Less than 10% are focused on the Netherlands. The contents stand or fall with the quality of the source.

3,100 subscribers

In terms of circulation, both *Fringe* journals enjoy a top ranking in their sector, respectively OSINT and FOI, among the worldwide communities of independent email journals and mailing lists.

Fifty-five percent of the subscribers are intelligence specialists, 30% journalists and 15% FOIA specialists. They live in 110 countries: 35% in NL, 5% in UK, 25% in US and 35% in the rest of the world. Fifteen percent of the subscribers are government employees [half of whom work in intelligence services] and 15% are employed by universities and colleges.

Pose questions directly or by Linked In and Twitter

Please feel free to mail me, Roger Vleugels, directly. You can also contact me by the networks I belong to. More than 1,000 subscribers have joined one or more groups managed by me on LinkedIn: **FOIA Specialists**; **Wob Specialists**; **NARINT**; **Dutch Intelligence Watch Specialists** or **Intelligence 2.0**.

I am also active on Twitter. Most of my tweets are in Dutch, but I also tweet breaking news in English: **@RogerVleugels**. For privacy and usability reasons, I do not like Facebook. Therefore I am only passively present on that network.

Fringe is solely a research tool

All articles [re]published in *Fringe* are solely meant for research by the subscribers themselves. It is forbidden to [re]publish or [re]circulate articles either in part or in their entirety. This is not a *Fringe* policy but a consequence of the Fair Use Notice. Because *Fringe* is a free-of-charge research tool, it is permitted to recirculate copyrighted material according to the Fair Use Notice. More information on this rule is available at the end of this colophon.

The meaning of the ► symbol

At the start of an article you will find several ►. They identify the source and the date of the article.

The source: after one or more ► you will find the source [the first source mentioned is the original one, the latter source is the publication or stringer from which/whom *Fringe* received the article].

The date: before ► you will see the date on which *Fringe* received the article; after ► the original publication date [if known].

Subscriptions are free of charge and include both journals

Subscribers receive both journals free of charge. A voluntary contribution is very welcome, however. Producing *Fringe* is a time-consuming project. Each year in January I ask subscribers for a voluntary contribution.

Copyright law [see the Fair Use Restriction at the bottom of this colophon] forbids me to charge for journals like *Fringe*. Therefore, the only way to collect enough money to keep this service going is by voluntary contributions or donations.

The percentage of paying subscribers is about 8%. To guarantee the service in the long run 400-500 paying subscribers on a yearly basis are needed.

To start a subscription e-mail: Start *Fringe* in the subject line, to roger.vleugels@planet.nl

To stop a subscription e-mail: Stop *Fringe* in the subject line, to roger.vleugels@planet.nl

Voluntary contributions or donations are very welcome

My suggestion:

48.00 Euros per year for individual subscribers [this equals one Euro per issue]

24.00 Euros per year for students and others with modest means

200.00 Euros per year for news media or other organizations with multiple users/subscribers or subscribers who are well to do

Payments from the Netherlands

ING Bank no. 3432010, account holder: Roger Vleugels, Utrecht

Reference: "Fringe contribution" or "Fringe donation"

Payments from abroad

ING Bank: IBAN: NL79INGB0003432010 / BIC: INGBNL2A, account holder: Roger Vleugels, Utrecht, The Netherlands

Reference: "Fringe contribution" or "Fringe donation"

Payments by post (for larger sums, please use registered mail)

Roger Vleugels / Korfoedreef 213 / 3562 SL Utrecht / The Netherlands

Reference: "Fringe contribution" or "Fringe donation"

Fair Use Notice

The *Fringe* journals contain copyrighted material the use of which has not always been specifically authorized by the copyright owner. The material is being made available for purposes of education and research of the subscribers themselves. This constitutes a "fair use" of such copyrighted material as provided for in section 107 of the US Copyright Law.

In accordance with Title 17 U.S.C. Section 107, the material on these journals are distributed without profit to those who have expressed an interest in receiving the included information for research and educational purposes only. If a subscriber wishes to use copyrighted material from these journals for purposes that go beyond "fair use," you must obtain permission from the copyright owner. For more information: www.law.cornell.edu/uscode/17/107.html