"Heads Up": Combating Government Secrecy and Corporate Meddling in the Public's Right to Know

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I. INTRODUCTION

The sounding of a horn late at night, or the occasional delay at a railroad crossing were for decades among the biggest concerns caused by the trains that made their way through the village of East Palestine, Ohio. On February 6, 2023, that all changed forever after a Norfolk Southern freight train derailed in the small community.[1] The image of a controlled burn of the chemicals it was carrying became representative of the environmental health concerns caused by the wreck.[2] Just as the thick, dark plume of smoke dwarfed the town's humble skyline, the once mundane annoyances brought by the railroad seemed insignificant.[3] Life as the community knew it was upended.

Despite being hundreds of miles down the tracks, people in Cincinnati were asking questions. The city had recently announced a preliminary deal to sell Norfolk Southern its railroad infrastructure.[4] One concern was evident: could the tragedy that occurred in East Palestine happen again?[5] Even prior to the

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[1] *Huge Smoke Plumes, Sick and Dead Animals, Persisting Odors: Ohio Village Is Not the Same After Toxic Train Crash*, FORTUNE (Feb. 15, 2023), https://fortune.com/2023/02/15/train-crash-ohio-east-palestine-dead-animals-odor-drinking-water-safety-smoke/ [https://perma.cc/9YYD-QWY6].

[2] *Id.*

[3] *Id.* (explaining that East Palestine residents reported persisting odors, sick or dead animals, and concerns about their drinking water and the lingering health impacts from the chemicals including the risk of cancer). Following the derailment, prominent government officials, politicians, and media outlets descended on the small town. *See* Henry J. Gomez, *Trump Points Fingers at the Biden Administration in East Palestine Visit*, NBC NEWS (Feb. 22, 2023), https://www.nbcnews.com/politics/donald-trump/trump-points-fingers-biden-administration-east-palestine-visit-rcna71568 [https://perma.cc/NY6B-3ZNU].

[4] Press Release, City of Cincinnati, Mayor Aftab Announces Proposed Sale of Cincinnati Southern Railway to Norfolk Southern for $1.6 Billion (Nov. 21, 2022), https://www.cincinnati-oh.gov/cityofcincinnati/news/proposed-sale-of-cincinnati-southern-railway/ [https://perma.cc/X4TK-SJS7]; Brian Planalp & Chris Riva, *Rail Giant Offers $1.6 Billion to Buy Cincinnati's 'Greatest Money Maker*,*'* FOX19 (Nov. 21, 2022), https://www.fox19.com/2022/11/22/city-cincinnati-proposes-16-billion-sale-railway-norfolk-southern/ [https://perma.cc/6H9Q-K4B2].

[5] *See* Madeline Fening, *Norfolk Southern Executives Tell Cincinnati City Council East Palestine Explosion Won't Hurt Sale of Cincinnati Southern Railway*, CITYBEAT (Feb. 14, 2023), https://www.citybeat.com/news/norfolk-southern-executives-tell-cincinnati-city-council-east-palestine-explosion-wont-hurt-sale-of-cincinnati-southern-railway-14758692 [https://perma.cc/GHJ5-KBAE]. State lawmakers will also have to approve the deal. Brian Planalp & Candice Hare, *Cincinnati's $1.6 Billion Railway Sale to Norfolk Southern Is Moving 'Fast' Despite Derailment*, FOX19 (Feb. 21, 2023), https://www.fox19.com/2023/02/21/cincinnatis-16-billion-railway-sale-norfolk-southern-is-moving-fast-despite-derailment/ [https://perma.cc/Y5NM-MBF4]. Some also questioned whether it made financial sense for the City. *Id.*

derailment, some people wanted to know more about how their government and this private third party even reached an agreement.[6] Some felt left in the dark, describing the government's desire to provide a full and timely production of public records as "recalcitrant," calling the deal a "nearly year-and-a-half of private, closed-door negotiations" that was only publicly announced when it was too late for the community to make any real impact.[7] In Cincinnati, a rare final approval of the agreement would also be required by city-wide election.[8]

But a specific provision in the agreement between the government and Norfolk Southern, which the public never got to approve, was already in full force. And it was potentially contributing to the reported delay and attitudes against releasing public records related to the deal. This consequential provision explained that any publicity the government put out ahead of the referendum would not be allowed without the notification, consultation, and consent of Norfolk Southern.[9] While it is alarming that private interests are creeping into

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[6] *See* Taylor Weiter, *Former State Lawmaker Calls for Lawsuit to Stop Community Meetings on Cincinnati Southern Railway Sale*, WCPO 9 (Oct. 19, 2023), https://www.wcpo.com/news/local-news/hamilton-county/cincinnati/former-state-lawmaker-calls-for-lawsuit-to-stop-community-meetings-on-cincinnati-southern-railway-sale [https://perma.cc/5HTU-PRVY]. A former lawmaker sought to compel the release of public records related to the sale of the city-owned Cincinnati Southern Railway before the derailment. *Id.*; *see* Verified Complaint for Writ of Mandamus at 23–24, State *ex rel.* Brinkman v. Cincinnati S. Ry., No. 2023-0185 (Ohio Feb. 7, 2023).

[7] Verified Complaint for Writ of Mandamus, *supra* note 6, at 2. The government opposed this characterization of the negotiations. Respondents' Motion to Refer Matter to Mediation at 2, State *ex rel.* Brinkman v. Cincinnati S. Ry., No. 2023-0185 (Ohio Feb. 24, 2023). The freight company has been operating under a lease with the city for decades. Planalp & Riva, *supra* note 4.

[8] Planalp & Riva, *supra* note 4. The referendum, posed as Issue 22 in the November 2023 General Election, passed with 51.6 percent of the vote. Sharon Coolidge, *Issue 22: Cincinnati Votes to Sell Its Railroad*, CIN. ENQUIRER (Nov. 7, 2023) https://eu.cincinnati.com/story/news/politics/2023/11/07/issue-22-city-votes-on-selling-cincinnati-southern-railway/71421018007/ [https://perma.cc/9XH4-P6BR]. Economic development projects and incentives are often approved by elected representatives, not directly through ballot initiatives. *See, e.g.*, Nandita Bose, *Amazon's Second Headquarters Clears Blocks in Virginia Funding Vote*, REUTERS (Mar. 16, 2019), https://www.reuters.com/article/us-amazon-headquarters-vote/amazons-second-headquarters-clears-blocks-in-virginia-funding-vote-idUSKCN1QX0RG [https://perma.cc/GJR3-DTFJ].

[9] Provision 14.07 within the Asset Purchase and Sales Agreement stated, "Buyer and Seller shall consult with one another with regard to all press releases issued or publicity at or prior to Closing . . . . " ASSET PURCHASE AND SALE AGREEMENT BETWEEN BOARD OF TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY, NORFOLK SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY 50 (Nov. 2022) [hereinafter CINCINNATI S. RY. ASSET PURCHASE AGREEMENT], http://cincinnatisouthernrailway.org/documents/CSR%20-%20NS%20Asset%20Purchase%20and%20Sale%20Agreement%20(Executed)%20%204880-3520-3135%201.pdf [https://perma.cc/8FQ2-FNWP]. The agreement also read:

public decision making, especially when an election is on the line following an environmental disaster, provisions like this are not uncommon.[10] This Note describes how the current legal treatment of such "heads up" provisions negatively impacts the free flow of public information. It offers a multifaceted solution to improve requester trust and process efficiency, ranging from potential state legislative reforms to federal litigation strategies.[11]

At their most basic, requesters can be any member of the public seeking information held by the government that may not be readily available.[12] To receive this material, one submits a public information request to the appropriate governmental body.[13] The public entity then decides when certain circumstances as proscribed by law make the information too sensitive to release or if the records will be given to the requester.[14]

Consultatory rights, also referred to in this Note as predisclosure notifications, require the government to tell a private entity it works with that information the government holds about that entity, or which may impact that entity, is going to be released to the public.[15] Governments can be required to provide this notice by state and federal laws and regulations or through private contracts.[16] The type of information that triggers notification varies. On one end of the spectrum, only information being released that will cause competitive harm to a business will trigger consultation; on the other end, a business can

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> [C]oncerning the transactions contemplated by this Agreement except as necessary as a result of public disclosure requirements under applicable laws or the applicable rules and regulations of any Governmental Authority or stock exchange. None of Buyer, CNOTP, or Seller or any of their respective Affiliates shall issue prior to Closing any such press releases or publicity without the prior written consent of the other Parties.

Id.

[10] *See, e.g.*, *Lawyer Defends FOIA Component of Amazon Deal*, INSIDE NOVA (Mar. 19, 2019), https://www.insidenova.com/news/arlington/lawyer-defends-foia-component-of-amazon-deal/article_61246af8-4a50-11e9-a301-c367791228c4.html [https://perma.cc/QA4N-ERW3]; Mya Frazier, *Big Tech's Bid to Control FOIA*, COLUM. JOURNALISM REV. (Feb. 2, 2018) [hereinafter Fraizer, *Big Tech*], https://www.cjr.org/business_of_news/facebook-amazon-foia.php [https://perma.cc/6QXY-485J].

[11] *See infra* Parts IV, V.

[12] *See, e.g.*, *Frequently Asked Questions*, FOIA.GOV, https://www.foia.gov/faq.html [https://perma.cc/XGB5-URXT] ("Generally any person—United States citizen or not—can make a FOIA request.").

[13] *Id.*

[14] *See, e.g.*, *What Is FOIA?*, FOIA.GOV, https://www.foia.gov/about.html [https://perma.cc/APH2-JS2A].

[15] *See FOIA Guide, 2004 Edition: "Reverse" FOIA*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/oip/foia-guide-2004-edition-reverse-foia [https://perma.cc/WN72-KKSC].

[16] *See id.*; *see, e.g.*, MISS. CODE ANN. § 25-61-9 (West 2023); Frazier, *Big Tech*, *supra* note 10.

require that the government gives it a heads up for all records request it receives involving that company.[17] This latter approach gives businesses a more substantial role in decision making and may even require the government to side with a private entity in legal disputes.[18]

Further, the Supreme Court recently expanded what type of business information can be kept secret under the federal Freedom of Information Act. Under the new interpretation, businesses and governments can keep hidden, and require predisclosure notification for, private commercial information if a company labels it as confidential, regardless of why this designation is made.[19] A business may do this merely because something is embarrassing or would cause public backlash, which is broader than the prior standard, which required "competitive harm" for records submitted involuntarily.[20] Further, the standard for records submitted voluntarily only required that disclosure would chill the government's ability to collect information in the future.[21] The concern is that secrecy in the current context can easily extend beyond the justified concerns of competition and innovation the business privacy exemption is designed to protect, and, instead, impede government transparency and democratic accountability.[22]

Open government advocates, journalists, and ordinary citizen requesters have criticized predisclosure notifications as strategic corporate meddling in public records processes, calling them "heads up" requirements that buy time to spin a story or outlast the public's attention span.[23] This practice, either purposely or inadvertently, bogs down the free flow of public information.[24] In turn, either due to delay, obstruction, or the perception that either is likely to occur, journalists and citizen requesters are less likely to trust and use the system—diminishing government transparency and public knowledge.[25] And in some instances, the problem extends beyond delay. Private partners may have

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[17] *Compare FOIA Guide, 2004 Edition: "Reverse" FOIA*, *supra* note 15 (describing the substantial competitive harm standard applied to agency decisions to disclose corporate records), *with* Frazier, *Big Tech*, *supra* note 10 (describing robust contractual obligations for governments to notify corporations before they disclose corporate records).

[18] Frazier, *Big Tech*, *supra* note 10.

[19] *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).

[20] Matthew Collette, *High Court Creates New FOIA Playing Field*, LAW360 (June 25, 2019), https://www.law360.com/articles/1172932/high-court-creates-new-foia-playing-field [https://perma.cc/3Z8F-SEDD].

[21] *See* Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871, 879–80 (D.C. Cir. 1992).

[22] Frazier, *Big Tech*, *supra* note 10.

[23] *See id.*

[24] *Id.*

[25] *Reporters Face Long FOIA Delays*, NBC NEWS (Sept. 12, 2005), https://www.nbcnews.com/id/wbna9318343 [https://perma.cc/3DX9-BXE3].

enough power to veto an entire request.[26] Conversely, governments and private entities trumpet such provisions as providing fairness and protection to private business information.[27]

The tension between economic development and the public's right to know has recently incited high-profile controversies surrounding mega-deals. Some expressed concern that government transparency became a bargaining chip as major cities vied to become the site of Amazon's HQ2.[28] Others have reported a trend toward corporate boldness, related to provisions negotiated between tech giants and small towns.[29]

Despite these headlines and the broad public impact of right-to-know laws, this Note provides the first significant legal analysis on the topic.[30] Part II discusses what Federal law, the Freedom of Information Act, and Executive Order 12,600 require as it relates to openness, privacy, and predisclosure notification. It also explores the conundrum created by a recent Supreme Court of the United States decision that has thrown into question how this framework of federal law—which some states use as a model—should be interpreted. Part III surveys how state laws handle privacy, predisclosure notification, and how contract law intermingles with those topics. Part IV suggests that the current state and federal landscape breeds distrust among journalists and citizen requesters and permits businesses to police themselves. Part V provides a toolbox of novel reforms to repair the process including a model state law aimed at restoring requester trust and a novel two-tiered approach to federal law which allows for the broad protection of exempt business information, but only requires notification if a higher standard is met. These solutions will also provide relief to already overburdened public records custodians. Part VI briefly concludes.

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[26] *See, e.g.*, Mya Frazier, *Facebook Won't Hire You for Its Data Center*, BLOOMBERG (Sept. 25, 2017), https://www.bloomberg.com/news/articles/2017-09-25/facebook-won-t-hire-you-for-its-data-center?leadSource=uverify%20wall [https://perma.cc/6L8A-NVW9].

[27] *See Lawyer Defends FOIA Component of Amazon Deal*, *supra* note 10. The current landscape creates "democratic blind-spots" similar to "informational blind-spots" seen in environmental law. Madeeha Dean, *An Environmental FOIA: Balancing Trade Secrecy with the Public's Right to Know*, 109 CALIF. L. REV. 2423, 2439–40 (2021) ("Trade secret law creates 'informational blind-spots' because its value depends on the suppression of data. But environmental regulation relies on the collection and distribution of data.").

[28] Frazier, *Big Tech*, *supra* note 10.

[29] Dean, *supra* note 27, at 2440; Frazier, *Big Tech*, *supra* note 10; *see also* Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 7 (2019).

[30] Government transparency, promoted by right-to-know laws, broadly impacts all members of society, including the wide swath of people that depend on public records requests. *See* Sarah Shik Lamdan, *Protecting the Freedom of Information Act Requestor: Privacy for Information Seekers*, 21 KAN. J. L. & PUB. POL'Y 221, 226 (2012) (noting that requesters can be ordinary people, businesses, journalists, the government itself or other community organizations).

II. THE EVOLVING FEDERAL LANDSCAPE

The Freedom of Information Act serves as the primary vehicle used to request records from the federal government. Part II describes how this law (a) has been impacted by the expansion of business confidentiality as it is defined by the Supreme Court; and (b) details the federal predisclosure notification process mandated by Executive Order 12,600.

A. *FOIA and the Expansion of Business Confidentiality*

An accurate public understanding of whether the government is meeting the needs of its citizens is critical in a democracy.[31] Voters must be well informed to elect representatives and decide questions that will promote their wellbeing.[32] When government is failing, this concept is even more important. "Freedom of information," "sunshine," and "right-to-know" laws all seek to further this goal. As Supreme Court Justice Louis Brandeis famously noted, "sunlight is said to be the best of disinfectants," adding that publicity has the power to overcome apathy and prompt remedial action.[33] Those values of transparency and accountability have been enshrined into law to address the power of the now massive federal government.[34] The Freedom of Information Act provides a framework to request public records from the federal government.[35] But even with a "presumption of openness," retrieving public information is not unfettered.[36] Federal agencies can withhold information if it meets one of nine exemptions, which cover topics including personal privacy, national security, and law enforcement.[37] Despite the access the law provides, there are concerns FOIA is still not doing enough to promote transparency.[38]

To address this issue, President Barack Obama directed executive branch agencies in 2009 to respond to FOIA requests in a way that "reflects a national commitment to ensuring an open government" and to be "administered with a

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[31] *A Key to Democracy: Access to Information Critical for Citizens, Governments*, CARTER CTR. (Apr. 11, 2005), https://www.cartercenter.org/news/documents/doc1860.html [https://perma.cc/Y53F-LU4G].

[32] *Id.*

[33] Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 425 (2015); Andrew Berger, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. (May 26, 2009), https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/ [https://perma.cc/3A5U-SDY3].

[34] Rizzardi, *supra* note 33, at 425.

[35] *Id.* Many states have similar open government laws. *See infra* Part III.

[36] *What Is FOIA?*, *supra* note 14.

[37] *Id.*

[38] Dean, *supra* note 27, at 2444–46 ("There is general consensus in all three branches of government that FOIA fails 'to pierce the veil of administrative secrecy . . . .'").

clear presumption: In the face of doubt, openness prevails."[39] Despite this message, issues of transparency continued during the Obama administration.[40] Following Obama's years in office, the Trump administration returned to a preference for secrecy.[41] The Biden Administration has since vowed to increase government transparency, despite lingering issues.[42] The current FOIA "presumption of openness" is defined by limiting withholdings to exemptions and legally prohibited disclosures, and encouraging partial disclosures instead of flat-out denials.[43] In 2022, Attorney General Merrick Garland released a memo to executive agencies to reemphasize this principle.[44]

Relevant in the business context, FOIA Exemption 4 gives government agencies the discretion to deny public records requests that involve "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[45] The coverage of this exemption has changed over time with varying judicial interpretations. Prior to 1974, courts held that information was "confidential" under Exemption 4 if it would not have normally been released to the public.[46] Then, the U.S. Court of Appeals for the D.C. Circuit—the most authoritative court on FOIA matters aside from the Supreme Court—decided *National Parks and Conservation Association v. Morton*, marking the next shift.[47] The *National Parks* test deemed information "confidential" if its release "would be likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."[48] This approach was followed by other circuits and left undisturbed until 1992.[49] Application of *National Parks* was next limited to situations in which a business is "obliged to furnish" information to the government in *Critical Mass Energy*

[39] *Id.* at 2445.

[40] *Id.* (noting that agencies improperly withheld documents in a third of cases that were challenged on appeal during the Obama administration).

[41] *Id.* at 2446 (noting that in 2018, federal records were censored, withheld, or said to be "unfindable" more often than at any point in the last decade).

[42] *Id.* ("Federal agencies still regularly overuse and misapply FOIA's Exemption 4 . . . .").

[43] *What Is FOIA?*, *supra* note 14.

[44] OFF. OF THE ATT'Y GEN., MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: FREEDOM OF INFORMATION GUIDELINES 1 (Mar. 2022), https://www.justice.gov/media/1212566/dl?inline= [https://perma.cc/MP8C-7CSU].

[45] 5 U.S.C. § 552(b)(4).

[46] Collette, *supra* note 20.

[47] Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 765 (D.C. Cir. 1974), *aff'd in part and rev'd in part sub nom.* Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); *see FOIA Guide, 2004 Edition: Litigation Considerations*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/oip/foia-guide-2004-edition-litigation-considerations [https://perma.cc/J9G2-E5TB].

[48] Collette, *supra* note 20.

[49] *Id.*

Project v. Nuclear Regulatory Commission.[50] Alternatively, if commercial information was submitted voluntarily, Exemption 4 would protect the disclosure, "if it is of a kind that the provider would not customarily release to the public."[51]

The "competitive harm" requirement survived, however, in cases where information is required to be provided to the government, and this test opened the door to more expansive disclosure.[52] In short, it mandated the release of some information that businesses themselves would otherwise likely consider "confidential."[53] Significantly, disclosures that would solely allow the public to criticize or embarrass a company were not considered sufficient to constitute "competitive harm," even if that meant the loss of customers or a disgruntled workforce, for example, due to publicity surrounding violations of civil rights, or environmental laws.[54]

As time went on, the *National Parks* and *Critical Mass* "competitive harm" standard came under attack, with some Supreme Court justices suggesting it be abandoned.[55] The knockout blow was delivered in 2019.[56] In *Food Marketing Institute (FMI) v. Argus Leader Media*, the Supreme Court overruled the *National Parks* test, discussing its strong distaste for the standard.[57] In its place, the Court created a new standard for Exemption 4 confidentiality: "At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."[58] Some believe this remolding of the standard makes it easier for the government to withhold commercial information.[59]

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[50] *See* Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871, 879–80 (D.C. Cir. 1992).

[51] *Id.* at 880.

[52] Collette, *supra* note 20.

[53] *Id.*

[54] *Id.*; Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983). The Court emphasized "[t]he important point for competitive harm in the FOIA context . . . is that it be *limited to harm flowing from the affirmative use of proprietary information by competitors*." *Id.* (alteration in original) (emphasis added).

[55] Collette, *supra* note 20 (citing N.H. Right to Life v. U.S. Dep't of Health & Hum. Servs., 577 U.S. 994 (2015)).

[56] *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2361 (2019).

[57] *Id.* at 2366. The Court called the decision a "relic" of a "bygone era of statutory construction." *Id.* at 2364.

[58] *Id.* at 2366. Despite this holding, the Court did not precisely define its new test. *See id.*; DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW 29 (2020).

[59] Collette, *supra* note 20.

B. *The Establishment of Federal Consultatory Rights*

The federal government must notify businesses that will be impacted by its release of certain information.[60] This concept of consultatory rights was cemented into the federal regulatory landscape in the Exemption 4 context through the issuance of Executive Order 12,600 by the Reagan administration in 1987.[61] This Order is still in effect.[62] EO 12,600 established required procedures for notifying entities that submit protected business information to the government, that is, in turn, sought out by a FOIA requester.[63] The goals of the Order were threefold: The Order worked to ensure that businesses, that submitted information to the government, were notified prior to disclosure of the information; that those submitters had an opportunity to object to such a release; and to make agency notification provisions more uniform across the federal government.[64] The drafters of the Order pointed out, in Section 10, that it is "not intended to create any right or benefit, substantive or procedural, enforceable at law."[65]

Ten sections lay out the Order's demands.[66] Notably, Section 1 requires Executive department and agency leaders to establish a notification process for records involving third-party confidential commercial information that they believe will have to be released.[67] Section 2 defines "confidential commercial information" to be understood as "records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm."[68]

This currently operable language provides a conundrum. This "confidential commercial information" definition conflicts with the Supreme Court's current definition of "confidential" in *FMI*, as the Order solely requires a showing of "competitive harm," which is no longer the standard applied to Exception 4.[69] In the wake of the *FMI* decision, the Department of Justice has advised agencies to follow *FMI*'s broader definition of "confidential" in predisclosure

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[60] *See* Exec. Order No. 12,600, 3 C.F.R. 235, § 1 (1987).

[61] *FOIA Update: Executive Order on Business Data Issued*, U.S. DEP'T OF JUST., https://www.justice.gov/oip/blog/foia-update-executive-order-business-data-issued [https://perma.cc/T6YR-2WWM] (Aug. 13, 2014).

[62] *See, e.g.*, Beagles v. U.S. Dep't of Lab. Wage & Hour Div., No. 16-506, 2019 WL 1085170, at *5–6 (D.N.M. Mar. 7, 2019); Exec. Order No. 12,600, 3 C.F.R. 235 (1978).

[63] Exec. Order No. 12,600, § 3(b).

[64] *Id.*; *FOIA Update: Executive Order on Business Data Issued*, *supra* note 61.

[65] *See* Exec. Order No. 12,600, § 10.

[66] *See generally id.*

[67] *Id.* § 1. Agencies are required to put forward a good faith effort to notify submitters. *Id.*

[68] *Id.* § 2.

[69] SHEFFNER, *supra* note 58, at 28–29; *see supra* Part II.A (discussing the new standard under *FMI*).

notification procedures, despite the text of the Order.[70] The rest of EO 12,600 also states multiple times that it requires notice in other situations where the department believes disclosure could lead to "substantial competitive harm."[71] The Order does not require the government to inform requesters that specific information has been withheld or redacted pursuant to it.[72]

The *Critical Mass* standard, paired with the federal establishment of consultatory rights under Executive Order 12,600, resulted in increased involvement of private entities in Exemption 4 cases through "reverse FOIA" lawsuits.[73] Businesses now have even more leverage in their claims following the *FMI* decision.[74]

III. DIFFERENCES AMONG STATE PREDISCLOSURE NOTIFICATION REQUIREMENTS

What is shielded as confidential business information varies by state. Some jurisdictions only exempt trade secrets from disclosure, while others more closely mirror the Supreme Court's *FMI* interpretation of FOIA's Exemption 4.[75] The consultatory rights that flow from those protections also differ. States' predisclosure notification requirements in this context generally take one of two forms: (A) notification is required, encouraged, or discussed neutrally by state law; or (B) governments negotiate the predisclosure notification process via individual contracts. The following subparts depict a non-exhaustive selection of states to illustrate these two sources of notification, including some states that use both practices.

A. *Notification Required, Encouraged or Discussed by Law*

Many states require or encourage public records custodians to provide predisclosure notifications to business submitters by statute or regulation. If notification is required, these practices more closely mirror EO 12,600, although

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[70] SHEFFNER, *supra* note 58, at 48.

[71] Exec. Order No. 12,600, §§ 2, 3.

[72] Scott Amey, *Should Contractor FOIA Objections Be Labeled?*, PROJECT ON GOV. OVERSIGHT (Aug. 20, 2014), https://www.pogo.org/analysis/2014/08/should-contractor-foia-objections-be-labeled [https://perma.cc/X72V-6VSX].

[73] Collette, *supra* note 20. A "reverse FOIA" lawsuit can be brought by a business intending to protect its confidentiality interests. *Id.* If the company believes a FOIA disclosure would cause "competitive harm," it has the right to challenge and prevent the release of information under the Administrative Procedure Act, 5 U.S.C. § 706. *Id.* (citing Canadian Com. Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008)).

[74] *See* SULLIVAN & CROMWELL LLP, *FMI V. ARGUS LEADER MEDIA*—SUPREME COURT BROADENS SCOPE OF FOIA EXEMPTION (June 2019), https://www.sullcrom.com/insights/memo/2019/June/FMI-v-Argus-Leader-Media-Supreme-Court-Broadens-Scope-of-FOIA-Exemption [https://perma.cc/JCZ7-FMPH].

[75] *Compare* 245 Nev. Reg. Admin. Regs. R042-18, at 4 (May 31, 2018), *with* UTAH CODE ANN. § 19-1-306(2)(a) (West 2008).

the "confidential information" definition in some of these jurisdictions now differs from the federal definition set by *FMI* and the Department of Justice.[76] Other state laws lay out, but do not mandate or encourage, notification procedures.[77]

1. *Nevada*

Predisclosure notification requirements are detailed in regulations related to specific statutes, rather than the state's right-to-know law.[78] For example, Nevada Revised Statute § 439.930 requires the state Department of Health and Human Services to create a website that discloses prescription drug prices.[79] Regulations implementing this law address what the Department is required to do when it receives a request under the Nevada Public Records Act.[80] The regulation is one of the few schemes to notify business submitters regarding the request for potential trade secrets—by *explicitly referencing* the federally analogous "duties" required under Executive Order 12,600.[81] The regulation instructs the Department to use FOIA Exemption 4 as "persuasive authority" to assess whether disclosure would violate federal law.[82]

2. *District of Columbia*

Predisclosure notification of commercial information is required by the District-level Freedom of Information Act.[83] The D.C. public records law exempts trade secrets and confidential commercial information obtained outside the government.[84] But it does so, applying the *National Parks* standard.[85]

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[76] *See supra* Part II.

[77] *See infra* notes 86–90 and accompanying text.

[78] *See* 245 Nev. Reg. Admin. Regs. R042-18, at 3–4 (May 31, 2018).

[79] NEV. REV. STAT. § 439.930 (2015).

[80] 245 Nev. Reg. Admin. Regs. R042-18, at 2 (May 31, 2018).

[81] *Id.* at 3 (citing Exec. Order No. 12,600, 3 C.F.R. 235 (1987)) ("To ensure that trade secrets are not improperly disclosed under the federal Trade Secrets Act and FOIA, federal agencies have a duty to adopt regulations establishing specific procedures that the federal agencies must follow when they receive requests for public records under FOIA seeking disclosure of information that may constitute a trade secret or other confidential commercial information."). The regulation does not specifically address disclosures that involve "confidential commercial information" despite its reference of the Order. *See id.*

[82] *Id.* at 3. The Supreme Court of Nevada has recently cited favorably to *FMI* when discussing trade secret protections. Nev. Indep. v. Whitley, 506 P.3d 1037, 1044 (Nev. 2022).

[83] D.C. Mun. Regs. tit. 15, § 704 (2023); *see also* MISS. CODE ANN. § 25-61-9(1)(a).

[84] D.C. CODE § 2-534(a)(1) (2023).

[85] *Id.* ("to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained"). Legislative history states the 1975 Act's language was based on the *National Parks* decision. Stephen J. Fuzesi & A. Joshua Podoll, *District of Columbia: Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/open-government-guide/district-of-columbia/#e-

3. *Washington*

This state provides an "option" to give notice to a third party affected by release, but does not require it.[86] The right-to-know statute considers the impact notification could have on requesters in stating, "[n]otices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requester's access to a disclosable record."[87] An agency is afforded wide discretion in making this determination.[88] The statute then lays out what the norms for notification, if chosen, would be.[89] It later reiterates the impact the process may have on requesters when providing a public interest balancing test for agencies that decide to go outside of these established norms: "every additional day of notice is another day the potentially disclosable record is being withheld."[90]

4. *Utah*

Notification requirements are discussed in the state's right-to-know law,[91] but are also treated differently by some individual state agencies. Generally, the Act requires notification for confidential commercial information more closely resembling the *National Parks* standard.[92] But the Utah Department of Environmental Quality ("DEQ") has its own statute controlling the records of the Department.[93] Under that statute, the definition of confidential business information governs access to records as if they were the "standards of the federal Freedom of Information Act, 5 U.S.C. § 552, and not the standards of

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business-records-financial-data-trade-secrets [https://perma.cc/K7DG-KN3H]. The *Critical Mass* decision has not affected the interpretation of the Act, despite state-level case law that has acknowledged federal application of EO 12,600 in recent years. *Id.*; *see* Off. of the People's Couns. v. Pub. Serv. Comm'n, 955 A.2d 169, 177 n.12 (D.C. 2008).

[86] WASH. REV. CODE § 42.56.540 (2023). Notification is not optional if it is required by an additional law. *Id.*; *cf.* WIS. STAT. § 19.356(1) (2023) (stating that notification to a third party is similarly optional unless required by law).

[87] WASH. REV. CODE § 44.14.04003(12) (2023). The statute requires an agency to have a reasonable belief the record is arguably exempt before sending notice. *Id.*

[88] *Id.* Agencies cannot be held liable for failing to notify if they make a good faith effort. *Id.* § 42.56.060.

[89] *Id.* § 44.14.04003(12). For example, it states the common practice of agencies is to give ten days' notice and expressly indicate deadlines for submitter responses. *Id.*

[90] *Id.*

[91] UTAH CODE ANN. § 63G-2-309(1)(b) (2023).

[92] *Id.* § 63G-2-309(1)(a)(i). A broader provision also protects a submitter if they have "a greater interest in prohibiting access than the public in obtaining access." *Id.* § 63G-2-305(2)(b).

[93] *See id.* § 19-1-306; *Environmental Laws and Rules*, UTAH DEQ, https://deq.utah.gov/laws-and-rules/environmental-laws-and-rules [https://perma.cc/7XQS-M8D9].

Subsections 63G-2-305(1) and (2)."[94] Instructive information provided to business submitters on the Department's website has previously stated the *Critical Mass* test is used to determine if pertinent business information is confidential in certain situations.[95] Despite this, state guidance from the Utah DEQ states predisclosure notification is not required by law, and some businesses claiming confidentiality will not be contacted, but it is "ordinarily" recommended they are informed.[96]

B. *Contractual Control Over Predisclosure Notification*

In some instances, governments and private entities outline predisclosure notification requirements through contracts, which can promote secrecy to a greater extent than state law.[97] For example, the Washington statute explicitly discusses the liabilities that can stem from a separate contract with a private entity "if an agency had a[n] . . . obligation to provide notice of a request but failed to do so."[98] Laws like these also permit overly-broad contractual

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[94] UTAH CODE ANN. § 19-1-306(2)(a) (2008).

[95] UTAH ATT'Y GEN'S OFF., FAQS ABOUT BUSINESS CONFIDENTIALITY FOR DOCUMENTS SUBMITTED TO DEQ' 4 (Oct. 2014), https://web.archive.org/web/20211204230733/https://documents.deq.utah.gov/legacy/laws-and-rules/docs/2014/10Oct/FAQsBusinessConfidentialityfordocumentsSubmitted.pdf (on file with the *Ohio State Law Journal*) (This document was first published in 2014, and on the website as late as 2021. Current guidance for submitters is no longer available on the same webpage.). The Utah DEQ records statute gives the department the authority to make disclosures to the federal EPA of related trade secrets and confidential business records. UTAH CODE ANN. § 19-1-306(3)(a) (2008). But, if this occurs, predisclosure notification to the submitter is required. *Id.* § 19-1-306 (3)(b). Utah state courts have yet to cite to *FMI*. A Lexis search yielded no results in Utah jurisidictions when Shepardizing "FMI." For an example, see Schroeder v. Utah Att'y Gen's Off., 358 P.3d 1075, 1077 (Utah 2015).

[96] UTAH ATT'Y GEN'S OFF., *supra* note 95, at 2. Examples of no-contact scenarios given include when the agency is up against GRAMA deadlines or "where it believes review of the records themselves is sufficient for its determination." *Id.*

[97] *See, e.g.*, OHIO REV. CODE ANN. § 187.04 (West 2013) (contracts made with the state's private economic development corporation); WASH. REV. CODE § 44.14.04003(12) (2023).

[98] WASH. REV. CODE § 44.14.04003(12) (2023). The primary rationale for the addition of this language appears to be to warn agencies they "might lose the immunity provided by RCW 42.56.060 because breaching the agreement probably is not a 'good faith' attempt to comply with the act." *Id.* Similarly, in Ohio, a relevant statute states that records received by third parties are not considered public records if held by its privatized economic development corporation, JobsOhio, unless designated to be releasable by contract. OHIO REV. CODE ANN. § 187.04(C)(1)–(2) (West 2013). Economic development is privatized in a number of states. Jonathan Morgan, *The Promise and Perils of Privatizing State Economic Development Agencies*, UNC SCH. OF GOV'T (Nov. 5, 2013), https://ced.sog.unc.edu/2013/11/the-promise-and-perils-of-privatizing-state-economic-development-agencies/ [https://perma.cc/883X-74CQ] (Ohio, Rhode Island, Florida, Indiana, Wisconsin, Michigan and Arizona). The pitfall of this approach can be a lack of transparency and disclosure. *Id.*

provisions like the one negotiated between Cincinnati and Norfolk Southern.[99] What ultimately happens in the contract scenario is that, during negotiations, the government and the business hash out what information can be released and when it can be released.[100]

Requiring predisclosure notification for all requests is not an uncommon tool for large companies negotiating tax incentives with governments. For example, in an agreement between Facebook and an Ohio municipal government, consultatory rights were given to the company for *any request* made pertaining to it, with a three-day notice period, prior to execution of the related deal.[101] This provision, which encapsulated negotiations over $37.1 million in tax incentives, was hashed out before the public could provide any input on it.[102] In North Carolina, one journalist reported that, "[n]ot only did Facebook want to know at least four days in advance of any public records request being fulfilled, it demanded, 'the notice shall include a copy of the request' . . . . Facebook would see my FOIA request before a public official could even respond to it."[103] The contract between Amazon and governments in Virginia and New York City to build a new headquarters also included predisclosure notification provisions that were publicly criticized.[104]

In sum, the source of the predisclosure notification obligation can have a significant impact on a state government or private entity's ability to challenge public information requests. While state laws provide some limits to secrecy, those involved in public-private relationships can often subvert these measures through contractual provisions.

IV. EXPANDING SECRECY AND THE CONSEQUENCES OF DISTRUST AND INEFFICIENCY

The broadening of "confidential business information" under *FMI* and similar contractual provisions leaves federal and state predisclosure notification schemes susceptible to several significant issues. First, already existing distrust of the public information process will be further exacerbated as requesters question whether the impacts of *FMI* and overly-secret government contracts regarding consultatory rights defy the presumption of openness promised by federal and state right-to-know laws. Second, the broadening of predisclosure

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[99] *See supra* Part I.

[100] *See* Frazier, *Big Tech*, *supra* note 10.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] Cale Guthrie Weissman, *New York Will Give Amazon an Early Warning About HQ2 Records Requests After All*, FAST CO. (Dec. 11, 2018), https://www.fastcompany.com/90279607/report-new-york-will-give-amazon-a-heads-up-to-any-foia-requests [https://perma.cc/E5MD-G875]; *see NYCEDC Nondisclosure Agreement*, POLITICO, https://www.politico.com/states/f/?id=00000167-9b0a-d2a9-a1ef-9f9f33000001 [https://perma.cc/QQ9K-F6WM].

notifications means already overburdened governments will have more on their plates. In turn, request backlogs may grow, and delay will inevitably impede the public's ability to receive public information. Third, the likelihood of the increased use of Executive Order 12,600 without additional transparency measures will leave critics, who believe businesses police themselves throughout this process, increasingly concerned about overinclusivity under the Order, similar state laws, and contracts.

A. *Eroded Trust and the Presumption of Openness*

Reliance on third-parties to carry out government functions has become ubiquitous.[105] Private entities and governments alike claim the partnerships, and the secrecy protections that come with them, are what allow them to efficiently carry out functions of the state.[106] But others are weary of businesses stepping into the government's shoes yet still attempting to play by the rules of commercial law.[107] Critics claim assertions of secrecy in this context can easily extend beyond the justified concerns of competition and innovation and impede government transparency, democratic accountability, and even increase harms.[108] Their scope includes the most pressing issues of the day, like environmental protection.[109] While some consider predisclosure notification to be a corporate courtesy, many of those seeking to know more about their governments have criticized the procedures at state and federal levels.[110] Journalists give the notification process the moniker: "heads up" requirement.[111] In one instance of public disapproval, these contractual

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[105] Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. REV. 462, 465 (2021). From supplying voting machines, to running detention centers, and even using algorithms to make bail determinations of the inmates within, the private sector has found itself squarely in the middle of government's most important functions. *Id.*

[106] *See* Morgan, *supra* note 98 (discussing why governments choose to privatize aspects of state economic development in hopes of avoiding the shortcomings of government bureaucracy). *But see* Stewart & Sanders, *supra* note 29, at 22 ("It's simply unacceptable in a democratic society to permit government to avoid popular oversight and accountability merely by entering into a contract with a private entity." (quoting MITCHELL W. PEARLMAN, PIERCING THE VEIL OF SECRECY: LESSONS IN THE FIGHT FOR FREEDOM OF INFORMATION 78 (2010))).

[107] *See* Stewart & Sanders, *supra* note 29, at 22; Varadarajan, *supra* note 105, at 465.

[108] Varadarajan, *supra* note 105, at 465.

[109] *Id.* at 465–66 (noting that some also suggesting a different standard should apply to FOIA in this context). In the context of environmental protection, there is concern "secrecy undermines risk management and increases the likelihood of environmental harms." Dean, *supra* note 27, at 2426. Federal and state laws governing information release specifically also present this problem. *Id.* at 2430, 2432 (discussing the EPCRA also permitting secrecy regarding the chemical identities of substances used by submitters).

[110] *See, e.g.*, Frazier, *Big Tech*, *supra* note 10; Weissman, *supra* note 104; Amey, *supra* note 72.

[111] Frazier, *Big Tech*, *supra* note 10; Weissman, *supra* note 104.

provisions were condemned as "the tech giant [seeking] to further control the release of information."[112] Commentators suggest New York City politicians initially denied the unpopular insinuation that the City was using such promises to court Amazon when the company was in search of its HQ2 headquarter location.[113] But it was ultimately revealed that the opposite was true: New York City agreed to a predisclosure notification process via contract.[114] Backlash also occurred when local government agreed to similar provisions with Amazon in Northern Virginia.[115]

The overriding concern is that this corporate armoring of FOIA makes it harder for the public to access legitimate information, like the details of how governments and businesses are sharing responsibility for projects and what sort of incentives are being offered to keep corporate dollars flowing into a community.[116] Open government advocates fear record custodians across the country have entered a new era of predisclosure notification that is going to stray further away from transparency and the presumption of openness.[117] Experts in Virginia claim to have witnessed this evolution regarding the requirements agreed to by the local government and Amazon.[118] In Ohio, similar provisions were said to be bolder than ever before.[119] Some FOIA researchers claim FOIA-

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[112] Frazier, *Big Tech*, *supra* note 10. This phrase was used to describe a contract negotiated by Facebook regarding a facility the company intended to move to a suburb outside of Columbus, Ohio. *Id.*

[113] Weissman, *supra* note 104.

[114] Sally Goldenberg & Dana Rubinstein, *Top City Official Gave Amazon a Role in Public Records Release*, POLITICO (Dec. 11, 2018), https://www.politico.com/states/new-york/city-hall/story/2018/12/11/top-city-official-gave-amazon-a-role-in-public-records-release-737885 [https://perma.cc/KR2M-QGDU]. The public had little access to information during the bidding process as well. *See* Scott Cohn, *Amazon Reveals the Truth on Why It Nixed New York and Chose Virginia for Its HQ2*, CNBC (July 10, 2019), https://www.cnbc.com/2019/07/10/amazon-reveals-the-truth-on-why-it-nixed-ny-and-chose-virginia-for-hq2.html [https://perma.cc/X85G-2C76].

[115] *Arlington Already Planning to Forward FOIAs to Amazon*, ARL NOW (Apr. 1, 2019), https://www.arlnow.com/2019/04/01/arlington-is-already-forwarding-foias-to-amazon/ [https://perma.cc/9CL6-PFU6]. Reports even stated that state and local governments were giving Amazon a say when it came to records requests before an agreement was formally hashed out. *Id.*

[116] *See, e.g.*, *id.*

[117] *See, e.g.*, *id.*

[118] Megan Rhyne, *One of These Is Not Like the Others*, VA. COAL. FOR OPEN GOV'T (Mar. 15, 2019), https://www.opengovva.org/blog/one-these-not-others [https://perma.cc/YL7U-WT3N]. Government officials in Virginia called those assertions a "red herring," stating there was nothing ethically wrong, or different from past agreements, with the Amazon provision. *Lawyer Defends FOIA Component of Amazon Deal*, *supra* note 10. The Arlington County Attorney said, "There are legitimate records that may be very sensitive and even prohibited by law from disclosure . . . We're simply giving the company the opportunity to know what's going on." *Id.*

[119] Frazier, *Big Tech*, *supra* note 10.

warning agreements like this set a precedent for more.[120] This is a problem when some are claiming their local records request process is already "akin to pulling teeth."[121]

With the broadening of Exemption 4 under *FMI*, vastly more information will be exempted from release under FOIA and states that use it as a model.[122] This will exacerbate the adversarial nature of the process. Requesters and government will increasingly be at odds as records custodians are required to protect more information, and the number of notifications required under EO 12,600 will increase.[123] Further, the intentional or inadvertent delay these additional notices will cause will continue to erode the trust of requesters. In turn, requesters may give up.[124] For example, journalists claim delay and distrust lead them not to file requests because, "[t]hey have heard the horror stories and say, 'I'm not going to do this anymore[.]'"[125]

Perceptions of fairness are critically important to a law's effectiveness and legitimacy in the communities that law impacts.[126] Just as a people who believe police are biased toward them are less likely to report a crime, requesters who believe Freedom of Information laws are deeply flawed will be less likely to use them legitimately.[127] The most dogged journalists may persevere in this environment, but newsrooms are increasingly staffed with less experienced or overworked journalists.[128] Therefore, there is risk that trust in the predisclosure

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[120] *Id.*; Stewart & Sanders, *supra* note 29, at 5 (noting a "recent push by lawmakers and developers to bring unprecedented secrecy to efforts to lure businesses to their communities" (quoting Aimee Edmondson & Charles N. Davis, *"Prisoners" of Private Industry: Economic Development and State Sunshine Laws*, 16 COMM. L. & POL'Y 317, 320 (2011))).

[121] Michael Kilian, *Reporters' Focus on Government Transparency Journalism Set to Bear Fruit Across New York State*, DEMOCRAT & CHRON. (Mar. 27, 2022), https://www.democratandchronicle.com/story/news/2022/03/25/gannett-new-york-government-transparency-reporting-efforts/7165077001/ [https://perma.cc/G74X-HV5C].

[122] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).

[123] *Reporters Face Long FOIA Delays*, *supra* note 25.

[124] *Id.*

[125] *Id.*

[126] *See generally* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513 (2003).

[127] *Compare id.* at 516–17 (finding that a perception of unfairness in law enforcement leads to a lack of cooperation), *with Reporters Face Long FOIA Delays*, *supra* note 25 (discussing how delays in the FOIA request process caused reporters not to file requests and led them to distrust "the people and the agencies they are working with").

[128] *See* Elizabeth Grieco, *10 Charts About America's Newsrooms*, PEW RSCH. CTR. (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/10-charts-about-americas-newsrooms/ [https://perma.cc/TR8H-Q7R5] (finding midcareer newsroom workers were impacted the greatest during a ten year period of newsroom employment decline, allowing the youngest subset of workers to overtake them as the most numerous newsroom employees); *see also* Jared Brey, *As Newsrooms Do More with Less, Can Reporters Keep Up?*, COLUM. JOURNALISM REV. (Sept. 12, 2018), https://www.cjr.org/united_states_project/productivity-stories-news.php [https://perma.cc/Q7EU-RDNE].

notification process, and right-to-know laws, will further erode following *FMI* and ultimately impede the free flow of legitimate information.

B. *Stressing an Already Overburdened System*

The higher number of records protected from disclosure under FOIA Exemption 4 and similar state provisions following *FMI* will likely trigger an increase in predisclosure notifications.[129] The federal government is already significantly overburdened with public records requests.[130] The FOIA backlog has only worsened in recent years.[131] Even before *FMI*, open government advocates were expressing concerns that heightened predisclosure notification requirements, made by contract instead of a by statute or regulation, would bog down the records request process and continue to overburden local officials.[132] The Reporters Committee for Freedom of the Press claims the additional burdens of predisclosure notification delay responses.[133]

For example, opponents to the contract between Amazon and Arlington, Virginia, a municipality which had already documented delay issues in processing records requests, were concerned the problem would be exacerbated.[134] County officials, in contrast, stated that Amazon would bear the brunt of additional work created by the process.[135] This did the opposite of assuaging the concerns of open government advocates: Giving more responsibility to the corporation was seen as especially problematic because a requester would have to specifically ask for their personal information to be

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[129] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).

[130] *See* Justin Doubleday, *FOIA Backlogs on the Rise After Record Number of Requests*, FED. NEWS NETWORK (Mar. 3, 2023), https://federalnewsnetwork.com/agency-oversight/2023/03/foia-backlogs-on-the-rise-after-record-number-of-requests/ [https://perma.cc/JA2E-NASN].

[131] *Id.*; Justin Doubleday, *The FOIA Backlog Continued to Grow Last Year*, FED. NEWS NETWORK (July 22, 2022), https://federalnewsnetwork.com/agency-oversight/2022/07/the-foia-backlog-continued-to-grow-last-year/ [https://perma.cc/Q6BF-TUYL] ("A request is considered backlogged when it has been pending at an agency longer than the statutory time to respond . . . .").

[132] *Arlington Already Planning to Forward FOIAs to Amazon*, *supra* note 115. The workflow concern regarding local officials was partially that they have "given themselves more work." *Id.*

[133] *Id.* The organization "provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists." *What We Do*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/what-we-do/ [https://perma.cc/GT3E-VPCL].

[134] *Arlington Already Planning to Forward FOIAs to Amazon*, *supra* note 115.

[135] *Id.* ("When the request is received, it will simply be forwarded to Amazon for its information . . . . No further staff effort is anticipated.").

removed from the request, and private companies would have a much greater opportunity to prevent a request from succeeding.[136]

Further, the unfortunate reality is that when state governments delay responding and miss statutory deadlines, those legal violations will go largely unenforced.[137] Requesters can file lawsuits, but those are often too long and costly to be effective.[138] News outlets and government watchdogs have reported the tactic of "delay, delay, delay" being used to give businesses or governments time to spin a story or wait until public interest in a topic has waned.[139] If the process becomes more burdensome, even more critical public information is at risk of being buried in government files and unavailable to the public regarding how government depends upon and works with the private sector.

C. *The Self-Policing Mechanism of Predisclosure Notification*

Historically, those in favor of predisclosure notification have cited "widespread concern within the business community," that without notification the government would not appropriately protect their information.[140] The *FMI* decision follows this pro-business, commercial privacy rationale.[141] That framework further protects companies through exemptions based on the private entity's own reporting of what constitutes confidential information.[142] The legal framework, applying EO 12,600, following the FMI decision has further reinforced business interests.[143] The Biden Justice Department advised other agencies that business entities are often in a better position than agencies to

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[136] *Id.* (noting that otherwise the company would have access to their name, address, phone number and signature).

[137] *Id.*

[138] *Id.*

[139] *See, e.g.*, Clark Merrefield, *How He Did It: A Journalist Uncovers the Afghanistan Papers*, JOURNALIST'S RES. (Feb. 28, 2020), https://journalistsresource.org/politics-and-government/100fghanistan-papers-washington-post-craig-whitlock/ [https://perma.cc/TG3Q-TMDM]; Colman M. Herman, *Delay, Delay, Delay*, NEW ENG. FIRST AMEND. COAL. (July 13, 2021), https://www.nefac.org/delay-delay-delay/ [https://perma.cc/6KVU-Q6RC]; Kilian, *supra* note 121; Stewart & Sanders, *supra* note 29, at 28 (citing COMM. ON OVERSIGHT & GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, FOIA IS BROKEN: A REPORT 34 (2016)).

[140] U.S. DEP'T OF JUST., FOIA UPDATE: OIP GUIDANCE: SUBMITTERS RIGHTS, 3 FOIA UPDATE 3 (Jan. 1982), https://www.justice.gov/oip/blog/foia-update-oip-guidance-submitters-rights [https://perma.cc/7G9Y-LBVV]. Past Department of Justice leadership has even argued this could lead to business submitters being reluctant to work with and provide the government valuable information it needs to run federal agencies. *Id.*

[141] SULLIVAN & CROMWELL LLP, *supra* note 74. Some predict *FMI* will save businesses money, citing a "greater protection to commercial information submitted to the federal government" and reduced costs associated with opposing disclosure. *Id.*

[142] *Id.*

[143] *See generally* U.S. DEP'T OF JUST., FOIA "EXEMPTION 4" (Oct. 2022) [hereinafter DOJ SLIDESHOW], https://www.justice.gov/oip/page/file/1399971/download [https://perma.cc/7DTD-WC6W].

determine when their records fall under Exemption 4.[144] While facially logical, this effectively leaves businesses to police themselves. Some have criticized the idea of self-regulation as the government "uncritically" accepting a contractor's claims, which could lead to redaction or withholding "more information than is justified or necessary."[145] Journalists note there has already been a shift from the norm regarding "what government documents should be released" to private entities "controlling what documents governments can release to the public."[146] This practice allows "large "companies like Facebook to stifle debate" about controversial topics like tax incentives.[147]

Self-policing also disrupts transparency. FOIA requires the government to indicate, when possible, how much information was redacted and under what exemption.[148] This transparency is important to requesters because it provides an idea of what type of information was withheld and under what justification.[149] The problem, to some, is that there is no indication of when information has specifically been redacted following a EO 12,600 review at the request of a contractor.[150] Some critics, who claim to have unearthed unjustified redactions, believe the process could be abused; they fear "the government rubber stamps the contractor's desires and redacts more information than it should."[151] The newly-gained power of businesses to self-police following *FMI* may embolden companies to withhold even more information. Vast withholdings would also make it more difficult to pinpoint illegitimate uses of the process.

V. A MULTIFACETED SET OF TOOLS TO FOSTER TRUST AND EFFICIENCY

A multifaceted toolbox of solutions is necessary to address concerns of distrust and inefficiency created by current applications of consultatory rights. To fix these issues, this Note first offers a model state law to encourage transparency and balances openness with the interests of business submitters. Secondly, this Note proposes a two-tiered approach to predisclosure

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[144] *Id.* at 36.

[145] Neil Gordon, *A National Action Plan for Contract Reform*, PROJECT ON GOV'T OVERSIGHT (May 21, 2015), https://www.pogo.org/analysis/2015/05/national-action-plan-for-contract-reform [https://perma.cc/N3WV-TTEL].

[146] Frazier, *Big Tech*, *supra* note 10 (quoting reporter Mark Williams of *The Columbus Dispatch*).

[147] *Id.*

[148] *See FOIA: Frequently Asked Questions*, *supra* note 12 ("If any portions of the records are withheld, for instance because disclosure would invade an individual's personal privacy, the agency will inform you of the specific FOIA exemption that is being applied.").

[149] Amey, *supra* note 72.

[150] *Id.* (discussing a Pentagon Inspector General (IG) audit report: "The IG cited exemption (b)(4) to redact information that clearly is not privileged or confidential, and it might make you wonder if any of those redactions were demanded by the contractor—Alenia North America—during a 12600 review").

[151] *Id.*

notification, which suggests that the current legal landscape allows agencies to permit wider exemption, but only requires predisclosure notification when the higher "competitive harm" standard is met. This approach is designed to restore confidence in the records request process and reduce backlogs. Lastly, this Note argues that governments would better foster trust if they provided more detailed descriptions of withholdings prompted by EO 12,600 and similar state laws, and publicly audited those processes.

A. *A Model State Law that Emphasizes the Presumption of Openness*

State legislators can adopt aspects of this model law into their own codes to improve trust and efficiency in the predisclosure notification process. Part V.A. suggests states implement two key aspects into their public records statutes: (1) include clear guidance and set norms related to the real-world impacts of the presumption of openness; and (2) include a limiting balancing test for notification that prioritizes public interest. The predisclosure notification law present in Washington state is discussed as an exemplar among its peers and most closely resembles the approach this model law proposes. However, while Washington's law contains some positive attributes, this Note is not advocating for its complete adoption. In turn, Part V.A.3. urges states to take an approach to contract law that diverges from many jurisdictions, including Washington state.

1. *Clear Guidance on the Day-to-Day Impacts of the Presumption of Openness*

To solve issues of trust, requesters must believe the system of public disclosure is operating as designed: under the presumption of openness.[152] Washington's open records law not only successfully states this purpose, but explicitly provides guidance on its impact on practical aspects of the predisclosure notification process.[153] The act describes its purpose as follows: "To provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure."[154] Next, as the statute lays out the specific procedures for predisclosure notification, its authors consistently remind their audience how the presumption of openness should be applied.[155] In its first

[152] The actual impacts of the system can be just as critical to its legitimacy, and utilization, as its perception of fairness. *See Reporters Face Long FOIA Delays*, *supra* note 25; Sunshine & Tyler, *supra* note 126, at 513.

[153] *See* WASH. REV. CODE § 44.14.04003(12) (2023).

[154] *Id.* § 44.14.010(3). The Act states that, the agency "will be guided by the provisions of the act describing its purposes and interpretation." *Id.*

[155] *See generally id.* § 44.14.04003.

paragraph, the law states, "[n]otices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requester's access to a disclosable record."[156] This statement properly orients records custodians toward disclosure as they begin the process. If an agency starts with a more defensive posture, as some do, there is a greater risk of over-exemption and a decrease in trust as a result.[157] Section 12 of the statute reemphasizes the importance of this presumption when it discusses whether third parties should receive notice.[158] This section addresses the concern of the "delay, delay, delay" tactic of public relations.[159] If the statute explicitly discouraged this, not only in its purpose section but in the provisions detailing predisclosure notification procedures, it is more likely that agencies would avoid these tactics requesters find untrustworthy. If the law's purpose is clear, and custodians are intentionally reminded of it, organizational culture surrounding openness will improve.[160] This language explicitly promoting openness and reemphasizing it throughout the process should be included in the model law.[161]

This model law should also include the aspects of the Washington statute that properly describes the norms of the disclosure process, signaling to submitters, agencies, requesters, and courts what is to be expected. For example, the statute provides, "[t]he practice of many agencies is to give ten days'

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[156] *Id.* § 44.14.04003(12).

[157] *See, e.g.*, Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 272–74 (2003); Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655, 671 (2022) (describing over-classification as "a rampant problem" in the area of national security); *see also* Stewart & Sanders, *supra* note 29, at 3–4 ("The practice in the recent Amazon headquarters bidding has the look of a new 'Ashcroft memo' of public-private partnerships, dangerously creating incentives that favor secrecy over government transparency." (footnote omitted)).

[158] WASH. REV. CODE § 44.14.04003(12) (2023) ("More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld.").

[159] *See* Herman, *supra* note 139.

[160] *See Understanding and Developing Organizational Culture*, SOC'Y FOR HUM. RES. MGMT., https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/understanding-developing-organizational-culture.aspx [https://perma.cc/9Z5P-VSAQ] ("Though culture emerges naturally in most organizations, strong cultures often begin with a process called 'values blueprinting,' which involves a candid conversation with leaders from across the organization."). It is too easy for high level guidance to get lost to the daily demands of record custodian's job or for those purpose statements to be manipulated.

[161] For example, records custodians may be more organizationally separated from the agency's strategic leadership and more inclined to make decisions based primarily on the impact to the public, rather than the agency. In an era favoring textualism, the goals of legislature regarding the presumption of openness need to be explicitly stated in the law. *See* Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 360 (2021) ("A legal system should give understandable commands that can be consistently interpreted.").

notice."[162] Providing agencies a clear standard will allow them to operate without concern they are running afoul of the law. Further, providing this benchmark to requesters allows them to better understand when delay or inappropriate practices have occurred.

2. *Limited Notification Designed to Promote Openness*

The next aspect of the Washington state law that should be incorporated into this Note's model law to restore trust and efficiency is its suggestion that governments should limit predisclosure notification to instances where fairness demands it—in balance with public interest. In Washington, statutory predisclosure notification procedures are optional unless required by another law.[163] Statutorily defined principles guide this decision: notification should occur if disclosure "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions."[164] This balance makes sense as a consideration of fairness and the societal benefits that result from competition and innovation.[165]

But the legislature needs to define this test in detail. The Washington statute accomplishes this goal.[166] If the legislature is not clear, a well-intentioned law with the goal of openness can end up misconstrued or hijacked.[167] This balanced approach also more closely aligns with the original intent of the *National Parks*

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[162] WASH. REV. CODE § 44.14.04003(12).

[163] *Id.* § 42.56.540. Government records custodians have "wide discretion to decide whom to notify or not notify." *Id.* § 44.14.04003(12).

[164] *Id.* § 42.56.540.

[165] Predisclosure notification can give businesses a rightful "heads up" that legitimately sensitive records are potentially being released to the public. *See Lawyer Defends FOIA Component of Amazon Deal*, *supra* note 10.

[166] Washington's law appears to apply the balancing test to all third parties, including individuals—including information about employees, crime victims, and other people deserving privacy rights. *See* WASH. REV. CODE § 42.56.540 (2023). Individuals should be afforded a greater right to privacy because the potential for disclosure to cause substantial and irreparable damage is greater than for business entities, which are afforded less privacy rights outside the realms of fair competition. *See* Exec. Order No. 12,600, 3 C.F.R. 235, § 10 (1987); *see, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979) (enjoining agency disclosure on the basis of the Trade Secret Act rather than a private "reverse-FOIA" right).

[167] Critics have described the California Public records Act as "a nebulous construct that begs to be misused." Stewart & Sanders, *supra* note 29, at 15 (discussing, among others, the California Public Records Act). The Act, speaking to exemption more generally, outlines when information is exempt, but also provides that in some cases, "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." CAL. GOV'T CODE § 6255(a) (2021). While this is a heavy burden to meet, there is still concern that "vague language" will "open the door for those who favor secrecy . . . ." Stewart & Sanders, *supra* note 29, at 15.

standard—to prevent disclosures that will cause "competitive harm."[168] Requesters are more likely to respect this rationale and trust the process, as it does not allow submitters or governments to hide information out of fear of embarrassment or public criticism as is permitted under *FMI*.[169] This should be the model standard because it strikes the best balance between the rightful interests of private industry and the public, while increasing efficiency.

3. *Contract Law Can Still Subvert This Important Balance*

Some state statutes, like Washington's, declare that other laws and contracts may require predisclosure notification despite the optional nature of general predisclosure notification provisions.[170] While this makes sense in some contexts, contract law is further removed from the democratic process and citizen feedback cannot as easily be incorporated into drafting.[171] Provisions under this standard tend to creep outside the norms of what a citizenry would permit, including provisions that give a longer "heads up" to businesses, do not require the removal of requesters' information (which some may fear could lead to tracking, intimidation, exclusion, and other types of pressure), and include broader requirements that demand notification when *any* contact is made with a requester or the public.[172] The primary concern these business-oriented contracts create is that they allow private entities to illegitimately get ahead of a story by getting a "heads up" about it when the law would typically not require that.[173] In turn, businesses can induce delay if they disfavor the release of particular information. At their worst, provisions could demand a heads up for every request pertaining to a submitter, as was the case related to publicity in the railroad agreement negotiated by Norfolk Southern, or provisions could require a government to fight requesters alongside third parties.[174] Such

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[168] Other states even specifically note in their statutes that their provisions are based on the *National Parks* or "competitive harm" standard in statute. *See supra* Part III.A.

[169] Communities need this information to understand if government and those it does business with are meeting their needs and adhering to their values. *See A Key to Democracy: Access to Information Critical for Citizens, Governments*, *supra* note 31.

[170] *See* WASH. REV. CODE § 44.14.04003(12) (2023).

[171] The idea that notification must be afforded when required by law makes sense. If people do not support the law, theoretically, they could remove their representatives from the legislature. In some instances, representative government is used to broker deals, but in other instances, deals do not reach that point until they have already been hashed out. *See* Frazier, *Big Tech*, *supra* note 10. Instead, government agencies with non-elected officials at their helm, heavily influenced by private companies, are hashing out the details of what will be included. *See id.* It is harder to influence these processes democratically.

[172] *See, e.g.*, *id.* The pre-execution contract related to the sale of the Cincinnati Railroad discussed in Part I is similar to this sort of provision as well. CINCINNATI S. RY., *supra* note 9, at 50.

[173] *See* Frazier, *Big Tech*, *supra* note 10.

[174] *Id.*; CINCINNATI S. RY. ASSET PURCHASE AGREEMENT, *supra* note 9, at 50; Deborah Fisher, Opinion, *Tennessee Must Stop Treating Government Business as a Trade Secret*,

requirements would chill requests and overburden the system. This would foster secrecy, prevent public criticism of government and more easily allows for corporate obstruction in this public process.[175]

To rectify these issues, states should pass legislation that requires all government contracts, and similar incentive deals, to include provisions that 1) have balanced the public interest with private business interests 2) are reviewable by a state agency for approval, and 3) are interpreted with a presumption of openness. For example, the Washington provision falls short when it comes to the latter-most recommendation. The statute effectively describes the impact secrecy and delay have on the requestor but fails to directly state requests should be executed under a presumption of openness.[176]

Admittedly, if agencies use this solution, as well as the two-tiered approach discussed in the next subpart, there is potential for overdisclosure of information that meets the *FMI* standard but does not rise to the level of "competitive harm." This is preferable to reduced transparency and efficiency. The information that might be overdisclosed would likely be less damaging to companies because it does not involve competitive harm. Comparatively, it can be difficult for citizens to claw back transparency once secrecy has been instituted. Governments will also be insulated from lawsuits related to overdisclosure under this model law and the two-tiered approach. The only way to sue a government for wrongful disclosure of business information is not under FOIA, but under the Trade Secrets Act.[177] This law only provides an avenue for legal action for releases that cause competitive harm.[178] Otherwise, the government is immune from liability that could impose financial penalties.[179] Ultimately, the government has discretion to grant FOIA exemptions, unless withholding is required by another statute.[180] For the broader *FMI* standard for Exemption 4, there is no such statute. Governments are thus unlikely to face significant legal penalties related to overdisclosure.

Further, counterarguments to this model law are unconvincing. This is not an overreach into the freedom to contract because one party is the government. A democratic society can and should hold their government to higher standards than private citizens when contracting.[181] While some may argue governments must be able to structure "heads up" provisions in economic development deals to remain competitive, states could offer incentives if they uniformly adopted

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TENNESSEAN (Mar. 10, 2019), https://www.tennessean.com/story/opinion/2019/03/10/tennessee-sunshine-law-trade-secret-open records/3109008002/ [https://perma.cc/GS2J-9KBM].

[175] *See* Frazier, *Big Tech*, *supra* note 10.

[176] WASH. REV. CODE § 44.14.04003 (2023).

[177] *See* 18 U.S.C.S. § 1836; Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979).

[178] *See* 18 U.S.C.S. § 1839(3).

[179] 5 U.S.C. § 552(a)(8)(A)(i)(I)–(II).

[180] *Id.* § 552(b)(3)–(4); *see* Collette, *supra* note 20.

[181] *Cf.* 29 C.F.R. § 1608.5 (1979) (prohibiting some federal contractors from discriminating in employment decisions due to their relationships with the government).

provisions that ensured citizens their government officials would not be touching transparency. Adopting this model law would ensure it is not and protect the presumption of openness and ensure that transparency is not a bargaining chip.

B. *A Two-Tiered Approach to Notification Prioritizes Trust and Efficiency*

The judicial and regulatory framework of state and federal law would allow a two-tiered approach to predisclosure notification, which would, in turn, enhance requester confidence and government efficiency. This solution could be achieved through judicial interpretation or a clarifying executive order. The two-tiered approach would allow agencies to permit broader overall exemption as mandated by *FMI*, but only require predisclosure notification in the most serious cases where the higher "competitive harm" standard is met. This aligns with the presumption of openness and balances public and private interests.[182]

This two-tiered approach will promote trust among requesters. Only providing notification in this context provides proper distance in the relationships between governments and private parties, which, in some instances, have gotten too cozy when it comes to predisclosure notification.[183] While this solution will only apply to disclosures operating under public law, it will set a norm visible to parties even in private contracts. This effect will be especially impactful if legislatures can openly emphasize the approach's public impact.[184] For example, a contract with a provision that demands a government provide notification for every single request, or consultation on all public relations matters, will appear even more distant from the standards set by law. The government officials, who approve these contracts, may think twice about the public perception of this comparison.

This two-tiered system could also lead to a more efficient use of government resources in the already overburdened area of public records. Under *FMI*, agencies will have to defer to businesses as to whether they have merely treated information as secretive.[185] This is a highly subjective standard.[186] A business may also be incentivized to overdesignate what it believes to be confidential business information to create an alarm system that stretches beyond legitimate

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[182] *See supra* Parts II, IV.

[183] *See* Frazier, *Big Tech*, *supra* note 10 (discussing notification requirements for *all* requester contacts).

[184] *See* Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1274 (2000) ("[O]ne of the ways in which the government can help influence norms is by casting an activity that was formerly viewed as an individual choice with individual consequences as one that creates negative externalities.").

[185] *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).

[186] *See id. See generally* DOJ SLIDESHOW, *supra* note 143.

uses to get notified of requests.[187] But if the two-tiered approach specifically applies the competitive harm standard to predisclosure notification, decisions will be more consistent, and it will be less necessary for businesses to police themselves.[188] The back-and-forth between the information holder and submitter regarding records that may require notification is time consuming, and can create delay, which further causes distrust and backlog, interrupting the free flow of information.[189]

Fairness for business will also not be lost under the two-tiered approach. Exemption 4 will still be bound by the *FMI* standard, as required by the Supreme Court.[190] *FMI*, though, does not address predisclosure notification.[191] So, it is permissive to give notification only where fairness is truly warranted—the release of legitimately damaging information—while still protecting exemption under the broader *FMI* standard. Further, the federal government has only spoken to the procedure in two recent instances: EO 12,600, which explicitly states the competitive harm standard should be followed, and its conflicting communication from the Department of Justice adopting the *FMI* standard.[192]

Without a clear mandate from the Supreme Court or the executive branch, a two-tiered system for predisclosure notification is still permissible because of EO 12,600's mention of the "competitive harm" standard.[193] The Order states seven times that the competitive harm standard applies.[194] When written in 1987, the Exemption reflected competitive harm as what the federal courts were still applying: the *National Parks* standard.[195] So, some may suggest the Order simply has not been updated, and was not meant to create a two-tiered standard. But this Note argues that the repetition of the term displays that the Order is specifically prioritizing the value of protecting competitive harm. If the Order

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[187] *See* Frazier, *Big Tech*, *supra* note 10.

[188] *See* SULLIVAN & CROMWELL LLP, *supra* note 74 (explaining that businesses will be given greater deference to decide exemption under FMI in comparison to the competitive harm standard).

[189] *See* WASH. REV. CODE § 44.14.04003(12) (2023) (acknowledging the time costs of notification).

[190] *See Food Mktg. Inst.*, 139 S. Ct. at 2366; *Exemption 4 After the Supreme Court's Ruling in* Food Marketing Institute v. Argus Leader Media, U.S. DEP'T OF JUST.' (Oct. 4, 2019), https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media [https://perma.cc/6YEP-WN63] ("In the wake of [*FMI*], agencies should now use those predisclosure notification procedures when necessary to seek the submitter's views . . . in determining whether information is 'confidential' for purposes of Exemption 4 of the FOIA, as outlined in this guidance, are met.").

[191] *See Exemption 4 After the Supreme Court's Ruling in* Food Marketing Institute v. Argus Leader Media', *supra* note 190.

[192] *See supra* Part II.

[193] Exec. Order No. 12,600, *supra* note 60.

[194] *Id.*

[195] *See id. See generally* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 765 (D.C. Cir. 1974).

was intented to track the Exemption over time, its authors could have explicitly stated that throughout.

Further, the Order could have been updated over time to reflect Supreme Court interpretation of Exemption 4, but it has remained unchanged.[196] This is in stark contrast with other areas of law governed largely by executive action, which are all too familiar with the whiplash executive orders can create upon a new presidential administration.[197] That instability has not occurred as it relates to predisclosure notification under the "competitive harm" standard of EO 12,600. Further, the Justice Department's Memo applying the *FMI* standard does not represent such a change.[198] The Memo is advisory, does not have the force of an executive order, and the Department has its own secrecy interests.[199]

This two-tiered solution is necessary unless a clarifying executive order is published. A new order is ultimately needed, and it should provide notification only when absolutely necessary for the fairness of the third party as it relates to competitive harm. If possible, it should discourage state actors from entering into contracts that allow for extremely broad notification or all-request notification. While the government cannot interfere with how private parties contract among each other, it can regulate how its agencies interact with private parties.[200] This will allow states to adopt the two-tiered approach more uniformly.[201] Uniform application among states is important to prevent the previously discussed "bargaining chip" issue.[202] Therefore, this two-tiered approach should be widely adopted, after it is either achieved through federal judicial interpretation or a clarifying executive order, to promote the presumption of openness.

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[196] Exec. Order No. 12,600, *supra* note 60. The Order, implemented in 1987, has stood for almost forty years. *Id.*

[197] *See, e.g.*, Julia Preston, *Decoding Trump's Immigration Orders*, MARSHALL PROJECT (Feb. 3, 2017), https://www.themarshallproject.org/2017/02/03/decoding-trump-s-immigration-orders [https://perma.cc/K4JC-PSLE].

[198] OFF. OF THE ATT'Y GEN., *supra* note 44, at 1.

[199] *See generally* DOJ SLIDESHOW, *supra* note 143; *Exemption 4 After the Supreme Court's Ruling in* Food Marketing Institute v. Argus Leader Media, *supra* note 190 (the advisory is called "guidance"). The Justice Department has previously been accused of allowing overexemption. Uhl, *supra* note 157, at 272–74.

[200] *See supra* Parts II, IV.

[201] The two-tiered approach is applicable to state statutes modeled on federal law or the "competitive harm" standard, unless expressly prohibited by other laws. Further, DOJ guidance does not prevent these states, which are independent of the federal government, from applying this solution.

[202] *See, e.g.*, *Lawyer Defends FOIA Component of Amazon Deal*, *supra* note 10; Frazier, *Big Tech*, *supra* note 10.

C. *Requiring Additional Disclosures and Audits Increases Transparency*

When the government decides to withhold information, it should be required to justify that decision as best as possible without compromising the integrity of justified secrecy. As previously discussed, concerns about the government handing over exemption questions to business submitters—who, in turn, largely get to police themselves—further emphasize the importance of transparency.[203] Increased communication about when predisclosure notification occurs, its result, as well as audits into whether it is being abused, will promote trust and efficiency.

The Freedom of Information Act already requires agencies to communicate to requesters how much information they are withholding and under which exemption.[204] But there is no requirement that demands disclosure when information has been redacted pursuant to Executive Order 12,600 or a similar predisclosure notification process.[205] As open government advocates have argued, "[t]he government should be required to inform FOIA requesters when a 12,600 review was conducted and to denote with a special label or notation information that was withheld as a result of that review."[206] This call for reform occurred prior *to FMI*'s broadening of Exemption 4 protections in 2019.[207] Advocates also suggest strengthening federal FOIA watchdogs to prevent overexemption.[208] To do this, organizations like POGO suggested in 2014 and 2015 that an annual audit of the 12,600 process should occur.[209] This Note suggests these reforms are more critical than ever post-*FMI* to determine whether the FOIA system is operating with a presumption of openness in a broadened world of exemptions. The prior concerns of open government advocates that the process is "being skewed in favor of those with a vested interest in secrecy" is now greater than ever.[210] These suggested changes could help restore public trust in the records request system—and in government as a whole.

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[203] *See supra* Part IV.C.

[204] Amey, *supra* note 72.

[205] Gordon, *supra* note 145.

[206] *Id.* The Project on Government Oversight (POGO) is "a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power[.]" *Mission and Values*, PROJECT ON GOV'T OVERSIGHT, https://www.pogo.org/about [https://perma.cc/K5E6-RZTU].

[207] Gordon, *supra* note 145 (noting that "[c]hanges could be implemented by the Office of Information Policy at the Department of Justice").

[208] *See id.* As POGO validly notes, "The public deserves to know who objected to the release of information, especially if it was a non-governmental entity." Amey, *supra* note 72.

[209] Amey, *supra* note 72; Gordon, *supra* note 145.

[210] Gordon, *supra* note 145.

VI. CONCLUSION

The free flow of legitimate public information is impeded under federal and state governments' current legal treatment of the predisclosure notification processes. Further, the presumption of openness will be at risk if issues of mistrust and inefficiency continue to fester. Changing state laws to more closely resemble the model state law this Note proposes, applying the two-tiered approach to interpreting EO 12,600, and instituting other transparency measures will combat the secrecy that has become pervasive in public-private relationships. In turn, citizens will better be able to bring government wrongs out of the shadows and demand democratic accountability.