Costly Monitoring:
Using Positive Theory to Analyze the Implications of the Freedom of Information Act

Patrick Egan
Department of Political Science
University of California, Berkeley
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ABSTRACT:

There is little empirical or formal research conducted by political scientists on freedom of information (FOI) laws. Those who have studied FOI laws have portrayed them as tools that help legislatures monitor bureaucracies at a lower cost than direct monitoring. In this paper, I formally model the effects of FOI laws to argue that such monitoring comes at a cost: it brings agency actions to the attention of the public, leading to a shift of policy toward the preferences of the median voter. In some cases, this shift is in the legislature’s interest. But in others, it is not. Self-interested, rational legislators therefore do not always have the incentive to adopt and expand FOI laws. I support this analytical finding with examples from the 40-year legislative history of the U.S. Freedom of Information Act, and lay out additional testable hypotheses that are yielded by my theory.

INTRODUCTION

“This legislation springs from one of our most essential principles,” stated President Lyndon Johnson upon signing the Freedom of Information Act (FOIA) in 1966. “A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.” (President 1966)

FOIA, which declares that citizens have a right to government records subject to certain exemptions for matters like national security, trade secrets, and law enforcement, is now considered a key element of the democratic process. But Johnson’s elevated rhetoric accompanying his signing of the FOIA elided the fact that his administration had never been particularly enthusiastic about the legislation (Archibald 1993). FOIA’s origins were in the divided government of the mid-1950s, when a committee in the Democratic-controlled House began an investigation by Representative John Moss (D-CA) of government secrecy policies in the Eisenhower administration. An 11-year campaign for an FOI law followed, with Moss as its unflagging advocate. It wasn’t until 1964 that FOIA won passage in the Senate thanks to the help of Moss’ Senate allies, and an aggressive lobbying effort by the press. But the bill was referred to the House Judiciary Committee, where it died unceremoniously. A similar fate was predicted after Senate passage in the 1966 session—a prediction so confident that the executive branch, known to be wary of the bill, waged little opposition. But Moss crafted a political deal that landed the bill in his own subcommittee and cleared its eventual passage by the House. “It took the Executive Branch by surprise,” wrote Sam Archibald, who was Moss’ subcommittee staff director for the entire 11-year campaign. “Instead of the expected easy death, the Congress watchers downtown knew they had a possible Freedom of Information Act on their hands.” (Archibald 1993: 729) After his
administration had won some important concessions in the legislation, Johnson signed the Freedom of Information Act—without ceremony or press coverage—on July 4, 1966.

Johnson’s wariness about FOIA was reasonable. With his signature, he enacted a powerful new tool with which the activities of the executive branch could be exposed to public scrutiny. Although he evoked high-flung principles upon its passage, it was clear that he—and most of the subsequent occupants of the Oval Office—believed the legislation to be contrary to the interests of the executive branch.

**FOIA as a monitoring instrument**

The handful of political scientists who have studied FOIA’s history largely agree with Johnson’s assessment. Although access to government documents is considered a hallmark—and indeed, a necessary element—of a functioning democracy, political scientists argue that at base, these laws are less about democratic principles than about a way for legislatures to monitor the bureaucracies of the executive branch. As in any principal-agent relationship, legislatures face information asymmetries in their attempts to monitor the bureaucracies they create, as agencies inevitably hold more information about their activities than do legislators.

Legislators can tackle this problem directly by undertaking monitoring efforts such as legislative hearings and investigations, ordering research to be conducted by the General Accounting Office, and requiring agencies to report on their activities. McCubbins and Schwartz (1984) call these “police patrol” activities: they are “comparably centralized, active and direct.” (166) But these activities have obvious opportunity costs: the time that legislators spend directly monitoring bureaucracies means less time spent pursuing other policy goals and working for reelection.

Political scientists argue that, like a profit-maximizing firm, Congress reduces these costs by outsourcing the activity to those who have greater incentives to pay the monitoring costs—most notably, interest groups. Using institutions such as public hearings, proposed regulations and comment periods, sunshine laws, and FOIA, these actors monitor the bureaucracy’s activities themselves and alert legislators when their interests are threatened. McCubbins and Schwartz (1984) term these “fire alarm” activities in contrast to the “police patrols” described above: “Congress’s role consists in creating and perfecting this decentralized system and, occasionally, intervening in response to complaints.” (166)

McCubbins, Noll and Weingast (1987) expand upon this argument by claiming that Congress creates administrative procedures not only to monitor the bureaucracy, but to control it. The coalition that forms to create an agency—legislative committees, House, Senate and president—“seek[s] to ensure that the bargain struck among the members of the coalition does not unravel once the coalition disbands. Specifically, the coalition will seek to…create pressures on agencies that replicate the political pressures applied when the relevant legislation was enacted.” Such a coalition does not “preselect specific policy outcomes,” but “they will know which interests ought to influence a
decision and what distributive outcomes will be consistent with the original coali-
tional arrangement.” (255)

Among the reforms achieving this effect, argue McCubbins, Noll and Weingast, is FOIA, which “limits the ability of an agency to impose a change in policy without warning by requiring that, with minor exceptions, all records be made publicly available.” Along with the Administrative Procedure Act and the Government in the Sunshine Act, FOIA “enable[s] interested parties to learn about any attempt by the agency to develop a new constituency or to change policy while it is still on the drawing board. This disadvantages the agency by making political intervention possible much earlier in the policymaking process.” (259)

The conclusion drawn by these scholars, therefore, is that FOIA is a relatively cheap way for legislators to ensure that the views of the coalition that create an agency continue to influence agency policy long after the coalition has disbanded. For example, FOIA would ensure that the same political forces that created the Department of Education in 1979—that is, those represented by a Democrat-controlled Congress and a Democratic president—are continued to be brought to bear upon the department even after the legislature and the presidency (and therefore the department itself) are controlled by political actors with differing views than the department’s creators.

In the view of McCubbins, Noll and Weingast (1987), then, FOIA is an institution that helps preserve the policy preferences of those who create an executive agency or department. How reasonable a claim is this, however? Rather than recreating the political views of an agency’s founders, a procedure like FOIA could alternately be conceived of as expanding the field of conflict over an agency to the entire political spectrum. For sure, FOIA makes it difficult for an agency to develop policy to its liking, away from the attention of other political actors. But FOIA makes information about executive branch activity available to everyone—not just those sharing the policy preferences of the agency’s founders. It is therefore unclear that FOIA gives those who hold such preferences an advantage over other political actors. As R. Douglas Arnold writes in a response article to McCubbins, Noll and Weingast, “It is easy to argue that these techniques affect administrative behavior. It is not so easy to predict exactly which interests in society would be advantaged by specific techniques. That is surely true for the broad procedural rules which merely open up the administrative process to normal political forces.” (Arnold 1987: 285)

To return to my example, it is hard to make the argument that a procedure like FOIA helps keep policy at the Department of Education steered toward the preferences of the Democrats who created the agency—or their constituents, notably the teachers’ unions, who supported its creation. Rather, a more reasonable claim is that FOIA shines a bright light on the department’s activity, leaving it open to the inspection of any party who is interested in what the department does.

Thus a rational consequence to predict from FOIA is that, instead of preserving the policy preferences of the creators of executive agencies, FOIA drives agency policy
toward the preferences of the median voter in the electorate. Agencies are headed by appointees of the president, who—following the scholarship of Downs and his descendants—faces electoral pressures to provide policies that meet the preferences of the median voter. The president can be assumed to have preferences over the policy of a given agency that, in the absence of public scrutiny, he would pursue unencumbered. But FOIA increases the likelihood that agency policies will become known to the public, and therefore leads agencies to think more carefully before they craft policies that will be unpopular.

Take, for example, a story that appeared in the June 5, 2000 issue of USA TODAY. The story reported that the Justice Department had sought and received permission for a record 880 wiretaps in spying and terrorism investigations in the previous year—up from 484 in the year before President Clinton took office (Willing 2000). This information had been obtained by a privacy advocacy organization through a FOIA request and shared with the newspaper. Certainly, it makes more sense to think that the effect of the release of this information to the public is to push the department’s policy on antiterrorism toward the preference of the median voter (terrorism was low on the list of concerns for the median voter in 2000), rather than the preferences of any other political actor. Similar conclusions can be drawn about other revelations of information under FOIA, such as that the Food and Drug Administration has not studied the effects of genetically modified corn (Lappe and Hayden 2000), or that the independent investigation of the FBI’s siege of the Branch Davidian compound near Waco, TX was projected to cost $11 million (Washington Post 2000). In all of these cases, we can presume that the revelation of information causes policymakers in the executive branch to think more carefully about the extent to which the median voter will approve of their policies.

The implications for Congressional action

Given that FOIA most likely drives executive branch policy toward the preferences of the median voter, when is it likely that Congress will push for an expansion of FOIA, and when will it advocate for its curtailment? I address this question formally below, but a brief informal analysis provides us with the intuition that Congress is most likely to press for the expansion of FOIA during times of divided government, and least likely to do so during times of unified government.

If we presume that legislators are utility-maximizing agents, they make decisions by weighing the costs and benefits of each potential action. They are likely to expand the ability of the public to make FOIA requests when the benefits of the expansion to the legislature outweigh whatever costs it may incur from the expansion. I assume that legislators’ costs and benefits regarding FOI laws depend on three factors: (1) legislators’ preferences regarding the agency under scrutiny; (2) the median voter’s preferences regarding the agency; and (3) the policy pursued by the agency itself. Depending on the locations of the ideal points of the legislature, the agency, and the median voter, a policy correction in the direction of the median voter can be either beneficial or harmful to the legislature.
Figures 1 through 3 depict three arrangements of the ideal points of a hypothesized legislator, a median voter, and an agency in a unidimensional policy space. (Other arrangements of ideal points are possible, but they have outcomes that match the three described here.) The preferences regarding agency policy are denoted by ideal points $X_L$ for the legislator, $X_A$ for the agency, and $X_M$ for the median voter. (For our purposes, we can consider $X_L$ to be either the ideal point of the legislature’s median voter, or of the median voter in the party in control of the legislature.) In each scenario, the agency adopts the policy that matches its ideal point, and then a successful FOI request exposes agency activity that is out of sync with the preferences of the median voter, resulting in a policy correction that moves agency policy closer to the median voter’s ideal point. I make the simple assumption that each political actor’s utility is greatest if policy matches its ideal point and decreases as policy moves further away from the actor’s ideal point in either direction.

**Figure 1**: Agency policy is located between preference of legislator and that of median voter. Policy correction results in loss of utility to legislator.

**Figure 2**: Ideal point for median voter is located between legislator and agency. Policy correction results in gain of utility to legislator.

**Figure 3**: Ideal point of legislator is located between that of the agency and the median voter. Legislator gains utility from policy correction as long as the distance between the median voter’s ideal point and the agency’s ideal point is no more than twice the distance ($x$) between the ideal points of the legislator and the agency.
In Figure 1, agency policy is located between the ideal points of the legislator and that of the median voter. Any information that becomes public about the agency will, we assume, result in a correction of policy toward the ideal point of the voter—and further away from the ideal point of the legislator. In scenarios like that of Figure 1, then, FOI laws are costly to legislators and we can expect such laws to be resisted—or curtailed, as was the case with amendments enacted to FOIA in 1986.

Now consider Figure 2. In this scenario, the median voter’s ideal point is located between those of the legislator and the agency. Therefore, any exposure of information that becomes privy to the public through FOIA will, we can assume, lead to a correction in agency policy toward that of the median voter. Happily for the legislator, this is a correction toward its ideal point, as well. In cases like these, FOI laws are costless to legislators: citizens simply become additional monitors of errant agency behavior that lead to policy corrections toward the ideal point of the legislator.

Finally, Figure 3 depicts the scenario in which the legislator’s ideal point is located between that of the agency and the median voter. In this case, unless the median voter’s ideal point is located more than twice the distance (depicted as the variable $x$) between the ideal points of the agency and the legislator, the legislator gains utility from the policy correction, because the resulting policy is closer to its ideal point than the agency’s original policy. Note that $x$ is small when the agency and the legislator have similar preferences, and larger to the extent that their preferences diverge. The greater the distance between the ideal points of the agency and legislator, the more likely the legislator is to gain utility from the release of information about the agency’s activity.

So when might we expect to see passage of—and restrictions on—FOI laws by legislators? When the legislature believes that there is a “runaway bureaucracy”—and the average voter shares its view. Conversely, we might expect that committee chairs with extreme views—i.e., whose ideal points are on the opposite side of agency policy than the median voter—might enact more restrictions on FOI laws’ coverage of the agencies in their jurisdiction to limit the exposure such agencies have to citizen oversight. All of these insights support a simple conclusion: Congress is more likely to make information access easier during times of divided government—when it is less likely to share the policy preferences of the president, and therefore the agency. Conversely, we should expect Congress to make access to government information more difficult during times of unified government, when it is likely to have preferences closer to that of the executive branch.

A Formal Analysis

To gain additional insight on the interaction between Congress and the bureaucracy, I now proceed with a formal analysis. I first show how adopting laws like FOIA reduce the monitoring costs faced by the legislature in every instance if, as McCubbins, Noll and Weingast assert, such procedures reinforce the policy preferences of the coalition that created the agency. In this setup, the legislature never has an incentive to make it more difficult to access information under FOIA.
I then analyze the implications of my claim that FOIA actually drives policy toward the preferences of the median voter. Here, the analysis supports my conclusion that the legislature has an incentive to expand access under FOIA during times of divided government, and has an incentive to cut back access to FOIA during times of unified government.

I first examine the implications for the interaction between Congress and the bureaucracy in a hypothesized world where FOIA does not exist—that is, where Congress monitors the bureaucracy’s activities directly, per McCubbins and Schwartz (1984)’s “police patrol” model. I will build upon these findings in the analysis to follow. I formalize the interaction in the following game, based on a popular example in the game-theoretic literature known as the “inspection game.” (See, e.g., Fudenberg and Tirole 1991, 17.) In this stylized interaction, an agency must decide whether to comply with the policy mandate given it by a legislator (who as before may be considered the median voter in a legislature, or the median voter of the party controlling the legislature), or to “defect”—that is, adopt a different policy closer to its preference. For its part, the legislator must decide whether to “inspect” the agency’s activity—conduct hearings, investigations, etc.—or to not inspect. Both actors determine their moves simultaneously, unaware of the other’s plans.

How might we expect each actor to approach this game? For the purposes of formalization, we make a few standard assumptions. We assume that the legislator (denoted \(L\)) and the agency (\(A\)) have ideal points \(X_L\) and \(X_A\) respectively located along a unidimensional policy space. (See Figure 4.) The assumption of unidimensionality—while not without its critics—can arguably be said to make sense here. Because both bureaucracies and Congressional committees specialize on particular issues, we can reasonably expect the interaction to involve only one dimension at a time.

Each actor \(i\)’s utility \(U_i\) from a given policy \(X\) is calculated with the quadratic loss function \(U_i = -(X - X_i)^2\) — that is, an actor’s utility decreases the farther away a policy \(X\) is away from the actor’s ideal point. Without loss of generality, we can assume that \(L\)’s ideal point \(X_L\) is equal to zero, and that \(A\)’s ideal point, \(X_A\), is equal to some positive number, \(x\) \((X_A = x > 0)\). In addition, we assume that should \(L\) choose to investigate agency activity, it incurs costs \(c\), \(0 < c < X_A\), and that should \(A\) be caught defecting, it incurs “embarrassment” costs \(e\), \(0 < e < X_A\). The legislature gains the same amount, \(e\), if it catches the agency defecting. We can consider \(e\) the political gain (for \(L\)) or loss (for \(A\)) that comes with the revelation that the agency is not following its policy mandate. For illustrative purposes, \(e\) is depicted as greater than \(c\) in Figure 4, although this need not be the case for the analysis here to hold.

**Figure 4:** Ideal points of legislator and agency in a unidimensional policy space
The strategic form of this game appears in Figure 5. If A defects and L does not investigate, A adopts policy equal to its ideal point $X_A = x$ and enjoys utility $U_A = (x - X_A)^2 = 0$, which by construction is the maximum value of the quadratic loss function. L’s resulting utility $U_L$ equals $-(X_L - x)^2 = -(0 - x)^2 = -x^2$. If A defects and L investigates at a cost of $c$, Congress discovers the defection, sets policy to its ideal point of zero, and A suffers a loss of $e$ while L enjoys a gain of $e$. If A complies with L’s policy preferences, its adopts policy $X_L = 0$ and its resulting utility is $-(0 - X_A)^2 = -x^2$. If L does not investigate in this case, its utility is zero. If L unnecessarily investigates, it incurs costs $c$.

Figure 5.
Game I: The Investigation Game

<table>
<thead>
<tr>
<th>Agency</th>
<th>Legislator investigate</th>
<th>Legislator don’t investigate</th>
</tr>
</thead>
<tbody>
<tr>
<td>defect</td>
<td>$(-x^2 - e, -c + e)$</td>
<td>$(0, -x^2)$</td>
</tr>
<tr>
<td>comply</td>
<td>$(-x^2, -c)$</td>
<td>$(-x^2, 0)$</td>
</tr>
</tbody>
</table>

To explore plausible outcomes in an interaction like this, we identify Nash equilibria—that is, sets of strategies in which neither player has an incentive to unilaterally change its strategy given the strategy of the other player. For example, one set of strategies we could examine would be (Comply, Don’t Investigate)—where A’s strategy is listed first, followed by L’s strategy. But we can easily see that this pair of strategies is not a Nash equilibrium. If A knows that L will not investigate, it has the incentive to change its strategy to Defect. Subsequently, if L knows A will Defect, then L wants to change its strategy to Investigate, and so forth. A glance at Figure 5 reveals that there are no Nash equilibria in this game in pure strategies—that is, if a player’s strategy is limited to choosing one move and “sticking with it,” no Nash equilibria exist.

In situations like these, game theorists look for mixed strategy Nash equilibria. A mixed strategy is a probability distribution over a player’s pure strategies. For example, a mixed strategy for L would be to investigate $\frac{1}{4}$ of the time and not investigate $\frac{3}{4}$ of the time. In mixed-strategy Nash equilibria, the players’ strategies are best replies to each other because each strategy makes the other indifferent between its pure strategies, meaning that the actors have no incentive to unilaterally change their course of action.

In the mixed-strategy Nash equilibrium of this game, then, L will investigate just often enough such that A obtains the same expected payoff regardless of whether it chooses to comply or defect. Formally, L makes A indifferent between its two strategies by investigating with probability $p$ such that:
\[ E(U_A[\text{defect}]) = E(U_A[\text{comply}]) \]

\[ p (-x^2 - e) + (1-p) (0) = p(-x^2) + (1-p) -x^2 \]

solving for \( p \), we have:

\[ p = x^2 / (x^2 + e) \]

For its part, \( A \) makes \( L \) indifferent between its two pure strategies by defecting with probability \( q \) such that:

\[ E(U_L[\text{investigate}]) = E(U_L[\sim \text{investigate}]) \]

\[ q (-c + e) + (1-q) (-c) = q(-x^2) + (1-q) 0 \]

\[ -qc + eq +qc - c = -x^2q \]

solving for \( q \), we have:

\[ q = c / (x^2 + e) \]

How are we to interpret these results? Keeping in mind that \( x \) is the distance between \( L \) and \( A \)'s ideal points and therefore how far apart their policy preferences are on this particular issue, consider first the implications of changes in the value of \( x \). If we hold the costs of investigation \( c \) and the embarrassment value \( e \) constant, as \( L \) and \( A \)'s preferences over a given policy grow wider (and \( x \) therefore grows larger)—\( L \) is more likely to investigate, while \( A \) is less likely to defect, in equilibrium. Formally,

\[ \frac{\partial p}{\partial x} = \frac{2xe}{(x^2 + e)^2}, \]

which is positive for any positive value of \( x \), indicating that \( p \) is increasing in \( x \) since we specified above that \( x > 0 \); and

\[ \frac{\partial q}{\partial x} = \frac{-2xc}{(x^2 + e)^2}, \]

which is negative for any positive value of \( x \), indicating that \( q \) is decreasing in \( x \).

Why is this the case? As \( x \) increases, \( A \)'s expected value of defecting rises relative to that of complying. Therefore, \( L \) must investigate more often to ensure that \( A \) is indifferent between its two pure strategies. An increase in \( x \) also raises the expected value of investigating for \( L \) relative to that of not investigating. \( A \) must therefore defect less as \( x \) increases in order to ensure that \( L \) is indifferent between its pure strategies.

A change in the value of \( x \) also affects what is called the value of the game, which is the payoff that each player can expect from playing the game against the other player’s
mixed strategy. Because in equilibrium both players are indifferent between their two pure strategies, the expected value of the game is the expected value of playing either pure strategy given the other player’s mixed strategy. Hence, the expected value of the game for $A$ equals:

$$E(U_A) = p \left( U_A(\text{comply} | \text{investigate}) \right) + (1-p) \left( U_A(\text{comply} | \neg \text{investigate}) \right)$$

$$= p (-x^2) + (1-p) (-x^2)$$

$$E(U_A) = -x^2$$

for $L$, the expected value of the game is:

$$E(U_L) = q \left( U_L(\neg \text{investigate} | \text{defect}) \right) + (1-q) \left( U_L(\neg \text{investigate} | \text{comply}) \right)$$

$$= q (-x^2) + (1-q) 0$$

substituting the equilibrium value for $q$ into this equation, we have:

$$E(U_L) = -x^2 \frac{c}{x^2 + e}$$

The expected value of the game for $A$ decreases as the distance between its ideal point and $L$’s widens. This is also true for the expected value of the game for $L$. (Formally, both $\frac{\partial E(U_A)}{\partial x}$ and $\frac{\partial E(U_L)}{\partial x}$ take on negative values for all positive values of $x$.) Note that for $L$ the expected value of the game increases as $e$ increases and decreases as $c$ increases—as we would expect from intuition.

The inspection game specifies formally why Congress would want to minimize the costs it incurs in monitoring the executive branch: in equilibrium, Congress’ expected utility rises as monitoring costs fall. According to this analysis, Congress never has an incentive to curtail access to information regarding the activities of the executive branch. But such a conclusion does not consider the potential costs that can arise if such monitoring activity leads to a policy correction toward the preferences of the median voter. I formally examine the implications of such a policy correction below.

**The inspection game and the median voter**

We now revisit the inspection game to incorporate the notion that policy is steered toward the ideal point of the median voter. There are three players: as in Figure 1, an agency $A$ and legislator $L$, and now in addition a median voter $M$. Each player has ideal points along a unidimensional policy space. Without loss of generality, $L$’s ideal point $X_L$ is set to zero and $A$’s ideal point $X_A$ is set to some positive value $X_A = x > 0$. $M$’s ideal point $X_M$ takes on the value $M$ and can be anywhere in the policy space.
In the previous game, I assumed that if \( A \) was caught defecting, policy reverted to \( L \)'s ideal point \( X_L \). Now, I assume that regardless of the policy chosen by \( A \), an inspection by \( L \) or a successful revelation of information through FOI results in policy being set equal to \( M \), the ideal point of the hypothesized median voter, \( X_M \). For this reason, I assign \( A \)'s “comply” policy to be \( M \), as opposed to \( X_L = 0 \) as I did in the previous game.

I examine two games that incorporate these assumptions. In the first game, as before, only “police patrol” monitoring exists; in the second game, \( A \) is subject to monitoring by an outside agent as happens under a law like FOIA. I am interested in calculating the expected value \( L \) can obtain from both games, and determining under what conditions \( L \) is likely to favor one game over the other. In both games, \( A \) decides whether to “defect” by adopting policy \( X_A \) or to comply, by adopting policy \( M \). Simultaneously, \( L \) decides whether or not to investigate \( A \)’s behavior.

The standard forms of the two games are depicted in Figures 6 and 7. Figure 6 depicts the payoffs in the “police patrol” monitoring scenario. Note that the payoffs are similar to those shown in Figure 5, except that \( M \) has been substituted as the value to which policy reverts should there be an investigation, rather than \( X_L = 0 \) as was the case in the first game.

**Figure 6.** Game II. The Inspection Game with a Median Voter

<table>
<thead>
<tr>
<th>Agency</th>
<th>Legislator</th>
<th>investigate</th>
<th>don’t investigate</th>
</tr>
</thead>
<tbody>
<tr>
<td>( X_A )</td>
<td>-((x-M)^2 -e), -( -M^2-c + e )</td>
<td>0, (-x^2)</td>
<td></td>
</tr>
<tr>
<td>( M )</td>
<td>-((x-M)^2), -(M^2-c)</td>
<td>-((x-M)^2), -(M^2)</td>
<td></td>
</tr>
</tbody>
</table>

A pure Nash equilibrium exists in this game, but only for certain values of the parameters. (\( X_A \), Don’t Investigate) is a Nash equilibrium if \(-M^2-c+e<-x^2\), as neither player has the incentive to change strategies unilaterally given the other player’s strategy. We would expect this inequality to hold in situations where \( x \), the distance between \( X_L \) and \( X_A \), is relatively small compared to the distance between \( X_L \) and \( X_M \)—in other words, where the legislature and the agency hold relatively similar policy preferences compared to that of the median voter. One case where we might expect to see such an arrangement of ideal points would be where the legislature and the presidency were controlled by the same party.

For all other values of the parameters, pure Nash equilibria do not exist. As before, if \( L \) chooses the pure strategy Investigate, \( A \) then wants to “comply”—that is, choose \( M \). This leads \( L \) to want to forgo investigating, and so forth. A Nash equilibrium
exists only in mixed strategies, where both players choose probability distributions over their pure strategies to make the other indifferent between their pure strategies. In equilibrium, \( L \) plays Investigate with probability \((x-M)^2 / [(x-M)^2 + e]\), while \( A \) plays \( X_A \) with probability \( c / (e + x^2 - M^2) \). (See the Appendix for these calculations.) These produce the expected values for the game for \( A \) and \( L \):

\[
E_{GAMEII}(U_A) = -(x-M)^2 \quad \text{and} \quad E_{GAMEII}(U_L) = \left[ \frac{ce}{(e + x^2 - M^2)} \right] - M^2 - c
\]

We are particularly interested in the value of this game for \( L \), because we want to examine if \( L \) can improve upon this value by adopting an FOI law. Note that \( L \)’s utility is the utility it gains from the median voter’s ideal point \((-M^2)\) minus the costs of direct monitoring \((c)\), which is offset by a fraction \( ce / (e + x^2 - M^2) \) that is a function of all the parameters in the game. Notably, amount of the offset rises, \textit{ceterus paribus}, as the distance between \( X_A \) and \( M \) decreases. We will return to this observation shortly.

We now turn to Game III, which incorporates an FOI law. In this game, it is assumed (unrealistically, but for illustrative purposes) that an FOI law leads to the disclosure of \( A \)’s policy to the public in each and every case. A glance at Figure 7 shows that, in this case, \( L \) has no incentive to ever investigate \( A \): regardless of whether \( L \) does so, \( A \)’s behavior will become known to the public and policy will be corrected to the ideal point of the median voter. \( L \) therefore avoids incurring unnecessary monitoring costs, and Don’t Investigate is a dominant strategy for \( L \). For its part, \( A \) never has the incentive to adopt its ideal point by playing \( X_A \), for policy will simply revert to \( M \) regardless. Therefore, this game has a Nash equilibrium in pure strategies: \((M, \text{Don’t Investigate})\). The expected value of the game is simply the payoffs for both players in the lower right hand corner of Figure 7: \( -(x-M)^2 \) for \( A \) and \( -M^2 \) for \( L \).

Figure 7.

Game III: The Inspection Game with a Median Voter and an FOI Law

<table>
<thead>
<tr>
<th>Agency</th>
<th>Investigate</th>
<th>Don’t Investigate</th>
</tr>
</thead>
<tbody>
<tr>
<td>( X_A )</td>
<td>(-(x-M)^2 - e, -M^2 - c + e)</td>
<td>(-(x-M)^2 - e, -M^2 + e)</td>
</tr>
<tr>
<td>( M )</td>
<td>(-(x-M)^2, -M^2 - c)</td>
<td>( -(x-M)^2, -M^2 )</td>
</tr>
</tbody>
</table>

We now turn to the question: when does \( L \) prefer Game III (which I will call the “FOI game”) to Game II (the “direct monitoring” game)? That is, under what conditions is \( L \) likely to favor the adoption of an FOI law? A reasonable conclusion is that \( L \) favors the game from which it gains the greater expected value. Hence, \( L \) prefers the FOI game to the direct monitoring game if:

\[
E(U_L[FOI \ game]) > E(U_L[direct \ monitoring \ game])
\]
\[-M^2 > \left(\frac{ce}{e + x^2 - M^2}\right) - M^2 - c\]
\[0 > \left(\frac{ce}{e + x^2 - M^2}\right) - c\]
\[c > \frac{ce}{e + x^2 - M^2}\]
\[1 > \frac{e}{e + x^2 - M^2}\]
\[x^2 - M^2 > 0\]
\[x^2 > M^2\]

The calculations show that $L$ prefers an FOI law to direct monitoring when $x^2$—the squared distance between its ideal point and $A$’s ideal point—is greater than $M^2$—the squared distance between its ideal point and that of the median voter. In other words, the greater the agreement $L$ is with $A$ on the agency’s policy compared to $L$’s distance from the median voter, the less likely $L$ is to want an FOI law. This is most likely in cases where the legislature and the agency (and thus the presidency) are controlled by the same political party.

Figure 8. Circumstances under which a legislature prefers direct monitoring versus an FOI law

Thus, if we make the reasonable assumption that the introduction of an FOI law leads policy to be corrected toward the ideal point of the median voter, we see that such a law is not costless to the legislature. In particular, to the extent that the legislature and the agency share similar preferences over the direction of the agency’s policy, the legislature has less incentive to adopt or expand FOI laws. In these cases, the legislature wants to avoid a revelation of agency policy to the public. Such a disclosure leads to policy
correction toward the preferences of the median voter, and thus a relative loss of utility for the legislature.

Testable Hypotheses

My theory yields the testable hypothesis that, all things being equal, Congress should expand FOIA access during times of divided government and curtail it during times of unified government. Notwithstanding the adoption of FOI in 1966, the major statutory expansions and restrictions to FOIA have followed this pattern: in 1974, the Democratic-controlled Congress expanded FOIA access over a veto by Republican President Gerald Ford. In 1986, leaders in the Republican-controlled Senate successfully spearheaded Republican President Ronald Reagan’s efforts to make access to information under FOIA more difficult. And in 1996, a Republican-controlled Congress substantially expanded information access under FOIA under Democratic President Bill Clinton. Recently, the Republican-controlled Congress and the administration of Republican President George W. Bush have moved to curtail access to information under FOIA.

I should note that I am not positing that this is the only mechanism governing the expansion and contraction of FOI access: for example, Clinton ran on an explicit promise to make government more open and transparent, and regardless of whether it was in his interest once he was elected, he carried out that pledge while in office.

To thoroughly test my hypothesis, in the future I plan to examine the expansions and restrictions put on FOIA in each Congressional session. (FOIA provisions are usually included in a half-dozen or so enacted bills per session.) Again, I expect expansions to take place under divided government and restrictions under unified government. A more fine-grained test of my hypothesis would be to examine expansions and curtailments at the committee level. Regardless of partisan control, I would expect areas of policy in which the administration and the relevant Congressional committees are in relative agreement to exhibit less FOIA access than for policies where there is substantial disagreement.
APPENDIX

Calculations of Mixed Strategies and Expected Values for Game II:

In Nash equilibrium, \( A \) chooses a probability \( q \) of playing \( X_A \) such that \( L \) is indifferent between Investigate and Don’t Investigate. Hence:

\[
E(U_L \text{[investigate]}) = E(U_L \text{[~ investigate]})
\]

\[
q ( -M^2 - c + e) + (1-q)(-M^2 - c) = q ( -x^2) + (1-q)(-M^2)
\]

solving for \( q \), we have:

\[
q = c / (e + x^2 - M^2).
\]

\( L \) chooses a probability \( p \) of playing Investigate such that \( A \) is indifferent between \( X_A \) and \( M \). Hence:

\[
E(U_A \{M\}) = E(U_L \{X_A\})
\]

\[
-(x-M)^2 = p (-(x-M)^2 - e)
\]

\[
p = (x-M)^2 / [(x-M)^2 + e]
\]

We calculate the expected values of this game for \( A \) and \( L \) by substituting \( q \) and \( p \), respectively, into either side of the expected values equations above:

\[
E(U_A) = p (U_A \{M | \text{investigate}\}) + (1-p) (U_A \{M | \text{~investigate}\})
\]

\[
= -(x-M)^2
\]

\[
E(U_L) = q (U_L \{\text{~investigate} | X_A\}) + (1-q) (U_L \{\text{~investigate} | M\})
\]

\[
= q ( -M^2 - c + e) + (1-q)(-M^2 - c)
\]

\[
= [ce / (e + x^2 - M^2)] - M^2 - c
\]
REFERENCES


