



## The Foilies 2022

### Recognizing the year's worst in government transparency

March 17, 2022

Each year during Sunshine Week (March 13-19), The Foilies serve up tongue-in-cheek “awards” for government agencies and assorted institutions that stand in the way of access to information. The Electronic Frontier Foundation and MuckRock combine forces to collect horror stories about Freedom of Information Act (FOIA) and state-level public records requests from journalists and transparency advocates across the U.S. and beyond. Our goal is to identify the most surreal document redactions, the most aggravating copy fees, the most outrageous retaliation attempts, and all the other ridicule-worthy attacks on the public’s right to know.

As we were writing up this year’s faux awards, news broke that officials from the National Archives and Records Administration had to lug away boxes upon boxes of Trump administration records from Mar-a-Lago, President Trump’s private resort. At best, it was an inappropriate move; at worst, a potential violation of laws governing the retention of presidential records and the handling of classified materials. And while *Politico* had reported that when Trump was still in the White House he liked to tear up documents, we also just learned from journalist Maggie Haberman’s new book that staff claimed to find toilets clogged up with paper scraps, which were potentially torn-up government records. Trump has dismissed the allegations, of course.

This was all too deliciously ironic considering how much Trump had raged about his opponent (and 2016 Foilies winner) Hillary Clinton’s practice of storing State Department communications on a private server.

Ultimately, we decided not to give Trump his seventh Foilie. Technically he isn’t eligible: his presidential records won’t be subject to FOIA until he’s been out of office for five years (releasing classified records could take years, or decades, if ever).

Our winners, from federal agencies to small town police departments to a couple of corporations, are all shameworthy in their own rights and, at least metaphorically, have no problem tossing government transparency in the crapper.

The C.R.E.A.M. (Crap Redactions Everywhere Around Me) Award — U.S. Marshals

The Wu-Tang Clan ain't nothing to F' with ... unless the F stands for FOIA.

Back in 2015, Wu-Tang Clan produced *Once Upon a Time in Shaolin*, but they only produced one copy and sold it to the highest bidder: pharma-bro Martin Shkreli, who was later convicted of securities fraud.

When the U.S. Marshals seized Shkreli's copy of the record under asset forfeiture rules, the Twittiverse debated whether you could use FOIA to obtain the super secretive album. Unfortunately, FOIA does not work that way. However, *BuzzFeed News* reporter Jason Leopold was able to use the law to obtain documents about the album when it was auctioned off through the asset forfeiture process. For example, he got photos of the album, the bill of sale, and the purchase agreement.

But the Marshals redacted the pictures of the CDs, the song titles, and the lyric book citing FOIA's trade secrets exemption. Worst of all, they also refused to divulge the purchase price—even though we're talking about public money. And so here we are, bringing da motherfoia-ing ruckus.

(The *New York Times* would later reveal that PleasrDAO, a collective that collects digital NFT art, paid \$4 million for the record.)

Wu-Tang's original terms for selling the album reportedly contained a clause that required the buyer to return all rights in the event that Bill Murray successfully pulled off a heist of the record. We can only daydream about how the Marshals would've responded if Dr. Peter Venkman himself refiled Leopold's request.

The federal government's lightning fast (by bureaucratic standards) timeline to authorize Pfizer's COVID-19 vaccine lived up to its Operation Warp Speed name. But the Food and Drug Administration gave anything but the same treatment to a FOIA request seeking data about that authorization process.

Fifty-five years—that's how long the FDA, responding to a lawsuit by doctors and health scientists, said it would take to process and release the data it used to authorize the vaccine. And yet, the FDA needed only months to review the data the first time and confirm that the vaccine was safe for the public.

The estimate was all the more galling because the requesters want to use the documents to help persuade skeptics that the vaccine is safe and effective, a time-sensitive goal as we head into the third year of the pandemic.

Thankfully, the court hearing the FOIA suit nixed the FDA's snail's pace plan to review just 500 pages of documents a month. In February, the court ordered the FDA to review 10,000 pages for the next few months and ultimately between 50,000-80,000 through the rest of the year. These 10-day Deadlines Go To 11 Award — Assorted Massachusetts Agencies

Most records requesters know that despite nearly every transparency law imposing response deadlines, they often are violated more than they are met. Yet Massachusetts officials' time-warping violations of the state's 10-business-day deadline take this public records' reality to absurd new levels.

*DigBoston's* Maya Shaffer detailed how officials are giving themselves at least one extra business day to respond to requests while still claiming to meet the law's deadline. In a mind-numbing exchange, an official said that the agency considers any request sent after 5 p.m. to have technically been received on the next business day. And because the law doesn't require agencies to respond until 10 business days after they've received the request, this has in effect given the agency two extra days to respond. So if a request is sent after 5 p.m. on a Monday, the agency counts Tuesday as the day it received the request, meaning the 10-day clock doesn't start until Wednesday.

The theory is reminiscent of the *This Is Spinal Tap* scene in which guitarist Nigel Tufnel shows off the band's "special" amplifiers that go "one louder" to 11, rather than maxing out at 10 like every other amp. When asked why Spinal Tap doesn't just make the level 10 on its amps louder, Tufnel stares blankly before repeating: "these go to eleven."

Although the absurdity of Tufnel's response is comedic gold, Massachusetts officials' attempt to make their 10-day deadline go to 11 is contemptuous, and also likely violates laws of the state and those of space and time.

#### The Spying on Requestors Award — FBI

If government surveillance of ordinary people is chilling, spying on the public watchdogs of that very same surveillance is downright hostile. Between 1989 and at least 2004, the FBI kept regular tabs on the National Security Archive, a domestic nonprofit organization that investigates and archives information on, you guessed it, national security operations. The Cato Institute obtained records showing that the FBI used electronic and physical surveillance, possibly including wiretaps and "mail covers," meaning the U.S. Postal Service recorded the information on the outside of envelopes sent to or from the Archive.

In a secret 1989 cable, then-FBI Director William Sessions specifically called out the Archive's "tenacity" in using FOIA. Sessions specifically fretted over former Department of Justice Attorney Quinlan J. Shea and former *Washington Post* reporter Scott Armstrong's leading roles at the Archive, as both were major transparency advocates.

Of course, these records that Cato got through its own FOIA request were themselves heavily redacted. And this comes after the FBI withheld information about these records from the

Archive when it requested them back in 2006. Which makes you wonder: How do we watchdog the spy who is secretly spying on the watchdog?

#### The Futile Secrecy Award — Concord Police Department

When reporters from the *Concord Monitor* in 2019 noticed a vague \$5,100 line item in the Concord Police Department's proposed budget for "covert secret communications," they did what any good watchdog would do—they started asking questions and filed public records requests under New Hampshire's Right to Know Law.

In response, CPD provided a license agreement and a privacy policy, but the documents were so redacted, the reporters still couldn't tell what the tech was and what company was receiving tax dollars for it. Police claimed releasing the information would put investigations and people's lives at risk. With the help of the ACLU of New Hampshire, *The Monitor* sued but Concord fought it for two years all the way to the New Hampshire Supreme Court. The police were allowed to brief the trial court behind closed doors, without the ACLU lawyers present, and ultimately the state supreme court ruled most of the information would remain secret.

But when *The Monitor* reached out to EFF for comment, EFF took another look at the redacted documents. In under three minutes, our researchers were able to use a simple Google search to match the redacted privacy policy to Callyo, a Motorola Solutions product that facilitates confidential phone communications.

Hundreds of agencies nationwide have in fact included the company's name in their public spending ledgers, including the City of Seattle, which even issued a public privacy impact assessment regarding its police department's use of the technology, which noted, "Without appropriate safeguards, this raises significant privacy concerns." Armed with this new information, *The Monitor* called Concord Police Chief Brad Osgood to confirm what we learned. He doubled-down: "I'm not going to tell you whether that's the product."

#### The Rip Van Winkle Award — FBI

Last year, Bruce Alpert received records from a 12-year-old FOIA request he filed as a reporter for the *Times-Picayune* in New Orleans. Back when he filed the request, the corruption case of U.S. Rep. William Jefferson, D-New Orleans, was still hot—despite the \$90,000 in cash found in Jefferson's cold freezer.

In 2009, Alpert requested documents from the FBI on the sensational investigation of Jefferson, which began in 2005. In the summer of that year, FBI agents searched Jefferson's Washington home and, according to a story published at the time, discovered foil-wrapped stacks of cash "between boxes of Boca burgers and Pillsbury pie crust in his Capitol Hill townhouse." Jefferson was indicted on 16 federal counts, including bribery, racketeering, conspiracy and money laundering, leading back to a multimillion-dollar telecommunications deal with high-ranking officials in Nigeria, Ghana and Cameroon.

By the time Alpert got the 83 pages he requested on the FBI's investigation into Jefferson, Alpert himself was retired and Jefferson had been released from prison. In a staff editorial about the extreme delay, *The Advocate* (which acquired the *Times-Picayune* in 2019) quoted Anna Diakun, a staff attorney with the Knight First Amendment Institute at Columbia University: "The Freedom of Information Act is broken." We suppose it's better late than never, but never late is even better.

Whose Car is it Anyway? Award — Waymo

Are those new self-driving cars you see on the road safe? Do you and your fellow pedestrians and drivers have the right to know about their previous accidents and how they handle tight turns and steep hills on the road?

Waymo, owned by Google parent Alphabet Inc. and operator of an autonomous taxi fleet in San Francisco, answers, respectively: none of your business, and no! A California trial court ruled in late February that Waymo gets to keep this information secret.

Waymo sued the California Department of Motor Vehicles to stop it from releasing unredacted records requested by an anonymous person under the California Public Records Act. The records include Waymo's application to put its self-driving cars on the road and answers to the DMV's follow-up questions. The DMV outsourced the redactions to Waymo, and claiming that it needed to protect its trade secrets, Waymo sent the records back with black bars over most of its answers, and even many of the DMV's questions.

Waymo doesn't want the public to know which streets its cars operate on, how the cars safely park when picking up and dropping off passengers, and when the cars require trained human drivers to intervene. Waymo even redacted which of its two models—a Jaguar and a Chrysler—will be deployed on California streets ... even though someone on those streets can see that for themselves.

#WNTDWPREA (What Not to Do With Public Records Ever Award) — Anchorage Police Department

"What Not to Do Wednesday," a social media series from the Anchorage Police Department, had been an attempt to provide lighthearted lessons for avoiding arrest. The weekly shaming session regularly featured seemingly real situations requiring a police response. Last February, though, the agency became its own cautionary tale when one particularly controversial post prompted community criticism and records requests, which APD declined to fulfill.

As described in a pre-Valentine's Day #WNTDW post, officers responded to a call about a physical altercation between two "lovebirds." The post claimed APD officers told the two to "be nice" and go on their way, but instead the situation escalated: "We ended up in one big pile on the ground," and one person was ultimately arrested and charged.

Some in the public found the post dismissive toward what could have been a domestic violence event—particularly notable because then-Police Chief Justin Doll had pointed to domestic violence as a contributor to the current homicide rates, which had otherwise been declining.

Alaska's *News Source* soon requested the name of the referenced arrested individual and was denied. APD claimed that it does not release additional information related to “What Not To Do Wednesday” posts. A subsequent request was met with a \$6400 fee.

FWIW, materials related to WNTDW is not a valid exemption under Alaska's public records law.

By the end of February 2021, the APD decided to do away with the series.

“I think if you have an engagement strategy that ultimately creates more concern than it does benefit, then it's no longer useful,” Chief Doll later said. It's not clear if APD is also applying this logic to its records process.