

America's lost history: The thwarting of the Freedom of Information Act

Patrick G. Eddington

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July 2022 not only marks the 246th anniversary of America's Declaration of Independence, it's also the 56th year that the Freedom of Information Act (FOIA) has been in existence. The Department of Justice (DoJ), the federal agency charged with ensuring FOIA is implemented across the executive branch, issued a [press release](#) commemorating FOIA's enactment, drawing on the lofty language from then-Attorney General Ramsey Clark's 1967 FOIA implementation [memo](#).

"If the government is to be truly of, by, and for the people," Clark wrote, "the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public."

Indeed, Clark's words have more often than not reflected an aspiration for FOIA, not the day-to-day reality of federal departments and agencies continuing to [withhold](#) literally millions of pages of records on key figures and events. Since 2017, the Cato Institute alone has filed nearly 30 FOIA lawsuits against the Departments of Defense, Homeland Security, Justice, and Transportation, among others. But there is another, perhaps even more troubling problem with making FOIA work: government agencies destroying or even losing key records. One of the key offenders is the Federal Bureau of Investigation (FBI).

Over the last three years and in response to multiple Cato FOIA requests, the FBI admitted on over 30 occasions to having destroyed potentially or known responsive records on subjects of interest to Cato, and on at least 18 occasions outright *lost* the records at issue. Because of the FBI's actions, historians and the public will know less about FBI surveillance of key historical figures and groups, from prominent anti-interventionists like the late Sen. Gerald Nye (R-N.D.) to religious organizations like the American Life League to the FBI's infamous Counterintelligence Program or COINTELPRO.

To be clear, [federal law](#) does allow agencies and departments to dispose of certain kinds of federal records, including setting specific retention periods. But the destruction or loss through carelessness of things like FBI investigative records on individual Americans or groups is another matter entirely.

The problem is so severe, across the entire federal government, that the National Archives and Records Administration (NARA) maintains a webpage devoted to “unauthorized disposition” incidents. It makes for quite the read, such as the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) illegally shredding case files spanning the years 1976-1991. Or the former FBI analyst who took home reports on Al Qaeda and kept them for over a decade. And of course, there was the CIA’s unlawful destruction of the “Torture Tapes” during the so-called rendition, detention, and interrogation (RDI) program.

The unlawful destruction or loss of federal records by agencies and departments is bad enough, but when a sitting American president does so, it immediately evokes memories of Watergate and a president out of control. Indeed, it was Richard Nixon’s effort to claim the power to destroy his own records that spurred the creation of the Presidential Records Act (PRA), as noted by John Langford, Justin Florence, and Erica Newland on Lawfare earlier this year.

The trio used reports of President Trump’s apparent document destruction frenzies to call for major reforms to the PRA, including banning future chief executives from destroying records while in office. The fact that the PRA currently allows a president to destroy records he or she deems — on their own volition — to “no longer have administrative, historical, informational, or evidentiary value” is flabbergasting. The fact that the law has such a loophole may allow President Trump to evade a criminal charge of destroying federal records.

And while that fact may not seem as damning as the evidence presented thus far by the House January 6 Select Committee on Trump’s potential direction of the effort to illegally keep him in office, it should be noted that it remains unclear whether White House records relevant to the committee’s investigation have, in fact, been destroyed. If such records have been destroyed, it will only underscore the need to change the law to include a “duty to report” requirement on all future White House staff to inform the Justice Department and Congress of any illegal document destruction in real time. No federal official, especially the President of the United States, should be above the law.

Former House senior policy advisor Patrick Eddington is a senior fellow at the Cato Institute.