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THE FUTURE OF FOIA IN AN OPEN GOVERNMENT WORLD:  
IMPLICATIONS OF THE OPEN GOVERNMENT AGENDA FOR  
FREEDOM OF INFORMATION POLICY  
AND IMPLEMENTATION

DANIEL BERLINER, ALEX INGRAMS & SUZANNE J. PIOTROWSKI\*

I. INTRODUCTION

JULY 4, 2016 marked the fiftieth anniversary of the 1966 Freedom of Information Act of the United States. Freedom of Information (FOI) has become a vital element of the American political process, become recognized as a core value of democracy, and helped to inspire similar laws and movements around the world. FOI has always faced myriad challenges, including resistance, evasion, and poor implementation and enforcement. Yet the last decade has brought a change of a very different form to the evolution of FOI policy—the emergence of another approach to transparency that is in some ways similar to FOI, and in other ways distinct: open government. The open government agenda, driven by technological developments and motivated by a broader conception of transparency, today rivals, or by some measures, even eclipses FOI in terms of political attention and momentum. What have been the consequences of these trends? How does the advent of new technologies and new agendas shape the transparency landscape? The political and policy contexts for FOI have fundamentally shifted due to the rise of the open government reform agenda. FOI was at one point the primary tool used to promote governance transparency. FOI is now just one good governance tool in an increasingly crowded field of transparency policy areas. Focus is increasingly shifting toward technology-enabled open data reforms. While many open government reformers see these as positive developments, many traditional FOI proponents have raised concerns. With a few notable exceptions, the academic literature has been silent on this issue. We offer a systematic framework for understanding the potential consequences—both positive and negative—of the open government agenda for FOI policy and implementation.

Unlike other recent work,<sup>1</sup> we do not seek to evaluate the relative merits or utility of FOI and open government reforms. Our starting assumption is that there is indeed inherent value in each. Each supports democratic values, both in ways that coincide as well as in ways that differ

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1. Beth Simone Noveck, *Rights-Based and Tech-Driven: Open Data, Freedom of Information, and the Future of Government Transparency*, 19(1) YALE HUM. RTS. & DEV. L.J. 1, 9 (2017).

from each other. Instead, we focus attention on clarifying the nature of the tradeoffs and interrelationships between them. In particular, we focus on the consequences for policy advocacy, political decision making, and for policy implementation, many of which have been neglected in previous discussions. Our focus takes into full account the nature of the public policy process as it plays out in practice between two such closely related reform movements.

There are many potential complementarities where FOI and open government reforms serve to support or reinforce each other's goals. These include the achievement of shared policy objectives, as well as different types of positive spillovers, such as greater resources, attention, and political opportunities for FOI advocates. Yet there are also many potential subtractive consequences, wherein the open government agenda can undermine or detract from the goals of FOI policy or implementation. These arise particularly from situations where resources or attention are zero-sum and can only be increased to one at the expense of the other, or where politicians are opportunistic and seek to undercut FOI.

We offer a framework of consequences of the open government agenda for FOI, wherein we differentiate between policy consequences—pertaining to policy advocates and political actors—and implementation consequences, which pertain to the effective operation of policies themselves. In turn, each of these types includes both complementary and subtractive policy dynamics. We detail each set of potential consequences and offer examples from the United States, other countries, and the Open Government Partnership (OGP)—a global initiative promoting transparency and open government. We conclude that there are both complementary and subtractive consequences of the open government agenda on FOI policy and implementation, and that policy-makers, advocates, and academics need to acknowledge these ramifications in order to adequately understand the complex dynamics of contemporary transparency policy.

The next section discusses definitions of FOI and open government, highlighting their most important distinctions and tensions, and describing what open government reform has looked like in practice. We then introduce our analytical framework for discussing the potential consequences for FOI in an open government world.

## II. FREEDOM OF INFORMATION

Freedom of information laws, also referred to as “access to information” or “right to information” in some political contexts, are a cornerstone of democratic government because they allow citizens to gain knowledge about public affairs.<sup>2</sup> FOI laws, often called freedom of information acts (FOIAs), embody the democratic principle of transparency,

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2. See Piotrowski et al., *Levels of Value Integration in Federal Agencies' Missions and Value Statements: Is Open Government a Performance Target of US Federal Agencies?*, 00 PUB. ADMIN. REV. 1 (2018); Ben Worthy, *More Open but Not More Trusted? The Effect*

which is considered a fundamental regime value in the United States and other established democracies.<sup>3</sup> The United States Supreme Court stated that the “basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>4</sup> These laws allow individuals to request public documents from governments without need to demonstrate interest or standing, and require officials to respond, subject to certain legal exemptions. According to Berliner and Erlich, FOI laws aim to “curb corruption and increase accountability by enabling citizens, journalists, civil society, and opposition politicians to access information about spending, procurement, policy-making, and other types of information from governments and public agencies.”<sup>5</sup> Through FOI requests, journalists, civil society advocates, and the public generally can obtain information about politicians and public administration that would not normally be published proactively.

While the earliest FOIA was the Swedish 1766 Freedom of the Press Act, most FOIAs have followed the example of the United States law passed in 1966. Indeed, a worldwide “wave” of FOIA legislation from the 1980s to the 2000s saw most democracies around the world—and many non-democracies—recognize the need to formalize public information rights.<sup>6</sup> A prominent transnational movement of legal experts and civil society organizations has also arisen to promote the adoption of such laws and to develop standards around important legal principles.<sup>7</sup> By summarizing scholarly reviews of such FOI laws from around the world,<sup>8</sup> the key characteristics of the laws can be observed and then organized into four common categories: (1) requirements for how the requested information should be made available in terms of costs, formats, and time frames; (2) a

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*of the Freedom of Information Act 2000 on the United Kingdom Central Government*, 23 GOVERNANCE: INT’L J. POL’Y, ADMIN. & INSTITUTIONS 561 (2010).

3. See, e.g., Suzanne J. Piotrowski, *Transparency: A Regime Value Linked with Ethics*, 46 ADMIN. & SOC’Y 181 (2014).

4. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

5. Daniel Berliner & Aaron Erlich, *Competing for Transparency: Political Competition and Institutional Reform in Mexican States*, 109 AM. POL. SCI. REV. 110, 110 (2015).

6. See generally John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006).

7. See Milton Mueller et. al, *Civil Society and the Shaping of Communication–Information Policy: Four Decades of Advocacy*, 20 INFO. SOC’Y 169 (2004); Andrew Puddephatt, *Exploring the Role of Civil Society in the Formulation and Adoption of Access to Information Laws* (2009) (working paper) (on file with The World Bank Access to Information Working Paper Series); Daniel Berliner, *Transnational Advocacy and Domestic Law: International NGOs and the Design of Freedom of Information Laws*, 11 REV. INT. ORGAN. 121 (2016).

8. See, e.g., Sonja Bugdahn, *Does the EU Stifle Voluntary Policy Transfer? A Study of the Introduction of Freedom of Information in Portugal and Ireland*, 85 PUB. ADMIN. 123 (2007); Alasdair Roberts, *Retrenchment and Freedom of Information: Recent Experience Under Federal, Ontario and British Columbia Law*, 42 CANADIAN PUB. ADMIN. 422 (1999).

list of exempted information categories, such as information pertaining to criminal investigations or personally identifiable information about citizens; (3) a description of the public agency's responsibilities for monitoring and appraising compliance; and (4) details of procedures that requesters can take to appeal refusals. Through such statutory mechanisms, FOI laws are commonly thought to embody the democratic principle of transparency. The laws provide an institutional means for important information to be shared internally among public organizations or externally with members of the public and non-governmental users. This connection with transparency is also a key stepping-stone to understanding the open government reform agenda and its contrast with FOI in the means and tools for realizing principles of transparency in public policy.

### III. OPEN GOVERNMENT REFORMS

#### A. *Defining Open Government*

While open government and freedom of information both share the value of government transparency, it has also been widely understood by scholars and practitioners that open government is a broader, and thus more contested, concept than transparency. Meijer, Curtin, and Hillebrandt describe this broader quality of open government in terms of *vision* and *voice*; the former pertains to information provision for citizens, while the latter pertains to citizen engagement that influences government.<sup>9</sup> Because of its conceptual ambiguity, scholars have struggled to settle on a definition of open government, but consensus is now building.<sup>10</sup> According to McDermott and Jaeger and Bertot, in addition to transparency, open government also incorporates the value of public participation, and that of collaboration, both between government actors and between government and non-governmental actors.<sup>11</sup> In this paper, we build on this understanding, that open government incorporates the values of transparency, public participation, and collaboration.

The transparency literature compares and contrasts FOI and open government in a multitude of ways. FOI can be a tool of open government, and open government is "instrumentally and ideologically enabled" by FOI laws. Yet these two reforms are conceptually and technically distinct.<sup>12</sup> FOI has long been viewed as a sub-category of the open govern-

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9. Albert J. Meijer et al., *Open government: Connecting Vision and Voice*, 78 INT'L REV. ADMIN. SCI. 10 (2012).

10. See, e.g., Justin Longo, *Open Government – What's in a Name?*, GOVLAB: GOVLAB BLOG (Aug. 5, 2013), <http://thegovlab.org/open-government-whats-in-a-name/> [https://perma.cc/K89S-V6CX].

11. See Patrice McDermott, *Building Open Government*, 27 GOV'T INFO. Q. 401 (2010); Paul T. Jaeger & John Carlo Bertot, *Transparency and Technological Change: Ensuring Equal and Sustained Public Access to Government Information*, 27 GOV'T INFO. Q. 371 (2010).

12. Andrew R. Schrock, *Civic Hacking as Data Activism and Advocacy: A History from Publicity to Open Government Data*, 18 NEW MEDIA & SOC'Y 581, 584 (2016).

ment idea, rather than as simply a symbol of it, or as a related concept.<sup>13</sup> Open government contrasts with FOI in important aspects, many of which underlie the policy and implementation prospects for FOI that are explored in this article.

Open government is more dynamic than freedom of information, as open government introduces an active—or *interactive*—role for citizens, private organizations, and other non-governmental stakeholders. For some scholars, it is the interactions inherent in a public forum that are the most important vehicles for matching information access and transparency to public accountability.<sup>14</sup> The logic of this public accountability approach to open government is that a range of actors are needed to mediate and make sense of information or data gained through FOI requests before it can be used to help public decision-makers.

### B. *The Open Government Partnership*

The Open Government Partnership (OGP) was founded jointly in 2011 by eight countries (Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, the United Kingdom, and the United States) along with a coalition of civil society organizations, foundations, and development agencies. The OGP describes itself as “a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.”<sup>15</sup> In its efforts to achieve these goals, the OGP has substantially expanded in size so that today it counts seventy-five countries, and a pilot program with fifteen subnational governments, among its members. Unusually for such international initiatives, the OGP gives civil society groups equal representation with governments in its governing structure, including parity on its steering committee and in its co-chair positions.

In order to join the OGP, countries must first meet a set of minimum eligibility criteria pertaining to fiscal transparency, access to information, asset disclosure, and civic engagement.<sup>16</sup> Joining countries must also develop a national action plan (NAP) of specific commitments designed to make government more open. While these NAPs vary in number, issue focus, and ambition of their commitments, they are required to lay out a

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13. See Patrick Birkinshaw, *Freedom of Information*, 50 PARLIAMENTARY AFFAIRS 164 (1997).

14. See, e.g., Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUROPEAN L. J. 447 (2007); Rui Pedro Lourenço et al., *Open Data Driven Public Accountability*, 11 TRANSFORMING GOV'T: PEOPLE, PROCESS & POL'Y 42 (2017).

15. *What is the Open Government Partnership?*, OPEN GOV'T PARTNERSHIP, <https://www.opengovpartnership.org/about/about-ogp> [https://perma.cc/2S57-KQ7U] (last visited Aug. 2, 2018).

16. See *Eligibility Criteria*, OPEN GOV'T PARTNERSHIP (June 1, 2018), <https://www.opengovpartnership.org/resources/eligibility-criteria> [https://perma.cc/LQB3-EQSU].

detailed implementation strategy, and are evaluated every two years through an expert assessment process called the Independent Reporting Mechanism (IRM).

The OGP is a key actor in the global open government reform movement. While it is not the only global open government initiative<sup>17</sup> with country-level participation, it is unique for two main reasons that make it an important case for understanding new policy influences on FOI. First, the OGP demands a high level of national commitment among its members, although the specific issue focus of those commitments are flexible. Second, the OGP demonstrates how the open government agenda in practice can serve to advance national FOI policies while simultaneously promoting a variety of related reform approaches.

The OGP identifies three primary values as part of its open government goals—transparency, participation, and accountability—and countries are encouraged to address each of these values in their plans. For example, one commitment in the Philippines' 2017 NAP sought to improve governance of development projects in poor municipalities by establishing new local councils with participation from local civic associations.<sup>18</sup> This program was designed to “promote transparent, accountable, participatory local governance.” In another example, Canada's current NAP has a program called “Open Science”, the goal of which is to “encourage greater collaboration and engagement with the scientific community, the private sector, and the public.”<sup>19</sup> The US Second National Action Plan was mostly geared towards addressing transparency reforms rather than participation or collaboration.<sup>20</sup> Open data projects, another key plank of the open government movement, have also featured strongly in many NAPs. According to data published by the OGP in November 2017 on all 2,900 commitments to date, 16% of commitments were tagged as pertaining to “open data.” On the other hand, only 8% were tagged as pertaining to “access to information,” the OGP's tag for FOI issues.

FOI thus makes up only a small slice of the OGP's reforms, which deal with wide range of ideas including open data, participatory budgeting, asset disclosure, e-petitions, and so on. The OGP has organized a high-level policy movement aimed at transparency, but in a way that goes far beyond

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17. Other global transparency initiatives include the Extractive Industries Transparency Initiative (EITI) and the Construction Sector Transparency Initiative (CoST).

18. See *01 Civil Society Participation to Improve LGU Service Delivery*, OPEN GOV'T PARTNERSHIP: CURRENT COMMITMENTS, <https://www.opengovpartnership.org/current-commitments/01-civil-society-participation-improve-lgu-service-delivery> [<https://perma.cc/82NW-6Z5T>] (last visited Aug. 2, 2018).

19. *Open Science*, OPEN GOV'T PARTNERSHIP <https://www.opengovpartnership.org/starred-commitments/open-science> [<https://perma.cc/TR8B-KKSN>] (last visited Aug. 2, 2018).

20. See Suzanne J. Piotrowski, *The “Open Government Reform Movement”: The Case of the Open Government Partnership and U.S. Transparency Policies*, 47 AM. REV. PUB. ADMIN. 155 (2016).

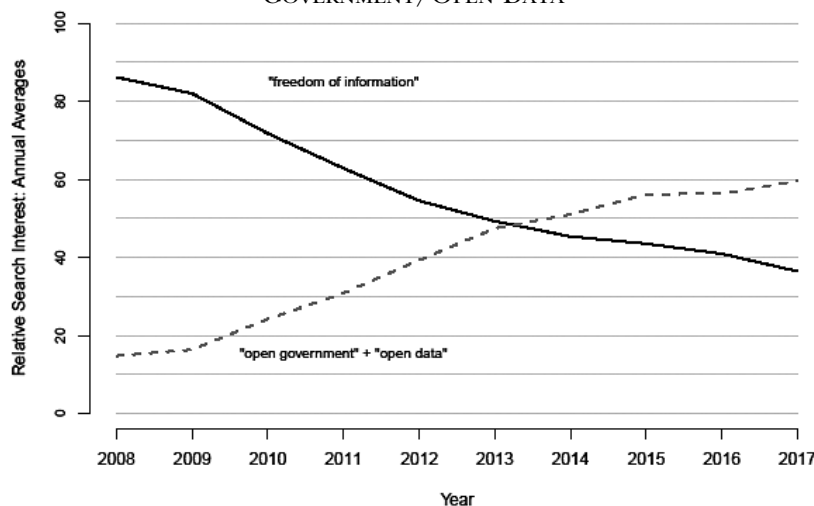
FOI laws. FOI was once the primary vehicle for advancing open government, but its future status amidst these trends is far from clear. It may be that initiatives such as the OGP will buoy FOI further. On the other hand, critics argue that FOI is in danger of being crowded out. Where do these concerns come from, and how might they be borne out or not?

### C. Value Tensions Between Open Government and FOI

FOI and open government reforms share values of transparency and accountability. This alignment means that, in many or even most cases, the policy and political goals of the open government movement are also normatively desired by the FOI community. On the other hand, both the fundamental values and the scope of policy tools emphasized by open government reformers are *broader* and *more diverse* than those emphasized by the FOI community.

Figure 1 shows the public's relative interest in FOI and open government, including open data, as evidenced by Google searches. The data cover ten years and come from the Google Trends tool, measuring Google search volume converted to annual averages. We included "open government" and "open data" as one category because in the vernacular these two are commonly conflated, with open data driving much of the discussion surrounding open government. While Google searches are clearly one limited measure of the public's interests, the trends are clear. Searches for "freedom of information" have steadily declined over the period, while searches for "open government" or "open data" have steadily risen. We posit that the trends reflected in Figure 1 reflect the broad trend of the public's attention shifting away from freedom of information towards open government and open data.

FIGURE 1. GOOGLE TRENDS FOR FREEDOM OF INFORMATION AND OPEN GOVERNMENT/OPEN DATA





Indeed, many individuals involved in the open government agenda have remarked on the tensions between different constituent issue goals and advocacy communities—and particularly between the open data and FOI communities. One civil society member involved early in the OGP worried that

the obvious explanation (in my mind) for why ‘open data’ gets so much attention in the context of ‘open government’ is that it is the sexiest, flashiest reform of the bunch. It’s much cooler (and frankly less politically controversial) for any government to put government health databases online . . . than it is for the same government to provide greater transparency around the financing of political parties in the country.<sup>21</sup>

On the other hand, one open data advocate remarked that “it often feels like members of the access to information community are dismissive of the technology aspects of the open government movement.”<sup>22</sup>

In 2012, Toby McIntosh, a journalist who covers open government and FOI in-depth, wrote at length about the evolving relationship between FOI and open data communities, based on interviews with members of each. He noted that:

[t]he cultural differences, in part the gap between lawyers and computer experts, may have played a role in keeping the two communities apart. To veterans of the freedom of information (FOI) community, the open data (OD) movement grabbed center stage with laptops and ambitious ideas for making government data more useful. Busy with its own challenges, the OD community has seen little need for worrying about traditional issues of concern to FOI activists. So despite sharing many common values and goals, the two communities have stayed largely apart, working in their respective activity zones . . . .

For FOI activists, the years of struggle to build the legal guarantees for the right of access seem unappreciated by the OD community. Difficult campaigns to obtain and shape good access regimes now seem to be overshadowed by a tinsel-town of portals, dashboards and apps.<sup>23</sup>

However, despite the hopes that open government can be a vehicle for greater public accountability, Yu and Robinson pointed out that this

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21. Lyle Turner, *Is Open Data a Good Idea for the Open Government Partnership?*, GLOB. INTEGRITY (Sept. 2011), <https://www.globalintegrity.org/2011/09/open-data-for-ogp> [https://perma.cc/C6CH-49CT].

22. David Eaves, *Some Thoughts on the Open Government Partnership*, EAVES.CA (April 18, 2012), <https://eaves.ca/2012/04/18/some-thoughts-on-the-open-government-partnership> [https://perma.cc/ZCE6-KPPX].

23. Toby McIntosh, *Open Data, FOI Communities Show Signs of Convergence*, FREEDOMINFO.ORG (Sept. 14, 2012), <http://www.freedominfo.org/2012/09/open-data-foi-communities-show-signs-of-convergence> [https://perma.cc/T7AR-Y4B5].

notion is challenged by the open government agenda's inherent ambiguity between goals of service delivery and public accountability.<sup>24</sup> Suggesting that "the term 'open government' has become too vague to be a useful label in most policy conversations," they raised concerns that "governments may be able to take credit for increased public accountability simply by delivering open data technology."<sup>25</sup> Weinstein and Goldstein, responding to this critique, instead emphasized the benefits of a "big tent view of openness" which could lead to "progress across a wide variety of areas under the big tent."<sup>26</sup>

Open government ambiguity need not herald a zero-sum game between rival goals. However, it does highlight an inherent tension in the open government movement; a tension that is traditionally conceptualized in the *efficiency versus democracy* dualism of government values.<sup>27</sup> While some open government reformers emphasize its importance to democratic accountability, others see the value of open government primarily in its ability to reduce waste, improve performance, and create new economic opportunities. Proponents of open data reforms, in particular, often place great emphasis on commercial opportunities and the ability to "stimulate entrepreneurship" and "supporting startups."<sup>28</sup>

FOI, in contrast, has always been primarily concerned with supporting democratic government rather than improving efficiency.<sup>29</sup> In fact, efforts to improve efficiency in government may even have undermined FOI implementation in the United States.<sup>30</sup> FOI is most strongly pertinent to democratic-constitutional rights, trust, and legitimacy.<sup>31</sup> FOI also has a strong legislative basis, creating legally enforceable rights, while open data can be regulated by law but is more often linked to innovation and infor-

24. Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government"*, 59 UCLA L. REV. DISC. 178 (2012).

25. *See id.* at 182.

26. Jeremy Weinstein & Joshua Goldstein, *The Benefits of A Big Tent: Opening Up Government in Developing Countries A Response to Yu & Robinson's the New Ambiguity of "Open Government"*, 60 UCLA L. REV. DISCOURSE 38, 48 (2012); *see also* Jeremy M. Weinstein, *Transforming Multilateralism: Innovation on a Global Stage*, STANFORD SOC. INNOVATION REV. (2013), [https://ssir.org/articles/entry/transforming\\_multilateralism\\_innovation\\_on\\_a\\_global\\_stage](https://ssir.org/articles/entry/transforming_multilateralism_innovation_on_a_global_stage) [<https://perma.cc/K3YQ-KHYV>].

27. *See* Robert Alan Dahl, *The Problem of Civic Competence*, 3 J. DEMOCRACY 45 (1992); Douglas Yates, *Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government*, 77(1) AM. POL. SCI. REV. 278 (1982).

28. Noveck, *supra* note 1; *Open Government Partnership Should Foster Accountability and Social Justice*, GUARDIAN: POVERTY MATTERS BLOG (Nov. 4, 2013), <https://www.theguardian.com/global-development/poverty-matters/2013/nov/04/open-government-social-justice-david-cameron> [<https://perma.cc/K6J4-HVEA>].

29. *See* Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

30. *See* Piotrowski et al., *supra* note 2.

31. *See* Ackerman et al., *supra* note 6; Birkinshaw, *supra* note 13.

mation-sharing processes than citizen rights.<sup>32</sup> Importantly, while the open government agenda does reflect *both* values of efficiency and democracy, its arrival has marked a *relative* shift towards values of efficiency, compared with the more focused FOI emphasis on democratic values that preceded it.

Prior research on open government and FOI has addressed other ways that the two may be in tension. For example, Hardy and Maurushat saw a tension between *proactive* and *reactive* types of information release.<sup>33</sup> Past research has also described different users or “tribes”: namely, entrepreneurs and academics for open data, and lawyers and media specialists for FOI.<sup>34</sup> These different users may also create tensions as they champion FOI and open data as distinct paths to transparency and accountability. While open government tribes value technology and technical specifications, FOI tribes value disclosure and publishing.<sup>35</sup> Noveck contrasts the “rights-based” FOI movement with the “technology-driven” open data movement.<sup>36</sup>

To summarize, open government and FOI are both reforms involved in the effort to make government more transparent. While FOI was long the focal point of transparency advocates, this position has been challenged by the greater diversity and breadth of the computer-mediated open government movement, introducing a wider focus on participation, collaboration, and technological innovation. This shift has created new tensions in the open government movement, the consequences of which have only just begun to be explored by scholars.

#### IV. ANALYSIS OF CONSEQUENCES OF THE OPEN GOVERNMENT AGENDA FOR FOI

FOI no longer occupies the same position of prominence that it once did among transparency issues, among transparency advocates, and among transparency politics. The rise of the open government agenda has situated FOI as just one among many related transparency—and participation-oriented—policies, as well as incorporating a new focus on technological tools.

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32. See Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443 (2012); Taewoo Nam, *Challenges and Concerns of Open Government: A Case of Government 3.0 in Korea*, 33 SOC. SCI. COMPUTER REV. 556 (2014).

33. See Keiran Hardy & Alana Maurushat, *Opening Up Government Data for Big Data Analysis and Public Benefit*, 33 COMPUTER L. & SEC. REV. 30 (2017).

34. See Katleen Janssen, *Open Government Data: Right to Information 2.0 or Its Rollback Version?* (ICRI Research Paper No. 8, 2012), available at <https://ssrn.com/abstract=2152566> [Permalink unavailable].

35. See Eric Afful-Dadzie & Anthony Afful-Dadzie, *Liberation of Public Data: Exploring Central Themes in Open Government Data and Freedom of Information Research*, 37 INT’L J. INFO. MGMT. 664 (2017).

36. Noveck, *supra* note 1.

What are the consequences of these shifts for FOI? We argue that a wide variety of both positive and negative consequences exist, and that these must be examined in the context of the full public policy process, including advocacy, agenda-setting, political decisions, implementation, and ultimate usage by citizens and organizations. We draw on the lessons of three different literatures in public policy. First, the literature on agenda-setting highlights the importance of scarce political attention<sup>37</sup> and of advocacy groups as policy entrepreneurs.<sup>38</sup> Theories of social movements highlight the importance of resource availability<sup>39</sup> and of political opportunity structures.<sup>40</sup> And finally, the literature on policy feedbacks highlights the continued importance of advocacy movements and constituent demand even after reforms have been passed into law.<sup>41</sup>

Our focus is thus not on the normative merits of open government and FOI, but rather, on what actual policy dynamics have played out thus far between the two policy agendas, and what can be expected between them in the future. Importantly, our focus does not take for granted that transparency policies, once adopted, simply become accepted parts of the political landscape. Rather, like many types of reforms,<sup>42</sup> they are always contested and potentially under threat, particularly when advocacy movements fade away or shift focus elsewhere.

Combining these insights, we divide our focus into consequences at two different stages: policy, comprising advocacy, agenda -setting, and political decisions; and implementation, comprising both the administrative implementation of reforms as well as the activities of citizens and organizations that utilize them. For each, we consider ways in which the open government agenda may be complementary to FOI, as well as ways in which it may be subtractive. The combination of these different types of consequences is presented in Table 1.

Policy consequences include shifts in attention, resources, and political support. These can be complementary between open government and FOI policy and implementation, such as infusions of new actors, funding sources, and political momentum into advocacy movements. But they can

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37. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); FRANK BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (2nd ed. 2009).

38. See Kingdon, *supra* note 37; Paul A. Sabatier, *An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein*, 21 *POL'Y SCI.* 129 (1988).

39. See John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 *AJS* 1212 (1977); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 *ANN. REV. SOCIOLOGY* 527 (1983).

40. See Herbert P. Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 *B.J. POL. S.* 57 (1986).

41. See Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 *WORLD POL.* 595 (1993); ERIC M. PATASHNIK, *REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED* (2014).

42. See *id.*

also be subtractive, such as creating opportunities for politicians to undercut FOI policy and implementation by shifting resources and support to less politically inconvenient policies.

Implementation consequences include the capacity of government entities to fulfill their assigned tasks, and specific policy-to-policy externalities that may either build or limit effectiveness. Some open government policies, such as open data initiatives, may have implementation consequences for FOI. Implementation consequences also include dynamics at the level of broader information ecosystems concerning the users and uses of government information. The broader open government agenda can contribute in some ways to new users, uses, and sources of demand for information, but also threatens to shift demand and undercut incentives in ways that may run counter to the goals of FOI advocates.

TABLE 1. IMPLICATIONS OF OPEN GOVERNMENT REFORM ON FOI  
POLICY AND IMPLEMENTATION

	<b>Potential Consequences of Open Government Reforms on FOI</b>	
	<b>Complementary</b>	<b>Subtractive</b>
<b>Policy Domain</b>	<u>Complementary Policy Dynamics (1)</u> <ul style="list-style-type: none"> <li>• Shared Goals</li> <li>• New Resources</li> <li>• New Political Opportunities</li> <li>• Broadening Government Priorities</li> </ul>	<u>Subtractive Policy Dynamics (2)</u> <ul style="list-style-type: none"> <li>• Goal displacement for advocacy groups</li> <li>• Priority displacement by governments</li> <li>• Attention displacement in policy agenda</li> </ul>
<b>Implementation Domain</b>	<u>Complementary Implementation Dynamics (3)</u> <ul style="list-style-type: none"> <li>• Reduced Workload</li> <li>• Building Capacity</li> <li>• Reduced Discretion</li> <li>• Stronger Information Ecosystems</li> </ul>	<u>Subtractive Implementation Dynamics (4)</u> <ul style="list-style-type: none"> <li>• Shifting implementation priorities</li> <li>• Increased Discretion</li> <li>• Weaker Information Ecosystems</li> </ul>

In any given context, both complementary and subtractive dynamics may coexist with each other. Alternately, one or the other may prevail depending on specifics of the case. These might include the level of competition over resources and attention (both in government and in advocacy movements), the extent to which policymakers and funders are seeking “the next big thing,” and the extent to which political actors see transparency and participation as an opportunity or a threat. The remainder of this section proceeds through the four types of relationships from the cells of Table 1, offering examples from the United States, from countries around the world, and from the Open Government Partnership.

### A. *Policy Domain*

#### *Complementary Policy Dynamics (Cell 1)*

We elaborate four different types of consequences that can lead to open government and FOI complementing each other with respect to policy. For FOI proponents, the open government agenda can further broadly shared goals, bring new resources, and offer new political opportunities. For political actors, open government can provide new reasons to support an agenda that includes FOI.

#### 1. *Shared Goals*

In the broadest sense, most goals are shared between the two agendas. Just as “a rising tide lifts all ships,” this means that a policy “win” for the open government agenda will usually be considered a positive development by advocates of FOI as well—and vice versa. Indeed, few members of either advocacy movement would disagree. In a 2010 report for the World Bank, FOI activist Helen Darbishire described shared goals and potential complementarities between proactive and reactive models of transparency, concluding that “proactive disclosure is integral to the transparency that underpins good government, and in that sense has always been part of the right to information.”<sup>43</sup>

A broader advocacy coalition, with more members and more linkages among them, may also translate into more momentum for shared goals. FOI advocates and open government advocates tend to be members of the same policy coalitions and therefore draw from a similar pool of public affairs and communication strategies. According to the theory of advocacy coalitions, policy coalitions of this sort form a common belief system that sustains long-term policy change.<sup>44</sup> In a study of public information policy advocates in the United States Congress between 1961 and 2003, Mueller, Page, and Kuerbis found evidence that coalitions evolved over time to address an increasingly “broader range of issues with a common agenda.”<sup>45</sup> In this scenario, advocates were able to collectively stamp their identity on the agenda and pursue goals more successfully.

#### 2. *New Resources*

Access to resources is of utmost importance to advocacy movements.<sup>46</sup> For organizations and advocacy groups engaged in work on FOI—both in the United States and around the world—the open govern-

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43. Helen Darbishire, *Proactive Transparency: The Future of the Right to Information?* 37 (2010) (working paper) (on file with The World Bank Governance Working Paper Series).

44. See Peter John, *Is There Life After Policy Streams, Advocacy Coalitions, and Punctuations: Using Evolutionary Theory to Explain Policy Change?*, 31 *POL’Y STUDIES J.* 481 (2003); Sabatier, *supra* note 38.

45. Mueller et al., *supra* note 7, at 183.

46. See McCarthy & Zald, *supra* note 39; Jenkins, *supra* note 39.

ment agenda can bring new resources and political opportunities. These resources can include new sources of funding, new ways to attract attention to their issue agenda, and new individuals willing to contribute time, energy, and expertise towards their goals. In terms of opportunities, the open government agenda can create both new sources of influence and leverage, and new points of access to the political process.

Historically, organizations supporting FOI tended to be coalitions of journalists, academics, lawyers, or human rights organizations. In the United States, programs that support FOI have received funding from organizations such as the Knight Foundation and the Fund for Constitutional Government. Globally, they have often received support from major foundations that frequently support non-government organizations working on human rights and press freedom, such as the Open Society Foundations, Hewlett Foundation, and Ford Foundation, as well as government aid agencies and United Nations bodies. The broader open government agenda has attracted (and perhaps been shaped by) new private donors, particularly those funded by technology industry philanthropy. These include the Omidyar Network (established by eBay founder Pierre Omidyar) and the Shuttleworth Foundation (established by Mark Shuttleworth, founder of an open source software development company). In some cases, private companies themselves (or their charitable arms) support work in the open government agenda, such as Google's support for the World Wide Web Foundation (which in turn supports open data projects around the world), the open government organization GovLab, and in-kind support to the OGP itself. Existing foundations and aid agencies have also become interested in open data, civic technology, and other open government projects,<sup>47</sup> which may offer existing advocacy groups new sources of project-based funding. This presumes, of course, that such a focus comes in addition to, rather than displacing, existing work on FOI.

Individuals willing to devote time, effort, and expertise are another resource important for advocacy organizations. Volunteer-driven efforts on projects like "civic hacking" offer the potential to bring new individuals, particularly from information technology backgrounds, into the broader advocacy community. An example of such efforts is the Code for All network, which has branches in countries around the world, including Code for America, Code for South Africa, and Code for Romania.

### 3. *New Political Opportunities*

The open government agenda has also led to the opening of new political opportunity structures,<sup>48</sup> including for FOI policy. The OGP itself provides a new arena for political influence by many civil society organiza-

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47. See Dennis Linders, *Towards Open Development: Leveraging Open Data to Improve the Planning and Coordination of International Aid*, 30 GOV'T INFO. Q. 426 (2013).

48. See Kitschelt, *supra* note 40.

tions. Unlike nearly all other international institutions, civil society parity has always been a core value of the OGP, and it was founded by a unique coalition of government and civil society representatives.<sup>49</sup> The OGP governance structure consists of equal representation of government and civil society members on its steering committee, with two government co-chairs and two civil society co-chairs at any given time. Several individuals from FOI-focused organizations have held seats on the OGP's steering committee, both at its founding and subsequently. These include Thomas Blanton of the U.S.-based National Security Archive, Helen Darbishire of the Spain-based Access Info Europe, and Giorgi Kldiashvili of the Georgia-based Institute for Development of Freedom of Information. This representation provides a new opportunity for FOI advocates to shape global priorities on open government issues. It has not been mere "window-dressing" either. Civil society participants in the OGP have achieved important policy victories, including the building of a robust and independent monitoring process, and the 2014 creation of a "Rapid Response Policy."

The simple fact of a government's membership in the OGP can also give advocacy groups new forms of political leverage, as they can use membership to highlight the gaps between a government's rhetorical commitments and their actions in practice. This is a pattern similar to the "Helsinki effect,"<sup>50</sup> whereby transnational activists effectively mobilized around international human rights agreements—even if they had been adopted as mere window dressing originally. In cases of OGP members that had not yet passed FOI laws, civil society groups often made targeted claims of hypocrisy, helping to drive FOI adoption in countries including Argentina,<sup>51</sup> Brazil,<sup>52</sup> Kenya,<sup>53</sup> and Tanzania.<sup>54</sup> In other cases, FOI advo-

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49. See Weinstein, *supra* note 26.

50. See DANIEL C. THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* (2001).

51. See Julia Keseru, *Why the GOP Needs to Get Serious About Freedom of Information Laws*, SUNLIGHT FOUNDATION: BLOG (Oct. 29, 2015), <https://sunlightfoundation.com/2015/10/29/why-the-ogp-needs-to-get-serious-about-freedom-of-information-laws/> [<https://perma.cc/7Q63-ZDRS>].

52. See Gregory Michener & Carlos Pereira, *Is Brazil Fit to Lead the Open Government Partnership?, Secrecy vs. Transparency and the Ambivalence of Brazil's Presidents*, BROOKINGS (July 18, 2011), <https://www.brookings.edu/opinions/is-brazil-fit-to-lead-the-open-government-partnership-secrecy-vs-transparency-and-the-ambivalence-of-brazils-presidents/> [<https://perma.cc/2B23-9HKA>]; *Encouraging Freedom of Information Movements in Brazil*, OPEN GOV'T PARTNERSHIP (July 18, 2014), <https://www.opengovpartnership.org/stories/encouraging-freedom-of-information-improvements-brazil> [<https://perma.cc/5HCC-RXYT>].

53. See *Kenyan Officials Say Lack of FOI Hampers Open Data*, FREEDOMINFO.ORG (May 29, 2013), <http://www.freedominfo.org/2013/05/kenyan-officials-say-lack-of-foi-hampers-open-data/> [<https://perma.cc/U3XY-GFFQ>].

54. See Ben Taylor, *Closing in on Tanzania's Open Government Plans*, THE GUARDIAN (Nov. 1 2013), <https://www.theguardian.com/global-development-professionals-network/2013/nov/01/closing-tanzania-open-government-plans> [<https://perma.cc/T28W-XUZZ>]; *Open Government Partnership Should Foster Accountability and So-*



cates have mobilized around OGP membership to demand reforms to strengthen FOI laws, or to attempt to block legislation that would weaken FOI, such as the campaign against South Africa's so-called "secrecy bill."<sup>55</sup>

Finally, the open government agenda's focus on participation also creates new arenas for civil society influence at the national level, whether through the OGP's process of National Action Plan co-creation, or through other participatory and deliberative bodies that seek to engage non-governmental actors in policymaking. An example of this in the U.S. is the Freedom of Information Act Advisory Committee, established in 2014 to "foster dialog between the Administration and the requestor community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures."<sup>56</sup>

#### 4. *Broadening Government Priorities*

The open government agenda can also create new incentives for political actors to embrace FOI. The very ambiguity of open government can be a powerful way to appeal to more diverse sets of actors and preferences. The strong linkages drawn by open government advocates with new opportunities for business, efficiency, and economic growth can make the entire bundle of open government policies more appealing to many governments. And the valence of "open government" makes it nearly impossible for politicians to explicitly oppose. Indeed, in many recent cases where new political parties took power, they maintained their predecessors' emphases on open government even amid many other substantial policy changes—including in Argentina, France, Indonesia, and Mexico. On the other hand, while Noveck notes that open data appeals "to both the right and the left politically" in the United States, the endurance of the open government agenda in the post-Obama administration period remains to be seen.<sup>57</sup>

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*cial Justice*, *supra* note 28; *Several African Nations Criticized at OGP Meeting*, FREEDOMINFO.ORG (May 27, 2015), <http://www.freedominfo.org/2015/05/several-african-nations-criticized-at-ogp-meeting/> [https://perma.cc/8NMN-CPHP]; *Tanzanian Government Offers Modified RTI Legislation*, FREEDOMINFO.ORG (June 23, 2016), <http://www.freedominfo.org/2016/06/tanzanian-government-offers-modified-rti-legislation/> [https://perma.cc/VWQ3-CKQH].

55. See David Smith, *South Africa's 'Secrecy Bill' Attracts International Condemnation*, GUARDIAN (June 13, 2012), <https://www.theguardian.com/world/2012/jun/13/south-africa-secrecy-bill-un-condemnation> [https://perma.cc/98QB-NQH6]; *CSOS on OGP Board Caution South Africa on Secrecy Bill*, RIGHT2INFO.ORG (Dec. 15, 2011), <http://www.right2info.org/recent/csos-on-ogp-board-caution-south-africa-on-secrecy-bill> [https://perma.cc/X58V-9BZ3]; Lyle Turner, *What the South African Secrecy Bill Means for the Open Government Partnership*, GLOBAL INTEGRITY (Nov. 2011), <https://www.globalintegrity.org/2011/11/south-africa-and-ogp> [https://perma.cc/DV8F-Q36Y].

56. The Office of Government Information Services, Freedom of Information Act (FOIA) Advisory Committee, U.S. NAT'L ARCHIVES & RECORDS ADMIN. (July 31, 2018), <https://www.archives.gov/ogis/foia-advisory-committee> [https://perma.cc/82BC-T768].

57. Noveck, *supra* note 1, at 14.

*Subtractive Policy Dynamics (Cell 2)*

On the other hand, other types of policy dynamics may not be so positive. We identify three different varieties of displacement that may lead to FOI policies weakening: goal displacement for advocacy groups; priority displacement for governments; and attention displacement in policy agenda.

5. *Goal Displacement for Advocacy Groups*

While one potential complementary dynamic involved new resources and funding for FOI users and proponents as a result of the open government agenda, the reverse of this is also possible. Resources for advocacy groups may, in fact, be zero-sum across the different issue areas of open government, rather than positive-sum. Foundations and other donors may re-prioritize their funding goals away from FOI and instead towards open data, technology-enabled civic engagement, and other new issue areas. This reflects concerns raised by FOI advocates that attention and resources are shifting towards “sexier” issues, to their detriment.

Many advocacy groups may need to alter their own priorities to meet this new donor agenda, even if it does not reflect their own preferred goals. This type of donor-driven “goal displacement” is frequent in global development and humanitarian agendas.<sup>58</sup> Other FOI efforts may simply shut down for lack of resources. For example, the website *FreedomInfo.org*, a central hub for news and information on FOI laws and advocacy around the world since 2002, ceased publication in June 2017. It had previously been funded by donors including the Hewlett, Ford, and Open Society Foundations.

6. *Priority Displacement by Governments*

Politicians and bureaucrats often resent FOI and find it a “thorn in their side.” Both adoption and implementation of FOI reforms are inherently political, and therefore political actors may seek to delay or weaken them.<sup>59</sup> Not only did former British Prime Minister Tony Blair famously call the 2000 Freedom of Information Act his greatest regret, but according to Worthy, former U.S. President Bill Clinton actually warned Blair before its passage of what he saw from his own experience as a chilling

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58. See, e.g., Simon N. Morfit, “AIDS is Money”: How Donor Preferences Reconfigure Local Realities, 39 *WORLD DEV.* 64 (2011); Milli Lake, *Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood*, 58 *INT’L STUDIES Q.* 515 (2014).

59. See Daniel Berliner, *The Political Origins of Transparency*, 76 *J. POL.* 479 (2014); Berliner, *supra* note 7; Gregory Michener, *How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws*, 28 *GOVERNANCE* 77 (2014).

effect.<sup>60</sup> Politicized attempts to weaken FOIA policies have been frequent around the world.<sup>61</sup>

If opportunistic politicians or bureaucrats resent FOI requirements, then the ambiguities of the open government agenda may provide new political opportunities of their own, enabling policy changes that are presented as open government reforms, yet serve to undercut or de-emphasize FOI. In the United Kingdom in 2012, Cabinet Office Minister Francis Maude said, "I'd like to make Freedom of Information redundant, by pushing out so much data that people won't have to ask for it."<sup>62</sup> In 2015, when a commission to review the United Kingdom's Freedom of Information Act was announced, many saw it as an attempt to limit or roll back FOI.<sup>63</sup> Indeed, Worthy noted that some authorities "used the inquiry to argue that FOI was burdensome and was taking resources away from 'vital services.'"<sup>64</sup> The statement announcing the review made sure to note that "the World Wide Web Foundation's Open Data Barometer and Open Knowledge's Global Open Data Index ranked the UK as the world's leading country on open government," while emphasizing numerous times the need for "protecting a private space for frank advice."<sup>65</sup>

Further, by allowing governments to claim credit for less politically-inconvenient reforms, the broader open government agenda may enable a false sense of transparency even where access-to-information rights are nonexistent or ineffective. This was a frequent criticism regarding Kenya, whose government launched a high-profile open data portal in 2011, yet delayed passage of an FOI law until 2016.<sup>66</sup>

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60. BEN WORTHY, *THE POLITICS OF FREEDOM OF INFORMATION: HOW AND WHY GOVERNMENTS PASS LAWS THAT THREATEN THEIR POWER* (2017).

61. *See, e.g.*, ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006).

62. Ben Rossi, *Francis Maude: "I'd like to make FOI redundant"*, INFO. AGE (July 4, 2012), <http://www.information-age.com/francis-maude-id-like-to-make-foi-redundant-2111138/> [<https://perma.cc/V3U4YFNU>].

63. *See* Rajeev Syal, *Freedom of Information Act Review 'May Curb Access to Government Papers'*, GUARDIAN (July 17, 2015), <https://www.theguardian.com/politics/2015/jul/17/ministers-to-review-freedom-of-information-act> [<https://perma.cc/L3LK-LKJD>].

64. *See* Worthy, *supra* note 60, at 132.

65. George Bridges, *Freedom of Information: New Commission (Written Statement to Parliament)*, <https://www.gov.uk/government/speeches/freedom-of-information-new-commission> [<https://perma.cc/9EDN-2QA7>].

66. *See* Greg Brown, *Why Kenya's Open Data Portal is Failing—and Why It Can Still Succeed*, SUNLIGHT FOUNDATION: BLOG (Sept. 23, 2013), <https://sunlightfoundation.com/2013/09/23/why-kenyas-open-data-portal-is-failing-and-why-it-can-still-succeed/> [<https://perma.cc/Q6KM-ZMPY>]; *Kenyan Officials Say Lack of FOI Hampers Open Data*, *supra* note 53; *Kenya: Realising the Right to Information*, ARTICLE 19 (2014), <https://www.article19.org/data/files/medialibrary/38388/Kenya-RTI-for-web.pdf> [<https://perma.cc/9F3P-UQ76>].

### 7. *Attention Displacement in Policy Agenda*

Both policymakers and advocacy groups have limited attention, creating challenges for policy issues to remain on the agenda.<sup>67</sup> Even within the relatively narrow domain of open government policies, when the array of policies gets larger, this can mean that any given issue receives less focus. The ambiguity of “open government” can also lead to confusion among policy-makers and the public, and may prove more difficult in motivating people than something more straightforward like “transparency.” For example, Worthy noted that open data reforms in the United Kingdom suffered from “competing (and vague) visions and understandings of what the new data are for.”<sup>68</sup>

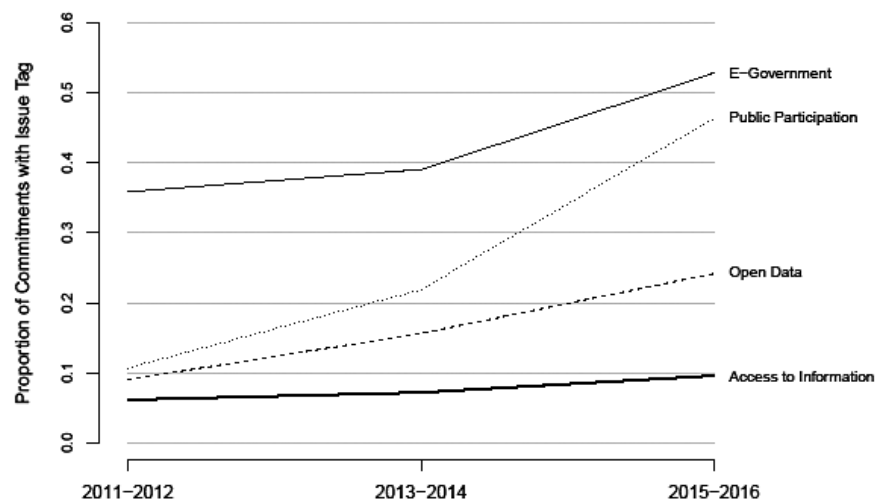
As a result, important FOI protections may slip off the radar, with new open government initiatives displacing them. Some evidence consistent with attention displacement can be seen in the commitments made by countries in the Open Government Partnership. The OGP Support Unit tags each commitment with one or more of several dozen different issue labels. A given commitment can have more than one tag. In Figure 2, we track the trends over time for four of the most common issue tags, across three different rounds of National Action Plan launches (due to the timing of when countries join, far fewer plans were launched in 2011, 2013, and 2015, so we group the years into three stages). Although all four issues grew more prevalent—both a function of commitments receiving more tags on average, and of other peripheral issues becoming less common—“access to information” clearly saw the least growth compared to the others. In fact, although in the initial rounds of NAPs, “access to information,” “public participation,” and “open data” were all roughly equally frequent, the latter two subsequently saw rapid growth while “access to information” stagnated.

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67. See Baumgartner & Jones, *supra* note 37.

68. Ben Worthy, *The Impact of Open Data in the UK: Complex, Unpredictable, and Political*, 93 PUB. ADMIN. 788, 799 (2015).

FIGURE 2. ISSUE TRENDS IN OGP COMMITMENTS



### B. *Implementation Domain*

#### *Complementary Implementation Dynamics (Cell 3)*

In terms of the implementation and effectiveness of FOI laws and response systems, the open government agenda offers the possibility of complementarities that lead to greater capacity, effectiveness, responsiveness, and public uses. The ways that open government may improve FOI implementation are reduced workload, increased capacity, reduced discretion, and stronger information ecosystems.

#### 1. *Reduced Workload*

One of the most frequent arguments made in favor of open data and other forms of proactive information disclosure is that they reduce the workload for overburdened FOI offices. Instead of citizens filing a request for every document or dataset needed, and government officials filling those requests, a great deal of efficiency can be gained by simply making the information available online to begin with. In principle, this then means that the remaining requests—for more specific information, for that which is not already online, or where more complex judgments are needed regarding legal exemptions—can be handled more promptly and responsively.

#### 2. *Building Capacity*

Open government policies can also have complementary dynamics for FOI implementation if they result in greater ease of information retrieval in the case of future information requests. Many e-government or open data initiatives may result in improved archival and records manage-

ment practices, greater digitization, and capacity-building efforts for administrative entities that are also involved—directly or indirectly—in the FOI response process. Such developments would offer another potential route to improved implementation and responsiveness of FOI itself. E-government efforts can also include greater digitization of the information request process, such as through the creation of online portals and tracking systems.<sup>69</sup> These might not only improve responsiveness, but also lower barriers to FOI use by citizens.

### 3. *Reduced Discretion*

Requirements for government information to be available online can also reduce the official discretion that may be an unfortunate dimension of some FOI responses. By making information available to all, official discretion no longer plays any role in determining who can and cannot access government information. This is particularly relevant in contexts where FOI responsiveness may be biased, for example in favor of elite requesters<sup>70</sup> or against political opponents.<sup>71</sup>

### 4. *Stronger Information Ecosystems*

Many scholars have noted the importance of broader ecosystems of media organizations, civil society groups, and other “infomediaries” that gather, process, and share information<sup>72</sup> to the effectiveness of transparency policies as tools of accountability.<sup>73</sup> Open government reforms or advocacy may spur the development, density, or institutionalization of broader information ecosystems, which may in turn strengthen the public demand for government information, and the reach of that information to interested citizens.

#### *Subtractive Implementation Dynamics (Cell 4)*

Unfortunately, it is also possible that the open government agenda will have a subtractive relationship with FOI and implementation weakens.

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69. See Silvana Fumega, *Information and Communication Technologies and Access to Public Information Laws*, The World Bank, 2014.

70. See Gregory Michener & Karina Rodrigues, Paper Presentation at the Fourth Global Conference on Transparency Studies: *Who Wants to Know? Assessing Discrimination in Transparency and Freedom of Information Regimes* (June 4–6, 2015).

71. See Daniel Berliner, Benjamin Bagozzi, Brian Palmer-Rubin & Aaron Erlich, Presentation at the Midwest Political Science Association Annual Conference: *The Political Logic of Government Disclosure: Evidence from Information Requests in Mexico* (Apr. 2016).

72. Kazi Nazrul Fattah, *Right to Information (RTI) Legislation: The Role of Infomediaries in Enhancing Citizens' Access to Information*, 26 DEV. PRAC. 3 (2016).

73. See Stephen Kosack & Archon Fung, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65 (2014); Jonathan Fox, *Social Accountability: What Does the Evidence Really Say?*, 72 WORLD DEV. 346 (2015); Albert van Zyl, *How Civil Society Organizations Close the Gap Between Transparency and Accountability*, 27(2) GOVERNANCE 347 (2014).

This can be the case particularly where budgets, attention, and other resources are limited or zero-sum, or where new information policies undercut the incentives of crucial users.

##### 5. *Shifting Implementation Priorities*

Open government reforms may actually result in fewer resources available for FOI, if the same administrative units are given additional tasks and mandates but without concomitant staff or funding. This may result in bureaucratic de-prioritization of FOI, and potentially worse responsiveness to requests. Alternately, although greater availability of information online may result in reduced workloads for FOI staff or offices, this may be used as a justification for the shrinking of those offices and the shifting of staff and resources to other purposes. In extreme cases, this could also mean less responsiveness to the remaining information requests.

One example of new open government policies negatively influencing FOI implementation comes from a recent reform in Mexico. Since 2007, Mexican government agencies were required to make seventeen different types of information available online in the Portal de Obligaciones de Transparencia. However, a 2015 reform—which was hailed by open government advocates for having involved substantial input from civil society—increased the requirements to forty-eight different types of information, with several hundred more specific requirements for certain types of entities.<sup>74</sup> The task of identifying and digitizing this information was given to agencies' existing FOI response units, but without any additional staff or resources, leading to severe administrative burdens and in some cases slower response times to FOI requests.<sup>75</sup> Meanwhile, the updated portal was criticized for its complicated and difficult interface, concerns over the reliability of information, and for the refusal of some entities to include politically sensitive information.<sup>76</sup> In this case, the relationship between

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74. See Ximena López et al., *Los Retos de Implementar Una Ley de Transparencia*, CIDAC (Nov. 24, 2015), <http://cidac.org/los-retos-de-implementar-una-ley-de-transparencia> [<https://perma.cc/QC27-AULU>]; Alberto Morales, *Dan Prórroga a Sujetos Para Transparentar su Información*, EL UNIVERSAL (May 5, 2017, 2:21 PM), <http://www.eluniversal.com.mx/articulo/nacion/politica/2017/05/5/dan-proroga-sujetos-para-transparentar-su-informacion> [<https://perma.cc/D74A-CC53>].

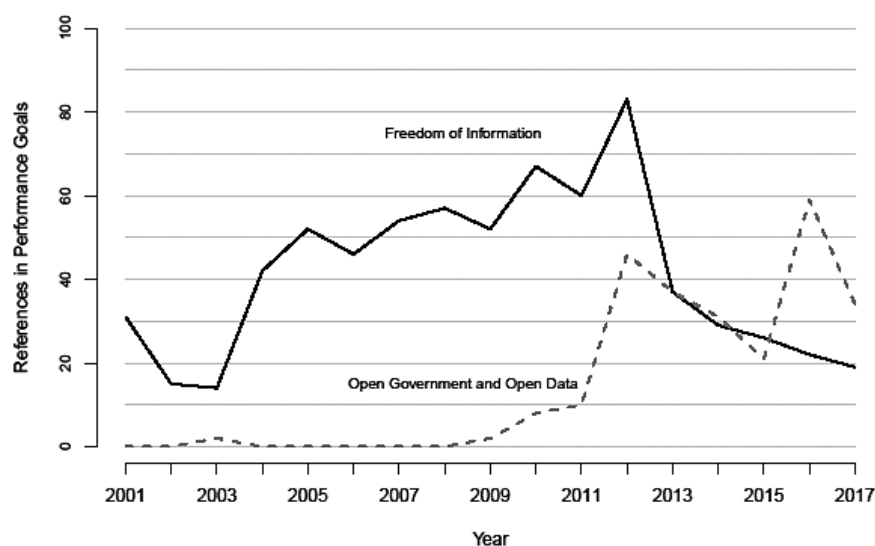
75. See Ríos Cázares et al., *Transparencia: Diagnóstico Institucional 2016*, MÉXICO: CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS (CIDE)- INSTITUTO NACIONAL DE ACCESO A LA INFORMACIÓN Y PROTECCIÓN DE DATOS (INAI) (2017), available at <http://izai.org.mx/investigacion/files/Transparencia%20Diagnóstico%20Institucional%20-%202016.pdf> [<https://perma.cc/LHB2-98ZJ>]; López et al., *supra* note 74; Morales, *supra* note 74. Twelve out of eighteen cabinet-level ministries experienced slowed average response times to information requests from 2014 to 2017. Author's calculations, excluding ministries not in existence for full period, with data from INAI Annual Reports 2014-17, available at <http://inicio.ifai.org.mx/SitePages/Informes-2017.aspx> [<https://perma.cc/G5MY-FNSA>].

76. See La Redacción, *Nosotrxs Exige Aclaración al INAI para Evitar "Sesgos Políticos"*, PROCESO (Aug. 23, 2017), <http://www.proceso.com.mx/500269/nosotrxs-ex>

new open government efforts and existing FOI implementation was condemned to be subtractive by the fixed nature of resources, staff, and capacity.

Another example of shifting bureaucratic implementation priorities comes from the U.S. federal agency performance plans. Figure 3 compares trends in the extent of integration of FOIA goals, and open government and open data goals, into U.S. federal performance plans. The data is taken from the annual performance plans of twenty-four of the largest federal agencies between years 2000 and 2017, and follows the method of Piotrowski and Rosenbloom<sup>77</sup> to assess goal integration of democratic-constitutional values, where references to FOIA, open government, and open data are counted in the goal statements of the performance plans. This type of integration into performance planning is important because agencies are required in the 1993 Government Performance and Results Act to demonstrate what performance targets they have set and whether the targets were achieved.

FIGURE 3. FREEDOM OF INFORMATION AND OPEN GOVERNMENT/OPEN DATA IN U.S. FEDERAL AGENCY PERFORMANCE PLANS



ige-aclaracion-al-inai-evitar-sesgos-politicos [https://perma.cc/E3UM-S9U6]; Ramón Aguilera Murguía, *Día Internacional de los Archivos: Poco qué Festejar*, PROCESO (June 9, 2017), <http://www.proceso.com.mx/490390/dia-internacional-los-archivos-poco-festejar> [https://perma.cc/7YGR-QJE9]; INAI: *La Institución Más Opaca de México es el Sindicato de Pemex; se Oculta con Tretas Legales*, SINEMBARGO (Aug. 22, 2017), <http://www.sinembargo.mx/22-08-2017/3290756> [https://perma.cc/3HCD-JTRU].

77. Suzanne J. Piotrowski & David H. Rosenbloom, *Nonmission-Based Values in Results-Oriented Public Management: The Case of Freedom of Information*, 62 PUB. ADMIN. REV. 643 (2002).



Since 2012, the appearance of “open government” and “open data” as frequent goals in agency performance plans has been accompanied by a reduction in FOIA-related goals. Two dips in open government and open data are noteworthy, in 2012 and 2016.<sup>78</sup> Further investigation is needed here, but we conjecture that they may indicate a decline in confidence around transparency following the disclosures of WikiLeaks and Edward Snowden, and the policy shifts associated with Donald Trump, respectively. Comparing FOIA and open government shows that although the trend lines have converged and overlapped in recent years, the overall pattern suggests that U.S. federal agencies are increasingly setting goals for open government and open data, while fewer goals are devoting attention to freedom of information.

#### 6. *Increased Discretion*

While open data advocates note that greater availability of information online reduces government discretion, many FOI advocates have noted the opposite—that open data relies on the discretion of officials and politicians over which information to make available and which to omit. As Burgess notes, “[i]t is unlikely that the government would be willing to automatically publish information that has been uncovered by FOI and would be embarrassing out of its own free will.”<sup>79</sup> Recent precedent also suggests that implementation of open data relies on discretion in the form of legal and ethical considerations because policymakers have to navigate complex legal areas of personal privacy.<sup>80</sup> Discretion in open data policies is thus a complicated area entailing multiple areas of policy decision-making.

In many cases, the legal framework for open data may also be weaker than a demand-driven enforceable right such as FOI. Very few legal statutes address the types of data or documents that should be released. As open data advocate David Eaves wrote in 2013:

[I]n many places, open data enjoys no legal protection. In almost every jurisdiction, at any time, a government can remove and stop sharing a data set at which point it would only become available via a FOI request. In other words, barring a few legislated examples, we enjoy easy access to open data at the pleasure of the government.<sup>81</sup>

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78. See Piotrowski, *supra* note 20.

79. MATTHEW BURGESS, FREEDOM OF INFORMATION: A PRACTICAL GUIDE FOR UK JOURNALISTS 214 (2015).

80. See Alejandro Saez-Martin et al., *Freedom of Information in Local Government: Rhetoric or Reality?*, 43 LOC. GOV'T STUD. 245 (2017).

81. See David Eaves, *In Jakarta, Open Environmental Data Meets Freedom of Information Law*, TECHPRESIDENT (May 10, 2013), <http://techpresident.com/news/we-gov/23865/jakarta-open-environmental-data-meets-freedom-information-law> [<https://perma.cc/V8UF-FPZN>].

For example, major statutes, such as directives 2003/98/EC and 2013/37/UE of the European Parliament, focus on the grounds for re-use of public information rather than the type or quality of information that should be included. In a study of laws governing data release in E.U. countries, Sáez Martín et al. found that, of twenty-four countries, just four were legally required to proactively publish statistics on management results, and just one country's laws required details of public contracts and details of senior posts such as salary and compatibility of private activities.<sup>82</sup> These legal frameworks provide little help for citizens to know what data they should expect their government to make open, thereby giving wider discretion to policy-makers themselves to decide.

One stark illustration of the discretion involved in open data policy is shown by the contrast in the approaches of current U.S. President Trump and his predecessor, President Obama. While Obama launched the U.S.'s first open data mandate for federal agencies (the 'M1313' memo), Trump has since taken down the White House open data portal,<sup>83</sup> and *The Washington Post* reported that nearly a quarter of the data on the federal platform, data.gov, has been removed.<sup>84</sup> This highlights the crucial importance of legal frameworks that cannot be so easily revoked when new leaders enter office.

#### 7. *Weaker Information Ecosystems*

Finally, open government reforms can potentially even undercut broader information ecosystems by interfering with the incentives of crucial activities and organizations.

In the United States as in most countries, journalists are an essential component of the information ecosystem linking transparency and accountability. However, a core element of journalists' incentives to file information requests is driven by the need to "break" stories and obtain "scoops," for both professional reputation and financial motives. Thus, the ability to obtain information via FOI, but not have it immediately available to all, has often been an important element of sustaining the viability of FOI-driven investigative journalism. In the United States, plans for a "release-to-one-release-to-all" system were met with concern by many journalists. Responses included calling the plan "evil genius,"<sup>85</sup> writing that

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82. See Saez-Martin et al., *supra* note 80.

83. See Andrew Tarantola, *Trump Administration is Killing Its Open Data Portal*, ENGADGET (Apr. 14, 2017), <https://www.engadget.com/2017/04/14/trump-admin-killing-open-data-portal/> [<https://perma.cc/LY6M-6KGF>].

84. See Juliet Eilperin, *Under Trump, Inconvenient Data is Being Sidelined*, WASH. POST (May 14, 2017), [https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e\\_story.html](https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e_story.html) [<https://perma.cc/U67P-ZCMT>].

85. Alexander Howard, *Journalists Want Transparency, But Not Right Away*, HUFFINGTON POST (Mar. 1, 2017), [http://www.huffingtonpost.co.uk/entry/journalists-foia-policy\\_us\\_55a422a6e4b0a47ac15d238e](http://www.huffingtonpost.co.uk/entry/journalists-foia-policy_us_55a422a6e4b0a47ac15d238e) [<https://perma.cc/AX6C-SMRM>].

“the government is now giving away your FOIA scoops,”<sup>86</sup> and claiming that it would “absolutely hurt journalists’ ability to report on documents they obtained through a FOIA request.”<sup>87</sup>

A similar dynamic could arise if a shift to make more documents and information proactively available online actually serves to undercut the incentives of crucial “infomediaries” to use government information in investigative reporting or in analyses that help translate complex datasets and raw documents into a more easily actionable form. Of course, this dynamic may be limited and may be offset by other positive developments. Yet since for-profit media organizations have proven essential components of effective information ecosystems in most countries, their incentive structures cannot be considered irrelevant.

The dependence of open government reforms on non-profit “infomediaries” also creates risks regarding future sustainability. One of the best-known of such organizations in the United States, the Sunlight Foundation, nearly shut down entirely in 2016 after facing difficulties in obtaining funding and finding a new executive director. Ultimately, the organization did not shut down, but did terminate or spin-off many of its applications. One commentator noted the irony that “Sunlight succeeded in part by training many developers who eventually just went on to work for the federal government.”<sup>88</sup> In 2017, the United Kingdom infomediary mySociety noted its uncertain future funding, writing that “at worst it’s quite possible that we’ll be forced to close some of our popular UK services and restrict the further development of our democracy work internationally.”<sup>89</sup> If such civic organizations come to occupy an increasingly large share of the transparency ecosystem, their future sustainability is of crucial importance to both FOI and open government agendas.

## V. CONCLUSIONS AND DISCUSSION

The role FOI can play in a world where transparency reform is increasingly dominated by technology-enabled open data and participatory platforms is an open question. FOI has been viewed by scholars as a characteristic of democratic government, and since the second half of the twentieth century, legal systems have given FOI extensive treatment and protection. Today, however, the theoretical perspectives used to under-

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86. *Id.*

87. Erik Wemple, *FOIA reform: A Bit Too Much Transparency for Journalists?*, WASH. POST (July 10, 2015), [https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/10/foia-reform-a-bit-too-much-transparency-for-journalists/?utm\\_term=.9716ee89cfe2](https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/10/foia-reform-a-bit-too-much-transparency-for-journalists/?utm_term=.9716ee89cfe2) [<https://perma.cc/4KBG-VHWE>].

88. Robinson Meyer, *Is This the End of the Sunlight Foundation?*, THE ATLANTIC (Sept. 22, 2016), <https://www.theatlantic.com/technology/archive/2016/09/sunlight-sunset/501071/> [<https://perma.cc/BF8Q-JZT7>].

89. Mark Cridge, *Contributing to the Democratic Commons*, MY SOCIETY: BLOG (Sept. 5, 2017), <https://www.mysociety.org/2017/09/05/contributing-to-the-democratic-commons/> [<https://perma.cc/ES4J-Z59G>].

stand the purposes of FOI and open government, as well as the practice of transparency reform typified by movements such as OGP, show that global policy has shifted. In many policy areas, such as the kind of tools used and reforms undertaken by OGP countries, or the annual performance plans adopted by U.S. federal agencies, there is evidence that open government and open data are attracting greater attention and resources.

By exploring recent developments in FOI and open government, we have addressed the consequences for FOI in both the policy and implementation domains. Advocates of FOI and open government talk about them in similar ways and indeed participate in many of the same networks and initiatives. This situation can give rise to several positive-sum outcomes such as shared goals, new resources, and new political opportunities. By galvanizing many types of organizations spanning civil society and the private sector, the OGP is a good example of this sort of complementarity. By bringing the two areas of FOI and open government together, we also see potential complementarities for implementation, such as reducing workload, building capacity (in both cases for government and non-government actors), and creating information ecosystems that rely on the strengths of both proactive (open data) and reactive (FOI requests) types of information sharing.

On the other hand, the complementary nature of FOI and open government may not necessarily play out in practice, or it may have limits in certain respects. One limitation to the complementary view is that resources and attention are scarce, so in the long run, there may be crowding out of FOI in political and policy agendas. This is true of both government and non-governmental organizations. Other subtractive potentialities play out in the area of policy implementation. Some of these are exactly the reverse of complementary scenarios; namely, that implementation priorities shift, discretion of information decision-makers increases, and information ecosystems fragment. Additionally, we have presented some evidence to suggest that implementation may become more burdensome for public organizations or that priorities may shift away from FOI due to the inability to maintain programs in both areas: Alarmingly, FOI is increasingly less included in U.S. federal agency performance planning. Piotrowski and Rosenbloom argued that democratic-constitutional values like FOI are susceptible to this type of “mission-extrinsic” avoidance.<sup>90</sup>

Our analysis also demonstrates that many future directions of policy development are possible. Noveck suggests that “in the long term, FOIA and open data may themselves converge as we move to a future where all government data sits in a secure but readily-accessible cloud.”<sup>91</sup> However, such a happy convergence requires that positive, and not negative, policy and implementation dynamics prevail. Depending on the choices of key

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90. See Piotrowski & Rosenbloom, *supra* note 77.

91. Noveck, *supra* note 1, at 6.

decision-makers, futures of divergence and policy interference may be equally likely.

By tracing these potential relationships both in theory, and through some recent empirical examples, we have shown that FOI and open government are not inevitably in opposition with each other, but rather, can result in either zero-sum or positive-sum outcomes. Under what scope conditions might we expect either complementary or subtractive dynamics to predominate? Our discussions suggest that the relationships between FOI and open government will be more zero-sum when resources, policy attention, and political support are scarcer, and when the behavior of political actors is more opportunistic. These factors, in turn, vary widely around the world, over time, and by issue sector and institutional context. We thus leave it up to the reader to ascertain the likelihood and seriousness of these conditions in any particular context.