

**Government Secrecy and Transparency**  
**Fall 2018**  
**Th, 9-10:40<sup>1</sup>**  
**Room 354**

Professor Mark Fenster  
[fenster@law.ufl.edu](mailto:fenster@law.ufl.edu) and 352-273-0962  
376 Holland Hall  
Office hours: TBA; and preferably by appointment.

**Course Description**

To what extent do citizens have a "right" to access to information produced or used by the government? Looked at from the other direction, to what extent does government need and have the authority to keep secret information it collects and uses for tasks essential to its operation? And considered more abstractly, to what extent does a functioning democracy and government depend upon a transparent, fully accessible government?

This seminar will frame and address these questions at both conceptual and practical levels. We will focus on the public records and open meeting laws that apply to federal and state government. But we will also consider the philosophical and historical basis for such laws, and their intended and unintended consequences. There are no prerequisites, but students who have taken Administrative Law (either federal or Florida) will enjoy the advantage of having studied the rules that apply to public bureaucracies. Those who have taken certain regulatory courses that study information disclosure regimes, including Environmental Law and Securities Regulation, will also see some similarities.

I expect that all those enrolled are serious about the topic both as a practice area and as an area of philosophical, political, and/or historical concern. Course readings reflect this dual focus.

**Student Learning Outcomes**

*The objectives for this course include:*

- Knowledge of and ability to explain substantive administrative and constitutional law relating to access to government information, as well as of the history, theory, and justification for informational access;
- Knowledge of and ability to explain techniques for effectively representing government entities that seek to comply with information access law and private individuals and entities that seek information from the government; and
- Ability to perform legal analysis, reasoning, and research in written and oral communication.

*Assessment of Student Learning:*

I will assess your attainment of competency in these learning outcomes by:

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<sup>1</sup> If we agree to take a ten-minute break in the middle of class, as I suggest we should, we will run until 10:50.

- Assessing the quality of your writing, which may either be a research paper or shorter papers/ memos. My assessment will include reviewing and providing feedback on your written work.
- Assessing the effectiveness of your participation in class, including your discussion of assigned readings, how you explore the intricacies and difficulties of the substantive law and theory and history, and your ability to draw connections between various areas of the course.

## Requirements

### **Reading Assignments**

There is one required book for the course: David E. Pozen and Michael Schudson (eds.), *Troubling Transparency: The History and Future of Freedom of Information* (Columbia University Press, 2018). Recommended, but not required, is my book *The Transparency Fix: Secrets, Leaks, and Uncontrollable Government Information* (Stanford University Press, 2017), two chapters of which are assigned. I've made PDFs of those chapters available via TWEN, but you may find the entire book helpful. If enough students buy it, I will use the (meagre) royalties I earn for some kind of treat on the last day of class.

The remainder of the readings will be available via the course TWEN site or easily downloadable via the Internet and your chosen legal database. I will use the TWEN site not only to post readings but to communicate with the class, and so all enrolled students *must* sign up for it.

### **Week-to-week workload**

ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every “classroom hour” of in-class instruction. This seminar has 2 “classroom hours” of in-class instruction each week, requiring at least 4 hours of preparation outside of class. This includes both the reading and written assignments you must submit. I expect that the readings assignments will include around 50-100 pages each week. The readings are book chapters, law review articles, and cases. Law review articles are long and tediously footnoted; my expectation is that you will read the text and skim or skip the footnotes.

### **Attendance and In-Class Expectations**

I expect that you will attend every class, except for classes you miss due to documented medical issues or for religious observance (with advance notice). Missing more than one class will result in a grade penalty; more than two absences can result in my dropping you from the course. I expect too that you will arrive on time. You will incur an absence for every two classes in which you arrive more than a few minutes late without advance notice and a documented excuse.

You will be responsible for being “on-call” for at least a portion of a reading for each week. I expect that you will have read the material for which you are on-call in greater depth and that you are prepared to discuss it in some detail during the class period. I will make the assignment a week in advance.

When you are not on-call, I expect that you will be attentive and prepared and that you will participate. I am hesitant to disallow laptops and devices because most of the readings are available online and printing them only for class is wasteful, but I will ban them, either individually or for the class, if students regularly use their devices for non-course-related activity.

### **Written Assignments and Presentations**

Students may choose to do either (1) a "senior" *research paper* for purposes of filling their Advanced Writing Requirement or (2) three shorter *papers/ memos* over the course of the semester of 6-8 pp. each. *Students need to decide by the second week of class which option they will choose.* I will circulate a sign-up sheet on August 23 for that purpose, although you can notify me before then of your intent. Students may change options after the second week only for good reasons, and only with my express permission. These are the guidelines for each choice:

- *Research Paper Option:*
  - **Generally:** A research paper can be on any topic related to the course, and can take the form of a law review note-like legal research paper (about one or more doctrinal or policy issues), a reform proposal, an historical or philosophical essay, etc. The paper must be at least 25 pp. (double-spaced, 12-point type, with one-inch margins) and have at least 50 footnotes citing at least 20 discrete sources.
  - **Topic deadline:** Students who choose the research paper option must submit at least three sentences via an email *sent before class on August 30 identifying the topic on which they plan to write.*
  - **Outline deadline:** They must submit an outline of the paper with a list of at least ten discrete sources (cases, law review articles, books, etc.) via an email *sent before class on September 21.*
  - **Individual meetings:** Each student must meet with me on or about the week of October 8 to discuss their progress on the paper topic and research. You may of course meet with me more frequently than that.
  - **Draft deadline:** A rough draft of at least two-thirds of the paper is due via an email *sent before class on October 25.* I will return the drafts by class on November 1.
  - **Paper deadline:** The final paper is due via email by 9AM on November 30. You may request an extension until no later than December 13, but the deadline for an extension request is November 16 at 5 PM. I strongly discourage extensions for other than exceptional circumstances.
  - **Presentation:** Each student who chooses this option will make a brief (5-10 minute) presentation of their paper on the final class period. I will factor your performance in the presentation into my determination of your participation grade.
- *Short Papers/Memos Option:*
  - **Generally:** The papers/memos will track the assigned class readings. Each student who chooses this option will choose three class days when a paper will be due, subject to my approval. You may choose your own topic for your short paper (e.g., providing a detailed summary and critique of one reading, a comparison of two more readings) or I can help you come up with one. You are not required to do additional research, but you may choose to do so.
  - **Leading class discussion:** Those who choose this option will lead class discussion of the topics on which they write, although they can expect that the students who are on-call for that day will contribute to the class discussion.
  - **Deadline:** Short papers are due by 8 AM on the day of the assignment they cover. No extensions are available. Failure to submit an assignment by the beginning of class will affect the assignment's grade. Failure to attend class and lead discussion for that day will lead to a failure for that assignment. Note that the earlier you are able to submit your paper earlier than the start of class, the more feedback I can give you to help in your leading of class discussion that day.

## **Evaluation/ Grading**

Students in this course can benefit from the higher mean GPA I can give in a seminar, which is 3.6. I am not, however, bound by that guideline, and if the papers do not warrant high grades I will not give them simply because I can.

I will base final grades on student performance in written assignments and class participation (including discussion leadership and general participation). ***Writing matters, as does public presentation and discussion.*** These skills are essential to legal and policy practice, and I'm committed to using the seminar format to give students more experience in developing their writing and public speaking. I am happy to meet with students in advance to discuss writing and public speaking skills and strategies, but I will not spend extensive class time developing students' basic skills, nor will I correct every grammatical, logical, and spelling error in work submitted. I will, however, attempt as best I can to identify and correct a sample of the writing errors I find in your work, and attempt to give you evaluative feedback on your writing.

In short, I will grade both your substantive work and the quality of your communication of ideas, but can only assist you thoroughly in your substantive ideas. I am happy to assist students who are concerned about their basic skills to find additional assistance, but I cannot provide extensive assistance myself.

## **Academic Misconduct**

Academic honesty and integrity are fundamental values of the University community. Written work that you submit to meet an assignment should be your own, and you should make clear with quotation marks and proper citation those parts of your work that others had stated first. I take plagiarism seriously and will penalize plagiarized work severely. Students should also be sure that they understand the UF Student Honor Code at <http://www.dso.ufl.edu/students.php>.

## **Accommodations**

Students requesting accommodation for disabilities must first register with the Disability Resource Center (<http://www.dso.ufl.edu/drc/>). Once registered, students will receive an accommodation letter which must be presented to the Assistant Dean for Student Affairs (Dean Mitchell) when requesting accommodation. Students with disabilities should follow this procedure as early as possible in the semester.

## Reading Assignments

Class 1: Aug. 16 - Basic concepts and history

1. Thomas Blanton, "The World's Right to Know," available at <https://foreignpolicy.com/2009/11/11/the-worlds-right-to-know/>
2. Ann Florini, "The End of Secrecy" (TWEN)
3. Fenster, "The Transparent State We Want but Can't Have" (Introduction to *Transparency Fix*) (TWEN)
4. Fenster, "The Opacity of Transparency," pp. 894-910 (TWEN)

Class 2: Aug. 23 - Introduction to FOIA—History and Policy Debates.

1. Michael Schudson, "Origins of the Freedom of Information Act" (TWEN)
2. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L. J. 649, 649-50, 659-83 (1984) (edited version on TWEN).
3. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION 14 (Mar/Apr 1982) (TWEN).
4. Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401 (2000).

Class 3: Aug. 30 - FOIA, an overview of the law

1. Edited and annotated version of 5 U.S.C. § 552 (TWEN)
2. Breyer, Stewart et al, *Administration Law and Regulatory Policy*, pp. 720-740 (TWEN)
3. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980) (TWEN).

Class 4: Sept. 6- What is FOIA, exactly?

1. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)
2. Frederick Schauer, "Positive Rights, Negative Rights, and the Right to Know," *Troubling Transparency*, chapter 2
3. Fenster, "FOIA as an Administrative Law," *Troubling Transparency*, chapter 3

Class 5: Sept. 13 – How (Well) Does FOIA Work?

1. Mark Fenster, "Transparency's Limits" (chapter 3 of *Transparency Fix* and TWEN)
2. Margaret Kwoka, "The Other FOIA Requesters," *Troubling Transparency*, chapter 4
3. Michele Bush Kimball, "Shining the Light from the Inside: Access Professionals' Perceptions of Government Transparency," 17 COMMUNICATIONS LAW & POLICY 299 (2012) (TWEN)
4. David Pozen, "Transparency's Ideological Drift," 128 YALE L.J. \_\_\_\_ (forthcoming 2018), Part III (pp. 19-38) (TWEN)

Class 6: Sept. 20 – Privacy (**visit with Prof. Jon Mills**) (readings to be edited)

1. *Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388 (Fla. Dist. Ct. App. 2001)
2. "In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida's Public Records Law Under the Hot Lights", Patrick N. Bailey, 26 NOVA L. REV. 305 (2001)
3. Fl. Stat. chapter 406 §135

4. Fred H. Cate, *The Right to Privacy and The Public's Right to Know: The Central Purpose of the Freedom of Information Act*, 46 ADMIN. L. REV. 41
5. "Can Sunshine Laws Sometimes Shed Too Much Light?", Patrick Jonsson, *Christian Science Monitor*, May 22, 2001

Class 7: Sept. 27 - Florida Public Records Laws

1. Statutory and Constitutional Provisions
  - a. Fla. Const. art. I, § 24
  - b. Fla Stat. ch. 119 §§ 119.01, 119.07
2. Florida Attorney General, *Government in the Sunshine Manual: A Reference for Compliance with Florida's Public Records and Open Meetings Law* (2017) (TWEN), **skim Part II**
3. *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992)
4. *Wait v. Florida Power & Light*, 372 So. 2d 420 (Fla. 1979)
5. *Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc.*, 379 So. 2d 633 (Fla. 1980)
6. *Justice Coalition v. Ist DCA Nominating Commission*, 823 So. 2d 185 (Fla. 1st DCA 2002)

Class 8: Oct. 4 - Florida Open Meetings Laws

1. Statutory and Constitutional Provisions
  - a. Fl. Const. art. 1, § 24
  - b. Fla. Stat. § 286.011
2. Florida Attorney General, *Government in the Sunshine Manual: A Reference for Compliance with Florida's Public Records and Open Meetings Law* (2017) (TWEN), **skim Part I**
3. *Sarasota Citizens For Responsible Government v. City of Sarasota*, 48 So.3d 755 (2010)
4. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992)
5. *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999)

Class 9: Oct. 11 – No class: mandatory status meetings with students who are writing research papers; voluntary meetings for those writing shorter papers.

Class 10: Oct. 18 – Case study: Public universities (**visit of Prof. Frank LoMonte**) (readings to be edited)

1. "State University Presidential Searches: Law and Practice", Nick Estes, 26 J.C. & U.L. 485 (2002)
2. *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983)

Class 11: Oct. 25 – Alternatives/ Supplements to FOI (1): Formal and Informal Internal Checks

1. Seth Kreimer, "The Ecology of Transparency Reloaded," *Troubling Transparency*, chapter 7
2. Nadia Hilliard, "Monitoring the U.S. Executive Branch Inside and Out..." *Troubling Transparency*, chapter 8
3. David Pozen, "The Leaky Leviathan," 127 HARV. L. REV.512 (2013)

Class 12: Nov. 1- Alternatives/ Supplements to FOI (2): Transparency in the Digital Age

1. Beth Simone Noveck, "Open Data: The Future of Transparency in the Age of Big Data," *Troubling Transparency*, chapter 10

2. Mark Fenster, "Disclosure's Effects: WikiLeaks and Transparency," 97 IOWA L. REV. 753, 755-81 (2012) (skim the rest)
3. Mary-Rose Papandrea, "The Publication of National Security Information in the Digital Age," 5 J. NAT'L SECURITY L. & POL'Y 119 (2011)

Class 13: Nov. 8- FOI Around the World

1. Kyu Ho Youm & Toby Mendel, "The Global Influence of the US on FOI," *Troubling Transparency*, chapter 12
2. Gregory Michener, "Transparency as Leverage or Transparency as Monitoring? U.S. and Nordic Paradigms in Latin America," *Troubling Transparency*, chapter 13
3. Irma Sandoval-Ballesteros, "Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico," *Troubling Transparency*, chapter 14.

Class 14: Nov. 15- Paper Presentations (This is the last scheduled class)