Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

IMPACT OF THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT ON INTELLIGENCE ACTIVITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON LEGISLATION

OF THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

APRIL 5, 1979

Printed for the use of the Permanent Select Committee on Intelligence

U.S. GOVERNMENT PRINTING OFFICE

56-940 O WASHINGTON : 1980

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

(Established by H. Res. 658, 95th Cong., 1st Sess.)

EDWARD P. BOLAND, Massachusetts, *Chairman*

CLEMENT J. ZABLOCKI, Wisconsin
BILL D. BURLISON, Missouri
MORGAN F. MURPHY, Illinois
LES ASPIN, Wisconsin
CHARLES ROSE, North Carolina
ROMANO L. MAZZOLI, Kentucky
NORMAN Y. MINETA, California
WYCHE FOWLER, JR., Georgia

J. KENNETH ROBINSON, Virginia
JOHN M. ASHBROOK, Ohio
ROBERT McCLORY, Illinois
G. WILLIAM WHITEHURST, Virginia
C. W. BILL YOUNG, Florida

THOMAS K. LATIMER, *Staff Director*
MICHAEL J. O'NEIL, *Chief Counsel*
PATRICK G. LONG, *Associate Counsel*
JEANNE M. MCNALLY, *Clerk*

SUBCOMMITTEE ON LEGISLATION

MORGAN F. MURPHY, Illinois, *Chairman*

ROMANO L. MAZZOLI, Kentucky
WYCHE FOWLER, JR., Georgia
EDWARD P. BOLAND, Massachusetts

ROBERT McCLORY, Illinois
JOHN M. ASHBROOK, Ohio

BERNARD RAIMO, Jr., *Counsel*
IRA H. GOLDMAN, *Counsel*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

CONTENTS

Statement of: *Page*

Frank C. Carlucci, Deputy Director of Central Intelligence ---------- 2

Accompanied by Lyle L. Miller, Deputy Legislative Counsel, Central Intelligence Agency; Ernest Mayerfeld, Chief, Freedom of Information and Privacy Law Division, Office of the General Counsel, Central Intelligence Agency; George Owens, Chief, Information and Privacy Staff, Directorate of Administration, Central Intelligence Agency; and Robert Owen, Information Review Officer, Directorate of Operations, Central Intelligence Agency.

Daniel B. Silver, General Counsel, National Security Agency --------- 16

AFTERNOON SESSION

Thomas H. Bresson, Acting Chief, Freedom of Information Act Branch, Records Management Division, Federal Bureau of Investigation --- 48

Accompanied by Michael Hanigan, Assistant Security Chief, FOIA Branch, Records Management Division, FBI; and Dennis Miller, Unit Chief, Research Unit, Records Management Division, FBI.

APPENDIX

A. FBI Statistics Regarding Freedom of Information Act and Privacy Act ---------- 63

B. FBI Proposals to Amend the Freedom of Informaton Act ------------ 64

C. Statement of the Honorable Richardson Preyer ---------------------- 158

D. CIA Submission Regarding the Freedom of Information Act ---------- 162

E. The Freedom of Information Act ---------------------------------- 163

F. The Privacy Act --- 168

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

IMPACT OF THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT ON INTELLIGENCE ACTIVITIES

THURSDAY, APRIL 5, 1979

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON LEGISLATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room H-405, the Capitol, Hon. Morgan F. Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy, McClory, Ashbrook, and Whitehurst.

Also present: Michael J. O'Neil, chief counsel; Patrick G. Long, associate counsel; Bernard Raimo and Ira H. Goldman, committee counsel; Herb Romerstein and James O. Bush, professional staff members; Louise Dreuth, secretary; and William A. Leece, security director.

Mr. MURPHY. The meeting of the Subcommittee on Legislation of the Permanent Select Committee on Intelligence will come to order.

Since this committee's existence, it has been told the Freedom of Information and Privacy Acts have had a significant impact on the intelligence community. The committee has solicited a wealth of information about this subject from the CIA and other intelligence agencies. They consider that the application of those statutes raise grave implications for their continued operations. The committee feels that because the public may not understand the ramifications of the Freedom of Information Act upon intelligence operations, and because some of the suggestions for amending the act are far-reaching ones, that it should sponsor a public discussion of the particular influence that the Freedom of Information and Privacy Acts have on foreign intelligence and counterintelligence activities.

Our first witness today is as able a spokesman as the CIA can command, the distinguished Deputy Director of the Agency, Mr. Frank Carlucci.

Mr. Carlucci, we welcome you here today.

Before we start, I will ask my colleague Mr. McClory if he would like to say a word.

Mr. MCCLORY. Thank you very much, Mr. Chairman.

Yes, I do want to join in welcoming Mr. Carlucci to our meeting here this morning. I have had the privilege of meeting him before. I realize the subject we are dealing with today concerns itself with protecting the rights of individual Americans while at the same time

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

having account of the importance of our intelligence agencies—for we want to be certain we don't impair their effectiveness in any way.

It is a very delicate subject that we are dealing with, and, it seems to me, if the subject is only remotely connected with intelligence and does not impinge on civil rights, that we should consider at least some adjustment to the Freedom of Information Act to accommodate the intelligence agencies.

I know that Mr. Carlucci has a wealth of experience and is a very reputable professional. I know that his views are going to be extremely helpful to us in reaching a decision, and I want to join with the chairman in welcoming you here today.

Mr. MURPHY. You may proceed, Mr. Carlucci.

STATEMENT OF MR. FRANK C. CARLUCCI, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE; ACCOMPANIED BY: LYLE L. MILLER, DEPUTY LEGISLATIVE COUNSEL, CENTRAL INTELLIGENCE AGENCY; EARNEST MAYERFELD, CHIEF, FREEDOM OF INFORMATION AND PRIVACY LAW DIVISION, OFFICE OF THE GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY; GEORGE OWENS, CHIEF, INFORMATION AND PRIVACY STAFF, DIRECTORATE OF ADMINISTRATION, CENTRAL INTELLIGENCE AGENCY; AND ROBERT OWEN, INFORMATION REVIEW OFFICER, DIRECTORATE OF OPERATIONS, CENTRAL INTELLIGENCE AGENCY

Mr. CARLUCCI. Thank you, Mr. Chairman, members of the subcommittee. I am pleased to appear before you today to respond to your interest in the impact public disclosure statutes have had on the missions and functions of the Central Intelligence Agency. I intend to be as detailed as is possible in a public session, and I am, of course, prepared to go into classified matters in further detail in executive session.

At the outset, however, I want to point out that I am facing a real dilemma in appearing before you today on this subject. As my remarks will hopefully make clear, we do have problems in our country in keeping the authorized and legitimate activities of CIA secret. Some of these problems are real, but for others, such as the Freedom of Information Act, it is essentially a matter of perception. I will be telling you today why that is so. However, since we are dealing with perception, I know as clearly as I am sitting before you today that my statements before you will be used by hostile foreign intelligence services in an effort to convince potential agents that collaboration with CIA is indeed a foolhardy endeavor because inevitably their actions will be made public. Even so, I firmly believe that this open session can counteract such attempts if the end result is an increased capacity for our agency and its officers to deal with individuals and convincingly offer the protection from public disclosure which people who place their life or liberty in jeopardy demand.

I also want to make it clear that Admiral Turner and I support the general concept of openness in government. Indeed, Admiral Turner has been criticized for bringing too much openness to the Central Intelligence Agency. Under his leadership, approximately 150 finished

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

intelligence reports have been declassified per year and have been made available to the public through the Library of Congress. We have moved from the former "no comment" response and now routinely provide unclassified information in response to media inquiries. We are conducting a dialog with American academic specialists, and, increasingly, analytical personnel participate in the presentation of unclassified professional papers. In this way the substantive product of CIA is made available and contributes to an informed public without risking the disclosure of sensitive intelligence sources and methods.

Nor do we take issue with public disclosure statutes as vehicles for giving citizens greater access to the affairs of Government and assuring individuals that information on them which may legitimately be gathered by their Government is accurate and will not be abused.

What we do question seriously and thoughtfully, however, is the appropriateness of applying Government-wide public disclosure concepts to the authorized and legitimate activities of the Central Intelligence Agency which require secrecy. Indeed, the Congress itself has recently reaffirmed the uniqueness of our mission and the information derived from it by creating this oversight committee and its counterpart in the Senate. As a result, there now exists effective congressional oversight mechanisms to assure the accountability, legality and propriety of CIA activities which must remain secret. Admiral Turner and I, as congressionally approved Presidential appointees, insure that this committee is now and will continue to be supplied with whatever information you need in order that you may be satisfied the Central Intelligence Agency is following the law and in so doing exercising good judgment. You, not 20,000 FOIA requesters, foreign and American, are the proper people to conduct oversight.

It is, I submit, through these committees and their staffs, as well as the extensive executive branch review mechanisms, that oversight of this Nation's most sensitive activities ought to be undertaken.

It is, of course, for Congress to decide whether the best interests of the Nation are served by the application of general openness concepts to intelligence activities. It is our position that the best interests of the Nation are not so served. My central theme today, therefore, is that the total application of public disclosure statutes like FOIA to the CIA is seriously damaging our ability to do our job.

Before I make this case, allow me to make two other points: It is undeniable that under the current FOIA national security exemptions exist to protect our most vital information. The question is whether they are so perceived by those upon whom we depend to provide us, in absolute secrecy, that information.

The difficulty in protecting intelligence information arises from more than the FOIA. There have, for example, been leaks, we have had leaks, there have been cases of espionage, former Agency employees have written books without proper clearance beforehand and Phillip Agee and others of his group publish a bulletin dedicated to exposing our undercover employees and operations overseas. We are trying to deal with all of these issues.

Unfortunately, the Freedom of Information Act has emerged as a focal point of the oft heard allegation that the CIA cannot keep a secret, that is, cannot properly protect its information from public disclosure. It has, therefore, assumed a larger than life role as a

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

symbol of this Nation's difficulty in keeping confidences inviolate. I do not agree that we cannot keep a confidence, but it is that perception held by many of those who would only enter into an arrangement with us on a confidential basis that is the crucial issue at hand.

In order to appreciate FOIA's impact on intelligence, it is important to clearly understand how we operate.

It is a misconception that our people spend most of their time moving around trying to pick up information in bars and photographing documents with secret cameras. Actually, their mission is to establish what is essentially a contractual relationship with people in key positions who might otherwise be inaccessible to our diplomats overseas.

This is not an easy task nor is it quickly accomplished. The principal ingredient in these relationships is trust. To build a relationship which in many cases entails putting one's life and that of one's family in jeopardy to furnish information to the U.S. Government is a delicate and time-consuming task. Often, it takes years to convince an individual that we can protect him. Even then, the slightest problem can disrupt this relationship.

Recognize also that most of those who provide us with our most valuable and therefore most sensitive information come from societies where secrecy in both government and everyday life prevails. In these societies, often those suspected of anything less than total allegiance to the ruling party or clique may be summarily dismissed from their jobs, incarcerated, or even executed. In societies such as these, the concepts behind the FOIA are totally alien, frightening and indeed, contrary to all that they know. It is virtually impossible for most of them to understand the law itself much less why an organization such as the Central Intelligence Agency, wherein repose their most guarded secrets, should be subject to the act. It is difficult to convince them that someday they will not awaken to find in a U.S. newspaper or magazine information which they have furnished to the Agency which can be traced back to them.

Hardly a day goes by that there is not a sensational news article describing CIA information released under FOIA. The fact that much of it is repetitious, and most of it is history, is lost on our agent network.

Imagine the shackles being placed on the CIA case officer who must eventually convince the foreign agent to cooperate with us. The moment of truth for the case officer comes usually at the time of recruitment. The agent, while leaning towards cooperation, will demand that his information be protected. He wants absolute assurance that nothing will be given out which could even conceivably lead his own increasingly sophisticated counterintelligence people to appear at his doorstep. But the barrage of intelligence disclosure is, Mr. Chairman, making it harder and harder for our case officers to be convincing.

Although, when asked, we assure these individuals that their information is and will continue to be protected, we have on record numerous cases where our assurances have not sufficed. Foreign agents, some very important, have either refused to accept or have terminated a relationship on the grounds that, in their minds—and it is unimportant whether they are right or not—but in their minds the CIA is no longer able to absolutely guarantee that information which they provide the U.S. Government is sacrosanct. Again, we believe we can keep

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

it so, but it is, in the final analysis, their perception, not ours, which counts.

For example, a foreign intelligence source from a Communist country broke off a productive association with us specifically because of fear of the consequences of disclosure under the Freedom of Information Act. Subsequently he failed to use established means for reviving contact with the Agency despite the asset's renewed residence outside his native land. We can only assume that he is lost as a source of foreign intelligence.

There are other cases where agents have cited the FOIA as the reason for unwillingness to either cooperate initially, continue to cooperate, or cooperate as fully as in the past. How many cases of refusal to cooperate where no reason is given but if known would be for a similar reason I cannot say. I submit, however, that based upon the numerous cases of which we are aware, there are many more cases of sources who have discontinued a relationship or reduced their information flow based on their fear of disclosure. No one can quantify how much valuable information is lost as a result.

The FOIA also has had a negative effect on our relationships with foreign intelligence services. Recently, the chief of a major foreign intelligence service sat in my office and flatly stated that he could not fully cooperate as long as CIA is subject to the Freedom of Information Act. In another case, a major foreign intelligence service dispatched to Washington a high ranking official for the specific purpose of registering concern over the impact of the FOIA on our relationship. I strongly argued that we had adequate national security exemptions. While admitting awareness of these exemptions, this representative noted correctly that even information denied under the exemption was subject to later review and possible release by a U.S. court. While this fortunately has not yet happened, I was not in a position to guarantee that it will not. These are but two examples. The question I cannot answer is how many other services are now more careful as to what information they pass to our agency.

Finally, it is not only foreign sources of intelligence information that feel threatened by the FOIA's applicability to the Central Intelligence Agency. The FOIA has impacted adversely on our domestic contacts as well. As the committee is well aware, patriotic Americans volunteer information which is invaluable to the U.S. Government. Most of these Americans, for business and other reasons, insist that we protect the fact of their cooperation and the information which they provide.

Despite the universal concern over FOIA, most Americans continue to help us. But there are those who, in assessing the risk of disclosure, determine that it is not in their best interest to cooperate. They find their sense of patriotism frustrated by an obligation that their private interests not be jeopardized. For example, the head of a large American company and a former Cabinet member recently told me that he thought any company was out of its mind to cooperate with CIA as long as the provisions of the FOIA apply to it. I think he is absolutely wrong, but again, in the final analysis it is his perception, not ours, that counts. Unfortunately, he is not alone. Over the past few years, this dilemma has prompted other important U.S. sources of information to discontinue their cooperation with U.S. intelligence.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Once again, this reaction cannot be laid entirely at FOA's doorstep, but it is the principal symbol to most. These examples demonstrate the chilling effect the Freedom of Information Act has had on our ability to collect intelligence. Mr. Chairman, we are expected to provide the best possible information to U.S. policymakers and the Congress. We are seriously hampered in achieving this objective unless we can give more certain guarantees to our sources that their information will be held inviolate.

Let me point to another aspect. As this Committee well knows, the vast majority of CIA information is properly secret and efforts to excise these secrets from documents not only involve the adverse effects of the perception of the risk of disclosure which I have already discussed, but also produces information, more often than not, out of context and therefore misleading and extremely small in comparison to the actual quantity reviewed. Of course, it is also possible that a sophisticated foreign intelligence service could piece together, from the bits and pieces of released information a larger portion of the entire picture regarding a particular intelligence activity or operation.

Mr. Chairman, my presentation to you would be incomplete if I left you with the impression that the sole problem created by the subjection of our records to the FOIA was one of perception. FOIA processing is, of course, carried out by human beings. This raises the possibility of human error and of faulty judgment as to what may and what may not be released in one or another situation. Mistakes, although few and far between, have been made and will, I fear, continue to occur no matter how much care we exert in processing requests.

Additionally, and perhaps more importantly, FOIA requests break down the CIA's system of compartmented records. Our compartmented records system allows only those with a genuine need to know to have access to one or another document or file. Under an FOIA request all records and files relevant to the particular request are drawn together. They remain together during the FOIA request, appeal and litigation process, thus giving them far wider distribution than they would normally have and that is consistent with good security practice. Thus we find the anomaly that FOIA is given a rank of importance higher than the need to know principle which is the underpinning of our informational security system.

As I stated, our principal concern with the FOIA is the chilling effect it has on our sources.

Before closing, however, I would like to share with you examples of some of the administrative burdens we face in endeavoring to comply with the act. In spite of the devotion of increased manpower coupled with efforts to improve our efficiency and productivity, we continue to receive a heavier volume of FOIA and Privacy Act requests than we can handle. In this regard, we receive over 4,100 Freedom of Information Act, Privacy Act, and Executive Order 12065 requests per year or about 16 per day. Our current backlog is over 2,700 unanswered requests.

We have many different record systems, as many as 21 of which may have to be searched in order to respond to a particular FOIA request. These divergent record systems, as I noted earlier, must be separately maintained because of the compartmented security system which we find essential.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

The average cost of processing requests amounts to $800 each.

Many of our requests are sent to us via a form letter. For example, requests received from universities often follow this pattern and generally speaking are extremely broad, asking for "all information CIA has on relationships between CIA and the university and CIA and university staff or officials."

Other requests are of the curiosity variety. To most of these we are unable to provide documents but must, nonetheless, expend many fruitless man-hours in arriving at that conclusion.

Many are from foreigners, possibly representatives of hostil intelligence services and clearly some are from those whose apparent purpose in writing is to uncover information which would do harm to this Nation's interests overseas.

A number are from individual authors. In one case we have devoted the total efforts of one person full time for a period of 17 months. This again is for a single request by one individual.

In another area, we have already expended approximately 4 man-years on FOIA requests from Phillip Agee who, as noted earlier, is an admitted adversary of the CIA dedicated to exposing the identities of employees serving overseas. He does that through the vehicle of this publication called the Covert Action Bulletin. You can see here the centerfold, the CIA, and the target of a bullseye. I would like to pass this copy around, and you can see the kind of information that is being put out, including the last section where they name names of CIA people overseas. It is in my judgement disgraceful that we should be asked to assist him in his endeavors.

During 1978 we spent 116 man-years working on requests for information under the disclosure statutes. By comparison, this expenditure of valuable human resources is greater than that spent on any one of several areas of key intelligence interest to the United States.

Thus, Mr. Chairman, the burden of the FOIA is also a problem for us and one, when coupled with the more serious problems I described earlier, in need of remedy. That remedy is difficult to fashion and we have given it a lot of thought. We recognize the importance of maintaining the general FOI concept. We do not seek a total exemption from FOIA. What we really seek is a more effective way to assure our sources that we are doing what the 1949 CIA enabling act directs us to do, that is, protect them. We think we can achieve this objective, at least partially, by perfecting the relevant CIA Act provisions in a manner fully consistent with the spirit and letter of national security exemptions already in the Freedom of Information Act. At the same time we are also conscious of the competing needs of our U.S. citizens whose support and confidence we must maintain. It is for this reason that we believe that our files should continue to be accessible to American citizens and permanent resident aliens, subject to existing FOIA exemptions, to the extent that information concerning such persons may be contained in our files.

Mr. Chairman, while I am not a career intelligence officer, I have been associated with intelligence for a number of years as a Foreign Service officer. After 1 year in my current position, I can tell you in all candor that the erosion of our ability to protect our sources and methods, and more importantly, the larger than life perception of that

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

erosion is the most serious problem the CIA faces today. If we do not solve it we cannot continue to be the best intelligence organization in the world.

If we believe we need intelligence then we have to accept some secrecy. FOIA has called into question around the world our ability to keep a secret. Its application in its current form to CIA is inappropriate, unnecessary in light of current oversight mechanisms, and harmful.

That concludes my prepared statement, Mr. Chairman. I am prepared now to answer whatever questions you and members of the committee may have.

Mr. MURPHY. Thank you, Mr. Carlucci.

The committee is interested in hearing how CIA files are arranged and how the FOIA requests are regularly handled.

Can you give us more of an idea of what happens when you receive a request?

Mr. CARLUCCI. Well, when we receive a request, we make an initial determination of whether it is an FOIA request, a Privacy Act request, a request that falls under the Executive order on classification of documents. The files are then searched by a dedicated staff in the Directorate of Administration. There are other staffs. They work with other staffs in our different directorates who are more familiar with the individual files. When the material is pulled out of the files, it then has to be reviewed by what I would call a substantive officer, somebody who is intimately acquainted with the subject matter. That means that people are diverted from their other activities to go through these files—and some of them are quite extensive, as many as 600 or 700 documents in an individual file. The reviewing officer then makes a judgment on what can be released, including what are the segregable portions of the documents that can be released, and it is then returned to our information control staff for appropriate handling.

Let me ask, we have two people here from our information and privacy staff and from our Directorate of Operations, Mr. George Owens, in the first case, Mr. Robert Owen in the second case, and see if they would care to add to the description.

Mr. OWENS. Congressman, I might add a little bit to the fact that the initial request, when it comes into our office in particular, we look around the Agency in terms of what components, what organizations may have records responsive to the request. That can very frequently add to the number of places we can go. I can cite the maximum number that we could go to initially at this point has been roughly 21 different places we could go to. Those components, then, who are most familiar with their records and precisely what is contained therein then review their records. They will search for that documentation. Then they have to go through the very time consuming and cumbersome task of looking at all the information to make sure that it is responsive or can be released under FOIA. They identify the exemptions to us, return it to our office for final processing. We in turn return it to the requester, giving him the exemptions, if there are deletions from the documents, or giving them in full if documents can be released in full.

Mr. MURPHY. Thank you.

Have you ever put a cost factor on all of this over 1 year?

Mr. CARLUCCI. It runs about $2.6 million.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. OWENS. Last year it was $2.9 million.

Mr. MURPHY. Just your agency?

Mr. CARLUCCI. Just our agency, yes, sir, 116 man-years approximately. That is just personnel costs.

Mr. MURPHY. Mr. Carlucci, when you suggest that congressional oversight is the most appropriate way to assure accountability and legality in CIA activities, do you also agree that there should be explicit statutory authority making any CIA files available to these intelligence committees?

Mr. CARLUCCI. Well, we already have an executive order, Mr. Chairman, which indicates we should keep the committees informed. As you are aware, the administration has been working with the Congress in developing charter legislation, and we would expect that that provision, that issue would be addressed in charter legislation as well.

My own experience after a year in the Agency is that we are responsive to the oversight committees. We have provided vast amounts of information. I think the oversight process is working well. Where information might be particularly sensitive, I think the committee has recognized that and we have worked out solutions to those kinds of problems. So from our perspective, we think the current arrangement is working well, and we think the committee is being furnished sufficient information to do its job.

But that, of course, is a judgment that the committee can make better than I can make.

Mr. MURPHY. Mr. McClory, do you have any questions?

Mr. MCCLORY. You indicated, Mr. Carlucci, the various types of inquiries that come to you, the demands that come to you under the exercise of the Freedom of Information Act.

What percentage of these relate to persons who are just trying to get information about themselves?

Mr. CARLUCCI. A very substantial portion of the requests relate to people who are asking us what do you have in your files about me? I don't know if we have an exact account, about 52 percent, sir.

Mr. MCCLORY. What is your attitude with regard to that part of the Freedom of Information Act? Does that impinge on the classified nature of your files?

Mr. CARLUCCI. That is not our most serious concern, Congressman McClory. We are principally concerned about operational files which would reveal information to those who would do us harm. We think it is probably appropriate to continue to make our Agency responsive to the first person requests.

You will note that we have not asked for any kind of exemption to the Privacy Act either.

Mr. MCCLORY. So if that authority remained subject only to your right to refuse to disclose sources and methods and identities, that would be a satisfactory solution of the present problem.

Mr. CARLUCCI. Yes, sir, it would.

Mr. MCCLORY. I feel a principal part of our job here is to try to strengthen the intelligence agencies, including the CIA. I know that there has been a great deal of damage done, particularly as you indicated from unfortunate disclosures, some of which I am sure you can attribute to the Congress itself. I would hope that we could take some appropriate action on this committee. I am likewise aware, as you

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

point out dramatically in your statement, that what we have done principally is to dry up foreign sources because it is our foreign contacts that don't understand this law and are fearful, and they place a much greater fear on their lives than our own citizens would be. I know that we have had in our own country the identity of intelligence people disclosed and we have killed their chances for covert activities. On the other hand, when that happens to a foreign source or a foreign resource, it is pretty serious, and not only is the person's life placed in jeopardy, but we cut off new sources of information.

Isn't that correct?

Mr. CARLUCCI. Yes, sir.

Mr. MCCLORY. So that if we want to do a job of helping to strengthen the CIA and other intelligence agencies, we should take primary account of that and how we can, through amendment to the statute, protect those sources and encourage those sources to cooperate with us.

Mr. CARLUCCI. It is my personal view, Congressman McClory, that the perception abroad and to a certain extent in this country, that the U.S. Government cannot keep a secret, is the single most important issue that the Central Intelligence Agency faces, and if we are not able to deal with this issue and to deal with it rather rapidly, I won't think we can continue to maintain our position as the most effective intelligence organization in the world.

Mr. MCCLORY. I think from the standpoint of a purely budgetary interest that we have—and I guess this has been discussed in another subcommittee of this committee—the fact that we are spending $2.9 million is of concern to us, plus the fact that the existing law continues as a handicap in connection with the CIA doing the full job that they want to do and that we want them to do.

Mr. CARLUCCI. The workload factor is one that of course troubles us. It is not the principal argument that we are making, but in terms of the workload—and I believe this will be addressed in subsequent testimony in more detail, we find that the courts are requiring us increasingly to justify our deletions, and to do so in an unclassified form.

So we get ourselves into a Catch-22 situation where we delete something and then the court says, well, you have to describe in your affidavit why you deleted it, and in so describing it, you may identify the very source that you have deleted, to say nothing of the added workload burden that this will impose on us as people have to go through the lengthy justification of each deletion.

This court decision, by the way, results from a lawsuit brought by two people whose names you will see on the masthead of the Covert Action Bulletin, Ellen Ray and William Schaap.

Mr. MCCLORY. Now, the Phillip Agee publication, Covert Action Information Bulletin, is a commercial operation, a moneymaking operation which takes advantage of a statute which we enacted for the purpose of protecting individuals' civil rights.

Do they pay for the information they get, and how do we bill them, and who pays the bill?

Mr. CARLUCCI. Well, of course, under the Freedom of Information Act, the requester is not required to pay if determination is made that the information is in the public interest, and the courts have taken a

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

rather liberal view of information that is in the public interest. We had one case fairly recently——

Mr. MAYERFELD. The FitzGibbon case.

Mr. CARLUCCI. This is Mr. Mayerfeld, in our General Counsel's office.

Mr. MAYERFELD. This was a case where the author of a book refused to accept our determination that the activity was not in the public interest, which is a requirement of the act in order to waive fees, and the court ruled against us, that we should have waived fees because the matter was in the public interest.

Mr. McCLORY. What about Agee? Does he pay?

Mr. CARLUCCI. He has not paid yet. Well, he may have paid——

Mr. MAYERFELD. No.

Mr. CARLUCCI. Well, he has got two types of request. The two types of request are the Privacy Act request and the FOIA request. While we put the man-years in to answer his request because we are required to go through the process, we have not yet provided the information to him, so there will have to be a determination, if the information is provided, whether he would pay.

Mr. McCLORY. One more question. I have before me a proposed amendment to the Freedom of Information—this is an amendment to the CIA Authorization Act.

Would that amendment, would that satisfy the needs of the CIA as you see it?

Mr. CARLUCCI. Before I answer that question, Congressman McClory, let me go back to the last question just for a minute. I am told that we collected $10,000 last year in fees, and you can compare that with the $2.9 million that we expended in implementing the act.

I believe you have the amendment that was furnished as a drafting service in response to Congressman Burlison's request. If it is the latest version that exempts first person requests, then we think this amendment would deal with the kinds of problems that are laid out in my testimony, yes, sir. (See Appendix D.)

Mr. McCLORY. Thank you very much.

Thank you, Mr. Chairman.

Mr. MURPHY. Would anybody else like to interrogate the witness?

Mr. ASHBROOK. Yes; I have a number of questions.

I have a little trouble understanding your testimony.

Is it your position, the CIA position, that the FOIA has or has not been used for the release of information that is harmful to the Agency?

Mr. CARLUCCI. My testimony in this session is that the perception that the FOIA can be used to give out information that is harmful to the national security is a matter of serious concern.

Mr. ASHBROOK. Of course, that wasn't my question, not the perception.

Mr. CARLUCCI. I also pointed out at the outset of my testimony that I am sure that whatever I say here will be used by hostile services in disinformation campaigns. In terms of actual instances, I would prefer, Congressman, to deal with that in an executive session.

Mr. ASHBROOK. I guess that is what bothers me about your testimony. I have underlined five places where you have indicated you think that the people who feel that damaging information has come out through the FOIA are wrong. You refer to the businessman on

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

page 10, the company, and you categorically say "I think he is absolutely wrong." I guess I sit here in another world. I don't see how you can think he is absolutely wrong. I think he is absolutely right, and I guess the fact that all the way through you indicate they are wrong in their perception of what FOIA can do or has done makes me think I must be tuned in on a different wavelength.

Mr. CARLUCCI. Let me say that I think in theory, the nine exemptions can be used to protect national security information. It is a time-consuming and laborious process which involves human beings who are fallible, but the point is how others perceive it. They can look at the exemptions and still recognize that we have to go through the search process, and that that is being done by human beings. They also realize that whatever decision the Agency makes can be overturned by the courts. As I indicated, the courts have not yet done that. Their tendency is to make us justify increasingly in unclassified form our deletions, but it is still possible for the courts, who must make a de novo determination, to make a different judgment than we make, and that is a matter of concern to our collaborating sources and services.

In terms of specific instances where I think Freedom of Information Act has resulted in damage, I would be most happy to go into them in executive session. But if I were to go into them in open session, I would be defeating the very concept that I am trying to advance.

Mr. ASHBROOK. Well, I don't want you to. The only thing that I would say where I differ with you, at least to the extent that this committee is examining, is when you say that the fundamental issue, the important issue is how others perceive it. I would have to say I think the fundamental issue is how others use it, it being the FOIA. I guess we are talking about the same thing.

Mr. CARLUCCI. Well, let me make a point there. One of the problems of the FOIA is that we cannot go beyond the request. That is, we cannot try to find out who is making the request. We have to accept the letter at face value. So unless the information comes to us incidentally or through some other channel, we cannot really tell you about the user or how the information is being used. If somebody eventually publishes a book or writes in a letter that they are going to publish a book, then we know how it is being used, but if it is being used by hostile intelligence services, obviously they are not going to write us directly, although it is my understanding that under the terms of the law, if the head of the KGB were to write us directly, we would have to respond within 10 days. But obviously they would use some kind of an intermediary, and that intermediary is not even recognizable to us. We can't even tell in many cases when requests come from foreigners or Americans.

So it is very difficult for us to go behind the requests to answer the kind of questions that you raised.

Mr. ASHBROOK. Well, let me ask one more question, because of one other concern I have. I have been kicking around in this business from a legislative standpoint for 20 years now and I figure I only know probably one-hundredth of what some of our enemies know who get the same information. This is the whole problem of a first person request. It would be humorous if it weren't so serious. A person re-

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

quests information on himself. The person in the agency may think he sanitized it. But, I know more about me and my contacts than anyone does. I can read something in the light of what I have done. If you think you are fooling me, by crossing out an informant's name you are wrong. I know exactly who you are talking about. The person putting the information together for release may think he has done everything in the world to protect the source, but when I read about myself, I know damned well who it was in New York that they were talking about, or in Belgrade or somewhere, and to me, that is the greatest danger of the FOIA, the first person request information that the person gets on himself. You may think you have done everything you can to protect the source, but when I read it, I know I was only in Belgrade once, in 1965, and I know darned well who they must have meant that I got some information from. You know, it is almost foolish to think a person cannot get information on himself and put together the pieces to identify the sources you are trying to protect. And to me, that is the greatest danger of the release of information.

Mr. CARLUCCI. I am prepared to concede that that is a danger. Our feeling was that we had to weigh the value of the disclosure concept versus our responsibility, our statutory responsibility to protect our sources and methods, and we tried to come up with what we consider an equitable solution in response to Congressman Burlison's request. This doesn't mean it is the best of all worlds for us. We are leaning over backward, I think, in the direction of greater public disclosure, but what we want to do by virtue of, what we hope can be done by virtue of the amendment that Congressman Burlison requested, is to protect our most essential secrets, and more significantly give us a greater confidence in talking to our agent network and our liaison services that we can protect them. And we think the amendment goes far enough to protect that.

Mr. ASHBROOK. Well, I would agree with your perception, because other members of the staff and the committee and I have talked to dozens of foreign intelligence officers, responsible people, and they just come short of thinking we are crazy.

Mr. CARLUCCI. I have heard that many times myself.

Mr. ASHBROOK. They say with a wistful smile on their face, now, what is wrong with you people. Their perception is very important. Not only is their perception that this disclosure is dangerous, but that we are probably stupid for allowing it.

Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Carlucci, what percentage of requests are Privacy Act requests, requests by a person for file information about himself as opposed to a set of circumstances or facts other than about himself?

Mr. CARLUCCI. As I indicated earlier, I think about 52 percent.

Mr. MURPHY. Are what?

Mr. CARLUCCI. Are first person requests, Privacy Act and FOIA first person requests.

Mr. MURPHY. Do 52 percent seek information just about themselves?

Mr. CARLUCCI. Yes, sir.

Mr. MURPHY. It is my understanding that a Government-wide task force has been formed to look into this problem. Should we not wait for its administrative recommendations before we proceed on this, or what is your view on that?

56-940 O - 80 - 2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. CARLUCCI. We are participating in the Government-wide task force, and we will certainly cooperate with it. I am responding to questions that were raised by the committee during the budget hearings. I feel a responsibility to acquaint the committee with our problems. Indeed, the committee has consistently urged me to acquaint it with whatever problems we may face. I have laid those problems out. My own view is that this is a serious and urgent situation, that at least the perception of an erosion continues, and we have accordingly responded to requests from the committee for drafting assistance.

Mr. MURPHY. Mr. Carlucci, I understand you have to make a meeting.

Mr. CARLUCCI. Well, I am prepared to stay as long as the committee thinks it is valuable, Mr. Chairman. I think this is more important than my meeting.

Mr. MURPHY. I would like to go into executive session to hear some of the matters that you would be telling us, as far as I am concerned.

Mr. CARLUCCI. I would be delighted.

Mr. MURPHY. Mr. McClory, do you have any objection?

Mr. McCLORY. I have no objection. I move, Mr. Chairman.

Mr. MURPHY. All right, Mr. McClory moves we go into executive session. All those in favor say yes.

[A chorus of "ayes."]

Mr. MURPHY. Opposed.

[No response.]

Mr. McCLORY. We have got a new rule. We can go into executive session with two votes. We have just amended the rule.

Mr. MURPHY. All the public, we request that you step outside. We won't be too long, and we will come back in for Mr. Silver's testimony.

Mr. Carlucci, if you want to identify some of your own people that have clearances to stay.

Mr. CARLUCCI. I have got seven people.

Mr. MURPHY. Then everybody else, please leave.

[Whereupon at 10:25 a.m., the subcommittee proceeded in executive session, to reconvene in open session thereafter.]

[Whereupon, at 11:06 a.m., the subcommittee resumed.]

Mr. MURPHY. The Subcommittee on Legislation will be in open session now, and we will hear from Mr. Daniel B. Silver, General Counsel of the NSA.

Mr. Silver?

STATEMENT OF DANIEL B. SILVER, GENERAL COUNSEL, NATIONAL SECURITY AGENCY

Mr. SILVER. Thank you, Chairman.

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to inform this subcommittee about the impact that administering the Freedom of Information Act and the Privacy Act is having on the National Security Agency. I will first briefly describe the volume of requests under the acts and the cost of compliance. I then would like to outline the manner in which requests are handled within the Agency and the statutory provisions that figure most

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

prominently in NSA's processing of FOIA and Privacy Act requests, Finally, I would like to describe particular problems arising in the application of the FOIA to NSA's signals intelligence activities.

Mr. Chairman, I submitteed a prepared statement on these matters which is fairly lengthy. With your permission, I would like to summarize portions of it in the interests of saving time.

Mr. MURPHY. Without objection, it is so ordered.

[The prepared statement of Mr. Daniel B. Silver follows:]

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

SUBCOMMITTEE ON LEGISLATION
HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

TESTIMONY OF
DANIEL B. SILVER,
GENERAL COUNSEL, NATIONAL SECURITY AGENCY

April 5, 1979

Mr. Chairman and Members of the Committee, I appreciate this opportunity to inform this Subcommittee about the impact that administering the Freedom of Information Act (FOIA) and the Privacy Act is having on the National Security Agency. I will first briefly describe the volume of requests under the Acts and the cost of compliance. I then would like to outline the manner in which requests are handled within the Agency and the statutory provisions that figure most prominently in NSA's processing of FOIA and Privacy Act requests. Finally, I would like to describe particular problems arising in the application of the FOIA to NSA's signals intelligence activiities.

Volume and Cost of Requests Under the Acts

The FOIA provides that any person has a right to access to all records of any federal agency, except such records or portions of records as may be covered by one of nine exemptions enumerated in the Act. The exemptions must be asserted individually for each covered record or portion of a record. Consequently, the fact that a record will almost certainly fall within a statutory exemption does not relieve the Agency from the obligation to search for it and review it. The Privacy Act operates somewhat

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

differently. Its purpose is to give citizens more control over what information is collected by the Federal Government about them and how that information is used. Under the Act, agencies are required to report publicly all "systems of records" maintained on individuals. The Act requires that the information collected in these systems of records be accurate, complete, relevant, and timely. It mandates that information be used only for the announced purposes for which it was collected. It requires agencies to maintain records of disclosures of personal information. Finally, the Privacy Act permits citizens or aliens lawfully admitted for permanent residence to have access to personal information about them in agencies' systems of records and to amend inaccuracies that they find there. This right of amendment is enforceable in Court. The Privacy Act, like the FOIA, contains specific exemptions from release for certain kinds of information. These are, however, more limited than under the FOIA.

Under the FOIA all of NSA's records are subject to a request for inspection by any person, whether or not a citizen or permanent resident alien. While all classified information, and certain additional information, is exempt from disclosure, the FOIA obligates the Agency to conduct a reasonable search for documents that are adequately described. The Act then places on the Agency

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

the burden of justifying the withholding of any documents it may find. Under the Privacy Act requests may be made only by citizens and permanent resident aliens, only for records concerning the requesting party and only for records located in a "system of records" -- i.e., a system in which records are retrievable by name or personal identifier. Because of the more restricted scope of the Privacy Act, it has so far presented the Agency with considerably fewer problems than the FOIA. The records organized in "systems of records" within NSA, as statutorily defined, are personnel, security and administrative records. NSA's intelligence records are not filed by name or other individual identifier.

The costs to the Agency of administering the Acts, although substantial, have not yet become a matter of pressing concern. In calendar year 1978, the cost to the Agency of administering the FOIA was about $524,000. (This includes only direct costs of searching, preparing responses and handling administrative appeals. It does not include the costs to the government of defending litigation against the Agency under the FOIA.) The number of requests processed was 704. That was the second consecutive year in which the cost was over a half million dollars. The number of requests in calendar year 1978 exceeded the previous year's by more than one-third.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In calendar year 1978, the cost of administering the Privacy Act was about $125,000, up by 12% over the previous year. The number of requests processed for access to, or amendment of, records was 318, an 88% increase over the comparable figure for 1977.

Handling of Requests; statutory exemptions

Requests to the Agency for information -- whether they cite the FOIA, the Privacy Act, or both -- are delivered to the Chief,Policy Staff, who is the initial decision authority under both Acts. On the basis of his knowledge of Agency activities, the Chief, Policy Staff, forwards copies of each request to those organizations within the Agency that are likely to have files that may contain the kinds of records requested. Privacy Act requests that cite specific NSA systems of records are forwarded to the custodians of those files. Privacy Act requests citing no system of records are forwarded to custodians of all systems of records that might contain information about an individual fitting the description the requester provides. FOIA requests are forwarded to the organizations maintaining files that may contain the records requested.

The effort expended by the Agency in locating records and reviewing them yields relatively little in terms of the actual volume of information disclosed. The vast bulk

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

of NSA records contains intelligence information or information about the Agency and its activities that would be harmful to the national security if disclosed. Such information is withheld. Consequently, the release of the records occurs, for the most part, only when persons currently or formerly affiliated with the Agency ask under the Privacy Act for records, found in Agency personnel or administrative files, containing personal information about themselves. Agency records located in response to requests under the FOIA for information about a particular subject or individual are usually classified intelligence documents that are covered by statutory exemptions from release.

Under the FOIA, there are two principal bases on which NSA withholds records from release, either in whole or in part. The first is that the information the records contain is classified and thus exempt under 5 U.S.C. Section 552(b)(1), which provides:

> (b) This section does not apply to matters that are--
> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

This is known as the "(b)(1) exemption."

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

A second statutory basis for exemption is that the information is specifically exempted from disclosure by statute and therefore exempt under 5 U.S.C. Section 552(b)(3), which covers information:

> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

This is referred to as the "(b)(3) exemption."

The principal statute on which NSA usually bases (b)(3) exemptions is Public Law 86-36 (May 29, 1959, 73 Stat. 63, 50 U.S.C. 402 note), Section 6 of which permits the withholding of certain kinds of information about NSA:

> SEC. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) [repealed by Pub. L. 86-626, 74 Stat. 427] shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency:

Additional statutory basis for asserting the (b)(3) exemption is found in 18 U.S.C. Section 798 (set forth in an appendix to this statement), making it a crime to engage in unauthorized disclosure of communications intelligence

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

information, and 50 U.S.C. Section 403(d)(3), which provides that the Director of Central Intelligence "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

The specific exemptions under the Privacy Act that NSA must most often use to withhold information are those in 5 U.S.C. Sections 552a(k)(1), (2), and (5):

> "(k) SPECIFIC EXEMPTIONS.-The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3),(c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3),(d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is-
>
> "(1) subject to the provisions of section 552(b)(1) of this title;
>
> "(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence; ....

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;"

In addition, as stipulated in the Agency's published rules implementing the Privacy Act, information in NSA's systems of records is subject to being withheld under Public Law 86-36 and 18 U.S.C. Section 798.

Problems Arising in the Application of the FOIA

While the administrative burden and expense of application of the FOIA are not problems for NSA of a severity anywhere near as great as at some other agencies, the operation of the Act does pose, in my view, serious problems for the Agency. The Act is having an adverse effect on NSA's ability to protect sensitive intelligence source and method information, the disclosure of which could have serious detrimental consequences on NSA's abiity to carry out its mission. It would be an exaggeration to say that the FOIA as yet has caused any irreparable disclosure of sensitive information. The evolution of FOIA requests and litigation to date, however, and the course the development of law is taking with respect to the (b)(1) exemption,

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

are likely to produce a slow but steady leakage of information whose ultimate consequences are extremely hazardous.

Part of the problem lies in a trend of judicial decisions on the (b)(1) exemption, particularly in the District of Columbia Circuit and district court, that is making it increasing difficult for the government to maintain the (b)(1) exemption without disclosing considerable information in the course of litigation --in some cases, almost as much information as release of the disputed records might reveal. Beyond this, the singular nature of NSA's activities makes even the process of responding to FOIA requests highly risky when those requests touch upon intelligence information, as most do.

It is a well-known fact that NSA has only a single source of the intelligence information it produces -- i.e. the interception of signals and communications. The fundamental security tenet of the signals intelligence process is that the identity of the Agency's targets, the degree of its ability to intercept those targets, the extent and nature of the Agency's ability to handle large masses of information and the extent of any cryptographic successes are all matters that must be kept in strictest secrecy. Disclosure of any of these items of information would encourage intelligence targets to take countermeasures, with the likely result that the United States would be denied valuable intelligence.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In order to protect the kinds of information I have just described it is also necessary to maintain secrecy as to the information that is derived from signals intelligence. If a foreign power knows that the United States possesses certain information as the result of signals intelligence, that foreign power can analyze its own communications and other signals and often thereby determine the insecurities in its own practices that enabled the United States to derive the information. Once located, such insecurities can be remedied. While the contents of messages intercepted by NSA are frequently unexceptional in themselves, their disclosure would enable the foreign power involved in sending or receiving such a message to determine that its communications had been intercepted.

These considerations often place NSA in an extremely difficult position in responding to FOIA requests that seek information contained in signals intelligence records. In some cases even the admission that NSA possesses information on a particular subject is enough to disclose classified information.

Significant information about a withheld record may be disclosed merely by citing the statutes requiring its exemption. Citing 18 U.S.C. Section 798 reveals, at least in general terms, that the information being withheld was obtained by NSA from foreign communications, since

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

18 U.S.C. Section 798 protects only against the unauthorized disclosure of classified communications intelligence information. More specific and damaging facts about the source of the information could be disclosed by admitting the existence of records in circumstances where such existence implies the source, as, for example, when a person who requests NSA records pertaining to himself has engaged in only limited travel overseas or has communicated with a foreign government or organization on very few occasions. In such circumstances, a response affirming that there are NSA-originated documents protected by 18 U.S.C. Section 798 would suggest to the requester the identity of the foreign communication source involved.

Even reliance on 50 U.S.C. Section 403(d)(3) as the basis for a (b)(3) exemption indicates that the NSA information being withheld was obtained from foreign communications, since the "intelligence sources and methods" protected by that statute in the case of NSA could only refer to communications intelligence sources and methods.

In the wake of Vaughn v. Rosen, 484 F.2d 820, rehearing denied (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (D.C. Cir.1974 and later Phillippi v. Central Intelligence Agency, et al., 546 F.2d 1009 (1976), district courts have exerted steadily increasing pressure to disclose in the public record more and more about

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

the documents being withheld. Information such as the dates of the withheld documents, the numbers of documents being withheld, and the number of pages of each of the documents, although possibly innocuous when applied to records based on other kinds of intelligence sources and methods, can, when applied to records obtained through communications intelligence sources and methods, reveal sensitive information that should not be publicly disclosed. Merely citing the Executive Order that governed the initial classification of the record suggests the time frame in which NSA originated the record.

The foregoing kinds of data, revealed by normal documentation of an FOIA denial, often risk the disclosure of classified information, especially in the most usual kind of FOIA request to NSA, in which the requester asks for records pertaining to himself. Other kinds of requests pose an even more acute threat that to provide usual information about the records being withheld would in itself disclose sensitive information about communications intelligence sources. The most difficult kind of request is one that pinpoints a category of intercepted communications or other signals. An example would be a request for communications sent on a particular day between particular officials or organizations, or a request for communications of a particular foreign government regarding a specific subject or incident. Such requests are by no means rare.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

To respond that NSA has originated the records requested thus frequently would reveal the exploitation of a particular communications intelligence source. NSA officials are constrained by 18 U.S.C. Section 798 not to acknowledge the existence of the requested records when they do in fact exist. It is out of the question to untruthfully deny the existence of the records. Yet the FOIA mandates a response. NSA's response to a request of this kind must be that the existence or non-existence of the requested records is classified national security information exempt from release under the FOIA by 5 U.S.C. Section 552(b)(1) and 5 U.S.C. Section 552(b)(3). A statement that the requested records exist would be classified for the reasons stated above. A statement that the requested records do not exist must also be classified, because the precedent of responding in the negative when the records do not exist would render a refusal to confirm or deny existence tantamount to an admission that the record exists. Even under NSA's present approach, it appears that at least some requesters construe an existence/non-existence response to be an affirmation that the requested records do in fact exist. This is, of course, inaccurate, but if believed by foreign powers could be damaging to communications intelligence sources.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

NSA takes seriously its obligation under the FOIA to release as much requested information as possible, subject to statutory exemptions. Consequently, refusal to confirm or deny the existence of requested records is resorted to as infrequently as possible. In numerous cases, the Agency's FOIA authorities, either original or appellate, have determined that the risk of revealing sensitive information about sources and methods is not sufficiently great to warrant withholding information about the existence of requested intelligence records. Such judgments must be made on the basis of the particular facts and circumstances of each case. For example, in response to FOIA requests for information about certain internationally-known public figures, the Agency has confirmed the existence of such information (although it has not released the records themselves) on the basis of a determination that such acknowledgement would not jeopardize sources and methods. In no such case does the Agency indicate whether the intercepted communications are to, from, or merely about the named individual. It is assumed that the volume of international communications that either are to or from such individual, or that mention his name, is so great that no specific target or communication link would be pinpointed by admitting the existence of NSA records.

56-940 O - 80 - 3

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

It should be clear from the foregoing, that, even without disclosure of intelligence information itself, NSA's processing of FOIA requests poses discernible security risks. One is the ever-present risk of mistake. Such a mistake could involve the inadvertent release of classified information or an error of judgment in determining whether to acknowledge the existence of information responsive to a particular request. While Agency officials try to put themselves in the position of foreign intelligence analysts and to determine in a particular case how much information could be derived from a particular response, this process is far from reliable. Since we do not know how much information a foreign target may have about NSA, derived from other sources, an acknowledgement that is deemed innocuous in fact may be helpful -- against a back-background of other information -- to a foreign power. In addition, as the volume of requests and responses increases, there is reason to fear that the mosaic of information disclosed by numerous responses to FOIA requests, even if highly circumscribed, will prove helpful to foreign powers in their attempts to analyze the capabilities and activities of the United States Signals Intelligence System. Finally, there are risks inherent in the internal processing of FOIA requests, before any response is issued. A cornerstone of security protection for

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

sensitive information about NSA's intelligence sources and methods is the restriction of that information, within the Agency, to as few individuals as possible. This is the "need-to-know" principle. The processing of FOIA requests frequently causes sensitive information to be brought to the attention of persons who otherwise would not have access to it. While there is no evidence that this has caused serious security breaches to date, the expansion of access to such information must be viewed as an added security hazard.

All of the risks described above are magnified many-fold when an FOIA requester files suit in a district court challenging the Agency's refusal to disclose information.

So far, at least, no communications intelligence record withheld by NSA under 5 U.S.C. Section 552(b)(1) or 5 U.S.C. Section 552(b)(3) has been ordered released by a Court. Subjecting such records to processing and litigation under the FOIA is, thus, as futile as it is risky.

Under 5 U.S.C. Section 552(a)(4)(B), the courts have a de novo review function in considering the validity of FOIA exemptions. The terms of the Act, as amended in 1974, authorize a court to examine classified records in camera to determine the propriety of withholding national security information. The Conference

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Report makes clear, however, that "*in camera* examination need not be automatic" and that before a court orders *in camera* inspection "the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." (Conf. Report p.9) The Conference Report also emphasizes congressional recognition that:

> "(T)he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." (p.12)

Despite this legislative history, the present state of the law on the nature of the *de novo* review process in FOIA cases and the role of the agency affidavit in that process is unclear. Courts -- particularly in the District of Columbia, where the bulk of significant FOIA litigation occurs -- are taking an increasingly expansive view of their role in *de novo* review of FOIA exemptions and are demanding more and more information about withheld records. They are placing an increasingly greater burden on the government to "prove" the validity of security classification and convince the judge that if he were the classifying authority he would assign the same classification. In many cases, such proof is demanded on the public record,

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

thus exerting heavy pressures on intelligence agencies to disclose increasing amounts of information in an attempt to accomplish an inherently impossible task -- to describe publicly the classified information and the damage that would result from its release.

The recent trend of decisions in the District of Columbia suggests that the pressures on intelligence agencies will not abate. In Weissman v. CIA, 565 F. 2d 692 (1977), the United States Court of Appeals for the District of Columbia Circuit adopted a rather circumscribed view of the de novo review process. The court held that if an exemption is claimed on the basis of national security a district court must be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. 565 F.2d at 697. However, in Ray v Turner, 587 F.2d 1187 (1978) the court seems to have turned to a more expansive interpretation. In that case, the court stated that the intent of Congress in passing the 1974 FOIA amendments was to allow the courts to make an objective, independent judicial determination on national security matters, 587 F.2d 1194. Summarizing salient characteristics of de novo review in the national security context, the court stated that once the government has met its burden of establishing an exemption, the trial court must make its de novo determination, according substantial weight to an agency's

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

affidavit justifying the classified status. Whether or how to conduct an in camera examination of the document rests in the sound discretion of the court, in national security cases as in all other cases. Id. A judge has discretion to order in camera inspection on the basis of an uneasiness or doubt he wants satisfied before he takes responsibility for a de novo determination. 587 F.2d at 1195. The court added that the foregoing considerations developed for exemptions under 5 U.S.C. Section 552(b)(1) also apply to exemptions under 5 U.S.C. Section 552(b)(3) when the statute providing criteria for withholding is in furtherance of national security interests. Id.

In his concurring opinin in Ray, Chief Judge Wright would carry the court's role a step further. In addition to determining de novo application of an exemption to records withheld from FOIA release, where an in camera submission is utilized a court should "(as) a check against agency abuse of the in camera affidavit procedure, ...require the agency to explain why the information in its in camera submission should not have been included in a public affidavit, and should make available to all parties any portions of the in camera affidavits that it determines, after full consideration of the agency's arguments, do not warrant a protective order." Id. at 1211 n. 43.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

The latter procedure was followed by the district court in Baez v. National Security Agency, et al., Civil Action No. 76-1921 (D.D.C. Memorandum and Order Filed November 2, 1978, p.2). The court ordered to be made public all but two paragraphs of the in camera affidavit submitted by NSA, without even consulting the agency regarding its reasons for applying the classification. In his opinion, Judge Bryant observed:

> "The Agency has presented basically three arguments why the disclosure of any information about these documents would threaten the national security or reveal the structure or activities of N.S.A. First of all, foreign governments do not know which international common carrier facilities the N.S.A. is capable of monitoring. Secondly, foreign governments do not know the actual intelligence targets of the N.S.A. And, thirdly, foreign governments do not know the particular communications circuits which the N.S.A. is now monitoring or has in the past monitored. ... The Court finds all three arguments unconvincing. ..."

A motion for reconsideration of the court's Memorandum and Order is currently awaiting decision. The information at issue has not yet been released, pending resolution of that motion.

The judicial trends described above, if continued, portend serious difficulties for NSA in maintaining needed secrcy about its communications intelligence activities. In virtually every case, the rationale for withholding records is the same, namely that the records would reveal specific targets of intercept activity, particular circuits

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

that are monitored, or specific capabilities for processing information. The judgment that the disclosure of these facts would be damaging to the national security is an informed professional judgment, based upon extensive experience with the signals intelligence process. Frequently the judgment reflects an understanding of the manner in which the United States would be able to exploit similar information about a foreign signals intelligence agency.

As indicated by our experience in the Baez case, it is difficult to communicate to judges who are not intimately familiar with the signals intelligence process the basis on which these judgments are made. The courts are confronted with able attorneys for FOIA requesters, who carefully marshall every scrap of information about NSA's activities, and then argue, on the basis of what they assert is already publicly known, that the additional disclosure of the requested information cannot be harmful. Although frequently the information presented to the court as being in the public domain comes from newspaper articles and other unofficial sources, and may not be accurate, there is a risk that the courts will fail to perceive the difference between official release and surmise and will accept the plaintiff's contentions.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

This risk is particularly acute because the judgment that information must be withheld frequently is made on the basis that the cumulative effect of releasing information of like type would be damaging to the signals intelligence system. Thus, while identifying a single intercepted message might not prove fatal, identifying hundreds or thousands undoubtedly would. The court, however, sees only the single message in the course of its *de novo* review and may have difficulty in perceiving the cumulative damage that would be done by a series of releases.

To date, NSA has not been compelled to disclose any classified intelligence information as a result of FOIA litigation (although an adverse decision in the *Baez* case would change this situation). On the other hand, the mere process of defending FOIA litigation clearly has caused more information about the Agency's signals intelligence activities to be released than is desirable. Each case imposes pressure to disclose in public affidavits as much of the rationale for withholding the requested information as is possible. Responding to these pressures, the Agency in affidavits has confirmed facts about its activities that were deemed widely known or inferable. Such disclosures, while perhaps not yet harmful in themselves, pose the risk of a "slippery slope" phenomenon. The more the Agency publicly acknowledges about its activities, the more ammunition it supplies to FOIA

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

requesters who argue that against the background of what is known further disclosures cannot be deemed harmful.

It is somewhat paradoxical, in my view, that Congress has recognized the special sensitivity of communications intelligence information to the extent of providing protection under the espionage laws (18 U.S.C. Section 798) more rigorous than for most other kinds of classified material. Yet at the same time, under the Freedom of Information Act, NSA is called upon repeatedly to litigate the same question and to bear the burden of proving that communications intelligence information is fragile and requires protection. The present state of the law leaves it open to the courts to reject in the FOIA context the judgment that Congress has reached under 18 U.S.C. Section 798. Moreover, current trends in the development of FOIA litigation make no provision for the unusual sensitivity of communications intelligence information and thus raise the risk that the process of litigation itself will render nugatory the protection sought to be obtained by withholding communications intelligence information from disclosure.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

§ 798. Disclosure of classified information[1]

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. SILVER. Thank you very much.

The volume of requests that we receive and the cost of processing those requests is only a small fraction of those that Mr. Carlucci described to you in the case of the CIA. And we cannot complain, at least so far that the volume or the burden on the Agency in purely fiscal and logistical terms is excessive. There is, of course, an essential difference between these two acts. Under the Freedom of Information Act, any of the Agency's records is subject to a request for inspection by any person, be he a citizen, a permanent resident alien, or a foreigner. While we have the nine statutory exemptions, which cover basically all of our classified information and certain additional information about the Agency and its operations, the FOIA nonetheless requires us to conduct a reasonable search responsive to a request, even though we may know at the outset that the documents we will find will be exempt from disclosure. It places on the Agency the burden of justifying the withholding of any documents that it may find.

Under the Privacy Act, requests may be made only by citizens and permanent resident aliens, only for records concerning the requesting party, and only for records that are located in a system of records as defined under the act. In very general terms, that is a system in which the records are retrievable by name or by some personal indentifier. Because of the restricted scope, the Privacy Act has presented very few problems to the Agency in comparison with the FOIA.

Within NSA, our systems of records under the Privacy Act include personnel, security, administrative, medical, and similar records. They do not include any intelligence records as such. Our intelligence records are not filed in files or dossiers by names of individuals or organizations, and consequently, in our view, are not within a system of records subject to the Privacy Act.

The costs, as I indicated before, of administering the act have not yet become a matter of concern. In calendar 1978, the cost to the Agency of administering the FOIA was about $524,000. Now, this is the direct personnel cost of searching. It does not include the cost to the Government of defending the various FOIA cases in which we were defendant. The number of requests processed was 704. That was about a one-third increase over the previous calendar year. In 1978, the cost of administering the Privacy Act was about $125,000, an increase of approximately 12 percent over the previous year. There was an 88-percent increase in the number of requests. The number, however, was still quite small.

I might note that of the FOIA requests that we receive, about 75 percent are in the first person category, where the requester seeks information that the Agency may have about himself, and this is, for reasons I will describe shortly, a category that gives the Agency very serious problems in responding.

When we receive a request under either of the acts, the staff, the Agency policy staff, which is responsible for handling initial decisions, forwards a copy of the request to each organization within the Agency that is likely to have files that may contain responsive material. In the case of the Privacy Act, these generally are the military and civilian personnel organizations, the security organization, the medical center. In the case of the Freedom of Information Act, it

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

would be any component of the Agency that, based on the expert judgment of the policy staff, is likely to have files containing information that is responsive.

A considerable amount of effort goes in to locating files. Very little of what is located is ever disclosed. The vast bulk of our records, outside of the personnel systems of records, contain intelligence information or information about NSA and its activities that would be harmful to the national security if disclosed. That information is withheld.

The releases of information that we have made, except for a small amount of declassification of World War II communications intelligence material that was deemed no longer to require classification, are almost always in cases of Privacy Act requests for records about usually an agency employee or a disappointed applicant for employment.

There are two principal statutory bases on which NSA withholds records containing intelligence information or information about the Agency from release. The first is the exemption for information that is specifically authorized under criteria established by an executive order to be kept secret in the interests of national defense or foreign policy, and which is in fact properly classified pursuant to the executive order. This is the so-called (b)(1) exemption to the Freedom of Information Act, also referred to sometimes as the "national security exemption."

A second statutory basis for exemption is information that is specifically exempted from disclosure by statute under section (b)(3) of the Freedom of Information Act. The principal (b)(3) statute on which we rely is Public Law 86-36, which provides, in part, that no law shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or the names, titles, salaries or number of persons employed by such agency. Additional statutory basis under the (b)(3) exemption is found in 18 U.S.C. 798, which is a criminal statute making it a crime to engage in unauthorized disclosure of communications intelligence information, and section 403(d)(3) of the National Security Act, which provides that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods.

Even though, as I said earlier, the administrative burden and expense of applying the Freedom of Information Act are not yet problems for the Agency—and I say not yet because we are experiencing an upward trend in FOIA requests, and if this continues we could run into the kinds of problems that other agencies have described to you or will be describing to you—although these are not problems of that order of severity, in my view the operation of the act does pose a serious problem for the Agency. The act is having and is likely to have an adverse effect on our ability to protect sensitive intelligence source and method information, the disclosure of which could have serious detrimental consequences on NSA's ability to carry out its mission.

It would be an exaggeration to say that the FOIA to date has caused any irreparable disclosure of sensitive information. However, the evolution of the kinds of requests that we are getting, and the litigation in which we have been involved, coupled with the course that the law is

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

taking with respect to the (b) (1), or national security, exemption, suggests that we are likely to experience a slow but steady leakage of information whose ultimate consequences are extremely hazardous. A part of this problem is one of a trend of judicial decisions, particularly in the District of Columbia Circuit and district court, that are making it increasingly difficult for the Government to maintain that exemption without disclosing considerable information in the course of litigation. In some cases—and this is a particularly acute problem because of the nature of our information—in some cases this involves almost as much information as the release of the disputed records might reveal.

The singular nature of NSA's activities makes even the process of responding to FOIA requests highly risky when those requests touch upon intelligence information, as most of the ones we receive do. It is a well known fact that NSA has only a single source of the intelligence information it produces, namely the interception of signals and communications. The fundamental security tenet of the signals intelligence process is that we must keep in strictest secrecy the identity of the Agency's targets, the degree of our ability to intercept those targets, the extent and nature of our ability to handle large masses of information and retrieve that which is of intelligence interest, and of course, the extent of any cryptanalytic success that we may have. The disclosure of any of these items of information we believe would encourage intelligence targets to take countermeasures, with the likely result that the United States would be denied valuable intelligence.

The nature of the product we have, and the unique, singular source from which it comes, makes particularly acute the problems to which Congressman Ashbrook alluded before; namely, that even if we apply ourselves to the process of sanitization and produce something which to the ordinary bystander conveys little or no intelligence information, in the hands of a knowledgeable person, for example, a person who was a party to an intercepted communication, the information that is left behind may render the process of sanitization unavailing. It is for this reason that we have had to take the position repeatedly in response to FOIA requests that there are no segregable portions of the documents in question and we cannot release any information whatsoever about them.

Even taking that position, the very process of responding to Freedom of Information Act requests seeking information contained in intelligence records poses problems for us, and in some cases the mere admission that NSA possesses information on a particular subject described in a request is enough to disclose classified information about intercept activities. Significant information about a withheld record may be disclosed merely by citing the statutory basis on which we are withholding it; 18 U.S.C. 798 reveals, if we cite it in a response, that the information being withheld was obtained by NSA from foreign communications, since that is the only subject matter protected from disclousure under that statute.

In other cases, admitting the existence of information in our files is tantamount to admitting or identifying the source, as, for example, when a person who requests NSA for records pertaining to himself is known to have engaged in only very limited foreign contacts. In cases of that sort, even admitting that we have information that refers to a named individual, put together with the fact that we are in the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

business of intercepting foreign communications, may be a tipoff to a foreign intelligence service that we have in fact intercepted communications involving that individual, or to or from that individual to a specific foreign government.

Even the fact that we rely on section 403(d)(3) of the National Security Act, the provision giving the Director of Central Intelligence responsibility to protect sources and methods, may convey information to a trained observer since, in our case, the intelligence sources and methods to which the statute apply could only be communications intelligence sources and methods.

Coupled with these problems of responding to a request even in the most conclusory and uncommunicative terms are the problems of the development of the law, in which the courts have exerted steadily increasing pressure to disclose in the public record more and more information about the documents being withheld. Information frequently is sought as to the dates of the withheld documents, the numbers of such documents, the number of pages in each of the documents, and each of these items, although possibly innocuous when applied to some other kind of intelligence information, can in particular cases be a tipoff as to the identity of the communications information possessed by the agency. Merely citing the executive order on which the original classification was based is a tipoff as to the general time frame in which the information was obtained, since there have been a succession of such executive orders over time.

The problems to which I have alluded are problems which arise in almost every kind of request, and they arise again and again in the first person requests where someone asks for whatever information we may have concerning himself. Other kinds of requests pose even more acute problems. For example, we get requests that pinpoint a category of intercepted communications or signals, that ask for communications sent on a particular day or between particular individuals or organizations, or that seek communications of a particular foreign government regarding a specific subject or incident. Such requests are by no means rare, and they appear to be in the process of becoming more frequent.

In cases like that, if we were to respond that we had records responsive to the request, even without releasing them, we would be as much as admitting the fact of the interception implied in the request. We are constrained by 18 U.S.C. 798 not to do this. On the other hand, it is out of the question to untruthfully deny the existence of records. We are required under the FOIA to make some kind of response, which leaves us with the only choice of refusing to confirm or deny the existence of information responsive to the request.

This response is necessary because if we admitted the existence of records in cases where we actually had them and they were responsive to the request, we would be revealing classified information. If we took the tack of refusing to answer in those cases but truthfully denying whenever we didn't have the records, whatever approach we took in the case where we did have records would be proved ineffective.

Even under our present system there is good reason to believe that many requesters assume whenever we refuse to confirm the existence or nonexistence of a record that such refusal is tantamount to an affirmation. We are concerned by the slow but steady cumulative buildup

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

of a mosaic of information about the Agency's communications intercept activities that a knowledgeable and sophisticated foreign observer could be deriving even from these shreds of what the requester presumably perceives as noninformation in the response from the agency.

In addition, NSA takes seriously its obligation under the act to release as much requested information as possible, subject to the statutory exemptions. Consequently, we resort as infrequently as possible to a refusal to confirm or deny the existence of records. This means that someone must make a judgment in each particular case whether admitting that we have records in some way responsive to the request is likely to reveal sensitive information about sources and methods. These judgments are made on the basis of what we think generally would be known about the subject matter of the request, and there is always the possibility that the judgment is incorrect. If we get a request for information about a well-known, internationally active and traveled public figure, we may feel that we can confirm that we have some records that are either to or from that individual or mention that individual because of the multiple possibilities of intercept channels and foreign targets that could be involved. On the other hand, there is a very high risk that in making those judgments, we are less knowledgeable, less sophisticated than the requester or any foreign government that may be using this information and that we are making the kind of mistakes that Mr. Carlucci referred to in his testimony.

There is another problem within NSA, also alluded to in Mr. Carlucci's testimony, inherent in the very act of processing these requests. As I indicated before, we consider ourselves obligated to make a reasonable search in good faith for the records, even though we may be virtually certain from the outset that whatever we find will be exempt from disclosure. These searches cut across our own system of compartmentation and across the principle of need to know, and result frequently in extremely sensitive information having a much wider distribution within the agency than it would under any other set of circumstances.

There is no evidence to date that this phenomon has resulted in any serious security breach, but the basic cornerstone of good security practice is to limit information to as few people as possible, and I think one has to take it for granted that spreading sensitive information around unnecessarily is a bad security practice and implies various security hazards.

All these problems that exist at the initial processing stage within the agency are magnified manyfold when an FOIA requester files suit in the district court, challenging the agency's refusal to disclose information. To date, no communications intelligence record withheld under either the (b)(3) or the (b)(1) exemption has been ordered released by a court. Subjecting such records to processing and litigation under FOI, consequently, is as futile as it is risky, and we certainly hope that it will continue to be futile, because if it doesn't, we are in very serious trouble with respect to the disclosure of sensitive sources and methods.

Under the Freedom of Information Act, the court has a *de nova* review function in considering the validity of FOIA exemptions and can examine classified records *in camera* to determine the propriety of withholding national security information. The legislative history

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

of the 1974 amendments which expand the power of the court in the area of *de novo* review and *in camera* inspection is not entirely clear, and there is great dispute in the law today as to precisely how far the District Court is intended to go and in what circumstances.

The courts, particularly in the District of Columbia, where most significant FOIA litigation takes place, are taking an increasingly expansive view of their role in *de novo* review of FOIA exemptions, and as I said before, are demanding more and more information about the records withheld. There is an increasing burden on the government to prove the validity of security classification and to convince the judge that if the judge were the original classifying official, he would have assigned the same classification. In many cases such proof is demanded on the public record, which exerts on the intelligence agency heavy pressure to disclose increasing amounts of information in an attempt to accomplish a task which is inherently impossible, that is to describe publicly the classified information and the damage that would result from its release, because a full public description of the information in most cases is tantamount to releasing the information itself.

Now, in my statement on pages 18 and 19, I describe some of the recent cases in the District of Columbia, including the recent decision in *Ray* v. *Turner* and the case of *Shapp* v. *Turner*, to which Mr. Carlucci alluded, and in which the U.S. Court of Appeals for the District of Columbia circuit, appeared to take a somewhat more expansive view of the role of the district court in reviewing both (b)(1) exemptions and (b)(3) exemptions in which the withholding statute is one intended to protect national security, such as Public Law 86-36. The concurring opinion in that case, the *Ray* case, by Chief Judge Wright, would carry the court's role a step further. Judge Wright would have the court, in addition to determining *de novo* the application of the exemption, require *in camera* submissions almost invariably as a check against agency abuse of the *in camera* affidavit process, would require the agency to explain why the information contained in its *in camera* submission should not have been included in a public affidavit, and would make available to all parties any portions of the *in camera* affidavits that the court determines, after full consideration of the Agency's arguments, do not warrant a protective order.

This procedure, which was not adopted by the majority of the court in that case, was nonetheless identical to that followed by one of the judges of the district court in a recent decision in *Joan Baez* v. *National Security Agency*, a case in which we filed an in camera affidavit explaining in considerable detail why the records that were being withheld, if disclosed, would cause damage to the national security. The district judge described himself as unconvinced by the Agency's affidavit, and ordered the affidavit to be released on the public record. This has not yet occurred because the Government has filed a motion for reconsideration which is still pending before the court. If it does, the damage to the national security from releasing that affidavit, in my opinion, will be significantly greater than would have occurred if the records themselves had been released in the first place, because the records require analysis and construction. The affidavit does that job very clearly and explicitly for the foreign intelligence services that might be interested. It tells them precisely what conclusions they

56-940 O - 80 - 4

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

should draw from those records about our signals intelligence capabilities.

This kind of decision, obviously, makes us very nervous about the future of FOIA litigation involving our materials. These judicial trends that I have described, if continued, portend serious difficulties for NSA in maintaining secrecy about its communications intelligence activities. In virtually every case that we litigate, the rationale for withholding records is precisely the same: the record is either an intercepted communication or an intelligence report that describes an intercepted communication in terms that leave no doubt as to who the parties were, what the date was, and the route over which it was sent. The judgment that this information would be damaging to the national security if disclosed is an informed professional judgment based on extensive experience with the signals intelligence process. Frequently what it reflects is an understanding of what the United States could do with similar information about foreign signals intelligence activities in reconstructing the capabilities of foreign signals intelligence services.

As indicated by experience in the *Joan Baez* case, however, it is difficult to communicate to judges who are not intimately familiar with the signals intelligence process the basis on which these judgments are made. The courts are confronted with able attorneys for FOIA requesters, who carefully marshall every scrap of information about NSA's activities, and then argue, on the basis of what they assert is already publicly known, that the additional disclosure of the requested information cannot be harmful. Frequently what they present to the court are surmises from the press, scraps of information that are not entirely accurate, but it is difficult in many cases for the courts to discern the difference between official release and press hypothesis, and this is an attractive argument, apparently, to the courts.

Mr. MURPHY. Mr. Silver, I am going to interrupt you at this point. You are almost through, I notice. You have just got another page or two.

The proposed amendment that Mr. Burlison requested, have you read it and studied it?

Mr. SILVER. I am not sure that I have seen the most recent version.

Mr. MURPHY. I would like for you to take a copy of it to see what your legal department may want to add to it or delete from it, and let me just ask one question, and then I yield to Mr. McClory because we have a vote on the floor.

Has NSA received FOIA requests from foreign governments or aliens who seek to discover the information you have been talking about, your signals intelligence.

Mr. SILVER. I would have to give you the same answer that Mr. Carlucci did, that we have no way of knowing who was behind the FOIA requests. To my knowledge we have not received any that openly come from foreign governments or foreign intelligence services, but it is entirely possible that foreign governments are interested in responses to requests that we have received.

Mr. MCCLORY. You are only engaged in getting national security information, aren't you?

Mr. SILVER. Yes, sir.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. McCLORY. You don't get any personal information about people unrelated to our national security?

Mr. SILVER. We may, by the nature of the activity we conduct, get a certain amount of information that is incidental.

Mr. McCLORY. That you eliminate.

Mr. SILVER. Under the current rules we do, yes, sir.

Mr. McCLORY. And you have never given up any information under any Freedom of Information requests so far, have you?

Mr. SILVER. Do you mean as a result of litigation?

Mr. McCLORY. Yes.

Mr. SILVER. As a result of litigation, we have not been compelled to. In some cases we have given information at the administrative level in response to Freedom of Information Act requests, but never any intelligence records.

Mr. McCLORY. And you are going to pursue the *Joan Baez* case.

Is there reconsideration being given for that?

Mr. SILVER. There is a motion for reconsideration. Assuming the Justice Department is in agreement, we will pursue our right of appeal as far as we can take it.

Mr. McCLORY. Actually you feel that you should be exempted from the Freedom of Information Act?

Mr. SILVER. It is tempting to say yes.

Mr. MURPHY. I am going to save you—if you want to answer it, you may.

Mr. SILVER. We are not seeking a total exemption from the Freedom of Information Act.

Mr. MURPHY. Thank you, Mr. Silver, and we are going to adjourn now and reconvene at 1:30.

[Whereupon, at 11:38 a.m., the subcommittee recessed, to reconvene at 1:30 p.m. the same day.]

AFTERNOON SESSION

Mr. MURPHY. The meeting of the Select Committee on Intelligence, Subcommittee on Legislation will come to order.

Mr. MAZZOLI. Mr. Chairman?

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. I thank the chairman. I was unable to be here for this morning's session, Mr. Chairman, and I have a brief statement which I will first ask permission to read, and second, ask that it be put in the record of our discussions.

Mr. Chairman, as was the case with our electronic surveillance hearings, and with our more recent hearings on the disclosure of national security information, our Subcommittee on Legislation today begins hearings on a difficult and a delicate issue which raises questions concerning the basic principles upon which our form of representative government is based.

One of these principles underlies the Freedom of Information Act, and was noted by James Madison who wrote:

> A popular Government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own governors must arm themselves with the power which knowledge gives.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Equally important, Mr. Chairman, however, is the principle that government exists, among other reasons, to protect the people which it serves. It is beyond dispute that a vigorous and productive intelligence service is essential to such protection and that, to a large degree, foreign intelligence and counterintelligence activities must be based on secrecy.

That tension will always exist between such disparate concepts is to be expected. It is up to the Congress, to our subcommittee, to our committee, to make this tension a creative one and, by carefully balancing the competing interests, insure the existence of both open government and legitimate intelligence activities.

I am, Mr. Chairman, of the opinion that a proper balance between secrecy and the public's right to be informed has been struck by the Freedom of Information Act.

Exemptions have been carefully drawn to insure that information which should not be disclosed is, indeed, not disclosed.

There is, according to my way of thinking a heavy burden of proof on those who would alter this legislation by adding further exclusions and exemptions.

Mr. Chairman, I commend you for having arranged these most important hearings, and look forward to working with you on the development of suitable legislation.

Mr. MURPHY. Thank you, Mr. Mazzoli.

Our first witness this afternoon is Mr. Thomas H. Bresson, Acting Chief, Freedom of Information Act Branch, Records Management Division of the FBI.

STATEMENT OF MR. THOMAS H. BRESSON, ACTING CHIEF, FREEDOM OF INFORMATION ACT BRANCH, RECORDS MANAGEMENT DIVISION, FEDERAL BUREAU OF INVESTIGATION; ACCOMPANIED BY MICHAEL HANIGAN, ASSISTANT SECURITY CHIEF, FOIA BRANCH, RECORDS MANAGEMENT DIVISION, FBI; AND DENNIS MILLER, UNIT CHIEF, RESEARCH UNIT, RECORDS MANAGEMENT DIVISION, FBI

Mr. BRESSON. Mr. Chairman, I thank you on behalf of Director Webster for the invitation to provide testimony concerning the impact the Freedom of Information and Privacy Acts have had on the FBI's foreign intelligence and counterintelligence activities. Director Webster has designated me, in my capacity as Acting Chief of the FOIPA Branch, to appear before you today. I might add that I have been assigned to FOIPA matters in the FBI since the latter part of 1974 and am familiar with the FOIPA and its implementation insofar as the FBI is concerned. Prior to that I was assigned in an investigative capacity for approximately eleven years.

Your letter of March 22 advised of your particular interest in knowing how FBI records are organized and maintained, how FOIPA requests are processed, the costs and administrative burdens of compliance with the statutes, and if and to what extent compliance endangers foreign intelligence or counter intelligence activties.

With regard to the organization and maintenance of FBI records, our central records system at FBI Headquarters consists of approxi-

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

mately 6 million files which are maintained in file cabinets at the FBI Headquarters here in Washington. The files are arranged in numerical sequence based on classification number and case number. The classification number represents the jurisdictional subject matter or class of each case. For example, our kidnaping cases are filed under the classification No. 7, and espionage investigations, for example, under classification No. 65.

The FBI's file No. 65–1000 would indicate the one-thousandth espionage investigation that we have opened.

Access to these numbered files is gained through an alphabetically arranged index card system, referred to as indices, which consists of approximately 60 million 3-by-5 cards. These cards identify the subject individual, organization, or subject matter and list the classification and case number of the file in which the information is located. To retrieve the record of a particular individual, the search begins with a manual review of the alphabetical index, which will cite one or more possible references to this individual in our numerical file system. The file is retrieved by Records Management Division personnel, reviewed to establish if it is identical to the record requested, and forwarded to the FBI employee who requested the file.

All of our files, including criminal, foreign intelligence, counterintelligence, applicant, and others, are part of this central records system, with the maintenance responsibility fixed with the Records Management Division.

With regard to the manner in which we process FOIPA requests, all FOIPA requests are processed by a separate component, the FOIPA Branch, a part of our Records Management Division. The Branch has a current complement of 309 employees whose work is dedicated solely to FOIPA matters; 34 are law-trained special agents and 275 are support personnel. Training-selected FBI support employees previously assigned to other duties within the FBI to become specialists in the FOIPA area, permits the maximum number of special agents to assume other responsibilities. The volume of incoming requests and the corresponding workload, coupled with the statutes' response time requirements and the limited resources available to us, make the concept of centralized processing the most efficient insofar as our operations are concerned.

The first step in processing an FOIPA request is to retrieve the relevant files by following the procedures I have just described. Every day we receive an average of 60 to 70 new FOIPA requests and a great deal of correspondence regarding FOIPA requests being processed or awaiting assignment. One unit in our FOIPA Branch is engaged solely in handling this correspondence, searching and locating the requested files, and duplicating the file for review by the research analyst to whom the case will be assigned.

The analyst first must become familiar with the entire file in order to reach proper judgments in applying the exemption provisions during the actual processing phase. It may be that an individual documented as having provided information in confidence in the early stages of the investigation is later reported in our records to have publicly disclosed the same information. Discerning this fact, the analyst would not claim the confidential source exemption.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

The processing stage consists of a line-by-line review for the determination of what may be disclosed. Where the documents relate to foreign counterintelligence or other national security matters, a complete review is also necessary to insure the documents are currently and properly classified. The analyst uses a marking pen to excise from the duplicated file copy those words, if any, which are subject to exemption pursuant to the provisions of the statutes. The finished work product is then duplicated. The second duplication is the material furnished to the requester, while the first copy is the material we maintained as our record copy of what we released.

In those cases that become subject to litigation, the analyst and agent supervisor must review the same material and prepare affidavits which explain the rationale for withholding information from the records sought. Court decisions require us to provide detailed justifications for each item claimed to be exempt. These justifications must be carefully drawn to preclude the possibility of disclosing by description the very information we are trying to protect.

As you may know, a first-person request, that is, an individual's request for his own records, is treated as a Privacy Act request, while a third-party request such as a researcher's request for the Watergate investigation, is treated as an FOIA request. While the Privacy Act provides for the exemption of files compiled for law enforcement purposes, including such records as our foreign counterintelligence files. we will, pursuant to Department of Justice policy as published in title 28, Code of Federal Regulations, section 16.57, determine the applicability of the FOIA as well, thereby affording the requester the maximum possible disclosure.

Attached to my statement are three charts (see app. A). One of them shows the amount of money the FBI has spent to administer the FOIPA program. The second shows our manpower, and the third displays the volume of requests we have received since 1974.

Our costs were about $9 million for fiscal year 1978; and although we are budgeted in fiscal year 1979 for a fewer number of personnel, I anticipate a comparable cost figure for this fiscal year.

Insofar as the volume of the requests is concerned, the most current figures in the chart would indicate our total receipts to be about 67,000 requests. The most recent updated figure would bring us up to the figure of 69,575 requests, that as of March 23 of this year.

The chart will also indicate the number of requests stayed about the same during 1977 to 1978. I might add, we have noted, however, that many of the requests we are receiving today are those that result in actual processing. Many of the requests that we do receive are no-record-type requests.

With regard to the foreign intelligence and counterintelligence impact, our greatest concerns are that the identity of confidential sources of information may be disclosed, public reluctance to cooperate will ensue due to the fear of disclosure, and the FBI's intelligence capabilities, limitations, and subjects of interest may be revealed to the Nation's detriment.

The FBI's ability to discharge its foreign intelligence and counterintelligence responsibilities depends in large measure upon the willingness of human beings to furnish information to us. To the extent the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Freedom of Information Act and any other statute or event or circumstance inhibits someone from telling the FBI what he knows, our ability to do our job is made more difficult. In foreign intelligence and counterintelligence investigations, as elsewhere, the confidential informant is indispensable.

We have found that there are those in many segments of society who are refusing to provide us information because they fear their identity may be disclosed under the acts. These people are not only confidential informants, but also private citizens, businessmen, and representatives of municipal and State governments. Included as well are officials of foreign governments. The FBI is not suggesting that every person who is reluctant to provide us information is reluctant solely because of the Freedom of Information Act. We are saying that we do have examples, actual case histories, of people who have told us they do not want to provide information to us because they fear disclosure under the Freedom of Information Act.

The report of the Comptroller General captioned "Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies," dated November 15, 1978, contains several specific examples of documented instances wherein established or potential sources of information declined to assist us in our investigations. This report points out our belief that the acts have had the greatest impact on informants in the organized crime and foreign counterintelligence areas, two of the areas in which the FBI currently concentrates its greatest efforts. Our sources of information in the foreign counterintelligence field are usually well educated, sophisticated, and informed about the laws and court decisions, and media coverage concerning the release of information from FBI files. They are very sensitive to the fact that FOIPA disclosure of their cooperation with us could jeopardize their community standing or livelihood, or more seriously, given the appropriate situation, their life or physical safety.

We consider this perception by the public to be a serious impairment to our intelligence-gathering capabilities. The Comptroller General's report concluded the various law enforcement agencies surveyed almost universally believe that the ability of law enforcement agencies to gather and exchange information is being eroded, but the extent and significance of the information not being gathered because of FOIA and the Privacy Act cannot be measured. It is true that quantitative measurement of the loss of information is most difficult to ascertain. In many cases we will never be sure why a source or potential source of information declined to pass on to us information that was vitally needed in our intelligence-gathering effort. But as I stated above, the FOIA has been specifically cited by some as the reason for their refusal to cooperate.

In responding to a request for information from an FBI investigative file, we are required to review each record line by line and determine if the information can be released pursuant to the provisions of the FOIA. The burden of proof rests with us to establish the need to withhold, and we must further demonstrate that records being withheld contain no reasonably segregable information, which by definition means information not specifically protected by one or more of the nine exemptions. Exemptions, by repeated court interpretation, are to

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

be construed strictly, applied narrowly, and where any doubt exists, the disclosure is favored. The person most knowledgeable about what particular information may read to source identity is, unfortunately for us, oftentimes the requester who is the subject of the investigation. Therefore, the processing of a request which involves sensitive records pertaining to the investigation of an organization, conspiracy or any continuing criminal enterprise with several members, all of whom can be requesters, requires very delicate processing.

Congress, in amending the FOIA in 1974, recognized the need for protecting confidential sources. While law enforcement files were no longer exempt as a class, the language specifically provided for access to records, but only to the extent that production would not, and I am quoting from the statute:

disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

The practical application of this exemption, when read in conjunction with the requirement to release reasonably segregable information, renders the judgment call a most difficult task in many situations. What appears to be innocuous or harmless information may indeed be the missing piece or pieces of a puzzle to the requester who is the subject of the investigation. When the records pertain to investigations of organizations and the members have the opportunity to pool and compare the information furnished to them by each of the intelligence agencies to whom they addressed requests, this danger becomes more apparent.

We have further concern for the inadvertent disclosure which may result from human error, a risk that is present whenever a page-by-page review of thousands of documents is undertaken.

These practical problems that confront us in applying the (b)(7)(D) exemption, the source exemption, and the risks that are present whenever sensitive records are reviewed for public disclosure, places us in a position of not being able to dispel as completely mythical or imagined, the perception problem which exists among our sources and potential sources that I referred to earlier in my statement.

In the intelligence area, the adversary many times is as interested in learning what we do not know as he is in discovering what we do know. And that is another concern we have about the act's impact on our foreign counterintellience investigations. If, in responding to a Freedom of Information Act request, we tell the requester the FBI has no information about a particular individual or subject matter, we may have assisted our adversary more than we know. Assume there is in this country an agent of a hostile foreign government residing here in violation of the laws of the United States. Further assume that person makes a Freedom of Information-Privacy Act request seeking records about himself and the response he receives from the FBI is that we have no records in our files identifiable with him. If a year from now the same individual makes another request and in the period of time between the two requests we have initiated an investigation of him, we know of no way to respond to his second request in such a way that we do not effectively alert him and his government that we now have an investigative interest in him.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In sum, complying with the acts in their present form raises concerns about identifying confidential sources, having people refuse to provide information because of the acts, revealing the extent and limitations of our intelligence and counterintelligence investigations, and disclosing prematurely the existence of an investigation.

Mr. Chairman, Director Webster has emphasized that the FBI is not seeking a repeal of the Freedom of Information and Privacy Acts. The Bureau is committed to the goal of having an informed citizenry. I believe we have demonstrated this through the release of many hundreds of thousands of pages of material in our reading room alone which is available to the public, cases such as the John F. Kennedy assassination case and the Martin Luther King assassination investigation. The Director is encouraged by the interest of this and other committees in examining, however, the proper balance between the disclosure of information and the effectiveness of our law enforcement and intelligence efforts.

I thank you again for your invitation. I have attempted to discuss those subjects the committee indicated were of interest. I have no proposals at this time to submit for any type of legislative relief. We are working with the Department of Justice task force at this time in an effort to propose some possible solutions. I am hopeful that we will at some future date, in the not too distant future, be able to present some of those proposals.

Mr. MURPHY. Thank you very much.

How frequently do you believe that actual criminals or foreign intelligence agents use the Freedom of Information Act to frustrate ongoing FBI investigations?

Mr. BRESSON. I am not sure that I can give you a statistical response to that, Mr. Chairman. I do know, for example, we have pending before us at the present time a request that originated with a foreign country, or citizen of a foreign country which happens to be an Eastern European country, and as you know, the Freedom of Information Act provides for access to any individual—it is not limited to U.S. citizens.

We probably will never know with certainty—and I think Mr. Carlucci mentioned this this morning—never know with any certainty whether or not a request is being made on behalf of a foreign or hostile intelligence service.

Mr. MAZZOLI. Mr. Bresson, do you have any statistical breakdown of the number of people that you have identified as foreign persons who have made a request in the last year or so under the Freedom of Information Act?

Mr. BRESSON. No, Congressman Mazzoli, I don't have a statistical breakdown of that.

Mr. MAZZOLI. How do you identify someone who is a foreigner?

Mr. BRESSON. Most of our requests from foreign countries are mailed from foreign countries. We have had requests from various countries of the world requesting information under the Freedom of Information Act about various subjects, sometimes cases of historical interest, some of current interest.

Mr. MAZZOLI. I don't know whether it is in the record.

Is there an amount of money that you figure it costs you to process this information?

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. BRESSON. We have a chart with the statement showing our budget costs on a yearly basis.

Mr. MAZZOLI. That is the $9 million you had last year that you would get again in fiscal year 1979 or 1980?

Mr. BRESSON. 1979. I believe I may have made a mistake. It should have been fiscal year 1979.

Mr. MAZZOLI. How would you go about identifying a person to be sure that he or she indeed was the person represented to be in a request under the Freedom of Information Act?

Mr. BRESSON. Our normal requirements and procedures call for the individual to present a notarized signature showing that he is indeed the person who furnished the request. If for some reason it comes to our attention that this may be a bogus request, we would pursue it further. But those are rare instances because the practicalities involved, of course, are that we are receiving 60 to 70 some requests a day, and it oftentimes is very difficult to follow it up in that regard.

Mr. MAZZOLI. How long does it take you to respond to a Freedom of Information Act inquiry? I know that some are more broad in their scope than others, but if there is such a thing as an average inquiry, what would be the average time to process?

Mr. BRESSON. It would vary, as you have indicated, Congressman, by the complexity of the case and other circumstances.

Our procedure is to acknowledge the receipt of the request within a 10-day period of time. We let the requester know that we have received that request and we will get back to him as soon as we can to advise him whether or not we actually have the records he is seeking. But if we do have a record concerning that individual or the subject of his request, it will vary in the amount of time mainly because, as I say, the complexity of the records and the volume. It may run anywhere from 135 days to 165, 170 days. Again, if we have to review these records for classified data as well as the other exemptions to the act, it may take a little longer. But an average, normal request is being handled by us now roughly in 135 days.

Mr. MAZZOLI. I guess if we believe in Freedom of Information as a concept, it is the Nation's responsibility to provide to you the number of people and the amount of money and the amount of resources, computers or copy machines or whatever to fulfill your statutory responsibilities. But I think the fundamental question we have to answer ourselves is whether or not, assuming that we have provided those materials and resources to you, provision of this information somehow hurts our national security or interferes with our national defense. If you were to address yourself not so much about getting more money, not so much about getting more machinery or assigning more special agents, because those are I think tractable problems, but to whether all this would hurt national security, what one or two things would you cite to me on behalf of the proposition that a continuation of the Freedom of Information Act would be in your judgement harmful or unwise?

Mr. BRESSON. I am not quite sure I know how to respond to the question. As I mentioned before, we are working with a task force of the Department of Justice to try and determine how the act can work better, whether or not there is a need for a proposal by the Department of Justice to advocate some change in the Freedom of Information

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Law. It unfortunately is a very complex problem because we are talking about the rights of people, of citizens to have access to Government files.

As I have indicated in my statement, and as Judge Webster has testified previously, we are not against freedom of information, and trying to strike that balance is a most difficult assignment. It is a most difficult assignment, I am sure, for someone to actually sit down and draft language to the existing law and try to come up with a better solution. I believe that it is going to take some very delicate considerations and some very thoughtful deliberations before a meaningful proposal can be submitted.

But as I indicated at the outset, I think the opportunity for us to present our problems to this committee and other committees will assist us in moving along in that process, and I am hopeful that that will come about soon.

Mr. MAZZOLI. Well, I gather at this point you are prepared to speak only to the difficulty of finding the people, the money, the mechanisms to answer these requests and not so much on the impact that the statutes have had on investigations or the ability to mount proper foreign counterintelligence activities, is that right?

Mr. BRESSON. Not exactly, Congresman Mazzoli. The Director testified at the Government Operations Subcommittee, chaired by Congressman Preyer not too long ago, at which time he said he wasn't really concerned at this point about the resources and the money. The public is willing to expend this.

Mr. MAZZOLI. I agree with you.

Mr. BRESSON. So that is really not our main thrust. Our concern at this point is are we protecting the national interest in implementing the law, and I personally appreciate that very much, being the man who signs the letters saying that this is the information that we have determined is available to you. I want to make sure that our product is complying wih the law, the Freedom of Information Act, but I also want to make sure that we are not disclosing an informant in that release.

Mr. MAZZOLI. What did Judge Webster say to Richardson Preyer at that hearing? You started to say at a hearing where Mr. Webster appeared before Mr. Preyer? Did he testify to the dangers as he saw them, aside from any financial impact or personnel impact?

Mr. BRESSON. Yes. Judge Webster testified, and I think the thrust of his testimuony can be fairly characterized as leaning more toward the problem of protecting our informants, protecting our manuals, the investigative operations were paramount in his mind, in his testimony.

Mr. MAZZOLI. I understand. I appreciate that. I think an explication of that kind might help us, and I know that as you say it is a very difficult problem to put your finger on. I think we have to accept the fact that the burden of proof is going to be on the proponents of change to make the case because otherwise we have not only the problem of dealing with a Congress which has already passed a bill that has become the law, but unless it can be documented exactly how this has hurt, how some sharpshooters may be manipulating the system to help them find out at what point we are on their tail, and how some foreign agents, in fact, may have been using this

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

to mount intelligence efforts within the United States at our expense, it is going to be hard to sustain the burden.

Mr. BRESSON. I feel, Congressman Mazzoli, that we have presented a good case for documentation. We have solicited input from our field offices, the information from our field agents who are working with this problem every day, and they have given back to us examples that we can document showing where our informants have backed off furnishing information to us because of their fear.

Mr. MAZZOLI. Well, that is what I was asking about. What I was driving at was some examples, if you are permitted to give them, of where this act has indeed caused informants to bail out, it has caused investigations to end, it has caused our agents to come out from under cover, it has caused some effect like that.

I have used more than my 5 minutes, but I say to the gentleman from Illinois, that is what we are going to need, and I don't see it here. This is the kind of data I frankly think we will have to have.

Mr. McCLORY. If the gentleman will yield, we did in closed session this morning get some case examples from the Deputy Director of the CIA.

Mr. MAZZOLI. Maybe we need a session with you and Mr. Webster. The gentleman from Illinois.

Mr. McCLORY. Thank you, Mr. Chairman.

This file system, is this all a manual operation? You have no automatic data processing capability?

Mr. BRESSON. Not with regard to our central records system; no. Where our files are maintained, the search through our indexes is conducted manually.

Mr. McCLORY. 60,000 cards?

Mr. BRESSON. We have approximately 60 million index cards.

Mr. McCLORY. 6 million files and 60 million indexes?

Mr. BRESSON. 60 million index cards.

Mr. McCLORY. Three by five cards.

Mr. BRESSON. That is correct, approximately.

Mr. McCLORY. And that enables you to identify the 6 million files.

Mr. BRESSON. Well, what the index cards indicate are the names that are indexed in those files, so there will be many more index cards than files.

Mr. McCLORY. You do have an exemption now from disclosing confidential information on national security information, do you not?

Mr. BRESSON. Yes.

Mr. McCLORY. Now, do I understand that notwithstanding those exemptions, that the perception as far as the potential informant is concerned is such that he feels that maybe you won't take advantage of those exemptions?

Mr. BRESSON. I think it is a two-pronged problem. First, we have the mechanism of processing an FOIA request, and it requires a great deal of judgment on the part of the person processing the request to separate what is reasonably segregable, what can be released in this file, and what we should withhold, and many times it is an extremely difficult decision to make. And the disadvantage we have is that the requester who may be the subject of the file oftentimes knows much more about that file than we do, and what we think is an innocuous piece of information may not be. For example, if we release even the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

fact that our agents went to the city of St. Louis to conduct an investigation, that mere fact alone may trigger in the mind of the requester, the receiver of the data, that the fact that he was in St. Louis was only known to one individual, and that is the only reason we must have conducted an investigation in that city.

It is that type of analysis that a person receiving the information can make. It may result when we are releasing information we should not have released. The perception problem is caused when an individual learns by reading in media accounts or through newspaper and other public knowledge sources that the FBI is releasing its files, that same individual is going to be very uneasy about providing information to us.

I can give a specific example of a telephone call made to my office by a source, an individual who had worked with us in the past. He told me the subject of a request that we had recently processed under FOIA called him and told him that he had just received his FBI file and that he, the requestor, had identified our source as an informant.

Now, naturally this individual was extremely upset, and I told him, I tried to assure him that in our processing procedures we make sure this does not happen, but let me know the facts, let me get the case and I'll personally review it. And I did. And in my judgment, the information we released would not have identified him.

I got back to this individual. I said, look, I think they are testing you on this. They don't know. There is no way they could tell from the released information that you were the source, and he agreed with me, somewhat hestitatingly, I might add but he agreed, I think, that we protected him in that particular case.

But I am almost willing to bet that if an agent goes out and talks to that individual again, we are not going to get cooperation from that individual.

Mr. McClory. Well, the subject of the FOIA request probably knows that the only source of the information about him could come from that one individual. I wouldn't know.

Most of the newspaper articles I read which are based upon disclosures from a Freedom of Information Act request are so old. In the first place, they don't even interest me, and I just think, well, it makes a newspaper story. I think that the reader of the newspaper story tends to relate the thing to the present time—that this is a practice that is being carried on at the present time by the FBI or the CIA or whoever it is—but actually when you read the story you find, well, this was 15 years ago or 20 years ago or something like that.

Couldn't we get a statute of limitations, perhaps, and say, well, you can get information about yourself, but 10 years is it, and we are going to throw out these files.

Mr. Bresson. Well, you may be referring to Judge Webster's moratorium concept that he has expressed, although I think his moratorium would work in a different direction. He was hoping there was some way, and he didn't necessarily want to advance this as the only hope for salvation, so to speak, what he was trying to do in his solution or his suggestion about a moratorium was to put a little age on the file so we could protect sources and we could protect pending investigations.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Now, we have a great concern over the problem which the Director of the FBI has described in the past as some "archeological diggings;" when we go back to files and cases back in the 1950's and rehash them in the day's news today, it doesn't do our agency any good, and I know that. The Director, for example, has also indicated he wants to improve our minority hiring, and there was a period of time when we were getting a lot of newspaper publicity regarding our activities in the 1960's, the Martin Luther King type of release. These were being rehashed again and again and again in the newspapers in 1978, and Director Webster was very concerned that this sort of thing was hurting our ability to go out and attract minorities when they keep bringing up these stories that occurred 10, 12, 15 years ago.

Mr. McClory. Well, the Chairman, Mr. Murphy and I sat on the temporary Select Committee on Intelligence, and some of the earlier activities, especially the kind of private disclosures which the late former FBI Director would make to the President or to others, and to Members of Congress, were extremely damaging, of course. I think those were the kinds of things we wanted to avoid by this legislation.

You have only one file system now, don't you? The Director doesn't have a private file.

Mr. Bresson. No, sir.

Mr. McClory. Do you see some great benefits that are flowing to individuals now through the application of the Freedom of Information Act or is it just present damage to our country as a result of the continuation of this legislation?

Mr. Bresson. Again I think it is a question of balance. There are those cases which the FBI has processed under FOIA procedures, for example, the John F. Kennedy assassination case and the Martin Luther King assassination. Questions have been, of course, asked by the public concerning these investigations. Perhaps in going through this type of file we can settle some of these doubts, but the problem is in those cases, for example, where an individual is requesting a file, and that file is mostly classified information because it deals with our foreign counterintelligence activities. We can review that file and we may be able to release bits and pieces from that file but most of it is exempt under the classified exemption, properly so. The result is there is no public benefit that I can see in releasing bits and pieces of information. There is no benefit to the public and there is not much benefit to the Agency which is required to process volumes of documents to find that most of the documents are properly exempt from disclosure.

Mr. McClory. Could you furnish the committee, do you suppose, some suggestions as to what specific amendments we might consider in the Freedom of Information Act, or in other parts of the statute, within the next couple of weeks, say, to help us see what you perceive as a statutory change that might improve the existing law? (See app. B.)

Mr. Bresson. Congressman McClory, I will be very happy to present your views to the Department task force that we are working with in an effort to kind of move things along, and perhaps that might do it. Again, as I indicated at the opening part of my statement, we are working with the task force, and I believe that that probably is the proper procedure for suggesting amendments. But I will pass on

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

to them your concerns, and I am sure it will spur them on in that regard.

Mr. McClory. I am contacted from time to time by agents in the FBI with regard to my colleagues who leave the Congress and ascend to the bench.

[General laughter.]

Mr. Murphy. Ascend?

Mr. McClory. Now, if the request is made to the FBI under the Freedom of Information Act, is my identity disclosed to these persons whom I always give very glowing support for.

Mr. Murphy. It's not under oath, is it?

Mr. Bresson. Congressman McClory, under the Privacy Act, when you are asked to furnish information concerning any applicant for a position, you are asked up front whether you desire to have the expressed assurance of confidentiality.

The problem I see, though, even in those circumstances, if you were the only one to furnish derogatory information and we excise your name and your information and everyone else in furnishing information and they do not ask for assurance of confidentiality, the problem is that the requester may very logically deduce that you were the one who furnished the derogatory information. It is a problem.

Mr. McClory. Well, I'm going to cooperate anyway.

Thank you.

Mr. Murphy. Mr. Mazzoli?

Mr. Mazzoli. I don't have any more questions.

Mr. Murphy. One more question.

What percentage of Freedom of Information requests are made by persons seeking information in your files about themselves and what percentage are for information not relating to the requester?

Mr. Bresson. The breakdown on that I believe would be heavily weighed in favor of the first person requester.

Mr. Murphy. Fifty-two percent for the CIA.

Mr. Bresson. Much higher. It would be about 80 percent. I might add that, if I may, 16 percent of our 18,000 requests last year came from prisoners who were inmates in penal institutions. I am not just speaking of convicted felons. I am talking about people who we are able to tell from the return address on the envelope are presently incarcerated.

Mr. McClory. Mr. Chairman, excuse me. My counsel wanted to ask one question and Mr. Ashbrook is unavoidably absent, and Mr. Romerstein wanted to ask one question.

Mr. Murphy. I would like to ask unanimous consent to introduce the statement of the Honorable Richardson Preyer, chairman of the Subcommittee on Government Information and Individual Rights of the Government Operations Committee, with regard to hearings he held on this matter. I would like it to be included in the record.

Mr. McClory. Without objection. (See app. C.)

Mr. Mazzoli. Mr. Chairman, may I ask a question?

Mr. Murphy. Sure.

Mr. Mazzoli. Would you tell me what would be the average amount of money that you get for processing a so-called average case?

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. BRESSON. You mean what we would receive in terms of fees that might be charged?

Mr. MAZZOLI. Yes.

Mr. BRESSON. Our present policy now is that we do not charge anything for a case involving less than $25, 10 cents a page, 250 pages. We would not charge anything for that amount, less than $25. If the requester's request involves a case involving more than $25, he will pay the 10 cents a page. We do not have searching fees in our requests because of the retrievability of our files. We are able to locate them rather quickly. They do not usually entail a great deal of searching expense. Therefore the only charges we usually get involved in are the duplication costs.

Mr. MAZZOLI. Is that an FBI internal decision not to charge for matters fewer than 250 pages?

Mr. BRESSON. Yes; it was, and it was really based on a cost analysis of how much money is involved in writing to the requester, asking for the $7.50 and then having that letter come in with the $7.50 and putting it in the process of getting to the Treasury. It came out to approximately $25 for internal expense, and that was the reason that we did reach the cutoff figure of $25.

Mr. MAZZOLI. I would like to hear more on this topic. It seems to me that one of the things that would make this act a little more manageable to you would be to charge. If somebody wants something and they can pay, they ought to pay for it. I don't know why you cut off at $25, even though it may cost you a certain amount of money. Maybe the institution of certain kinds of automatic data processing would help. VISA and Master Charge handle millions of things for $2 or $3 and they seem to make a bundle of money on it. So maybe there is some way here of setting a fee. Maybe it should be more than 10 cents a page so that you bump more into the $25 category.

Is there anything that would be helpful to the committee to decide how the money——

Mr. BRESSON. Congressman Mazzoli, I welcome the thought, and I would like to look into that further.

Mr. MAZZOLI. What about CIA. Mr. Chairman? Did they have any charge?

Mr. MURPHY. I think out of a total cost of $3 million, they have charged $10,000 in the last fiscal year, and I think they spent $2.9 million. So really there is no relationship. It is a burden that falls on the taxpayer.

Mr. MAZZOLI. It is a tremendous burden on the taxpayer.

It may be if we got some money back we could pursue the routine requests, and the person who wants to persist then, fine, and if they can file in forma pauperis or something, there can be some arrangement so they can get something done for nothing, if there is some reason for it.

Mr. BRESSON. I might just add that while it was an internal decision, it was one of the GAO recommendations when they conducted an audit of our operations to consider this, raising the fee amount. I might also address the question of fees that were received by other agencies. Other agencies may have legitimate searching costs that we do not have. Our central records system, even though it be a manual searching procedure, is very efficient.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. MAZZOLI. Why should the requester benefit from your efficiency? And I mean that very seriously. I don't mean you charge them $1,000 to search your file, but why not have a flat fee of $10 to make a search, or $25, something reasonable, you know, that would defray other costs, because if I understand, I am a taxpayer and I am paying for each FBI agent, some part of his or her day, and you are not charging those people who are requesting, and you are not charging anything for postage to respond, yes we have a file, no we don't have a file.

Mr. BRESSON. The only thing I can respond to that is that we did carefully evaluate that decision. There was at one time a $3 limit, but as I say, what we were finding was that it was costing us a lot more than $3 to get the $3. It was costing us nearly $25 to collect the $3.20 amount that was owed, and that really was what led to the decision.

Mr. MAZZOLI. And then, of course, you reach the nightmarish sort of conclusion just like we have with energy where we ask the people to conserve, and then they conserve, and then the gas companies raise the bills because they are not making enough money. So we are back at square 1.

I thank you, Mr. Chairman.

Mr. MCCLORY. I have no questions. Mr. Romerstein has a question.

Mr. MURPHY. Mr. Romerstein?

Mr. ROMERSTEIN. Thank you, Mr. Chairman.

Mr. Chairman, these questions were prepared in consultation with Mr. Ashbrook and are questions he would have asked if he were here.

Mr. MURPHY. How many are there?

Mr. ROMERSTEIN. I'll hold it down to three, Mr. Chairman.

On August 10, 1978, a convict named Gary Bowdach, who is now in prison for a variety of violent crimes, testified before the Senate Permanent Subcommittee on Investigations. He testified that he had filed FOIA requests with almost 10 agencies, including the FBI, Drug Enforcement Administration, and so forth. He said that the purpose of the requests was to identify informants so that they could be murdered.

Are you aware of the testimony and could you comment on it?

Mr. BRESSON. I am aware of the testimony of Mr. Bowdach. I am in a position of saying that I don't believe he identified FBI informants. I am not that familiar with the release that he may have obtained from the FBI at this time to give you any further amplification on that. I am aware generally of his testimony, and that is a very large concern to us, and I have indicated we have 16 percent of our requests coming in from this type of individual, and the fact that this is their purpose is of very much concern to us in our processing procedures.

Mr. ROMERSTEIN. Mr. Bowdach testified further, that on behalf of another criminal, he made an FOIA request to the Drug Enforcement Administration which supplied 5 pounds of documents, and he claimed that careful examination identified a DEA informant—it would not have been an FBI informant. And Bowdach then said that he believed the informant was later murdered.

Would you have any information concerning that?

56-940 O - 80 - 5

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Mr. BRESSON. I am sorry, I don't have any information concerning that. If it is desired, I might be able to supplement the record with an answer to that. I would have to consult with the DEA for an answer.

Mr. ROMERSTEIN. And the last question concerns a GAO report dated November 15, 1978, which discussed four foreign counterintelligence cases where the FOIA was the reason for the loss of valuable sources. They identified three as potential sources and one an ongoing source who refused to continue to cooperate because of fear of FOIA.

Is this a common situation?

Mr. BRESSON. My answer to that would be yes. If I can somewhat quantify that answer, what I am saying is that we in our survey of our field agents found numerous examples of sources, both potential sources, businessmen, paid informants, who were telling us in counterintelligence investigations that they no longer wanted to work for us or provide us information because of their fear that the FOIA would cause us to give up their names or the information they provided. This is a real concern to us.

I am not in a position to measure it in terms of how many sources we have and how many sources made statements like this to us, nor am I sure when a person refuses to cooperate whether or not it is or is not because of the FOIA. But in answer to the question of Congressman Ashbrook, I would have to say that it is definitely a reality. It is a fact that we have documented instances of sources in this intelligence area who have refused to cooperate with us because of the FOIA.

Mr. ROMERSTEIN. Thank you. Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Bresson and your staff, for coming in today. We appreciate it very much.

Mr. MURPHY. We adjourn, subject to the call of the Chair.

Mr. BRESSON. Thank you.

[Whereupon, at 2:48 p.m., the subcommittee recessed, subject to the call of the Chair.]

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Appendix A

FEDERAL BUREAU OF INVESTIGATION—SUMMARY OF FOIPA COSTS, FISCAL YEARS 1974 THROUGH 1ST QUARTER OF FISCAL YEAR 1979

Fiscal year estimate	FOIPA program [1]	Other estimated headquarters costs [2]	Field estimated costs [2]	Payments to DOJ FOIPA litigation	Total FOIPA estimated costs
1974	$160,000				$160,000
1975	462,000				462,000
1976	3,090,000	$323,293	$79,241	$157,837	3,650,371
Transition quarter	906,081	98,749	48,397	75,392	1,128,619
1977	9,119,983	254,530	318,324	392,133	10,084,970
1978	8,203,819	403,809	656,069	358,436	9,622,133
1979 (1st quarter)	1,816,182	298,602	130,522		2,245,306
Total	23,758,065	1,378,983	1,232,553	983,798	27,353,399

[1] The costs for the FOIPA program are based on total personnel service costs plus other operating expenses.
[2] Fiscal years 1976 through 1st quarter of fiscal year 1978—the estimated costs are composed of personnel compensation and benefits only. Beginning with calendar 1978, the costs are estimated on a total cost basis.

Federal Bureau of Investigation personnel allocation for FOIPA

Fiscal year:	*Positions* [1]
1975	8
1976	175
1977	[2] 208
1978	[3] 389
1979	309
1980	309

[1] Fiscal year 1975 and 1976 allocated from realignment of personnel within FBI. Fiscal year 1977 through 1980 funded to FOIPA program.
[2] Does not include 282 special agents assigned to headquarters during "Project Onslaught."
[3] Although allocated 389 for 1978, our highest onboard complement figure reached only 368.

Federal Bureau of Investigation FOIPA requests received [1]

Year	Requests
1973	64
1974	447
1975	13,881
1976	15,778
1977	18,026
1978	18,084
1979 through 2/9/79	1,438
Total	67,718

[1] 1974 FOIA amendments were effective Feb. 19, 1975; Privacy Act of 1974 was effective Sept. 25, 1975.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

APPENDIX B

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

June 19, 1979

BY LIAISON

Honorable Morgan F. Murphy
Chairman
Subcommittee on Legislation
Permanent Select Committee
on Intelligence
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

On April 5, 1979, Mr. Bresson of my staff testified concerning the Freedom of Information Act before your Subcommittee. He was asked to submit our legislative proposals.

Enclosed are the FBI's proposals for your consideration.

Sincerely yours,

William H. Webster

William H. Webster
Director

Enclosure

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

June 19, 1979

To make the 1966 Freedom of Information Act more effective and responsive to an open society, Congress amended the law in 1974. Because some of the amendments required law enforcement agencies to disclose information in their files, Congress, recognizing the sensitive nature of those files, included provisions which permit law enforcement agencies to withhold certain types of information. Thus, enactment of the amendments was an effort to strike a balance between the disclosure of sensitive information and the need to withhold from public disclosure information which the national security and effective law enforcement demand be held in confidence.

When President Lyndon B. Johnson signed the Freedom of Information Act into law on July 4, 1966, he said, "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits." I am as convinced today of the undeniable validity of that proposition as President Johnson was more than a decade ago.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

The objective of public disclosure aimed toward the goal of an informed citizenry is one to which the FBI is committed. For example, although the Privacy Act provides for the exemption of files compiled for law enforcement purposes, the Bureau processes first-person requests under the Freedom of Information Act to afford the requester the maximum possible disclosure. In 1978 the FBI made final responses to 20,000 Freedom of Information-Privacy Acts requests. We have placed in our public reading room over 600,000 pages of materials concerning such matters as our investigations of the assassinations of President Kennedy and Dr. Martin Luther King, Jr.; Cointelpro; and many significant cases of historical interest. The public can review any of these materials at no cost. I am well pleased with the FBI's demonstrated response to the mandate of Congress in this area.

It should be noted our response has been achieved at a substantial cost. With over 300 employees at FBI Headquarters assigned full time to Freedom of Information-Privacy Acts matters, the Bureau expended over nine million dollars in the program last year. Furthermore, we have learned that because of the Act the FBI is not now receiving vital information previously provided by persons throughout the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

private sector, foreign, state and municipal law enforcement organizations, informants and other sources.

I have described the FBI's experience with the Freedom of Information Act in testimony before Committees of Congress. Several of our Oversight Committees asked me to submit to them proposed changes in the Act. In response to those requests, I have prepared some amendments.

My proposals, which do not necessarily represent the views of the Department of Justice or the Administration, endeavor to refine the Act, not to repeal it. As you consider them, I ask you to observe not only what they would do, but also what they would not do. They would not, for example, diminish the rights and privileges a criminal defendant or civil litigant now enjoys under the rules of civil and criminal procedure, nor would they limit or restrict in any way the power of the Department of Justice or the Congress or the Courts to oversee any activity of the FBI. What they would do, I submit, is make those adjustments to the Act suggested by reason and experience.

Existing time limits for responding to requests would be changed to establish a relationship between the amount of work required in responding to requests and the amount of time permitted to do the work. The proposals also would change the law to permit, not require, us to disclose our records to felons and citizens of foreign countries. We

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

also propose deleting the requirement a record be an investigatory record before it can be protected under existing exemption (b)(7). This proposal would enable the FBI to protect such noninvestigatory records as manuals and guidelines to the extent the production of them would cause any of the harms specified in existing exemptions (b)(7)(A) through (F).

The proposals would divide all FBI records into two categories. The first category would consist of the most sensitive information the FBI possesses: records pertaining to foreign intelligence, foreign counterintelligence, organized crime, and terrorism. The proposals would exempt them from the mandatory disclosure provisions of the Act. Title 28, Code of Federal Regulations, Section 50.8, which provides for access to files over 15 years old of historical interest, will remain in effect.

All other FBI records would be in the second category and subject to the Act's mandatory disclosure provisions.

Several proposals are designed to reestablish the essential free flow of information from the public to the FBI. We propose the statute specify that state and municipal agencies and foreign governments merit confidential source protection when they provide information on a confidential basis. To make clear we are permitted to withhold seemingly innocuous information which standing alone may not identify

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

a source, but which could do so when combined with other information subject to release under the Act or known to the requester, we propose we be permitted to withhold information which would tend to identify a source. This proposal would adopt the comments of several courts and make the language of the exemption conform more closely to the original intent of Congress.

To increase our ability to protect confidential sources, we are proposing a seven-year moratorium on law enforcement records pertaining to law enforcement investigations. The FBI will not use the moratorium in concert with a file destruction program to frustrate the Freedom of Information Act.

Because the proposals are permissive in nature, they would not prohibit releasing information. To insure fundamental fairness and to address matters of public interest, the FBI will draft with the Department of Justice a policy for disclosing information even though the law would permit withholding it.

These proposals would protect legitimate law enforcement interests while carefully preserving the basic principle underlying the Freedom of Information Act. In my view they merit your consideration.

Sincerely yours,

William H. Webster
Director

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

TABLE OF CONTENTS

		Page
I.	Time Limits	1
II.	Certain Aliens; Felons	8
III.	Protection of Law Enforcement Interests	13
	A. The FBI's Most Sensitive Records	18
	B. All Other FBI Records	22
	1. Ongoing Investigations	24
	2. Personal Privacy	25
	3. Confidential Sources	26
	4. Moratorium	32
	5. Physical Safety	33
IV.	Public Records	34
V.	*In Camera* Review	37
VI.	Annual Report	43
VII.	Appendix	
	A. The Impact of the Freedom of Information Act on the FBI	
	B. The Proposed Freedom of Information Act	
	C. Title 28, Code of Federal Regulations, Section 50.8	

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

TIME LIMITS

Existing Law

Subsection (a)(6)(A) requires each agency upon any request for records to make the records available within 10 days.

Subsection (a)(6)(B) permits the agency in narrowly defined unusual circumstances to extend the time limits for no more than 10 additional days.

If an agency fails to comply with the time limits, subsection (a)(6)(C) enables the person who made the request to file suit in United States District Court to enjoin the agency from withholding documents. The subsection provides that if the Government can show exceptional circumstances exist and the agency is exercising due diligence, the court may allow the agency additional time.

Observations

Every working day the FBI receives approximately 60 new requests for records. Although we do not have any records pertaining to the subject matter of some requests and others require processing only a few pages, some requests encompass thousands of documents. In most instances more than ten days elapse before we can identify, locate and assemble

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

the requested documents, much less process them for release. Contrary to what some may imagine, there is no machine which reproduces in a matter of minutes all the requested information contained in any one or more of the millions of FBI files. Often we must review many documents which contain information concerning other individuals as well as the requester.

The ability to respond to requests within an extremely short time period depends largely on the sensitivity of the records the agency's duties and functions require it to maintain. The FBI must review its records with extreme care prior to releasing them. That review entails a page-by-page, line-by-line examination of each document. To proceed in any other manner would jeopardize classified data, valid law enforcement interests, and third-party privacy considerations.

The volume and nature of work involved and, to an extent the limited resources available, render it impossible for the FBI to meet the 10-day time limit. As the General Accounting Office concluded after a 14-month review of our operations, "Considering the nature of the information gathered by the FBI, the processing of requests within 10 working days will probably never become a reality." "Timeliness and Completeness of FBI Responses to Freedom of Information and Privacy Acts Requests Have Improved," page 12

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

of a Report to the Congress by the Comptroller General of the United States, April 10, 1978.

The General Accounting Office determined the FBI appeared to be making every effort to reduce the response time and it is noteworthy the Comptroller General did not recommend any administrative or managerial changes to reduce that time.

Our failure to meet the time limits does more than place us in the unseemly posture of failing to be in strict compliance with the law. It creates a vicious circle. When we miss a deadline the person who requested the records can file a lawsuit. Time spent responding to the lawsuit naturally results in time lost responding to the requests of others. That in turn delays even more our responding to those other requests.

The conclusion appears inescapable. The time limit provisions should be modified.

Proposal

We propose subsection (a)(6)(A) be amended to read: "Each agency, upon any request for records made under paragraphs (1), (2), or (3) of this subsection shall --

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"(i) notify the person making the request of the receipt of the request and notify the person making the request within 30 days after receipt of the request of the number of pages encompassed by the request and the time limits imposed by this subsection upon the agency for responding to the request; determine whether to comply with the request and notify the person making the request of such determination and the reasons therefor within 60 days from receipt of the request (excepting Saturdays, Sundays and legal public holidays) if the request encompasses less than 200 pages of records with an additional 60 days (excepting Saturdays, Sundays and legal public holidays) permitted for each additional 200 pages of records encompassed by the request, but all determinations and notifications shall be made within one year; and notify the person making the request of the right of such person to appeal to the head of the agency any adverse determination;

and

"(ii) ....

"(B) ....

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in attempting to respond to the request, the court shall allow the agency additional time to complete its review of the records...."

Commentary

Our proposal has two main features. It would establish a relationship between the amount of work required to respond to a request and the amount of time permitted to do the work. It would insure we would be granted additional time to respond to requests if exceptional circumstances exist and if we are exercising due diligence.

Our current practices of acknowledging receipt of the request promptly and notifying the requester at the outset if we do not have any records concerning the subject matter of his request would not be affected.

The proposal would require us to notify the requester within 30 days of the number of pages encompassed by his request and to inform him of the applicable time limits.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In the absence of exceptional circumstances the proposal would permit no more than 60 working days to process every 200 pages of records encompassed by the request. Because some requests require the review of thousands of pages and the proposed schedule could result in a prolonged response time, we suggest the imposition of a maximum time limit of one year, absent exceptional circumstances.

Although we are convinced making the time limits proportional to the amount of work required is a sound idea, we are not wedded either to the 60-day:200-page ratio or the one year maximum limitation. We propose that schedule with the realization the subsection under consideration applies to all Executive agencies, not just to those which, like ours, must review extremely sensitive records in a detailed, careful, and time-consuming manner.

If we were able to begin working on requests as soon as they are received, we could process most, but not all of them within the proposed time limits. Because we could not meet the 60-day:200-page deadline in exceptionally complex cases, or the one year maximum limit in exceptionally large requests, or either when confronted with other exceptional circumstances, our proposal would make clear we will be given additional time if we can show the court there are exceptional circumstances and that we are exercising due diligence in attempting to respond to the request.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Unfortunately, we are not currently in a position to begin working on a request soon after it is received. We note, indeed we underscore, the number of requests now on hand and awaiting processing and the volume and scope of incoming requests and pending litigation are so great, that four to six months usually elapse between the time a request is received and the time we are able to furnish the records to the requester.

We propose the 60-day:200-page schedule, with the exceptional circumstance provision intact, as a reasonable alternative to existing law, notwithstanding the four- to six-month delay imposed mainly by the backlog of work. The proposal relies on Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). In that case the court found the deluge of requests in excess of that anticipated by Congress is a factor to be considered in determining the existence of exceptional circumstances.

56-940 O - 80 - 6

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

CERTAIN ALIENS; FELONS

Existing Law

Subsection 552(a)(3) requires each agency upon any request for records to make the records promptly available to any person.

Observations

Although only a citizen of the United States or an alien lawfully admitted for permanent residence may make a request for records under the Privacy Act, the Freedom of Information Act imposes upon the FBI the duty to furnish records to any person in the world who asks for them.

At present about 16 percent of our Freedom of Information Act requests are made by or on behalf of prisoners. The actual figure could be higher because only those requests which bear the return address of a prison or which state the requester is a prisoner are counted in our statistical tabulation. The percentage of requests from prisoners is growing. A little more than a year ago only six percent of the requests were made by prison inmates.

Although we do not know how many requests are made by convicted felons, it may be assumed we are receiving requests from persons who have been convicted of a felony but

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

are no longer under sentence. Members of organized crime families, for example, despite having been convicted of felonies, are free to request FBI documents. We do receive requests from organized crime figures.

Furthermore, because the present statute requires us to furnish FBI records to "any person," a citizen of a foreign country, even a citizen of a hostile foreign country, may demand and receive FBI documents. We have had requests from individuals who reside in foreign countries.

Because every request must be honored and because we receive more requests than we can process immediately, it is our policy to respond to requests in the order in which they are received. The result is the requests of most citizens must wait their turn while the Bureau responds to requests for FBI documents from felons and residents of foreign countries.

Proposal

We propose amending existing subsection (a)(3) by adding the following sentence:

> "This section does not require a law enforcement or intelligence agency to disclose information to any person convicted of a felony under the laws of the United

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

States or of any state, or to any person acting on behalf of any felon excluded from this section."

We propose subsection (e) be amended to define "person" as "a United States person as defined by the Foreign Intelligence Surveillance Act of 1978."

Commentary

The Foreign Intelligence Surveillance Act of 1978 defines "United States person" as "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3)."

Subsection (a) reads, "Foreign Power" means --

"(1) a foreign government or any component thereof, whether or not recognized by the United States;

"(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;"

The legislative history of the Freedom of Information Act makes clear the passage of the law was prompted in no small part on the premise that the opportunity to obtain information is essential to an informed electorate. Our proposal would tailor the Act to serve that purpose, while carefully preserving the rights of the electorate. The definition of "person" is sufficiently broad to insure the rights of public interest groups and associations would not be affected.

Some of those the proposal could exclude from the Act are not a part of the electorate because they are citizens of foreign countries. The proposal also would preclude felons from demanding as a matter of right the benefits of the Act at taxpayers' expense. That would have two advantages. First it would enable the FBI to respond more promptly to the requests of those for whom the Act primarily was designed. Indeed, most felons have lost their right to vote and thus are not part of the electorate. Secondly, it would put to an end the current practice of convicts who are making requests for the purpose of identifying those who probably

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

were responsible for their conviction. [It can be assumed many of these felons do not require proof beyond a reasonable doubt in identifying a particular person as a source of information.] If felons can be prohibited from voting in elections, a right lying at the very heart of our democracy, the law should permit their being excluded from FBI files as well as the voting booth.

The proposal would not limit existing habeas corpus or civil and criminal discovery procedures, all of which will remain as they are today. Furthermore, the proposal does not prohibit the Bureau from responding to requests of felons and those who are not United States persons. It provides we would not be required to respond to those requests. Thus, the FBI would be permitted to make records available and we shall work with the Department of Justice to draft guidelines governing access under the Act to a law enforcement or intelligence agency's information by felons and those who are not United States persons.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

PROTECTION OF LAW ENFORCEMENT INTERESTS

Existing Law

Subsection 552(b) provides the Act does not apply to matters that are --

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"....

"....

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Observations

The FBI observes there are difficulties in applying this exemption in such a way that legitimate law enforcement interests receive adequate protection. Those interests include protecting highly sensitive information, ongoing investigations, manuals and some other noninvestigatory records, and confidential sources.

Proposal

We propose subsection (b)(7) be amended to read as follows:

"(b) This section does not apply to matters that are--

"(7) records maintained, collected or used for foreign intelligence, foreign counterintelligence, organized crime, or terrorism purposes; or records maintained, collected or used for law enforcement purposes, but only to the extent that the production of such law enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy or the privacy of a natural person who has been deceased for less than 25 years, (D) tend to disclose the identity of a confidential source, including a state or municipal agency or foreign government which furnished information on a confidential basis,

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

and in the case of a record maintained, collected or used by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source including confidential information furnished by a state or municipal agency or foreign government, (E) disclose investigative techniques and procedures or (F) endanger the life or physical safety of any natural person; PROVIDED, however, this section shall not require a law enforcement or intelligence agency to (i) make available any records maintained, collected or used for law enforcement purposes which pertain to a law enforcement investigation for seven years after termination of the investigation without prosecution or seven years after prosecution; or (ii) disclose any information which would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity, if the head of the agency or in the case of the Department of Justice, a component thereof, certifies in writing to the Attorney General, and the Attorney General determines, disclosing the information would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity."

We also propose the following definitions be added to subsection (e):

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"Foreign intelligence" means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons.

"Foreign counterintelligence" means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons.

"Terrorism" means any activity that involves a violent act that is dangerous to human life or risks serious bodily harm or that involves aggravated property destruction, for the purpose of --

(i) intimidating or coercing the civil population or any segment thereof;

(ii) influencing or retaliating against the policies or actions of the government of the United States or of any State or political subdivision thereof or of any foreign state, by intimidation or coercion; or

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(iii) influencing or retaliating against the trade or economic policies or actions of a corporation or other entity engaged in foreign commerce, by intimidation or coercion.

"Organized crime" means criminal activity by two or more persons who are engaged in a continuing enterprise for the purpose of obtaining monetary or commercial gains or profits wholely or in part through racketeering activity."

Commentary

Our proposal would divide all FBI records into two categories. The first category would consist of the most sensitive information the FBI possesses: records pertaining to foreign intelligence, foreign counterintelligence, organized crime, and terrorism. The proposal would exempt them from the mandatory disclosure provisions of the Act. All other FBI records would be in the second category and subject to the Act's mandatory disclosure provisions.

Title 28, Code of Federal Regulations, Section 50.8, will remain in effect. That section, based on an Order dated July 17, 1973, provides for access to files of historical interest. The complete text is in the appendix.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

The proposal substitutes for the Freedom of Information Act's "compiled," the definition of "maintained" used in the Privacy Act of 1974, 5 U.S.C. § 552a (a)(3). Not only would the proposed change aid the consistency of the two related statutes, it also would preclude any gap in protection resulting from a narrow interpretation of "compiled." The thrust should go to the purpose for which the records are maintained, collected or used, and not soley the purpose for which they originally were compiled.

<u>The FBI's Most Sensitive Records</u>

The FBI is charged with the responsibility for foreign intelligence, foreign counterintelligence, terrorism and organized crime investigations within the United States. Our activities in these four areas invariably are among the most sensitive the FBI conducts and the records we maintain, collect and use in connection with these matters are our most sensitive. The degree of sensitivity of information is directly proportional to the degree of harm resulting from the disclosure of that information to the wrong person.

Most of our investigations in these areas are detailed, complex and extensive. Thus, of all our records our most sensitive are also the most vulnerable to examination by those motivated by other than legitimate reasons to

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

identify sources and determine the scope, capabilities and limitations of our efforts.

Although one of the purposes of the Freedom of Information Act was to compel disclosure of agency information to assist in informing the electorate, one cannot conclude all citizens request and receive the FBI's most sensitive information for the purpose of making themselves a more informed electorate.

This is not to intimate all persons who desire to examine these records have evil motives. A few, no doubt, do. We know, for example, of an organized crime group which made a concerted effort to use the Freedom of Information Act to identify the FBI's confidential sources.

In these types of cases revealing the absence of information in our files is most damaging. The lack of any investigative activity in a particular place at a particular time conveys in clear and unmistakable terms our limitations. That we do not possess records showing FBI investigative activity in a certain city is to announce we have no knowledge of what transpired there. It is important to remember under the Freedom of Information Act we are required to explain why information is being withheld, identify with as much specificity as possible the nature of the information, and describe document not being disclosed.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

It must be recognized that hostile foreign governments, terrorist and organized crime groups not only have the motive to subject our releases to detailed analysis, they have the resources to finance such an examination by knowledgeable and skilled analysts.

Risks surface internally as well. The FBI traditionally has operated on the "need-to-know" principle: sensitive information is provided only to those FBI employees who have a need-to-know the information. It would not be uncommon for a veteran Special Agent assigned to the Criminal Investigative Division to have no knowledge about a foreign counterintelligence case, and for an employee assigned foreign counterintelligence responsibilities to know only a portion of the details of that same case. Yet, to respond to a Freedom of Information Act request all relevant records must be assembled in one place. Throughout the response, appeal and litigation stages the records receive much more exposure than they otherwise would.

We must remember, too, it is human beings in the FBI who review our records and try to decide what must be released and what properly should be withheld. Human beings have made mistakes in the past; they will make them in the future. Furthermore, there is a limit to human knowledge. FBI employees do not know, cannot know and have no way of learning the extent of a requester's knowledge of names, dates

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

and places. The Freedom of Information Act analyst in the FBI may have no way of knowing or learning the significance to a hostile analyst of a particular item of information. Yet, somehow, the FBI employee is suppose to make an intelligent judgment.

To our knowledge no confidential source has ever experienced physical harm as a result of one of our releases, but one of the most alarming aspects of this entire area is that the greatest danger lies in a hostile foreign government identifying an FBI source and leaving that source in place. We are heartened by the absence of an identifiable victim; we remain concerned.

We have not lost sight of our commitment to be as open as possible. To that end we have defined the four highly sensitive categories in an effort to strike a proper balance between openness in government and keeping secret those things which are fit to be kept secret from the world.

Through its elected representatives the public has placed upon the FBI our foreign intelligence, foreign counterintelligence, terrorism and organized crime responsibilities. We recognize the American people have a right to know how the FBI is discharging those responsibilities. The Act does not require any person who desires to receive a document to show a need for the information or to express a reason for requesting it. We do not suggest the Act be changed to impose any

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

such requirements. What we are proposing is that the public's right to know about these highly sensitive matters be channeled through the existing powers of its courts, its Congress, and its other representatives.

The FBI must account to the public for its activities in these particularly sensitive areas. We should give our accounting not to the world, but to the public's courts, Congress, and Executive. All other FBI records would remain subject to direct public access.

All Other FBI Records

Existing subsection (b)(7) clearly does not protect law enforcement manuals because they are not "investigatory records." With the law in its present form, we are unable to reduce to writing in a manual, training document or similar paper those items of information we want our Special Agents in the field to know without running the risk of having to provide our game plan to those who would use our own information to avoid detection or capture.

The manner in which the courts have struggled to find some basis to justify withholding those portions of law enforcement manuals which deserve protection may be seen in such cases as Cox v. Department of Justice, 576 F.2d 1302 (8th Cir. 1978); Cox v. Department of Justice, ___F.2d___

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(8th Cir. 1979); Caplan v. Bureau of Alcohol, Tobacco and Firearms, 445 F.Supp. 699 (S.D.N.Y. 1978); aff'd on other grounds, 587 F.2d 544 (2nd Cir. 1978).

The difficulty the courts have had in relying on existing exemption (b)(2), which protects all records relating solely to the internal personnel rules and practices of an agency, lies in part in the difference between the House and Senate Reports on the scope of exemption (b)(2). The House Report would allow manuals to be protected; the Senate Report would not.

We propose deleting the requirement the record be an investigatory record before it can be protected under exemption (b)(7). The proper test ought to be whether the production of the record would cause any of the harms subsections (b)(7)(A) through (F) are designed to prevent. Ginsburg, Feldman and Bress v. Federal Energy Administration, Civ. Act. No. 76-27, 39 Ad. L.2d (P & F) 332 (D.D.C. June 18, 1976), aff'd, No. 76-1759 (D.C. Cir. Feb. 14, 1978), vacated pending rehearing en banc (D.C. Cir. Feb. 14, 1978), aff'd mem., No. 76-1759 (D.C. Cir. 1978).

If our proposal were enacted, exemption (b)(7) would protect all FBI records to the extent the production of them would cause any of the harms addressed in exemptions (b)(7)(A)

56-940 O - 80 - 7

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

through (F). See Irons v. Bell, et al., ___F.2d___ (1st Cir. 1979). Remaining portions of records would be disclosed under the Freedom of Information Act.

Ongoing Investigations

Effective law enforcement demands that in certain situations the existence of an investigation not be disclosed. Although existing exemption (b)(7)(A) permits the withholding of information to the extent that the production of records would "interfere with enforcement proceedings," we know of no way to respond to a Freedom of Information Act request without alerting the requester there is an ongoing investigation. Subsection (a)(6)(A)(i) requires us to inform the requester the reasons for our determination whether to comply with his request. Thus, we are required by the statute to cite (b)(7)(A) to protect an ongoing investigation and by citing that exemption we confirm the existence of the investigation.

The General Accounting Office found, "(I)f requesters, unaware that they are under investigation, seek access to their records, they would immediately realize the situation once the agency cited the (b)(7)(A) exemption to withhold information that may harm a pending investigation. Thus, the agency faces a dilemma. It cannot lie to requesters by saying that no records exist, nor can it choose to ignore the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

requesters.... Because the use of the (b)(7)(A) exemption puts the agency in a 'no-win' situation, some feasible procedure is needed by which the Government's and public's interests are served fairly and efficiently." "Timeliness and Completeness of FBI Responses to Freedom of Information and Privacy Acts Requests Have Improved," pages 57-58 of a Report to the Congress by the Comptroller General of the United States, April 10, 1978.

Our proposal would solve this dilemma. It would enable us to avoid alerting a requester only in those instances in which alerting him would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity. To insure the provision would be employed only when absolutely necessary, our proposal would require the Director of the FBI to certify in writing to the Attorney General and for the Attorney General to make the determination that disclosing the information would interfere with the ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity.

Personal Privacy

Exemption (b)(7)(C) permits the FBI to withhold information in its investigatory records which would "constitute an unwarranted invasion of personal privacy." This

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

exemption does not protect any interests of deceased individuals because personal privacy considerations do not survive death.

Our proposal would extend the privacy interests protected by this exemption for 25 years after death.

Confidential Sources

Although exemption (b)(7)(D) is designed to protect confidential sources, there are difficulties with making the exemption do that for which it is intended. It is essential these difficulties be minimized or eliminated because the confidential source is indispensable; he is the single most important investigative tool available to law enforcement. "The courts have also recognized the danger that citizen cooperation with law enforcement agencies will end if such confidential sources are not protected." May v. Department of Justice, Civil Action No. 77-264SD (S.D. Me. 1978).

In responding to a request for information from an investigative file, we must review each record to determine if we can release the information. The duty is ours to establish the need to withhold, and we must demonstrate that records being withheld contain no "reasonably segregable" information; that is, information not specifically protected by exemption (b)(7)(D) or any of the other eight exemptions.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In practice this means that an FBI employee, even though he has learned to evaluate more carefully what information is reasonably segregable, does not know, cannot know, and has no way of learning the extent of a requester's knowledge of dates, places and events. The person most knowledgeable about what particular information may lead to source identity is, unfortunately for us, oftentimes the requester who is the subject of the investigation. What appears to us to be innocuous or harmless information may provide the requester the missing piece of the puzzle. Stassi v. Department of Justice, et al., Civil Action No. 78-0536 (D.D.C. 1979). When the records pertain to investigations of organizations and the members have the opportunity to pool and compare the information furnished to them, the danger becomes more apparent.

We have further concern for the inadvertent disclosure which may result from human error. That is a risk present whenever a page-by-page review of thousands of documents is undertaken.

Still, an FBI employee must review the relevant materials and predict what information can be released. The consequences of erring are severe.

Approximately 16 percent of our Freedom of Information Act requests are coming from prison inmates. Our experience tells us that in many instances their requests

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

are being made for the purpose of identifying informants. We know that an organized crime group made a concerted effort to identify sources through the Freedom of Information Act.

The FBI's ability to discharge its responsibilities depends in large measure upon the willingness of human beings to furnish information to us. To the extent the Freedom of Information Act or any other statute or event or circumstance inhibits someone from telling the FBI what he knows, our ability to do our job is made more difficult.

We have found that there are those in many segments of society who are refusing to provide us information because they fear their identity may be disclosed under the law. These people are not only confidential informants, but also private citizens, businessmen and representatives of municipal and state governments. Included as well are officials of foreign governments. The FBI is not suggesting that every person who is reluctant to provide us information does so solely because of the Freedom of Information Act. We are saying we do have examples -- actual case histories -- of people who have told us they do not want to provide information to us because they fear disclosure under the Act. Several of these examples are in the appendix.

The Report of the Comptroller General captioned, "Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies," dated November 15, 1978, contains

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

several specific examples of documented instances wherein established or potential sources of information declined to assist us in our investigations. This General Accounting Office Report points out our belief that the Acts have had the greatest impact on informants in the organized crime and foreign counterintelligence areas, two of the areas in which the FBI currently concentrates its greatest efforts. Our sources of information in the foreign counterintelligence field are usually well educated, sophisticated and informed about the laws, court decisions and media coverage concerning the release of information from FBI files. They are very sensitive to the fact that Freedom of Information-Privacy Acts disclosure of their cooperation with us could jeopardize their community standing or livelihood, or more seriously, given the appropriate situation, their life or physical safety.

We consider this perception by the public to be a serious impairment to our capabilities. The Comptroller General's Report concluded the various law enforcement agencies surveyed almost universally believe that the ability of law enforcement agencies to gather and exchange information is being eroded, but the extent and significance of the information not being gathered because of the Freedom of Information Act and the Privacy Act cannot be measured. It is true quantitative measurement of the loss of information is most

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

difficult to ascertain. In many cases we will never be sure why a source or potential source of information declined to provide vital information to us, but the Freedom of Information Act has been specifically cited by many as the reason for their refusal to cooperate.

The practical problems that confront us in applying the existing (b)(7)(D) exemption and the risks present whenever sensitive records are reviewed for public disclosure place us in the position of not being able to dispel as completely mythical or imagined the perceptual problem which exists among the citizenry. Our proposal addresses the practical and perceptual problems.

The first part of exemption (b)(7)(D) permits the FBI to withhold information which "would" identify a confidential source. The second part protects any confidential information the source furnished to the FBI in the course of a criminal or lawful national security investigation. To make clear we are permitted to withhold seemingly innocuous information which in and of itself would not identify a source, but which could identify a source when combined with other information subject to release under the Freedom of Information Act, we propose amending subsection (b)(7)(D) to permit withholding information would would tend to identify a source.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Changing the exemption from "would disclose the identity of a confidential source" to "would tend to disclose the identity of a confidential source" adopts the comments of the courts in such cases as Nix v. United States of America, 572 F.2d 998 (4th Cir. 1978), Church of Scientology v. Department of Justice, 410 F.Supp. 1297 (C.D. Cal. 1976), and Mitsubishi Electric Corp., et al., v. Department of Justice, Civil Action No. 76-0813 (D.D.C. 1977).

The proposal also would make the language of the exemption conform more closely to the original intent of Congress. The author of the exemption, Senator Hart, stated, "The amendment protects without exception and without limitation the identity of informers. It protects both the identity of the informer and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to law enforcement agencies and desire their identity be kept confidential," 120 Congressional Record 17034 (emphasis added).

Our proposal would make clear state and municipal agencies and foreign governments which furnish information on a confidential basis are confidential sources within the meaning of the exemption. The proposal would be consistent with Nix, supra; Church of Scientology, supra; Lesar v. Department of Justice, 455 F.Supp. 921 (D.D.C. 1978);

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

May, supra; and Varona Pacheco v. F.B.I., et al., 456 F.Supp. 1024 (D. Puerto Rico 1978).

Our proposal also would eliminate the requirement that the information be furnished "only" by the confidential source before it may be protected. Striking the word "only" would preclude the possibility of a successful demand the information must be released because the same information was furnished by two or more confidential sources.

Moratorium

The Act should include a moratorium provision. The requester who has as his purpose identifying FBI sources can review an FBI release while names, dates, places and relationships are relatively fresh in his mind. That recollection, undimmed by the passage of time, is of no small aid to the individual endeavoring to identify a confidential source by subjecting an FBI release to a detailed analysis.

We propose we not be required to release law enforcement records pertaining to a law enforcement investigation for seven years after termination of the investigation without prosecution or seven years after prosecution.

We will not use the moratorium provision in concert with a file destruction program to frustrate the Freedom of Information Act.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Because some investigations are ongoing for extended periods, records pertaining to them could be withheld for a long time. Since our proposal is worded to permit, not prohibit, our releasing information during the moratorium, we will be able to and we shall work with the Department of Justice to formulate a policy for access to records of public interest and to information pertaining to protracted investigations.

Physical Safety

Exemption (b)(7)(F) permits the FBI to withhold information which would endanger the life or physical safety of law enforcement personnel.

Our proposal would permit protecting the life or physical safety of any natural person.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

PUBLIC RECORDS

Existing Law

Subsection 552(b), after itemizing those matters to which the Act does not apply, reads,

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Observations

This provision prevents an agency from withholding an entire document when only a portion of it is exempt. It necessitates our making a line-by-line review of records to determine if any portion should be released. Such a review requires a great deal of effort and expense with very little corresponding benefit to the requester in some cases, especially those involving requests for records pertaining to ongoing investigations.

Proposal

We propose the last sentence of subsection 552(b) be amended to read,

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"Any reasonably segregable portion of a record not already in the public domain which contains information pertaining to the subject of a request shall be provided to any person properly requesting such record after deletion of the portions which are exempt under this subsection."

Commentary

Exemption (b)(7)(A) allows an agency to withhold investigatory records compiled for law enforcement purposes, but only to the extent that their release would interfere with enforcement proceedings. The FBI uses this exemption most often in responding to requests for records about pending, ongoing investigations. Of course, the (b)(7)(A) exemption, like all others, must be applied with the reasonably segregable clause in mind. The General Accounting Office concluded, "As a result requesters would probably not receive any information they were not already aware of, while the agency would have devoted many useless hours deciding what information could be released." "Timeliness and Completeness of FBI Responses to Freedom of Information and Privacy Acts Requests Have Improved," page 57 of a Report to the Congress by the Comptroller General of the United States, April 10, 1978.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Our proposal would harmonize the (b)(7)(A) and "reasonably segregable" provisions without striking discord in the design of either.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

IN CAMERA REVIEW

Existing Law

Subsection 552(a)(4)(B) empowers United States District Courts to order the production of any agency records improperly withheld from the person who requested the records. It requires the court to determine the matter *de novo* and permits the court to examine agency records *in camera* to determine whether the records should be withheld under any of the exemptions set forth in subsection (b) of the Act. The subsection places the burden on the agency to sustain its action.

Observations

To meet the burden of justifying our withholding information, the FBI often must submit detailed affidavits describing the information being withheld and explaining with specificity why that information fits within the exemptions of the Act. The filing of a public affidavit in litigation may result in more harm than releasing the documents themselves.

In *Kanter* v. *Internal Revenue Service, et al.*, 433 F.Supp. 812 (N.D.Ill. 1977), the court observed, "The government is correct in noting that a detailed index would be a cure as perilous as the disease. Such an index would

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

enable the astute defendants in the criminal case /who were the plaintiffs in this Freedom of Information Act lawsuit/ to define with great accuracy the identity and nature of the information in the possession of the prosecution. 433 F.Supp. at 820.

"...(T)he principal problem with a standard ... index is the government's fear that detailed itemization and justification would enable the objects of its investigation to 'fill in the blanks,' i.e., that it would impede its enforcement almost as seriously as complete disclosure .... (T)he court acknowledges the validity of the government's concern." 433 F.Supp. at 823.

In recognition of the danger, agencies are permitted to submit more detailed affidavits to the court _in camera_ when a public affidavit would harm governmental interests. _Phillippi_ v. _CIA_, 546 F.2d 1009 (D.C. Cir. 1976); _Kanter_ v. _IRS, et al._, _supra_; S.Rep. No. 93-854, 93d Cong., 2d Sess. Affidavits submitted for _in camera_ review usually contain as much information or more than the documents themselves, an analysis of the information and an assessment of the damage its release would cause. For example, the affidavit may explain exactly how the release of certain information would identify an informant or harm national security. Yet one court recently

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

ordered the release of all but two paragraphs of an affidavit which an agency had submitted in camera. Baez v. National Security Agency, et al., Civil Action No. 76-1921 (D.D.C. Memorandum and Order Filed November 2, 1978). The case is being appealed.

Furthermore, some reservations have been expressed over the use of in camera inspections. The critics maintain in camera inspections defeat the adversary process because the plaintiff and his attorney are not permitted to examine the documents. See, for example, the concurring opinion in Ray v. Turner, 587 F.2d at 1199. (D.C. Cir. 1978).

Proposal

We propose the second sentence in subsection 552(a)(4)(B) be amended to read as follows:

"In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action; but if the court examines the contents of a law enforcement or intelligence agency's records withheld by the agency under exemptions

56-940 O - 80 - 8

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(b)(1), (b)(3), the introductory clause of exemption (b)(7), or exemption (b)(7)(D), the examination shall be in camera. The court shall maintain under seal any affidavit submitted by a law enforcement or intelligence agency to the court in camera."

/The phrase "the introductory clause of exemption (b)(7)" refers to a clause we propose be added to existing subsection (b)(7)./

Commentary

Under this proposal the burden would remain on the agency to sustain its action, and the power of the court to make de novo determinations and inspect agency records in camera would not be affected.

The proposal would make clear that if a court decides to review the records of a law enforcement or intelligence agency, the review of some of those records must be in camera. Records which could be reviewed only by the court would include those being withheld under exemption (b)(1) -- properly classified information; exemption (b)(3) -- information required by some other statute to be kept confidential; the introductory clause of exemption (b)(7) -- foreign intelligence, foreign

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

counterintelligence, terrorism and organized crime information; and/or exemption (b)(7)(D) -- information identifying a confidential source.

The proposal also would insure that affidavits submitted by law enforcement or intelligence agencies for in camera examination are reviewed only by the court.

Adoption of this proposal would dismiss the suggestion that a plaintiff or his attorney should examine highly sensitive documents, which are being reviewed by a court in camera, so the plaintiff can assist the court in determining whether the documents should be disclosed to the plaintiff. Congress, in enacting the de novo determination and in camera inspection provisions of the Act, was adamant in its conviction that the courts could be entrusted to make intelligent decisions about highly sensitive Government documents. Our proposal rejects the notion the courts have shown themselves incapable of making in camera determinations without the assistance of the plaintiff or his attorney.

As to affidavits submitted for in camera review, the proposal adopts the philosophy of Kanter, supra at 824, "The method of a detailed index was devised by the court in Vaughn v. Rosen for the benefit of the court rather than the plaintiffs. There is no reason why the court cannot consider

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

such an index in camera, thereby preventing undue disclosures to the plaintiffs. While in camera consideration will deprive the court of the benefit of plaintiffs' critique of the index, it does have certain advantages. It is preferable to the laborious task of scrutiny of the documents themselves. Furthermore, a properly drawn index will summarize documents, and put into relief their fundamental facts and importance. An index will also focus the court's attention on the basis of the government's claim that each document is covered by /one of the exemptions./" See also Lesar v. Department of Justice, 455 F.Supp. 921 (D.D.C. 1978).

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

ANNUAL REPORT

Existing Law

Subsection 552(d) requires each agency to submit to Congress on or before March 1 of each calendar year a report covering the preceding calendar year. It also requires the Attorney General to submit an annual report on or before March 1 for the prior calendar year. Both reports must include statistical compilations for various aspects of the processing of Freedom of Information Act requests.

Observations

We are required to keep two sets of statistics: one for the calendar year report required by the statute and another for programs operating on a fiscal year basis. The administrative burden and unnecessary expense which result from these duplicative efforts could be eliminated if the existing statute required a fiscal year report.

Proposal

We propose the first sentence of existing subsection 552(d) be amended to read,

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"On or before December 1 of each calendar year, each agency shall submit a report covering the preceding fiscal year to...."

and the last paragraph of subsection 552(d) be amended to read,

"The Attorney General shall submit an annual report on or before December 1 of each calendar year which shall include for the prior fiscal year a listing of...."

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

APPENDIX

SURVEY OF IMPACT OF
THE FREEDOM OF INFORMATION ACT (FOIA)
AND
PRIVACY ACT (PA)
ON LAW ENFORCEMENT ACTIVITIES

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

INTRODUCTION

On April 25, 1978, the General Accounting Office (GAO) requested Federal Bureau of Investigation (FBI) participation in a GAO study on the impact of the Freedom of Information Act (FOIA) and the Privacy Act (PA) of 1974 on law enforcement activities. To compile data for the GAO request, the FBI canvassed its Headquarters components and 59 field divisions. The following examples include instances of perceived and/or actual impact reported by FBI field offices and Headquarters divisions in response to the GAO request and subsequent to the GAO study. Examples which involve classified matters are not included.

A. STATE AND MUNICIPAL LAW ENFORCEMENT AGENCIES

An FBI office noted a trend to exclude Agents working organized crime matters from key intelligence meetings in their area. Several state law enforcement officers have mentioned a concern for the security of information in connection with Freedom of Information-Privacy Acts (FOIPA) disclosures as the reason for the closed meetings. The office undertook efforts through meetings with state and local law enforcement agencies to improve their understanding of the FOIA and PA legislation. These efforts have not met with complete success.

*

The Attorney General for a certain state has advised he intends to follow a policy concerning the release of state records to be in conformity with the FOIPA. Consequently, in applicant background investigations, state police arrest records concerning relatives of applicants are not made available to the FBI.

*

Due to the FOIPA, difficulty has been experienced on several occasions in obtaining information from a certain police department. Some officers have stated their reluctance to make information available concerning subjects of local investigation because of these Acts. The organized crime control bureau and the intelligence division of the police department have expressed concern over the FBI's ability to protect sources of information.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In a civil rights investigation in which the subject was a former employee of a law enforcement agency, the head of that agency advised subject's personnel file contained several previous complaints concerning his alleged brutality. However, the agency refused to make the personnel file or information contained in it available to the FBI, out of fear the subject would have access to this information under the PA.

*

In a recent civil rights investigation, an effort was made to obtain a copy of a police department report of the victim's death. Local authorities would make the report available for review but declined to provide a copy for inclusion in the FBI's investigative report. Anticipating a civil suit would be filed against the city and police department arising from the victim's death, they questioned the ability of the FBI in view of the FOIA and PA to maintain the local report in confidence.

*

A representative of a certain police department intelligence division has stated he is very reluctant to furnish information regarding possible domestic revolutionaries. He is fearful such information could inadvertently be released pursuant to the FOIPA.

*

A detective of a prosecutor's office was contacting his local sources relative to the whereabouts of a former resident who was a Federal fugitive charged with murder. The detective said his sources and contacts in the Cuban community were reluctant to provide information in this case or others because of the fear of disclosure under the FOIA.

The following letter was written by the Chief of Police of a major city:

"With respect to FBI files being made accessible to persons or organizations pursuant to the Privacy Act or the Freedom of Information Act, I request that all investigative records of information, from whatever (deleted) Bureau of Police source (including the (deleted) Police Bureau as an organization, its employees, etc.), in your files be protected and kept confidential.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"If such protection cannot be assured to this organization by the FBI, we will only be able to cooperate in the exchange of non-sensitive, non-confidential information. The (deleted) Bureau of Police would not be able to pass on sensitive information to the FBI without this assurance of confidentiality, and the effectiveness of the working relationship between our organizations would be greatly diminished."

*

A chief of police stated in the early part of 1977, that if any information is released by Federal law enforcement agencies as a result of a request under the FOIPA, which indicated that the source of information was his police department, he would no longer allow his department to furnish information to any Federal law enforcement agencies.

*

A representative from the criminal conspiracy section of a certain police department has stated his section is very reluctant to discuss information concerning possible intelligence operations. The representative stated he feared this information could inadvertently be released by the FBI to an individual pursuant to an FOIPA request.

*

In civil rights matters, officers of a certain police department have been cautioned by their departmental attorneys that, when interviewed as subjects by FBI Agents, they should respectfully decline to furnish any information based on the 5th Amendment. They have been cautioned further that any statement they do make to the FBI would be subject to disclosure under the FOIPA.

*

Two police departments in a certain state will not share their informants and, more importantly, a substantial amount of their informant information on Federal violations, for fear an informant will be disclosed accidentally by the FBI through a request in connection with the FOIPA.

*

It has been observed the exchange of information among local police, state and Federal investigators at the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

monthly meetings of a police intelligence organization has decreased substantially. Because of uncertainty over what information may meet FOIA or PA disclosure criteria, there is very little information exchanged at these meetings.

*

Since the spring of 1976, a southern office of the FBI has encountered an express reluctance by a police department and a sheriff's office's intelligence unit to cooperate in furnishing written information to the FBI on security, as well as criminal, matters. A member of the intelligence unit stated that, despite past FBI assurances that all intelligence information would be considered confidential, it had been learned a former black activist, who had made an FOIA request to the FBI was furnished a copy of an intelligence report previously furnished to the FBI by the police department. Although this document did not reveal the identity of any informant, that local agency advised it had no choice but to decline to furnish further written information to the FBI, in order to prevent this situation from arising again.

*

In the course of a fugitive investigation, an FBI Agent was denied information contained in city employment records, due to the PA. Subsequently, the Agent was able to obtain these records through a Federal search warrant which was served on City Hall. However, because of delays required to obtain the search warrant, the Agent missed apprehending the fugitive at his place of employment.

B. FOREIGN LIAISON

In recent conversations with two members of a foreign police agency in an investigation concerning copyright matters, these officers stated they did not furnish all information to the FBI as they had in the past, due to the FOIA.

*

On April 11, 1978, an individual who has some contact with foreign police department officers declined to actively assist the FBI because of the fear of seeing his name in the newspapers. He advised the promise of confidentiality by law enforcement in today's political environment is worthless.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

A citizen who has close contact with a foreign police agency discontinued his association with the FBI because he feared that, under the FOIA, information might be released which would identify either himself or this foreign police agency.

*

In the past two years, several Agents have had contact with foreign police representatives visiting the United States. These representatives have come from Western countries, some of which have experienced internal problems with terrorism. These police representatives generally offered the observation that, despite their high regard for the reputation and professionalism of the FBI, they believed (one said it was sadly amusing) all of the fine efforts of the FBI are sometimes diluted, if not negated, when the investigative results have to be furnished under the FOIPA to subjects of investigations. This same dismay over restrictions on the FBI was relayed by a person who traveled to another foreign country and visited that country's national police force.

C. ABILITY OF LAW ENFORCEMENT PERSONNEL TO OBTAIN INFORMATION FROM THE GENERAL PUBLIC

1. AIRLINES

In an FBI case an airline company accepted a stolen check for airline passage. As their computers indicated to the ticket agent the check was stolen, the airline refused to issue the ticket which had been completed by the ticket agent. During the course of FBI investigation, the airline was requested to surrender the completed but unused ticket as evidence; however, the company declined to make the ticket available to the FBI due to the FOIPA.

2. BANKS

Citing the PA, a large bank would not make available details of a particular financial transaction without a subpoena, although the bank was the vehicle in a possible 2.2 million dollar fraudulent Interstate Transportation of Stolen Property transaction.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

A former president of another bank obtained loans using fraudulent financial statements. The former employee's bank would not make available to the FBI the personnel file, the loan file, or the results of the internal audit regarding the president's activities, based on the PA. This information was not available from other sources.

*

During an investigation concerning the disappearance of $1,000 from a bank, investigating Agents contacted a senior vice president to request background information on a particular suspect bank employee. The vice president advised that, due to recent Federal and state privacy legislation, he could not furnish personnel information concerning this employee, as he feared the employee might then have grounds to file a lawsuit for invasion of privacy.

*

In an investigation involving false statements to an estimated 50 to 65 banks resulting in 3.8 million dollars in lawsuits, an FBI office served a subpoena for bank records on a bank and made request to interview bank officers who had been personally contacted by subjects. The bank, a victim of the scheme, would not permit the requested interviews without additional subpoenas directed to the officers involved. By way of explanation, the bank advised the PA prevented discussion of any information concerning a bank customer without subpoena.

*

A certain bank was the victim in a Bank Fraud and Embezzlement - Conspiracy case. Losses suffered in this case were approximately $476,000. Bank officials advised that under bank policy, which was based on the FOIPA, they would furnish no information to the FBI without a subpoena duces tecum.

3. <u>HOSPITALS AND PHYSICIANS</u>

In an applicant investigation a waiver was provided the FBI to obtain medical records concerning hospitalization at the health center of an educational institution. The school physician refused to provide any information either to the FBI or to the applicant, even

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

after the latter personally went to the health center to sign a second waiver drawn by the school. The office of the school president advised refusal to release information was due to the PA.

*

An individual identified as operating a check-kite scheme with banks in several states had been hospitalized. Investigation determined this individual had initiated his check-kite scheme from a hospital telephone. Nevertheless, hospital officials, citing the FOIPA, refused to verify his hospitalization or dates of confinement.

*

In a fugitive case, an FBI Agent attempted to obtain background data on the fugitive from a private hospital where he had been a former patient. Hospital officials expressed the belief that Federal privacy law inhibited them from verifying the subject's status as a former patient, much less releasing background information on him.

4. HOTELS

A hotel which is a part of a large nationwide hotel chain refused to furnish information on guests, including foreign visitors, without a subpoena due to the enactment of the FOIPA.

*

During a fugitive investigation of a subject wanted by Federal and local authorities for extortion and firearms violations, an Agent contacted the security officer at a hotel. The purpose of this contact was to develop background information on a former employee of the hotel, an associate of the fugitive, who had knowledge of the fugitive's current whereabouts. Security officials at the hotel refused to furnish any information from their files without a subpoena because they felt they were open to civil litigation under the provisions of the PA.

*

Numerous hotels and gambling casinos in the State of Nevada, which would formerly furnish information from their records on hotel guests and gambling customers during

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

routine investigations, now require a subpoena before they will release any information to the FBI. The reason given by hotel officials is for hotel protection, in the event of a lawsuit following an FOIPA release to these subjects of investigation.

5. INSURANCE COMPANIES

Information submitted to Medicare through an insurance company, which would show Medicare fraud perpetrated by the staff of a hospital, was withheld by the company, citing the PA. It was necessary to obtain a Federal Grand Jury subpoena for the desired information.

*

In the field of arson investigations, major insurance companies and the Fire Marshal Reporting Service have stated they will provide no information to Federal law enforcement agencies except under subpoena. They advise their legal departments believe this position is necessary for protection against civil suit, in the event of an FOIPA disclosure.

*

In a Racketeer Influenced and Corrupt Organizations investigation involving numerous subjects in an arson-for-profit scheme in which insurance companies are defrauded after the insured property is burned, at least 15 insurance companies, numerous insurance claims adjusting firms, and insurance agents have refused or have been most reluctant to furnish files regarding losses and coverage because of the universal fear that the information furnished could be obtained by the insured in an FOIPA disclosure which the insured might use against the insurance company or firm in a civil suit. FBI recourse has been the obtaining of Federal Grand Jury subpoenas to obtain the desired information, which in every instance caused delay in the investigation. Many of these firms cited widespread news publicity resulting from FOIPA disclosures as cause for their total lack of confidence in the FBI maintaining any information confidential.

6. LEGAL PROFESSION

On May 5, 1977, a nationally known U. S. District Court judge refused to be interviewed on an applicant matter because he wanted any information furnished about the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

applicant to remain confidential. It was the judge's opinion the FBI could not prevent disclosure of this information at a later date to the applicant under the PA.

*

In response to an FBI inquiry concerning an applicant, a former Assistant United States Attorney (AUSA) confided that significant information, meaningful and derogatory, would not be forthcoming concerning the applicant because of the FOIPA. When pressed by the FBI Agents upon this point, the former AUSA stated that he would counsel his clients not to furnish the FBI with derogatory information in applicant-suitability matters.

*

During an investigation in March, 1978, by a mid-western FBI office, private attorneys were interviewed concerning the qualifications of a candidate for a Government position. These private attorneys initially declined to furnish derogatory information in their possession concerning the candidate, in view of the provisions of the PA. They did furnish pertinent information on a promise of confidentiality, and it is unknown what information they withheld due to fear of the effect of the PA.

*

A Federal district judge was interviewed in a background investigation concerning a departmental applicant. The judge stated he did not feel that the FBI could provide confidentiality concerning his statements. He declined to furnish candid comments concerning the applicant and stated he did not wish to be interviewed concerning any FBI applicant investigations in the future.

*

A prominent attorney was contacted concerning an applicant. He indicated he was in a position to furnish uncomplimentary information concerning the applicant, but advised the interviewing Agent that due to the FOIPA he would not do so. Thereupon, he furnished a brief, neutral commentary.

*

In connection with a suitability investigation concerning a nominee for U. S. district judge, two attorneys

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

contacted in July, 1976, expressed extreme reluctance to furnish their true opinion regarding the qualifications of the candidate. They indicated they were fearful that, should the candidate be appointed to a judgeship and later learn of their statements, he would find a way to punish them professionally through his position. The attorneys eventually provided their comments after receiving an express promise of confidentiality; however, there is no assurance that they were as candid as they might have been.

*

In a recent background investigation conducted pertaining to a Federal judgeship, one attorney contacted advised he had derogatory information concerning the judicial candidate. However, he declined to furnish this information to the FBI stating he felt the information would eventually be disclosed to the applicant under the PA. He felt that, if this disclosure ever occurred, he would be unable to practice before the applicant's court.

7. NEWSPAPERS

In a Corruption of Public Officials case, consideration was being given for change of venue to another city. The local FBI office was requested to review newspaper clipping files to determine the amount of publicity the corruption matter had received. On April 10, 1978, a newspaper editor advised that, in light of the FOIPA, no information from newspaper clipping files would be made available to the FBI except upon service of a subpoena.

8. POLITICIANS

Recently in a southern state, the state chairman on one of the state's two major political parties was interviewed regarding a presidential appointment. This individual was advised of the provisions of the PA at the outset of the interview and requested confidentiality. He made one or two statements of a derogatory nature and then requested that these statements be disregarded. He advised that, although he was aware his identity could be protected under the PA, he was not confident this protection would be effective. After the above statement, the interviewee would provide only a general statement regarding the appointee's honesty and terminated the interview.

*

56-940 O - 80 - 9

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In a southwestern state, a highly placed political figure offered to furnish information to the FBI concerning a multimillion dollar act of political corruption. The information was never received because the Agent could not guarantee that his identity would not later be inadvertently disclosed through sophisticated querries sent to the FBI through the FOIA. This source feared that the adversary in this matter could collect pieces of information from the FBI through the FOIA, then assemble the information, possibly using a computer and identify the source.

*

During the course of a public corruption investigation, the interviewing Agent in a southern office detected reluctance of witness police officers to provide complete information, subsequent to a discussion of the FOIPA. It was the opinion of the interviewing Agent this reluctance was based on apprehension by the police officers this information could be made available to the subject, a trial judge before whom the police officers frequently appeared.

9. PRIVATE COMPANIES

During a routine investigation, a Special Agent sought the cooperation of a company personnel manager to determine the subject employee's residence from company records. Citing the restrictions of the PA, the personnel manager would neither confirm the subject's employment with his company nor provide any background information.

*

During a recent national security investigation involving a possible Foreign Agents Registration Act violation, a lead was set out to interview the owner of an electronics firm regarding the purchase of loudspeakers and other electronics used by foreign nationals in a public demonstration. The owner of the electronics firm refused to disclose this information unless a subpoena was issued, stating he feared the customers who rented his equipment might learn of his cooperation, under the FOIPA, and bring a civil action against the electronics firm for breach of confidentiality.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In connection with bank fraud matters being investigated in a certain city, an auto dealer refused to furnish time cards of employees because he would violate the PA.

*

Because of the FOIPA, the policy of an oil company limits the type and amount of information that the company will provide to the FBI regarding an applicant for employment. The personnel clerk for that company advised that, even when an applicant has executed a waiver form, the only information the company will furnish regarding the applicant's employment is as follows: verification of employment, dates of employment, position and salary.

*

During the course of an investigation, Agents sought to review employment records at a department store and were advised that employment records were no longer available because of the PA. Agents also attempted to secure information concerning the subject from two other stores and were advised that this information was not available without a court subpoena.

*

In an investigative matter regarding an electronics company, a former employee of the company, who was a principal witness, became fearful that he would be sued by the subjects of the investigation and the company if he provided information to the FBI. He was reluctant because he believed this information would be available through the FOIPA; if the criminal allegation was not ultimately resolved in court, he feared he would become civilly liable. On several occasions, this witness asked what his civil liability would be and expressed reluctance in providing information of value to the investigating Agent.

*

Another investigative matter was based on information furnished by businessmen in a small town. When they initially furnished the information, these sources asked that they not be called upon to testify. Being businessmen in a small town, they expressed fear the information they provided would be used against them and harm their businesses. When these sources learned information which they furnished

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

might be obtained through the provisions of the FOIPA by the investigation subjects, they stated they would not furnish any further information to the FBI.

*

In a fugitive investigation, information was developed that the subject was a former employee of an oil company. When contacted, the oil company management declined to furnish any background information from their personnel files concerning subject's former employment. The stated reason for not furnishing this information was concern for possible future company liability should the fact of FBI cooperation become known to the subject under the FOIPA.

10. PRIVATE LENDING COMPANIES

An Equal Credit Opportunity Act case involved a limited investigation based on a Department of Justice memorandum which directed that 14 former employees of a loan company be identified and interviewed. Citing the PA, the loan company's legal counsel declined to identify to the FBI the 14 former employees. Instead, he had his current employees make personal contact with these 14 individuals to request their permission to release their names to the FBI. This indirect process delayed the investigation for a one-week period. The company was also asked to release loan applications of certain individuals who had been granted loans within the past 18 months. On the basis of the PA, the loan company declined to release these financial documents.

11. PUBLIC UTILITIES

During a recent security investigation, a lead was set forth requesting utility checks to be made to obtain information regarding certain individuals. Officials of a utility were contacted and advised that checks of their records would not be possible due to the provisions of the PA.

*

A local security office of a telephone company referred an illegal telephone call case to an FBI resident agency. However, the company refused to furnish any data concerning the principals involved in the violation without a subpoena for telephone company records.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In a fugitive investigation, an FBI office was given reliable information concerning the nonpublished telephone number of the fugitive's location on the Christmas holiday. The FBI holiday supervisor tried in vain to obtain the location of the number from various officials at the telephone company and the fugitive was not apprehended. The company insisted a subpoena was needed, based on FOIPA considerations, before this type of information could be released to the FBI.

12. QUASI-LAW ENFORCEMENT

The disciplinary board of a state supreme court advised that, because of FOIPA considerations, all requests for information by the FBI must be in letter form and a release authorization signed by the applicant must be enclosed with the request letter. It was intimated that a written request might not elicit all information if the disclosure could cause difficulties for the board.

*

An association will no longer provide any information to law enforcement agencies or investigators unless served with a subpoena. This association has in the past assisted the FBI in coverage of aspects of the racing industry. The association has advised its current restrictive policy is the direct result of FOIPA legislation.

13. TRAVELER'S AID

A kidnapping case involved a 65-year-old victim who had been brutally beaten, stabbed and left for dead in a rural area of one state. The victim could only provide nicknames for the kidnappers. Investigation revealed that the subjects had attempted to gain transportation from the Traveler's Aid Society. The Society, after being advised of the urgency of the matter, nevertheless refused to supply information on December 20, 1977, from records which would identify one of the subjects and possibly reveal the whereabouts of both subjects. This information was subsequently obtained the next day by subpoena duces tecum and teletyped to an FBI office within a few hours after receipt. Both subjects were arrested in another state on December 26, 1977. However, a few hours prior to the arrest, one subject shot and killed an individual in that other state.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

14. UNIONS

On alleged privacy grounds, an international union will no longer provide information to law enforcement agencies unless served with a subpoena.

*

During the course of a Racketeer Influenced Corrupt Organizations case involving certain union members and company officials, the investigating Agent contacted nonunion employees concerning alleged harassment by union members and the firing of several rifle shots at nonunion members. A prospective witness to a particular incident declined to furnish any information to the FBI, on FOIPA grounds, stating that, "the Government just can't keep a secret anymore."

*

In a similar FBI case, a labor union official refused to furnish information to the FBI. He claimed he would have no confidence in the security of his information in view of the ability of individuals to obtain their files under the FOIPA.

15. WESTERN UNION

During the course of an investigation to locate and apprehend a fugitive, a Special Agent and a cooperating witness attempted to obtain information from a Western Union office, concerning a telegraph money order and message sent to the cooperating witness from the subject. Employees at the Western Union Company advised they could not disclose any information regarding the money order or message, due to "privacy concerns," without a court order.

16. MISCELLANEOUS

In an investigation regarding an escaped Federal prisoner, a man telephoned an FBI office and advised he knew the location of the fugitive. The caller stated he was concerned that the fugitive would find and kill him if he furnished the FBI the information. The caller was given assurances that his identity and any information he gave would be considered confidential. The caller refused to give his name, specifically stating, "I know about the FOIA. Anything I tell you guys will get back

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

to him." When asked the location of the fugitive, the caller stated he was in a motel on a certain street and then hung up the phone. After contacting numerous motels on that street, the fugitive was located and apprehended.

*

In a bank robbery investigation a high school student was identified as a suspect. When officials at the high school were approached in an attempt to obtain necessary information concerning the suspect (descriptive data, address, whereabouts, etc.), the officials declined to furnish the information due to the FOIPA. After the loss of precious time, the school principal was finally convinced that the student posed a threat to the community, in view of the fact he was armed and probably desperate. He eventually provided the information and the student was arrested.

*

During the course of another bank robbery investigation a warrant was obtained for a female subject. The investigation determined the subject had applied for a job through the state unemployment office. That office refused to provide any information, advising it was protected by state and Federal privacy acts. It was necessary to obtain a subpoena to force the unemployment office to disclose the requested information. During the period of time between the service of the subpoena and its return, the subject committed another bank robbery. The FBI believes that if the information had been disclosed at an earlier time, the second bank robbery would not have occurred, as the subject would have been arrested more promptly.

*

One FBI office received information from an AUSA indicating a woman had information concerning ghost employees and other frauds within the Comprehensive Employment and Training Act (CETA) program. When contacted, the woman refused to be interviewed because she feared that her identity might be disclosed through an FOIPA request.

*

Two individuals in a position to furnish important information regarding a series of train wrecks refused to do so because they feared the FOIA would force the FBI to reveal

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

their identities. This attitude existed even after assurances were given by the Agents regarding the FOIA.

D. <u>IMPACT ON CURRENT INFORMANTS OR POTENTIAL INFORMANTS RESULTING FROM PRESENT FOIPA DISCLOSURE POLICIES</u>

Three individuals were separately contacted in an effort to obtain their cooperation in organized crime matters. Each of these individuals advised the contacting Agent they felt their confidentiality could not be maintained due to current FOIA legislation. It is believed these individuals would have been cooperative had they not feared the FOIA and they would have been valuable FBI informants. Because of the wide publicity which the FOIA has received, these individuals were well aware of the public's ability to gain access to information in FBI files.

*

Shortly after a skyjacking began, an unidentified caller stated to a Special Agent that he was a medical doctor and that the skyjacker was probably identical to an individual who was an outpatient at the psychiatric clinic where the caller was employed. He stated the individual was schizophrenic and was dangerous to himself and to other persons. The caller suggested that a psychiatrist should be available during all negotiations with the skyjacker. The caller's identity was requested since he was obviously knowledgeable concerning the skyjacker and could furnish possible valuable information in an attempt to have the skyjacker peacefully surrender. Despite the fact that several lives were in jeopardy, the caller stressed that he was unable to furnish his name because of FOIPA requirements and terminated the call. Because of this telephone call, the FBI did have a psychiatrist available during negotiations with the skyjacker (who had been correctly identified by the caller) and the skyjacker's surrender was accomplished without loss of lives or property.

*

For approximately three years, a telephone caller known to the FBI Agent only by a code name furnished information in a wide variety of cases, from drug-related matters to terrorism. The caller never identified himself and advised he could never testify since to do so would risk death. The caller finally terminated his relationship, expressing fear that an inadvertent release of information by the FBI, under the FOIA, might identify him.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

An individual in a position to know information about an FBI subject stated to a Special Agent that she would not furnish any information lest it and her identity appear in the newspapers. She made reference to information which was being published in the press as a result of an FOIPA request.

*

An Agent was recently in contact with an individual believed capable of providing reliable direct and indirect information regarding high-level political corruption. This individual advised his information would be furnished only if the contacting Special Agent could guarantee that the individual's identity would never be set forth in any FBI files. The contacting Agent attributed this individual's reluctance to have his identity set forth in FBI files to a fear of the FOIPA and its effect on the FBI's ability to maintain confidentiality of information from informants.

*

In August, 1976, an FBI field office contacted a source to determine why he was not now providing the FBI with information as he had been in the past. This source replied that he was in fear of losing his job and of retaliation by individuals about whom he might furnish information. The source asked if the FBI could guarantee the confidentiality of his relationship and of the information he furnished. He stated he was particularly concerned about confidentiality in light of the FOIA. In view of his apprehensions, this individual is no longer being contacted by the FBI.

*

A particular organized crime case involved an investigation to identify male juveniles being transported interstate for homosexual activity. Due to fear of reprisals stemming from FOIA disclosures and PA problems, various school officials would not cooperate in the investigation to verify the identity of the juveniles. In the same case, prominent citizens in a community displayed reluctant cooperation with the FBI out of fear of FOIA disclosure.

*

A potential source advised he would not cooperate with the FBI due to fear his identity would be publicly revealed, which would be detrimental to his profession.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

This potential source referred to news accounts in the local press regarding material made available under the FOIA, which had disclosed the names of several individuals in professional capacities who had assisted the FBI and the nature of their assistance. This type of publicity, according to the potential source, would be detrimental to any individual in business who elected to cooperate with the FBI.

*

A Special Agent advised that an individual in a high management position in a state agency wished to provide information to the FBI on a confidential basis. During one of the Agent's initial conversations with this source, confidentiality was requested, specifically that the source's name never be mentioned in FBI files due to "past legislation, FOIPA, etc." This person was in a position to furnish information concerning white-collar crime and political corruption; however, the potential source subsequently refused to cooperate with the FBI, in spite of the Agent's assurances.

*

An FBI office has had success in developing a number of valuable informants from a group of loanshark victims. Recently, upon interview, several of these individuals stated a desire to cooperate, but have refused to do so for fear of the subjects of the investigation learning their identities through an FOIPA release.

*

A criminal informant, who furnished very significant information in an automobile theft ring case, advised he feared for his life after reading in various newspapers of disclosures made under the FOIPA. As a result, this source will no longer furnish information which is singular in nature.

*

Several attempts have been made to reactivate a former source, who had been extremely cooperative and productive. Current attempts to persuade the source to once again aid the FBI have been negative. The former informant refuses to cooperate, as he believes his identity cannot be kept secure due to FOIPA disclosure policy.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

An informant was recently closed inasmuch as the source advised he believed the FBI could not efficiently protect the confidentiality of his relationship and his identity, due to the FOIPA. This source has previously provided excellent information regarding gambling and organized crime. He stated that he is afraid, if his name ever surfaced as providing information to the FBI, he would lose his business and everything he has worked for in his life.

*

In 1976, an active informant stated he would no longer continue in that capacity because it was his belief, as a result of the FOIPA, his identity and confidentiality could no longer be protected.

*

In an Interstate Transportation In Aid of Racketeering investigation, an individual was successfully developed as a potential source of information concerning racketeering and political corruption. However, upon learning of the provisions of the FOIPA, this individual requested that his conversations not be recorded and refused further cooperation.

*

Another field office informant related a conversation which occurred between himself and several organized crime figures. One individual commented that within the next few years the FBI will be severely restricted in its efforts to obtain information from confidential sources. He stated that he fully expected the provisions of the FOIPA would be successfully utilized in identifying FBI informants. Agents subsequently contacting this valuable source have noted a subtle reluctance on his part to more fully penetrate the particular organized crime activities which he is in a position to cover.

*

An FBI office in a major city has received information from several reliable informants that most organized crime members in the area have been instructed to write to FBI Headquarters requesting file information pertaining to themselves. These informants have advised the sole purpose of this process is to attempt to identify informants who have supplied information to the FBI on organized crime

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

matters. Requests have been submitted by virtually every organized crime figure in the area.

*

An informant who has a great deal of knowledge concerning a violent group is reluctant to furnish information on the gang because of the FOIPA. He has considerably reduced the amount of information he furnishes to the FBI.

*

An informant who has furnished considerable information concerning a terrorist organization advised that he is very upset about the FOIA. He has learned through conversations that former and current extremists are writing to FBI Headquarters under the FOIA in an effort to identify and expose informants. The informant indicated he is apprehensive about the Bureau's ability to properly safeguard information furnished by him.

*

A long-time confidential informant stated, "I can't help you any more due to the Freedom of Information Act." This informant had previously furnished valuable information which led to arrests and recovery of Government property. Even though the promise of confidentiality was explained to the informant, he still refused to furnish further information.

*

A former informant regularly furnished information resulting in recovery of large amounts of stolen Government property and the arrest and conviction of several subjects. In a pending case, the former informant refused to cooperate because of his fear of the FOIPA, which he felt would in fact jeopardize his life should he continue cooperating with the FBI.

*

In January, 1978, an office of the FBI received information one prime bombing suspect was applying under the FOIA for his file. Sources close to the suspect advised he was seeking to discover the FBI's knowledge of his activities and the identities of Agents who were investigating him.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In a western field office, a former highly productive confidential informant advised that he did not feel secure, due to widespread publicity concerning FBI informants and the FOIA legislation. He stated that, although he continued to maintain his confidentiality regarding his relationship with the FBI, he was not sure that the FBI could do the same. Due to this source's feelings, he discontinued all contact with the FBI.

*

An informant furnished information concerning organized crime figures and on organized crime conditions. Subsequently, the source acquired the conviction that no guarantee could be given that his identity would be protected. Accordingly, the source declined to furnish any further information to the FBI.

*

The Drug Enforcement Administration (DEA) was advised that an informant of one FBI office might be in a position to provide timely information concerning large narcotics shipments, in exchange for a reward from DEA and the guarantee of confidentiality. A local representative of DEA responded that confidentiality could be guaranteed by DEA only in instances where the informant was operated by DEA as a source. DEA reward money could be paid to any individual supplying information; however, the true identity of an FBI source would be reflected in DEA records for such payment. The FBI source was advised of the results of the inquiry with the DEA. The source subsequently furnished the identities of the drug subjects of which he had knowledge. This information was disseminated to DEA. However, the source declined to have further contact with these subjects, for fear his identity would be made known at some later date under an FOIA request to DEA.

*

An FBI informant is well connected to the organized crime element. Over the past year the informant's productivity has dramatically decreased. Consequently, this decrease was discussed with the informant, who stated that he had begun to doubt the FBI's ability to protect the contents of its own files and information provided by its informants. He had learned that an organized crime figure had received over 300 pages of FBI documents and was unquestionably trying to identify informants.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

The criminal informant coordinator of a northeast office has been told by an individual, who would potentially be an excellent source of criminal information on the waterfront, that even though he had cooperated with law enforcement personnel in the past he would never do so again. He stated that he was afraid that one day, as the result of FOIPA, he might "see his name in the newspaper."

*

An informant who has been furnishing information to Special Agents of the FBI since 1953, regarding gambling, prostitution, stolen goods, and criminal intelligence information, when last contacted by an Agent, indicated he would no longer furnish any information to the FBI due to the fact it could be disclosed under the FOIPA. The informant felt his personal safety could be jeopardized by the disclosure of his identity, and he no longer wanted to take the personal risk and provide information regarding criminal activities.

*

An organized crime informant has expressed great concern over his safety due to the recent disclosure of information released under the FOIPA. A Special Agent has advised that he believes the informant will terminate his relationship with the FBI because of his concern.

*

A confidential source stated he was fearful his name would become known to certain individuals. He cited their possible access through FOIPA requests to the information he has provided. The source became unproductive and contact with him was discontinued.

*

A confidential source advised that "general street talk" was that one should not provide information to the Government since this information would eventually be publicized as a result of the FOIPA.

*

A long-time informant announced that he felt his confidentiality could no longer be guaranteed and refused to furnish further information. Provisions of the FOIPA were explained to the informant, particularly relating to

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

disclosure of informants and informants' information; however, this informant still wishes to sever contacts with the FBI.

*

Agents recently contacted a former criminal informant who associated with several individuals currently under investigation. The source, who displayed knowledge of the FOIA, expressed extreme concern of the disclosure provisions. The two Agents spent approximately one-half hour discussing this with the source. Both Agents were of the opinion that the FOIA prevented them from obtaining details of value.

*

An asset advised that, while talking with an individual who is a known intelligence officer of a foreign country, he was advised that certain officials of that country were using the FOIA law to obtain information from the files of the FBI and other agencies through intermediaries. The official expressed some humor over the fact that such information is available.

*

An individual, who is in a position to furnish possible foreign counterintelligence information, expressed the opinion the Federal Government could not protect his identity in view of the constant scrutiny by Congress of the FBI and CIA and the subsequent news media leaks. This individual also stated he would be fearful that his identity would be revealed through access to records by the public under the FOIA, as well as extensive civil discovery proceedings exemplified by the Socialist Workers Party civil lawsuit. In addition, this individual expressed concern over former intelligence agency officers who were publishing books, possibly jeopardizing the confidentiality of sources.

*

In another FBI security investigation, an individual was located who was in a unique position to act as an operational asset in foreign counterintelligence activities. While willing to assist the U. S. Government for patriotic reasons, this individual felt his identity might be revealed under the FOIPA. He therefore felt compelled to report a

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

pending highly sensitive undercover operation concerning national security to his employment supervisors, thereby jeopardizing that most sensitive operation.

*

An informant expressed deep concern over security and possible disclosure of his relationship with the FBI, noting recent instances in which FBI sources had been identified in the press. The informant, who had provided critical information for many years in matters of the highest sensitivity, requested that his relationship with the FBI be terminated and that his name be deleted from the FBI records.

*

One informant is a well-known and highly respected individual with many dealings with certain foreign countries. The informant has repeatedly voiced concern over possible disclosure of his identity through the FOIA. The source has now requested that all contacts be minimized in frequency and duration, that all information furnished be paraphrased, that his real or code names never be used, and that access to his information be severely restricted within the FBI. It has become apparent also, that while the informant's dealings with certain foreigners are known to have increased, the frequency of his FBI contacts, the length of these contacts, and the amount of substantive information furnished have declined.

*

A former source of excellent quality was recontacted, since his background was such that he could develop information of value concerning a terrorist group. After three hours of conversation, the former source agreed to cooperate with the FBI but only in a very limited manner. He stated that due to the FOIA he no longer believes that FBI Agents can assure his complete protection. He made it clear that he will never again function as he had previously in behalf of the FBI, noting that disclosure of his identity would most assuredly cost him his life.

*

An individual who has requested his identity be protected and who has provided information pertinent to a suspected foreign government intelligence officer, has also expressed concern pertinent to revelation of his

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

identity as furnishing information to the FBI. This individual querried the Special Agent involved in the investigation as to whether his identity could be protected and stated that he was concerned because of future business dealings with certain foreign countries. He felt that should his identity become known to foreign government officials, it would cause damage to his business relationships. Because of the above, this individual stated that he did not wish to be contacted on a regular basis by the FBI.

*

In September, 1977, a former Special Agent advised an FBI Agent that an informant had contacted him upon learning that an FBI subject had obtained documents under the FOIPA. The informant expressed the fear that his identity as a confidential source against this subject would be revealed. This subject was trying to identify individuals who had provided information to the FBI concerning his activities.

*

In a western FBI office, an individual was contacted in a recent foreign counterintelligence investigation, as he was in a position to furnish valuable information on a continuing basis regarding the subject. Although this potential source displayed an otherwise cooperative attitude, he stated he would not furnish information for fear his identity might be revealed at some future date due to provisions of the FOIA.

*

Members of an organization dedicated to bringing about a movement based on Marxism-Leninism, recently discussed the FOIA. A decision was reached to direct inquiries to both the FBI and the CIA under provisions of the FOIA requesting information concerning the organization. It was anticipated that a comparison of information concerning individuals, including dates, times and activities, would identify informants in the organization.

*

In 1976, a most valuable and productive FBI informant ceased his activity in behalf of the Bureau. His reason for this decision was his concern over the FOIA, which he believed offered the distinct possibility of

56-940 O - 80 - 10

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

disclosing his identity as an informant. This source provided coverage on two major subversive- and/or violence-oriented groups of investigative interest.

*

Recently an informant, who is furnishing information regarding certain foreign visitors to the United States, expressed great concern over the possibility of his identity being disclosed. The source stated that he recently read in a local newspaper that foreign visitors could gain access to FBI records through the FOIPA.

*

A businessman was being approached by an intelligence officer of a foreign government. Upon interview by the FBI, the asset stated that were it not for the FOIPA, he would be willing to be operated against this and other hostile intelligence officers. However, because of FOIPA, he felt a real danger that his identity would be divulged which would in turn seriously and detrimentally effect his business overseas. For this reason, asset has refused to become involved in a foreign counterintelligence operation.

*

Since the advent of the FOIPA, numerous documents containing information furnished by an FBI asset of long-standing have been released under provisions of these laws. These releases have had a deleterious effect upon an asset's relationship with the FBI. There has been a noticeable decrease in the volume of information furnished by the asset, who has been frank to state that he no longer has his former confidence that the FBI can maintain the confidentiality of his relationship. On numerous occasions, the asset has expressed reluctance to furnish information which he fears might be released under the FOIA, resulting in his physical jeopardy or leaving him open to civil suit. This asset has not yet terminated his relationship with the FBI, but the relationship is now a very tenuous one.

*

A source who previously furnished information on a timely basis relating to foreign terrorist activities has expressed reluctance to furnish additional information because of the possibility of his identity being exposed due to the FOIPA.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

A southwestern confidential source, who is in a position to furnish information concerning Middle East terrorist matters, advised that he did not desire to continue contact with any representative of the FBI or to furnish information because of fears that his assistance might become known. The source stated that his concern was due to various media articles relating to actual or potential FOIPA disclosure of information furnished confidentially to law enforcement agencies.

*

An informant of one FBI office has expressed concern that individuals about whom he was providing information were requesting their FBI files under the FOIPA. This informant expressed fear for his personal safety and that of his family. This source had in the past provided reliable and corroborating information about individuals who have been convicted of Federal crimes. There has been a recent reduction in amount and quality of the source's information.

*

On several occasions in the recent past, an informant voiced his concern for his safety out of fear that his identity would in the future be revealed under the FOIPA. He stated that when he began assisting the FBI it was his understanding that his identity and the information he furnished would always remain confidential.

E. MISCELLANEOUS (OTHER RELEVANT EXAMPLES)

1. SUITABILITY INVESTIGATIONS

In an applicant investigation, an official of a police department refused to be candid in his remarks pertaining to the applicant in view of the FOIPA.

*

In a recent applicant case, a source expressed concern less he be identified as the provider of derogatory information. He clearly indicated he was aware that the applicant would have access to this information through the PA. Other officers interviewed simply refused to be candid regarding the applicant, due to their awareness that the information might be released to him.

*

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

In a suitability investigation, a local police department refused to make a record check on the applicant's brother without a waiver from the brother, because it was believed there was a possible PA violation.

*

Special Agents have recently observed a general reluctance by local law enforcement officers to furnish derogatory hearsay information in suitability investigations. Members of the law enforcement community have been apprised of the access and disclosure provisions of the FOIPA.

*

A former high official of one city was being considered for a White House staff position. An individual in that municipality refused to comment since he believed the candidate would be able to obtain this information through the PA. The official, who was aware of the Act's provisions, stated he still believed someone in the White House would have access to comments made.

*

During a 1978 Special Inquiry investigation in one city, the interviewee advised he was a business competitor acquainted with the appointee. He inquired as to what degree of confidentiality could be provided if he furnished information regarding the appointee. The PA provisions were explained to the interviewee. This was not a sufficient degree of confidentiality and he would have nothing to say about the appointee.

During the same investigation, a police officer advised he had derogatory background information concerning the appointee. He said he did not want to "go on record" with the FBI concerning this information in view of the PA. He stated that he considered the information so pertinent that it required his direct contact with the Congressional Committee, which had requested the investigation. After receiving the officer's information, the Committee requested the FBI to discontinue the suitability investigation.

2. LAWSUITS

A $600,000 civil suit was filed by a Honolulu plaintiff against a neighbor regarding derogatory information provided the FBI approximately 20 years ago concerning the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

plaintiff in a suitability investigation. The FOIPA request made by the plaintiff allegedly had enabled her to identify the defendant as the source of the derogatory information, which she claimed in her lawsuit was defamatory. The civil action required the defendant to retain private counsel at great personal expense and resulted in personal trauma. The defendant's retained counsel was successful in obtaining dismissal of the suit on the technical defense of "Statute of Limitations." The primary issue of whether or not a person could sue an individual who had provided information to the FBI was not addressed.

*

In early 1978, an employer contacted one FBI office concerning certain derogatory information furnished in 1967, on an employee who was then seeking a position with the White House staff. This individual, who has subsequently made a PA request to the FBI, determined that the former employer had provided derogatory information concerning her, and threatened to sue the employer if correction of this information was not forwarded to the FBI. The employer's written retraction of the previous information was subsequently submitted to the FBI.

*

An unsuccessful applicant for the position of Federal Bankruptcy judge obtained his file under the FOIPA. He subsequently decided that several former employers and law partners had furnished derogatory information to the FBI concerning him. He filed civil suit against these former employers and law partners and also filed an FOIPA civil suit against the FBI.

*

A subject found guilty in a criminal case, subsequently filed a civil action against witnesses who testified against him in that matter. He made several FOIPA requests to discover the identities of additional witnesses whom he may join in his civil suit.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

THE PROPOSED

FREEDOM OF INFORMATION ACT

If our proposals are enacted, the Freedom of Information Act will read as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. This section does not require a law enforcement or intelligence agency to disclose information to any person convicted of a felony under the laws of the United States or of any state, or to any person acting on behalf of any felon excluded from this section.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constitutent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action; but if the court examines the contents of a law enforcement or intelligence agency's records withheld by the agency under exemptions (b)(1), (b)(3), the introductory clause of exemption (b)(7), or exemption (b)(7)(D), the examination shall be in camera. The court shall maintain under seal any affidavit submitted by a law enforcement or intelligence agency to the court in camera.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(6)(A) Each agency, upon any request for records made under paragraphs (1), (2), or (3) of this subsection shall--

(i) notify the person making the request of the receipt of the request and notify the person making the request within 30 days after receipt of the request of the number of pages encompassed by the request and the time limits imposed by this subsection upon the agency for responding to the request; determine whether to comply with the request and notify the person making the request of such determination and the reasons therefor within 60 days from receipt of the request (excepting Saturdays, Sundays and legal public holidays) if the request encompasses less than 200 pages of records with an additional 60 days (excepting Saturdays, Sundays and legal public holidays) permitted for each additional 200 pages of records encompassed by the request, but all determinations and notifications shall be made within one year; and notify the person making the request of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If one appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraphs (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in attempting to respond to the request, the court shall allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records maintained, collected or used for foreign intelligence, foreign counterintelligence, organized crime, or terrorism purposes; or records maintained, collected or used for law enforcement purposes, but only to the extent that the production of such law enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy or the privacy of a natural person who has been deceased for less than 25 years, (D) tend to disclose the identity of a confidential source, including a state or municipal agency or foreign government which furnished information on a confidential basis, and in the case of a record maintained, collected or used by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source including confidential information furnished by a state or municipal agency or foreign government, (E) disclose investigative techniques and procedures or (F) endanger the life or physical safety of any natural person;

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

PROVIDED, however, this section shall not require a law enforcement or intelligence agency to

(i) make available any records maintained, collected or used for law enforcement purposes which pertain to a law enforcement investigation for seven years after termination of the investigation without prosecution or seven years after prosecution; or

(ii) disclose any information which would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity, if the head of the agency or in the case of the Department of Justice, a component thereof, certifies in writing to the Attorney General, and the Attorney General determines, disclosing that information would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record not already in the public domain which contains information pertaining to the subject of a request shall be provided to any person properly requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before December 1 of each calendar year, each agency shall submit a report covering the preceding fiscal year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before December 1 of each calendar year which shall include for the prior fiscal year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(e) For the purpose of this section--

(1) the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

(2) the term "person" means a United States person as defined by the Foreign Intelligence Surveillance Act of 1978;

(3) the term "foreign intelligence" means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons;

(4) the term "foreign counterintelligence" means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons;

(5) the term "terrorism" means any activity that involves a violent act that is dangerous to human life or risks serious bodily harm or that involves aggravated property destruction, for the purpose of --

(i) intimidating or coercing the civil population or any segment thereof;

(ii) influencing or retaliating against the policies or actions of the government of the United States or of any State or political subdivision thereof or of any foreign state, by intimidation or coercion; or

(iii) influencing or retaliating against the trade or economic policies or actions of a corporation or other entity engaged in foreign commerce, by intimidation or coercion;

(6) the term "organized crime" means criminal activity by two or more persons who are engaged in a continuing enterprise for the purpose of obtaining monetary or commercial gains or profits wholely or in part through racketeering activity.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

TITLE 28

CODE OF

FEDERAL REGULATIONS

SECTION 50.8

Policy with regard to criteria for discretionary access to investigatory records of historical interest.

(a) In response to the increased demand for access to investigatory files of historical interest that were compiled by the Department of Justice for law enforcement purposes and are thus exempted from compulsory disclosure under the Freedom of Information Act, the Department has decided to modify to the extent hereinafter indicated its general practice regarding their discretionary release. Issuance of this section and actions considered or taken pursuant hereto are not to be deemed a waiver of the Government's position that the materials in question are exempted under the Act. By providing the exemptions in the Act, Congress conferred upon agencies the option, at the discretion of the agency, to grant or deny access to exempt materials unless prohibited by other law. Possible releases that may be considered under this section are at the sole discretion of the Attorney General and of those persons to whom authority hereunder may be delegated.

(b) Persons outside the Executive Branch engaged in historical research projects will be accorded access to information or material of historical interest contained within the Department's investigatory files compiled for law enforcement purposes that are more than fifteen years old and are no longer substantially related to current investigative or law enforcement activities, subject to deletions to the minimum extent deemed necessary to protect law enforcement efficiency and the privacy, confidences, or other legitimate interests of any person named or identified in such files. Access may be requested pursuant to the Department's regulations in 28 CFR Part 16A, as revised February 14, 1973, which set forth procedures and fees for processing such requests.

(c) The deletions referred to above will generally be as follows:

(1) Names or other identifying information as to informants;

(2) Names or other identifying information as to law enforcement personnel, where the disclosure of such information would jeopardize the safety of the employee or his family, or would disclose information about an employee's assignments that would impair his ability to work effectively;

(3) Unsubstantiated charges, defamatory material, matter involving an unwarranted invasion of privacy, or other matter which may be used adversely to affect private persons;

(4) Investigatory techniques and procedures; and

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(5) Information the release of which would deprive an individual of a right to a fair trial or impartial adjudication, or would interfere with law enforcement functions designed directly to protect individuals against violations of law.

(d) This policy for the exercise of administrative discretion is designed to further the public's knowledge of matters of historical interest and, at the same time, to preserve this Department's law enforcement efficiency and protect the legitimate interests of private persons.

/Order No. 528-73, 38 FR 19029, July 17, 1973/

56-940 O - 80 - 11

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

APPENDIX C

RICHARDSON PREYER, N.C., CHAIRMAN
ROBERT F. DRINAN, MASS.
GLENN ENGLISH, OKLA.
DAVID W. EVANS, IND.
PETER H. KOSTMAYER, PA.
TED WEISS, N.Y.

THOMAS N. KINDNESS, OHIO
M. CALDWELL BUTLER, VA.
JOHN N. ERLENBORN, ILL.

225-3741

NINETY-SIXTH CONGRESS
Congress of the United States
House of Representatives
GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-B-C
WASHINGTON, D.C. 20515

April 5, 1979

STATEMENT OF HONORABLE RICHARDSON PREYER

CHAIRMAN, SUBCOMMITTEE ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS

Mr. Chairman, I appreciate the opportunity to briefly outline before the committee this morning the current Freedom of Information Act (FOIA) oversight being conducted by the House Government Information and Individual Rights Subcommittee.

As you know, the Government Information and Individual Rights Subcommittee has legislative and oversight responsibility for the Freedom of Information Act and the Privacy Act of 1974.

On February 28 of this year, the subcommittee held the first of what is expected to be a number of oversight hearings this Congress on the impact of the Freedom of Information Act on the Federal law enforcement and intelligence communities. During this session of Congress the subcommittee plans to take a close look at the procedures used by the investigative and intelligence agencies to protect sensitive records, while complying with the disclosure requirements of the open records acts.

FBI Director William Webster was our first witness, and presented some very useful testimony. Admiral Turner has been extended an invitation to address the subcommittee as well.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Our first hearing was in large part sparked by a letter received by the committee last January 24 stating that "given the resources available, the FBI cannot now, nor in the foreseeable future, comply with the time limits of the Freedom of Information Act" or the Privacy Act regulations of the Department of Justice.

According to Director Webster's letter, it currently takes four to six months for the FBI to answer Freedom of Information Act requests. The Freedom of Information Act's statutory deadlines provide ten working days to reply to citizen document requests, and a maximum of forty working days -- or eight weeks -- to respond to both the initial request and appeal of denial.

Although we have not yet received the CIA's annual FOIA report for 1978, its 1977 report outlined difficulties similar to those recently presented by the FBI in meeting the statutory deadlines.

The Freedom of Information Act was enacted in 1966 and established the general principle that any person should have access to records maintained by Executive branch agencies. Following hearings by the subcommittee in the early seventies, the Act was amended in 1974 to tighten procedural requirements. Time limits were added for the processing of requests, and the seventh exemption of the Act was modified to allow disclosure of certain portions of inactive files of Federal law enforcement agencies. Specific grounds were included to allow the withholding of information that might jeopardize ongoing investigations, and such important concerns as the identity of informants, special investigative techniques, and the safety of law enforcement personnel.

The Central Intelligence Agency, of course, relies very heavily on the first exemption of the FOIA, dealing with classified data, and the third exemption, allowing the public withholding of data covered by certain other

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

specific statutes.

These issues are obviously quite complex and difficult to quantify. Last year the General Accounting Office, at the request of Senator Eastland, was asked to examine the effect of the Freedom of Information Act and Privacy Act on Federal law enforcement. The GAO concluded "it was not possible to accurately document the total impact these two laws have had on the investigative operations of the FBI." The GAO report observed that "Other laws or regulations, administrative policies, and a general distrust of law enforcement agencies may have had as much or more to do with the FBI's difficulties as the FOI/PA [the Freedom of Information and Privacy Acts]."

The Subcommittee on Government Information and Individual Rights spent much of 1977 and 1978 examining an equally difficult area: Freedom of Information requests for proprietary corporate data held by Federal agencies. The committee issued a report last summer entitled "Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits" (House Report 95-1382), recommending a number of administrative procedural reforms to better protect information whose release could result in substantial competitive harm to the submitting company. Following an expected decision by the Supreme Court this term, we will begin consideration of an amendment to the Freedom of Information Act to provide a statutory basis for so-called "reverse FOIA" lawsuits. (A "reverse Freedom of Information Act" suit arises when submitters of data to the government sue to prevent agencies from releasing documents under FOIA.)

Needless to say, the question of proprietary data has involved some delicate balancing of interests, and taken considerable staff resources. As I mentioned at the outset, this Congress this same energy will go into an examination of the law enforcement and intelligence communities' difficulties

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

with the open records and privacy laws.

There are no easy answers to the problems posed by these agencies. No one seems seriously suggesting at this stage in our history that these laws be repealed wholesale. They have played too vital a role in citizen oversight and knowledge of the real contributions and problems of our government. However, the Subcommittee on Government Information and Individual Rights is entirely receptive to realistic proposals to overcome the specific problems these Federal components appear to be encountering. Our hearings and examination will be aimed toward finding those solutions. Any assistance your committee, Mr. Chairman, can provide, would be welcome.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

APPENDIX D

CIA SUBMISSION REGARDING
FREEDOM OF INFORMATION ACT

AMENDMENT TO SECTION 6 OF THE CIA ACT OF 1949

CHANGES IN EXISTING LAW
50 U.S.C. 403g

Changes in existing law are shown as follows: existing law in which no change is proposed is shown in roman; existing law proposed to be omitted is enclosed in brackets; and new matter is underscored.

* * * * *

In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of Section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of [section 654 of Title 5, and the provisions of] any [other] law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency. In furtherance of the responsibility of the Director of Central Intelligence to protect intelligence sources and methods, information in files maintained by an intelligence agency or component of the United States Government shall also be exempted from the provisions of any law which require publication or disclosure, or search or review in connection therewith, if such files have been specifically designated by the Director of Central Intelligence to be concerned with: The design, function, deployment, exploitation or utilization of scientific or technical systems for the collection of foreign intelligence or counterintelligence information; Special activities and foreign intelligence or counterintelligence operations; Investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; Intelligence and security liaison arrangements or information exchanges with foreign governments or their intelligence or security services; except to the extent that information on American citizens and permanent resident aliens requested by such persons on themselves, pursuant to Sections 552 and 552a of Title 5, may be contained in such files. The provisions of this Section shall not be superseded except by a provision of law which is enacted after the date of this Amendment and which specifically repeals or modifies the provisions of this Section. [Provided, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5.]

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

APPENDIX E

Freedom of Information Act

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provisions of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the application time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

APPENDIX F
PRIVACY ACT

Public Law 93-579
93rd Congress, S. 3418,
December 31, 1974

An Act

To amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Act of 1974".

Privacy Act of 1974. 5 USC 552a note.

SEC. 2. (a) The Congress finds that—

Congressional findings. 5 USC 552a note.

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

Statement of purpose.

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

88 STAT. 1896
88 STAT. 1897

SEC. 3. Title 5, United States Code, is amended by adding after section 552 the following new section:

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

5 USC 552a.

"§ 552a. Records maintained on individuals

"(a) DEFINITIONS.—For purposes of this section—

"(1) the term 'agency' means agency as defined in section 552(e) of this title;

5 USC 552.

"(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence;

"(3) the term 'maintain' includes maintain, collect, use, or disseminate;

"(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

"(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

"(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

13 USC 8.

"(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

"(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

"(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

"(2) required under section 552 of this title;

"(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

"(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

"(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

"(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

Personal review.

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

Amendment request.

"(2) permit the individual to request amendment of a record pertaining to him and—

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

"(B) promptly, either—

"(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

Review.

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

Notation of dispute.

"(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

"(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

"(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

"(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information;

Publication in Federal Register.

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

"(A) the name and location of the system;

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system;

"(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

"(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

"(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

"(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

Rules of conduct.

"(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

Confidentiality of records.

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

Publication in Federal Register.

"(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

5 USC 553.

"(1) establish procedures whereby an individual can be notified

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

Fees.

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

Publication in Federal Register.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

"(g)(1) CIVIL REMEDIES.—Whenever any agency

"(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d)(1) of this section;

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

Jurisdiction.

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Amendment of record.

"(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Injunction.

"(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Damages.

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

"(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

"(B) the costs of the action together with reasonable attorney fees as determined by the court.

"(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

"(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

"(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

"(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

"(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

"(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through

5 USC 553.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

"(1) maintained by the Central Intelligence Agency; or

"(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

5 USC 553.

"(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of this section if the system of records is—

5 USC 552.

"(1) subject to the provisions of section 552(b)(1) of this title;

"(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

18 USC 3056.

"(4) required by statute to be maintained and used solely as statistical records;

"(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

"(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553 (c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

5 USC 553.

"(l)(1) ARCHIVAL RECORDS.—Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

44 USC 3103.

"(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

Publication in Federal Register.

"(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

"(m) GOVERNMENT CONTRACTORS.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

"(n) MAILING LISTS.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

"(o) REPORT ON NEW SYSTEMS.—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such

Notice to Congress and OMB.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

Report to Speaker of the House and President of the Senate.

"(p) ANNUAL REPORT.—The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

5 USC 552.

(q) EFFECT OF OTHER LAWS.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.".

5 USC prec. 500.

SEC. 4. The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552a. Records about individuals."

immediately below:

"552. Public information; agency rules, opinions, orders, and proceedings.".

Privacy Protection Study Commission. Establishment. 5 USC 552a note. Membership.

SEC. 5. (a)(1) There is established a Privacy Protection Study Commission (hereinafter referred to as the "Commission") which shall be composed of seven members as follows:

(A) three appointed by the President of the United States,

(B) two appointed by the President of the Senate, and

(C) two appointed by the Speaker of the House of Representatives.

Members of the Commission shall be chosen from among persons who, by reason of their knowledge and expertise in any of the following areas—civil rights and liberties, law, social sciences, computer technology, business, records management, and State and local government—are well qualified for service on the Commission.

(2) The members of the Commission shall elect a Chairman from among themselves.

Vacancies.

(3) Any vacancy in the membership of the Commission, as long as there are four members in office, shall not impair the power of the Commission but shall be filled in the same manner in which the original appointment was made.

(4) A quorum of the Commission shall consist of a majority of the members, except that the Commission may establish a lower number as a quorum for the purpose of taking testimony. The Commission is authorized to establish such committees and delegate such authority to them as may be necessary to carry out its functions. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information necessary to the performance of their functions, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or a member designated by the Chairman to be acting Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, other persons, and the public, and, on behalf of the Commission, shall see to the faithful execution of the administrative policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(5) (A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that request to Congress.

Budget requests.

(B) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

Legislative recommendations.

(b) The Commission shall—

(1) make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information; and

Study.

(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of section 552a of title 5, United States Code, should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.

Ante, p. 1897.

(c) (1) In the course of conducting the study required under subsection (b) (1) of this section, and in its reports thereon, the Commission may research, examine, and analyze—

(A) interstate transfer of information about individuals that is undertaken through manual files or by computer or other electronic or telecommunications means;

(B) data banks and information programs and systems the operation of which significantly or substantially affect the enjoyment of the privacy and other personal and property rights of individuals;

(C) the use of social security numbers, license plate numbers, universal identifiers, and other symbols to identify individuals in data banks and to gain access to, integrate, or centralize information systems and files; and

(D) the matching and analysis of statistical data, such as Federal census data, with other sources of personal data, such as automobile registries and telephone directories, in order to reconstruct individual responses to statistical questionnaires for commercial or other purposes, in a way which results in a violation of the implied or explicitly recognized confidentiality of such information.

(2) (A) The Commission may include in its examination personal information activities in the following areas: medical; insurance; education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing.

(B) The Commission shall include in its examination a study of—

(i) whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual;

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

(ii) whether the Internal Revenue Service should be prohibited from transfering individually indentifiable data to other agencies and to agencies of State governments;

(iii) whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a (g) (1) (C) or (D) of title 5, United States Code; and

Ante, p. 1897.

(iv) whether and how the standards for security and confidentiality of records required under section 552a (e) (10) of such title should be applied when a record is disclosed to a person other than an agency.

Religious organizations, exception.

(C) The Commission may study such other personal information activities necessary to carry out the congressional policy embodied in this Act, except that the Commission shall not investigate information systems maintained by religious organizations.

Guidelines for study.

(3) In conducting such study, the Commission shall—

(A) determine what laws, Executive orders, regulations, directives, and judicial decisions govern the activities under study and the extent to which they are consistent with the rights of privacy, due process of law, and other guarantees in the Constitution;

(B) determine to what extent governmental and private information systems affect Federal-State relations or the principle of separation of powers;

(C) examine the standards and criteria governing programs, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information; and

(D) to the maximum extent practicable, collect and utilize findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and private bodies, institutions, organizations, and individuals which pertain to the problems under study by the Commission.

(d) In addition to its other functions the Commission may—

(1) request assistance of the heads of appropriate departments, agencies, and instrumentalities of the Federal Government, of State and local governments, and other persons in carrying out its functions under this Act;

(2) upon request, assist Federal agencies in complying with the requirements of section 552a of title 5, United States Code;

(3) determine what specific categories of information, the collection of which would violate an individual's right of privacy, should be prohibited by statute from collection by Federal agencies; and

(4) upon request, prepare model legislation for use by State and local governments in establishing procedures for handling, maintaining, and disseminating personal information at the State and local level and provide such technical assistance to State and local governments as they may require in the preparation and implementation of such legislation.

(e) (1) The Commission may, in carrying out its functions under this section, conduct such inspections, sit and act at such times and places, hold such hearings, take such testimony, require by subpena the attendance of such witnesses and the production of such books, records, papers, correspondence, and documents, administer such oaths, have such printing and binding done, and make such expenditures as the Commission deems advisable. A subpena shall be issued only upon an affirmative vote of a majority of all members of the Com-

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

mission. Subpenas shall be issued under the signature of the Chairman or any member of the Commission designated by the Chairman and shall be served by any person designated by the Chairman or any such member. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(2)(A) Each department, agency, and instrumentality of the executive branch of the Government is authorized to furnish to the Commission, upon request made by the Chairman, such information, data, reports and such other assistance as the Commission deems necessary to carry out its functions under this section. Whenever the head of any such department, agency, or instrumentality submits a report pursuant to section 552a (o) of title 5, United States Code, a copy of such report shall be transmitted to the Commission.

Reports, transmittal to Commission. Ante, p. 1897.

(B) In carrying out its functions and exercising its powers under this section, the Commission may accept from any such department, agency, independent instrumentality, or other person any individually indentifiable data if such data is necessary to carry out such powers and functions. In any case in which the Commission accepts any such information, it shall assure that the information is used only for the purpose for which it is provided, and upon completion of that purpose such information shall be destroyed or returned to such department, agency, independent instrumentality, or person from which it is obtained, as appropriate.

(3) The Commission shall have the power to—

(A) appoint and fix the compensation of an executive director, and such additional staff personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

5 USC 5101, 5331.

5 USC 5332 note.

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

The Commission may delegate any of its functions to such personnel of the Commission as the Commission may designate and may authorize such successive redelegations of such functions as it may deem desirable.

(4) The Commission is authorized—

(A) to adopt, amend, and repeal rules and regulations governing the manner of its operations, organization, and personnel;

Rules and regulations.

(B) to enter into contracts or other arrangements or modifications thereof, with any government, any department, agency, or independent instrumentality of the United States, or with any person, firm, association, or corporation, and such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5);

(C) to make advance, progress, and other payments which the Commission deems necessary under this Act without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529); and

(D) to take such other action as may be necessary to carry out its functions under this section.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Compensation.

(f)(1) Each [the] member of the Commission who is an officer or employee of the United States shall serve without additional compensation, but shall continue to receive the salary of his regular position when engaged in the performance of the duties vested in the Commission.

Per diem.

5 USC 5332 note.

(2) A member of the Commission other than one to whom paragraph (1) applies shall receive per diem at the maximum daily rate for GS-18 of the General Schedule when engaged in the actual performance of the duties vested in the Commission.

Travel expenses.

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

Report to President and Congress.

(g) The Commission shall, from time to time, and in an annual report, report to the President and the Congress on its activities in carrying out the provisions of this section. The Commission shall make a final report to the President and to the Congress on its findings pursuant to the study required to be made under subsection (b)(1) of this section not later than two years from the date on which all of the members of the Commission are appointed. The Commission shall cease to exist thirty days after the date on which its final report is submitted to the President and the Congress.

Penalties.

(h)(1) Any member, officer, or employee of the Commission, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any person who knowingly and willfully requests or obtains any record concerning an individual from the Commission under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

5 USC 552a note.

SEC. 6. The Office of Management and Budget shall—

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and

Ante, p. 1897.

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

5 USC 552a note.

SEC. 7. (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2

SEC. 8. The provisions of this Act shall be effective on and after the date of enactment, except that the amendments made by sections 3 and 4 shall become effective 270 days following the day on which this Act is enacted.

Effective date. 5 USC 552a note.

SEC. 9. There is authorized to be appropriated to carry out the provisions of section 5 of this Act for fiscal years 1975, 1976, and 1977 the sum of $1,500,000, except that not more than $750,000 may be expended during any such fiscal year.

Appropriation. 5 USC 552a note.

Approved December 31, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 93-1416 accompanying H.R. 16373 (Comm. on Government Operations).
SENATE REPORT No. 93-1183 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 120 (1974):
Nov. 21, considered and passed Senate.
Dec. 11, considered and passed House, amended, in lieu of H.R. 16373.
Dec. 17, Senate concurred in House amendment with amendments.
Dec. 18, House concurred in Senate amendments.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 1:
Jan. 1, Presidential statement.

Approved For Release 2011/09/26 : CIA-RDP04M01816R000100320003-2