Union Calendar No. 738

92d Congress, 2d Session - - - - - - House Report No. 92-1419

ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

TWENTY-FIRST REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

TOGETHER WITH

ADDITIONAL VIEWS

SEPTEMBER 20, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., September 20, 1972.

Hon. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-first report to the 92d Congress. The committee's report is based on a study made by its Foreign Operations and Government Information Subcommittee.

CHET HOLIFIELD, *Chairman.*

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ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

SEPTEMBER 20, 1972.—Committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

Mr. HOLIFIELD, from the Committee on Government Operations, submitted the following

TWENTY-FIRST REPORT

TOGETHER WITH

ADDITIONAL VIEWS

BASED ON A STUDY BY THE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE

On September 14, 1972, the Committee on Government Operations approved and adopted a report entitled "Administration of the Freedom of Information Act." The chairman was directed to transmit a copy to the Speaker of the House.

I. BACKGROUND

The Freedom of Information Act (FOI Act) was signed into law by President Lyndon B. Johnson on July 4, 1966, as Public Law 89-487.[1] It went into effect on July 4, 1967.

In his bill-signing statement President Johnson 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. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. * * * I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

The new law followed more than a decade of effort by the Foreign Operations and Government Information Subcommittee and its predecessor, the Special Subcommittee on Government Information,

[1] As result of Public Law 90-23, approved June 5, 1967, Public Law 89-487 was codified as 5 U.S.C. 552.

established on June 9, 1955, under the chairmanship of Representative John E. Moss of California. Similar efforts were focused in the Senate Subcommittee on Administrative Practice and Procedure, under the chairmanship of Senator Edward V. Long of Missouri, and its parent Committee on the Judiciary. Volumes of hearings, investigations, and studies of information policies of the Federal Government over this 11-year period produced many reports, committee prints, and analyses of the withholding of information by the Executive bureaucracy.[2]

1958 Amendment to 1789 "Housekeeping" Statute

In 1958, near the end of the 85th Congress, the House and Senate enacted, without a dissenting vote, the first statute devoted solely to freedom of information. The Moss bill (H.R. 2767) was a one sentence amendment to the 1789 "housekeeping" law which gave Federal agencies the authority to regulate the business of the agencies and to set up filing systems and keep records. The language of the amendment added to section 22 of title 5 of the United States Code was: [3]

> This section does not authorize withholding information from the public or limiting the availability of records to the public.

Yet hearings before the subcommittee in 1972 indicate that some agencies are still relying on the original 1789 "housekeeping" statute as authority to withhold certain types of information from the public, despite the enactment of Public Law 85-619 fourteen years ago. It is expected that this subject will be dealt with in a subsequent report. The subcommittee's hearings, parts 4, 5, and 6, entitled "U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act," are hereinafter referred to as "hearings."

Freedom of Information Act

The Freedom of Information Act was enacted as an amendment of section 3 of the Administrative Procedure Act of 1946 and emerged from the functional inadequacy of the prior section 3, which contained the first general statutory provision for public disclosure of executive branch rules, opinions, and orders, and public records. Some of its provisions, however, were vague and contained disabling loopholes which made the section as much a basis for withholding information as one for disclosing. Section 3 as originally enacted was the target of many legislative attempts to close the loopholes and make the language more specific, but all failed of final approval until the 1966 amendment.

The Freedom of Information Act was milestone legislation that reversed long-standing Government information policies and customs.[4] Previously, most agencies operated on the basis of the original provisions of section 3 of the Administrative Procedure Act of 1946 which stated that unless otherwise required by statute, "matters of official record shall in accordance with published rule be made available to

[2] Such documents are too numerous to list, but file copies are in the subcommittee's office. An Index and Bibliography of hearings, reports, prints and studies was published in January 1964 as a Committee Print entitled "Availability of Information From Federal Departments and Agencies."

[3] Public Law 85-619. The 1958 amendment to the 1789 "housekeeping" law has been subsequently codified as 5 U.S.C. 301.

[4] For a legislative history of the FOI Act, prepared by the American Law Division, Library of Congress, see Hearings, pt. 4, pp. 1367-1378.

persons properly and directly concerned except information held confidential for good cause found." Moreover, the original section 3 contained a blanket exclusion from its applicability of any function of the United States requiring secrecy in the "public interest" and "any matter relating solely to the internal management of an agency."

The Freedom of Information Act replaced this general language relating to secrecy, indicating that Congress, in enacting the act, has adopted a policy that "any person" should have clear access to identifiable agency records without having to state a reason for wanting the information and that the burden of proving withholding to be necessary is placed on the Federal agency.

Withholding of Information by Government

Withholding of information by government under the act is permissive, not mandatory, and must be justified on the basis of one of the specific nine exemptions permitted in the act. These relate to matters that are [5]—

(1) Specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute;

(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 files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) Contained in or related to examination, operating, or condition report 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.

The act makes it clear in section 552(c) that the exemptions have absolutely no effect upon congressional access to information:

> 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.

Continuous Oversight

General oversight into the administration of the Freedom of Information Act has been exercised by the Foreign Operations and Government Information Subcommittee and the Senate Subcommittee on

[5] Sec. 552(b) of title 5, United States Code.

Administrative Practice and Procedure since the act took effect on July 4, 1967. The House subcommittee has provided informal assistance service in hundreds of cases involving the act that have been referred by Members of Congress and their staffs or called to the subcommittee's attention by newsmen, radio-television broadcasters, researchers, attorneys, historians and scholars, and by individual citizens. It has provided information about the act and informal suggestions involving the procedural handling of FOI cases. The hearings undertaken by the subcommittee in March 1972 are the first in-depth review of the extent to which executive departments and agencies have complied with the law and the implementing guidelines contained in the Attorney General's Memorandum.[6]

[6] See "The Freedom of Information Act (10 Months Review)," Committee Print, May 1968, published by the Administrative Practice and Procedure Subcommittee, Senate Judiciary Committee. Also see Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5, U.S.C. 552)," Committee Print, November 1968, published by House Government Operations Committee.

II. INTRODUCTION, FINDINGS, AND CONCLUSIONS

Our concern in this report and those which will follow is the protection, preservation and enlargement of the American people's "right to know".

The overall guidance to executive agencies for their administration of the Freedom of Information Act was clearly stated by Attorney General Ramsey Clark in the foreword to his memorandum of June 1967: [7]

> If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.
>
> Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.
>
> Public Law 89–487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.
>
> Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.
>
> This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.
>
> No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments

[7] "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act," U.S. Department of Justice, June 1967, pp. iii–iv. The full text of the memorandum, which is now out of print, is contained in pt. 4 of the hearings, pp. 1079–1131.

in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

That disclosure be the general rule, not the exception;

That all individuals have equal rights of access;

That the burden be on the Government to justify the withholding of a document, not on the person who requests it;

That individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

That there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself—in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility. * * *

Freedom of Information Not a Partisan Matter

There are some who would like to make freedom of information a partisan issue, claiming it is they or their party who represent the one true champion of this particular devotion to liberty. But, in fact, years of study by this committee show each new administration develops its own special secrecy techniques which, as time passes, become more and more sophisticated. The factor of credibility, together with the inclination of government to invade the privacy of our citizens, poses an ominous threat to our democratic system which must be opposed at every turn despite the agony it might create. We believe it is better to have too much freedom than too little.

Comprehensive Hearings on Broad Government Information Policies

The subcommittee received sworn testimony from 142 witnesses at 41 days of public hearings by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations during June and July 1971 and March 1972 through June 1972. The hearings were an intensive study of the effectiveness of the Freedom of Information Act and related matters involving information policies and practices of the Federal Government. The FOI Act has been the law of the land 5 years, as of July 4, 1972, appropriately enough the anniversary of American independence—the day 196 years ago when the "many" revolted against the despotic monarch. This committee has both legislative and oversight investigative jurisdiction over the Freedom of Information Act.

The hearings on U.S. Government information policies and practices began June 23, 1971, and cover many months of intensive testimony, interrogation, analysis of questionnaires, and research studies provided by the Congressional Research Service, Library of Congress.[8] The subcommittee sought not only to examine those departments and agencies with poor records of compliance with the Freedom of Information Act but also those governmental units which tried to implement congressional FOI mandate with dedication and enthusiasm. There were such but the overall picture which emerges was encrusted with bureaucratic dust and grime which need to be vigorously scrubbed away.

When Congress passed the Freedom of Information Act, it issued a rule of government that all information with some valid exceptions was to be made available to the American people—no questions asked. The exceptions—intended to safeguard vital defense and state secrets, personal privacy, trade secrets and the like—were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.

But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people—the people are not their servants. This report is another reminder to our Government of that fact. Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The Government, however, has no rights. It has only limited power delegated to it from "We, the people * * *."

Series of Reports Based on Hearings

This report is the first of a series to cover virtually all major aspects of freedom of information as it relates to our Government. Those areas of concern include the administration of the Freedom of Information Act, the subject of this first report; the security classification system which has long impeded the free flow of information on national defense and foreign policy; the so-called doctrine of "executive privilege" used by Presidents to deny vitally needed information to Congress; the information policies of governmental advisory committees; legislative proposals to close loopholes and narrow, if not eliminate, certain exemptions in the Freedom of Information Act; and other related subjects.

[8] A complete listing of the hearing dates is printed in the legislative calendar of the House Committee on Government Operations.

The ultimate objective is to strengthen and clarify the Freedom of Information Act to make it more effective and responsive to an open society. Action on legislation to accomplish this objective, based partially on these in-depth hearings and studies, will be sought by this committee.

Major Problem Areas

Some of the major problem areas pinpointed during the hearings are:

1. The bureaucratic delay in responding to an individual's request for information—major Federal agencies took an average of 33 days with such responses; and when acting upon an appeal from a decision to deny the information, major agencies took an average of 50 additional days;

2. The abuses in fee schedules by some agencies for searching and copying of documents or records requested by individuals; excessive charges for such services have been an effective bureaucratic tool in denying information to individual requestors;

3. The cumbersome and costly legal remedy under the act when persons denied information by an agency choose to invoke the injunctive procedures to obtain access; although the private person has prevailed over the Government bureaucracy a majority of the important cases under the act that have gone to the Federal courts, the time it takes, the investment of many thousands of dollars in attorney fees and court costs, and the advantages to the Government in such cases makes litigation under the act less than feasible in many situations;

4. The lack of involvement in the decisionmaking process by public information officials when information is denied to an individual making a request under the act; most agencies provide for little or no input from public information specialists and the key decisions are made by political appointees—general counsels, assistant secretaries, or other top-echelon officials;

5. The relative lack of utilization of the act by the news media, which had been among the strongest backers of the freedom of information legislation prior to its enactment; the time factor is a significant reason because of the more urgent need for information by the media to meet news deadlines. The delaying tactics of the Federal bureaucrats are a major deterrent to more widespread use of the act, although the subcommittee did receive testimony from several reporters and editors who have taken cases to court and eventually won out over the secrecy-minded Government bureaucracy; and

6. The lack of priority given by top-level administrators to the full implementation and proper enforcement of Freedom of Information Act policies and regulations; a more positive attitude in support of "open access" from the top administrative officials is needed throughout the executive branch. In too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment.

Findings and Conclusions

The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public's legal right to know has been obvious in parts of two administrations. This reluctance has been overcome in a few agencies by continued pressure

from appointed officials at the policymaking level and in some other agencies through public hearings and other oversight activities by the Congress. However, it has been clearly demonstrated during these hearings that much information of the type previously denied to the public has been made available under the act.

Part of the gap between the promise of access to public records which the FOI Act held out 5 years ago when it became law and the practice of the Federal agencies which administer the law can be closed by improvements in the rules and regulations adopted by the agencies to implement the law. Additional narrowing of the gap is taking place through court decisions that clarify the law. Some of the gap can be closed by legislative changes to clarify the intent of Congress or to correct shortcomings apparent in the first 5 years of the law's operation.

But no changes in law and no directives from agency heads will necessarily convince any secrecy-minded bureaucrat that public records are public property. Only day-to-day watchfulness by the Congress and the administration leaders can guarantee the freedom of government information which is the keystone of a democratic society.

In general, the committee finds that the Freedom of Information Act has helped thousands of citizens gain access to the information, when they have been able to overcome Government roadblocks. The information media, which serve as the major conduit of knowledge between the public and their government, have been helped by the FOI Act. But administrative delays and obfuscation have been a particular problem for the press, for news is a perishable commodity. In the few cases when the press has taken a case to court, government secrecy usually has been overcome. In other cases, the likelihood of court action has persuaded Federal agencies to grant access to public records.

While there have been too few landmark cases decided by the courts to indicate a pattern of interpretation of every part of the FOI Act, it is clear that, by and large, the courts are effectively exercising their authority under the act to judge the Government's stewardship of the people's right to know. The courts' judgment has usually been against needless Government secrecy.

Finally, it is apparent that a clearly defined role for essential public information activities and personnel in the Federal Government is necessary if such activity is to be afforded its proper status within the bureaucracy. The public information role in Government is becoming even more important as Federal programs expand and become decentralized. Public information experts should serve as a "bridge" between an impersonal government and the individual citizen, to make certain that he is sufficiently informed about Federal programs that may affect him and his family.

Following are findings and conclusions on the specific administrative and legislative problems apparent after 5 years of experience with the Freedom of Information Act. (See ch. X of this report for recommendations.)

1. *Administrative Problems*

—Some agency regulations are confusing, inadequate, or deficient, adhering neither to the guidelines in the 1967 Attorney General's memorandum nor the intent of Congress.

—The Office of Legal Counsel, Department of Justice, has undertaken an advisory role to assist other agencies in the administration of the FOI Act, but the office needs to exercise a greater leadership function, for example, by advising other agencies of significant court interpretations of the act and by preparing a pamphlet for the general public to explain the rights of individual citizens to obtain public records from Federal agencies.

—Some Federal agencies have not kept adequate records of requests for public information under the act to properly evaluate their performance; some have not informed an individual of the precise exemption under the act being exercised to deny a requested record; others have not advised individuals of the administrative right to appeal the denial to a higher agency authority, nor of ultimate rights to legal remedy in the courts.

—Very few agencies have involved public information officials in administrative decisions on requests for public records under the act; very few agencies have issued clear policy statements on commitment to the principles of the FOI Act, nor have they issued directives to place appropriate priority on compliance with the provisions of the act.

—Many agencies have failed to provide suitable training or orientation of employees on the meaning, intent, and proper administration of the FOI Act, even those directly affected by responsibilities that involve public requests under the act.

—Excessive fees for search and reproduction of public records in some agencies have deterred individuals desiring access to such records; moreover, there is a wide disparity among agencies in fees charged for the same types of records.

2. *Legislative Problems*

—The delay by most Federal agencies in responding to an individual's request for public records under the FOI Act, or delay in acting on an administrative appeal frequently has negated the basic purpose of the act; while reforms might be initiated at the administrative level, amendments to incorporate recommendations of the Administrative Conference of the United States into the act are a way to achieve the prompt handling of requests by individuals under the act.

—Many Federal agencies have used the "identifiable record" requirement of the FOI Act as an excuse to withhold public records; thus, legislative clarification is necessary.

—The delay by Government attorneys in filing responsive pleadings in suits brought by individuals to obtain public records and the high costs to an individual in pursuing litigation under the act have often been serious deterrents in obtaining public records, giving unfair advantage to the Government.

—Federal agencies have not been required to report to Congress on their activities under the FOI Act, and an annual evaluation would not only improve administration of the act but also permit more effective and systematic legislative oversight.

—The nine exemptions in the act which permit withholding of information have been misused by Federal agencies. Confused interpretations of agency regulations, the desire to withhold records which might embarrass an agency, and misunderstanding of court decisions affecting these exemptions, all have contributed to the problem. These deficiencies can only be corrected by amendments to the FOI Act itself.

III. FREEDOM OF INFORMATION REGULATIONS AND ADMINISTRATIVE REQUIREMENTS

Hearings on the administration of the Freedom of Information Act were first announced on January 24, 1972; they began on March 6, and extended through April 19. Immediately prior to, or during the course of these hearings, 14 Federal departments and agencies indicated they were revising their regulations regarding FOI Act matters.[9] Two of these departments released their new regulations within the 24-hour period immediately prior to their appearance before the subcommittee.[10]

In early May, the Food and Drug Administration (FDA) published new regulations to make most of its voluminous files, which have always been kept confidential, available to the public under the provisions of the FOI Act. Earlier in the hearings, FDA had been singled out by HEW's witness, Mr. Robert O. Beatty, Assistant Secretary for Public Affairs, for special criticism:[11]

> * * * I am well aware of the less than salutary performances of the Food and Drug Administration under the act and the interest of this committee in why. A part of the answer, I think, lies in the inherent characteristics of the Food and Drug Administration as a regulatory agency—the only such regulatory agency in the Department.
>
> Another I think is simple bureaucracy. FDA has documented for me since March of 1969, they have received a total of 96 inquiries under the act, have given 79 approvals, 11 denials, and three withdrawals, with an average response time, however, of about 2 months. Certainly that is far too long. I think the committee would agree and we all agree within the Department and within the FDA that is too long. I am sure the committee will be happy to know, however, that the entire question of the release of information by the Food and Drug Administration has been under intensive review by this agency during the last 6 months and a major change in the agencies' policy and resulting performance should result from that review. We had hoped to be able to present to the committee today for discussion as it saw fit these new regulations but we were not quite able to make it.

It would appear that the subcommittee's hearings on the administration of the FOI Act had some direct influence in prompting the revision of agency regulations during the time period of these hearings. As part of its oversight responsibility, the subcommittee had exercised an early and continuous concern over agency regulations to implement the act.[12]

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[9] They are American Revolution Bicentennial Commission, Department of Commerce, Department of the Army, Environmental Protection Agency, Food and Drug Administration, Department of Health, Education, and Welfare, Department of Housing and Urban Development, Department of Interior, Inter-American Foundation, Department of Labor, Selective Service System, Department of Transportation, Department of State, and Department of the Treasury.

[10] Departments of Labor and Transportation.

[11] Hearings, pt. 5, p. 1660.

[12] See Committee Print issued by this Committee in November 1968, "Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5 U.S.C. 552)".

Mr. David Maxwell, General Counsel of the Department of Housing and Urban Development, commented during his appearance before the subcommittee that the hearings "had a great deal to do" with HUD's review of its regulations. Speaking of the net effect of the proceedings, he said:[13]

> I think these [hearings] are very desirable, not only for us, but for all of the other agencies. We are most appreciative of having our attention called to these [FOI Act] matters in this way.

Mr. Frank M. Wozencraft, a principal drafter of the June 1967 Attorney General's memorandum on the FOI Act's administration recommended:[14]

> I would hope that each chairman when he comes before a committee, be it this committee or his substantive committee, would be asked: "What have you done to see to it that all of the general policies and guidelines in your agency are published?"

Wozencraft suggested that agencies be continuously urged to revise their regulations to conform with the FOI Act, amendments to it, landmark court decisions, and be required to make such regulations better known to both the public and to those responsible for administering the act.

Legally Questionable Regulations

The chief reason the committee urges better regulations is to remove bureaucratic roadblocks to the extent possible, short of actual statutory amendments. Such impediments in administering the FOI Act may result from unclear regulations, undisclosed guidelines, portions of regulations which are not in conformity with statutory or case law, the failure to make regulations known to agency operating personnel involved in the administration of the FOI Act, or the failure to provide adequate training in the act for such persons.

Among the legally questionable regulations included in the subcommittee's review is a Federal Power Commission (FPC) stipulation that "Records not made part of the public record * * * may be disclosed if requested, *upon showing it is in the public interest that they be disclosed* * * *." [15] Chairman Moorhead questioned this language, noting: [16]

> * * * the overall philosophy stated in the Attorney General's memorandum is that the burden be on the Government to justify the withholding of the document, not on the person who requested it.
>
> It seems to me, in section (d), you try to shift the burden back to the requestor, that the Government must say this is why we are not going to give you this other record * * *.
>
> Thus, Congress said everything should be public unless—so that the burden is on the Government to defend its nondisclosure of public business, rather than saying that this person has to show "good cause" and prove his case.

[13] Hearings, pt. 6, p. 1916.
[14] Hearings, pt. 4, p. 1074.
[15] For a further discussion of this problem, see p. 28 of this report.
[16] Hearings, pt. 6, pp. 1956-1957.

The 28 divisions or units of the Department of Agriculture (USDA) all publish separate regulations, exemplifying the fact that there is no centralized administration of the FOI Act at this huge agency.[17] There is no USDA regulation which expressly refers to the Attorney General's memorandum as a guideline for information that is being subject to the claim under exemption (b)(5) of the FOI Act (inter-agency or intra-agency memorandums or letters). The memorandum quotes H. Rept. 1497, 89th Congress, and states: "Accordingly, any internal memorandum which would 'routinely be disclosed to a private party through the discovery process in litigation with the agency' is intended by the clause in exemption (5) to be 'available to the general public,' unless protected by some other exemption."[18] No mention is made in the USDA regulations of the discovery test outlined in the memorandum of "routine" availability. It is not surprising, therefore, that USDA has been one of the major "problem" agencies showing a spotty record in administration of the act.

As a matter of practice, USDA commonly utilizes multiple exemptions for a requested document. While this practice is not specifically sanctioned by the regulations, it might be prohibited by a requirement that a "specific and pertinent exemption" be cited.[19]

The Cost of Living Council (CLC) and its two subsidiary units—the Pay Board and the Price Commission—issued its regulations under the FOI Act on February 1, 1972.[20] The parts of the regulations dealing with "exempt information" were in conflict among the three issuing agencies.

In their regulations the CLC restated the provisions of subsection (b) of Section 552—exemptions (1) through (9)—but specifically referred to Section 1905 of Title 18, U.S. Code in the third exemption. This criminal statute imposes a fine and imprisonment on any Government employee who unlawfully discloses specified data or information coming to him in the course of his employment, and is highly questionable in regulations relating to the FOI Act.[21]

Although it is clear that the exemptions set forth in subsection (b) of the Freedom of Information Act are permissive and not mandatory, the CLC originally made no provision for disclosure of "exempt information" if such disclosure is in the public interest. The CLC regulations were subsequently amended on August 15, 1972, to reflect those regulations originally adopted by the Price Commission.

The amendment adds a new subsection 102.3(c) which reads as follows:

> (c) The Chairman of the Council or his delegate is authorized at his descretion to make any record enumerated in sec. 102.4 available for inspection when he deems disclosure to be in the public interest and disclosure is not otherwise prohibited by law.

[17] Hearings, pt. 5, pp. 1556-1593.
[18] Attorney General's memorandum, op. cit., p. 35, hearings, pt. 4, p. 1119.
[19] See "Note, Freedom of Information: The Statute and the Regulations," Georgetown *Law Journal*, LVI (November 1967), p. 42.
[20] 37 F.R. 2178; 6 CFR, pt. 102.
[21] See *Schapiro* v. *Securities and Exchange Commission* (DC, D.C., 1972). The court said in part in the Schapiro case ". . . The Securities and Exchange Commission alleges that 18 U.S.C. 1905 prevents the disclosure of this information. That statute, however, does not prevent the disclosure of information that is authorized to be disclosed under other laws. There is nothing in sec. 1905 of title 18 that prevents the operation of the Freedom of Information Act. Moreover, the provision for documents specifically exempted by statute (5 U.S.C. 552(b)(3)) relates to those other laws that restrict public access to specific government records. It does not, as defendants allege, relate to a statute that generally prohibits all disclosures of confidential information."

The Pay Board in its regulations has incorporated by reference the provisions of subsection (b) of the FOI Act without any changes.[22] It has, however, made provision for the release of "exempt information" to a complainant at the discretion of the Chairman of the Pay Board.[23] As in the case of the CLC, the Pay Board originally made no provision for disclosure of exempt information in the public interest. However, on Sept. 7, 1972, the Pay Board announced its intention to amend its regulations so as to bring them into conformity with the spirit of the Freedom of Information Act.

Paragraph (a) of section 200.20 was revised as follows:

> (a) In general. All documents and exhibits filed by any party with the Pay Board in the course of its proceedings are part of the records of the Board, available for inspection and copying by members of the public, except to the extent and in the manner specified in this subpart, and except to the extent such information is of the nature specified in 5 U.S.C. 552(b)(1)–(9). However, the Chairman of the Pay Board or his delegate, is authorized at his discretion to make any record enumerated in 5 U.S.C. 552(b)(1)–(9) available for inspection if he deems disclosure to be in the public interest, and disclosure is not otherwise prohibited by law.

The Price Commission regulation affecting "exempt information" is similar to the CLC regulations, restating the provisions of subsection (b) of the act with minor procedural changes.[24] However, the Commission makes specific provision for the release of "exempt information" at the discretion of the Chairman of the Commission:[25]

> (b) The Chairman of the Commission, or his delegate, at his discretion may make any record enumerated in paragraph (a) of this section available for inspection when he deems disclosure to be in the public interest, if disclosure is not otherwise prohibited by law.

One of the more flagrant abuses of the FOI Act uncovered by the subcommittee involved the Price Commission. In its printed form PC–1, "Request (Report) For Price Increase For Manufacturing, Service Industries and the Professions," the Commission actually solicits confidentiality from the companies who are applying for price increases under the Economic Stabilization Act of 1970. The printed form PC–1 reads in part:[26]

> It is requested that the information submitted herewith be considered as confidential within the meaning of section 205 of the Economic Stabilization Act of 1970 (as amended), Title 5, U.S. Code, 552 and Title 18, U.S. Code, section 1905.

Such solicitation of confidentiality by the Price Commission was entirely inconsistent with the FOI Act. This language adopted by the Price Commission in 1971 was ordered removed from subsequent press runs of form PC–1 in August 1972 although current supplies of the old form are still in use.

[22] Title 5 U.S.C., sec. 552.
[23] Pt. 2000, sec. 200.20 (Pay Board regulations).
[24] Pt. 311, sec. 311.5(a) (Price Commission regulations).
[25] Pt. 311, sec. 311.5(b).
[26] A copy of form PC–1 is on file in the subcommittee office.

As was stressed over and over during the hearings, the exemptions contained in subsection (b) of the act are permissive and not mandatory and the committee knows of no agency that has specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality. It is the duty of each agency to determine on an individual basis whether or not specific information fits the test of confidentiality as provided in subsection (b)(4) of the FOI Act.

Moreover, it would seem that the degree of public confidence in the integrity of the administrative processes which regulate wages and prices under our economic stabilization program can only be earned by actions which convince the American public that requests for increases are judged in an equitable manner in the cold light of public scrutiny—not hidden behind the closed door of blanket confidentiality that is contrary to the law.

Few of the departments and agencies specified in their regulations any limitations on action time for responding to requests brought under the FOI Act. We have noted elsewhere in this report that the problem of "foot-dragging" delays is one of the most common problems encountered.[27]

In analysing the agency's responses to the subcommittee's questionnaire on their operations under the FOI Act, a study conducted for the subcommittee by the Congressional Research Service (CRS) of the Library of Congress provided a revealing picture of agency behavior on the matter of response delays. Assessing the case load of FOI denials for the 1967–71 period, CRS analysts computed the average number of days required for each agency to respond to both initial requests for information and appealed requests. According to this study:[28]

> These time spans ranged from an average of 8 days (Small Business Administration) to 69 days (Federal Trade Commission) for responses to initial requests and from 13 days (Department of the Air Force) to 127 days (Department of Labor) for responses to appeals. For those agencies listed in the analytical chart, the average number of days taken to respond to initial requests was 33 (for 27 agencies); the average number of days to respond to appeals was 50 (for 20 agencies). In terms of the average time lapse on initial requests for agencies listed in the analytical chart, 11 agencies exceeded this average; 9 agencies exceeded this average for time on acting on appeals. The Department of Health, Education, and Welfare, Interior, Justice and the Renegotiation Board exceeded the total average for both stages of the administrative process. Statistically, four agencies seem to be in no hurry to expedite requests for information under the Freedom of Information Act.

Such delays, even for a few days or a week, can make requested information of little or no value to someone attempting to meet a deadline on any research project or news story where the requested information is needed on a timely basis. We have noted elsewhere in this report that working journalists have made little use of the FOI Act

[27] See pp. 19–42 of this report.
[28] The full text of the study is in the hearings, pt. 4, pp. 1333–1343; the quotation appears on p. 1337.

because of this problem of bureaucratic delay in obtaining responses to requests for information. Such excessive delays also can frustrate efforts by researchers, scholars, and other types of professional writers who seek information from their government.

Lack of Top-Level Consideration of FOI Problems

One indication of the importance of the FOI Act in terms of agency priorities is the record keeping of the agency. In response to the subcommittee's questionnaire in the summer of 1971 regarding the administration of the FOI Act, the Department of the Army, Navy, the Department of Labor, the Civil Service Commission, and subunits of the Transportation Department all indicated they could not provide certain requested statistics because they had failed to keep any records on these matters.[29] Certain agencies frankly stated they had no records.

Recordkeeping

The Library of Congress analysis noted these and other problems concerning the quality of agency data, stating:[30]

> Responses to the subcommittee's questionnaire were generally complete and detailed for most agencies, but in certain cases the agencies seemed to misunderstand the questions or they provided otherwise unusable information. The Department of Defense for example, acknowledged incomplete records to answer some questions. The Civil Aeronautics Board supplied aggregate information for fiscal year 1968 only. The Federal Highway Administration and the Federal Railroad Administration reported they kept no records on Freedom of Information Act requests.
>
> In a number of instances details were omitted from agency responses. The number of requests for public records was not provided, for example, by the Department of the Army, the Department of Health, Education, and Welfare, the Coast Guard, the Federal Maritime Administration, and the Civil Service Commission, though those agencies did provide information on individual denials. Often no initial request dates were supplied for individual cases or no dates on appeals were given, thus making the computation of time intervals impossible or limited to a few cases. In many responses the titles and citations of relevant court cases were garbled or missing. The Department of the Army, the Department of the Navy, the Department of State, and the Securities and Exchange Commission failed to cite appropriate sections of the Freedom of Information Act as a basis for refusing information.

The uneven quality of such data received in response to the questionnaire raises serious questions concerning the interest of some Federal departments and agencies in how the act is administered, since they do not even maintain sufficient records to evaluate their performance under the statute.

Even details on court actions under the FOI Act were sorely lacking. The Library of Congress analysis commented:[31]

[29] The text of the subcommittee questionnaire is on pp. 1334–1335 of the hearings, pt. 4.
[30] Ibid., p. 1336.
[31] Ibid., p. 1336.

> * * * Frequently, the responding agencies cited court cases which resulted from their refusals to provide materials but they failed to provide details on the administrative procedure which preceded judicial action. * * *

The problems of administration and inadequate recordkeeping become compounded when it is realized that the agencies do not always keep their personnel responsible for administering the FOI Act abreast of recent precedent-making court decisions. The Agriculture Department's Assistant General Counsel, for example, told the subcommittee: [32]

> * * * In the court cases the Department was involved in, where they gave information as a result of the court cases, a press release was then issued by the agencies informing them of the information that was being made available and it would be made available upon request to anyone else and this press release is then summarized by the information office of Mr. Gifford's office and that is circulated to all of the agencies, so through that they get advice as to the type of action under court cases where the Department is a party to the case.

Thus, personnel of the USDA handling FOI requests receive only a summary of a press release regarding a court case involving released documents under the FOI Act within their agency. They do not normally have an opportunity to read the decision in the case; they may not even see the full press release about the case; and they are given summaries involving only those cases in which their own Department was a litigant.

This problem of disseminating decisions of the courts involving FOI Act cases among all executive branch personnel who deal with Government information requests was discussed during the hearings with then Assistant Attorney General Ralph E. Erickson, Office of Legal Counsel, whose office is responsible for the operations of the Freedom of Information Committee: [33]

> Mr. MOORHEAD. Would it not be advisable to rewrite and bring up to date the Attorney General's memorandum and establish a procedure for ongoing distribution of advisory opinions as new case law is developed?
>
> Mr. ERICKSON. When I first became involved in freedom of information matter(s) I looked at that book and I said, "My God, this thing should be brought up to date."
>
> Since that time I have come to recognize that it may not be quite that easy to bring it up to date, because we do have a number of, I think, rather important questions to be answered, and maybe answered in the foreseeable future. I think it is something that should be brought up to date at some point in time. I am not sure that this is the exact time. I would certainly prefer to have some pronouncement by the Supreme Court before we do this. But, I do think it is—it would be helpful, and it is something that should be done in due course.

[32] Hearings, pt. 5, p. 1594.
[33] Hearings, pt. 4, p. 1190.

Chairman Moorhead went on to ask Mr. Erickson if thought had been given to some other method of keeping agencies up to date on legal developments under the FOI Act, such as seminars for public information officers and lawyers having such duties.

Erickson responded:[34]

> It is one of the questions. I feel something should be, something should be done. I have not formulated, really, any plan as to how it might be done. I mentioned the increase in our consultations, and it seems to me that that, in and of itself, serves to inform and keep other agencies advised.
>
> But, I certainly would not be adverse to some more concentrated effort, more expansive effort to keep other agencies advised, because I think the law is evolving, is developing, and certainly it would be a help.

Chairman Moorhead asked if general counsels of Federal agencies were advised when a significant court decision under the FOI Act is rendered. Erickson said that "we have developed no automatic procedures for doing so, but that certainly would be one of the alternatives to be considered."

Summary

It is obvious to the committee from its study of the problems of effective administration of the FOI Act that clearcut, easily understood regulations that adhere closely to the philosophy of the public's right to know the business of its Government, as expressed in the law enacted by Congress and the guidelines issued in 1967 by the Attorney General can go a long way toward making the act truly meaningful under our representative system of government. Yet, we have learned that the regulations, themselves, regardless of how positive or how precise, do not necessarily guarantee effective operation of the FOI Act in any agency. A constructive attitude toward the act by the top leadership of the agency and a genuine desire to make more information available to the public are essential ingredients.

The committee believes that there are many positive actions that can be taken at the administrative level to make the act more workable and more effective. Such actions must, however, be considered in the context of recommended statutory amendments. Administrative recommendations are therefore discussed in chapter X of this report, along with the proposed objectives of amendments to the FOI Act itself.[35]

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[34] Ibid.

[35] See pp. 83-86 of this report.

IV. GOVERNMENT ROADBLOCKS PREVENTING EFFECTIVE USE OF THE FREEDOM OF INFORMATION ACT

During the hearings on bills which became the Freedom of Information law, no witnesses testifying for Government agencies supported the legislation. A few expressed approval of the people's right to know, but each favorable comment on the general principle was hedged by specific objections to the legislative language proposed to enforce the right to know. Since there was general opposition to the legislation throughout the Federal bureaucracy, the agencies would not be expected to administer the law so that public access to public records is a simple process.

And they have not. In the great majority of the agencies, administration of the Freedom of Information Act has been turned over to the lawyers and the administrators, not to the Government information experts whose job is to inform the public.

Nearly all agencies move so slowly and carefully in responding to a request for public records that the long delay often becomes tantamount to denial.

Dozens of agencies have set up complicated procedures for requesting public records.

Many will respond only to repeated demands for information, filed formally and in writing. Others require detailed identification of the records sought, so that only those who have complete knowledge of an agency's filing system can identify properly the records sought.

Some agencies have harassed citizens who had the temerity to press their demands for public records; others, when forced to provide copies of Government documents, have given out illegible copies.[36]

The "Renting" of the Pentagon

Even before the Columbia Broadcasting System produced its controversial exposé of the Defense Department propaganda machine—a program titled "The Selling of the Pentagon"—the Freedom of Information Act was twisted almost out of shape by Defense Department officials trying to hide the facts about the "renting" of the Pentagon. Repeated delays and insistence on bureaucratic formalities were almost successful in hiding from the public how much money the Department collects in concession payments from private companies which have stores in the Pentagon concourse.

In 1970, Roy McGhee, a reporter for United Press International, asked for the financial details on the leasing of store space in the bowels of the Pentagon where thousands of employees pass daily on their way to the bus stops inside the building. He found, after repeated telephone calls, that the Defense Department collected almost $1 million in proceeds from private companies doing business on the

[36] As an example, see hearings, pt. 4, p. 1308.

Pentagon concourse. He said that about half of this income was turned over to the Treasury and the rest was contributed to a Defense Department "Concessions Committee", which used about $250,000 of the fund to finance social clubs, dinner dances and tennis tournaments for Pentagon employees.[37]

But he said he could not get an exact accounting of the use of such funds, nor could he discover how much each private company was paying the Pentagon to lease space in the concourse and sell wares to thousands of captive customers. He asked the Department's public information office and he asked the Department's general counsel how much each private company was paying to lease space in the public building, but the information was refused. McGhee testified:

> That is where the instance stands. I have not pursued it further. I do not have the time. My company did not file a lawsuit to get the information.[38]

McGhee wrote a news story based on the information he could find, reporting the refusal to disclose the income from the leasing of the Pentagon concourse space, and the University of Missouri Freedom of Information Center took up the battle from there. The Center telephoned to try to get the information and then put a formal request in writing, threatening to go to court under the Freedom of Information Act if the information was refused. The Defense Concessions Committee agreed to make public the contracts entered into with private companies leasing space in the Pentagon, but only if a records search charge of $3.45 an hour was paid for a 4-hour search job.

Since the Defense Concessions Committee was responsible for only 16 contracts, all filed in the committee's office, the FOI Center pointed out that 4 hours for searching the files to find the contracts seemed an unnecessary waste of time. In response, more than 1 year after McGhee first began his investigation of the "renting" of the Pentagon, the Defense Department Concessions Committee finally agreed to make the information on the contracts available to anyone who came into the committee's Pentagon office—if given at least 1 day advance notice.

"Catch-22" at the Agriculture Department

The Freedom of Information Act requires Government agencies to make available "identifiable" public records, but the Attorney General's Memorandum explaining the new law warns that the identification requirement should not be used as a method of withholding records. Yet some agencies make identification requirements so strict that they must be taken to court to force cooperation.[39]

Harrison Wellford of the Center for the Study of Responsive Law asked the Department of Agriculture for research reports on the safety of handling certain pesticides. His request was refused because the Government records he sought were not clearly identified.[40]

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[37] Hearings, pt. 4, p. 1291; a fact sheet provided by the Department of Defense on the operation of the Concessions Committee, including criteria affecting receipts and disbursements may be found in the appendix of part 6 of the hearings; the fact sheet states that the division of funds by the Concessions Committee among (1) payments to GSA on the basis of rental square footage, (2) payments to the Pentagon Employees Welfare and Recreation Fund, (3) investments in cafeteria property, and (4) other disposition of excess funds is in accordance with Treasury Department, GSA, and DOD rules and regulations for receipts of this type; see also colloquy on this case with DOD General Counsel Buzhardt, pt. 6, p. 2120.

[38] Hearings, pt. 4, p. 1289.

[39] *Bristol-Myers Co.* v. *Federal Trade Commission*, 283 F Supp. 745; *Wellford* v. *Hardin*, 315 F. Supp. 768; hearings, pt. 4, pp. 1344 to 1367.

[40] Hearings, pt. 4, p. 1253.

Wellford then asked for the indexes the Department maintained so the specific files could be identified, but he was told that the indexes were interagency memoranda and would not be made available. He testified:

> So, it was a Catch-22 situation. We were told our request was not specific, and we were not given access to the indexes which would have allowed us to make our request specific.[41]

So Wellford took his case to court and won access to the information. He went back to the Agriculture Department, looked at the indexes, and found that the information he sought was kept in individual pesticide folders called jackets. He was told that the jackets also contained company confidential information and that the confidential information had not been separated from technical information he sought. He testified:

> We requested this information 2 years before and there was plenty of time to reorganize their filing systems so they would not have this commingling problem. * * * The final straw was when USDA stated that if the information were made available, it would cost $91,840 to prepare the registration files for public viewing. At that point we decided to try to find other means to get the information.[42]

Secrecy Through Delay and Obfuscation

Nothing in the Freedom of Information Act requires expeditious handling of requests for access to public records, nor would fast and efficient response to requests be expected from agencies which uniformly opposed the legislation.

Most agencies take about a month to answer the initial request for access to public records. They delay even longer in answering appeals against the initial refusal, with the average time for a decision on an administrative appeal being about 2 months.[43]

Very few of the agencies make an effort to inform requestors that they can appeal the initial decision. While the Freedom of Information Act does not require an administrative appeal system, the necessity for such a system was spelled out in the Attorney General's Memorandum explaining the act to the agencies.[44] Thus, in most agencies the regulations state that an initial refusal may be appealed to a top official in the agency, but the agencies seldom make a point of its appellate procedure in the letters denying the initial request. This may help explain the small number of administrative appeals. Of nearly 2,200 instances in which access to public records was refused in the first 4 years of the act's operation, fewer than 300 denials were appealed administratively within the agencies, and in about 100 cases, the individual refused information went to court to enforce the right to know.[45] Agencies continued to block legitimate public access in some cases even after courts ordered documents made public.

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[41] Hearings, pt. 4, p. 1251.
[42] Hearings, pt. 4, pp. 1254-1255. This amount includes both search fees and copying costs.
[43] Hearings, pt. 4, pp. 1333-1343.
[44] Attorney General's Memorandum, June 1967, pp. 28-29.
[45] Subcommittee questionnaire analysis, op. cit., pt. 4, pp. 1333-1343.

Nashville *Tennessean* Case

The editor of the Nashville Tennessean, Mr. John Seigenthaler, testified on one such case.[46] His newspaper suspected that a blind homeowner may have been swindled on the basis of an FHA appraisal of his property. The homeowner and, later, the newspaper asked the Department of Housing and Urban Development for a copy of the FHA appraisal, but they were refused. The Nashville Tennessean took the case to court. The judge set a hearing in 2 weeks, but the Government lawyers demanded the full 60 days permitted under the Federal Rules of Civil Procedure to answer the newspaper's request for access to a public record.

Following the hearing, the court ordered the Government agency to make public a copy of the FHA appraisal, but the copy turned over to the newspaper was totally and completely illegible.

Once more, the newspaper went to court and the judge ordered the Government to produce a legible copy of the FHA appraisal report. The district court did agree with the Government's contention that it could censor the FHA appraisal report, deleting the name of the appraiser. The newspaper took that issue to the circuit court of appeals, and once more, over the opposition and delaying tactics of the Government agency, won a court order granting access to a legible public record—including the identity of the FHA appraiser.[47]

The Longs and the Internal Revenue Service

The delays and frustrations faced by citizens trying to use the Freedom of Information Act are nowhere more apparent than in the attempt by a Seattle, Wash., couple to get information from the Internal Revenue Service (IRS). Among the documents requested by Philip H. and Susan B. Long are those with simple statistical information showing how the IRS carries out its tax collecting duties. They also requested the blank forms which IRS agents fill out as a basis for an annual activities report.[48] After repeated trips to IRS headquarters in Washington, D.C., and to a number of regional and field operations, the Longs got some of the public records they requested. More of the material was made available by IRS after the Longs filed suit under the Freedom of Information Act.

Because of the continued prodding by the Longs, IRS prepared a dossier on the couple, listing every letter sent by them and every interview they held with IRS officials. When faced with the Longs' request for the blank IRS forms, Donald Virdin, chief of the IRS Disclosure Staff, testified that the agency convened 18 top officials to discuss the disclosure problem. The top officials decided the Longs could not have the blank forms because there were too many of them.[49]

As a result of handling the Longs' request for public records, Virdin testified that the Treasury Department discovered some IRS documents in its public library which, he said, should not have been made public. The documents were merely quarterly statistical reports on the audit work of IRS, but upon the recommendation of Virdin, the IRS disclosure expert, the reports were taken out of the public library, no longer to be disclosed.[50]

[46] Hearings, pt. 4, pp. 1302-1310.
[47] Hearings, pt. 4, pp. 1302-1309.
[48] Hearings, pt. 6, p. 2025.
[49] Hearings, pt. 6, p. 2025.
[50] Hearings, pt. 6, p. 1994.

Mr. Virdin's staff of disclosure experts also prepared a digest of the IRS experience with requests for public records under the Freedom of Information Act. The digest was requested by a taxpayer, but was refused. It was classified "for national office official internal use only." Later the document was made public with the secrecy label removed.[51]

USDA Hides Meat Inspection Reports

Another witness, attorney Peter H. Schuck of the Center for the Study of Responsive Law, described his experience with the Agriculture Department (USDA) and their "Delay-until-the-information-becomes-stale" routine, which involved efforts to obtain information on meat inspection plants in Missouri under the Wholesome Meat Act of 1967. He testified:

> I have been engaged since mid-October (1971) in a vain effort to gain access to three categories of information: (1) Compliance surveys conducted by USDA with respect to the meat inspection programs of Missouri, Nebraska, and several other States; (2) USDA's correspondence with State officials concerning their findings; and (3) the surveys required by USDA to be conducted in these states and submitted to USDA as part of its compliance review program.[52]

By mid-December (1971), he continued, "USDA had reneged on several oral promises to produce the information." Schuck then filed administrative appeals and on May 2, 1972—some 5 months after his original request—his appeal was denied by Mr. G. R. Grange, Acting Administrator of the Consumer and Marketing Service, despite the fact that the Department of Justice's Freedom of Information Committee had strongly urged USDA to make the information public.[53]

Schuck also testified that a Missouri State senator and a Springfield, Mo. radio station had made similar requests to USDA for the information about the Missouri meat inspection program and its conformity with Federal standards and had likewise been turned down.

Several months after his testimony, Schuck filed suit against the department under the Freedom of Information Act to obtain the information. The case is now pending in the courts.[54]

Federal Communications Commission's "Blacklist"

Mr. R. Peter Straus, publisher of Straus Editor's Report, told the subcommittee of its efforts to obtain permission from the Federal Communications Commission to inspect the list of some 10,900 individuals and organizations whose names and addresses are on a so-called blacklist. FCC claims that they possess qualifications that are believed to require close examination in the event they apply for a license.[55]

The request by Mr. Straus was denied by Mr. John M. Torbet, Executive Director of the FCC. The "blacklist" problem was discussed later in hearings with the FCC.

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[51] Hearings, pt. 6, p. 2027.
[52] Hearings, pt. 4, pp. 1261–1262.
[53] This case was also discussed with USDA witnesses later in the hearings. See pt. 5, pp. 1605–1609.
[54] *Schuck* v. *Butz*, D.C. D.C. Docket No. 897-72.
[55] Hearings, pt. 4, pp. 1284–1287; see FCC testimony, pt. 5, pp. 1789–1792 and 1810–1816.

Philadelphia *Inquirer* Case

An urban affairs writer for the Philadelphia Inquirer, Mr. James B. Steele, told the subcommittee of the efforts which he and his associate, Mr. Donald L. Barlett, made to obtain information under the FOI Act from the Department of Housing and Urban Development. The information first requested in August 1971 was the names of FHA staff and fee appraisers connected with the appraisal of rundown houses which were bought by real estate speculators and sold at inflated prices, FHA-insured, to hundreds of low-income families.[56] The information was needed in connection with a series of exposé articles on housing frauds in Philadelphia.

The information that would link specific appraisers to inflated appraisals of individual dwellings was denied by Theodore Robb, HUD's regional administrator in September 1971. The newspaper's appeal of the denial to HUD Secretary George Romney was rejected on November 11, 1971. Steele testified:

> In a four-page letter, he asked us to blame him for any slip-ups that might have been made by FHA, but don't blame the appraisers. He said it was not relevant to criticize an employee of HUD. He wrote:
>
> > No enterprise, public or private, can expect its employees to contribute as openly and honestly to the formulation of its policy if those employees believe that their opinions (such as appraisals) are to be subject to public second-guessing.[57]

But the official national organization of appraisers, The Society of Real Estate Appraisers, in a letter to the subcommittee said:

> This letter is for the record of the subcommittee's present hearings on possible Government abuses of "The Freedom of Information Act." It refers particularly to the recent controversy over HUD's withholding of the names of appraisers involved in FHA 235–236–237 programs.
>
> We understand an intended Justice Department appeal of the court decision ordering release has not been entered and HUD has now released the names. While this settles this particular incident, the future may see similar attempts to withhold information by other agencies for varying reasons. The Society of Real Estate Appraisers is opposed to any such Government agency action.
>
> The function of the appraiser as related to Government is to protect the interests of the people and the Government. There is no alchemy nor mystery to the appraisal process. The appraiser should not be cloaked in secrecy as to imply there is. His function is to estimate fair market value, which involves just compensation of the public and the fiscally sound operation of the Government. The steps taken to estimate value involve reason and judgment. Public and Government must realize professionally the appraiser should be an impartial observer. The best way to keep him that way is to let both sides know who he is and what he's doing.

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[56] Ibid., p. 1294. The case is similar to the Nashville *Tennessean* case mentioned above.
[57] Ibid., p. 1295.

> Private appraisers who do work for the Government make no secret of it; indeed, they list such work proudly in their qualifications. It is often impressive to their other clients. It cannot do much for a Government's image to impose secrecy upon a subject that is being legitimately boasted about outside that government. * * *[58]

The Inquirer filed suit in the U.S. district court in Philadelphia. Oral arguments were held during December 1971 and on March 9, 1972, the court held in favor of the Inquirer and ordered the names of the appraisers released.[59]

Freedom of Information Suit Sometimes Brings Action

Washington attorney Benny L. Kass told the subcommittee that "the mere threat of the act * * * has often released documents that have been earlier withheld." He said:

> One specific instance I might cite is that for 6 months, I was getting an absolute run-around between the Civil Aeronautics Board and the Federal Reserve Board. I wanted to get a copy of the Civil Aeronautics Board response to the Federal Reserve on their implementation of the Truth-in-Lending Act. The CAB said, we have no objection, but that is from the FRB, because we wrote it to them, and the FRB said that we have no objection, but get it from the CAB because they sent it to us, and finally, I went through this run-around and filed an action under the Freedom of Information Act, and about 3 days later the CAB hand-carried this to my office, and disclaimed all knowledge of my action. And so, I think, in some instances the filing of a suit gives rise to a level where somebody, at least, starts to worry about it.[60]

Health Hazards in Industrial Plants

The close relationship between the FOI Act and the administration of the law affecting the health and safety of workers is illustrated by the testimony of Mr. Anthony Mazzocchi of the Oil, Chemical & Atomic Workers International Union, (OCAW) AFL–CIO.[61]

Mr. Mazzocchi described the problems that his union encountered in attempts to obtain information based on inspector's reports of health and safety hazards under the Occupational Safety and Health Act of 1970 (OSHA), administered in the Department of Labor. The information problem also involves the National Institute for Occupational Safety and Health (NIOSH) of the Department of Health, Education, and Welfare, which conducts inplant hazard evaluations.

The union official testified:

> The one court fight in which this union has been involved under the Freedom of Information Act centered on the same kind of inspector's reports that were written by OSHA's

[58] Hearings, pt. 6, p. 1910.

[59] *Philadelphia Newspapers* v. *HUD*, D.C. E.D. Pa., 1971. A related class action suit involving the interests of low-income homeowners in Philadelphia, brought by a subsequent witness, Mr. George D. Gould, an attorney with the Community Legal Services, Inc., is described in pt. 5 of the hearings, pp. 1402–1405.

[60] Hearings, pt. 5, p. 1414. A similar view was expressed by another witness, Mr. Reuben B. Robertson, III, a Washington attorney; see hearings, pt. 4, p. 1262.

[61] Hearings, pt. 5, pp. 1499–1514. Allegations by this witness were subsequently taken up with witnesses from the Labor Department and HEW. See pt. 5, pp. 1626–1628; 1682–1684. Additional correspondence on this matter may be found in pt. 5, pp. 1646–1654.

predecessor, the Walsh-Healey Administration. On February 1, 1971, the U.S. District Court ruled in the case of *Wecksler et al.* v. *Shultz* that the inspector's reports were to be made public. As late as August 1971, high officials of the Labor Department were ignorant of the results of the case and still denied us access that the court had granted us 6 months earlier. Anyhow, the Wecksler case should be enough precedent for OSHA. If not, we will have to go to court again." [62]

Mazzocchi also charged that the "trade secrets" exemption of the FOI Act was being abused, causing serious health hazards to workers:

> The last public information problem in the OSHA inspection-citation process inevitably involves trade secrets. Under OSHA regulations, an employer can declare any part of his manufacturing process to be a trade secret. Once the declaration is made, the inspector will abide by the wishes of the employer. Employees are not given an opportunity to challenge management's contention. This kind of carte blanche for employers will lead to arbitrary and capricious actions. For years, the industrial water wastes inventory was delayed because industry contended that trade secrets would be revealed if they had to describe the nature of the poisons being dumped into American rivers and streams. This same position can be fostered today under OSHA. An employer can declare the toxic air contaminants inside a plant to be a trade secret. The Labor Department will support him as the Office of Management and Budget supported the water polluters. Workers will never know what they are breathing until it is much too late.[63]

Information in such cases is also denied to the union under the "investigatory files" exemption of the FOI Act (552(b)(7)), according to the OCAW union witness:

> * * * The figure 40 deaths a day is very conservative because it includes only reportable deaths from injuries, and omits those stemming from damage which may show up years after the onset of exposure to a substance or group of substances.
>
> Our inability to secure the type of information that is lifesaving information, really, in our opinion, is just contrary to the intent of the Freedom of Information Act, and the Department is hanging its hat for the most part on No. 7, investigatory files compiled for law enforcement purposes—holding that anything occurring under the Occupational Health and Safety Act is for investigatory and law enforcement purposes, which means that we would be consistently denied information, the crucial information.
>
> Mr. MOORHEAD. That was just the point I was going to ask you. Going back to the top of page 4, you say:
>
> "Up to this point, the public and the affected workers have been generally denied access to this information."
>
> On what basis?
>
> Is that the investigatory claim?

[62] Ibid., p. 1509.
[63] Ibid., pp. 1509–1510.

Mr. MAZZOCCHI. Yes; that is what the Department claims, and when information is finally divulged, sometimes it is really too late.

You see, timeliness is also very important to the disclosure of some information, and to disclose it at a point after the confrontation has passed, rather than at a point when people can do something about the particular condition, is still frustrating the intent of the Freedom of Information Act, in our opinion.

Mr. MOORHEAD. In the third paragraph on page 4, you also refer to being denied the access to various reports of inspectors.

Is that the same exemption cited there?

Mr. MAZZOCCHI. Right.[64]

The language of exemption (b)(7) of the FOI Act, as it has been interpreted, thus makes it difficult, if not impossible, for workers in hazardous plants to be informed about specific health or safety problems that exist in an interim period while inspectors' reports are slowly making their way through the bureaucracy toward eventual enforcement proceedings, fines, and correction action. This use of the exemption "investigatory files compiled for law enforcement purposes" in such situations involving occupational safety and health, even the lives of millions of American workers is contrary to sound public policy. This case and other abuses of the investigatory file exemption have prompted a reexamination of the language of subsection (b)(7), dealt with later in this report.

Consumers' Stake in Freedom of Information

A graphic and timely case of the withholding of information by the Federal Power Commission (FPC) on natural gas reserves was called to the attention of the subcommittee in testimony by Mr. Charles F. Wheatley, Jr., general manager and general counsel of the American Public Gas Association.[65] This information affects natural gas rate case decisions of the FPC involving billions of dollars in higher gas rates for many millions of consumers.

Data on natural gas reserves, compiled by a committee of the American Gas Association (AGA), used by the FPC in making their rate increase determination in the southern Louisiana rate case,[66] was withheld from consumer-oriented groups who sought to make an independent evaluation of the data. Stung by public and congressional criticism of their dependence on industry-furnished gas reserves studies, the Commission in December 1971 ordered a limited check of certain gas reserve data supplied by the American Gas Association. The Commission, however, ordered that the data involved be kept confidential and withheld from the public. It is in the context of this FPC study of gas reserves that the FOI Act became an issue.[67]

Wheatley testified:

> The American Public Gas Association, American Public Power Association, and Consumer Federation of America filed a petition for rehearing with the Commission on Janu-

[64] Ibid., p. 1515.
[65] Hearings, pt. 5, pp. 1522-1533.
[66] Ibid., p. 1523.
[67] Ibid., p. 1526.

> ary 20, 1972 challenging, inter alia, the provisions for secrecy of the National Gas Survey reserve study. In rejecting this, the FPC relied upon the Natural Gas Act and the Freedom of Information Act as justification for its imposition of secrecy of all the underlying figures reported to its agents by the AGA and the producers. They quoted the language of section 8(b) of the Natural Gas Act which appears at the top of page 9 of my statement and with respect to the Freedom of Information Act they quoted section 552(b) of title 5, which is also quoted at the top of page 9, and in that section, subsection 4 which refers to trade secrets and commercial or financial information obtained from a person and privileged or confidential * * * and (9) which concerns geological and geophysical information and data, including maps concerning wells.[68]

In his testimony Mr. Wheatley carefully analyzed the FPC interpretations of the exemptions of the FOI Act relied on and presented a strong case that the use of exemptions (b)(4) and (9) are not properly claimed by FPC.[69] He asserted that "the FPC appears to be giving a broad unwarranted interpretation to section 552(b) of the Freedom of Information Act to bar all public inquiry into its asserted investigation of the AGA gas reserve estimates under the National Gas Survey. This is a matter of fundamental importance to the consumers of the country * * *." [70]

Wheatley went on to point out:

> The survey as conducted by the FPC appears designed merely to give the AGA industry figures a coating of respectability which they do not deserve in the absence of cold hard proof under public scrutiny. In testimony on March 2, 1972, before the Senate Commerce Committee, Alan S. Ward, Director of the Bureau of Competition of the Federal Trade Commission also reported that the National Gas Survey as now being conducted would not satisfy the public's and the Government's need and right to know the facts—he concluded in this statement:
>
> > As with the existing AGA procedures, too much concern about confidentiality of proprietary data seems likely to interfere unduly with the public's and the Government's need and right to know the facts about our Nation's current energy resources.

Several weeks later, FPC General Counsel Gordon Gooch vigorously defended the Commission's position in testimony before the subcommittee, also discussing the provisions of the FPC regulations.[71] Section 1.36(d) of title 18 code of Federal Regulations states that records "not made a part of the public records by this section may be requested in writing, accompanied by a showing in support of filed with the Secretary and will be made available for public reference upon good cause shown."

Subcommittee Chairman Moorhead and others questioned the "good cause" requirement as being inconsistent with the intent of

[68] Ibid., p. 1526. Witnesses from the FPC were subsequently questioned concerning their interpretation of the FOI Act. See pt. 6, pp. 1951–1954.
[69] Ibid., pp. 1527–1528.
[70] Ibid., pp. 1528.
[71] Hearings, pt. 5, p. 1528.

the FOI Act. In subsequent colloquy and in response to questioning by Representative Wright, General Counsel Gooch stated that the "good cause" language of the regulation applied to matters "expressly exempt by the Freedom of Information Act." [72]

Affirmative Action Plan Information

One of the most controversial problem areas under the FOI Act described by witnesses testifying before the subcommittee was that involving affirmative action plans to bar discrimination by Federal contractors. The subcommittee also received a considerable number of letters, mostly from college and university faculty members, expressing displeasure over the way in which the Department of Labor and the Department of Health, Education, and Welfare was handling alleged discriminatory complaints and the withholding of information contained in the institution's affirmative action plan.

Executive Order 11246, as amended, prohibits all Federal contractors from discriminating on the basis of race, color, creed, sex, or national origin. Hundreds of complaints alleging sex discrimination against women by educational institutions have been filed, but governmental handling of complaint investigations has been often criticized.[73] Until the recent enactment of the Equal Employment Opportunities Enforcement Act of 1972, there was no other legal recourse to complainants of alleged violations of the Executive order.

The Executive order also requires that all Federal contractors, except State and local governments, who have contracts for more than $50,000 and who employ 50 or more people, must have a written affirmative action plan. The plan must include a policy of commitment to the principles of equal employment opportunity, an analysis of the workforce with regard to the utilization of women and minorities, goals, and timetables for correcting deficiencies and a plan of action by which the contractor can demonstrate a good faith effort to comply.

Miss Gates described in her testimony of her organization in its attempts to obtain detailed information contained in contractors' affirmative action plans: [74]

> WEAL members have usually been unsuccessful in attempts to secure these plans from contractors. We suspect that in most cases the employer has no plan and is therefore in violation of the Executive order, although occasionally a plan exists but the employer knows it will not withstand scrutiny and so will not release it.
>
> When plans have not been made available by the employer, we have sought them from the Government through communications with the Office of Civil Rights, Department of Health, Education, and Welfare and with the Office of Contract Compliance, Department of Labor.
>
> We have been told that Peter Nash, when he was Solicitor of Labor, decided that the plans were exempt under the Freedom of Information Act because they contained trade secrets and commercial or financial information obtained from a person and privileged or confidential.

[72] Hearings, pt. 6, pp. 1958-1959. The FPC subsequently informed the subcommittee that the "good cause" language was added to section 1.36(d) *after* the FOI Act was passed. They could give "no indication" why this was done. See hearings, pt. 6, p. 1960.
[73] See testimony of Miss Margaret Gates, Woman's Equity Action League, hearings, pt. 6, pp. 2146-2149.
[74] Ibid, pp. 2147.

She went on to outline a strong argument against the use of the FOI Act exemptions claimed by the Labor Department, including (b) (4) and (7). The argument against use of the FOI Act exemptions to withhold affirmative action plan information was clearly summarized in Miss Gates' testimony: [75]

> We maintain that an affirmative action plan is a condition of a Federal contract and as part of the contract must be as accessible to the public as any other Government document not specifically exempted under the act * * *.
>
> To deny disclosure of the plans is to destroy what appears to be the only method by which the Executive order can be enforced. The compliance agencies lack the resources to do adequate reviews and investigations and the contractors know that their chances of losing valuable contracts are virtually nil. Affirmative action plans are not even requested from the contractors unless a compliance review is anticipated because the Government lacks the personnel necessary to determine whether all of the programs are adequate.
>
> If the Government does not have the resources to review and evaluate the plans that is the more reason to permit the public to do so.
>
> The intention of the Department of Labor now seems to be to make available the approved plans but to deny access to the inadequate or uninspected proposals which are the very ones which minorities and women could benefit most from seeing. This practice also permits employers to conceal the fact that they have no plan at all, which usually means they have given no thought whatsoever to equal employment opportunity * * *.
>
> If the affected classes know what their employer's commitment is, they can protect their own interests by monitoring the implementation of the plan.
>
> They can bring union and community pressure to bear upon the contractor to meet his obligations. By comparing the original plan of the contractor with an improved version accepted by HEW they can also assess how well the Government is negotiating on their behalf.
>
> Of course, one cannot but suspect that these are precisely the reasons why neither the contractor nor the Government is willing to disclose the plans.

The Women's Equity Action League witness concluded her statement with this blunt charge: [76]

> I am asserting that the Department of Labor is unwilling to release affirmative action programs because if it chose to make them available it certainly could do so. The Freedom of Information Act never forbids disclosure, but only permits nondisclosure * * *.
>
> I think that what is lacking is an acknowledgment on the part of both the Government and its contractor that the spirit of the Freedom of Information Act requires that the public have access to the kind of information we seek.

[75] Ibid., pp. 2147–2148.
[76] Ibid., pp. 2148–2149.

> Contractors who are making a good faith effort to correct deficiencies in their employment patterns have nothing to fear from disclosure.
>
> One compliance officer told me that an example of why plans are considered "competitive" information and shouldn't be made public is the case of a major city bank which published its plan, which was a good one, and received so much favorable publicity that it hurt its competitor's business.

Earlier in the hearings, Labor Department Solicitor Schubert was asked about the disclosure policies of compliance agencies under Executive Order No. 11246 affecting affirmative action plans. He described a policy review that was then underway and stated that "the odds clearly are that we will go for broader disclosure in respect of affirmative action programs and perhaps compliance reviews." [77]

Questions were also raised on this subject with Mr. Manuel B. Hiller, Assistant General Counsel, Business and Administrative Law Division, HEW. He told the subcommittee that it was the view of HEW's legal counsel that "affirmative action plans are subject to publication disclosure under the Freedom of Information Act * * * and (they) cannot justify a refusal to make public affirmative action plans when they are requested." Hiller also quoted a December 22, 1971, instruction of HEW's Office of Civil Rights: [78]

> Once the plan has been accepted and is subject to no more negotiations it is OCR policy to release the plan to anyone who requests it. In negotiating, staff members should notify school authorities or Federal contractor(s) of this policy.

Thus, despite assurances from these two Departments, it appears that many of the objections to disclosure policies in cases involving affirmative action plans are still unresolved. There is little, if any, opportunity for input by those employees currently affected by a plan during the critical negotiating stages. Moreover, there is a serious question about the time period when an affirmative action plan is actually considered by a Department to be actually "accepted," so that it would fall under the requirement of public release.

The subcommittee is continuing its study of the broad freedom of information ramifications of this controversial problem.

Information on Employment of Women in Government

A similar problem involving the difficulties encountered by a publisher in obtaining information from governmental offices about Federal employment practices affecting women was described by Mrs. Myra E. Barrer of Today Publications and News Service.[79]

The problem of obtaining details concerning the implementation of President Nixon's directive of April 21, 1971 regarding agency plans to make greater use of women's skills in high level governmental positions began last September when Mr. and Mrs. Barrer wrote to affected departments for details of these governmental affirmative action plans. Only a handful of Government agencies responded, and then not until April 1972—some 7 months later.[80] Some agencies refused to provide the information. citing exemption (b)(5) "inter-

[77] Hearings, pt. 5, p. 1643.
[78] Ibid., p. 1688.
[79] Hearings, pt. 6, pp. 2176-2179.
[80] Ibid., p. 2178.

agency or intra-agency memoranda" of the FOI Act. This denial was asserted in a letter to the Barrers dated September 3, 1971, and signed by Mr. Frederic V. Malek, Special Assistant to the President.[81] Of the 63 plans requested, only 15 had been made available by April 19, 1972, the date of Mrs. Barrer's testimony.

Broad Range of Government Activities Covered

The types of cases involving the Freedom of Information Act among Federal departments and agencies who testified before the subcommittee during the 14 days of hearings touched upon a broad range of the activities of government both at home and abroad.

For example, the Interior Department presented correspondence with individual citizens and groups that dealt with denials of information concerning financial data on concessionaires in national parks; deaths and disabling injuries in national parks; regulations of the Fish and Wildlife Service; documents relative to water pollution control; a report on a wilderness area, and the Treleaven report on the department's public information function, discussed elsewhere in this report.[82]

Department of Transportation (DOT) General Counsel John W. Barnum's testimony discussed the so-called Garwin report on the supersonic transport (SST), which had been the subject of considerable controversy over funding in the Congress and also involved a suit under the FOI Act.[83] It also included such diverse areas as Coast Guard information practices; access of the public to information contained in research and development contracts; and the heavy caseload of requests under the act involving the Federal Aviation Administration.[84]

Mr. Ronald M. Dietrich, General Counsel of the Federal Trade Commission (FTC), described the details of its information policies under the FOI Act as they relate to the regulatory functions of the Commission.[85] His testimony described problems involving the types of proprietary data provided to the FTC by companies subject to Commission jurisdiction and regulations that have been established to protect the competitive position of such companies.

An interesting listing of requests for information to the FTC which have involved exemption (b)(4) of the FOI Act (trade secrets) was provided for the hearing record. This list of typical cases provides a good insight into the day-to-day types of cases which the Commission receives under the act.[86]

The Environmental Protection Agency's (EPA) witness, general counsel John R. Quarles, Jr., described the positive approach that agency takes to the Freedom of Information Act: [87]

> At the Environmental Protection Agency, we attempt to comply with the spirit, as well as the letter, of the Freedom of Information Act.
>
> The philosophy of open disclosure which that act embodies is, we believe, a necessary part of modern government. The

[81] Ibid., p. 2183. The term "working documents" was used in connection with (b)(5) a term that is not even in the language of the exemption subsection of the act.
[82] Hearings, pt. 4, pp. 1280–1281; 1313–1314; 1323; pt. 5, pp. 1737–1751; and pt. 6, appendix.
[83] Hearings, pt. 5, pp. 1761–1763. See *Soucie* v. *David*, 448 F. 3d 1067, 2 ERC 1626 (D.C. Cir. 1971).
[84] Ibid., pp. 1763; 1766–1782. An affirmative step was taken by DOT in holding a FOI seminar in Washington on May 17, 1972 for departmental operating personnel. Experts from the Justice Department, the Civil Service Commission, and the subcommittee staff participated in a panel discussion of FOI Act principles and administration. The committee feels that all Federal agencies should follow DOT's lead in holding such seminars on the act at both the Washington and regional levels.
[85] Hearings, pt. 6, pp. 1846–1853.
[86] See listing in pt. 6 of hearings, pp. 1868–1870.
[87] Hearings, pt. 6, p. 1876.

> public will not tolerate a government that is conducted in secret. A Federal agency that wishes to have any credibility with the public must be frank and open in its conduct of affairs. This is especially important for the Environmental Protection Agency * * *.

As a new agency, it has benefited from the experiences of many other older departments and agencies in administering the FOI Act and, consequently, has promulgated one of the most enlightened and positive sets of regulations to implement the act.[88] Of particular importance is EPA's procedure involving the handling of "trade secrets" under exemption (b)(4) of the FOI Act. The burden of justification of the trade secret claim is placed on the individual company or individual involved.[89]

General counsel David Maxwell, of the Department of Housing and Urban Development (HUD), unveiled a new set of regulations under the FOI Act, promulgated on the eve of his appearance before the subcommittee.[90] He announced a policy change with respect to the release of the names of appraisers involved in housing projects, discussed earlier in this report.[91] The difficulty of departmental implementation of basic policy at the area or regional office levels is illustrated by the fact that several months after the assurance given by Mr. Maxwell, similar types of information were still being denied under the FOI Act by HUD officials outside Washington.[92]

The importance of providing training and indoctrination of regional and local office personnel of all Federal agencies as to the intent of the Freedom of Information Act and how it should be administered in the public interest was stressed in a colloquy with HUD witness Maxwell.[93] The decentralized administration of vast numbers of important Federal programs makes such action imperative if the FOI Act is to be an effective instrument in safeguarding the "public's right to know."

Testimony by Mr. Donald O. Virdin, Chief, Disclosure Staff, Office of the Assistant Commissioner (Compliance), Internal Revenue Service (IRS) and that of Mrs. Charlotte T. Lloyd, Assistant General Counsel, Treasury Department covered some of the most serious cases of bureaucratic abuses uncovered during the subcommittee's investigation of the administration of the Freedom of Information Act.[94] This subject is also dealt with earlier in this report. It should be noted that much tax data is exempt from disclosure by law.

The list provided by IRS for the hearing record which summarizes the types of requests received under the FOI Act since July 1967, is a revealing insight into the impact which the act has on day-to-day activities of a Federal agency.[95] Almost half of the requests to IRS were denied. In addition, many of the requests recorded in the list were for copies of printed handbooks or manuals available in the public reading room, so that the denial record on substantive requests under the act is even higher than the percentages show.

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[88] Ibid., pp. 1894–2001.
[89] Ibid., pp. 1878–1880.
[90] Ibid., p. 1911.
[91] Ibid., p. 1911. See p. 13 of this report.
[92] Staff meeting with news staff of the St. Louis Globe-Democrat and conversations with Washington bureau staff, Gannett Newspapers.
[93] Hearings, pt. 6, p. 1931.
[94] Ibid., pp. 1983–2022; 2026–2027; 2030–2033. For examples see p. 23 of this report.
[95] Hearings, pt. 6, p. 1995.

The Department of State's witness, Mr. William D. Blair, Jr., Deputy Assistant Secretary for Public Affairs, described the broad range of activities involving international relations that are covered by the department's administration of the FOI Act.[96]

One of the few Federal agencies not providing for an appeals process under the act, the State Department witness explained such rationale, but indicated that "we are presently preparing to amend these regulations to provide for an administrative appeal to a higher level within the department from an initial denial of a request."[97] Changes to liberalize its copying fee schedule were also promised.

Mr. Blair also discussed a case involving a request under the act by a Cornell University professor, Mr. D. Gareth Porter, for information concerning the list of Vietnamese landlords who rent villas, hotels, and apartments to the U.S. AID Mission in Saigon.[98] The information was withheld under exemptions (b)(2), (3), and (6) of the FOI Act and title 18, section 1905 of the U.S. Code. The justification of such action appears to the committee to be without merit, based on the fact situation, and is typical of the types of abuses uncovered during this investigation.

He also discussed the Passport Office "lookout list," similar in some respects to the FCC "blacklist" mentioned previously in this report, and the rationale behind the secrecy policy attached to such computerized list. The Agency for International Development's (AID) "watch list" of suspended or debarred importers and suppliers under the Vietnam commodity import program was also explored as part of the department's information policies.[99] Unlike the FCC and Passport Office lists, the AID list is published quarterly.

Testimony by Mr. J. Fred Buzhardt, General Counsel of the Department of Defense, and statements from witnesses from each of the three military services covered a wide scope of activities involving the FOI Act.[100]

Each component part of the department has established its own regulations based on the DOD policies set forth in their directive 5400.7. Each military department and defense agency has its own procedures for handling requests under the FOI Act. The general philosophy as expressed by Mr. Buzhardt is: [101]

> I assume that any request for a record made by a member of the public constitutes a valid request within the purview of the Freedom of Information Act.
>
> It should not be necessary for an individual requesting a record to cite the Freedom of Information Act before his request is evaluated in accordance with the intentions of Congress expressed in the act. Such a restriction would obviously favor the sophisticated and work to the disadvantage of those average citizens who may have little technical knowledge about the Freedom of Information Act, yet are the very persons for whom the "right to know" is most important.
>
> It is, therefore, our policy to treat each request for a record as though it was made by the most knowledgeable law firm

[96] Ibid., pp. 2076–2081.
[97] Ibid., p. 2078.
[98] Ibid., pp. 2085–2087.
[99] Ibid., pp. 2096–2098.
[100] Ibid., pp. 2101–2112.
[101] Ibid., p. 2107.

in Washington, with all the proper citations and references to Freedom of Information Act provisions and case interpretations. The only requests which may be denied are those involving records which clearly come within one of the exemptions of section 552(b), title 5, U.S.C.

Even then, all officials of the Department of Defense are instructed that a record exempted under the Freedom of Information Act should be released whenever it is determined that no significant purpose would be served by withholding it. Thus, for example, many records which technically might fall within the second exemption of the Freedom of Information Act as "internal personnel rules or practices" of the department or agency, would routinely be released on request because no significant purpose would be served by refusing them; although the second exemption serves a very practical purpose in excusing the Department of Defense from publishing in the Federal Register its parking regulations, for example. We would, of course, provide a copy on request because no significant purpose would be served in withholding it.

Mr. Buzhardt's testimony also clarified another matter which had been the subject of considerable confusion—the basis for use of the legend "For official use only." He said: [102]

> * * * the marking "For official use only" does not relieve an official of his responsibility to review a request for a record for the purpose of determining whether an exemption (under the FOI Act) is applicable and whether any significant purpose will be served by denying that record to the requester. The reviewer may discover that the legend was improperly applied or that the passage of time makes it possible to release the document.
>
> I might add that the term "For official use only" is not properly denominated a "classification." There are only three categories of security classification: "Top Secret," "Secret," and "Confidential," and these all have to do with the interest of the national security or foreign relations of the United States.
>
> I repeat for emphasis that "For official use only" documents can be withheld from the public only when they come within one of the express exemptions provided by the Congress in the Freedom of Information Act, and only when their release would be inconsistent with a significant responsibility of the Department of Defense.

Since the DOD information directive did not require keeping statistical records on requests received by the Department or its component services or agencies, only the Air Force could provide the type of data on requests under the FOI Act.[103] Mr. Buzhardt noted, however, that a February 18, 1970, memorandum from the General Counsel's office directed "all components * * * to keep records on denials" of information under the act.[104]

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[102] Ibid., p. 2110.
[103] See subcommittee questionnaire analysis, op. cit., pp. 1333–1343.
[104] Hearings, pt. 6, p. 2127.

A colloquy with Mr. Bert Z. Goodwin, Assistant General Counsel of the Air Force, brought out other diverse matters involving the act such as the denial of Air Force Academy records dealing with honor board hearings.[105] Another colloquy with Mr. R. Kenly Webster, Principal Deputy General Counsel of the Army, dealt with the Army's information policies in the handling of the case involving Lt. Col. Anthony B. Herbert (retired).[106]

Some of the best examples of Federal Government roadblocks to the effective operation of the Freedom of Information Act were provided in testimony by Mr. Sanford Jay Rosen and Mr. John Shattuck of the American Civil Liberties Union (ACLU), both of whom have had extensive experience in FOI Act litigation.[107]

Among specific FOI Act cases being handled by the ACLU attorneys, Mr. Rosen mentioned those involving a university professor seeking a study of Vietcong defector morale; a law review project involving disciplinary proceedings at the U.S. Air Force Academy; a death report being sought by a father from the Navy on the demise of his son; and the efforts of a historian to obtain access to documents in the National Archives that are some 30 years old.[108] It is expected that this latter subject will be dealt with in another report.

Remedies Suggested by Witnesses To Limit Governmental Roadblocks

A number of significant approaches to limit governmental roadblocks to more effective and expeditious administration of the Freedom of Information Act were suggested by subcommittee witnesses.

It is abundantly clear, however, that procedural changes in administrative regulations or even amendments to the act itself will not necessarily solve the types of abuses brought to light during the course of these hearings. This point was effectively made in the foreword of the Attorney General's memorandum setting forth guidelines for administration of the FOI Act 5 years ago:[109]

> No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

One of the key purposes of the act, reiterated in that same memorandum was "that there be a change in Government [information] policy and attitude." The committee has noted the original hostility toward the FOI bill by the Federal bureaucracy and the fact that, in historical terms, 5 years of experience in the administration of the act measured in these hearings is not a significant time period.

It also notes the significant efforts on the part of many Federal agencies to comply fully with the congressional intent and the Attor-

[105] Ibid., pp. 2128–2131.
[106] Ibid., p. 2131.
[107] Ibid., p. 2204. Their excellent analysis of leading FOI Act court cases appears on pp. 2205–2212. The ACLU witnessess also provided for the hearing record a number of suggested amendments to the FOI Act. Hearings, pt. 6, pp. 2234–2235.
[108] Ibid., p. 2217.
[109] Attorney General's memorandum, p. iii, hearings, pt. 4, p. 1081.

ney General's guidelines for proper implementation of the act. It is constrained to point out, however, that such positive implementation and constructive efforts are spotty and are not uniform in all Federal departments and agencies. In a number of significant instances, the committee finds that an entrenched bureaucracy is stubbornly resisting the efforts of the public to find and pry open the hidden doors which conceal the Government's business from its citizens.

One of the positive suggestions presented for the subcommittee's consideration was contained in Recommendation No. 24 of the 1971 Administrative Conference, referred to elsewhere in this report.[110] The specific recommendation in part B—guidelines for handling of information requests—would place a time limit of 10 working days to respond to an original request for information under the FOI Act, except under certain specific situations, and that final action should be taken within 20 working days from the date of filing an administrative appeal of an agency's denial of information.[111]

The imposition of such a reasonable time limit would substantially speed up the handling of requests under the act and help correct one of the most flagrant and widespread bureaucratic abuses noted in the subcommittee's inquiry—the stalling tactics that often cause the requestor of information to abandon his efforts to obtain information because it is no longer timely for his purposes. This reform would perhaps be most significant in the case of the news media requests under the act, which have not been significant in number.[112] The lack of positive use of the FOI Act by newsmen and other media representatives has been puzzling to the subcommittee and was explored during the testimony of newsmen and editors who had effectively utilized the act to obtain information from government officials.[113]

Another suggested way to clear the massive governmental roadblocks preventing more effective operation of the Freedom of Information Act was proposed by Mr. Mitchell Rogovin, general counsel of Common Cause. He told the subcommittee:[114]

> Common Cause proposes one major amendment to the Freedom of Information Act which it considers to be of the utmost importance. Our proposal for a statutory annual report by each agency to Congress is based on the belief that no law can be enforced on the Federal bureaucracy without continuous outside reinforcement of the spirit of the law. We do not believe that you can leave the enforcement of the Freedom of Information Act entirely to the initiative of those few who can afford costly litigation. Litigation is the exception, rather than the rule.
>
> * * * This amendment we offer as paramount to all others because it should help create and maintain an atmosphere conducive to a spirit of more open access to government information. It would require continuous action of both the executive and legislative branches in behalf of the people's

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[110] See p. 55 of this report.

[111] Hearings, pt. 4, pp. 1233–1234 for full text of recommendations.

[112] See subcommittee questionnaire analysis, op. cit., pp. 1333–43 and remarks by Chairman Moorhead on p. 1333. Only 90 of the more than 2,200 denials of information over the 1967–71 period measured by the analysis involved the media, or about 6 percent. Of course, this does not measure the extent to which information was obtained from government officials by newsmen by expressing intent to file suit under the FOI Act to obtain information requested.

[113] See hearings, pt. 4, pp. 1278, et seq.

[114] Hearings, pt. 5, pp. 1491–1492. The problem of delay by the Federal Government in responding to complaints in court actions under the FOI Act is discussed elsewhere in this report at page 19.

> Finally, I'd be the first to admit that like any other function of Government, resources (e.g., people and tax dollars) applied to public affairs are subject to abuse or misuse. The best safeguard against that happening is to give the function sufficient authority and the resources to develop the professionalism that transcends political expediency. To the extent that it happens, the public will be better served and what the people have a need and right to know about their Government will no longer be an issue.

While the committee does not concede that the provision contained in section 3107 represents any serious conflict with the responsibility of Federal agencies to adhere fully to the provisions of the Freedom of Information Act, it does recognize the psychological effect it has on many Government public information officials that contributes to an overall downgrading of status and professionalism of this vital function of modern government.

Despite the fact that this restrictive language of section 3107 is already included in title 5 of the U.S. Code, the similar language continues to be added to the "general provisions" section of several appropriations bills each year as a limitation on the appropriations made for these departments and agencies.

He added:

> I doubt that you will find any job descriptions in the public information service which define the incumbent as a publicity expert * * *. Some information people, I am told, are quietly disguised as administrative or special assistants and they reside in innocuous places, such as personnel or budget offices.
>
> Whatever label we bear, and we are called many things, our basic function and primary reason for existence is the dissemination of information to the public. We would appreciate some assurance from this subcommittee that we are not violating section 3107 of title 5 of the United States Code, and, thus, become instant criminals every time we disseminate information to the public, as we are required to do under provisions of the Freedom of Information law.

This point was also made in earlier testimony by Mr. Robert O. Beatty, Assistant Secretary of Public Affairs, Department of Health, Education, and Welfare. Beatty told the subcommittee.[160]

> * * * Without going into details of the damage that perhaps the law has done, even though it was well intentioned as a constraint on flackery in Government, I will say I think it has not prevented abuses that it was intended to prevent and has, at times, driven legitimate public affairs people underground, so to speak, because it does reflect an attitude on the part of Congress that public affairs, public information, public relations are somehow not quite legitimate functions of Government.

Beatty urged that the ancient (1913) provision contained in section 3107 be superseded so as to "legitimatize public affairs as a valid function of Government, clearly defining its functions and responsibilities across the board." [161] He also suggested as other ways to upgrade the status of Government public information: [162]

> In summary, what this country needs is more information about its Government—and more resources allocated to the task, not less. One way to achieve this would be to:
>
> Establish an assistant secretary for public affairs in every executive department;
>
> Supersede the 1913 law which places the role of public affairs personnel in Government in doubt;
>
> Require accountability to the Cabinet level and to Congress for public affairs planning, performance and budgeting;
>
> Investigate, with a view of legislative or administrative action to correct, the morass of bureaucratic constraints to the production of effective Governmental communications.
>
> I urge the House Subcommittee on Government Information to take a hard look at these things, Mr. Chairman.

[160] Hearings, pt. 5, p. 1661.
[161] Ibid., p. 1661.
[162] Ibid., p. 1667.

law—but it would also give proper recognition to the legitimate and increasingly necessary role of public information officers as "the bridge" between faceless government and its citizens.

This committee recognizes the increasing dangers of impersonal government by computers and the adverse effect it can have as a dehumanizing force in our increasingly complex and interdependent society. It also recognizes that Federal programs have been expanded into virtually every facet of human endeavor and their administration has been greatly decentralized to the community level. There is, therefore, an even greater need to relate such programs to individual citizens and groups through efficient, skilled, nonpartisan public information specialists. Otherwise, it will be difficult for many Americans to benefit fully from the programs created and funded by the Federal Government.

A Question of Legitimacy—Section 3107 of Title 5, United States Code

One of the most frequently cited inconsistencies in Federal law that affects the role of public information officials is section 3107 of title 5, United States Code:

> Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.

The prohibition was written into an October 22, 1913, law dealing with the Interstate Commerce Commission and has remained on the statute books ever since, despite the vastly different role that "publicity," public information, or public relations plays in our modern industrial society. Also, our governmental structure and programs over the past 60 years have been drastically changed but the law has remained the same.

Mr. William L. Webb, president of the Government Information Organization, said in his statement to the subcommittee.[149]

> The Freedom of Information Act, when laid side by side with section 3107 of title 5 of the United States Code, creates a state of schizophrenia in the minds of many government public information employees * * *. Many government public information officers feel they are caught in the cross-currents of these two statutory directives, and that the public is the real loser. The Freedom of Information law clearly orders the Government to recognize the public's right to know what its Government is doing. Obviously there must be an effective and free flow of information from the Government to the public if we are to comply with this mandate. But the machinery to accomplish this obligation takes personnel and money, and section 3107 can be construed as outlawing funds and people for such purposes.

[149] Hearings, pt. 6, pp. 2155–2156. An analysis of President Nixon's Nov. 6, 1970, memorandum directing a curtailment of "public relations" activities by Federal agencies may be found in pt. 6 of the hearings, pp. 2159–2167. The July 24, 1971, National Journal article by Dom Bonafede is entitled "White House Report—Agencies Resist Nixon Directive To Cut Back Spending on Public Relations." The subcommittee has been regularly monitoring agency reports to OMB as required by the directive to determine the effect of cuts on effective administration of the FOI Act. For a history of the 1913 rider, see article by Mr. Joseph S. Rosapepe, hearings, pt. 6, pp. 2170–2175.

FOI difficulties and provide for continuous review and education.

Mr. J. Stewart Hunter, former Associate Director of Information for Public Services, Department of Health, Education, and Welfare, put his finger on what is perhaps one of the basic reasons for the lack of input by Government public information officials in agency decisions involving the FOI Act. He said: [146]

> As a member of the executive branch and as a Government information officer, I welcomed this legislation when it was enacted. I have been puzzled, if I may say so, at the apathy of some of my colleagues in public information who should, in conscience and as a practical matter, have become its vigorous champions. They and the members of the press should give you their enthusiastic approbation and support.

More than a month later, another witness gave indication that efforts were underway to upgrade the status of public information officers. Mr. William L. Webb, president of the 200-member Government Information Organization, stated that "many times where information is denied, the information officer himself or office has not been consulted or not been given an opportunity to make any input or whether or not the document should be made available." [147]

He went on to tell the subcommittee that:

> In some agencies the information officer is not placed in the same professional category as, for example, a lawyer, an engineer, an economist, or an accountant. Yet the information officer is charged with the somewhat awesome responsibility of serving as a bridge between the citizen and his government.

Webb said that his organization had set up an ad hoc committee to review the role of the government information officer. He observed: [148]

> It is my feeling that the mission of the public information officer not only has never been adequately defined, but is often misunderstood. In many agencies the information officer plays only an administrative, or housekeeping role. Some information people are faced with a "wish you'd go away" syndrome. They feel that their agencies would really prefer not to have any information officer at all, and sometimes try, budget-wise and personnel-wise to come as close to this goal as possible.

Public Information Role Requires Upgrading

A more clearly defined role for public information personnel in the Federal Government and a general uplifting of their status within the bureaucracy are long overdue. Not only could such steps have significant impact on more conscientious administration of the Freedom of Information Act—both the letter and spirit of the

[146] Ibid., p. 1021.
[147] Hearings, pt. 6, p. 2157. A discussion of the problems of a public information officer in getting news across to the media is contained in a colloquy with Mr. Leonard Weinles of the FCC in pt. 6 of the hearings, pp. 1802-1803; 1808-1810.
[148] Ibid., p. 2157.

If the information chief proposes to deny a request, he must discuss the situation in advance with an information lawyer in the Office of the General Counsel, the operator who wants the information denied, and the public information adviser.

They have had a number of seminars and conferences with low level officials on administration of the FOI Act. And they report they rarely charge fees for search and seldom for copies.

In responding, Mr. Robert Beatty, Assistant Secretary of Public Affairs for HEW, said, "I think a major factor in the department's affirmative approach to the act has been the early and continuing involvement of public affairs professionals in its implementation. Additionally, I think every secretary of the department since the inception of the act to the present has vigorously supported its intent and purpose." [142] Mr. Beatty added that HEW has confined its denial authority to four persons, all public affairs officials.

The HEW official said "It was Congressman Moss, who determined in 1968 that something like 18/100,000th of the entire Federal budget is spent on the dissemination of information about what the Government is doing and that as much Government effort is spent to inform 535 Congressmen as is spent to inform 210 million American citizens. I think this is a ridiculous imbalance of this allocation of resources and I think it is one of the reasons—and I say this in all sincerity—that the people, regardless of party in this country, are growing increasingly disenchanted with their Government because they know so little about what is going on or what is supposed to be going on or what it can do." [143]

Need for Improved Public Information Capability

The problem of proper authority over information requests was also dealt with by other witnesses, Mr. Arthur Sylvester, former Assistant Secretary for Public Affairs, Department of Defense. He suggested that the subcommittee "consider the feasibility of requiring each agency to identify a single person as responsible for the release of information, someone on whom you can put your finger for the responsibility of getting the news out. I think this would tend to reduce buckpassing." [144]

Another witness, Mr. Harold R. Lewis, former Director of Information for the Department of Agriculture observed: [145]

> Typically, three types of officials would be involved in considering an FOI request or appeal—an administrator, a legal counselor, and an information officer. The information officer's role would chiefly be that of adviser, not decisionmaker. He would have to resort to persuasion rather than clearcut decision, and persuasion rarely carries the weight of authority.
>
> As a result, some FOI decisions could be made without adequate regard for implications of withholding action. A central point of review, with specific authority beyond that usually provided department officers, would obviate many

[142] Ibid., p. 1658.
[143] Ibid., p. 1662.
[144] Hearings, pt. 4, p. 1016.
[145] Ibid., p. 1017.

> could be more devastating than when the Department of Justice Committee says to somebody that it is indefensible and we will not take it to court. We will not defend it, and I think that is the end of the road right there, and there are lawyers who do that, too.

A similar question concerning the proper balance between the roles of public information officers and legal authorities of an agency was put to another witness, Mr. Ralph E. Erickson, then Assistant Attorney General, Office of Legal Counsel, Department of Justice. He responded: [139]

> I would feel rather clearly that if the inquiry were to come into the public information officer, that the public information officer should handle it to the extent that he can.
>
> If he runs into a situation where he feels that it is something that he should not disclose or cannot disclose, for some reason, he certainly should consult the general counsel. I would not expect that all of these things would be formalized within the General Counsel's Office. That, to me, is overlegalizing it, if you will * * *.
>
> I am assuming that we have a responsible public information officer that is going to be aware of the concerns, the interests of the Department, and the interest of the public, and the individual that may be involved in the disclosure which could be harmful to the person about whom the disclosure is being made.
>
> And at that point in time we would expect a responsible public information officer to check with his general counsel.

Health, Education, and Welfare Involvement of PIO

During the subcommittee's review of the administration of the Freedom of Information Act, Chairman Moorhead commented on the public information role in the Department of Health, Education, and Welfare: [140]

> HEW is the only agency in which the public information people appear to control public information. When the FOI Act was passed, HEW set up a special office to help administer it. This was part of HEW's continuing effort—going on ever since the Department was created—to gain some semblance of coordination over the diverse agencies which made up the Department.

HEW now has an Assistant Secretary for Public Affairs, the only agency outside of Defense and State where the information function is raised to the top operating level. Their special FOI office operates under him.

HEW listed as freedom of information requests only those requests for information which were in writing and mentioned the FOI Act. Requests go to program officials—that is, those running particular programs such as health, social security, for food and drug, with which the information is concerned. Anyone can grant information but only the chiefs of public information can deny information.[141]

[139] Ibid., p. 1195.
[140] Hearings, pt. 6, p. 1657.
[141] Ibid., p. 1657.

Executive Director is not required to seek the advice of, nor does he in practice consult with, the Public Information Officer before acting upon a request which raises a question of interpretation under the Freedom of Information Act." [135]

Selective Service System Ignores PIO

Very few information experts in our Government are at the top administrative level where credibility is determined and even when they are, they are sometimes not consulted. The Selective Service System was a prime example of the latter. Although the Chief Public Information Officer is a super-grade and referred to as "a member of the top-management team," he has played virtually little or no role in advising on refusals to provide information to the public. Questions confirming this brought forth an assurance from the General Counsel that the situation would be rectified and the Chief Public Information Officer would be consulted in the future.[136]

Contrasting View of PIO Role

A somewhat different point of view was expressed by several attorneys who have had extensive experience in Freedom of Information matters. Mr. Frank Wozencraft, a former assistant attorney general who participated in the drafting of the 1967 Attorney General's memorandum on the act, said: [137]

> I did not mean to imply that only lawyers should be charged with releasing documents. As I said earlier, I think the public information officer can be very useful in a great many situations, but a lot of times his problem is also to have great consciousness of the image of the agency. Sometimes if the image of the agency might be tarnished a little bit by the document, he may be much more inclined to withhold it rather than release it.
>
> And my thought of having a general counsel in at the appellate level is in case that does happen, to let us have someone else to whom an appeal can be directed.

The General Counsel of the Civil Service Commission, Mr. Anthony Mondello, who also served in the Justice Department and participated in the drafting of the Attorney General's memorandum, argued for a dominant role for agency lawyers in FOI Act cases: [138]

> * * * I think we should keep lawyers on the scene all of the time because I think the lawyers in Government have been very helpful in persuading these operation officials who, you know, for 20 years perhaps ran an office, owned the files, so to speak, and have been turning down everybody under former section 3. It has been legal counsel, I think, who has been very instrumental in letting them realize that day is gone, and the great benefits of the act seen in the past 4 years, I think, are a direct result of that kind of working out with lawyers with the threat that we are going to lose it in court, and you make the agency head resist, and nothing

[135] Ibid., p. 1795.
[136] Hearings, pt. 6, pp. 1834–1836.
[137] Hearings, pt. 4, p. 1158.
[138] Ibid.

Mr. MOORHEAD. Is that on an appeal or on the initial request?

Mr. SCHUBERT. On appeal. The initial decision under the rules and regulations is made by the highest officer of the unit in the field, as I indicated, almost invariably after discussion with the Solicitor's Office indicated, but there is nothing in the procedure which wires the public information officer into that process.

Mr. MOORHEAD. Well, whether the request was to Washington or to the field and then there is a denial, then an appeal is made, to whom does the appeal go?

Mr. SCHUBERT. The appeal is to the Solicitor and what I have said to my staff was I want to be sure whenever an appeal is received that that appeal be coordinated and that the process of determination regarding that appeal include the public information officer and the Special Assistant to the Secretary.

Chairman Moorhead told Mr. Schubert earlier that staff investigation showed initial decisions to refuse information were made for the most part at the various operative levels within the Department of Labor and public information experts played no part in the decisions.

"Appeals are handled by the Under Secretary after seeking the advice of the legal office," Congressman Moorhead said. "Although the Labor Department has an extensive public information office and the Secretary has a special assistant who is an expert in the field * * *, none of the information people apparently are consulted at any time in the public information process." [131]

Interior Department PIO Role

The Interior Department also kept no records of requests under the act; the public information office (PIO) was not consulted in handling such requests; and decisions on refusals were made at low administrative levels. Access to information requested was granted in only 40 percent of the cases.[132]

Robert Kelly, Director of Communications for the Department of the Interior, was asked by Congressman Conyers whether his office has "ever been asked for advice on a refusal." Mr. Kelly's answer was: "Not since I have been there, really." [133]

Federal Communications Commission Ignores PIO

Some regulatory agencies, such as the Federal Communications Commission (FCC), ignore the public information officer. Staff studies introduced into the record during the hearings showed 36 percent of the 98 requests to the FCC were refused.[134] The initial decisions were made by the FCC Executive Director with the advice of the General Counsel's Office. The Public Information Office was never consulted, neither in response to an initial request for information or when an appeal was acted upon. The FCC General Counsel, in answering a written question submitted by the subcommittee, said bluntly: "The

[131] Ibid., p. 1614.
[132] See subcommittee questionnaire analysis, hearings, pt. 4, pp. 1333-1334.
[133] Hearings, pt. 5, p. 1714.
[134] Subcommittee questionnaire analysis, op. cit., p. 1339.

Department of Agriculture is done on what I call a very decentralized basis? In other words, each agency head has the final say on a request for information; is that correct?

Mr. BUCY. That is correct, Mr. Chairman.

This was followed later by these additional questions and answers:

Mr. MOORHEAD. How many times in the 4 years under the act did operating officials seek the advice of public information experts before making the decision to withhold?

Mr. BUCY. We don't have any record on that, Mr. Chairman, because there we leave it to the attorneys who service the particular agency to answer in the first instance. Then they come to one of the divisions that happens to be under my supervision which coordinates and keeps all of the people in the General Counsel's Office advised of developments in this field, but we wouldn't have a record that would be meaningful as to the number of times that we have been consulted with respect to initial requests and decisions on information.

Mr. MOORHEAD. I think maybe I should have directed that question to Mr. Gifford since it asked how many times they asked the advice of public information experts.

Mr. GIFFORD. Mr. Chairman, I have been with the Department only since June 15 last year and I am trying to recall whether anything has come to my attention since that time. I can't recall anything coming to my particular attention. It could have been brought up with the Deputy Director. I don't know.

Of course, on many occasions information people within the agencies will consult with us on matters usually having to do, however, with expediting the release of information. This would not relate to the question of what information is going to be withheld, but usually relates to how we can get something moving when the information machinery, let's say, is not turning as rapidly as it should.

Labor Department Information Practices

This issue was brought up again in testimony before the subcommittee by Mr. Richard F. Schubert, newly appointed solicitor of the Department of Labor. Chairman Moorhead queried Mr. Schubert on whether the advice of public information officers was sought on decisions by other departmental officials in providing information when requests came to them. The response was: [130]

Mr. SCHUBERT. There is not any requirement. My investigation, primarily as a result of the discussion that we had with your staff a week or so ago, revealed that the practice was at best mixed and it was as a result of that finding that I have asked my people in the Washington office of the Solicitor's Office to set up a procedure whereby not only public information officers in the Labor Department in Washington, but also the Special Assistant to the Secretary for Press Relations be a part of any appeal process on the decision made to deny disclosure.

[130] Ibid., p. 1622.

V. PUBLIC INFORMATION EXPERTS AND THE FREEDOM OF INFORMATION ACT

One would expect that when a department or agency is faced with a question whether to withhold or release a document requested by a taxpayer under the Freedom of Information Act, expert advice and recommendations would be sought from that department's or agency's chief public information officer. But this advice often is not sought and in a number of cases the chief public information officer may even be unaware such a question is under consideration.

There seems to be a pattern throughout Government that these matters are handled by the General Counsel, sometimes in consultation with a policymaking official whose primary interest may be protecting the agency from criticism. A public information officer, if asked for advice, might head off a number of such refusals by pointing out that withholding can subject the agency to even more serious criticism.

As Harold R. Lewis pointed out:[128]

> Information people are by the nature of their training and in the performance of their job, more sensitive, I think, to the general needs of the public than are technical and administrative people.
>
> They work every day with the media people, and know better the impact of what is going to happen, either good or bad, based on how an information situation develops.

Refusals often raise the question, justified or not, "What is the Government trying to hide?" A minor matter can often take on a sinister appearance under such circumstances. Thus, the preference always should be toward public disclosure unless solid defensible and compelling reasons exist otherwise. There must be no doubt they can hold up at the bar of public opinion, as well as in court.

Decentralization Problem in USDA

The subcommittee found in its hearings that some large Government departments and agencies are set up under a system of decentralized operations which, by their organizational nature, impede the chief public information officers in providing the type of advice that should be immediately available and given. This is true of the Departments of Agriculture, Interior, and Labor, for example. The following questioning by subcommittee Chairman Moorhead of Mr. Charles W. Bucy, Assistant General Counsel of the Department of Agriculture, and its Director of Information, Mr. Claude W. Gifford, is illustrative of the problem:[129]

> Mr. MOORHEAD. I would like to ask you gentlemen if it is not correct that the handling of information requests by the

[128] Hearings, pt. 4, p. 1058.
[129] Hearings, pt. 5, p. 1561.

require that denials be supported with specific references to exemptions, provide for uniform fees for furnishing records, etc., could do as much as any single measure to assure effective implementation of the Act.[125] In addition, agencies should include in their regulations in implementation of the Information Act a provision requiring the agency to disclose information that is technically exempt from mandatory disclosure where there exists no legitimate purpose for withholding the information. Several agencies already have such provisions in their regulations, but the practice should be universal.

Third, Congress should conduct periodic oversight hearings, like these hearings, to assure that agencies are complying with the act's requirements, are attempting to bring their regulations into line with the uniform regulations, and are generally living up to the act's objective of maximum disclosure.

Fourth, agencies should maintain, insofar as is practicable, detailed statistics concerning requests for information, and the disposition of those requests, especially denials. At present, it is extremely difficult to obtain any meaningful idea of the agencies' compliance with the Information Act.

Summary

The committee finds that the correction of some basic problems of administrative roadblocks which hinder the fully effective operation of the Freedom of Information Act, typical examples of which are outlined above, require significant amendments to the act. Some of the general suggestions presented by witnesses to improve the effectiveness of the act have also been described in this part of the report. Specific legislative objectives to remedy the types of problems in the administration of the act over the past 5 years, pinpointed by the subcommittee's investigations, studies and hearings are described later in this report.[126] Other administrative problems, such as those involving defective regulations, lack of proper training in the act, overly excessive search and copying fees for provision of information, inadequate recordkeeping, and similar matters might be properly corrected by the type of positive action recommended later in this report.[127]

[125] Last year, the Committee on Access to Government Information of the Section of Administrative Law endorsed Recommendation No. 24 in a report to the section.
[126] See p. 80 of this report.
[127] See p. 83 of this report.

> that we get into when we refuse the request * * *. I favor that approach.

The effective administration of the FOI Act, with all its problems, is considered by some to be largely a matter of positive attitude or philosophic conviction that supports the principle that the public is entitled to know the business of its government. This point of view was expressed by Mr. David Parson, a Chicago attorney and Chairman of the Committee on Government Information of the Federal Bar Association: [122]

> When the head of the agency has as his basic tenet the distribution and availability of information, then it follows that everybody or most everybody in the agency will follow his policy; therefore, it does not become a problem for the lawyer, and it does not become a problem for the public information officer. It is only when the head of the agency does not set that policy of distribution of information that it then becomes a problem of whether we are charging too little or too much, whether one person or another has to make that final determination of what will be distributed.
>
> So I think the crux of the matter is, as I have also seen it in practice, is that once the heads of the agencies are aware of the need for the public to have this information, any information, information which does not violate the right of privacy and national security, then all of the other problems really melt away.

The administrative law section of the American Bar Association (ABA) also noted that "despite general compliance with the statute by most agencies, problems have been encountered in receiving prompt replies to requests for agency records." [123] The ABA statement said:

> The administrative law section believes that the Freedom of Information Act is serving a useful and necessary function in our society, and, notwithstanding the dire predictions of some when it was enacted, has proved to be a workable statute.

The statement recommended a number of proposals to alleviate some of the enforcement problems: [124]

> First, agencies should make a greater effort to educate information officers and other personnel at all levels of the government as to their obligations and responsibilities under the Freedom of Information Act, and should encourage a spirit of maximum disclosure of Government information among all employees.
>
> Second, agencies should conform, insofar as is practicable, their internal regulations with the uniform regulations in implementation of the Freedom of Information Act recommended by the Administrative Conference of the United States. (Recommendation No. 24.) The administrative law section believes that adoption of these regulations, which establish specific time limitations for responding to requests,

[122] Hearings, pt. 4, p. 1164.
[123] ABA statements, op. cit., hearings, pt. 5, p. 1435.
[124] Ibid., p. 1435.

Other witnesses suggested that the law be amended to provide for the award of reasonable attorney's fees and court costs to the plaintiff when information that is sought by an individual from a Government agency under the FOI Act is refused and in a subsequent court case results in a victory for the plaintiff.[118]

In its statement to the subcommittee, the administrative law section of the American Bar Association (ABA) also made such a recommendation:[119]

> The Freedom of Information Act should be amended to provide for the recovery of reasonable attorney's fees and costs by successful plaintiffs, in the discretion of the court, in lawsuits brought under the act. At present, the substantial expenses of litigation may well discourage many citizens from bringing suits under the act even where the agency has clearly withheld information wrongfully.

Another witness, Washington attorney Jacob A. Stein, suggested a procedure similar to that under the Federal Tort Claims Act:[120]

> Denial made at the agency level, I would suggest, must be made within 60 days. I use the 60-day figure because many times the information really is not available to the agency on a good faith basis. However, in making a denial, the agency must specify the defenses pursuant to the act, and that specification must be made in good faith. No defense may be raised when this matter is litigated unless such defense was presented at the agency level. Upon hearing in court, if the court finds that a defense raised at the agency level was not made in good faith, the court shall award reasonable attorney's fees and costs upon such finding * * *.

A more extreme approach to the governmental FOI Act roadblock problem was discussed in the following colloquy between Representative Frank Horton and Interior Department Solicitor Mitchell Melich.[121]

> Mr. HORTON. Does the Department of the Interior have any recommendations with regard to changes in the Freedom of Information Act prompted by experience in working with it * * *.
>
> Mr. MELICH. I would say to the committee that I think, in order to have a much freer flow of information, that the act ought to be amended to have specific sections requiring the Government to make disclosure, and I think where the difficulty is, is that you leave that to the discretion of us in the bureaucracy. That is where we have our difficulty and I realize it is a difficult thing to write the kind of mandatory regulation which I think ought to be in the act so that there would not be any question about some of these gray areas

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[118] For example, see statement by Mr. Robert Ackerly, hearings, pt. 5, p. 1432; sec. 2412 of title 28 of the United States Code presently permits the award of court costs to plaintiffs in civil suits against the Federal Government in certain instances. Costs and attorney's fees are authorized in certain civil rights cases; see 42 U.S.C. 2000(e)-5(k).

[119] Hearings, pt. 5, p. 1436.

[120] Ibid., pt. 5, p. 1392.

[121] Ibid., pp. 1731-1732. An earlier witness, Mr. Frank M. Wozencraft, had proposed that agency budgets have line items devoted to "compliance with the FOI Act." He argued that this would remove the most prevalent excuse for failure to comply with the act and enable the agency to be held more strictly accountable. See hearings, pt. 4, pp. 1073-1074.

> right to know. It would provide an annual forum for the expression of and scrutiny by public opinion.
>
> The amendment would require that every government department, bureau, or agency submit annually to Congress a report which would detail, item by item, the record of each agency's response to requests for disclosures of information under the Freedom of Information Act. It would, in effect, require an accounting of each and every refusal to disclose the information requested * * *.

As Common Cause has indicated, this amendment would "institutionalize" the type of work of the subcommittee in preparation for these hearings—the collection of statistical data on administration of the act over a 4-year period, analysis of such data, investigation of allegations of abuse of the exemptions under the act, and similar types of oversight activities.

Still another type of remedy is directed toward the "foot-dragging" government official who uses every conceivable device to delay making information available under the FOI Act. The dimensions of this problem were described by Mr. William A. Dobrovir, a Washington attorney who has handled a number of freedom of information cases:

> The first problem is the intransigence of Government officials. Basically, they do not believe in freedom of information. They believe that the public's business is their business, and not the business of the public. Until there is a fundamental change in the attitude on the part of Government officials, either by process of education, or by a process of some kind of court sanction, I do not believe that the act is going to be administered. Government officials engage in delay. In one case, in which I represented the plaintiffs and in which we were ultimately successful, there was a 5-months' delay in the response to the appeal, which does nothing but add additional delay into the process, because never have I heard of a Government agency on appeal overturning the initial denial of access to information.[115]

The administrative appeal delay, added to the delay in responding to an original request for information, could be effectively dealt with by a time limitation such as recommended by the Administrative Conference and discussed earlier. Another witness, Attorney Bernard Fensterwald, Jr., suggested a 2-week limitation on an original request within the agency and a 2-week limit on appeal.[116] He also proposed an additional enforcement penalty:

> We might give some thought to a monetary penalty on the agency that withholds. For example, suppose the Defense Department wrongly withholds. If you charge them, for example, $100 a day from the day that the formal request was put in until the court finally ordered that the documents be shown, this would be some incentive for them not to withhold when they should not, and too, not to drag their feet, because every day they are dragging their feet they lose and it is costing them $100 a day * * *.[117]

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[115] Ibid., p. 1394. Other examples of delay are found in the ACLU statement, hearings, pt. 6, pp. 2212-2213.
[116] Ibid. p. 1377. A similar proposal was made by Mr. Richard Wolf, hearings, pt. 4, p. 1066.
[117] Hearings, pt. 5, p. 1432.

VI. THE HIGH COST OF INFORMATION

One of the related perplexing problems of individual citizens in obtaining information from Federal agencies has been the matter of fees charged for search and copying of material to be made available under the Freedom of Information Act.

Section 552(a)(3) provides, in part:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, or request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person * * *.

This language and references in the legislative history make it clear that Congress intended that "search and copying fees" authorized under existing statutes could be charged for records made available under the act.[153]

Guidelines set forth in the Attorney General's Memorandum further emphasize this point: [154]

> The provision authorizing agencies to require payment of a fee with each request for records under subsection (c) makes it clear that the services performed by all agencies under the act are to be self-sustaining in accordance with the Government's policy on user charges * * *
>
> The law (5 U.S.C. [1964 Ed.] 140) referred to in the House Report as directing Federal agencies to charge a fee for any direct or indirect services such as providing reports and documents provides the statutory foundation of the user charges program * * *
>
> The statute further authorizes the head of each agency to establish any fee, price, or charge which he determines to be "fair and equitable" taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *.

User Charges

User charges policy for Federal agencies is contained in Office of Management and Budget Circular No. A–25 "User Charges." [155] The circular provides that "where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service."

[153] H. Rept. No. 1497, 89th Cong., 2d sess., p. 9.

[154] Pp. 25–27. Reference to subsec. (c) are to the precodification version as contained in Public Law 89-487; present reference is subsec. (3) of Public Law 90-23 (5 U.S.C. 552(a)(3)). The reference to the user charges statute (cited above) (5 U.S.C. 140) has been codified as 5 U.S.C. 483(a).

[155] Issued Sept. 23, 1959 (revised October 22, 1963).

The circular provides some broad guidelines to be used in (1) determining the costs to be recovered, (2) establishing appropriate fees, and (3) providing for the disposition of receipts from the collection of fees and charges.

The Attorney General's memorandum further observes: [155]

> It is evident from the provisions of the user charges statute, the Bureau of the Budget circular, and the legislative history of the act that the enactment does not contemplate that agencies shall spend time searching records and producing for examination everything a member of the public requests under subsection (c) (now subsection (a)(3)) and then charge him only for reproducing the copies he decides to buy. Instead, an appropriate fee should be required for searching as distinguished from a fee for copying. Such fees should include indirect costs, such as the cost to the agency of the services of the Government employee who searches for, reproduces, certifies, or authenticates in some manner copies of requested documents. Extensive searches should not be undertaken until the applicant has paid (or has provided sufficient assurance that he will pay) whatever fee is determined to be appropriate.
>
> * * * Charging fees may also discourage frivolous request, especially for large quantities of records the production of which would uselessly occupy agency personnel to the detriment of the performance of other agency functions as well as its service in filling legitimate requests for records.

This committee's 1968 committee print containing a staff compilation and analysis noted that after 1 year of operation the problem of fees was already apparent: [157]

> Another aspect of the law which could be used to block, rather than facilitate access, is the reference to fees (to the extent authorized by statute) to recover the costs of clerical handling of information requests. The intent of the law was to make information available to the public, yet some agencies have raised possible financial barriers using the fee device.

The analysis went on to cite the wide disparity of fees provided for in various agency regulations and the lack of any uniform standards. It stated further:

> Although the Freedom of Information Act does not address itself to the possibility that request for information may be considered frivolous by the agencies, the Attorney General's memorandum states: 'Charging fees may also discourage frivolous requests . . .' In view of the wide range of application and search fees, it appears that there is no agreement on the use of fees to discourage 'frivolous requests,' although spokesmen for several agencies concede that this is the reason for some of their charges. Neither in the law nor in the Attorney General's memorandum is there a definition of 'frivolous' or a suggestion for the establishment of adminis-

[156] Pp. 26-27.
[157] Ibid., p. 6. See footnote 12.

trative machinery to determine if a request is 'frivolous,' thus some agencies have abrogated to themselves more power in the handling of public information than the law intended.

During the subcommittee hearings, considerable attention was devoted to a discussion of fee schedules of various Federal agencies and the extent to which such search and copying fees were being used to deny information that Congress intended to be made available to the public upon request under the act. Executive branch witnesses were also requested to supply information on the amount of fees collected under the act during the previous fiscal year.[158]

Administrative Conference—Recommendation No. 24

Valuable insights into the scope of this problem of administrative problems and fees were furnished by Mr. Roger C. Cramton, Chairman of the Administrative Conference of the United States, during his testimony on March 14, 1972.[159] The Conference had undertaken some 2 years ago a detailed study of the implementation of the Freedom of Information Act and in May 1971 had adopted Conference Recommendation No. 24, entitled "Principles and Guidelines for Implementation of the Freedom of Information Act." The recommendations have been transmitted to all Federal departments and agencies and, while not binding upon them, should receive most serious consideration because of the prestigious makeup of the Conference.

Among the important recommendations of the Conference were those set forth in "Part A, General Principles": [160]

(1) A restrictive interpretation of the exemptions authorizing non-disclosure;

(2) Full assistance and timely action on public request for information;

(3) Disclosure to the fullest extent possible of all but exempt parts of documents;

(4) Specification of reasons when requests for information are denied, together with a statement as to how the denial may be appealed and to whom; and, finally,

(5) Minimum fees for providing information, which should be waived when it is in the public interest to do so.

Part B of Recommendation No. 24 provides that each agency should adopt procedural rules to effectuate the above principles and details guidelines as a model for the kinds of procedures that are appropriate for such purpose.

Part C of the recommendation calls upon each agency to establish a fair and equitable fee schedule relating to the provision of information. It also proposes that a committee of representatives from the Office of Management and Budget (OMB), the Justice Department,

[158] For examples of response, see hearings, pt. 5, pp. 1595, 1625, 1679, 1713, 1763. See hearings, pt. 6, appendix for a listing by agency; see also p. 58 of this report.

[159] Hearings, pt. 4, pp. 1219-1251. The Administrative Conference of the United States, a permanent, independent Federal agency, is engaged in the improvement of the procedures of Federal departments and agencies. The objective of the Conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers.

[160] Ibid., p. 1221

and the General Services Administration (GSA) should establish criteria for determining what are "fair and equitable fees."

Conference Chairman Cramton told the subcommittee:[161]

> Recommendation 24 was communicated to all Federal agencies. They were asked to consider it seriously. They were also asked to respond to us by a given date as to the extent to which they had taken action pursuant to it and what further plans they had for such action. We have now received comments from all but a handful of Federal agencies.
>
> Looking first to the five general principles of the recommendation, the record of compliance revealed by these agency responses is good. This assumes, of course, that compliance means a statement of intention to adhere to these principles in practice as distinguished from merely having them publicly stated in regulations. On this basis, we have rated about 25 agencies as in substantial compliance with the policies of the recommendation, and 11 agencies in partial agreement, with further study underway.

Mr. Cramton went on to point out, however, that with respect to "compliance with the major specific proposals of the guidelines, the record becomes more checkered."

The Office of Legal Counsel, Department of Justice, took the initiative in calling a meeting of the interagency committee recommended in part C. The OMB and the GSA joined Justice in the interagency committee study of fee schedules and the following conclusions were reached:[162]

(1) Fee schedules for routine reproduction or photocopying of documents are often too high;

(2) Charges for time spent in routine search or in monitoring reproduction should be at a clerical rate;

(3) Considerable flexibility is necessary with respect to fees for nonroutine compilations and reproductions of files where searches may require use of professional, operating, or management personnel. This last problem is particularly acute because to charge actual costs would often result in a prohibitively high fee, thus frustrating the primary intent of the Freedom of Information Act.

OMB Director George P. Shultz stated in a letter to Chairman Moorhead dated March 6, 1972:[163]

> OMB joined with Justice and GSA to establish a committee as recommended in part C of the Conference's Recommendation No. 24. The committee concluded that fees charged by agencies were lacking in uniformity and in some cases appeared to be excessive, and recommended that these matters be brought to agency attention. Action to give

[161] Ibid., p. 1222; see pp. 1232-1235 for text of Recommendation No. 24; the staff work was done by Prof. Donald A. Giannella, Professor of Law, Villanova Law School; see p. 55 of this report for additional discussion of Recommendation No. 24. The new head of the Office of Legal Counsel is Mr. Roger C. Cramton who, as Chairman of the Administrative Conference of the United States, testified before the subcommittee on Recommendation No. 24 to improve the administration of the FOI Act.

[162] Ibid., p. 1223.

[163] The text of OMB Director Shultz, memorandum appears at pp. 1231-1232 of pt. 4 of the hearings.

> effect to this recommendation of the interagency committee is now in process, and I will be pleased to make a further report when that action is completed.

Subsequent to the issuance of Recommendation No. 24 by the Administrative Conference, Chairman Moorhead requested the General Accounting Office (GAO) in a letter dated July 19, 1971, to investigate the appropriateness of fees charged by Federal agencies for searching and copying. Several meetings between the subcommittee staff and GAO investigators resulted in inquiries to the interagency committee established by Justice, OMB, and GSA as to progress being made on their study, so as to avoid unnecessary duplication of effort by GAO. Conclusions of the interagency committee as stated above were duly referred to OMB because of its overall responsibility for the administration of user charges through Circular No. A–25.

On May 5, 1972, Chairman Moorhead was advised by letter from Mr. William L. Gifford, Special Assistant to the President, that a memorandum, dated May 2, 1972, had been sent to the heads of all executive departments and agencies "asking that they initiate a review of their agencies' charges for search, reproduction, and certification of records. The purpose of this review is to determine whether some reductions of current charges could be made while continuing to cover the costs of providing the service. The memorandum emphasizes that fees should not be set at an excessive level for the purpose of deterring requests for copies of records." [164]

Mr. Cramton summarized the findings of the Administrative Conference's survey of agency fee schedules in his testimony: [165]

> Almost every agency has a rule which calls for charging fees.
>
> Almost every agency has a rule permitting the waiver of any charge in appropriate cases and most make no charge where costs would be $1 or less * * *.
>
> Several agencies have a mandatory minimum charge for handling information requests whether any documents are provided or not. But mandatory fees are often not charged even when applicable * * *.
>
> Copying charges vary widely, from 5 cents per page at Agriculture to perhaps as high as $1 per page at the Selective Service System. A charge of 25 cents per page is most common.
>
> Clerical research charges vary widely, from a low of $3 per hour at the Veterans' Administration to as much as $7 per hour at the Renegotiation Board.

The committee is concerned over the real possibility that search fees and copying charges may be used by an agency to effectively deny for exemption under subsection (b) of the act. As Chairman Moorhead pointed out during the hearings, many agencies have circumvented the copying cost problem by leasing copying facilities to private companies who charge the public for the services. Such

[164] Hearings, pt. 4, pp. 1223–1224.
[165] Ibid., p. 1218. A table showing typical agency fees for the production of documents compiled by the Conference appears at p. 1245.

charges—which obviously include a profit margin for the company—are also a matter of concern to this subcommittee.[166]

Fee Problems Under Freedom of Information Act

Several witnesses detailed their experiences with Federal agencies on the fee problem.

Reuben B. Robertson, III, an attorney with the Center for the Study of Responsive Law, testified:

> My own view is that the search fee should be eliminated entirely, because it is essentially inconsistent with the basic provision of the Freedom of Information Act that the Government should properly index and file and maintain its records.
>
> The only reason that a search fee would be necessary is that there is no index in the agency of what information is available and where it is located. Very few, if any, agencies have gone to any kind of automatic data processing. Very few have comprehensive resources where you can go and find out what is available, and how you can get it, and whom you are supposed to ask.
>
> One particular incident, which demonstrates the intentional harassment aspect, occurred when one of the students working under me in a study of air safety asked an official at the Federal Aviation Administration for the names of the 26 inspectors who reported directly to him. He was charged a search fee for that information. That is typical of what can happen.

Mr. Harrison Wellford, also with the Center for the Study of Responsive Law, described to the subcommittee a case involving a scientist teaching at the University of Georgia who requested information on pesticides from the Department of Agriculture (USDA) and was asked to give some assurance "that he could pay at least a fee of $100 before they would go to the trouble of making the search." [167]

He went on to detail a personal case with the Department of Agriculture, also involving pesticide information, in which the "USDA stated that if the information were made available, it would cost $91,840 to prepare the registration files for public viewing." [168]

Still another witness, Mr. Bertram Gottlieb of the Transportation Institute, told the subcommittee of his efforts to obtain information from the Maritime Administration on all ships that had been purchased by American operators from the U.S. Government under the Ship Sales Act of 1946 and the amounts of operating differential subsidies each received from public funds.[169] His request was turned down as being "too broad," whereupon he submitted the names of each of the ships, obtained from another source. The Maritime Administration then quoted a minimum fee of $8 an hour for its personnel to produce the subsidy information requested, working on weekends, or a total minimum fee of some $12,000. Mr. Gottlieb testified that after "considerable dickering", he received permission to employ

[166] Ibid., p. 1252.
[167] Ibid., p. 1253.
[168] Ibid., p. 1255. This matter was discussed by a USDA witness, see hearings, pt. 5, p. 1559 and 1595.
[169] Ibid., p. 1270–1271.

some university students to review the agency records and in this way finally obtained the data he was seeking.

The imposition of fees by agencies for searching and copying information sought under the provisions of the FOI Act is further complicated by the agency's administrative costs. Chairman Moorhead pointed out: [170]

> Although the authority to impose fees was designed to offset the cost of the Government for the provision of requested information, it is questionable whether this intent is effectively being carried out. One regulatory agency did a statistical study of this problem. About 34,000 items for which a fee could have been charged were handled during the fiscal year in question. The fees collected would have amounted to about $17,000. However, some 11,000 bills would have been mailed to collect those fees. Since it costs this agency $1.60 to send out a bill, the cost of billing would have been about $17,600—or about $600 more than the amount they could have collected. At last word, the agency is still pondering the problem.

During the hearings, departmental and agency witnesses were asked to furnish statistics on the amount of fees collected during fiscal year 1971 for search and reproduction of records made available under the FOI Act. Some departments, such as Defense and Transportation, said that they kept no such records; others provided estimates. The total fees collected by the 10 responding agencies that kept records was $345,955.[171]

[170] Ibid., p. 1218. The agency referred to is Federal Power Commission.
[171] See hearings, pt. 6, appendix for a listing by agency.

VII. PUBLIC INFORMATION VERSUS PUBLICITY

It is axiomatic that the requirement for Government agencies to inform the public about their activities can result in propaganda. The line between "public information," "publicity or public relations," and "propaganda" is fine indeed and, like beauty, is often in the eye of the beholder.

Mr. Robert O. Beatty, HEW's Assistant Secretary for Public Affairs, testified: [172]

> Generally, in government, public information is "good" and public relations is "bad," because it's supposed to connote some sort of self-serving propaganda effort for the perpetuation of bureaucrats or politicians.

As discussed elsewhere in this report, Beatty preferred the term "public affairs," and urged repeal of the 1913 statute which prohibits the use of appropriated funds to pay a "publicity expert." [173] Such action is necessary to help legitimatize essential Government information activities and to raise the role of public information personnel to a higher level of professionalism and status within the agency to enable them to fully participate in effectively administering the Freedom of Information Act.

Warnings against press agentry or image making by Federal agencies apply equally to those which seem to be administering the FOI Act properly, as well as to those agencies which have made few changes in their public information policies and practices since the new law took effect. Examples are apparent in the old line agencies like the Department of the Interior and in new agencies such as the Environmental Protection Agency (EPA), established after the enactment of the FOI Act.

The Image of EPA

"A Federal agency that wishes to have credibility with the public must be frank and open in its conduct of affairs," John R. Quarles, Jr., general counsel of EPA, testified about his agency's implementation of the Freedom of Information Act.[174]

EPA witnesses also testified that final authority on refusals of access to public records rests with the agency's public affairs officers and that other provisions of the act are administered to speed the disclosure of information. For instance, tight limits are applied to the time EPA officials may take to make disclosure decisions, and fees for search and copying public records often are waived. Such forward-looking provisions for public access to EPA information can, however, be nullified when information activities become publicity-seeking devices.

Shortly after testifying to EPA's steadfast commitment to a proper Government information program the agency selected two New York

[172] Hearings, pt. 5, p. 1666.
[173] For a discussion of this aspect of public information's role in Government, see pp. 49 and 50 of this report.
[174] Hearings, pt. 6, p. 1876.

City agencies to develop plans to advertise the work of EPA. Both agencies were to develop comprehensive advertising plans to cover, among other things, "the image of EPA projected through advertising." [175] One of the image-making companies was to concentrate on advertising strategy for inner city programs. The other company was to worry about the EPA's image in the rest of the nation.

The agency selected to handle the overall EPA "image problem" is Geer, DuBois & Co. of New York City; the agency selected for an "inner-city image-making plan" is John F. Small, Inc., of New York's Madison Avenue. Both agencies were directed to make sure their employees working on the project were thoroughly familiar with EPA's mission and the environmental problems it is supposed to help solve—details which the EPA's full-time public information staff would not have to spend time learning.

The price EPA paid the advertising agencies to find out EPA's mission and develop an advertising program to sell EPA to the public was $101,535. The contracts were of an open-end nature, with wage rates pegged on an hourly basis for 22 employees specifically named in the contracts. The contracts call for the hourly rates to be paid "for the duration of this agreement," which is to be 1 year from the date the contracts are signed.[176]

For John F. Small, Inc., the hourly wages range from $50 an hour for Small himself and two of his top associates down to $25 an hour for a print production supervisor. For Geer, DuBois & Co., Inc., the hourly wages range from $50 an hour for Peter Geer and $40 an hour for his executive vice president, down to $16 an hour for a production and traffic operator.

The Interior Department's Publicity Program

The Department of the Interior confuses "image-making" with "public information" on a slightly smaller scale than EPA. The agency paid $121 a day to a political publicity man to recommend improvements in Interior's public information practices and then decided that the public information report was not a public record under the FOI Act.

Harry Treleaven, who worked in President Nixon's successful 1968 campaign and was a leading character in the book "The Selling of the President, 1968," prepared a report to Interior Secretary Rogers C. B. Morton on the information and public relations activities of the Department.[177]

The 85-page report was presented in April 1971. It included 18 pages of general observations and recommendations with the remainder covering in slightly more detail the information activities of the Department's 11 divisions.[178]

Ward Sinclair, a reporter for the Louisville Courier-Journal, asked for copies of the Treleaven report but was refused. He appealed the refusal under the Freedom of Information Act but was again refused. Mr. Mitchell Melich, Solicitor of the Department of Interior, argued

[175] For details of these contracts see hearings, pt. 6, appendix.
[176] Ibid.
[177] This case is discussed at length in the hearings; see pt. 4, pp. 1280-1281 and also pt. 5, pp. 1743-1751. An article by columnist Jack Anderson, revealing portions of the Treleaven report appears on pp. 1740-1741 of the hearings.
[178] This 18-page portion of the report may be found on p. 1744 of pt. 5 of the hearings.

that the Treleaven report, designed to improve the Department's publicity practices was an "internal document" and exempt from public scrutiny under section (b)(5) of the Freedom of Information Act. He also testified: [179]

> Just as important was the fact that disclosure would result in an unnecessary invasion of the personal privacy of those department employees named in the report.

The Department had sent the Treleaven report to a number of Members of Congress and also made it available to the Foreign Operations and Goverment Information Subcommittee. Chairman Moorhead sent the subcommittee copy of the report back to the Department, pointing out that only the last sections named Interior Department employees and suggesting that the general comments and recommendations in the first 18 pages of the Treleaven report be made available for the subcommittee's public record.[180]

The Department reluctantly agreed to make public the first 18 pages of the report except for a single paragraph which, Solicitor Melich argued, contained "references to named individuals, the disclosure of which could prove an unwarranted embarrassment to those individuals." In spite of the fact that the FOI Act permits withholding under the privacy claim only if the information would constitute a "clearly unwarranted invasion of personal privacy", Solicitor Melich argued: [181]

> When the Secretary sought the advice and counsel of Mr. Treleaven a confidential relationship was established. Disclosure of Mr. Treleaven's views with respect to a particular individual could result in personal embarrassment without serving any useful purpose.

The University of Missouri Freedom of Information Center formally asked for access to the first 18 pages of the Treleaven Report, including the single censored paragraph. Apparently, investigators for the center had access to the censored section--a section which had been included in the document given to many Members of Congress and circulated in the Interior Department. When the center appealed to Secretary of the Interior Rogers C. B. Morton to lift the censorship of the offending paragraph, the center identified the employee who might be embarrassed by identification.[182]

Harry Treleaven's censored paragraph had recommended that the Department's publicity practitioners should make greater use of Secretary Morton on television, getting him visually involved in newsworthy events. Treleaven's report said: [183]

> Secretary Morton is not only the most photogenic member of the administration—but he's also able to participate physically in all kinds of outdoor situations and look natural. It's important that the communications program make full use of this, because it's a way of making sure that the Secretary's statements get maximum exposure, as well as building

[179] Ibid., p. 1695.
[180] Correspondence relative to the report is in pt. 6, pp. 1743-1744; 1749-1751 of the hearings.
[181] Ibid., p. 1751.
[182] Hearings, pt. 6, appendix, pp. 2275-2276.
[183] Hearings, pt. 6, appendix, p. 2276.

valuable goodwill for the Department and the administration. Information officers in each of the Bureaus should be required to submit, on a regular basis, ideas for this kind of involvement. (Every time this was suggested in an interview it immediately sparked ideas.) And arrangements for motion picture and still photography should be built into all personal appearance plans.[184]

[184] Ibid.

VIII. THE DEPARTMENT OF JUSTICE'S ROLE IN THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

Shortly after the Freedom of Information Act was signed into law in 1966, the Department of Justice was assigned the task of preparing guidelines for the administration of the act by Federal departments and agencies. Supervision for the project was assigned to then Assistant Attorney General Frank M. Wozencraft, Office of Legal Counsel (OLC) at the Department.[185]

These comprehensive guidelines, published in June 1967, were officially entitled "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act." The memorandum served as the basis for the drafting of regulations by executive agencies for the administration of the FOI Act, which became effective the following month.[186] Next to the act itself, and the legislative history contained in committee reports and debates on the bill, the Attorney General's memorandum has become the single most important interpretative document upon which executive departments and agencies rely to defend judgments on what information should be made available to the public under the act.

The foreword to the memorandum by Attorney General Ramsey Clark set forth the general principles accurately reflecting congressional intent in enacting the FOI Act and correctly pointed out that:[187]

> * * * Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

This observation is particularly important in the case of the FOI Act, which represented such a vast departure in both the philosophy as well as the information practices of the Federal bureaucracy.

As Mr. Wozencraft stated:[188]

> The act was a watershed event, because it reversed the philosophy of releasing Government information. Previously, the Government would withhold the document unless it was persuaded that there was a valid reason to disclose it. Now, it must release the document, unless it can establish a valid reason to withhold it. That was, and is, and should be, a cause for jubilation in itself, even though its promise has yet to be entirely fulfilled.

As the hearing record clearly shows, the laudatory principles and goals set forth in the memorandum have seldom been achieved by Federal agencies in their administration of the FOI Act. Part of the reason may be attributed to sections of the memorandum, which

[185] Mr. Wozencraft testified before the subcommittee, hearings, pt. 4, pp. 1068, et seq.
[186] See pp. 5-6 of this report for background discussion of memorandum.
[187] Attorney General's memorandum, see p. 4 of this report.
[188] Hearings, pt. 4, p. 1069.

in its overall tone and in detailed discussions of the exemptions of subsection (b) of the act leans toward a restrictive interpretation of these key provisions. Conflicting language in the House and Senate reports on the legislation and the natural tendency of an executive department to interpret any act in their favor may have contributed to the direction taken in this guideline document.

The memorandum stressed an important principle of the act—that the use of the nine exemptions of subsection (b) is permissive and not mandatory, a point that many Federal agencies do not adequately reflect in their administration of the act over the past 5 years. The memorandum stated: [189]

> * * * Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

Mr. Wozencraft pointed out in his testimony that in the drafting of the memorandum, the interpretations of provisions of the FOI Act could only be "our best effort" and that "definitive answers" necessarily had to await judicial rulings to provide more clear interpretations of some of the ambiguous portions of the statute.[190]

There is no question that in the drafting of the memorandum, the Justice Department officials who were responsible made conscientious efforts to provide an equitable guideline basis for administration of the act. Mr. Wozencraft testified that he and his staff consulted with general counsels of Federal agencies, with the staffs of the two congressional committees which had jurisdiction over the legislation, with bar association groups, and with various organizations representing all segments of the news media.[191]

Justice Department's Triple Role

The Department of Justice plays three roles under the Freedom of Information Act. First, as an executive department, it is an "agency" under the act and is subject to all of the same administrative procedures in making information available under the act as are other Federal agencies.[192]

The second important function of the Department of Justice is its role as legal counsel to the Federal Government. As the executive branch's "law firm", the Department has exercised considerable influence over the operation of the FOI Act since its enactment. Then Assistant Attorney Ralph E. Erickson told the subcommittee: [193]

> * * * The Civil Division of our Department handles the litigation for most Government agencies when suit is filed under the Freedom of Information Act. A status report indicated that as of January 1, 1972, the Civil Division had 46 freedom of information suits pending in some stage of litigation * * *.

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[189] Attorney General's memorandum, pp. 2-3.

[190] Hearings, pt. 4, pp. 1070-1071. For a valuable study by the American Law Division, Library of Congress entitled, "The Freedom of Information Act: Comparison of the Case Law With the Attorney General's Memorandum," see hearings, pt. 6, p. 2254.

[191] Ibid.

[192] The Department's own administrative record of handling FOI requests is discussed in the hearings, pt. 4, pp. 1175-1177.

[193] Ibid., p. 1177. An estimated 200 suits have been filed under the FOI Act.

In information subsequently furnished to the subcommittee on the details of the Civil Division's role in handling litigation under the FOI Act, the number of cases had risen to 48 as of March 1, 1972, of which number some 12 cases "were being handled directly in all respects by Civil Division attorneys." In two additional cases, "briefs were prepared by Civil Division attorneys and filed although the oral argument was left to the U.S. attorney's office." [194]

The third, and most vital role played by the Justice Department affecting the governmentwide policies for administration of the Freedom of Information Act is the advisory or consulting responsibilities exercised by the Office of Legal Counsel through its Freedom of Information Committee, currently headed by Mr. Robert Saloschin. Mr. Erickson described in his testimony the broad groundrules: [195]

> * * * In such [FOI] cases, our functions are limited by the decentralized administration of the act, as prescribed by Congress, in requiring each agency to act on requests for its own records. In other words, we generally have no authority to compel another agency to comply with a request for its records. Subject to this limitation, the functions of the Justice Department in freedom of information matters are counseling, coordinating, and representing other agencies in court * * *.

Work of the Freedom of Information Committee

The Freedom of Information Committee, composed of five lawyers from the Office of Legal Counsel and the Civil Division, was created by a December 8, 1969, memorandum cosigned by Mr. William H. Rehnquist and Mr. William D. Ruckelshaus, then heads of the OLC and the Civil Division, respectively.[196]

That memorandum was prompted by a series of events during 1968 and 1969 that concerned administrative problems under the FOI Act being experienced by various Federal agencies. Mr. Erickson testified that the Department "began to be increasingly concerned that some agencies might be engaging in dubious or unwarranted denials of requests under the act, leading to litigation burdensome both to the requestor and to the Government. This feeling crystallized after the July 10, 1969, decision in the famous hearing aids case." [197] He went on to say that this impression "was sharpened that same summer after various informal requests for assistance and advice reached us from agencies that were receiving the attentions of Mr. Nader and his associates."

In addition to establishing the Freedom of Information Committee, the December 8, 1969, Rehnquist-Ruckelshaus memorandum, addressed to "General Counsels of all Federal departments and agencies re coordination of certain administrative matters" under the FOI Act requested that the Department of Justice be consulted prior to the issuance of a final denial of a request for information if there was any possibility that the denial might result in litigation. The memorandum made the following major point: [198]

[194] Ibid., p. 1197.
[195] Ibid., pp. 1177–1178.
[196] The text of the memorandum appears in the hearings, pt. 4, pp. 1132–1133.
[197] Ibid., p. 1178. *Consumers Union v. Veterans' Administration*, 301 F. Supp. 796 (S.D. N.Y. 1969) (footnote 2 on p. 1178 of hearings).
[198] Dec. 8, 1969, memorandum, op. cit., p. 1132. The memorandum was addressed to general counsels only, not public information officials.

In discharging these functions, the Department has noted several developments which we believe warrant your attention. First, the Government in recent months has lost cases in court which involved a number of the exemptions contained in the act. *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. July 10, 1969) (involving exemptions 2, 3, 4 and 5); *General Services Administration* v. *Benson*, 415 F. 2d 878 79th Cir. Aug. 26, 1969) (exemptions 4 and 5). Second, there has been considerable variation in agency practices with respect to consulting the Department on freedom of information controversies before the agency takes final action, which may result in the filing of suit against the agency. Third, there are particular problem areas under the act, which are common to a number of agencies, where an exchange of views may be beneficial.

The implications of the judicial decisions cited above, as well as other cases, are under continuing review in the Department. However, enough review has already been accomplished to point to two conclusions: (1) Although the legal basis for denying a particular request under the act may seem quite strong to an agency at the time it elects finally to refuse access to the requested records, the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court and from the standpoint of the broad public policy of the act; (2) an agency denial leading to litigation and a possible adverse judicial decision may well have effects going beyond the operations and programs of the agency involved, insofar as it creates a precedent affecting other departments and agencies in the executive branch.

In order to coordinate activities among Federal agencies and to avoid the creation of "bad" precedents under the FOI Act from the Government's viewpoint, the Freedom of Information Committee in OLC was established. The memorandum said: [199]

In view of the foregoing, it seems manifestly desirable that, in most instances, litigation should be avoided if reasonably practicable where the Government's prospects for success are subject to serious question. This can often best be done if, before a final agency rejection of a request has committed both sides to conflicting positions, the matter is given a timely and careful review, in terms of litigation risks, governmentwide implications, and the policy of the act, as well as the agency's own interests. To facilitate review of the nature just described, we need your cooperation. To improve cooperation on our part, we have just established an informal committee of representatives of the Civil Division and of the Office of Legal Counsel. The functions of this committee will be to assist in such review and help assure closer cooperation in our work.

We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any sub-

[199] Ibid.

> stantial possibility that such denial might lead to a court decision adversely affecting the Government. Such consultation will serve the review function discussed above, and in some instances may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request. The requested consultation may be undertaken formally or informally as you prefer, and ordinarily should be directed initially to the Office of Legal Counsel rather than to the Civil Division.

This committee places great importance on the role that the Freedom of Information Committee can and does, in many cases, play in the administrative processes of Federal agencies involving the handling and decisionmaking on requests made under the FOI Act. For the most part, it believes, the committee has had a salutary effect on the overall administration of the act. This committee also is convinced that the FOI Committee and the Office of Legal Counsel could—and should—exercise more of a leadership and coordinating function to improve the administrative machinery as well as to foster a more positive attitude in the Federal bureaucracy toward the basic principles and goals of the FOI Act. These administrative problems were spelled out earlier in this report.[200]

Mr. Erickson testified that through March 1, 1972, the FOI Committee had received "an estimated 400 to 500 contacts, which have led to approximately 120 committee consultations * * * (and) have involved about 30 different agencies." [201] He explained the consultation procedures as follows:

> Consultation procedures are usually quite simple. About 80 percent of consultations are conducted by a face-to-face meeting of the committee with representatives of the agency. Agencies usually send a lawyer and one or two operating officials to a consultation, although the representation may vary from just one person to several and occasionally includes both the general counsel and the head of the agency. Typically the committee is represented by at least three and usually four of its members. All five members are of course notified of every meeting, and sometimes all five attend.
>
> Speed is a major goal in all the committee's work, and it is usually obtained. A meeting usually occurs within less than a week of the phone contact which led to it, and some are held the very next day. Sometimes papers that will be discussed at the meeting are shown to committee members beforehand.
>
> The meetings vary in length from about 30 minutes on simple matters to 2 hours or more on complex ones. No minutes are kept, although any participant is free to take his own notes. The agencies usually get the committee's reaction immediately, from the discussion during the course of the

[200] See pp. 9–10 of this report.
[201] Hearings, pt. 4, pp. 1179–1180. For a listing of agencies consulting with the FOI Committee, see p. 1181; for a listing of the range of subject areas covered by these 120 consultations, see p. 1213. A colloquy with Mr. Erickson revealed the fact that the FOI Committee does not respond to requests by the public for such counseling; see p. 1198.

> meeting, although in some cases there may be further telephone calls or other contacts after a meeting. As for the remaining 20 percent or so of committee consultations which do not involve a face-to-face meeting with agency representatives, the usual procedure is that papers from the agency are circulated to the committee members, who read them and give their comments to the chairman, and if no further discussion is needed, the chairman gives the agency the committee's collective reaction by telephone.

Mr. Erickson indicated to the subcommittee that "the rate of consultations seems to be accelerating, and is estimated to be running now at roughly between 75 and 100 a year."

According to his testimony, the FOI committee's consultations on the 120 cases through March 1, 1972, resulted in advice to the agencies that (1) the information was clearly exempted from disclosure—about 40 cases or one-third; (2) the information was probably not exempt and should be released—about 40 cases or one-third; and (3) the information was in an uncertain category, suggesting an alternative solution or a practical accommodation of the dispute over disclosure—about 40 cases or one-third.[202]

It is difficult to determine precisely what effect the FOI Committee's recommendations have had on agency decisions in FOI Act requests. The informal nature of the work of the committee and the lack of documentary evidence of subsequent actions taken by the individual agencies on cases brought to the committee for consultation points up one of the administrative weaknesses of the procedure. Nevertheless, the Committee on Government Operations shares the positive view of the Department toward the work of the FOI Committee in helping to encourage greater understanding of the act and to help bring about a more enlightened administration of the act within the Federal bureaucracy.

This committee's studies of the FOI Act's operational status after 5 years would generally parallel the evaluation stated by Mr. Erickson at the conclusion of his testimony: [203]

> * * * The act is an epochal step in democratic government. Our experience indicates that that act is working, but that much additional effort, experience, good judgment, and good will may be needed to keep it working and to improve its operations.

[202] Ibid., pp. 1182-1183
[203] Ibid., p. 1184.

IX. LITIGATION UNDER THE FREEDOM OF INFORMATION ACT—1967-1972

The ultimate weapon provided to the public under the Freedom of Information Act that can be wielded against a recalcitrant Federal bureaucracy is the right to file suit in a U.S. District Court to obtain requested Government records if all other efforts are fruitless. The law directs that such cases be considered in the form of injunctive proceedings against the Government. Such cases are considered *de novo* and the burden is on the agency to justify its refusal to make records available to the complainant. In the case of noncompliance with the order of the court in such cases, the responsible Government employee or member of the uniformed service involved in the suit may be punished for contempt.[204]

> No law is self-enforcing, least of all a law designed to help the citizen in a contest with the government. Thus, the Freedom of Information Act has a built-in enforcement tool—the citizen's right to go to court and force the government to prove the need to withhold public records.
>
> The court-enforcement provision has been used effectively during the first 4 years the act has been in operation. In some areas—particularly the protection of national defense information and the protection of investigatory files—the courts have been reluctant to order the disclosure of government secrets. In other areas—particularly the contention that privileged financial information and internal memoranda must be hidden from the public—the courts have rejected Government arguments.
>
> Hopefully, Government agencies will consider the trend of court action and stop using the excuses for secrecy which have been rejected by the courts. If not, it may be necessary for Congress to amend the Freedom of Information Act to limit further the Government's claim that routine financial information and government memoranda are not public records.[205]

As noted earlier, the Justice Department witness stated that about 200 suits have been filed under the FOI Act, and that some 48 cases were pending in the Civil Division as of March 1, 1972. He estimated that the Government's position has been sustained in about half of the FOI cases litigated nationwide, "although the Government has had very little success in the Court of Appeals for the District of Columbia circuit."[206]

Another witness told the subcommittee:[207]

> So far the act has received relatively little examination by the courts, despite the hundred or so cases that have thus far

[204] Sec. 552(a)(3) of title 5, United States Code.
[205] Statement by Chairman Moorhead, Mar. 19, 1972. Hearings, pt. 4, p. 1344.
[206] Hearings, pt. 4, p. 1177.
[207] Mr. Richard Wolf, Institute for Public Interest Representation, Georgetown University Law Center, hearings, pt. 4, p. 1067.

appeared. My count indicates that the Federal courts of appeals have decided only 17 cases. Nine of these have occurred, as might be expected, in the District of Columbia circuit. We are seeing some trends developing in this circuit. But the Supreme Court, except for yesterday's announcement, has yet to pass on any of the complex issues of privacy and disclosure which are raised in the act. Some of these difficult problems are perhaps better left to careful judicial development, and this will certainly occur.

It is difficult to deal adequately in this report with the matter of court decisions under the FOI Act in sufficient detail to make such an analysis meaningful in this context. Moreover, oversimplification of case references would necessarily tend to be misleading to Members of Congress, private attorneys, Government officials, students, and others who will utilize the contents of this report. For this reason, the committee has included in the hearing record a comprehensive analysis, summary, major holdings, and important court dicta on more than 30 of the leading cases decided thus far under the act. These objective studies were prepared by researchers in the American Law Division of the Congressional Research Service of the Library of Congress.[208] The general summary of court decisions that follows is taken from these studies.

Within this caveat, it is accurate to state in a summary fashion, that the courts have been generally reluctant to order the disclosure of Government information falling within exemption (b)(1) of the act—information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"—and exemption (b)(7)—"investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

On the other hand, the courts have generally ruled against the Government's contention that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" should be withheld from the public under exception (b)(4) of the act. In a majority of the cases thus far decided, the courts have also rejected Government arguments that "interagency 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" should be withheld from public disclosure under exemption (b)(5).

There have been too few court decisions to indicate a clear pattern on other sections of the FOI Act, including several of the other exemptions permitted in subsection (b). A number of other valid observations may be made, however, on the basis of the Library of Congress studies:

(1) the courts are taking seriously the statutory grant of authority to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld;

(2) the courts are following the statutory directive to put the burden of proof that withholding of requested information is necessary on the shoulders of the Government agency that withholds public records;

[208] Ibid., pp. 1344–1367.

(3) while the courts do not always rule in favor of the person seeking access to public records, they have exercised a judgment that used to be exercised solely by the Federal bureaucracy, often having a personal or political stake in keeping it secret;

(4) the courts have generally ruled that on the question of an "identifiable record" requested by the public under the act, the Government agency may not use the identification requirement as an excuse for withholding because the means to identify documents are solely within the control of the agency holding the requested record;

(5) the courts have rejected Government arguments that the particular information being sought could be ferreted out by diligent search outside the Government;

(6) the courts have also ruled against Government claims that all of a public record could be withheld if only part of the document is exempt from disclosure under the Act;

(7) the courts have likewise rejected arguments that a Government unit is not an "agency" covered by the law, even though it has substantial independent authority to exercise specific functions; and

(8) the courts have a spotty record with regard to the provision of the Act that directs "precedence on the docket" and expeditious handling of FOI Act cases. This particular observation is dealt with later in this section of the report in detail.

The analysis of litigation under the FOI Act does not take into account the many thousands of Government documents, records, and other information which have been made available to the public upon request without the necessity of resorting to relief in the courts. Nor does such analysis clearly reflect the results of the administrative actions taken upon requests for information by Government agencies.

Of the 2,195 denials of information reported in detail to the subcommittee by 29 major departments and agencies, only 296 were appealed administratively within the agency by the requestor. Of this number, 196 original denials were upheld by appeal to higher authority, while 37 denials were reversed; an additional 42 original denials were reversed in part through appeal. But in only 99 cases where the requestor was finally denied information by an agency was court action initiated. In only 23 of these 99 cases was the agency's refusal to furnish the information requested sustained by the courts. The agency's refusal was reversed in whole or in part by the courts in 32 of the cases.[209]

Thus, while there have been too few landmark cases by the courts to accurately interpret many sections of the FOI Act during the 5 years since it became effective, the record shows that by and large the courts are effectively exercising their responsibility to judge the Govern-

[209] Hearings, pt. 4, pp. 1338-1343. The total of 99 cases used here is substantially less than the 200 FOI cases mentioned earlier because they represent the experience of only the 29 largest Federal agencies; moreover, many suits are dropped before being acted upon by the court as information requested is often made available.

ment's stewardship of the people's right to know and the courts' judgment has usually been against unjustifiable Government secrecy.

The High Cost of Obtaining Relief

Many private attorneys and public interest organizations who testified before the subcommittee stressed the high cost of litigation under the FOI Act. This fact is also reflected in the statistical analysis of agency denials based on the subcommittee's questionnaire, which shows that of the 2,195 denials of information cited above, 640 were requests for government information or records by corporations and private law firms—about 30 percent of the total, while only 90 represented denied requests from the media; 85 from public interest groups; 41 from researchers; and 13 from labor unions. Some 547 were lumped as "other," which included other categories of miscellaneous organizations and the individual citizens.[210] A review of the cases listed in the Library of Congress study mentioned above will confirm the large number of them that involve corporations or law firms representing citizen complainants.

Few individuals can afford the expense of litigating a suit under the Freedom of Information Act, even though the agency's decision to withhold information may be clearly unlawful. Mr. Reuben B. Robertson, III, an attorney with the Center for the Study of Responsive Law pointed out during the hearings: [211]

> The filing of any suit, of course, entails obtaining legal counsel, it involves the expenses of legal costs and fees, and a great deal of time and delay. Most people, I think, when they are confronted with this kind of an approach do tend to go away. Often we have found that just the filing of a suit is enough to get the Government to release the information. * * *

Harrison Wellford stated that: [212]

> * * * One problem is that the act expects of public officials an obedience to the unenforceable. If a public officer ignores the act, the citizen must engage the agency in court, the only recourse afforded by the act. Those who can afford legal challenge are those special interests who need the FOIA least of all. Examination of court records establish this point. In the first 2 years of FOIA, 40 cases were brought under the act. Thirty-seven of these involved corporations or private parties seeking information for some private claim or benefit. Only three cases involved a demand by the public at large for information. Most surprising of all, no member of the media, which should be the prime beneficiary of the FOIA, had initiated a single court action under the act. In practice, therefore, the attitudes of agency personnel determined whether FOIA was to be a pathway or roadblock for citizen access.

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[210] Ibid.
[211] Ibid., p. 1252; see pp. 55 and 56 of this report for a discussion of remedies.
[212] Ibid., p. 1257. A unique approach to the problem of high costs in FOI suits involving low-income citizens is a class action suit by five low-income homeowners representing the interests of over 30,000 such persons in Philadelphia. The suit was filed by an attorney with the Community Legal Services, Mr. George D. Gould, who testified before the subcommittee. See hearings, pt. 5, pp. 1402-1403.

It has been pointed out that the costs of the Government in defending suits against the public, costing hundreds of thousands of taxpayers' dollars, are provided through agency budgets. Of course, the tremendous manpower and resources of the Justice Department can be brought into play against any plaintiff bringing suit under the FOI Act. These court costs and attorney's fees of the Government are, in effect, also being borne by the individual citizen-plaintiff through his taxes that go to pay for the cost of running the Government, including the salary of his adversary in court.

As a deterrent to the action of a governmental official who abuses his authority, either by a willful misinterpretation of the FOI Act or by some other action to deny information to an individual, it was suggested in one colloquy during the hearings that such Government official be subject to a fine or administrative reprimand. The witness, Mr. William Dobrovir, a Washington attorney replied: [213]

> Well, I do not think that a fine would be appropriate, but certainly an administrative reprimand or something that would go in the official's file, assuming it is a civil service person, something that would go in his file that would show that he made this decision, and that the decision was wrong, or was made, and if the court ruled, you know, the decision was made, in bad faith—but ordinarily courts do not do that.

Delay in Filing Responsive Pleadings

A major complaint voiced by a number of witnesses who have had extensive experience in Freedom of Information Act litigation is the delay in responsive pleadings by the Government. Under the Federal Rules of Civil Procedure, the Government is accorded 60 days in which to answer the complaint and each additional motion. Private litigants, on the other hand, must respond within 20 days in each such case. This has led to interminable delays in the adjudication of suits under the FOI Act, since the Government often makes full use of the time period accorded to them for response, and in some cases exceeds the 60-day limitation. Information sought by plaintiffs from Government is likely to be a perishable commodity, and in many cases these procedural delays by Government attorneys—whether or not made in good faith—may result in substantive damage to the plaintiff's case. In some instances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy.

Typical of the comments by witnesses are these statements:

> * * * The Government should, upon complaint in court, be given the same 20-day period in which to reply as is accorded to private parties in a case in Federal court, and not the 60 days normally given to the Government. And the Freedom of Information cases, in fact, should be expedited in hearing, which they currently are not.[214]
>
> * * * If I sue a citizen in the Federal district court, they have 20 days in which to respond; yet if I sue the Federal Government under this (FOI) act, even though Congress intended

[213] Hearings, pt. 5, p. 1427.
[214] Bernard Fensterwald, Jr., Washington attorney, ibid., p. 1377.

that there be an immediate action, there are 60 days in which the Government can respond. But I think certainly there ought to be a shortening of that time through either the rules of Federal procedure or, more specifically, through congressional action.[215]

* * * * *

A colloquy between Representative Erlenborn and these two witnesses on this problem of Government delay in filing responses produced a positive approach: [216]

Mr. ERLENBORN. As a last observation, I would agree with many of the suggestions that have been made here today as to speeding up the process. It seems to me that any action bogs down with 60 days for filing of an answer; and no final decision for a good deal of time after that makes the information in many cases useless, and probably inhibits the filing of suits. Perhaps either the establishment of some central office for making final decisions at the executive level, or putting the burden on the head of the agency, rather than having it dispersed in various places within the agency, might also be helpful, with some set period of time for appealing, say, from the decision of some bureau chief to the head of the agency, the Cabinet officer or the chairman of the independent regulatory agency. This would centralize at least within that agency decisionmaking, and you would have some coherent policy of that agency.

Mr. FENSTERWALD. It is centralized in the Justice Department now. I do not know how successful it is, but they have requested all departments and agencies to clear with them any final denial before it goes forward.

Mr. ERLENBORN. What about a formal written statement from the head of the agency? For example, if you wanted information from Defense, Mr. Laird himself would have to make the ultimate decision?

Mr. KASS. With a time limit on it?

Mr. ERLENBORN. Yes; with a time limit on it. Would that be helpful?

Mr. KASS. Very much so.

Mr. ERLENBORN. It is better to have him do it, or some person within the Defense Establishment at a lower level?

Mr. KASS. Congressman, if I could give you some of my own background on this quickly, having participated to some extent in the drafting of this, there was no specific procedure in the Freedom of Information Act itself requiring these exhaustive administrative remedies. When the Justice Department prepared their memorandum and discussed it with the committee, and the committee staff, trying to incorporate some form of exhaustion of administrative remedies at the top of the agency, there was no objection because what was pointed out to us by Frank Wozencraft and others who have been here before, the main reason for that was to let somebody in the very top, in a political and substantive position, make a final determination.

[215] Benny L. Kass, Washington attorney, ibid., p. 1380.
[216] Ibid., pp. 1414–1415.

> This is the problem, except in the Justice Department if you write the Attorney General, he will not answer you because he has to make the final response. You have to write him again, two or three more times, before you ever get a response.
>
> Mr. ERLENBORN. Well, I certainly would hope that one of the things that we could consider and do would be to put some short time limit in the act.

A statistical analysis of 33 FOI Act suits filed in the U.S. District Court for the District of Columbia shows that it took an average of 68 days for the Government to file a responsive pleading and an average of 167 days before the FOI Act was decided by the court.[217] This record hardly meets the criteria spelled out in subsection (a)(3) of the act that, except for cases the court deems of greater importance, FOI Act cases shall have "precedence on the docket," shall be assigned for hearing and trial "at the earliest practicable date," and shall be "expedited in every way."

Since the administrative remedies had been fully or partially exhausted in each of these 33 cases, the Government attorneys were fully aware of the subjects of the information request at issue even before the complaint was filed by the plaintiff. Thus, in such FOI cases it is difficult, if not impossible, to defend the rationale for extending to the Government the 60-day period for response—three times that accorded to private parties—because of its size and complexity of administrative behavior. The affected Federal agency would have already reviewed the nature of the information requested, the bases it might have to rely upon under the exemptions permitted under the FOI Act, and quite possibly would have already consulted with the Justice Department's FOI Committee as to the legal precedents that might apply. Therefore, the need for 60 days to prepare the necessary response to defend the suit for the Government can only work to the disadvantage of the plaintiff.

The Dobrovir analysis shows that in 19 of the 33 cases the Government took longer than 60 days to file a responsive pleading. One case took 140 days, another 137 days, another 135 days, another 105 days, another 104 days, and still another took 103 days. The fact that the average of all 33 cases was higher than the 60-day period provided for in the Federal Rules of Civil Procedure is a danger signal that prompts remedial action, since it strongly suggests that the procedural foot-dragging by Government attorneys in FOI Act suits may be negating the congressional intent and basic purpose of the act.

Other Problems Involving Court Interpretations

Other related problems involving court interpretations of parts of the FOI Act deal with the phrase in subsection (a)(3) "shall make the records promptly available to any person." As has been stated earlier, Congress eliminated the "need to know" requirement contained in the old section 3 of the Administrative Procedure Act when it enacted the FOI Act. Yet some courts continue to inquire into a person's "need to know" during hearings on FOI cases. It was not the intent of Congress

[217] The analysis was prepared by attorney William Dobrovir; see hearings, pt. 5, p. 1398, for table showing dates and case identification.

that any person should have to have a stated reason for wishing to see any particular Government document or record, nor should that motivation be a matter for the courts to concern themselves with during litigation under the act.

Finally, some courts have decided for themselves that it is discretionary with them whether they order the production of information which is held not to be subject to the exemptions permitted by subsection (b) of the FOI Act. In effect, they are applying theories of equity to balance the need of the individual citizen to the information requested under the act and the need of the Government to withhold such information. Information requested under the act by the plaintiff should be considered only with respect to whether or not the Government's arguments fulfill the "burden of proof" requirement that the information is subject to the subsection (b) exemptions claimed. If the court finds that the Government has not met such test, the information should be ordered to be made promptly available to the plaintiff solely on the substantive merits of the case.

Summary

By and large, the Federal courts have taken adequate notice of the importance of the Freedom of Information Act as a milestone enactment by Congress of the fundamental right of all Americans to be informed about the business of their Government. Perhaps the most eloquent statements by a court in this regard were contained in the *Soucie* v. *David* case: [218]

> Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate Federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

[218] *Soucie* v. *David*, 448 F. 2d 1067, 2 ERC 1626 (D.C. Cir. 1971).

X. ADMINISTRATIVE AND LEGISLATIVE OBJECTIVES TO STRENGTHEN AND IMPROVE THE OPERATION OF THE FREEDOM OF INFORMATION ACT

Opponents of the legislation that became the Freedom of Information Act issued dire warnings to the effect that if the bill were enacted "the administrative processes of the Federal Government would grind to a halt," that "the President would spend all his time responding to requests for information from high school students," that FOI cases "would overburden the Federal courts." They implied that the pillars of the Republic would collapse. Extreme arguments on specific legislative proposals usually are far-fetched exaggerations that cannot stand the tests of time or rational analyses. Such is the case with respect to the exaggerated claims about the effect of the FOI Act on the processes of Government.

Witnesses who expressed an opinion about the way in which the FOI Act has operated during these past 5 years were overwhelmingly positive in their comments, varying only in the degree of salutary effect the act has had on the Federal bureaucracy. Typical of the comments made by the subcommittee witnesses are the following:

> Mr. LEWIS. * * * So, from the standpoint of making information freely available, the freedom of information law, I felt, was a real milestone in the long history of sensitive relationships centered on the peoples' "right to know" versus the need Government has felt to withhold information for national security or other reasons.
>
> For a government information officer, a strategic part of whose job was to keep information moving, the new law had distinct advantages in its policy direction for disclosure, and in the provisions that put the burden of proof for withholding on the Government and which gave citizens the right to seek legal action against withholding. Particularly in the early phases of the law's application, these measures brought about a more positive attitude toward disclosure among administrative and other officials, and they strengthened the hands of those responsible for release of information. * * * [219]

> Mr. WOZENCRAFT. * * * Now, after almost 5 years under the act, those who expected it to strip away the veils of Government secrecy feel cheated; and those who predicted disaster grumblingly insist that although the pillars of the Republic have not crumbled the act has been an expensive and troublesome nuisance and they wish it would go away.

[219] Hearings, pt. 4, p. 1016.

Since I shared neither set of expectations, I share neither view today. I have been disappointed that the act has not yet had more impact, but I am far from disheartened. The drafting of the act leaves much to be desired, and its implementation far more. Nevertheless, viewed objectively and disregarding excessive fears or expectations, the act remains a watershed event in the history of Government, unprecedented, as far as I know, by any other nation.* * * [220]

Mr. ERICKSON. * * * In conclusion, we at Justice are working with you in Congress as participants, within our own branch of Government, in the task of trying to insure the success of the Freedom of Information Act. The act is an epochal step in democratic government. Our experience indicates that that act is working, but that much additional effort, experience, good judgment, and good will may be needed to keep it working and to improve its operations. You may be assured the Department of Justice will continue to give its best efforts toward a fair, reasonable and effective administration of the act * * *.[221]

Mr. HUNTER. * * * In the spring issue of the Texas Law Review, in an article entitled "The Games Bureaucrats Play; Hide and Seek Under the Freedom of Information Act," Mrs. Joan Katz of Mr. Ralph Nader's Center for Responsive Law says:

> [The Act] has not fulfilled its advocates most modest aspirations * * *. The ambiguities and deficiencies of [the statute] will be remedied, if at all, only by the passage of new and improved legislation.

These are harsh judgments. After 4½ years as one of the act's principal administrators in HEW, my opinion is that the truth, as it usually does, lies somewhere in between. I believe that the law's general effect has been salutary and has worked in the public interest. I believe, however, that there are faults in the act and in its administration in the executive branch which are indeed grievous and need correction. These hearings are most welcome, for there has been world enough and time to make a proper assessment of the act * * *. [222]

Mr. REEDY. * * * I think that you gentlemen performed a very valuable service when you passed the Freedom of Information Act. I am not quite certain that you are going to get a large number of cases under it, or that you are going to get a lot of information out of it. But frequently the value of legislation consists in the fact that it exists and that every government official knows that the press has an ultimate weapon against him if he becomes a little bit too tight, too

[220] Hearings, pt. 4, p. 1069.
[221] Ibid., p. 1184.
[222] Ibid., p. 1019.

tough in withholding information. This means he will be considerably more candid.

But, you would still have to get back to the other question of what good is the weapon, if information can be placed into areas that cannot be reached by the normal processes. I am not a lawyer and I do not come here with specific recommendations because I think this is a legal question. But, I believe if I were in your position, gentlemen, this is the principal thing I would look at. What can be done about these huge, sprawling bureaucracies, these new agencies that are being set up within the White House itself? * * * [223]

James C. Hagerty, former press secretary to President Eisenhower, observed that Government information procedures "cannot remain static, for the simple reason that Government and public attitudes do not remain static." He urged a course of action precisely like that followed by the committee in studying, reviewing, and in this report, suggesting changes and modifications to the FOI Act to meet the changing conditions and times. He told the subcommittee on the opening day of these hearings, as the leadoff witness: [224]

At the outset, I think it is pertinent to the discussion to point out that the proper dissemination of Government information to the news media and to the public is by no means a new problem. It has been a fairly constant issue, in varying degrees, between Government, the news media and the citizens of our Nation almost since our founding days. From time to time in our country's history it has resulted in public distrust of the credibility of Government. It has also raised questions as to the responsibility and integrity of a free press. It has never been definitively solved and I am not sure it ever can be.

But hearings like this, I do believe, can be helpful and informative. Personally, I have always believed that Government information procedures, like Government itself, should be studied and reviewed periodically so that, if necessary, changes and modifications in policies and practices can be made to try to meet changing conditions and times. It cannot remain static, for the simple reason that Government and public attitudes do not remain static.

I think it really comes down in principle and in practice to a matter of understanding and balance between the Government and its citizens. Admittedly that understanding and balance is difficult of constant attainment and sometimes it does get out of kilter, either unintentionally or deliberately. Yet, as the 1966 report from the House Committee on Government Operations recommending passage of the Freedom of Information Act declared at that time, the goal should be the achievement of a workable balance between the right of the people to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.

[223] Ibid., p. 1014.
[224] Ibid., pp. 1009-1010.

And, the report added, "the right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government."

Now, I don't think that any reasonable private citizen nor any individual in Government service can deny such a goal as a necessary objective. But its practical achievement, it seems to me, lies in the key words "workable balance" and "without indiscriminate secrecy."

For no one can also fail to realize—as indeed the Freedom of Information Act does in its nine exemptions—that Government must conduct part of its operations privately if it is successfully to formulate its policies and reach its final decision in both foreign and domestic affairs. But once those final decisions are made, again with the exception of the exemptions voted in the act, they should become a matter of public record and knowledge without question, without bureaucratic delay or subterfuge.

It is within this context and the broad philosophical conviction that underlies the Freedom of Information Act that the committee makes the following administrative and legislative recommendations based upon the indepth investigations, studies, analyses, hearings, and day-to-day oversight of the administration of the act conducted by the Foreign Operations and Government Information Subcommittee.

Administrative Recommendations

The committee recommends that the following administrative actions be taken by the appropriate Federal departments and agencies to improve the administration, operation, and obtain full compliance with the provisions of the FOI Act. (For findings and conclusions, see ch. II of this report, p. 6.)

The Department of Justice should

—initiate a review of all agency regulations to determine the degree of compatibility with the Attorney General's memorandum and subsequent court decisions. Wherever deficiencies or inadequacies are found, such agencies should be advised to promulgate necessary amendments to their regulations to bring them into conformity with the spirit, as well as the letter, of the FOI Act.

—establish a regular procedure by which the Office of Legal Counsel will issue advisory opinions on the act to all agency general counsels and public information officers which opinions should also call attention to significant court decisions in FOI Act cases.

—prepare a pamphlet in simple, concise language for the general public, to be published by the Government Printing Office, setting forth the basic principles of the Freedom of Information Act, the procedures by which a citizen may obtain public records from a Federal agency, his right to appeal a denial of his request, including court remedies, and other similar advice concerning the citizen's rights under the act.

Federal departments and agencies should

—improve their system for keeping records of requests for information under the FOI Act, thus making possible a more adequate evaluation of the agency's performance in complying with the provisions of the act. Such action should include top-level administration supervision and oversight.

—each agency head should make a positive statement affirming his personal commitment to the principles embodied in the FOI Act.

—centralize within the department or agency and provide policy direction to field offices to properly implement administrative procedures affecting the FOI Act so as to achieve better coordination among all subagencies or units within the parent entity.

—require that letters refusing access to public records notify the requestor of the right of administrative appeal where it exists and cite the specific subsection or subsections of the FOI Act which are the basis for the initial refusal.

—assure maximum participation of and consultation with public information personnel in administrative actions under the Freedom of Information Act.

—establish on a uniform basis the lowest reasonable search and reproduction fees for documents made available under the act and include provisions for waiver of fees in hardship cases or when waiver would serve the public interest.

—institute seminars and other training procedures to make sure that all affected employees understand the importance, intent and proper administration of the FOI Act, including the preparation of pamphlets explaining procedures under the act.

Legislative Objectives

The legislative history of the Freedom of Information Act is not clear and simple, nor is the act itself. It contains general phraseology, undefined terms, and loosely drawn provisions that have bothered the courts as well as Government officials seeking to interpret the act. Like most important legislation, the version of the freedom of information bill finally enacted into law after 11 years of effort was a compromise that involved various public interest groups, the House of Representatives, the Senate, and officials of the executive branch. The purpose of the following legislative objectives is to clarify the compromises in the FOI Act that have been the source of confusion and misinterpretation. They are also intended to reflect some of the leading court decisions that interpreted vague phraseology. These objectives are based on the constructive suggestions presented to the subcommittee by leading legal authorities on the act.

The legislative objectives are, for the most part, in general, nonlegislative language. Specific statutory language to carry out the objectives of this report will be drafted for introduction and consideration by the committee. All but three of the legislative objectives

are proposed amendments to the FOI Act itself; the exceptions are within the jurisdiction of other legislative committees of the Congress and, of course, are advisory only.

The committee recommends consideration of the following objectives for incorporation into the Freedom of Information Act to strengthen, clarify, and improve its operations:

Section 552(a)(3)

1. The requirement that a request for "identifiable records" should be reworded to require a "reasonable" identification of the record, consistent with court determinations that the requestor would not have access to detailed and complicated identification details.

2. A new subsection should be added to provide that an agency shall grant or deny access to information within 10 working days of receipt of the request. An administrative appeal against the initial refusal also should be required, with a limit of 20 working days for the agency to act after receipt of such appeals. This subsection also should provide that the failure of the agency to meet either the 10- or 20-day time limit shall constitute exhaustion of administrative remedies for purposes of litigation.

3. The Government should be required to file responsive pleadings in freedom of information cases within 20 days. Under the present Federal Rules of Civil Procedure the Government is given 60 days to file pleadings in civil cases, while private litigants are accorded only 20 days.

4. Court costs and reasonable attorneys' fees should be awarded, in the discretion of the court, to the complainant if the court issues an injunction or order against the Government agency on a finding that the information sought was improperly withheld from the complainant.

5. All Federal agencies should include in their annual report to Congress or transmit to this committee by letter each year a report detailing their administration of the Freedom of Information Act. This report should include, at the very least, data on the number of requests for records under the act, the number of denials, the number of administrative appeals, the elapsed time in responding to initial requests and the handling of appeals, the number of suits filed within the year, the section relied upon in each denial, and any regulatory changes made during the year.

Section 552(b)

Subsection (b)(2) should be amended to insure that the exemption applies to internal personnel practices as well as internal rules. This amendment also should clarify the fact that only sensitive operating manuals and guidelines, the disclosure of which would significantly impede or nullify a proper agency function, should be exempt from disclosure under this subsection.

Subsection (b)(4) should be amended to clarify the intent of Congress that trade secrets and commercial or financial information can be withheld only if they actually are confidential. A general principle should be considered, providing that this exemption shall not apply to information furnished by any person when the purpose of providing the information is to secure a specific financial benefit or privilege from the Federal Government.

Subsection (b)(6) should be amended by substituting the word "records" for "files", thereby prohibiting the Government agencies from commingling nonexempt and exempt records in a single "file" thus claiming that all the records, including publicly available records, constitute an exempt "file"

Subsection (b)(7) should be amended to substitute "records" for "files" as in subsection (b)(6) and to clarify that only "specific" law enforcement purposes are to come within the scope of this exemption. Subsection (b)(7) should be amended to insure that certain categories of information are not to be considered exempt even if contained within an "investigative" record, such as

(a) scientific tests, reports and data unless otherwise exempt under the act;

(b) Government inspection reports re'ating to health and safety; and

(c) records or information relied upon in public policy statements, rules or regulations.

This subsection also could be amended to provide that investigatory records or information shall be made available to the public once an investigation has ceased and adjudication, or the reasonable prospect thereof, has ended. It could also be amended to apply its provisions clearly to regulatory as well as judicial enforcement proceedings and to make clear that once an investigatory record becomes public information informants' names or identities or such information which would necessarily lead to the identification of such informant may continue to be withheld, although other information they furnished shall not be withheld unless otherwise exempt.

Recommendations to Other Committees

The committee respectfully recommends that the pertinent legislative committees of the House carefully review the record of the hearings and consider amendments to the statutes listed below to assist in efforts to strengthen and improve the overall capability of the public information machinery of the Federal Government.

(1) Because of the documented need to upgrade the public information capability in our representative system and to provide for a legitimate, efficient, nonpartisan public information system within the executive branch; because of the corresponding need to provide recognized status and emphasis on the role of public information officers as the "bridge" between the Government and its citizens, the committee recommends that the appropriate committees of the Congress consider legislation that would repeal section 3107 of title 5, United States Code, a 1913 statute that prohibits the use of appropriated funds "to pay a publicity expert" and which has acted to place dedicated public information personnel within the civil service in a status of illegitimacy. The committee further recommends that the Committee on Appropriations consider the elimination or modification of language included in a number of annual appropriation bills that limits expenditures for "publicity" or similar purposes.

(See hearings, pt. 5, p. 1661; pt. 6, pp. 2155–2156; p. 2159 and pp. 2170–2176; also pp. 48–52 of this report.)

(2) The committee recommends that the Committee on Ways and Means review that portion of the hearings in which the conflict of section 1106 of the Social Security Act (42 U.S.C. 1306) with the Freedom of Information Act is discussed and consider legislation that would clarify section 1106 and the interpretation presently being given to that section by officials of the Social Security Administration, appears to extend it far beyond its original meaning and intent to protect the privacy of those covered under the Social Security Act. (See hearings, pt. 5, pp. 1681–1683.)

(3) The Committee on the Judiciary should consider amending title 18, section 1905, United States Code, since a recent decision of the United States District Court for the District of Columbia has cast doubt on the extent to which section 1905 is itself a statute which specifically exempts records from disclosure (*Schapiro* v. *Securities and Exchange Commission,* 339 F. Supp. 467 (February, 1972)). This section imposes criminal sanctions on government employees who divulge certain categories of trade and financial information in the course of their official duties. It has often been cited by Federal agencies as a statute prohibiting the release of information. We feel that the suggested amendment should clearly state the purpose of title 18, section 1905, so as to dispel the belief that this section authorizes the withholding of information otherwise available under the FOI Act. (See hearings, pt. 5, pp. 1643–1645, and p. 14 of this report.)

ADDITIONAL VIEWS OF HON. JOHN E. MOSS

I concur with the findings, conclusions and recommendations in this report. The importance of freedom of information is greater than ever today in light of the steady erosion of our Constitution by the Executive branch under all of the wartime administrations of both major political parties. This ominous trend must be reversed.

There are fundamental things which separate our representative system of government from a dictatorship. They include:

(1) free elections;
(2) freedom of information; and
(3) faith in the good sense of the people.

The first means nothing without the latter two elements. Thus, it was not by accident that the framers of the Constitution put freedom of expression as the First Amendment to the Bill of Rights. Nations may have all the free elections they want but unless their citizens are truly informed, those elections are largely meaningless. No citizen can adequately judge the performance of his leaders unless he has sufficient facts on which to make an informed judgment.

In dictatorships, the few who rule the many are removed only by death, some form of coup, or revolution. In democracies, the few who govern must account to the electorate—whether it be good news or bad news—and then regularly submit themselves to the judgment of the people at the polls. That judgment determines whether governmental power is to be continued or taken away. Of course, there is no guarantee that the people will make the right decision. There is only the hope they will do so. Dictators have only contempt and distrust for the judgment of the people—in their words, the "many". For this reason, they control and manipulate information to serve the ends of the ruling few, making certain the people do not become restless enough to revolt. If the few are adroit in their maneuverings—propaganda, secrecy, distortions, omissions and outright lies—they can hold the reins of government for years, even decades and, in some cases, generations. A democracy without a free and truthful flow of information from government to its people is nothing more than an elected dictatorship. We can never permit this to happen in America.

JOHN E. MOSS.

ADDITIONAL VIEWS OF HON. BELLA S. ABZUG

This report performs a needed and valuable service for the American people.

Congress enacted the Freedom of Information Act in the firm belief that a democracy works best when the people have maximum information about their government's activities.

The Freedom of Information Act established the policy that disclosure should be the general rule, rather than the exception—that all persons should have equal rights of access to government information, rather than only a favored few—and that when a citizen requests information from a government agency, the burden of proof should be on the government to justify withholding it, rather than on the citizen to justify its release. The Act gave the citizen who is improperly denied access to government information the right to challenge that denial in court.

Yet the Committee's in-depth examination, which included 41 days of public hearings, shows that government agencies are widely evading these hopes and goals of Congress and the Nation. The report cites several ways in which this evasion occurs. Among these are: excessive delays in responding to requests for information, excessive fees charged for copying documents, deliberate denials of information in the hope that the high cost of litigating every case would frustrate requests for information, and widespread reluctance of government officials to let the people know the truth about what goes on in government.

I commend the Committee for this excellent report.

However, the Committee has failed to note one of the major aspects of the government's rather poor record in achieving the goals of the Freedom of Information Act, namely, the makeup and experience of the people who head and staff the public information offices of Federal Government agencies.

There are, according to the Office of Management and Budget, more than 6,000 full-time Federal Government employees involved in public relations and information work. In addition, many thousands of additional Federal officials and employees spend much of their time making speeches, attending meetings, writing articles, and in other ways explaining the Government's work and program to the public. Fairly extensive studies about their composition and experience have already been conducted by this Committee's Foreign Operations and Government Information Subcommittee, and by the Washington office of the Freedom of Information Center of the University of Missouri.

One of the facts which these studies have disclosed is that Government information offices are almost totally dominated by men. Of the approximately 400 top-level persons working in the public relations operations of the executive department and independent agencies, 97

e men and only 3 percent are women. This is, indeed, a star-
arity, particularly when we consider that women compose
nt of the Federal Government's full-time, white-collar em-
id 3.9 percent of all employees working with Grades GS–13
; that more than 6 percent of the Government's employees
as general attorneys are women; and that in 1970 women in
id 3.9 percent of all employees working with grades GS–13
nen (Civil Service Commission, "Study of Employment of
the Federal Government, 1970"). The subcommittee also ad-
that only one woman now has the title of "director" of an
nformation activities, and that the highest level female infor-
ficer is an "assistant" to the director of communications for
ive branch.

the past two years, I have been informed of many instances,
olving information offices, in which qualified women have
riminated against by Federal agencies in hiring or promo-
me case, a highly qualified woman applicant for a GS–12
agency's information office was told by its director that "we
nt a woman writer." In another case, cited in hearings be-
House committees, an outstanding senior public informa-
oyee was denied promotion to the position of director of
nation office when the position became vacant. (Hearings on
H.R. 16098, before House Committee on Education and
st Cong., June, p. 466; Hearings on H.J. Res. 35, before
diciary Committee, 92nd Cong., March–April, 1971, pp.

lata, though they are not comprehensive, indicate that sex
ition is widely prevalent in Federal Government informa-
s, and certainly more so than in most other Federal offices
white-collar professional jobs.

ment information offices have a major role in apprising the
out Government programs. Sex discrimination in such offices
results in distorting, consciously or unconsciously, the type,
manner in which Government information is presented to
. I have noted many times that Government publications or
ases present information involving, for example, Govern-
ies on income, poverty, employment discrimination, educa-
other areas of life affected by Government. In many cases,
ns and press releases either make little or no reference to
include no data by sex showing the disproportionate gaps,
her inadequacies which are sex-based. Such discriminatory
ork not only reflects the vast amount of sex-based dis-
h still exists in government employment, but also is
for continuing the attitudes and myths which cause
on to exist.

tand that the Subcommittee's preliminary studies have
a growing percentage of the Government's information
re being appointed from among persons whose primary
background is in public relations and advertising, rather than in journalism, news reporting and editing, or substantive areas such as science, law, education, etc. It is disturbing to see this trend toward Madison Avenue merchandising of Government information.

SHEET

e 88, line 7, delete "ployees and 3.9 percent of all employees
ng with". Add new line between lines 7 and 8 reading "and above
eased by 6.6 percent compared to 3.6 per-".

I hope, and urge, that the Foreign Operations and Government Information Subcommittee will expand its studies, and hold hearings, on the extent to which the Federal Government's information and public relations work is imbued with sex discriminatory and news huckstering methods and practices.

BELLA S. ABZUG,
Member of Congress.

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