ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: [redacted]
Director of Information Services
1206 Ames

EXTENSION

NO. OIS*378*86 STAT

DATE 31 July 1986 STAT

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. DDA 7D24 HDQS				Bill:
2.				This is what I was calling about yesterday.
3.				We received a call from the Information Security Oversight Office (ISOO) concerning a paragraph in a publication called Access that dealt with the Ku Klux Klan incident in the Agency. That article is attached. Steve Garfinkel, the Director of ISOO was anticipating questions as to why such a report would be classified.
4.				
5.				
6.				
7.				In looking into it, I find that the so-called report was a letter from Dave Gries to Senator Durenberger, see attached. It was classified Confidential. Note that there is no additional information in that letter of 22 May 1986 than what was put out as a Headquarters Notice, also attached. The Headquarters Notice has since been released with minimum sanitization to FOIA requesters.
8.				
9.				
10.				
11.				
12.				The letter from Gries to Senator Durenberger is, in our judgment, improperly classified. We have requested OCA to downgrade the letter and will so report to Steve Garfinkel.
13.				
14.				[redacted] STAT
15.				Attachments: As Stated

Not sent. DDA 86 sucked in 31 July unsigned Steve Garfinkel C/IRMD

31 JUL 1986

FORM 1-79 610 USE PREVIOUS EDITIONS

DA:D/OIS: [redacted] STAT

Distribution:
Original & 1 - Addressee w/att.
1 - OIS SUBJECT w/att.
1 - OIS Chrono wo/att.

ACCESS REPORTS
FREEDOM OF INFORMATION

Volume 12 Number 15 July 16, 1986

Washington Focus: The House Government Operations Committee is expected to consider H.R. 4862, a business procedures amendment to the FOIA sponsored by Rep. Glenn English (D-Okla), chairman of the House Subcommittee on Government Information, Justice and Agriculture, and Rep. Tom Kindness (R-Ohio), ranking minority member of the subcommittee, when it meets in early August. English will apparently introduce an amendment to the bill at that time allowing agencies to promulgate regulations providing for the routine disclosure of certain categories of business information which would not require a notice to the company before release. The change, which was suggested by Public Citizen and other public interest and press groups, has met some resistance from business, which fears it may give agencies too much leeway in defining what types of business information can be routinely disclosed. If the issue can not be settled by negotiation, and business support for the amended bill begins to wane, it is almost certain to spell the end of the business procedures amendments, at least for this session.

STORIES IN THIS ISSUE:

BILL AIMED AT SPIES MAY HIT THE PRESS

An amendment to the Diplomatic Security and Antiterrorism Act, meant to deprive convicted spies of any money they might have gained, or stand to gain, from their illegal activities, has sparked concern among public interest and press groups who fear the amendment's provisions could be used against the press.

Besides providing for forfeiture of any profits from espionage activities, the amendment requires government seizure of "any of the person's proerty used, or intended to be used, in any manner or part, to commit, or to faciliate the commission of, such violation."

Editor: Harry A. Hammitt

Access Reports/FOI newsletter is published biweekly, 24 times a year. Subscription price is $250 per year.

ISSN 0364-7625.

Critics contend that, if the government were to make good on CIA Director William Casey's threats to prosecute the press for violations of communications intelligence statutes, and a media organization were found guilty, the amendment could be used to seize all assets of the organization. The Reporters Committee for Freedom of the Press points out that the forfeiture provisions are so broad that "in the case of a news organization convicted under the espionage statutes, [forfeiture] logically could include virtually any assets used in news gathering and dissemination, such as video equipment, computers, word processors, and printing equipment."

The amendment, introduced by Sen. Ted Stevens (R-Alaska), and cosponsored by 40 other Senators, would adopt forfeiture provisions currently included in federal drug laws, allowing the government to freeze all assets of those indicted under espionage laws pending the outcome of the trial.

During floor debate, Stevens emphasized that his bill, patterned generally after a federal "Son of Sam" statute, was aimed solely at confiscation of ill-gotten gains of spies themselves. He stated that "it [is not] an attempt to in any way prevent a third party from engaging in the business of writing either for the print media or for the air or television media the stories of those who have been involved in these kinds of activities."

Stevens made those remarks in response to a question posed by Sen. Charlies Mathias (R-Md) concerning the Samuel Morison espionage case. Noting that the case was currently on appeal and that it had "wide-ranging First Amendment implications," Mathias asked Stevens if his amendment would have any substantive impact on the espionage law under which Morison was convicted.

Stevens responded by saying it was not his intention to in any way change the definition of the underlying offenses contained in the espionage statutes.

Although the implications of the bill, which was passed by the Senate June 25, may have been unintended, they have nevertheless caused an uproar. Rep. Don Edwards (D-Calif), chairman of the House Subcommittee on Constitutional Rights said that "coupled with Casey's threats to prosecute the press, this provision is frightening. . .If this provision is enacted, the media can publish stories on intelligence matters only at the risk of their businesses. Obviously it will have a chilling effect."

Allan Adler, legislative counsel for the ACLU, added that if the government could prosecute *The Washington Post* for publishing classified information, "then the property of *The Post*, if it were a named defendant, would be forfeited to the government." Commenting on the forfeiture provisions, Adler noted that the purpose of forfeiture in the case of the press would be "to end the ability to engage in the enterprise that constitutes the offense. In Casey's view, the act of publishing the story is the offense."

Since the House has already passed a different version of the bill, the whole issue will now go to conference where there is a good chance that the problematic language of the Stevens amendment will either be modified or taken out completely.

D.C CIRCUIT PUTS BALL IN FEC'S COURT

A D.C. Circuit panel has put off a decision on whether Legi-Tech, a company which provides its subscribers with computerized information about campaign contributions on file at the Federal Election Commission, may be violating the Federal Election Campaign Act by disseminating the donor lists of organizations such as the National Republican Congressional Committee.

Writing for the majority, Circuit Court Judge Kenneth Starr stated that "[c]onsiderations of uniformity in the application of law, efficient use of judicial resources, and appropriate deference to Congress' mandate to the FEC combine to lead us here to. . .stay our hand until the FEC has had an opportunity to speak to this question."

Saying he was unconvinced that the Congressional Committee's claims that copyrighting its donor list was consistent with the FECA, Starr also said he was troubled by the Committee's interpretation of the FECA's prohibition against use of contributor information for "commerical purposes." He indicated that if the phrase really applied to any organization that sold such information, it "would bar newspapers and other commerical purveyors of news from publishing the information contained in those reports [to the FEC] under any circumstances. Such a result would obviously impede, if not entirely frustrate, the underlying purpose of the *disclosure* provisions of the FECA."

Although an FEC regulation allowed the media to print contributor information as long as the principal purpose of such communications "is not to communicate any contributor information listed on such reports for the purposes of soliciting contributions or for other commercial purposes," Starr noted that it was unclear as to whether the FEC would group Legi-Tech with the media for purposes of the regulation. In withholding judgment until the FEC could act on a pending complaint filed by the National Republican Congressional Committee, Starr pointed out that for the court panel to resolve the controversy "would require judicial speculation as to the Commission's views."

The case was before the panel on appeal from a lower court decision that the donor lists were not copyrightable. But Starr observed that even the Copyright Office expressed uncertainty about the issue, and declined to rule on that point since the resolution of the FEC complaint could well obviate any need to resolve the copyright issue.

In a separate concurring opinion, Senior Circuit Court Judge J. Skelley Wright pointed out that the FEC should keep in mind the "important and troubling First Amendment implications raised by any construction of the statute that bars the use of the information at issue in this case by organizations such as Legi-Tech." He also indicated he was troubled by the possibility that the Congressional Committee, if it were to lose its administrative appeal to the FEC, might still be able to pursue a copyright claim. He said it was doubtful that Congress "had intended to permit such private enforcement." (National Republican Congressional Committee v. Legi-Tech Corporation, No. 85-6037 and No. 85-6041, U.S. Court of Appeals for the District of Columbia, July 15)

COMMITTEE CONSIDERS RAISING COSTS OF TECHNICAL DATA

The House Armed Services Committee is working on an amendment to the Defense Authorization Bill which would allow the Defense Department to charge requesters the full cost of providing technical data under the Freedom of Information Act.

The amendment is apparently a response to complaints from the Defense Department that the cost of processing such requests has become burdensome. Because of the FOIA, the Department has never been able to recoup the true costs of requests, such as the cost of new equipment, duplication costs, and, particularly, the costs of high-level review of technical data to determine its releasability.

Most of these concerns would be addressed in the amendment. It would allow the Department to charge "all costs reasonably and directly attributable to responding to such request, including reasonable charges for the cost of services of agency personnel." This would include staff time spent locating the requested data, reviewing the data, and duplicating and other processing charges.

In an attempt to make sure defense contractors are not stymied by these provisions, the amendment would provide for waivers to U.S. citizens or corporations where they certified they were requesting the technical data to use in bidding on a contract, where the data was needed to comply with the terms of an international agreement, or where the Secretary of Defense determines that "such a waiver is in the interests of the United States."

However, small contractors are opposed to the legislation on several grounds. In a paper circulated to members of the Armed Services Committee, the National Tooling & Machining Association points out that "there is no reason to charge FOIA requesters more for technical data than other types of Government records. In fact there is reason to charge less or nothing since the dissemination of such data saves the Government money by permitting competition."

The Association also argues that charging to review the releasibility of the data would discourage small contractors from using the FOIA as a way of challenging proprietary markings that are frequently put on technical data by the submitting contractor.

Because it takes the Department so long to respond to requests, certifying that the information is requested for use in bidding on a contract is useless, according to the Association. It contends that technical data must be requested far in advance to be useful in responding to a contract solicitation.

Noting that the Committee claims the waiver provision is intended to cut down the volume of requests from data brokers, the Association argues that because of the poor performance of Defense Department data repositories, data brokers are often the only means of getting the information in a timely manner. The paper points out that "data brokers exist only because of DoD inefficiency and could not remain in business if DoD became efficient at data dissemination."

Although the amendment does not provide for withholding information and would not be considered an Exemption 3 statute, it does make several important procedural changes. In the very limited sphere of defense technical data, it would become permissible to charge for time spent reviewing documents for release, a concession which was included in the recent comprehensive draft FOIA legislation, but one which has been opposed by most public interest groups. It would also allow the Defense Department to keep the funds collected for processing technical data requests rather than mandating that the money be sent to the general Treasury fund as is the case with fees collected under the FOIA.

FBI NEITHER CONFIRMS OR DENIES PRESSER'S ROLE AS GOVT INFORMER

The Justice Department has won a victory in its effort to expand the use of the neither confirm or deny response in the area of invasion of privacy under Exemption 6 and Exemption 7(C).

A federal judge in Alexandria has sided with the Department, saying it need not disclose whether or not it has an informant file on Teamster President Jackie Presser. District Court Judge Claude Hitton noted that, absent a notarized release, Presser's "interest in non-disclosure of personal privacy information outweighs the public interest in scrutinizing the integrity of the FBI. An individual's willingness to serve as an informant is based, in large part, on FBI assurances that their relationship will remain confidential." He pointed out that "the public has an interest in such non-disclosure: impairment of ongoing and future law enforcement investigations."

The FOIA suit was brought by Mary Jane Freeman after the FBI told her it could locate no records documenting a connection between the Teamsters union and Lyndon LaRouche or any of his organizations. She specifically asked for Presser's informant's file in so much as it related to contacts with LaRouche.

After telling Freeman that no documents had been found, she produced an internal FBI document which mentioned Presser, LaRouche, and several of his organizations. In light of the memo, the FBI told the court it would conduct a further search, but later reported that it was still unable to find any responsive documents.

Hitton accepted the FBI's explanation that its search did not turn up the internal memo because it did not specifically reference the Teamsters and was thus not included in the file on the Teamsters or in LaRouche's file as a cross-reference to the Teamsters. In ruling on the search, Hitton noted that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for the documents was adequate."

Although Freeman argued that press accounts had established the fact that Presser was an FBI informant, Hitton ruled that "the FBI has not made an official public disclosure concerning Mr. Presser's alleged relationship with it and media speculation as to the thrust of an investigation does not constitute a disclosure. . .sufficient to justify the release of confidential informant information." (Mary Jane Freeman v. U.S. Department of Justice, Civil Action No. 85-0958-A, U.S. District Court for the Eastern District of Virginia, Mar. 12)

EXEMPTION 5 PROTECTS
NEGOTIATIONS WITH EXPERT WITNESS

A government expert witness has lost his bid to obtain records of Labor Department negotiations with another expert witness who was hired to take his place during a second administrative proceeding concerning a job discrimination suit against Harris Trust.

The Labor Department claimed the General Information Form and two paragraphs of a letter sent by the president of Statistica, Inc. were protected under Exemption 5 (attorney work product). Stephan Michelson, the original expert witness, argued the material contained factual information which could be separated from the opinion portion of the records.

After closely examining the case law in the D.C. Circuit, District Court Judge John Pratt agreed with the government that all the claimed materials had been properly withheld. Noting that "where work product is involved, drawing a line between facts and protected opinion work product" is less than helpful, Pratt found that the affidavit submitted by the Department was "sufficiently detailed and credible to uphold defendant's claim of exemption. . ."

However, Pratt did not agree with the government's argument, based on the Supreme Court's decisions in *FTC v. Grolier* and *Weber Aircraft*, that factual material did not have to be segregated from privileged documents because the records would not be "routinely available" in litigation. Pratt pointed out that a 1978 D.C. Circuit decision noted that "the government cannot exempt pure statements of fact from disclosure by calling them attorney work-product. . ."

He went on to observe that there would be times when an attorney's mental impressions were so inextricably intertwined with the facts that factual material could not be released without divulging protected opinions. He noted that the D.C. Circuit had said those facts "which might disclose an attorney's appraisal of factual evidence" could be protected.

Pratt also found that the letter from Statistica to the Labor Department met the threshold test contained in (b)(5) that the records be "inter-agency or intra-agency" in nature. He pointed out that the phrase had been previously used to include reports prepared by outside experts at the agency's request.

Pratt rejected Michelson's contention that the Labor Department affidavit was inherently unreliable because it had been submitted by the attorney involved in the case and was "self-serving." Quoting from an earlier D.C. Circuit opinion, Pratt pointed out that "in every FOIA case, there exists the possibility that Government affidavits claiming exemptions will be untruthful." But, quoting from an opinion by District Court Judge Gerherd Gesell, Pratt also noted that "if the agency cannot be trusted, the Act will never work. It is a profound mistake to transfer administrative responsibility to judges on the theory that persons employed by the Executive branch are not honest or lack judgment." (Dr. Stephan Michelson v. United States Department of Labor, Civil Action No. 85-2518, U.S. District Court for the District of Columbia, June 30)

News From Canada . . . .

From Canadian Correspondent Tom Riley, an international information consultant who heads his own company, Riley Information Services, P.O. Box 261, Station F., Toronto, Canada M4Y 2L5, Phone: (416) 593-7352.

First Parliamentary Report on Access Act

The first report resulting from the mandatory three-year review of the Access to Information Act by a parliamentary committee has recommended that Parliament revise Section 24 to give the Act precedence over secrecy provisions in other statutes. Statutes with secrecy provisions, which are currently exempt from the Access Act, are listed in Schedule II of the Act. Section 24(1), which exempts information laid out in Schedule II, "unlike other freedom of information statutes which [refer] to the categories of statutes to be covered by such an exemption," is exhaustively defined, says the committee in its report.

When the Act was first passed there were a considerable number of records exempted from disclosure, with 33 other Acts listed in Schedule II, "embracing some 40 identified sections and subsections in other federal statutes."

This gap created an anomalous situation contrary to the spirit of openness reflected in Section 2 of the Access Act. As it now stands, the report notes, if a head of a department exercises a discretion to withhold information which is deemed secret by another statute, even the Information Commissioner cannot review that decision. This, says the committee, is inconsistent with Section 2 of the Act which gives a statutory right of access to the citizen, with limited exceptions, with the burden of proof on the government to show why the information should not be released.

The report says that "two of the three principles set out in [Section 2] are violated to some degree by the existence of Section 24(1). First, this exception to the rule of open government cannot be termed 'limited and specific.' To the extent that these other statutory provisions contain broad discretion to disclose records, these exceptions to the rule of openness will remain unclear until the discretion is actually exercised in each case."

The report, written by the House of Commons' Standing Committee on Justice and the Solicitor General, which has been reviewing the Act for the last few months, goes on to say that "in the words of a leading American court decision interpreting the analogous provisions in the United States Freedom of Information Act, the thrust of the exemption is to 'assure that the basic policy decisions on government secrecy be made by the legislative branch rather than the executive branch,' a thrust consistent with one of the major objectives of the Act which is to substitute 'legislative judgment for administrative discretion.'"

The committee concluded it was not necessary to include Schedule II in the Access Act. "We are of the view that in every instance, the type of information safeguarded in an enumerated provision would be adequately protected by one or more of the exemptions already contained in the Access Act," the report says. "Most of the enumerated provisions in Schedule II protect either confidential business information or personal information. The exemptions in Sections 20 and 19 respectively of the Access Act provide ample protection for these interests."

The report points out that in other acts with secrecy provisions the information would be protected because there is a balancing test for certain confidential business information, "meaning in theory that some of the information described in [some of the Acts listed in Schedule 11] could possibly be released should Schedule 11 be eliminated. However, even here the information is protected because of the third-party provisions of the Access Act and the fact that only information given in confidence is protected."

The committee recognizes that "less frequently, information pertaining to national security, law enforcement, federal-provincial relations, or governmental economic interests is protected by certain Schedule 11 provisions. Once again, however, there are ample exemptions in the Access Act to address these important state interests."

Despite these views, the committee stated they "were persuaded that there should be three exceptions to the conclusions" -- the Income Tax Act, the Statistics Act, and the Corporations and Labour Unions Returns Act. "Even though the exemptions in the Access Act afford adequate protection for these kinds of information, the Committee agrees that it is vital for agencies such as Statistics Canada to be able to assure those persons sypplying data that absolute confidentiality will be forthcoming. A similar case has been made for income tax information."

As a result of these findings, the committee made three recommendations for change:

- o that the Access Act be amended to repeal Section 24/Schedule 11 and replace it with new mandatory exemption which are drafted so as to incorporate explicitly the interests reflected in the three provisions found in the three cited statistical and tax return statutes;

- o that the Department of Justice undertake an extensive review of these other statutory restrictions and amend their parent Acts in a manner consistent with the Access to Information Act; and

- o that any legislation seeking to provide a confidentiality clause which is not to be made subject to the Access Act should commence as follows: "Notwithstanding the Access to Information Act. . ."

In this way, concluded the committee, "Parliament will be made explicitly aware of the impact of its actions. As a result, it is hoped that future provisions which are inconsistent with the code of disclosure established in the Access Act will be minimal."

The committee's final report is not expected until later this year. The current report was tabled at the end of June as a review and Report to Parliament of Section 24 of the Act, which was required within three years of the effective date of the Act. The Access to Information Act became operational on July 1, 1983.

* * * * * * *

Short Notes:

Quebec's Commission on Access to Information has presented its annual report to the provincial Minister of Communications, Richard D. French. A summary of the report will appear in the next edition of *Access Reports*.

The annual reports of the Information Commissioner and the Privacy Commissioner were tabled in Parliament at the end of June. They will be the subject of special reports in future editions of *Access Reports*.

In Brief . . .

In an important decision for the Justice Department's efforts to block release of settlement negotiations, Judge Gerhard Gesell has upheld an agency application of Exemption 4 (confidential business information) to documents generated during an unsuccessful attempt to settle a debarment action brought by the Department of Health and Human Services against Paradyne Corporation. Gesell pointed out that the documents in question contained information in which Paradyne had a commercial interest. Continuing, he noted that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required." Although he found the commercial interest of the records was "slight," he said it should be protected under the exemption. He rejected the government's claim that the records were also exempt under (b)(5), noting that that exemption "does not cover papers exchanged between a government agency and an outside adverse party." (M/A-Com Information Systems v. United States Department of Health and Human Services, Civil Action No. 85-3215, U.S. District Court for the District of Columbia, Mar. 4)

By a 7-2 vote, the Supreme Court has decided the public does have a First Amendment right to attend most pretrial hearings in criminal cases. The Court ruled that the public could be barred from such proceedings only if there was a "substantial probability" that the defendant's right to a fair trial would be prejudiced by publicity and if there was no other means to adequately protect his right to a fair trial. The case involved Robert Diaz, a California nurse accused of murdering 12 patients. The California Supreme Court had upheld the lower judge and ruled the hearing had been properly closed. Overturning that ruling, Chief Justice Warren Burger wrote that "[the] risk of prejudice does not automatically justify refusing public access to hearings. . ." (Press-Enterprise Company v. Superior Court of California for the County of Riverside, No. 84-1560, U.S. Supreme Court, June 30)

A panel for the D.C. Circuit, saying it did not have enough information to rule on Exemption 5 (predecisional) claims made by the Justice Department, has remanded an FOIA suit back to the district court for a decision. The suit, filed by free-lance writer Steve Emerson, concerned Justice's refusal to release information on specific persons suspected of violating the reporting requirements of the Foreign Agents Registration Act. The district court initially rejected the Department's claim that the materials were protected by Exemption 7(C) (invasion of privacy concerning law enforcement files), but the government then moved to alter that judgment by submitting a sealed affidavit in which Exemption 5 claims were made. In his affidavit, Joseph Clarkson, Chief of the FARA unit in the Department's Criminal Division, stated the records were deliberative process materials and attorney work product. The district court denied the government's motion, which was then appealed to the circuit court. Noting that "it is

far from evident that all of the documents were prepared in anticipation of litigation, or that deliberative-process materials include no purely factual data," the panel sent the case back to the district court for further proceedings. (Steven A. Emerson v. Department of Justice, No. 84-01304, U.S. Court of Appeals for the District of Columbia, June 30)

The Senate's experiment with live television coverage ended temporarily July 15. The cameras will be turned off for at least three days while members collect their thoughts about the just concluded six-week experimental coverage. The Senate passed by voice vote a resolution to resume coverage on July 21. The full Senate is scheduled to vote July 29 on whether to make coverage permanent.

The Spring issue of FOIA Update, a publication of the Justice Department's Office of Information and Privacy, has shed further light on the failure of the comprehensive draft FOIA legislation. In an article on H.R. 4862, the business procedures bill introduced in the House Subcommittee on Government Information, Justice and Agriculture, OIP notes that the Government Information Subcommittee staff experienced difficulty reaching a concensus with public interest groups, particularly press groups. As the discussions reached an end, the article points out that press groups insisted on interpreting an expedited access provision in such a way as "to apply almost automatically to any journalist working on a deadline -- which would have presented totally unacceptable difficulties to agencies."

In an addendum to its May decision in Church of Scientology v. Internal Revenue Service, the majority and dissent continue to spar over whether the Haskell Amendment to Section 6103 of the Internal Revenue Code allows for release of tax returns where all identifying information has been deleted. Informed by the ACLU after their original decision that the "tax model" referred to during floor debate of the amendment was "an actual return with identifying details eliminated," Circuit Court Judge Antonin Scalia insisted this did not affect the basis of his decision. He preferred to rely on the statutory text rather than what Sen. Haskell and his colleagues may or may not have understood the tax model to be at that time. He pointed out that "the mere term 'Tax Model' assuredly does not suggest a redacted actual return." In dissent, Circuit Court Judge Patricia Wald said "I am amazed that the majority continues to claim that redaction is insufficient under the Haskell Amendment. She noted that the additional information provided by the ACLU "demonstrates that both the interpretations advanced by the government and the majority are wrong, and that all that the framers of the Amendment thought necessary under Section 6103 was effective redaction."

The public interest group People For the American Way has issued an overview report on the Freedom of Information Act on its twentieth anniversary. Reviewing the legislative history of the Act, citing several examples of the importance of information uncovered by the FOIA, and rebutting standard arguments concerning the costs and burdens of the law, the report concludes that the Act is "a symbol of open information in a democratic society" and that its existence has been of "enormous benefit to American society." Copies of the report can be obtained from People For the American Way, 1424 16th St. NW, Washington, DC 20036; phone (202) 462-4777.

The Securities and Exchange Commission has published notice of rulemaking for its EDGAR system of electronic filing. Currently being used under a pilot program which includes filings by voluntary participants, the operational EDGAR system would call for electronic filing of most documents processed by the SEC's Divisions of Corporation Finance and Investment Management. Of the issues on which the SEC requests comment, one deals with correspondence submitted with electronic filings and the question of how such correspondence ought to be processed under the FOIA. For further information, contact Mauri L. Osheroff at (202) 272-2573, or Patricia M. Jayne at (202) 272-7054. (Federal Register, p. 24155, July 2)

The Office of Technology Assessment has begun work on a study of federal information dissemination. The study, slated for completion in November 1987, will focus on present and future public information needs and how technology might help meet those needs. It will include a look at the role of the Government Printing Office, agencies, libraries, and private firms with an eye to possible uses of technological innovations in information dissemination.

Because he was unable to document any urgent need for the records, a district court judge has refused to make the Justice Department process a prisoner's request faster than it would be otherwise under the department's "first in, first out" schedule. Noting that there were 150 requests ahead of his, Judge Charles Richey said "there is no justification for moving plaintiff's request ahead of those of persons who have been patiently waiting." However, Richey instructed the Department to inform the requester within 30 days of the current status of the request and the anticipated date of completion, and added that "the Court is mindful of plaintiff's status as a pro se prisioner, and, therefore, grants this stay subject to review upon plaintiff's showing of urgency in the future." (Harry Aleman v. Gary S. Shapiro, Civil Action No. 85-3313, U.S. District Court for the District of Columbia, June 30)

A prisoner's Privacy Act suit has been dismissed because he failed to identify a physician to receive his medical records as provided for in Justice Department regulations. Dismissing the suit, Judge Norma Holloway Johnson pointed out that subsection (f)(3) of the Privacy Act instructed agencies to promulgate "special procedures" for the release of an individual's medical records. She noted the Justice Department regulations implementing (f)(3) provided the individual identify a doctor who would request the records directly; the regulations also required the doctor to verify his identity in making the request. Johnson observed that the prisoner had "made no effort whatsoever to comply with the requirements for the release of these documents." (George I. Benny v. Federal Bureau of Prisons, Civil Action No. 86-0112, U.S. District Court for the District of Columbia, June 30)

Destruction of a file does not violate the Privacy Act, according to the Tenth Circuit. "The Privacy Act was created to protect individuals against invasions of their privacy flowing from the misuse of existing files, not to mandate. . .that files be created and maintained." The case involved a sexual discrimination complaint filed by Allen Tufts on behalf of his wife Debra. After an investigation was started, the inspector general decided

the investigation was improperly handled and had the file destroyed. The Tufts later requested the file and sued for damages after learning the file no longer existed. Although the court found no Privacy Act violation, it noted in a footnote that the inspector general may have violated Air Force regulations which prohibit destruction of documents on the basis of an individual's opinion that they have no value. (Allen P. Tufts and Debra R. Tufts v. Department of the Air Force, No. 85-1794, U.S. Court of Appeals for the Tenth Circuit, June 11)

Using the Freedom of Information Act, a journalism professor at the State University of New York has uncovered an Energy Department project to send an unmanned space vehicle powered by plutonium up in the space shuttle. According to documents released to Karl Grossman, the project, known as Project Galileo, was slated for launch sometime this year. Because of the fallibility of the shuttle program, Grossman's sources told him such a launch could be catastrophic since, according to one source, one pound of plutonium, "if uniformly distributed, could hypothetically induce lung cancer in every person on earth." Critics contend that if the shuttle had exploded with a plutonium generator on board, the resultant fallout would have caused a substantial rise in eventual deaths due to lung cancer. Writing in the July issue of *Common Cause*, Grossman describes the difficulties he experienced in trying to get the Energy Department to release information on the project. After being denied a fee waiver, and after several appeals, he was informed the records would be released. However, Energy later told him the documents were "predecisional" and would not be released. Finally, Grossman resorted to congressional help, and a press release accusing the government of covering up its shuttle plans. At that point he was told that a "special" Energy Department-NASA team was assembling the information. A month later he received hundreds of pages of documents.

The Washington Post and the New York Daily News have asked a special panel of the D.C. Circuit to allow press access to proceedings involving grand jury records created during a special prosecutor's investigation of former Labor Secretary Raymond Donovan. The panel, which is responsible for appointing special prosecutors under the provisions of the Ethics in Government Act, has recently balked at releasing the records to New York state prosecutors who are preparing to try Donovan and several associates on charges of fraud and grand larceny. Although Bronx District Attorney Mario Merola and his staff have had access to many of the documents, the panel has so far declined to authenticate the records so that they can be introduced as evidence in Donovan's trial. In their briefs to the court, the two papers noted that "the Ethics in Government Act was enacted, and this court created, to restore the public's confidence that evidence of wrongdoing by high government officials will be fully and fairly pursued. The public's trust in the integrity of the government's handling of such evidence is seriously undermined if a proceeding such as this, which would normally be open to the public, is shrouded in secrecy."

The New York State Commissioner of Education has decided that an index of administrative "fair hearings" for the Office of Vocational Rehabilitation are available under the state's open records law. After initially being told the index was not disclosable under a provision in the law similar to Exemption 3 (other statutes) of the FOIA, New York attorney

David Jacoby appealed to the Commissioner who noted in his ruling that "I find that [Education Law Section 1007 and the relevant regulations of the State Education Department] do not prohibit the disclosure of the requested index as long as details identifying the persons involved are deleted."

The media has scored victories in two recent records access cases in Florida. According to the *Florida Freedom of Information Clearing House Newsletter*, a publication of the journalism school at the University of Florida, a Dade County circuit court judge ordered the Miami police department to release copies of subpeonas and other documents involving a federal investigation of police corruption to *The Miami Herald*. The department had withheld the records because they involved an active investigation, but *The Herald*'s attorney argued the department could not withhold the documents since it was the target of the investigation, not the investigating agency.

* * * * * * *

In a second Florida case, a judge in West Palm Beach has ordered the state attorney to pay nearly $29,000 in legal fees incurred by four media organizations in their fight to get records relating to the 1984 drug-overdose death of David Kennedy. Ruling in the case, the judge said the state attorney had "unlawfully and unreasonably" withheld the records.

The New York State Senate has rejected a proposal which would have allowed for a 30-month experiment in providing television, radio, and photographic coverage of state trial courts. The bill would have barred coverage of jurors, victims in sexual offense trials, and undercover policemen testifying at a trial. It would also have prohibited coverage of pretrial hearings, conferences between attorneys and judges, and jury selection. In all other courtroom situations, the coverage would have been permitted at the judge's discretion.

A bill introduced in the California State Senate would require the state's Department of Food and Agriculture to make public information about produce contaminated with illegal pesticides and where the produce was grown, according to *News Media Update*, a weekly joint publication of the National Newspaper Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists. The bill, which passed the Senate in mid-April, requires the head of the Food and Agriculture Department to monitor and release quarterly reports. It also requires publication of the names of individuals convicted of violating state pesticide regulations. State Sen. Gary K. Hart of Santa Barbara said he introduced the bill because "I believe that the public has a right to know just what kind of chemicals are on the food sold in California."

Coca-Cola has refused to obey a court order directing it to reveal the formulae for several of its soft drinks, information Coca-Cola has always kept as a closely-guarded secret. A federal court judge, declining to enter a default judgment against Coke, has barred the company from introducing certain evidence at trial, and establishing certain facts which the company cannot rebut. The trial involves a trademark infringement and breach of

contract suit brought against Coke by several of its bottlers who allege that Coca-Cola and Diet Coke are merely different versions of the same product. (Coca-Cola Bottling Co. of Shrevesport v. Coca-Cola, 32 Patent, Trademark & Copyright Journal 123, U.S. District Court for the District of Delaware, May 23)

A confidential report on an alleged mock-Ku Klux Klan meeting at CIA headquarters, which one official referred to as "a tasteless joke," has been submitted to the Senate Select Committee on Intelligence in response to inquiries made by the committee. When asked about the report, vice-chairman Patrick Leahy (D-Vt) replied: "I can't talk about it. It's classified." Under the 1982 executive order on classification issued by President Reagan, only information whose "disclosure reasonably could be expected to cause damage to the national security" may be classified. The confidential stamp applies only to information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security."

Central Intelligence Agency

Washington, D.C. 20505

OCA FILE SSCI

RECPT #

22 May 1986
OCA 86-1725

The Honorable Dave Durenberger, Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Director has asked me to respond to your letter received May 14, 1986 regarding allegations of a Ku Klux Klan group in the Computer Services Division of CIA. At the outset, let me assure you that after a thorough review we can find no indication that there has been any such group, or any such activity in CIA. It appears that the allegations you have received stem from a tasteless prank that occurred in late 1981 and was investigated at the time. The facts are as follows.

The incident was prompted when several employees in the [redacted] Computer Center happened to be listening to a local radio station that announced an upcoming meeting of the Ku Klux Klan. Upon hearing the announcement, a black employee joked to his white colleagues that they should attend the meeting. Shortly thereafter, upon returning to the office from an outside errand, the black employee found white paper hats made from computer paper and was told a KKK meeting had taken place. This was a tasteless attempt at a joke and was interpreted as such by the black employee. The following morning, in yet another misguided attempt at humor, Ku Klux Klan literature was found on the [redacted] Center bulletin board. After an investigation conducted by senior supervisory personnel all of the employees involved in these pranks received stern oral reprimands. 25X1 25X1

The other two racial incidents on record in recent years involve separate, informal one-on-one discussions that took place between a white and a black employee regarding the Ku Klux Klan. In one case, an oral reprimand was given, and in the other, the two employees were reprimanded and sent to a special seminar.

STAT [redacted]

[redacted] 25X1

None of the incidents outlined above involved employees found to be KKK members, and none consisted of anything more than off-the-cuff remarks and/or dubious efforts at humor. I should emphasize, however, that each was taken seriously and investigated thoroughly. We take seriously any indications of KKK involvement on the part of Agency personnel. In our view, any such involvement bears directly on the issue of employee suitability.

I trust this letter addresses the matters you have raised. A separate copy is being provided to Vice Chairman Leahy.

Sincerely,

[redacted] 25X1

David D. Gries
Director of Congressional Affairs

Distribution:
Original - The Honorable Dave Durenberger (OCA 86-1725)
Original - The Honorable Patrick J. Leahy (OCA 86-1726)
1 - DCI
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1 - IG
1 - D/OS/SSD/OSB
1 - OCA Record
1 - D/OCA
1 - DD/Legislation
D/OCA:DDG:mdo (22 May 1986)

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: [redacted]
Director of Information Services
1206 Ames

EXTENSION [redacted]

NO. OIS*378*86 STAT

DATE 31 July 1986 STAT

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. DDA 7D24 HDQS				Bill:
2.				This is what I was calling about yesterday.
3.				We received a call from the Information Security Oversight Office (ISOO) concerning a paragraph in a publication called Access that dealt with the Ku Klux Klan incident in the Agency. That article is attached. Steve Garfinkel, the Director of ISOO was anticipating questions as to why such a report would be classified.
4.				
5.				
6.				
7.				In looking into it, I find that the so-called report was a letter from Dave Gries to Senator Durenberger, see attached. It was classified Confidential. Note that there is no additional information in that letter of 22 May 1986 than what was put out as a Headquarters Notice, also attached. The Headquarters Notice has since been released with minimum sanitization to FOIA requesters.
8.				
9.				
10.				
11.				The letter from Gries to Senator Durenberger is, in our judgment, improperly classified. We have requested OCA to downgrade the letter and will so report to Steve Garfinkel.
12.				
13.				
14.				[redacted] STAT
15.				Attachments: As Stated

FORM 1-79 610 USE PREVIOUS EDITIONS

STAT

DA:D/OIS:

Distribution:
Original & 1 - Addressee w/att.
1 - OIS SUBJECT w/att.
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ACCESS REPORTS
FREEDOM OF INFORMATION

Volume 12 Number 15 July 16, 1986

Washington Focus: The House Government Operations Committee is expected to consider H.R. 4862, a business procedures amendment to the FOIA sponsored by Rep. Glenn English (D-Okla), chairman of the House Subcommittee on Government Information, Justice and Agriculture, and Rep. Tom Kindness (R-Ohio), ranking minority member of the subcommittee, when it meets in early August. English will apparently introduce an amendment to the bill at that time allowing agencies to promulgate regulations providing for the routine disclosure of certain categories of business information which would not require a notice to the company before release. The change, which was suggested by Public Citizen and other public interest and press groups, has met some resistance from business, which fears it may give agencies too much leeway in defining what types of business information can be routinely disclosed. If the issue can not be settled by negotiation, and business support for the amended bill begins to wane, it is almost certain to spell the end of the business procedures amendments, at least for this session.

STORIES IN THIS ISSUE:

BILL AIMED AT SPIES MAY HIT THE PRESS

An amendment to the Diplomatic Security and Antiterrorism Act, meant to deprive convicted spies of any money they might have gained, or stand to gain, from their illegal activities, has sparked concern among public interest and press groups who fear the amendment's provisions could be used against the press.

Besides providing for forfeiture of any profits from espionage activities, the amendment requires government seizure of "any of the person's proerty used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation."

Editor: Harry A. Hammitt

Access Reports/FOI newsletter is published biweekly, 24 times a year. Subscription price is $250 per year.

ISSN 0364-7625.

Critics contend that, if the government were to make good on CIA Director William Casey's threats to prosecute the press for violations of communications intelligence statutes, and a media organization were found guilty, the amendment could be used to seize all assets of the organization. The Reporters Committee for Freedom of the Press points out that the forfeiture provisions are so broad that "in the case of a news organization convicted under the espionage statutes, [forfeiture] logically could include virtually any assets used in news gathering and dissemination, such as video equipment, computers, word processors, and printing equipment."

The amendment, introduced by Sen. Ted Stevens (R-Alaska), and cosponsored by 40 other Senators, would adopt forfeiture provisions currently included in federal drug laws, allowing the government to freeze all assets of those indicted under espionage laws pending the outcome of the trial.

During floor debate, Stevens emphasized that his bill, patterned generally after a federal "Son of Sam" statute, was aimed solely at confiscation of ill-gotten gains of spies themselves. He stated that "it [is not] an attempt to in any way prevent a third party from engaging in the business of writing either for the print media or for the air or television media the stories of those who have been involved in these kinds of activities."

Stevens made those remarks in response to a question posed by Sen. Charlies Mathias (R-Md) concerning the Samuel Morison espionage case. Noting that the case was currently on appeal and that it had "wide-ranging First Amendment implications," Mathias asked Stevens if his amendment would have any substantive impact on the espionage law under which Morison was convicted.

Stevens responded by saying it was not his intention to in any way change the definition of the underlying offenses contained in the espionage statutes.

Although the implications of the bill, which was passed by the Senate June 25, may have been unintended, they have nevertheless caused an uproar. Rep. Don Edwards (D-Calif), chairman of the House Subcommittee on Constitutional Rights said that "coupled with Casey's threats to prosecute the press, this provision is frightening. . .If this provision is enacted, the media can publish stories on intelligence matters only at the risk of their businesses. Obviously it will have a chilling effect."

Allan Adler, legislative counsel for the ACLU, added that if the government could prosecute *The Washington Post* for publishing classified information, "then the property of *The Post*, if it were a named defendant, would be forfeited to the government." Commenting on the forfeiture provisions, Adler noted that the purpose of forfeiture in the case of the press would be "to end the ability to engage in the enterprise that constitutes the offense. In Casey's view, the act of publishing the story is the offense."

Since the House has already passed a different version of the bill, the whole issue will now go to conference where there is a good chance that the problematic language of the Stevens amendment will either be modified or taken out completely.

D.C CIRCUIT PUTS BALL IN FEC'S COURT

A D.C. Circuit panel has put off a decision on whether Legi-Tech, a company which provides its subscribers with computerized information about campaign contributions on file at the Federal Election Commission, may be violating the Federal Election Campaign Act by disseminating the donor lists of organizations such as the National Republican Congressional Committee.

Writing for the majority, Circuit Court Judge Kenneth Starr stated that "[c]onsiderations of uniformity in the application of law, efficient use of judicial resources, and appropriate deference to Congress' mandate to the FEC combine to lead us here to. . .stay our hand until the FEC has had an opportunity to speak to this question."

Saying he was unconvinced that the Congressional Committee's claims that copyrighting its donor list was consistent with the FECA, Starr also said he was troubled by the Committee's interpretation of the FECA's prohibition against use of contributor information for "commerical purposes." He indicated that if the phrase really applied to any organization that sold such information, it "would bar newspapers and other commerical purveyors of news from publishing the information contained in those reports [to the FEC] under any circumstances. Such a result would obviously impede, if not entirely frustrate, the underlying purpose of the *disclosure* provisions of the FECA."

Although an FEC regulation allowed the media to print contributor information as long as the principal purpose of such communications "is not to communicate any contributor information listed on such reports for the purposes of soliciting contributions or for other commercial purposes," Starr noted that it was unclear as to whether the FEC would group Legi-Tech with the media for purposes of the regulation. In withholding judgment until the FEC could act on a pending complaint filed by the National Republican Congressional Committee, Starr pointed out that for the court panel to resolve the controversy "would require judicial speculation as to the Commission's views."

The case was before the panel on appeal from a lower court decision that the donor lists were not copyrightable. But Starr observed that even the Copyright Office expressed uncertainty about the issue, and declined to rule on that point since the resolution of the FEC complaint could well obviate any need to resolve the copyright issue.

In a separate concurring opinion, Senior Circuit Court Judge J. Skelley Wright pointed out that the FEC should keep in mind the "important and troubling First Amendment implications raised by any construction of the statute that bars the use of the information at issue in this case by organizations such as Legi-Tech." He also indicated he was troubled by the possibility that the Congressional Committee, if it were to lose its administrative appeal to the FEC, might still be able to pursue a copyright claim. He said it was doubtful that Congress "had intended to permit such private enforcement." (National Republican Congressional Committee v. Legi-Tech Corporation, No. 85-6037 and No. 85-6041, U.S. Court of Appeals for the District of Columbia, July 15)

COMMITTEE CONSIDERS RAISING COSTS OF TECHNICAL DATA

The House Armed Services Committee is working on an amendment to the Defense Authorization Bill which would allow the Defense Department to charge requesters the full cost of providing technical data under the Freedom of Information Act.

The amendment is apparently a response to complaints from the Defense Department that the cost of processing such requests has become burdensome. Because of the FOIA, the Department has never been able to recoup the true costs of requests, such as the cost of new equipment, duplication costs, and, particularly, the costs of high-level review of technical data to determine its releasability.

Most of these concerns would be addressed in the amendment. It would allow the Department to charge "all costs reasonably and directly attributable to responding to such request, including reasonable charges for the cost of services of agency personnel." This would include staff time spent locating the requested data, reviewing the data, and duplicating and other processing charges.

In an attempt to make sure defense contractors are not stymied by these provisions, the amendment would provide for waivers to U.S. citizens or corporations where they certified they were requesting the technical data to use in bidding on a contract, where the data was needed to comply with the terms of an international agreement, or where the Secretary of Defense determines that "such a waiver is in the interests of the United States."

However, small contractors are opposed to the legislation on several grounds. In a paper circulated to members of the Armed Services Committee, the National Tooling & Machining Association points out that "there is no reason to charge FOIA requesters more for technical data than other types of Government records. In fact there is reason to charge less or nothing since the dissemination of such data saves the Government money by permitting competition."

The Association also argues that charging to review the releasibility of the data would discourage small contractors from using the FOIA as a way of challenging proprietary markings that are frequently put on technical data by the submitting contractor.

Because it takes the Department so long to respond to requests, certifying that the information is requested for use in bidding on a contract is useless, according to the Association. It contends that technical data must be requested far in advance to be useful in responding to a contract solicitation.

Noting that the Committee claims the waiver provision is intended to cut down the volume of requests from data brokers, the Association argues that because of the poor performance of Defense Department data repositories, data brokers are often the only means of getting the information in a timely manner. The paper points out that "data brokers exist only because of DoD inefficiency and could not remain in business if DoD became efficient at data dissemination."

Although the amendment does not provide for withholding information and would not be considered an Exemption 3 statute, it does make several important procedural changes. In the very limited sphere of defense technical data, it would become permissible to charge for time spent reviewing documents for release, a concession which was included in the recent comprehensive draft FOIA legislation, but one which has been opposed by most public interest groups. It would also allow the Defense Department to keep the funds collected for processing technical data requests rather than mandating that the money be sent to the general Treasury fund as is the case with fees collected under the FOIA.

FBI NEITHER CONFIRMS OR DENIES PRESSER'S ROLE AS GOVT INFORMER

The Justice Department has won a victory in its effort to expand the use of the neither confirm or deny response in the area of invasion of privacy under Exemption 6 and Exemption 7(C).

A federal judge in Alexandria has sided with the Department, saying it need not disclose whether or not it has an informant file on Teamster President Jackie Presser. District Court Judge Claude Hitton noted that, absent a notarized release, Presser's "interest in non-disclosure of personal privacy information outweighs the public interest in scrutinizing the integrity of the FBI. An individual's willingness to serve as an informant is based, in large part, on FBI assurances that their relationship will remain confidential." He pointed out that "the public has an interest in such non-disclosure: impairment of ongoing and future law enforcement investigations."

The FOIA suit was brought by Mary Jane Freeman after the FBI told her it could locate no records documenting a connection between the Teamsters union and Lyndon LaRouche or any of his organizations. She specifically asked for Presser's informant's file in so much as it related to contacts with LaRouche.

After telling Freeman that no documents had been found, she produced an internal FBI document which mentioned Presser, LaRouche, and several of his organizations. In light of the memo, the FBI told the court it would conduct a further search, but later reported that it was still unable to find any responsive documents.

Hitton accepted the FBI's explanation that its search did not turn up the internal memo because it did not specifically reference the Teamsters and was thus not included in the file on the Teamsters or in LaRouche's file as a cross-reference to the Teamsters. In ruling on the search, Hitton noted that "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for the documents was adequate."

Although Freeman argued that press accounts had established the fact that Presser was an FBI informant, Hitton ruled that "the FBI has not made an official public disclosure concerning Mr. Presser's alleged relationship with it and media speculation as to the thrust of an investigation does not constitute a disclosure. . .sufficient to justify the release of confidential informant information." (Mary Jane Freeman v. U.S. Department of Justice, Civil Action No. 85-0958-A, U.S. District Court for the Eastern District of Virginia, Mar. 12)

EXEMPTION 5 PROTECTS
NEGOTIATIONS WITH EXPERT WITNESS

A government expert witness has lost his bid to obtain records of Labor Department negotiations with another expert witness who was hired to take his place during a second administrative proceeding concerning a job discrimination suit against Harris Trust.

The Labor Department claimed the General Information Form and two paragraphs of a letter sent by the president of Statistica, Inc. were protected under Exemption 5 (attorney work product). Stephan Michelson, the original expert witness, argued the material contained factual information which could be separated from the opinion portion of the records.

After closely examining the case law in the D.C. Circuit, District Court Judge John Pratt agreed with the government that all the claimed materials had been properly withheld. Noting that "where work product is involved, drawing a line between facts and protected opinion work product" is less than helpful, Pratt found that the affidavit submitted by the Department was "sufficiently detailed and credible to uphold defendant's claim of exemption. . ."

However, Pratt did not agree with the government's argument, based on the Supreme Court's decisions in *FTC v. Grolier* and *Weber Aircraft*, that factual material did not have to be segregated from privileged documents because the records would not be "routinely available" in litigation. Pratt pointed out that a 1978 D.C. Circuit decision noted that "the government cannot exempt pure statements of fact from disclosure by calling them attorney work-product. . ."

He went on to observe that there would be times when an attorney's mental impressions were so inextricably intertwined with the facts that factual material could not be released without divulging protected opinions. He noted that the D.C. Circuit had said those facts "which might disclose an attorney's appraisal of factual evidence" could be protected.

Pratt also found that the letter from Statistica to the Labor Department met the threshold test contained in (b)(5) that the records be "inter-agency or intra-agency" in nature. He pointed out that the phrase had been previously used to include reports prepared by outside experts at the agency's request.

Pratt rejected Michelson's contention that the Labor Department affidavit was inherently unreliable because it had been submitted by the attorney involved in the case and was "self-serving." Quoting from an earlier D.C. Circuit opinion, Pratt pointed out that "in every FOIA case, there exists the possibility that Government affidavits claiming exemptions will be untruthful." But, quoting from an opinion by District Court Judge Gerherd Gesell, Pratt also noted that "if the agency cannot be trusted, the Act will never work. It is a profound mistake to transfer administrative responsibility to judges on the theory that persons employed by the Executive branch are not honest or lack judgment." (Dr. Stephan Michelson v. United States Department of Labor, Civil Action No. 85-2518, U.S. District Court for the District of Columbia, June 30)

News From Canada . . . .

From Canadian Correspondent Tom Riley, an international information consultant who heads his own company, Riley Information Services, P.O. Box 261, Station F., Toronto, Canada M4Y 2L5, Phone: (416) 593-7352.

First Parliamentary Report on Access Act

The first report resulting from the mandatory three-year review of the Access to Information Act by a parliamentary committee has recommended that Parliament revise Section 24 to give the Act precedence over secrecy provisions in other statutes. Statutes with secrecy provisions, which are currently exempt from the Access Act, are listed in Schedule 11 of the Act. Section 24(1), which exempts information laid out in Schedule 11, "unlike other freedom of information statutes which [refer] to the categories of statutes to be covered by such an exemption," is exhaustively defined, says the committee in its report.

When the Act was first passed there were a considerable number of records exempted from disclosure, with 33 other Acts listed in Schedule 11, "embracing some 40 identified sections and subsections in other federal statutes."

This gap created an anomalous situation contrary to the spirit of openness reflected in Section 2 of the Access Act. As it now stands, the report notes, if a head of a department exercises a discretion to withhold information which is deemed secret by another statute, even the Information Commissioner cannot review that decision. This, says the committee, is inconsistent with Section 2 of the Act which gives a statutory right of access to the citizen, with limited exceptions, with the burden of proof on the government to show why the information should not be released.

The report says that "two of the three principles set out in [Section 2] are violated to some degree by the existence of Section 24(1). First, this exception to the rule of open government cannot be termed 'limited and specific.' To the extent that these other statutory provisions contain broad discretion to disclose records, these exceptions to the rule of openness will remain unclear until the discretion is actually exercised in each case."

The report, written by the House of Commons' Standing Committee on Justice and the Solicitor General, which has been reviewing the Act for the last few months, goes on to say that "in the words of a leading American court decision interpreting the analogous provisions in the United States Freedom of Information Act, the thrust of the exemption is to 'assure that the basic policy decisions on government secrecy be made by the legislative branch rather than the executive branch,' a thrust consistent with one of the major objectives of the Act which is to substitute 'legislative judgment for administrative discretion.'"

The committee concluded it was not necessary to include Schedule 11 in the Access Act. "We are of the view that in every instance, the type of information safeguarded in an enumerated provision would be adequately protected by one or more of the exemptions already contained in the Access Act," the report says. "Most of the enumerated provisions in Schedule 11 protect either confidential business information or personal information. The exemptions in Sections 20 and 19 respectively of the Access Act provide ample protection for these interests."

The report points out that in other acts with secrecy provisions the information would be protected because there is a balancing test for certain confidential business information, "meaning in theory that some of the information described in [some of the Acts listed in Schedule 11] could possibly be released should Schedule 11 be eliminated. However, even here the information is protected because of the third-party provisions of the Access Act and the fact that only information given in confidence is protected."

The committee recognizes that "less frequently, information pertaining to national security, law enforcement, federal-provincial relations, or governmental economic interests is protected by certain Schedule 11 provisions. Once again, however, there are ample exemptions in the Access Act to address these important state interests."

Despite these views, the committee stated they "were persuaded that there should be three exceptions to the conclusions" -- the Income Tax Act, the Statistics Act, and the Corporations and Labour Unions Returns Act. "Even though the exemptions in the Access Act afford adequate protection for these kinds of information, the Committee agrees that it is vital for agencies such as Statistics Canada to be able to assure those persons sypplying data that absolute confidentiality will be forthcoming. A similar case has been made for income tax information."

As a result of these findings, the committee made three recommendations for change:

- o that the Access Act be amended to repeal Section 24/Schedule 11 and replace it with new mandatory exemption which are drafted so as to incorporate explicitly the interests reflected in the three provisions found in the three cited statistical and tax return statutes;

- o that the Department of Justice undertake an extensive review of these other statutory restrictions and amend their parent Acts in a manner consistent with the Access to Information Act; and

- o that any legislation seeking to provide a confidentiality clause which is not to be made subject to the Access Act should commence as follows: "Notwithstanding the Access to Information Act. . ."

In this way, concluded the committee, "Parliament will be made explicitly aware of the impact of its actions. As a result, it is hoped that future provisions which are inconsistent with the code of disclosure established in the Access Act will be minimal."

The committee's final report is not expected until later this year. The current report was tabled at the end of June as a review and Report to Parliament of Section 24 of the Act, which was required within three years of the effective date of the Act. The Access to Information Act became operational on July 1, 1983.

* * * * * * *

Short Notes:

Quebec's Commission on Access to Information has presented its annual report to the provincial Minister of Communications, Richard D. French. A summary of the report will appear in the next edition of *Access Reports*.

The annual reports of the Information Commissioner and the Privacy Commissioner were tabled in Parliament at the end of June. They will be the subject of special reports in future editions of *Access Reports*.

In Brief . . .

In an important decision for the Justice Department's efforts to block release of settlement negotiations, Judge Gerhard Gesell has upheld an agency application of Exemption 4 (confidential business information) to documents generated during an unsuccessful attempt to settle a debarment action brought by the Department of Health and Human Services against Paradyne Corporation. Gesell pointed out that the documents in question contained information in which Paradyne had a commercial interest. Continuing, he noted that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required." Although he found the commercial interest of the records was "slight," he said it should be protected under the exemption. He rejected the government's claim that the records were also exempt under (b)(5), noting that that exemption "does not cover papers exchanged between a government agency and an outside adverse party." (M/A-Com Information Systems v. United States Department of Health and Human Services, Civil Action No. 85-3215, U.S. District Court for the District of Columbia, Mar. 4)

By a 7-2 vote, the Supreme Court has decided the public does have a First Amendment right to attend most pretrial hearings in criminal cases. The Court ruled that the public could be barred from such proceedings only if there was a "substantial probability" that the defendant's right to a fair trial would be prejudiced by publicity and if there was no other means to adequately protect his right to a fair trial. The case involved Robert Diaz, a California nurse accused of murdering 12 patients. The California Supreme Court had upheld the lower judge and ruled the hearing had been properly closed. Overturning that ruling, Chief Justice Warren Burger wrote that "[the] risk of prejudice does not automatically justify refusing public access to hearings. . ." (Press-Enterprise Company v. Superior Court of California for the County of Riverside, No. 84-1560, U.S. Supreme Court, June 30)

A panel for the D.C. Circuit, saying it did not have enough information to rule on Exemption 5 (predecisional) claims made by the Justice Department, has remanded an FOIA suit back to the district court for a decision. The suit, filed by free-lance writer Steve Emerson, concerned Justice's refusal to release information on specific persons suspected of violating the reporting requirements of the Foreign Agents Registration Act. The district court initially rejected the Department's claim that the materials were protected by Exemption 7(C) (invasion of privacy concerning law enforcement files), but the government then moved to alter that judgment by submitting a sealed affidavit in which Exemption 5 claims were made. In his affidavit, Joseph Clarkson, Chief of the FARA unit in the Department's Criminal Division, stated the records were deliberative process materials and attorney work product. The district court denied the government's motion, which was then appealed to the circuit court. Noting that "it is

far from evident that all of the documents were prepared in anticipation of litigation, or that deliberative-process materials include no purely factual data," the panel sent the case back to the district court for further proceedings. (Steven A. Emerson v. Department of Justice, No. 84-01304, U.S. Court of Appeals for the District of Columbia, June 30)

The Senate's experiment with live television coverage ended temporarily July 15. The cameras will be turned off for at least three days while members collect their thoughts about the just concluded six-week experimental coverage. The Senate passed by voice vote a resolution to resume coverage on July 21. The full Senate is scheduled to vote July 29 on whether to make coverage permanent.

The Spring issue of FOIA Update, a publication of the Justice Department's Office of Information and Privacy, has shed further light on the failure of the comprehensive draft FOIA legislation. In an article on H.R. 4862, the business procedures bill introduced in the House Subcommittee on Government Information, Justice and Agriculture, OIP notes that the Government Information Subcommittee staff experienced difficulty reaching a concensus with public interest groups, particularly press groups. As the discussions reached an end, the article points out that press groups insisted on interpreting an expedited access provision in such a way as "to apply almost automatically to any journalist working on a deadline -- which would have presented totally unacceptable difficulties to agencies."

In an addendum to its May decision in Church of Scientology v. Internal Revenue Service, the majority and dissent continue to spar over whether the Haskell Amendment to Section 6103 of the Internal Revenue Code allows for release of tax returns where all identifying information has been deleted. Informed by the ACLU after their original decision that the "tax model" referred to during floor debate of the amendment was "an actual return with identifying details eliminated," Circuit Court Judge Antonin Scalia insisted this did not affect the basis of his decision. He preferred to rely on the statutory text rather than what Sen. Haskell and his colleagues may or may not have understood the tax model to be at that time. He pointed out that "the mere term 'Tax Model' assuredly does not suggest a redacted actual return." In dissent, Circuit Court Judge Patricia Wald said "I am amazed that the majority continues to claim that redaction is insufficient under the Haskell Amendment. She noted that the additional information provided by the ACLU "demonstrates that both the interpretations advanced by the government and the majority are wrong, and that all that the framers of the Amendment thought necessary under Section 6103 was effective redaction."

The public interest group People For the American Way has issued an overview report on the Freedom of Information Act on its twentieth anniversary. Reviewing the legislative history of the Act, citing several examples of the importance of information uncovered by the FOIA, and rebutting standard arguments concerning the costs and burdens of the law, the report concludes that the Act is "a symbol of open information in a democratic society" and that its existence has been of "enormous benefit to American society." Copies of the report can be obtained from People For the American Way, 1424 16th St. NW, Washington, DC 20036; phone (202) 462-4777.

The Securities and Exchange Commission has published notice of rulemaking for its EDGAR system of electronic filing. Currently being used under a pilot program which includes filings by voluntary participants, the operational EDGAR system would call for electronic filing of most documents processed by the SEC's Divisions of Corporation Finance and Investment Management. Of the issues on which the SEC requests comment, one deals with correspondence submitted with electronic filings and the question of how such correspondence ought to be processed under the FOIA. For further information, contact Mauri L. Osheroff at (202) 272-2573, or Patricia M. Jayne at (202) 272-7054. (Federal Register, p. 24155, July 2)

The Office of Technology Assessment has begun work on a study of federal information dissemination. The study, slated for completion in November 1987, will focus on present and future public information needs and how technology might help meet those needs. It will include a look at the role of the Government Printing Office, agencies, libraries, and private firms with an eye to possible uses of technological innovations in information dissemination.

Because he was unable to document any urgent need for the records, a district court judge has refused to make the Justice Department process a prisoner's request faster than it would be otherwise under the department's "first in, first out" schedule. Noting that there were 150 requests ahead of his, Judge Charles Richey said "there is no justification for moving plaintiff's request ahead of those of persons who have been patiently waiting." However, Richey instructed the Department to inform the requester within 30 days of the current status of the request and the anticipated date of completion, and added that "the Court is mindful of plaintiff's status as a pro se prisioner, and, therefore, grants this stay subject to review upon plaintiff's showing of urgency in the future." (Harry Aleman v. Gary S. Shapiro, Civil Action No. 85-3313, U.S. District Court for the District of Columbia, June 30)

A prisoner's Privacy Act suit has been dismissed because he failed to identify a physician to receive his medical records as provided for in Justice Department regulations. Dismissing the suit, Judge Norma Holloway Johnson pointed out that subsection (f)(3) of the Privacy Act instructed agencies to promulgate "special procedures" for the release of an individual's medical records. She noted the Justice Department regulations implementing (f)(3) provided the individual identify a doctor who would request the records directly; the regulations also required the doctor to verify his identity in making the request. Johnson observed that the prisoner had "made no effort whatsoever to comply with the requirements for the release of these documents." (George I. Benny v. Federal Bureau of Prisons, Civil Action No. 86-0112, U.S. District Court for the District of Columbia, June 30)

Destruction of a file does not violate the Privacy Act, according to the Tenth Circuit. "The Privacy Act was created to protect individuals against invasions of their privacy flowing from the misuse of existing files, not to mandate. . .that files be created and maintained." The case involved a sexual discrimination complaint filed by Allen Tufts on behalf of his wife Debra. After an investigation was started, the inspector general decided

the investigation was improperly handled and had the file destroyed. The Tufts later requested the file and sued for damages after learning the file no longer existed. Although the court found no Privacy Act violation, it noted in a footnote that the inspector general may have violated Air Force regulations which prohibit destruction of documents on the basis of an individual's opinion that they have no value. (Allen P. Tufts and Debra R. Tufts v. Department of the Air Force, No. 85-1794, U.S. Court of Appeals for the Tenth Circuit, June 11)

Using the Freedom of Information Act, a journalism professor at the State University of New York has uncovered an Energy Department project to send an unmanned space vehicle powered by plutonium up in the space shuttle. According to documents released to Karl Grossman, the project, known as Project Galileo, was slated for launch sometime this year. Because of the fallibility of the shuttle program, Grossman's sources told him such a launch could be catastrophic since, according to one source, one pound of plutonium, "if uniformly distributed, could hypothetically induce lung cancer in every person on earth." Critics contend that if the shuttle had exploded with a plutonium generator on board, the resultant fallout would have caused a substantial rise in eventual deaths due to lung cancer. Writing in the July issue of *Common Cause*, Grossman describes the difficulties he experienced in trying to get the Energy Department to release information on the project. After being denied a fee waiver, and after several appeals, he was informed the records would be released. However, Energy later told him the documents were "predecisional" and would not be released. Finally, Grossman resorted to congressional help, and a press release accusing the government of covering up its shuttle plans. At that point he was told that a "special" Energy Department-NASA team was assembling the information. A month later he received hundreds of pages of documents.

The Washington Post and the New York Daily News have asked a special panel of the D.C. Circuit to allow press access to proceedings involving grand jury records created during a special prosecutor's investigation of former Labor Secretary Raymond Donovan. The panel, which is responsible for appointing special prosecutors under the provisions of the Ethics in Government Act, has recently balked at releasing the records to New York state prosecutors who are preparing to try Donovan and several associates on charges of fraud and grand larceny. Although Bronx District Attorney Mario Merola and his staff have had access to many of the documents, the panel has so far declined to authenticate the records so that they can be introduced as evidence in Donovan's trial. In their briefs to the court, the two papers noted that "the Ethics in Government Act was enacted, and this court created, to restore the public's confidence that evidence of wrongdoing by high government officials will be fully and fairly pursued. The public's trust in the integrity of the government's handling of such evidence is seriously undermined if a proceeding such as this, which would normally be open to the public, is shrouded in secrecy."

The New York State Commissioner of Education has decided that an index of administrative "fair hearings" for the Office of Vocational Rehabilitation are available under the state's open records law. After initially being told the index was not disclosable under a provision in the law similar to Exemption 3 (other statutes) of the FOIA, New York attorney

David Jacoby appealed to the Commissioner who noted in his ruling that "I find that [Education Law Section 1007 and the relevant regulations of the State Education Department] do not prohibit the disclosure of the requested index as long as details identifying the persons involved are deleted."

The media has scored victories in two recent records access cases in Florida. According to the *Florida Freedom of Information Clearing House Newsletter*, a publication of the journalism school at the University of Florida, a Dade County circuit court judge ordered the Miami police department to release copies of subpeonas and other documents involving a federal investigation of police corruption to *The Miami Herald*. The department had withheld the records because they involved an active investigation, but *The Herald*'s attorney argued the department could not withhold the documents since it was the target of the investigation, not the investigating agency.

* * * * * * *

In a second Florida case, a judge in West Palm Beach has ordered the state attorney to pay nearly $29,000 in legal fees incurred by four media organizations in their fight to get records relating to the 1984 drug-overdose death of David Kennedy. Ruling in the case, the judge said the state attorney had "unlawfully and unreasonably" withheld the records.

The New York State Senate has rejected a proposal which would have allowed for a 30-month experiment in providing television, radio, and photographic coverage of state trial courts. The bill would have barred coverage of jurors, victims in sexual offense trials, and undercover policemen testifying at a trial. It would also have prohibited coverage of pretrial hearings, conferences between attorneys and judges, and jury selection. In all other courtroom situations, the coverage would have been permitted at the judge's discretion.

A bill introduced in the California State Senate would require the state's Department of Food and Agriculture to make public information about produce contaminated with illegal pesticides and where the produce was grown, according to *News Media Update*, a weekly joint publication of the National Newspaper Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists. The bill, which passed the Senate in mid-April, requires the head of the Food and Agriculture Department to monitor and release quarterly reports. It also requires publication of the names of individuals convicted of violating state pesticide regulations. State Sen. Gary K. Hart of Santa Barbara said he introduced the bill because "I believe that the public has a right to know just what kind of chemicals are on the food sold in California."

Coca-Cola has refused to obey a court order directing it to reveal the formulae for several of its soft drinks, information Coca-Cola has always kept as a closely-guarded secret. A federal court judge, declining to enter a default judgment against Coke, has barred the company from introducing certain evidence at trial, and establishing certain facts which the company cannot rebut. The trial involves a trademark infringement and breach of

contract suit brought against Coke by several of its bottlers who allege that Coca-Cola and Diet Coke are merely different versions of the same product. (Coca-Cola Bottling Co. of Shrevesport v. Coca-Cola, 32 Patent, Trademark & Copyright Journal 123, U.S. District Court for the District of Delaware, May 23)

A confidential report on an alleged mock-Ku Klux Klan meeting at CIA headquarters, which one official referred to as "a tasteless joke," has been submitted to the Senate Select Committee on Intelligence in response to inquiries made by the committee. When asked about the report, vice-chairman Patrick Leahy (D-Vt) replied: "I can't talk about it. It's classified." Under the 1982 executive order on classification issued by President Reagan, only information whose "disclosure reasonably could be expected to cause damage to the national security" may be classified. The confidential stamp applies only to information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security."

Central Intelligence Agency

Washington, D.C. 20505

OCA FILE SSC 1

RECPT #

22 May 1986
OCA 86-1725

The Honorable Dave Durenberger, Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Director has asked me to respond to your letter received May 14, 1986 regarding allegations of a Ku Klux Klan group in the Computer Services Division of CIA. At the outset, let me assure you that after a thorough review we can find no indication that there has been any such group, or any such activity in CIA. It appears that the allegations you have received stem from a tasteless prank that occurred in late 1981 and was investigated at the time. The facts are as follows.

The incident was prompted when several employees in the Ruffing Computer Center happened to be listening to a local radio station that announced an upcoming meeting of the Ku Klux Klan. Upon hearing the announcement, a black employee joked to his white colleagues that they should attend the meeting. Shortly thereafter, upon returning to the office from an outside errand, the black employee found white paper hats made from computer paper and was told a KKK meeting had taken place. This was a tasteless attempt at a joke and was interpreted as such by the black employee. The following morning, in yet another misguided attempt at humor, Ku Klux Klan literature was found on the Ruffing Center bulletin board. After an investigation conducted by senior supervisory personnel all of the employees involved in these pranks received stern oral reprimands.

The other two racial incidents on record in recent years involve separate, informal one-on-one discussions that took place between a white and a black employee regarding the Ku Klux Klan. In one case, an oral reprimand was given, and in the other, the two employees were reprimanded and sent to a special seminar.

ALL PORTIONS CLASSIFIED
CONFIDENTIAL

None of the incidents outlined above involved employees found to be KKK members, and none consisted of anything more than off-the-cuff remarks and/or dubious efforts at humor. I should emphasize, however, that each was taken seriously and investigated thoroughly. We take seriously any indications of KKK involvement on the part of Agency personnel. In our view, any such involvement bears directly on the issue of employee suitability.

I trust this letter addresses the matters you have raised. A separate copy is being provided to Vice Chairman Leahy.

Sincerely,

STAT

David D. Gries
Director of Congressional Affairs

Distribution:
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1 - DD/Legislation
D/OCA:DDG:mdo (22 May 1986)

13 June 1986

FULL TEXT OF CIA RESPONSE TO MEDIA ALLEGATIONS OF KKK ACTIVITY

Allegations of Ku Klux Klan activities at CIA are absolutely false. The charges were investigated by the Agency's Inspector General and shown to be without foundation. The IG findings were reported to the oversight committees. Racial attitudes of such groups are incompatible with CIA and U.S. Government regulations.

A confidential report on an alleged mock-Ku Klux Klan meeting at CIA headquarters, which one official referred to as "a tasteless joke," has been submitted to the Senate Select Committee on Intelligence in response to inquiries made by the committee. When asked about the report, vice-chairman Patrick Leahy (D-Vt) replied: "I can't talk about it. It's classified." Under the 1982 executive order on classification issued by President Reagan, only information whose "disclosure reasonably could be expected to cause damage to the national security" may be classified. The confidential stamp applies only to information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security."

Bob

Henry,

Let's discuss

AG

& July Rotunda.