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unanimous consent at this time on this side.

Mr. BYRD. Mr. President, those items are cleared on this side.

Mr. BAKER. Mr. President, I ask unanimous consent that Senate Resolution 352 and Senate Concurrent Resolution 93 be considered en bloc.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

GRATUITY TO JOYCE L. THISS

The resolution (S. Res. 352) to pay a gratuity to Joyce L. Thiss, was considered, and agreed to as follows:

S. Res. 352

Resolved, That the Secretary of the Senate hereby is authorized and directed to pay, from the contingent fund of the Senate, to Joyce L. Thiss, widow of George R. Thiss III, an employee of the Senate at the time of his death, a sum equal to five months' compensation at the rate he was receiving by law at the time of his death, said sum to be considered inclusive of funeral expenses and all other allowances.

AUTHORIZING CEREMONY IN THE ROTUNDA

The Senate proceeded to consider the concurrent resolution (S. Con. Res. 93) authorizing the rotunda of the U.S. Capitol to be used on April 30, 1984, for a ceremony commemorating the Days of Remembrance of Victims of the Holocaust.

Mr. LAUTENBERG. Mr. President, I know that the U.S. Holocaust Memorial Council is pleased that the Senate today will consider Senate Concurrent Resolution 93, a resolution to authorize the use of the Capitol rotunda for a ceremony on April 30, 1984. The Council has designated April 29–May 6, 1984, as "Days of Remembrance of Victims of the Holocaust." The ceremony in our Capitol rotunda will give these days a truly national focus.

I was honored to have the opportunity to introduce Senate Concurrent Resolution 93 earlier this month as a member of the U.S. Holocaust Memorial Council. I must express the deepest gratitude on behalf of myself and other cosponsors for the timely consideration of this resolution by the Committee on Rules and Administration and by the full Senate. That gratitude goes to the committee chairman, Mr. MATHIAS, and the committee's ranking minority member, Mr. FORD, and to the majority and minority leaders.

The Holocaust Memorial Council can now proceed in finalizing its plans for speeches, readings, and the music that will be a part of the April 30 program. Other observances across America will bring to millions of our people a renewed understanding of the events surrounding the Holocaust 40 years ago and the chance to commit themselves anew to insuring such gross inhumanity never happens again.

The concurrent resolution (S. Con. Res. 93) was considered and agreed to.

The preamble was agreed to.

The concurrent resolution, and the preamble, are as follows:

S. Con. Res. 93

Whereas pursuant to the Act entitled "An Act to establish the United States Holocaust Memorial Council", approved October 7, 1980 (94 Stat. 1547), the United States Holocaust Memorial Council is directed to provide for appropriate ways for the Nation to commemorate the Days of Remembrance of Victims of the Holocaust, as an annual, national, civic commemoration of the Holocaust, and to encourage and sponsor appropriate observances of such Days of Remembrance throughout the United States;

Whereas pursuant to such Act, the United States Holocaust Memorial Council has designated April 29, 1984, through May 6, 1984, as "Days of Remembrance of Victims of the Holocaust"; and

Whereas the United States Holocaust Memorial Council has recommended that a one-hour ceremony be held at noon on April 30, 1984, consisting of speeches, readings, and musical presentations as part of the Days of Remembrance activities: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That the rotunda of the United States Capitol is hereby authorized to be used on April 30, 1984, from 10 o'clock ante meridiem until 3 o'clock post meridiem for a ceremony as part of the commemoration of the Days of Remembrance of Victims of the Holocaust. Physical preparations for the conduct of the ceremony shall be carried out in accordance with such conditions as may be prescribed by the Architect of the Capitol.

Mr. BAKER. Mr. President, I move to reconsider the vote by which the measures were agreed to.

Mr. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

FREEDOM OF INFORMATION REFORM ACT

Mr. BAKER. Mr. President, next I am prepared to take up S. 774, which is Calendar Order No. 367.

Mr. BYRD. Mr. President, the minority leader is prepared to proceed.

Mr. BAKER. Mr. President, I ask the Chair to lay before the Senate Calendar Order No. 367, S. 774.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 774) entitled "The Freedom of Information Reform Act."

The PRESIDING OFFICER. Without objection, the Senate will proceed to its immediate consideration.

The Senate proceeded to consider the bill which had been reported from the Committee on the Judiciary with amendments as follows:

On page 15, line 10, strike "would" and insert "could reasonably be expected to".

On page 23, after line 10, insert:

PUBLICATION OF EXEMPTION 3 STATUTES

SEC. 18. Section 552 of title 5, United States Code, is amended by adding a new subsection (g) as follows:

"(g) Within two hundred and seventy days of the date of the enactment of this subsection, any agency which relies or intends to rely on any statute which was enacted prior to the date of enactment of this subsection, or during the thirty-day period after such date to withhold information under subsection (b)(3) of this section, shall cause to be published in the Federal Register a list of all such statutes and a description of the scope of the information covered. The Justice Department shall also publish a final compilation of all such listings in the Federal Register upon the completion of the two-hundred-and-seventy-day period described in the preceding sentence. No agency may rely, after two hundred and seventy days after the date of enactment of this subsection, on any such statute not listed in denying a request. Nothing in this subsection shall affect existing rights of any party other than an agency.".

So as to make the bill read:

S. 774

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FEES AND WAIVERS

SEC. 2. Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended to read as follows:

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedules shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. Such regulations—

"(a) shall provide for the payment of all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request. The term 'processing' does not include services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request, but does include services involved in examining records for possible withholding or deletions to carry out determinations of law or policy. Such regulations may also provide for standardized charges for categories of requests having similar processing costs,

"(b) shall provide that no fee is to be charged by any agency with respect to any request or series of related requests whenever the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee, and

"(c) in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or procured by the Government at substantial cost to the public, is likely to be used for a commerical purpose, and will deprive the Government of its commercial value, may provide for the charging of a fair value fee or, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the technological information, its costs to the Government, and any public interest in encouraging its utilization.

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

"(ii) With respect to search and duplication charges, documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public and not the commercial or other private interests of the requester. With respect to all other charges, documents shall be furnished without such charges where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational, or noncommercial scientific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media; or (c) a nonprofit group that intends to make the information available to the general public.

"(iii) One-half of the fees collected under this section shall be retained by the collecting agency to offset the costs of complying with this section. The remaining fees collected under this section shall be remitted to the Treasury's general fund as miscellaneous receipts, except that any agency determined upon an investigation and report by the General Accounting Office or the Office of Management and Budget not to have been in substantial compliance with the applicable time limits of paragraph (6) of this subsection shall not thereafter retain any such fees until determined by the agency making such finding to be in substantial compliance.".

TIME LIMITS

SEC. 3. Paragraph (6) of section 552(a) of title 5, United States Code, is amended to read as follows:

"(6)(A) Except as otherwise provided in this paragraph, each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten working days after the receipt of any such request whether to comply with such request and shall immediately notify the requester of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty working days after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as defined in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in extensions of more than an aggregate of thirty working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein;

"(iv) a request which the head of the agency has specifically stated in writing cannot be processed within the time limits stated in paragraph (6)(A) without significantly obstructing or impairing the timely performance of a statutory agency function;

"(v) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters; or

"(vi) an unusually large volume of requests or appeals at an agency, creating a substantial backlog.

"(C) Any requester shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. An agency shall not be considered to have violated the otherwise applicable time limits until a court rules on the issue.

"(D) Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the requester, subject to the provisions of paragraph (7). Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

"(E) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records shall be given expedited access.".

BUSINESS CONFIDENTIALITY PROCEDURES

SEC. 4. Section 552(a) of title 5, United States Code, is amended by adding after paragraph (6) the following new paragraph:

"(7)(A) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

"(i) a submitter may be required to designate, at the time it submits or provides to the agency or thereafter, any information consisting of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4);

"(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter, within ten working days after receipt of such request, and shall describe the nature and scope of the request and advise the submitter of his right to submit written objections in response to the request;

"(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure, specifying all grounds upon which it is contended that the information should not be disclosed; and

"(iv) the agency shall notify the submitter of any final decision regarding the release of such information.

"(B) An agency is not required to notify a submitter pursuant to subparagraph (A) if—

"(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to subparagraph (A)(i), if such designation is required by the agency;

"(ii) the agency determines, prior to giving such notice, that the request should be denied;

"(iii) the disclosure is required by law (other than this section) and the agency notified the submitter of the disclosure requirement prior to the submission of the information;

"(iv) the information lawfully has been published or otherwise made available to the public; or

"(v) the agency is a criminal law enforcement agency that acquired the information in the course of a lawful investigation of possible violations of criminal law.

"(C) Whenever an agency notifies a submitter of the receipt of a request pursuant to subparagraph (A), the agency shall notify the requester that the request is subject to the provisions of this paragraph and that notice of the request is being given to a submitter. Whenever an agency notifies a submitter of final decision pursuant to subparagraph (A), the agency shall at the same time notify the requester of such final decision.

"(D) Whenever a submitter has filed objections to disclosure of information pursuant to subparagraph (A)(iii), the agency shall not disclose any such information for ten working days after notice of the final decision to release the requested information has been forwarded to the submitter.

"(E) The agency's disposition of the request and the submitter's objections shall be subject to judicial review pursuant to paragraph (4) of this subsection. If a requester files a complaint under this section, the administrative remedies of a submitter of information contained in the requested records shall be deemed to have been exhausted.

"(F) Nothing in this paragraph shall be construed to be in derogation of any other rights established by law protecting the confidentiality of private information.".

JUDICIAL REVIEW

SEC. 5. Section 552(a)(4) of title 5, United States Code, is amended—

(1) by amending subparagraph (B) to read as follows:

"(B) On complaint filed by a requester within one hundred and eighty days from the date of final agency action or by a submitter after a final decision to disclose submitted information but prior to its release, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction—

"(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the requester;

"(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under paragraph (7)(A)(iii) or which would have been objected to had notice been given as required by paragraph (7)(A)(i); or

"(iii) to enjoin the agency from failing to perform its duties under sections (a)(1) and (2).".

"(2) by redesignating subparagraphs (C), (D), (E), (F), and (G) as subparagraphs (F), (G), (H), (I), and (J), respectively, and by adding after subparagraph (B) the following new subparagraphs:

"(C) In an action based on a complaint—

"(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

"(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such re-

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quester may intervene as of right in the action.

"(D) The agency that is the subject of the complaint shall promptly, upon service of a complaint—

"(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

"(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

"(E) In any case to enjoin the withholding or the disclosure of records, or the failure to comply with subsection (a) (1) or (2), the court shall determine the matter de novo. The court may examine the contents of requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action to withhold information and the burden is on any submitter seeking the withholding of information."; and

"(3) in redesignated subparagraph (H).

(A) by adding "or any submitter who is a party to the litigation" after "United States"; and

(B) by striking out "complainant" and inserting in lieu thereof "requester".

PUBLIC RECORD REQUESTS

SEC. 6. Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(8) In any instance in which a portion of the records requested under this subsection consists of newspaper clippings, magazine articles, or any other item which is a public record or otherwise available in public records, the agency may offer the requester a choice of (A) furnishing the requester with an index identifying such clippings, articles, or other items by date and source, provided that such index is already in existence, or (B) notwithstanding the waiver requirements contained in this section, furnishing the requester with copies of such clippings, articles, or other items at the reasonable standard charge for duplication established in the agency's fee schedule.".

CLARIFY EXEMPTIONS

SEC. 7. So much of section 552(b) of title 5, United States Code, as precedes paragraph (1) thereof is amended to read as follows:

"(b) The compulsory disclosure requirements of this section do not apply to matters that are—".

MANUALS AND EXAMINATION MATERIALS

SEC. 8. Section 552(b)(2) of title 5, United States Code, is amended by inserting a comma in lieu of the semicolon at the end thereof and adding the following: "including such materials as (A) manuals and instructions to investigators, inspectors, auditors, or negotiators, to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations, and (B) examination material used solely to determine individual qualifictions for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process;".

PERSONAL PRIVACY

SEC. 9. Section 552(b)(6) of title 5, United States Code, is amended to read as follows:

"(6) records or information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy;".

LAW ENFORCEMENT

SEC. 10. (a) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any natural person;".

(b) Section 552(a) of title 5, United States Code, is amended by adding after paragraph (8) thereof the following new paragraph:

"(9) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.".

ADDITIONAL EXEMPTIONS

SEC. 11. Section 552(b) of title 5, United States Code, is amended by striking out "or" at the end of paragraph (8), by striking out the period at the end of paragraph (9) and inserting in lieu thereof a "; or", and by adding the following new paragraph after paragraph (9):

"(10) records or information maintained or originated by the Secret Service in connection with its protective functions to the extent that the production of such records or information could reasonably be expected to adversely affect the Service's ability to perform its protective functions.".

REASONABLY SEGREGABLE

SEC. 12. Section 552(b) of title 5, United States Code, is amended by adding after the last sentence thereof the following: "In determining which portions are resonably segregable in the case of records containing material covered by paragraph (1) or (7) of this subsection, the agency may consider whether the disclosure of particular information would, in the context of other information available to the requester, cause the harm specified in such paragraph.".

PROPER REQUESTS

SEC. 13. Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by a requester who is a United States person for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to the requester.

"(B) The time limits prescribed in subparagraph (A) of paragraph 6 shall be tolled whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought. Nothing in this subparagraph shall be construed to bar (i) a request for any records which are not related to the subject matter of such pending proceeding, or (ii) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.

"(C) The Attorney General, in accordance with public rulemaking procedures set forth in section 553 of this title; may by regulation prescribe such limitations or conditions on the extent to which and on the circumstances or manner in which records requested under this paragraph or under section 552a of this title shall be made available to requesters who are persons imprisoned under sentence for a felony under Federal or State law or who are reasonably believed to be requesting records on behalf of such persons, as he finds to be (i) appropriate in the interests of law enforcement, or foreign relations or national defense, or of the efficient administration of this section, and (ii) not in derogation of the public information purposes of this section.".

ORGANIZED CRIME

SEC. 14. Section 552 of title 5, United States Code, is amended by adding a new subsection (c) as follows and redesignating the current subsections (c), (d), and (e) as (d), (e), and (f) respectively.

"(c) Nothing in this section shall be deemed applicable to documents compiled in any lawful investigation of organized crime, designated by the Attorney General for the purposes of this subsection and conducted by a criminal law enforcement authority for law enforcement purposes, if the requested document was first generated or acquired by such law enforcement authority within five years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years. Notwithstanding any other provision of law, no document described in the preceding sentence may be destroyed or otherwise disposed of until the document is available for disclosure in accordance with subsections (a) and (b) of this section for a period of not less than ten years.".

REPORTING UNIFORMITY

SEC. 15. Section 552(e) of title 5, United States Code (as redesignated), is amended—

(1) by striking out "calendar" the second and fourth places it appears and inserting in lieu thereof "fiscal";

(2) by striking out "March" each place it appears and inserting in lieu thereof "December";

(3) in paragraph (4), by striking out "subsection (a)(4)(F)" and inserting in lieu thereof "subsection (a)(4)(I)"; and

(4) in the next to last sentence, by striking out "subsections (a)(4) (E), (F), and (G)" and inserting in lieu thereof "subsections (a)(4) (H), (I), and (J)".

DEFINITIONS

SEC. 16. Section 552(f) of title 5, United States Code (as redesignated), is amended to read as follows:

"(f) For purposes of this section—

"(1) 'agency' means any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the execu-

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

tive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) 'submitter' means any person who has submitted to an agency (other than an intelligence agency), or provided an agency access to, trade secrets, or commercial, research, or financial information (other than personal financial information) in which the person has a commercial or proprietary interest;

"(3) 'requester' means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);

"(4) 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

"(5) 'working days' means every day excluding Saturdays, Sundays, and Federal legal holidays; and

"(6) 'organized crime' means those structured and disciplined associations of individuals or of groups of individuals who are associated for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while generally seeking to protect and promote their activities through a pattern of graft or corruption, and whose associations generally exhibits the following characteristics:

"(A) their illegal activities are conspiratorial,

"(B) in at least part of their activities, they commit acts of violence or other acts which are likely to intimidate,

"(C) they conduct their activities in a methodical or systematic and in a secret fashion,

"(D) they insulate their leadership from direct involvement in illegal activities by their organizational structure,

"(E) they attempt to gain influence in government, politics, and commerce through corruption, graft, and illegitimate means, and

"(F) they engage in patently illegal enterprises such as dealing in drugs, gambling, loan-sharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.".

PUBLICATION OF EXEMPTION 3 STATUTES

SEC. 17. Section 552 of title 5, United States Code, is amended by adding a new subsection (g) as follows:

"(g) Within two hundred and seventy days of the date of the enactment of this subsection, any agency which relies or intends to rely on any statute which was enacted prior to the date of enactment of this subsection, or during the thirty-day period after such date to withhold information under subsection (b)(3) of this section, shall cause to be published in the Federal Register a list of all such statutes and a description of the scope of the information covered. The Justice Department shall also publish a final compilation of all such listings in the Federal Register upon the completion of the two-hundred-and-seventy-day period described in the preceding sentence. No agency may rely, after two hundred and seventy days after the date of enactment of this subsection, on any such statute not listed in denying a request. Nothing in this subsection shall affect existing rights of any party other than an agency.".

Mr. BAKER. Mr. President, I ask unanimous consent that the amendments be considered and agreed to en bloc.

The PRESIDING OFFICER. Without objection, the amendments are considered and agreed to en bloc.

AMENDMENT NO. 2746

(Purpose: To modify the provisions regarding fees and additional exemptions under the Freedom of Information Act)

Mr. BAKER. Mr. President, I send to the desk an amendment on behalf of the Senator from Utah (Mr. HATCH) and the Senator from Vermont (Mr. LEAHY) and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Tennessee (Mr. BAKER), on behalf of the Senator from Utah (Mr. HATCH) and the Senator from Vermont (Mr. LEAHY), proposes an amendment numbered 2746.

Mr. BAKER. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 3, line 10, strike out "or royalties, or both".

On page 16, line 16, strike out "semicolon" and insert in lieu thereof "; or'".

On page 16, line 17, strike out "paragraphs" and insert in lieu thereof "paragraph".

On page 16, strike out lines 18 through 24.

On page 17, line 1, strike out "(11)" and insert in lieu thereof "(10)".

Beginning on page 20, line 15, strike out all through page 21, line 2.

On page 21, line 4, strike out "17" and insert in lieu thereof "16".

On page 23, line 12, strike out "18" and insert in lieu thereof "17".

Mr. HATCH. Mr. President, the amendment which I am offering today accomplishes two things: it deletes the proposed 10th exemption from the bill and it clarifies that any fair value fees for commercially valuable technoligical information generated by the Government are not to be assessed as royality fees.

S. 774 contained a new exemption, (b)(10), which permitted Federal agencies to withhold release of certain technical data subject to export controls. Our committee heard testimony from the administration regarding the need for this exemption. Foreign governments and foreign competitors of U.S. companies are able to obtain very valuable unclassified technical information simply by submitting an FOIA request to the Federal agencies that have paid to have the data developed. In fact, cottage industries have sprung up to systematically obtain and catalog such technical data, which they then market throughout the world. It is my understanding that one of these data brokers is suing the Department of Defense right now under the FOIA to obtain technical data relating to virtually all of DOD's procurement activities.

Fortunately, since the committee reported S. 774, legislation has been enacted which covers just such situations at DOD. This legislation permits the Secretary of Defense to withhold export—controlled technical data with military or space application that is in the possession or control of the Secretary of Defense. Enactment of this provision, as part of the DOD authorization bill, addresses a major problem area at which the (b)(10) exemption was directed.

There remain other areas with the potential of creating a problem, for instance, technical data with military or space application in the possession of NASA. In light of time constraints on this bill, it would be wisest to pursue other potential problem areas at another time. Accordingly, with a major part of the problem addressed by the proposed 10th exemption already enacted, it is the intent of this amendment to defer other concerns in this technical data area until another time.

The other aspect of this amendment deals with the provision authorizing the assessment of fair value fees in the case of any request for commercially valuable technological information which was generated or procured by the Government at substantial cost to the public. This provision is intended to carry out the policy set forth in user fees statutes (see, e.g., 31 U.S.C. 9701) and is not intended to allow the Government to claim copyright rights in this information. By striking the word "royalty" in this provision, fees will be assessed on the basis of the cost to the taxpayer to generate or procure the information, rather than on the basis of any potential value the information may hold in the marketplace. The former kind of assessment is a user fee, which recovers the taxpayer's cost, the later is a derivative of copyright law. This amendment will clarify that this provision is not designed to create a Government copyright, but a form of cost recovery.

With these amendments in place, I am enthusiastic to encourage the early passage of this bill.

Mr. President, at the outset of Senate consideration of S. 774, the Freedom of Information Reform Act, I would like to commend those members of the Judiciary Committee who have played a key role in the passage of this legislation. This allows me once again to praise the chairman of the Judiciary Committee and commend his dedication to improving the tools of our law enforcement community. In particular, however, I wish to express my deep appreciation to Senator PAT LEAHY. Without his tireless and indefatiguable efforts, this bill could not be passing the Senate today. This bill garnered the unanimous vote of the Judiciary Committee because Senator LEAHY was dedicated to remedying the

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evident problems FOIA has created in the areas addressed by this bill. At the same time, he diligently insured that the basic strengths of the Freedom of Information Act were not compromised by these amendments. He deserves great credit for the succesful balance struck by this bill.

Other Senators were also instrumental in the progress of this bill. Senator GRASSLEY, who also sits on the Constitution Subcommittee, was an important participant in the negotiations on this legislation, as was Senator DECONCINI, the ranking member of the subcommittee. Without their timely participation, I doubt we could be on the floor today. Other Senators were also significant in this process and I thank them all.

With that introduction of appreciation, I would now like to address the process and provisions of S. 774.

Two years ago the Senate Constitution Subcommittee undertook the most exhaustive examination of the Freedom of Information Act (FOIA) in the act's 17-year history. In the intervening period, now spanning two Congresses, the committee has held 9 hearings and entertained over 60 expert witnesses with the goal of drafting a bill that will improve the act without compromising its mission of providing our citizenry with a tool to learn about Federal Government activities. S. 774, the successor to S. 1730 in the 97th Congress, has now received the unanimous approval of the committee in two Congresses as an indication of the success of the bill in amending FOIA's most glaring weaknesses without compromising its vital strengths. In short, this bill will serve to correct flaws in the most important component of our Nation's information policy, a policy without peers among other nations of the world.

My presentation will briefly discuss the serious considerations that guided the Senate Judiciary Committee's unanimous adoption of the Freedom of Information Reform Act, S. 774.

During the committee's comprehensive oversight of FOIA, the witnesses expressed a warm appreciation for the policy of openness conveyed by FOIA. The witnesses also produced ample evidence, however, that FOIA has not always operated to produce a more efficient and more responsive Government. In those problem areas, the committee has attempted to correct the weakness while maintaining the beneficial policy.

LAW ENFORCEMENT

For example, FOIA has at times operated to jeopardize the confidentiality of law enforcement informants and investigations. This verifies the findings of the Senate Judiciary Subcommittee on criminal law in 1978:

> It can safely be said that none [of the sponsors of FOIA] foresaw the host of difficulties the legislation would create for the law enforcement community, nor did they foresee the utilization that would be made of the act by organized crime and other criminal elements or the damage it would do to the personal security of individual citizens * * * Informants are rapidly becoming an extinct species because of fear that their identities will be revealed in response to a FOIA request.

In that same year the General Accounting Office released a study citing 49 instances of potential informants refusing to cooperate with law enforcement authorities due to fear that FOIA could lead to disclosure of their identities. In 1979, FBI Director Webster supplied documentation of over 100 instances of FOIA interference with law enforcement investigations or informants. In 1981 his list was expanded to 204 examples. In fact, five different reports studying the impact of FOIA have concluded that the act has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations. Among these, the Attorney General's 1981 Task Force on Violent Crime found that FOIA should be amended because it is used by lawbreakers to evade criminal investigation or to retaliate against informants. A 1982 Drug Enforcement Administration study documented that 14 percent of DEA's investigations were aborted or significantly compromised by FOIA-related problems. Based on evidence of this charter, the committee undertook numerous changes in the seventh exemption to enhance those specific protections as well as the addition of new provisions to FOIA designed to protect law enforcement informants and investigations. For example, in the particularly sensitive area of organized crime investigations, the committee bill allows for an exclusion from the provisions of FOIA any record generated within 5 years of a FOIA request.

LEGISLATIVE BACKGROUND

The final version of exemption 7 of the Freedom of Information Act of 1967, which exempted "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency" (Public Law 90-23 (1967)), represented a compromise between a number of opposing viewpoints. The original Senate proposal read "investigatory files compiled for law enforcement purposes except to the extent they are by law available to a private party," 112 CONGRESSIONAL RECORD 11768 (July 31, 1964), and in the commentary to the authoritative 1965 Senate report, exempt files are described as "files prepared by government agencies to prosecute law violators" the disclosure of which could harm the position of the government in court. (S. Rep. 813, 89th Congress, 1st sess. 9 (1965).) The House generally took a broader view of the exemption. Under the House report, (b)(7) would have covered "all kinds of laws, labor and security laws as well as criminal laws" (H. Rep. 1497, 89th Congress 2d sess. 11 (1966)), and also include files prepared in connection with related government litigation and adjudicative proceedings.

While the final version of the 1966 exemption was the product of a compromise between conflicting viewpoints, it lasted from 1966 through 1974. Nonetheless, critics of the then existing exemption 7, led by Senator Phillip Hart were able to mount a successful drive on the floor of the Senate to amend the exemption. Their efforts limited coverage of (b)(7) to "investigatory records compiled for law enforcement purposes" only if the production of these records would result in one of the enumerated dangers provided by the amendment.[14]

During the course of the Senate's consideration of the amendment of (b)(7), Senators Hart and KENNEDY spoke of the amendment as but a minor revision, but others such as Senator Hruska voiced concern that the broad disclosure of law enforcement files would cause FBI sources to "dry up and become fewer and fewer as time goes on" 120 CONGRESSIONAL RECORD S. 9333—a prophecy fulfilled according to testimony in this committee's 1981 hearings.

The Senate passed the Hart amendment, Senator Hruska's objections notwithstanding, by a margin of 51-33. The conference committee adopted the amendment but added a clause protecting "confidential information furnished only by the confidential source" * * *[15] and also lowered the agency's burden of proof on privacy invasions from a showing that the privacy invasion was "clearly unwarranted" to a facially more lenient "unwarranted" standard.[16]

President Ford vetoed the FOIA amendments arguing that they would cause dilution of law enforcement activities but his veto was overridden in both Houses of Congress. Interestingly, an expert in the field of Federal information disclosure has noted, "The veto message was correct, in retrospect, and the burden on law enforcement agencies was a severe one; but the societal and political judgment in favor of openness overcame the practical problems of the (b)(7) amendment."[17]

[14] 5 U.S.C. § 552(b)(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

[15] C.F. 5 U.S.C. § 552(b)(7)(D).

[16] See 5 U.S.C. § 552(b)(7)(C).

[17] James T. O'Reilly, "Federal Information Disclosure: Procedures, Forms, and the Law," 17-17 (1977).

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Exemption 7, as revised by the 1974 amendments, has also become the subject of increasing bi-partisan criticism and dissatisfaction. For example the "Report of the Subcommittee on Criminal Laws and Procedures on the Erosion of Law Enforcement Intelligence and its Impact on the Public Security" stated that:

> The sponsors of the FOIA wanted to reinforce the citizen's right to know; * * * they wanted to put an end to the abuses perpetrated in the name of government secrecy and executive privilege. It can safely be said that none of them foresaw the host of difficulties the legislation would create for the law enforcement community, nor did they foresee the utilization of the Act that would be made by organized crime and other criminal elements or the damage it would do to the personal security of the individual citizen. (S. Rep. 51, 95h Cong. 2nd Sess.).

Though Congress overrode President Ford's veto, time has proven the legitimacy of the President's concerns about the 1974 FOIA amendments.

These comments are indicative of the concerns that have prompted the reform of the FOIA and reflective of the broad based support particularly for reform of (b)(7). Much of the testimony before the Constitution Subcommittee on the FOIA Reform Act can be characterized by a central and unifying theme; namely, that the reforms of 1974, while in many respects beneficial and consistent with the spirit of disclosure that has characterized the FOIA, have also resulted in unforeseen and untoward consequences which threaten society's interest in effective law enforcement and other governmental functions. The end product of these problems is unfortunately often an overemphasis upon disclosure at the expense of the confidentiality necessary to the efficient operation of some aspects of government. Exemption 7, which deals with law enforcement, it representative of these problems. In fact, (b)(7) provides an especially poignant reminder of the dangers that may accompany a blind emphasis on disclosure because it entails the stark reality of danger to the life of an informant or a suspected informant whose identity may be revealed by piecing together released FBI files.[18]

One commentator presciently envisaged that the 1974 amendment could result in difficulties if the courts interpreted the changes in (b)(7) as mechanically as they have applied the 1966 language.[19] Indeed, this has often been the result and the intent of the framers to maintain effective law enforcement has been ignored by some courts in the exaltation of form over substance.

Section 11(a) of this bill would make a series of amendments to Exemption 7 of the FOIA in an effort to remedy the shortcomings which have become manifest. The proposed amendments are designed to address three major concerns that have arisen from the present language of this exemption: (1) the fear among confidential sources that their identities will be revealed through Freedom of Information Act disclosures, and the resulting difficulties that law enforcement authorities have encountered in enlisting and using confidential sources; (2) the concern that sensitive law enforcement information will be disclosed to law enforcement suspects by Freedom of Information Act disclosures, thereby allowing criminals to avoid detection or prosecution; and (3) the concern that Freedom of Information Act disclosure will reveal law enforcement guidelines to suspects. These concerns were highlighted by the testimony of FBI Director Webster before the subcommittee:

> The violence and risk of reprisal in these areas are sufficiently great to increase the impact on informants whose perception is that we may not be able to protect the identity. * * * the FOIA permits the FBI and other law enforcement agencies to withhold informant's reports, but other information in the file can be withheld only if we can demonstrate it would identify a source. * * * Applying the exemption necessitates that human beings make judgment calls. * * * Thus, it is impossible to conclude with certainty that we are always correct. The lack of investigative activity in a particular place within a certain time frame announces we have no knowledge of what transpired there. Moreover, information that is released can form a blueprint of the Bureau's investigation and techniques. When it is necessary to reinstitute the investigation, the target is forewarned and forearmed. FOIA hearings, supra statement of William H. Webster.

Director Webster's is not the only persuasive voice commenting on this subject. In 1977, the Director of the Secret Service, Mr. Stuart Knight, testified that he had recommended that President Jimmy Carter refrain from traveling to two cities within the United States, because the Service did not have adequate information to guarantee his safety. In our 1981 hearings, the Service testified that conditions have deteriorated even further. The Attorney General's Task Force on Violent Crime concluded that FOIA must be amended because it is used by lawbreakers to "evade criminal investigation or to retaliate against informants." Citing law enforcement problems, syndicated columnist James J. Kilpatrick said: "Newsmen love the FOIA. But sad to say, our law is being sadly abused." "Freedom of Information for Whom?" (Wash. Star, July 25, 1981). Reader's Digest commented: "Congress passed FOIA with best of intent, but criminals * * * have perverted that intent to hobble the work of our law enforcement agencies." Professor Allen Weinstein, now on the editorial board of the Washington Post, wrote: "The big users of the act aren't journalist and public-interest groups. They are businessmen and criminals who are driving up the cost—and adding to the security risks—of the public's right to know." "Open Season on Open Government," (New York Times Magazine, June 10, 1979). The Drug Enforcement Administration released a study in 1982 concluding that 14 percent of the Agency's drug investigations were jeopardized or significantly compromised by FOIA releases. Mr. Robert Saloschin, former Director of the Office of Information Law and Policy in the Carter administration, stated that "there is a real need for careful legislative attention and appropriate action on FOIA's effects upon law enforcement."

Although such a catalog of recognition of FOIA's flaws relative to law enforcement could go on indefinitely, just a few more observations will serve to document the wide spread concern that cuts across all disciplines. Deputy Attorney General Edward C. Schmults states that "targets of FBI investigations use requests under the act in an attempt to discover the idenity of FBI sources. "Viewpoint", U.S. Chamber of Commerce reports. The Drug Enforcement Administration issued a study documenting that 60 percent of all FOIA requests received by the Agency came from imprisoned felons or known drug traffickers. Mr. Geoff Stewart, Special Counsel for the Department of Justice, noted that:

> Year after year, the law enforcement community has presented evidence to Congress and the general public that the FOIA was being used by criminals, terrorists, and hostile foreign intelligence agencies to identify the government's confidential sources and thwart law enforcement investigations. However, in response to this very real problem, the media and similar interest groups who have sometimes benefitted from expanded disclosure of sensitive government files responded only with a cynical heads-I-win-tails-you-lose argument: when the FBI publicly disclosed that the FOIA was permitting criminals to identify confidential sources, the Bureau was accused of needlessly frightening informants and potential informants in an effort to sabotage the act. But when the FBI tried to minimize in public the adverse impact the FOIA was having, the media claimed that this very silence showed that the FBI could point to no factual evidence supporting a change in the law.

Even the General Accounting Office in a 1978 study and the Department of Treasury in a 1981 study substantiated these claims. Management Review of Performance of Department of Treasury, in connection with the March 30, 1981, assassination attempt on President Reagan. Perhaps most persuasive of all, however, is the unanimous vote of this committee to significantly revise the seventh exemption.

MOSAIC PROBLEM

A major complication with FOIA, as discovered in the Constitution Subcommittee hearings, is the jigsaw puzzle of mosaic effect. Aptly named, the effect occurs when small pieces of information, insignificant by themselves, are released and then pieced together with other previously released information and the requester's per-

[18] O'Reilly, p. 17-4.

[19] Comment, "Amendment of the Seventh Exemption Under the Freedom of Information Act," William and Mary Law Review 697 1975).

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sonal knowledge to complete a whole and accurate picture of information that should be confidential and protected, such as an informant's identity. The result is, of course, that information was specifically exempted by Congress actually is released. This effect can occur with material exempted under each one of the exemptions. This phenomenon has particularly egregious consequences, however, as it relates to exemption 7.

Many courts have recognized this effect and sought to avoid the harm that may result from disclosure Judge Wilkey described the possible danger of partial disclosure in *Halperin* v. *Central Intelligence Agency*, 629 F. 2d 144 (1980):

> We must take into account, however, that each individual piece of intelligence information, much like a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself. *Id.* at 140.

The jigsaw puzzle effect can occur anytime there is material withheld under one of the exemptions. The courts have recognized this effect and have made allowance for it by requiring less disclosure. The committee recognizes and encourages the courts to continue the responsible application of this principal.

Another court also recognized the mosaic effect the possible resultant danger in an exemption (b)(1) case. In Hayden against National Security Agencys Tom Hayden and Jane Fonda each requested copies of all the files pertaining to them that had been compiled by the NSA. The NSA released a number of documents but claimed that certain documents contained information that had been obtained from foreign electromagnetic signals. The court found that withholding this information was justified under exemption (b)(1). The court also found that the NSA could not be compelled to disclose information obtained from channels that were not confidential because disclosure of this information might reveal sensitive information inadvertently sent over those channels. As stated by the court:

> [W]ith respect to NSA's signal intelligence operations, the sensitive material comprises more than just the substantive content of messages. Harm could follow from the disclosure of any material that might help to identity the communications intercepted by NSA, such as information about date, time, origin, or manner of transmission or receipt Id. at 1385.

Though the substantive information in the records was disclosable, the court recognized that the mere fact that the NSA had been monitoring those channels could, if the information were read by one familiar with intelligence operations, reveal more than should be safely revealed about the NSA's activities.

Moreover, a knowledgable requester may get a bit of information that is the key to unlocking the meaning of secrets obtained through other FOIA requests or independent of FOIA. This effect was also noted in *Malizia* v. *United States Department of Justice*, 519 F. Supp. 338 (1981). The court held that "since disclosing dates of interviews might well permit those familiar with the events under investigation to piece together the identity of sources * * * the date may be withheld." Id. at 351. Thus the court protected the informants and afforded the amount of confidentiality required to encourage other informants to come forth.

The Federal agencies called to release confidential material are acutely aware of the dangers posed by the mosaic effect. Robert L. Saloshin testified:

> The efficiency of law enforcement depends largely on cooperation in investigations by sources who have useful information. However, because of fears of embarrassment, reprisals, or even loss of time, such information will often only be provided to investigators if the source is guaranteed that his identity will remain secret. FOIA Hearings, supra.

FBI Director William Webster presented the committee with more than 204 incidents of recent refusals to provide information to the FBI because of the possibility of public disclosure of their identity. Id.

Release of an informant's name is not the only way that an informant's identity could be revealed. Surrounding circumstances and information revealed by the informant may also disclose an informant's identity, especially if several files are available. William Webster noted that convicts often request files simply to determine the identity of informants against them: "It's not just using one file, it's using several documents or several people putting their heads together to figure out who that person could be whose name was excised from an investigative file. Quoted in J. T. O'Reilly "Federal Information Disclosure." 9-12 (1981). Besides hindering investigations because informants are unwilling to cooperate, disclosure of identifying material can result in harm to informants.

The threat to the security of confidential matters posed by the jigsaw puzzle effect is neither a judicial creation or an agency fable. It is, in fact, a well known system that is used daily to uncover highly secret information. Gary Bowdach, who passed a lie detector test about his testimony, explained the way the criminal world applies the mosaic principles:

> I would like to make it very clear that if they deleted all the names where you couldn't see anything about it, just details of the report could also reveal the identity of the informant. If I know that I had a meeting with you on such and such a date, and in a certain restaurant in Miami, and I got a report a year later and it said a confidential informant who met with Bowdach at such and such restaurant on such and such a date, revealed to us that such and such happened, I don't have to know your name.
>
> I've just got to try to think, remember who I had a meeting with at that time and that place and I come up with you.
>
> So they could delete it, the way they are supposed to, but just details of the report itself can reveal to me the name of the informant.
>
> Hearings on Organized Crime Activities Before the Permanent Subcommittee on Investigations of Senate Committee on Government Affairs, 95 Cong., 2d sess., 1978.

Mr. Bowdach also noted that this practice is widespread and prevalent with organized crime figures in prisons.

It is the intention of the committee to acknowledge and correct the jigsaw puzzle or mosaic effect. The responsible application of this principle by the courts and by the agencies is fully within the scope of their discretion. The agencies and the courts should examine all information that is to be released with an understanding that a sophisticated requester, potentially an organized crime group, could sift through released documents with computers, and extract information to defeat the purpose of the Act's exemptions.

THRESHOLD MODIFICATION

Under present law, records are eligible for the Act under exemption 7 only if they are "investigatory records complied for law enforcement purposes." Some courts have construed this theshold requirement strictly, holding that records prepared for law enforcement purposes are not within the scope of exemption 7 if they are not literally "investigatory" in nature. For example, in Cox v. Department of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978), the court held that the mere fact that a staff manual of a law enforcement agency deals with investigative techniques and procedures does not place that manual within the scope of (b)(7) because the record was not compiled in the course of a specific investigation.[20] This undue emphasis on the literal meaning of the word "investigatory" is, in the committee's view, contrary to the overall purpose of exemption 7. The bill would therefore eliminate the requirement that records must be "investigatory," and would apply exemption 7 generally to all "records or information" compiled for law enforcement purposes. This language would make additional categories of documents besides "investigatory records" eligible for protection under exemption 7, such as various types of background information, law enforcement manuals, procedures, and guidelines. This more general threshold language also would properly focus the inquiry not on the nature of the records in which sensitive information happens to be contained, but on the substantive law enforcement interests which exemption 7 was intended to protect.

The change eliminates the outlandish result in a case where the requested information would "endanger the

[20] See for example Nationwide Mutual Insurance Co. v. Friedman, 451 F. Supp. 736, 746 (D. Md. 1978).

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life * * * of law enforcement personnel" but would not be covered by (b)(7) because it is not found in a record generated during an investigation.

The following language in a Senate committee report illustrates the problem that inheres in the present "investigatory" threshold:

The (b)(7)(D) exemption allow us to withhold from disclosure any mention of these techniques or devices, provided that the reference to the device or technique is contained in an investigative file.

However, many of these techniques and devices were developed through the use of research contracts. The research files and the data contained therein relating to the development and use of the techniques or device, is not an investigative file.

Therefore, although we will argue that the intent of Congress was to protect from disclosure these devices and techniques, the courts have shown a reluctance to accept "equity" arguments and claim our remedy is with Congress.

We have experienced similar problems regarding material we utilize in our training programs.

Any criminal who could gain access to the course material we provide during our training programs would have a decided advantage in avoiding apprehension and punishment.

We have received several requests for this type of material and we are unsure of ability to defend against its disclosure due to lack of specific language in the Act which protect it. Senate report, erosion of law enforcement, supra, at 60.

The bill would broaden the scope of exemption 7 by extending the protection for "records" to "records and information." This language was a particular point of controversy in the Supreme Court's recent decision in *Federal Bureau of Investigation* v. *Abramson*, to U.S.L.W. 4530 (U.S. May 24, 1982) (No 80-1735), the case involved a FOIA request for documents relating to the FBI's transmittal to the White House of Information concerning individuals who criticized the Nixon administration. The Court clarified that the material supplied to the White House did not lose its status as a record when the information was extracted from an FBI record and then recompiled for an arguably non-law enforcement purpose. "[O]nce it is established that *information* was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms, in exemption 7, the information is exempt." *Id.* at 4534 (emphasis added). This Supreme Court holding, announced following the committee's unanimous approval of S. 1730, the 97th Congress version of S. 774, recognizes that Congress intended to protect the substantive interests listed in (b)(7) regardless of the label put on the requested record.

INTERFERENCE WITH LAW ENFORCEMENT

S. 774 would also amend exemption (b)(7)(A) to provide exemption of all records or information which "could reasonably be expected to interfere with enforcement proceeding." At present, exemption (b)(7)(A) protects records from disclosure where disclosure would interfere with enforcement to the act to permit premature disclosure of investigative information or to allow the targets of law enforcement investigations to be able to use the act to harass, obstruct, or circumvent an investigation. See *NLRB* v. *Robins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978).

At present, however, exemption 7(A) needs to be clarified in order to protect all information pertaining to pending investigations and to better ensure that investigations will not be harmed by FOIA. The present standard has engendered no small amount of uncertainty by requiring agencies and courts alike to speculate on whether not disclosure would "interfere with" a pending proceeding. It is often virtually impossible to determine prior to the conclusion of a law enforcement proceeding whether the release of particular investigative records "would" interfere with the Government's efforts, because it is frequently difficult to know what direction the investigation will take, or what use the target of the investigation—who is usually the requester—might make of the information. Moreover, even the very administrative task of responding to requests under the current 7(A) exemption has often resulted in severe disruption of enforcement proceedings, since agencies have frequently been required to create lengthy and detailed affidavits to justify the determination that disclosure would "interfere with" an investigation or proceeding.[25]

The bill would address these concerns by changing the "would" standard to "could reasonably be expected" to interfere with enforcement proceedings. As amended, exemption 7(A) would not require an agency to show a direct interference but only the reasonable possibility of an interference.

INFORMANT PROTECTION

A mainstay of law enforcement today is the volunteered testimony and background information provided to Federal agencies by confidential sources. Major societal plagues like narcotics, organized crime, and extremist violence can only be controlled with adequate informant cooperation. The tenuous link of information sharing between informant and enforcer becomes shattered, to society's grave detriment, if Federal law enforcement officers cannot protect the confidentiality of such sources. Indeed that link is already in jeopardy.

The loss of potential confidential sources and the fear of harm to sources due to FOIA releases were two of the most frequently voiced concerns highlighted in testimony before the Constitution Subcommittee. In 1978, a GAO study set forth 49 examples of informants refusing to cooperate with law enforcement authorities due to FOIA.[26] The study was not confined to the FBI, the Drug Enforcement Administration, the Secret Service and other law enforcement agencies. In 1979, FBI Director Webster supplied documentation of over 100 instances of FOIA interference with law enforcement investigations or informants. In 1981, his list was expanded to 204 examples. Moreover, other more serious cases of the abuse of FOIA by criminal groups, terrorists, and foreign counterintelligence agents were detailed by Director Webster in a classified session before the committee. Although those details cannot be revealed, some of the sanitized fact patterns that the Director supplied are instructive:

A group advocating the violent overthrow of the United States made FOIA requests to the FBI. Although the FBI could withhold most information in the file, it had to state that it was withholding information to protect an informant. This confirmed the group's suspicions that it had an informant in its midst. This terminated the long-time informant's effectiveness in the group and left the FBI with no reliable way to monitor this terrorist organization.

Following a plot to blow up power installations to protest the Panama Canal Treaty, the leader of the plot was murdered. The FBI obtained information from informants about both the plot and the murder. A FOIA request for records pertaining to the matter, however allowed someone to write an article that practically identified the key informant. The informant began to receive anonymous death threats. Finally, the informant moved out of the state to escape the threats.

A violent terrorist group has a small group who leads the organization. That group has been infiltrated by an informant. Just recently the group has begun to make FOIA requests to learn which of the group is the informant.

The Fraternal Order of Police explained that FOIA impedes cooperations between federal and state law enforcement officers. FOIA hearings, supra, Mr. Gary Bowdach an admitted murderer, and convicted racketeer, testified graphically on his use of FOIA.

Senator NUNN. Turning to the Freedom of Information Act, what was your motivation in filing the Freedom of Information requests on your own behalf.

Mr. BOWDACH. To try to identify the informants that revealed information to the agencies.

Senator NUNN. Informants who testified against you?

Mr. BOWDACH. The ones that testified against me, I knew. I was concerned about the ones that didn't testify, the ones that were supplying confidential information.

Senator NUNN. Why did you want to get their names?

Mr. BOWDACH. To know who they were, to take care of business later.

Senator NUNN. To take care of business later on? You mean by that to murder them?

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[25] In fact, in one case the Internal Revenue Service was required to file a 13,000-page affidavit, *Kanter* v. *Internal Revenue Service*, 433 F. Supp. 812 (N.D. Ill. 1977), *dismissed*, 478 F. Supp. 552 (N.D. Ill. 1979).

[26] Impact of the Freedom on Information, and Privacy Acts on Law Enforcement Agencies. GAO Report by Comptroller General, Nov. 12, 1978.

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Hearings on Organized Crime Activities before the Permanent Subcommittee on Investigations of Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., 1978. Part I, page 233.

The Senate Subcommittee on Criminal Laws found in 1977 that "Informants are rapidly becoming an extinct species because of fear that their identities will be revealed in response to a FOIA request." "Erosion of Law Enforcement," supra.

The DEA recently produced a study which established that 14 percent of all DEA investigations were adversely affected by FOIA to the extent that investigations were "aborted, significantly compromised, reduced in scope, or required significant amounts of extra work."[27] The DEA study further noted that 40 percent of all FOI requests received by DEA are from prisoners and that a further 20 percent are from known or suspected drug traffickers. The Attorney General's Task Force on Violent Crime also made note of the deleterious effect that FOIA has had upon potential informants: "Decreases in the number of informants have been reported; it is believed by many that potential informants do not come forward out of fear of disclosure through FOIA requests from persons they helped convict."[28]

An important part of the public policy rationale for exemption 7(D) is the protection of the confidential source so he or she will continue as a future informant.[29] The excerpt from subcommittee testimony and other law enforcement data point out the need to remedy the serious shortcomings of the current exemption 7(D). This bill would make several important and needed changes to subparagraph (D) of exemption 7 to clarify and strengthen the existing exemption for information that would compromise a confidential source providing information or assistance to law enforcement authorities.

Exemption 7(D) presently protects against disclosure of information that, inter alia, "would . . . disclose the identity of a confidential source." The proposed amendment would broaden this exemption to include information that "could reasonably be expected to disclose the identity of a source." This broadening of the exemption is necessary because the release of information that does not itself identify an informant can, in many circumstances, result in such identification. When viewed in context with other information known to a requester, pieces of information obtained through the Act that do not appear revealing on their face may enable a requester to piece together facts that reveal the identity of an informant.

The proposed change is consistent with the practical approach to source protection established in analagous cases. The courts have articulated the so-called "mosaic" or "jigsaw puzzle" approach to (b)(7)(D). In *Halperin* v. *Central Intelligence Agency,* 629 F.2d 150 (D.C. Cir. 1980), the court denied a requester access to CIA documents detailing legal bills and fee arrangements of private attorneys retained by the agency who were source of intelligence. Although the agency might arguably have been able to demonstrate potential harm sufficient to invoke the "would" standard, the court held the materials exempt because "[w]e must take into account, however, that each individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance itself."[30] *Id.* at 150. The purpose of the broadening of exemption 7 is to make the approach followed in *Halperin* applicable to this exemption as well.

A good indication of the very real danger that may accompany the release of what appears on its face to be merely innocuous information is provided by the testimony of Director Webster:

> Groups of requesters seek the identity of government sources by collecting and carefully comparing the information released to them by FBI against information and records within their own knowledge and control. In addition, it can be anticipated that in many instances prison inmates, who make about 12 to 16 percent of our Freedom of Information Act requests, are doing so for the purpose of indentifying informants. We know that in one instance an organized crime group made a concerted effort to identify sources through the Freedom of Information Act. It must also be recognized that hostile foreign governments, terrorist and organized crime groups not only have the motive to subject our releases to detailed analysis, but also have the resources to finance such an examination by knowledgeable and skilled analysts.
>
> The FBI analyst may unknowingly assist the hostile analyst in responding to the requester. Seldom can an FBI employee learn the extent of a requester's knowledge of dates, places and events. The person most knowledgeable about what particular information may lead to a source's identity is, unfortunately for us, often times the requester who is the subject of investigation. What appears to our analysts to be innocuous or harmless information may provide the group a missing piece of the puzzle. When the records pertain to investigations of organizations and the members have the opportunity to pool and compare the information furnished to them, the danger is magnified.[31]

Moreover, codification of the mosaic approach would conform the terms of the exemption more closely to the original intent of Congress. The author of the exemption, Senator Hart, stated plainly:

> The amendment protects without exception and without limitation the identity of informers. It protects both the identity of the informer and information which might reasonably be found to lead to such disclosure. 120 Cong. Rec. 17,034 (1974).

The Committee intends to carry out Senator HART's stated intent and recognize the "mosaic" principle with this amendment.

The bill would also amend the language of Exemption 7(D) to identify more clearly the range of entities that may be considered "confidential sources." Under present law, foreign governments, state and local governments or agencies and private institutions have been afforded protection as "sources." For instance, the Second Circuit stated that "There appears to be no reason why a law enforcement agency . . . would not come within the plain meaning of the words confidential source. *Keeney* v. *Federal Bureau of Investigation,* 630 F.2d 114, 117 (2nd Cir. 1980). In a similar fashion, the District of Columbia Circuit stated: "In view of Congress' close attention to the concern that investigatory functions of criminal law enforcement agencies not be impeded, it seems clear that Congress could not have intended to draw a distinction between individual and institutional sources of information," *Lesar* v. *United States Department of Justice,* 636 F.2d 472, 491 (D.C. Cir. 1980).[32]

The bill's amendments to Exemption 7(D) would confirm this majority rule and would provide a clear statement on the face of the statute that institutional informants are included among the confidential sources protected by the Act, thereby alleviating the concern among some of these institutions that law enforcement information they provide the Federal government might be subject to release pursuant to a FOIA request. Because of the importance of these institutions as informants in the law enforcement process, the Committee believes that they too are entitled to express protection on the face of the statute. Even those instances where courts have taken a more narrow view of the term "confidential source", have occasioned judicial concern about the legislative lan-

[27] The Effect of the Freedom of Information Act on DEA Investigation," U.S. Department of Justice, DEA Office of Planning and Evaluation 1982.

[28] "Attorney General's Task Force on Violent Crime." United States Department of Justice, Final Report, Aug. 17, p. 41.

[29] O'Reilly, 17-43.

[30] See also, *Center for National Security Studies* v. *Central Intelligence Agency,* No. 80-1235 (D.D.C. 1982).

[31] The Freedom of Information Act Federal Law Enforcement Implementation. Hearing before a subcommittee of the Committee on Government Operations, House of Representatives, 96th Cong. 1st Sess. February 1979, 61-62. (Testimony of FBI Director William H. Webster).

[32] See also, *Nix* v. *United States,* 572 F.2d 998 (4th Cir. 1978); *Varonc Pacherp* v. *Federal Bureau of Investigation.* 456 F. Supp. 1024 (D. P.R. 1978); *Church of Scientology* v. *Department of Justice,* 612 F.2d 417 (9th Cir. 1979); *Dornau* v. *Federal Bureau of Investigation.* CA-81-2420 (D.D.C. 1982); *Pachero* v. *Federal Bureau of Investigation,* 470 F. Supp. 1091 (D. P.R. 1979); *Dunaucy* v. *Webster,* 519 F. Supp. 1059 (N.D. Cal. 1981); *Katz* v. *Department of Justice,* 498 F. Supp. 177 (S.D.N.Y. 1979); *Baez* v. *Department of Justice,* 647 F.2d 1328 D.D.C. 1980. *Founding Church of Scientology* v. *Regan* 670 F.2d 1158, 1161-62 (1981). But, *see, Ferguson* v. *Kelly,* 455 F. Supp. 324, 326-27 (N.D. Ill. 1978); *Founding Church of Scientology* v. *Miller,* 490 F.2d 144 (D.D.C. 1980) (citing J. Clifford Wallace).

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

guage that the court has felt obliged to construe as limiting coverage to human sources. This is the case in the dissent by Judge Clifford Wallace. *Church of Scientology* v. *Department of Justice*, 612 F.2d 417 (9th Cir. 1979) (Wallace J. dissenting). This bill responds to Judge Wallace's concern and logically extends the protection of (b)(7)(D) to financial and commercial interests.

The bill would also confirm that private businesses come within the definition of a "confidential source." While this issue has not generated a great deal of case law, the weight of authority includes financial and commercial institutions within the term "confidential source." [33]

Finally, the bill would grant greater protection to the information furnished to criminal law enforcement authorities by confidential sources. Currently, Exemption 7(D) permits the withholding of "confidential information" furnished "only by a confidential source" in the course of a criminal investigation. The present terms of the Act, if read literally, would appear to suggest that "non-confidential" information provided by a confidential informant is not exempt. This would be contrary to the evident intent of Congress.[34] Indeed, any attempt to segregate "confidential" from non-confidential information received from any informant would be impossible since informants could be identified from even very circumstantial information that might appear on its fact to be nonconfidential. The bill therefore would make it clear that all information provided by a confidential source is exempt, by eliminating qualifying terms that create confusion and ambiguity with respect to the scope of the exemption.

The apparent requirement that information must be furnished "only" by a confidential source to be exempt would also be eliminated by the bill to prevent the confusion which can result from a restrictive reading of the existing language. Professor Antonin Scalia, testifying before the Constitution Subcommittee, focused upon the problem created by a restrictive reading of this language:

> The exemption for law enforcement investigatory records sanctions the confidential information furnished by a confidential source in a criminal or national security investigation, but only if the information was "furnished *only* by the confidential source" (emphasis added). Obviously any confidential information furnished by a confidential source might serve to identify the source . . . [a restrictive reading would mean] that the confidential information could be withheld from the public (or the mob) only if the reviewer established, presumably from a review of the entire file, that the information was not obtained from anywhere else. That, it seems to me, is an extraordinarily strange weighing of the competing interests, when what rests on the one side may be the life of the informant, and on the other simply the general interest in disclosure. One can conceive of many situations in which the mere fact that the information was also obtained elsewhere would not adequately protect the identity of the informant. Suppose, for example, that the mob is not averse to harming both possible sources—or happens not to know that the other source possessed the information. FOIA, *supra*.

This precise problem arose in *Radowich* v. *United States Attorney*, 501 F. Supp. 284, 288 (D. Md. 1980). In this case, the lower court determined that this exemption was not applicable unless the information was available "only" from a confidential source and not available from another source. This was properly reversed by the court of appeals, which found no such congressional intent to restrict the exemption. There is not a single statement in the legislative history that suggests that Congress, by enacting the exemption, did not intend to cast a veil over *all* information furnished by a confidential source . . . irrespective of whether the information in whole, or in part, might have been available from another source." *Radowich* v. *United States Attorney*, 658 F.2d 957, 964 (4th Cir. 1981).[35]

The proposed amendment would make it clear that all information provided by a confidential source is exempt, regardless of whether it might also have been obtained from another source. This change would serve to further the legislative intent of the drafters of the 1974 amendments who awkwardly phrased the exemption. Senator Edward Kennedy, who was in charge of the amendment during the Senate debate, assured the Senate that the only source information that would be available would be that complied in civil investigations.[36]

The courts have interpreted these phrases in (b)(7)(D) consistently with this intent. In *Duffin* v. *Carlson*, 636 F.2d 709 (D.C. Cir. 1980), the court denied a FOIA requester access to information that was provided by a confidential source although some of it was arguably not confidential because it was supplied by other individuals also. The Court upheld the "blanket exemption theory" for any information provided by a confidential source and is precisely the result this bill should effect.

DISCLOSURE OF LAW INFORCEMENT TECHNIQUES

The bill would amend Exemption 7(E) to grant broader protection to records containing statements of law enforcement or prosecutorial guidelines. At present, Exemption 7(E) protects from disclosure only those investigatory records that would disclose "investigative techniques and procedures." This language has proven insufficient to protect a broad range of sensitive law enforcement materials from disclosure. The testimony of Director Webster is again helpful to an understanding of the inadequacy of (b)(7)(E):

> * * * concern has been broadly expressed that manuals such as an undercover agent manual might be the subject of a FOIA disclosure.
>
> We would very much like to see that these important tools of control of our operations be protected.
>
> It is important that our investigative agents * * * have this set out in writing. * * * These are the purposes of our manuals and guidelines.
>
> Recent FBI history tells us that reliance on oral approvals and assumed inherent authority contributed to some of the sad events that have been fully chronicled.
>
> And yet, if we provide specific investigative guides to our agents and they are available to outside requesters, the effectiveness of our investigations and the safety of our agents could be affected.
>
> Our undercover special agents, for example, on whom we are relying more and more, need detailed guidelines and instructions, as I have just mentioned. But the Act, as presently written, would not specifically exempt them from disclosure to a requester.
>
> Exemption 7 protects only investigatory records compiled for law enforcement purposes. Our manuals and guidelines, under present definitions, do not qualify as investigatory records. H. Rep. the Freedom of Information Act, supra, pp. 60-62.

Case law on the subject reflects the frequent inadequacy of (b)(7)(E) in protecting sensitive law enforcement information. For example, DEA was required to release portions of its agents manual which concerned aspects of the DEA's handling of confidential informants and its search warrant procedures because the investigatory threshold of (b)(7) was not met *Sladek* v. *Bensinger*, 605 F.2d 899 (5th Cir. 1979).[37] It has also been held that none of the exemptions of (b)(7) prevent the disclosure of guidelines for prosecutorial discretion. *Jordan* v. *United States Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) [38] the Internal Revenue Service Audit guidelines were also held not protected from disclosure. *Hawkes* v. *Internal Revenue Service*, 407 F.2d 787 (6th Cir. 1974).

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[33] *Dornail* v. *Federal Bureau of Investigation*, CA-81-2420 (D.D.C. 1982); *Dunaway* v. *Webster*, 519 F. Supp. 1059 (N.D. Cal. 1981), *Pacheco* v. *Federal Bureau of Investigation*, 470 F. Supp. 1091 (D. P. R. 1979).

[34] Senator Hart explained that under his amendment an agency "can provide blanket protection for any information supplied by a confidential source" and that "all the FBI has to do is state that the information was furnished by a confidential source and it is exempt." Joint Committee Print. Senate Committee on the Judiciary and House Committee on Government Operations. Freedom of Information Act and Amendments of 1974. (Pub. Law 3-502, 94th Cong. 1st Sess. 451 (1975).

[35] See also *Nix* v. *United States*, 572 F.2d 998 (4th Cir. 1978).

[36] Source Book: "Legislative History, Texts, and other Documents. Freedom of Information Act and Amendments of 1974." Public Law 93-502, Joint Committee Print. March 1975 at 459.

[37] See also *Firestone Tire and Rubber Co.* v. *Coleman*, 423 F. Supp. 1359, 1365-66 (N.D. Ohio 1976) (guidelines for bringing tire safety investigations); *Cox* v. *United States Department of Justice*, 576 F.2d 1302 (8th Cir. 1978).

[38] A recent decision of the D.C. Circuit repudiates the logic of *Jordan* but in dicta notes that the result of *Jordan* would remain unchanged under the new approach. *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981).

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

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The bill would modify the language of Exemption 7(E) to include "techniques and procedures for law enforcement investigations or prosecutions" and to protect expressly "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." This change, in conjunction with the elimination of the requirement that Exemption 7 apply only to "investigatory records," would alleviate the majority of the problems discussed above.[39] It should be noted that the revision of 7(E) is complemented by the proposed amendments to Exemption 2, which would exempt "manuals and instructions to other from disclosure if their disclosure could reasonably be expected to jeopardize investigations."

ENDANGERMENT OF LIFE OR PHYSICAL SAFETY

The bill would expand Exemption 7(F), which now authorizes the withholding of records where disclosure would endanger the life or physical safety only of law enforcement personnel. The bill would replace the words "law enforcement personnel" with the words "any natural person," thus extending exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process.

In the words of Professor Scalia of Chicago Law School:

> The 1974 amendments to FOIA are a monument to failure. Another instance of the irrationality of the 1974 effort is the exemption for information that would endanger the life or physical safety of law enforcement personnel. Why, pray tell, only law enforcement personnel? Why not their spouses or children? Come to think of it, why not anyone? FOIA hearings, *supra.*

INFORMANT RECORDS REQUESTED BY THIRD PARTIES

Section 10 of the bill would add a subsection (a)(9) to the Act to address a serious problem that has arisen for some law enforcement agencies, particularly for the Federal Bureau of Investigation, when requests have been received for the files of named individuals to see if those individuals are or have been confidential sources. The provision would provide that the act shall not apply to informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought according to the informant's name or personal identifier by a third party.

Under current law, criminal organizations can use the Act to attempt to uncover suspected informants in their midst, simply by asking for the records of individuals whom they suspect of being informants. In such cases, it is not sufficient that the Federal Bureau of Investigation could respond that it is withholding the informant's file under Exemption 7(D), as the very step of specifying that exemption would compromise the source. New subsection (a)(10) would resolve this problem by excluding the informant files of law enforcement agencies from the ambit of the Act whenever those records are requested according to the informant's name or personal identifier by a third party. In this way, the agency could properly limit its response to any collateral records or, if no such other records existed, properly respond that it has no records responsive to the FOIA request.

This problem does not exist in the context of an individual's request for his own records (including such requests made pursuant to the Privacy Act of 1974), even when at the direction of a third party. Because an individual remains free to modify or redefine his own request at any time, he would be free to contact the agency to reformulate his request so as not to cover the informant-related records. In response to the reformulated request, the agency could truthfully give a "no records" response without resorting to subsection (a)(10).

ORGANIZED CRIME

Section 14 of the proposed bill would serve to rectify many of the problems which now exist with regard to FOIA requests made by members of organized crime. The testimony of Director Webster before the Constitution Subcommittee highlighted the very real dangers which accompany FOIA requests by organized criminal groups who have both the incentive and the resources to use the act systemically—to gather, analyze and piece together segregated bits of information obtained for agency files.

There is much evidence of the existence of sophisticated networks of organized crime FOIA requesters. For example, organized crime members in the Detroit area have been instructed to submit FOIA requests to the FBI in an effort to identify FBI informants. In all, 38 members and associates of the Detroit organized crime family have made requests. "The list of requests reads like a Who's Who In Organized Crime in Detroit * * *. Through this concerted effort, the members and associates of this family have obtained over 12,000 pages of FBI documents" FOIA hearings (statement of William Webster), supra.

The withholding of information on the basis of one of the enumerated exceptions can often be ineffective in avoiding the anticipated harms that would accompany disclosure because invoking the exemption itself becomes a piece of the mosaic. To invoke (b)(7)(D) is to tell the requester, potentially a criminal seeking informants in his illicit organization, exactly what he may want to know—that his organization has an internal informant.

Currently the criminal element can use the FOIA to determine whether an investigation is being conducted. Although exemption (b)(7)(A) allows an agency to withhold records pertaining to a pending investigation, it does not allow an agency to deny the existence of records, thereby alerting the requester to an ongoing investigation. The same problem, as mentioned above, is encountered with regard to exemption (b)(7)(D). The intent of which is to protect the confidentiality of a source. The mere invocation of the exemption and the release of excised portions of the documents may be sufficient to reveal the source's identity or at a minimum inform the requester of the existence of an informant in his organization. One top organized crime chief, under investigation by the FBI and well-advised by his attorneys, filed a FOIA request with the FBI. He asked for information pertaining to whether the FBI or any other agency was conducting an electronic surveillance of him. FOIA hearings, *supra.* Any response other than "no records" would indicate to this sophisticated requester that he was indeed under such surveillance. He could adjust his activities accordingly.

This enables an agency to use a "no records" response to mitigate the danger that information which is innocuous on its face could be ultimately harmful when considered in connection with the totality of information which the requester possesses. Unfortunately, the agency often has no way of knowing how much the requester knows. The dates of documents, locations reporting investigations, the amount of material and even the absence of information are all meaningful when compiled in the systematic manner employed by organized crime.

The Freedom of Information Act presents the potential for damage to sensitive FBI investigations, even in cases where no release of substantive information is made. A requester with an awareness of the law's provisions, a familiarity with an agency's records systems, and whatever personal knowledge he brings to the situation, can gain insight into FBI operations regardless of his ability to procure a release of Bureau documents. For example, knowledge that a suspected informant's file has grown over a period of time is often enough to tip off the sophisticated criminal that the suspected informant has been talking to law enforcement officials too often.

Because of the mosaic problem with FOIA and the particular threat posed by organizations with historical continuity and an institutional memory and further because use of the exemptions themselves can become a "piece of the mosaic," simply broadening existing exemptions will not cure the problem of organized crime, abuse of FOIA. Accordingly, section 14 of the proposed bill would exclude from disclosure all documents compiled in a lawful investigation of organized crime which are specifically designated by the Attorney General for purposes of this section. This exclusion would

[39] For example, to the extent that the rationale of *Jordan, supra,* retains any vitality in the wake of *Crooker, supra, Jordan* is repudiated.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

apply to documents that were first generated or acquired by such law enforcement authority within 5 years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in a longer exclusion not to exceed 3 years.

Similar concerns as those addressed by section 14 were also raised with regard to terrorism and foreign counter-intelligence at the subcommittee hearings. While section 14 does not directly address these concerns, members of the Senate believe that they will no doubt require attention in the future. Again, the testimony of Director Webster is instructive:

A person involved with an extremely violent terrorist network who suspected informants in the group stated that in an attempt to identify these informants, multiple FOIA requests would be submitted to the FBI and the responses then would be analyzed. The group has in fact begun submitting requests.

A United States citizen declined to cooperate with the FBI in a unique opportunity to penetrate a hostile foreign intelligence establishment located in this country. Although otherwise willing to be cooperative, this citizen advised that he feared a future release of documents under the FOIA could reveal the extent of his cooperation and damage his financial livelihood.

An FBI Agent, conducting a foreign counterintelligence investigation concerning possible loss of technology to a hostile foreign country, contacted an American businessman about a research program being conducted by his company. The individual was cooperative, but refused to release a copy of a company business report to the agent, fearing that business competitors could obtain the report through the FOIA and learn of the company's research activities. Hearings, *supra*.

Due to the threat posed to investigation of organized crime by FOIA disclosures of any kind Section 14 requires that, during the suspense period, the act shall not apply to documents covered by the exclusion.

Our committee hearings have indicated also that FOIA is being misused by businesses in an effort to obtain valuable trade secrets. The testimonies are replete with such examples of abuse by business concerns of the spirit and original purpose of FIOA. For example, Mr. Jack Pulley, an attorney with the Dow-Corning Corp., told us of an article entitled "Freedom of Information Act: Strategic Opportunities and Threats," in which the authors described how FOIA could be used to gain what they called "a differential competitive advantage."

Currently the standard of protection, "trade secrets and commerical or financial information obtained from a person privileged and confidential," presumes that all confidential information will be protected, but supplies no statutory definition for confidential. Instead the 1966 Senate report specified that information "customarily not released to the public by the person from whom it was obtained" would be exempt. The House report extended protection to any information given the Government in confidence whether or not involving commerce or finance. Despite the breadth of protection intended by Congress, a Federal court unilaterally narrowed the exemption years later by requiring a submitter to demonstrate a substantial competitive harm in order to qualify for exemption. *National Parks* v. *Mortion*, 498 F2d 765 (D.C. Cir. 1974). This broader test requires agencies and courts to guess about the economic impacts of disclosure and has led to numerous reverse FOIA lawsuits as submitters have attempted to protect proprietary data against release to commercial requesters who believe that the act, under current standards, can be used to learn valuable information about competitors.

The current standard has also been held to offer no protection to nonprofit submitters, such as hospitals, universities and scientific researchers, because they cannot show economic injury if the product of their research is disclosed.

Under FOIA's current statutory scheme, a submitter of confidential information does not even receive notice that the sensitive information in the possession of the Government has been requested under FOIA. S. 774 provides simple procedural fairness in granting such notice and an opportunity for submitters to appeal their case to the Government agencies and the courts on the same basis as requesters.

BUSINESS CONFIDENTIALITY PROCEDURES

Provisions for the protection of individual privacy were written into Federal law through the Privacy Act of 1974, which imposes certain procedural limitations on agency disclosure of individually identifiable records. The omission in the 1966 Freedom of Information Act of a comparable set of procedures to protect items of organizational privacy, such as membership lists, marketing information, and business data, has created problems for Federal agencies and for the private sector. The committee is aware, as a result of its intensive study of organizational and business privacy concerns, that organizational privacy interests merit better procedural consideration than they have received under current law.

Section 4 of the bill provides a fair procedural recourse for the assertion of organizational privacy interests. The Freedom of Information Act was at one time a part of the Administrative Procedure Act. It is fitting that these amendments will move the disclosure process into line with the customary procedural safeguards which the APA already provides for informal adjudications of private rights. Notice, an opportunity to object, and a fair opportunity to present one's case in an impartial forum are the rights provided by section 4 of the bill.

Additionally, this section should preclude the negligent or inadvertent release by Federal agency personnel of protected information. In recent years, agencies have released highly sensitive and confidential information to requestors. While high-level agency officials may apologize to submitters and send admonishing letters to staff for releasing clearly non-releasable trade secret chemical formulae, the underlying problem is not remedied and subsequent releases of protected information have not been precluded. I believe that prerelease notice to submitters is essential to remedy the problem. The committee urges agencies that do not provide prerelease notice to submitters in all cases, such as FDA, to promptly adopt procedural rules, which they may do under existing statutory authority, to require prerelease notification even where regulations may establish specific standards for release.

Beyond the procedural changes in section 4, the committee heard extensive testimony and received many written submissions concerning substantive changes to the current terms of exemption (b)(4). There was a great deal of discussion concerning alternative wording of the new text of the fourth exemption, which covers confidential private proprietary, research and commercial data. Agreement to specific alternative wording was not possible before the critical committee vote on May 20, 1982, so the issue of which words will best be used to revise exemption (4) has been reserved for future consideration.

By reserving the issue for further refinement, I do not discount the legitimate concerns raised about the weaknesses of current law. I expect that a consensus alternative wording can be determined, to replace the unsatisfactory and unpredictable case law standard which has currently been applied, that of "substantial competitive harm." *National Parks & Conservations Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

Case law developments under the nebulous "harm" standard have varied widely, and the Congress has not acted to ratify that standard since it was created by three judges of the D.C. circuit in the 1974 *National Parks* decision. The question is not whether that unpredictable standard is desirable, but whether an appropriate consensus can be formed as to the wording of its replacement. The private persons who submit information to agencies will be able to sue the agency or to intervene in litigation to prevent dissemination of that private data to competitors. Until "substantial competitive harm" test is replaced by new statutory language, submitters, agencies, requesters and the courts will continue to struggle with issues of market displacement and economic possibilities, rather than the real issue of expectations of proper handling of private persons' and organizations' information.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Under section 4 of S. 774 agencies are directed to use informal rulemaking under section 553 of title 5 to specify their procedures for the handling of exempt private information. Many agencies already have such rules in place. The agency has the option to specify in its rules that the submitter must designate information which is within several classes.

The first designatable class is trade secret data or information which is an essential element thereof. The term "trade secret" has its usual common law meaning as interpreted by IV Restatement of Torts section 757, comment b (1938), and which is the dominant definition applied in Federal and State case law. See, *e.g., Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974), and 1 R. Milgrim, "Trade Secrets" ch. 2 (1967). That definition continues to predominate in the commercial arena, according to witnesses who appeared before the committee.

The second class which may be designated, if the agency chooses to require such designation is the class of "commercial, research, financial or business information." The terms "commercial" and "financial" carry over from the 1966 Freedom of Information Act and have been extensively defined in case law. See 1 J. O'Reilly, Federal Information Disclosures section 14.07 (1977). The term "research" is intended to permit designation of information by a research institution, regardless of its nonprofit status. The committee believes that witnesses for the American Association of Medical Colleges and others have made a strong case that protections should be available notwithstanding the absence of commercial profit orientation, an artificial distinction drawn in *Washington Research Project, Inc.* v. *Department of HEW,* 504 F. 2d 238, 244 n.6 (D.C. Cir. 1974). The term "business" refers to that class of information which does not necessarily have immediate value in commerce, but which is useful in a firm's dynamic competitive, *e.g.,* the "circumstantially relevant business information" class addressed by the academic economists who testified in the committee's 1981 hearings.

Timing of the designation will necessarily vary. The designation should be made in the submission of forms to the agency if the agency provides notice of the need for and opportunity for designation. The requirement that designation occur must, in fairness, be communicated adequately to those who would incur the financial consequences of a failure to designate. Where the agency inspects or audits the private firm and removes records, notes, photographs, etc., the agency has an obligation thereafter to provide fair opportunity for designation of the material which the submitter believes to be exempt. For example, an agency which inspects an electronics factory and photographs a new, as yet undisclosed machine, must give an opportunity later for designation of the confidential machine, prior to the agency disclosure. And the designation is intended to be an administratively simple as possible. The agency can require identification of portions which are confidential but it cannot require submission of legal briefs or evidence in support of confidentiality at the time of such designation. Some agencies now make the submission of information the equivalent of an adjudicated examination of its exempt status (40 C.F.R. § 2.204, EPA). Such a burden is not intended to be part of this designation requirement.

Notification that an agency is planning to take an adverse action is one of the most basic of administrative procedural rights, yet until this amendment it had by inadvertence been omitted from the procedures required under the Freedom of Information Act. Since notifications will not be required where the information will be either withheld or clearly must be disclosed, the number of notifications is not expected to be excessive. Enactment of this section carries through on the Supreme Court's statement concerning the Administrative Procedure Act, when the court applied APA remedies in the FOIA context: "Congress made a judgment that notions of fairness and informed administrative decision making require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 316 (1979). Notification is not required under several circumstances, discussed under Section 552(a)(7)(B) below.

Written objections may be made by the submitter, upon the agency's decision to disclose the private documents. These objections should specify all the grounds then known to the submitter upon which the submitter contends the information should not be disclosed. A submitter who learns of additional factual information relevant to the disclosure decision from an accounting or market study should present that information promptly for consideration by the agency.

The submitter who wishes to assert an objection to disclosure should submit the information within 10 working days after the postmark date of the agency notification. Where because of delays in mail or geographical distance from the agency, the submitter does not have sufficient opportunity to reply within the 10-day period, the submitter should communicate with the agency, informing it that the answer is being transmitted to the designated agency official and requesting an extension. An agency will balance the fair handling of submitter communications with the need to expedite the disclosure process. There may also be cases in which notification is not received by the submitter, but in which the submitter learns of the pending request for disclosure from a public log of requests or another source. Objections under this section may be filed with the agency prior to the receipt of a notification under subsection (a)(7)(A)(ii).

The submitter must be provided with notice of the agency's final decision regarding release. This provision must be read in connection with the waiting period described in subsection (a)(7)(C) below.

The provision for notifications to submitters may be excused under several defined circumstances. The agency has full discretion to provide the notification, notwithstanding the exception, if it chooses to do so.

If an agency decides that the request should be denied, notification need not be given. It would be given later if the agency changed its position upon a requesters administrative appeal of the denial. If the agency makes a finding that the information in fact has been lawfully made available to the public, then the claim to notification would not stand. Of course, an agency should give notification in case of doubts, for sometimes the information which appears to be public is merely misleading speculation about private commercial activity rather than lawful publication. Wrongful taking of the information, for example, disclosure by another commercial firm in breach of contractual obligations to the owner, does not constitute lawful availability to the public.

If an agency regulation requires designation of confidential information and the submitter fails to substantially comply with the rule, notice may be excused by the agency. The submitter's failing will be measured against the precision with which the agency has carried out its own responsibility to give notice of the requirements for designation of confidential information. Designation is optional with the agency.

Notification is also excused if a Federal statute, other than 5 U.S.C. 552, requires disclosure by law, if the agency has notified the submitter concerning the disclosure requirement prior to submission of the information. The term "by law" has the same content as its interpretation in *Chrysler* v. *Brown,* 441 U.S. 281 (1979). Such notice to the submitting person should be as explicit as possible and may take the same form as the Privacy Act statement required under 5 U.S.C. 552a(e)(3), or other express written notice. It is not permissible for an agency to collect private information and thereafter to retroactively declare it subject to a disclosure requirement by law, absent an intervening statutory amendment explicitly requiring such disclosure.

The final exception from notification occurs when a criminal law enforcement agency acquires the information in the course of a lawful criminal investigation. This exemption provision parallels the broad Privacy Act exemption for law enforcement oper-

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

ations; 5 U.S.C. 552a(j)(2). The committee intends that the principal function of the agency be enforcement of criminal laws, including police efforts to prevent, control or reduce crime or to apprehend criminals, such as the functions of the Federal Bureau of Investigation and the U.S. Secret Service. Many agencies have some statutory criminal sanctions in their otherwise civil enforcement schemes, but these are not within the narrow meaning of criminal law enforcement agencies for purposes of this exception from notification.

The agency should communicate to the requester on two occasions: when it notifies the submitter of a receipt of request for information and when it notifies the submitter of its final decision. After forwarding its final decision to disclose to a submitter who has objected to disclosure, the agency should wait for 10 working days before making disclosure of the records.

Exhaustion of administrative remedies and the appropriate location for lawsuits involving disclosure has been the subject for some confusion under current law. The Freedom of Information Act has never expressly required exhaustion of remedies as a precondition to suits. The situation is unchanged. Determination of whether the administrative steps for either requester or submitter should have been exhausted is a matter for determination by the courts. But to the extent that exhaustion is of concern, initiation of suit by either party, requester or submitter, will terminate any obligation on the other party to seek administrative remedies.

This section (a)(7) is purely procedural in nature. It has no effect on existing law which covers the substance of confidentiality decisions, including specific withholding statutes under Exemption 3, 5 U.S.C. 552(b)(3), such as the Census Act, 13 U.S.C. 214, the Trade Secrets Act, 18 U.S.C. 1905, and the Federal Trade Commission, 15 U.S.C. 57-2. The rights established by law protecting these private confidentiality interests continue unaffected by these procedural provisions.

Of the statutory provisions which remain unaffected by this section, one of the most significant is the Trade Secrets Act, 18 U.S.C. 1905, which has received much attention as a result of its use to support preservation of private data in *Chrysler Corp.* v. *Brown,* 441 U.S. 281 (1979). That statute represents the Criminal Code's intention to protect legitimate expectations, that Government will not disclose sensitive data unless Congress has made a specific statutory decision that certain types of confidential business information should be disclosed. This bill seeks to preserve expectations and leaves to section 1905 its current functional role as a determining factor in agency decisions regarding the release of business information, *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir., 1976), *cert. denied,* 4312 U.S. 924 (1977).

In addition, the extensive committee hearings revealed other aspects of FOIA in need of fine-tuning. The costs of the act to the taxpayer suggest that those who directly benefit by requesting information should readily accept the responsibility of paying the cost of producing the information, subject, of course, to an adequate waiver policy for requests made in the public interest. In this respect, the policy statements under consideration today closely parallel the Senate Judiciary Committee determinations. Both contemplate the imposition of appropriate processing fees, provision for agencies to retain collected fees, authorization for collection of user fees in the case of commercially exploitable resources, and other important fee reforms.

FEES AND WAIVERS

Section 2 of the bill makes a number of important changes to subsection (a)(4)(A) of 5 U.S.C. 552, to improve the provisions relating to the collection of fees under the act. The purpose of these changes is to make agency fee schedules more uniform and to allow agencies to recover more nearly the true costs of complying with requests under the act, except where the public interest or the small nature of the request warrants a waiver or reduction of the fee.

UNIFORM SCHEDULE OF FEES

One problem identified by witnesses before the subcommittee is the current lack of uniformity of fee schedules at the various agencies. These variations can lead to confusion among members of the public who deal with different agencies. Although some of the variations in fees do appear to reflect real differences in the costs to the agencies, in most cases greater uniformity of fee schedules would be possible and desirable.

The bill accordingly authorized the Office of Management and Budget to promulgate, pursuant to notice and receipt of public comment, guidelines to all agencies to promote a uniform schedule of fees. Each agency would be subject to these guidelines in establishing its schedule of fees, and would be required to justify variation from the uniform schedule by rulemaking. This provision would promote uniformity of fee schedules throughout the government while preserving the flexibility of particular agencies to take account of peculiar fee considerations.

RECOVERY OF PROCESSING COSTS

Existing law permits agencies to collect only the costs of searching for and copying requested documents. These costs are, however, only a fraction of the true costs of responding to the FOIA request. In fact, search and copying costs appear, on the average, to constitute no more than 4 percent of the cost of responding to requests, with the costs of reviewing documents, redacting exempt material, and other processing accounting for the remaining 96 percent of the total cost.

Clearly, one of the unexpected developments from the 1974 amendments to the act has been the great volume of requests and the expense of processing those requests, particularly requests which serve only commercial or private interests rather than the interests of the public. In contrast to Congress' estimate that the 1974 amendments to the act would cost no more than $40,000 to $100,000 annually to implement, the direct cost of compliance with the act by all agencies (not including litigation costs and other indirect costs) rose to at least $57 million by 1980. Many hundreds of Federal employees—over 300 at the FBI alone—devote all of their worktime to the processing of FOIA requests. Countless others spend part of their time reviewing documents in response to requests concerning specific agency projects they are working on.

Most often, the cost to the Government of search and review bears little corelation to the public interest in disclosure. The majority of all Freedom of Information Act requests are filed by or on behalf of corporations for purely private commercial reasons. In many instances, individuals too have made excessive use of the act, at public expense, for reasons that are purely personal, serve no public interest, and may in some cases even be contrary to the public interest. In one case, a single Freedom of Information Act request for voluminous Central Intelligence Agency documents by an ex-agent, Mr. Philip Agee, cost the public more than $500,000 to process. *Agee* v. *Central Intelligence Agency,* 417 F. Supp. 1335, 1342 n.5 (D.D.C. 1981). The bill is intended to end public financing for the processing of requests where it is not in the public interest.

Accordingly, the bill would allow agencies to collect "all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request." This provision would pass along to all requesters the true costs of processing their FOIA requests and would encourage all requesters to make reasonable efforts to narrow excessively broad requests.

The bill includes several provisions regulating an agency's authority to collect fees, in addition to the existing provision for waiver or reduction of fees in the public interest, as discussed below.

First, the bill provides that no charge may be made whenever the cost of routine fee collection and checks processing would be likely to exceed the amount of the fee itself. Second, the bill provides that any processing charges must be reasonable standard charges and must be limited

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

to services directly attributable to responding to the request.

Third, the term "processing" is defined to exclude services of agency personnel in resolving issues of law or policy of general applicability in responding to a request. Thus, a requester would not be charged for an agency's costs in establishing or rethinking a policy of general applicability, even if the request triggers such agency action. However, a requester could be charged the costs of review and reduction of documents pursuant to established agency policy.

In adopting a procedure for charging processing fees to all requesters (except in the case of small or public interest requests), the subcommittee specifically rejected a proposal for a three tier system of fees. Under the three tier proposal, only requesters acting with a business or commercial interest would be subject to full processing fees, while noncommercial requesters would be charged only search and copying costs as at present, and public interest requesters would receive a waiver or reduction of the fees. Such a three tier system is seriously flawed in many respects.

Most importantly, it would be completely impracticable to require the agencies to distinguish, for each of the thousands of requests received annually, between requesters who act for a business purpose and those who do not. Agencies simply lack the means to determine accurately the true purposes or motives of individual requesters. A business could well have individuals make requests on its behalf to qualify for the "noncommercial" rates. Agencies would be required to differentiate between those individuals who seek information in order to publish a book for profit and those who do not. Even a corporation might try to qualify for a "noncommercial" rate by demonstrating that its request does not relate to its business. Even these few examples demonstrate the complex problems that would be inherent on any attempt to differentiate between commercial and noncommercial purposes. Indeed, disputes over such agency determinations themselves could only engender greatly increased perceptions of inequity and resulting litigation.

Moreover, the direct assessment of different levels of fees merely because of the presence or absence of commercial interest is problematic. It is not clear why, for example, a small businessman attempting to learn about Government actions affecting him should be required to pay higher fees than an individual who files a far broader and burdensome request out of sheer curiosity. As the Agee case graphically illustrates, there is no public interest in subsidizing all "noncommercial" requests. Finally it should be noted that the bill would not affect at all the ability of individuals to obtain at no cost those records in which they have the greatest and most legitimate personal interest—that is, records about themselves—since those records are available under the Privacy Act.

For these reasons, the bill rejects a three tier system of fees, and adopts essentially a two tier system. Each requester should be charged the costs directly attributable to responding to his request, except in the case of small requests or where waiver or reduction of the fee would be in the public interest. The Administrative Conference of the United States, an official agency which has recently studied the subject of fees under the Freedom of Information Act at length, also rejected the three tier proposal discussed above, and has endorsed an approach similar to that taken in the bill.

The Federal agencies now cannot charge for their actual costs of processing FOIA requests. They are limited to search and copying charges, many of which bear little relation to the actual processing costs incurred by the agency, particularly for larger document requests. The 1974 amendments withdrew from the agency the ability to charge for processing time and resources spent on such issues as the excision of exempt portions from a disclosable document. If an agency were requested to disclose criminal investigation records to an alleged leader of an organized crime syndicate, for example, the 500-page file could be readily retrieved and inexpensively reproduced. But the agency could not charge that requester for its prerelease examination of that file and for the time needed to delete sensitive law enforcement information from the documents released. Similar situations have arisen with foreign commercial requesters who have sought confidential business data files by U.S. firms. The Federal agency must, as a practical matter, take sufficient measures to excise commercial documents, but under current law the U.S. taxpayers must subsidize that service for the competitor.

The committee intends that the amount of fees to be set by agency regulations shall include actual retrieval costs, including location and transmission of the records from a regional office or Federal records center to the agency disclosure office. The costs of reproduction of records should be calculated by regulation to recoup overhead, equipment and personnel costs of the duplication facility.

The bill shows that the charges for processing will accord with the customary practice of the agencies to screen the contents of requested documents to ascertain which portions are disclosable. Services involved in examining records for possible withholding or deletion include identification of personal or business privacy information, or other exempt information, deletion of the exempt material, examination of the deletions by a responsible official of the agency's disclosure staff or legal counsel, and recopying to produce the disclosable pages of documents.

These current sound practices may be supplemented by notification to the submitting person and consideration of objections by the agency, as provided in section 4 of the bill. Costs of that determination of possible withholding may be considered directly applicable to the request where the notification and objection process involves the carrying out of determinations of law or policy. The agency is not permitted to charge for costs incurred in the resolution of general applicable issues of law or policy, including those novel issues of precedential effect as to which interagency consultation is necessary. For example, a requester seeking disclosure of an import document may be charged the reasonable costs incurred by the Customs Service in locating the document, existing the exempt business information therefrom, notifying the submitting importer, determining the portions to be withheld, reproducing the pages to be released, and mailing the pages to the requester. Costs of that agency in interactions with the Department of Justice on precedential disclosure issues, the Office of Management and Budget on reports disclosure issue, or the Treasury Department on general departmental disclosure policies will not be chargeable to the requester.

An agency may provide for standardized charges for categories of requests having similar processing costs, for example, files on current license holders, permit applicants, prisoners, et cetera, if the agency determines that requests within the category are likely to have similar processing costs.

COMMERCIALLY VALUABLE TECHNOLOGICAL INFORMATION

The bill also would add a new provision to 5 U.S.C. 552(a)(4) to permit an agency to charge additional or alternative fees for technological information that has a commercial market value and that was generated by the Government at substantial cost to the public. These fees would reflect that fair market value of the information and would be determined by the agency.

The present act does not take into account the fact that such valuable technological information must now be turned over to private parties for fees that reflect little more than the cost of copying. That results in an unjustifiable windfall to a few people, who alone benefit from information that all taxpayers paid to develop.

This provision carries out Federal policy as enunciated in the Federal User Fee statute, 31 U.S.C. 483a. See. *New England Power Co.*, v. *Federal Power Commission*, 467 F.2d 425, aff'd 379 U.S. 966 (1972). Thus, it allows the Government to recoup costs of developing the valuable technological information from "special beneficiaries" who received a commercial benefit. Nothing in the bill, however, would su-

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

persede a statute specifying the fees for obtaining particular types of records.

In summary, Government agencies generate or purchase a great deal of technological information each year, at a substantial cost to the public. Some FOI requests have sought access to this information in order to obtain commercially valuable portions for a commercial purpose.

This subsection will not override fees chargeable under user cost recovery statutes or other statutes setting levels of fees for particular types of records. See, e.g., *SDC Development Corp.* v. *Mathews*, 542 F.2d 1116 (9th Cir. 1976).

PUBLIC INTEREST WAIVER OR REDUCTION OF FEES

An exception from the normal cost recovery principle is provided for situations in which members of the public request documents and the costs of collection of fees for the request exceed or equal the amount of the fee. Where correspondence, calculations of fees, and financial processing involved with funds received, would cumulatively cost the Government more than the sums which the individual requester would pay, the agency should not charge a fee. The agency may set a threshold figure, such as $25, below which the agency will not charge for disclosure requests. The same requester sometimes makes similar requests on a repetitive basis in such a situation the person making that series of requests can be charged the actual costs of responding to that set of requests. Providing for actual cost recoveries should terminate the implicit subsidies which federal agencies have been providing to the commerical services which make anonymous requests for disclosure of documents on behalf of unnamed clients, and then receive the benefit of agency search, selection and excision cost for free. One such commercial organization. FOI Services, Inc., of Rockville, Md., charges several hundred dollars annually to each of its subscribers, who then pay $18.50 plus mailing for each document which the service anonymously requests from Federal agencies. The company was founded by several Washington lawyers in 1975 and has prospered to the extent that it now issues sales catalogs of all the copies of information which it has on file from Federal agency disclosure, which can be cheaply obtained by phone request at a flat fee. The subsidization of such services is not a useful expenditure of taxpayer funds, and the provisions on cost recovery will remedy that part of the commercial requesting service problem.

With regard to fee waiver policies, the use to which information is to be put upon its disclosure can be a rational basis for distinguishing between requesters. The charges for processing of disclosable information shall be absorbed by the agency and shall not be charged to the requester if the information is determined by the agency to meet each of two specific tests: First, its requester is not seeking disclosure for a commercial use; second, the person is within one of three classes stated in this subsection.

For example, information about a new Government furniture program may be requested by an academic researcher and by a commercial data retrieval service. The academic user would not pay for the review, excision and deletion costs, and may request that the agency recognize its primary benefit to the general public from dissemination of that information. Upon an agency determination that the furniture information disclosure primarily benefits the general public, the agency shall reduce or waive charges for search and duplication. But the commercial data retrieval service will pay all charges for the access. If the present and future use is indefinite, the agency may condition the waiver upon assurance of nonresale of the documents released or upon the determination of any other circumstances or conditions, which, in the agency's judgment, establishes the noncommercial use to which the information is intended to be put.

DISPOSITION OF FEE COLLECTIONS

A well-articulated comment was made, by several of those appearing before the committee, that agencies have no source of funds to compensate for the additional processing costs of FOI requests. That cost can sometimes strain the agency budget. This subsection permits the agency to retain half of its compliance costs, which the agency shall apply to offsetting its costs of compliance with FOIA disclosure requirements.

This provision also carries language giving the agencies an incentive to comply with this bill's time limits.

With respect to time limits, the committee's extensive hearings disclosed that the current limits can be unrealistic. S. 774 substantially retains existing time limits, but allows 30 instead of 10 working days in the case of certain specified "unusual circumstances."

TIME LIMITS

Section 3 of the bill recognizes the need for timely responses to requests for information. Accordingly, the bill retains the existing 10-day requirement for initial response to a request. This section also provides more realistic time limits in specifically defined, unusual circumstances and provides for expedited processing in the public interest.

APPLICATION OF EXISTING TIME LIMITS

The act currently provides that within 10 working days an agency must make an initial determination whether to disclose the requested documents and, if the decision is made not to disclose the requested documents, to notify the requester of the reasons why documents are exempt. Upon a requester's appeal of an adverse decision, the agency thereafter has 20 working days to determine the appeal. By notice to a requester, an agency may extend those time limits for 10 working days in "unusual circumstances," such as where there is a need for additional time to search for and collect the documents from distant offices, to examine a voluminous amount of records, or to consult other agencies on the records. If an agency fails to comply with these deadlines, the requester is deemed to have exhausted his administrative remedies and may file a suit in district court to compel disclosure. Section 552(a)(6)(c) nevertheless permits the court to allow, in "exceptional circumstances," additional time for agency processing, provided that the agency is exercising "due diligence."

The complexity and sheer volume of the requests received by many agencies often renders compliance with the current time limits impossible. Recognizing the inherent inability of many agencies to process requests within the specified time limits, many courts have freed agencies of the need to comply with such time limits by resorting to use of the "exceptional circumstances" and "due diligence" provisions in section 552(a)(6)(c). In the leading case, *Open America* v. *Watergate Special Prosecution Force*, 547 F.2d 605 (1976), the U.S. Court of Appeals for the District of Columbia Circuit rules that—

> "exceptional circumstances exist" when an agency, like the FBI here, is diluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resourses are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests.

Id. at 616.[1] Accordingly, the court ruled that, under those circumstances, the Act's time limits "become not mandatory but directory." Id. It is then sufficient for the agency to process all requests on a first-in, first-out basis, unless the requester can demonstrate to a court "exceptional need or urgency" for preferential treatment. Id.

The unrealistic time limits in the current act cause serious problems for both agencies and requesters. For example, agencies are frequently pressed to engage in hasty processing, which increases the likelihood of premature denials, unnecessary litigation, and serious errors. Hasty agency processing to comply with an imminent deadline may result in improper release of trade secrets or other sensitive information. In his testimony before the Constitution Subcommittee, Pospere S. Virden, Jr., senior counsel of Honeywell, Inc., testified that:

> The time limits stipulated in the FOIA for responding to requests, usually ten days, are totally unrealistic for agency personnel to

[1] See also, *Exner* v. *Federal Bureau of Investigation*, 542 F.2d 1121, 1123 19th Cir. 1976.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

determine whether or not to withhold or release documents in the procurement process which, in each instance, may total hundreds or even thousands of pages. Faced with the overwhelming mass of material a tight deadline, the natural tendency is to release all the requested material as an expedient solution . . . If the wrong decision is made to release, the submitter has no effective remedy since FOIA provides no retrieval mechanism or restrictions on the use of documents once they leave the government.

For the requesters, on the other hand, the inability of many agencies to meet unrealistic expectations has often led to a general dissatisfaction with the act's operation, as well as needless litigation. Moreover, the present first-in-first-out system prevents agencies that have a backlog of requests for responding promptly even to small Freedom of Information Act requests when their processing is congested, except where the requester can demonstrate exceptional need or urgency. Members of the public and the news media are often unable to get timely responses from agencies that receive a large volume of requests.

UNUSUAL CIRCUMSTANCES

Section 3 of the bill would retain the existing requirements of the act for a response to a request within 10 working days and a determination of an appeal within 20 working days.

The bill, however, would revise the provisions dealing with unusual circumstances, both by extending the allowable time period and by specifying additional circumstances in which more time for completion of agency action would be allowed. In a great number of cases, it is simply impossible for agencies to search for, review, redact, and release documents in 10, or even 20, working days. The 10-day limit of extensions is simply too short to be realistic, and the list of unusual circumstances does not cover certain cases where additional time is legitimately needed. As Robert L. Saloschin, former Director of the Department of Justice's Office of Information Law and Policy [now Office of Information and Policy] testified before the Constitution Subcommittee:

> Two changes are, therefore, needed. First, there should be a more realistic list of circumstances that may warrant a time extension, including, for example, the need to obtain input from a private submitter of business information. Second, an agency should, by notice to the requester, be able to extend the limits to a specified date which it finds necessary because of circumstances listed in the statute, giving its reason for the extension, and subject, of course, to the requester's right to file suit challenging the extension as unwarranted or excessive.

The bill would increase the maximum extension allowed in the case of unusual circumstances from 10 to 30 days. Even a 30-day period is insufficient in cases where, for example, a request covers more than 1 million pages of documents and takes many months, even years, to process. In most cases though, an extension of no more than 30 days would be sufficiently long that the agency could realistically complete its processing of a request, yet sufficiently short that the requester would not be unduly inconvenienced. Indeed, it should be noted that in many cases courts applying the Open America rule have allowed extensions far longer than 30 days provided in the bill—in some cases far more than a year—because of backlogs.

In addition to extending the time periods, the bill adds three new provisions to the list of unusual circumstances. First, there is the case of a request for confidential business information submitted by a private party. In order to determine whether the submitted information is entitled to the protection of exemption 4 and to follow the procedures for notification set forth in section 4 of the bill, additional time to respond to the request is undoubtedly required.

Second, the bill codifies in part the existing case law by authorizing an extension in the case of "an unusually large volume of requests or appeals received by an agency, creating a substantial backlog." Although the problem has not occurred at every agency, there are numerous instances where agencies have received such a large volume of requests and appeals that it is impossible to meet the short time limits of the act. In the absence of a better mechanism in the act itself, the courts generally have allowed additional time, as long as the agency is exercising due diligence and is processing the requests on a first-in-first-out basis. The bill would provide a specific basis for such an extension while the court retains authority to review the agency's conduct and either allow additional time or require a response.

Third, the bill would allow an extension in those few cases where the head of the agency specifically determines that a request cannot be processed within the 10-day period without significantly obstructing or impairing the timely performance of a statutory agency function. In his testimony before the Constitution Subcommittee, Mr. Saloschin observed further that:

> The present time limits merit legislative attention for two reasons: (1) because they tend to indicate that FOIA work should always take precedence over other agency responsibilities, and (2) because they put government agencies in an apparent position, in the eyes of the public, of violating the law even when large backlogs or a large or difficult request prevents adherence to the statutory limits. (pp. 17-18 of his July 15, 1981 testimony.).

This provision would apply where the other unusual circumstances do not exist, yet the diversion of agency personnel to respond within 10 days would impair important agency functions. This provision would apprproiately recognize that, although prompt response to FOIA requests is a high agency priority, there are certainly some specific instances in which key agency personnel should not be diverted from assigned agency functions. It is intended that this provision be applied sparingly, and only with the specific approval of the head of the agency.

EXCEPTIONAL CIRCUMSTANCES

In addition to the unusual circumstances of paragraph (6)(B), the act currently contemplates judicial extensions of time in exceptional circumstances, provided that the agency is exercising due diligence. If a requester files suit after receiving no response from the agency, the agency is free to request, and the court to grant, additional time. This bill does not alter this language or intend to affect its implementation in the slightest. However, there is still a gap in the current act, during the time period in which the agency is technically in violation of the statute, but has no means to rectify the situation or to validate its actions.

This requirement would keep requesters better informed of the status of their requests and should also reduce the filing of unnecessary lawsuits because of timing. Moreover, although a court would still be able to review an agency's explanation of exceptional circumstances, an agency would not be considered to be in violation of the law until a court ruled on the issue.

EXPEDITED ACCESS

The bill would also add subsection (a)(6)(E) to the act. This new provision would require each agency to promulgate regulations whereby a requester who can demonstrate a compelling need for expedited processing and whose request will primarily benefit the general public, may be given processing priority over other requesters. The occasional need for expedited access was elaborated by a recently released report by the American Bar Association. In their report, the ABA noted that:

> It is as inexcusable for agencies to take the full time period to respond to requests where the information is clearly available and releasable, as it is to bind agencies to the short timeframes when they cannot be practicably met. (Final draft of the Report of the American Bar Association, Section of Administrative Law, p. 4.)

Reform of the privacy exemption is also substantiated by the Judiciary Committee's hearings and bill. As it currently reads, the privacy exemption contains a threshold test that often frustrates the substantive content of the exemption. Thus, even if a release of a record would constitute unwarranted invasion of personal privacy, it does not apparently qualify for exemption unless the record is found in a personnel, medical, or similar file. Congress intended in 1966 to protect personal privacy, not file labels. Therefore, in accord with recent Supreme Court decisions, S. 744 eliminates this formalistic limitation on appropriate privacy protection and thus enhances privacy protections.

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Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

PERSONAL PRIVACY[9]

LEGISLATIVE BACKGROUND

When the original Freedom of Information Act was reported out of the Senate Judiciary Committee in 1965, one of its nine exemptions provided that personal records could be withheld if disclosure would involve a "clearly unwarranted invasion of personal privacy." 5 U.S.C. 522(b)(6). In addition, the committee "decided upon a general exemption" covering all types of personal files "rather than a number of specific statutory authorizations for various agencies." S. Rept. No. 813, 89th Cong., 1st sess. 9 (1965). Thus the language of exemption 6 called for protection of "personnel and medical files and similar files." 5 U.S.C. 552(b)(6). Both the House and Senate reports implicitly suggested that the term "similar files" referred to those files, outside of medical and personnel records, which contain potentially harmful, personal information. The House report, for example, explained that "a general exemption for [this] category of information is much more practical than separate statutes protecting each type of personal record." H. Rept. No. 1497, 89th Cong., 2d sess. 11 (1966). This broad exemption for personal information was then tempered somewhat by the condition that disclosure would have to constitute a clearly unwarranted invasion of personal privacy.

Since passage of the FOIA with its nine exemptions, however, the Federal courts have rendered contradictory opinions which have often nullified the original intent of Congress. In some cases, for instance, the courts have given broad meaning to the definition of "similar files" while in other cases, its language has been narrowly and erroneously interpreted. Moreover, the courts have rendered varying definitions of what constitutes a "clearly unwarranted invasion of personal privacy." Some courts, for example, have construed the language as a qualifier that precludes almost any opportunity for exemption. Other court rulings, however, have taken a more practical approach, allowing significant exemption claims to stand.

Study of the major cases dealing with exemption 6 illustrates the inability of the courts to consistently interpret the language of the exemption and preserve the original intent of Congress when it passed the Freedom of Information Act. Indeed, Robert L. Saloschin, former Director of the Office of Information Law and Policy testified before the Subcommittee on the Constitution that some of the more recent court decisions "seriously reduce the ability of Federal agencies to protect information about individuals when release of the information may adversely affect the individuals and where there may be no public interest to be served by such release." FOIA Hearings supra. Moreover, Mr. Saloschin pointed out that such decisions "run counter to the intent of Congress in FOIA and the Privacy Act." Id. The section which follows illustrates how the courts have adhered to the purpose of Congress in some cases while straying from that intent in other cases.

JUDICIAL HISTORY

One of the first major appellate court cases concerning FOIA decided in 1969, dealt with medical files that were complied by the Government under a pledge of confidentiality. Upon request for disclosure, the Food and Drug Administration invoked exemption 6, maintaining that the language of the exemption allowed them to withhold any medical or personnel files. The Court of Appeals for the District of Columbia circuit held in this case, *Ackerly* v. *Ley*, 420 F.2d 1336 (D.C. Cir. 1969), that exemption 6 could be invoked only if the requested information passed a two-tiered test. First, the record had to be a medical personnel, or similar file and second, disclosure of the file would have to constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The court found that although the medical files in question passed the threshold test they failed to satisfy the balancing requirement, because, the court said, disclosure would not have caused an invasion of privacy that was clearly unwarranted.

One decision affecting the Freedom of Information Act occurred 2 years later in *Getman* v. *NLRB* 450, F.2d 670 (D.C. Cir. 1971). In this case, two law professors doing research on the workings of union representation elections which had been contested by employers, requested NLRB lists of eligible workers in order to interview those who did or did not vote. The court stated that its finding of an invasion of personal privacy depended upon, de novo consideration of the balance between the privacy rights of the affected individuals and public interest in disclosure. Next, however, the court inferred that Congress intended a very narrow construction of this FOIA exemption. In other words, the court opinion created the presumption that when privacy concerns and the public interest are essentially equal, the balance should tilt in favor of disclosure. The court could just as easily have found that Congress intended a general protection for personal privacy, rather than a narrow application of the exemption's 20 words.

In an opinion concurring only in the judgment, Circuit Judge MacKinnon wrote that Congress did not foresee the negative effects that the somewhat ambiguous language of exemption 6 would precipitate. Although he did not favor disclosure of the names and addresses of the union voters, Judge MacKinnon felt obligated to follow the court's interpretation of the exemption:

> It seems to me that furnishing bare lists of various Government files is not the sort of disclosure that Congress basically had in mind in enacting the Freedom of Information Act. But in my opinion, the Act as it presently exists practically requires the disclosure of such lists on demand. One need not elaborate on the various abuses that could result if lists of people as classified by the Government for particular purposes became available on demand in wholesale lots. If this situation is to be corrected, it will require an amendment to the Act

Regarding the balancing test, Judge MacKinnon also wrote that he could not predict whether disclosure would constitute a "clearly unwarranted invasion" of privacy. Although he suspected as much, he felt obligated to allow disclosure since the extent of the privacy invasion could not be known beforehand. Id. Thus, the "would constitute" language was read literally to require the court to conclude that an invasion of personal privacy absolutely would occur before the protection of the exemption could be invoked. Once again, this reads narrowly Congress primary motivation to protect privacy.

A similar court ruling in *Kurzon* v. *Department of Health and Human Services*. 649 F.2d 65 (1st Cir. 1981), more recently held that names and addresses of unsuccessful applicants for research grants from the National Cancer Institute could not be withheld, despite possible injury to the professional reputations of those involved. In its opinion, the Court of Appeals for the First Circuit stated that "by restricting the reach of exemption 6 to cases where the invasion of privacy is not only unwarranted but clearly so, Congress had erected an imposing barrier to nondisclosure." Id. at 67. The court might have considered in more detail, however, that this type of record could clearly have harmed the individuals who were denied grants. If Congress had gone agency by agency, statute by statute, and considered all possible instances where a record's disclosure might jeopardize privacy rights, this instance of undue embarrassment or potential harm to a professional reputation would have been included. Instead, Congress enacted a general protection for privacy that should be read to include such privacy rights. In short, the individual right to privacy—often acknowledged by the Supreme Court as

[9] See. *e.g., Department Air Force* v. *Rose*, (425 U.S. 352, 362-67 (1976); *Crooker* v. *Bureau of Alcohol, Tobacco, and Firearms*. No. 80-1278 D.C. Cir. Dec. 8, 1981) (en banc; Sludek v. *Bensinger*. 608 F.2d 899, 901-02 SH. Cir. 1979): *Jordan* v. *Department of Justice*, 591 F.2d 753, 767-71 (D.C. Cir. 1978) *(en banc) Ginsberg, Feldman & Bress* v. *Federal Energy Administration*, 591 F.2d 717, 721-31 (D.C. Cir.), *vacated and reheard (en banc)* 591 F.2d 752 (D.C. Cir. 1978, *(per curiam), aff'g by an equally divided court*. Civ. No. 76-27 (D.D.C. June 18, 1976), *cert denied*, 441 U.S. 906 (1979). This revision does not change the past disclosure practice for those administrative, noncriminal enforcement manuals which agencies such as the Food and Drug Administration or the Federal Trade Commission have heretofore released for guidance of the public Beneficial advances involuntary compliance among manufacturers, distributors, and other regulated forms have resulted, and should continue to flow, from sharing of already available administrative (noncriminal) documents. It would be retrogressive to undo that progress at this time.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

a fundamental guarantee [10] cannot be idly set aside whenever some member of the public may have an interest in seeing a record in Government files.

Access to Federal files is simply not a constitutional right, but a statutory opportunity provided when and if Congress chooses. As such, privacy rights, granted some degree of constitutional status according to the Supreme Court, should properly predominate over casual curiosity—inspired interests in access to sensitive information about an individual.

Wine Hobby USA v. *Bureau of Alcohol, Tobacco and Firearms.* 502 F.2d 133 (3d Cir. 1974) is a decision more in line with the original purpose of the sixth exemption. In this case, a distributor of amateur winemaking equipment sought the names and addresses of families who make wine for their private use and thereby claim tax-exempt status. The lower court ruled that names and addresses are not as highly intimate and personal as medical and personnel files and that they should be disclosed, regardless of the severity of the privacy invasion. 363 F. Supp. 231 (E.D. Pa. 1973). The Court of Appeals for the Third Circuit, however, proceeded directly to the balancing test and held that the privacy rights involved outweighed the negligible public interest served by disclosure. Although names and addresses are not, strictly speaking, similar files, the court wisely rejected any overly legalistic interpretation. Instead, through study of the legislative history, the court determined that "disclosure of names of potential customers for commercial business in wholly unrelated to the purposes behind the FOIA and was never contemplated by Congress in enacting the Act." (Id. at 137). This holding gives proper weight to Congress basic objective of privacy protection.

Although an occasional district court finding has missed the significance of the Wine Hobby case, see *National Western Insurance Co.* v. *U.S.*, 512 F. Supp. 454 (N.D. of Texas 1980) the more authoritative weight of opinion follows the District of Columbia Circuit ruling. For example, in *Disabled Officers Associations* v. *Rumsfeld*, 428 F. Supp. 454 D.D.C. 1977), a case concerning disclosure of lists, the D.C. District Court aligned itself with the Wine Hobby court and clarified that public interest in disclosure must override privacy rights. Although it permitted names and addresses to be released to a nonprofit organization, the court explained that disclosure is allowed only when the plaintiff can show that the request is motivated by a strong overriding public interest.

In Rose v. Department of the Air Force, supra, the Supreme Court ultimately ordered disclosure of private information, although it gave some consideration to protection claims under exemption 6. In that case, the student editors of a law review requested name-deleted copies of confidential Air Force proceedings against cadets charged with violating the honor code. The Air Force withheld the proceedings on the grounds that reconstruction of deleted names could be made from circumstantial information that would be provided. The Supreme Court held that exemption 6 "is directed at threats to privacy interests more palpable than mere possibilities." Id. at 35. Once again the Court seemed to suggest that the "would constitute" language in exemption 6 requires a nearly certain showing of palpable damage to privacy. Since the negative effects of disclosure could not be fully known until after the proceedings were made public, the Court ordered their release to the law review. In its memorandum, however, the Court was troubled by the difficulty of predicting potential future privacy harms. If, for example, the vitality of this exemption hinged on an agency's temporal problem of attempting to show in advance of a disclosure that it might have future adverse consequences, Congress intent to protect privacy rights could be substantially frustrated.

The reasoning of the Supreme Court in Rose raises the temporal dilemma; that is, the problem of predictability through time, which has been adequately addressed by other courts. For instance, *Tuchinsky* v. *Selective Service System*, 294 F. Supp. 803 (N.D. Ill. 1969), recognized that the possibility of a clearly unwarranted invasion of privacy must also be considered before releasing information for public scrutiny. In that case, a draft counselor requested the names and personal data of officials serving on the Selective Service Board. The court agreed to release the names of the Board officials but not personal information unless those involved gave their consent. As a result, the individuals were allowed the option of protecting their own privacy. This is an excellent way to carry out the basic intent of the sixth exemption while also recognizing disclosure interests.

In *Rural Housing Alliance* v. *Department of Agriculture*, 498 F. 2d 73 (D.C. Cir. 1973) the Court of Appeals for the District of Columbia Circuit upheld a broad interpretation of the similar files test and maintained a proper balancing requirement. The Federal question arose from a request for a Department of Agriculture report on governmental housing discrimination. The Department withheld most of the report on the premise that it should not reveal information relating to marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and personal reputations. The court agreed that such information fits the description of a "similar file" and that a broad interpretation was necessary "to protect individuals from a wide range of embarrassing disclosures." Id. at 77. The circuit court then remanded the case for further consideration of whether disclosure would cause a clearly unwarranted invasion of privacy. It instructed the district court to consider two factors when balancing interests under exemption 6. First, the court had to determine if disclosure would precipitate an invasion of privacy and, if so, how substantial that infringement would be. Second, the court had to decide the legitimacy and strength of the public interest in disclosure and whether the data could be obtained from other sources. Id. at 77-78. In addition, the court suggested that mere deletions of names is not always sufficient to protect personal privacy since positive identification can often be inferred from descriptive information, Id. at 78.

The court also seemed to agree with a Department of Agriculture suggestion that the most equitable way to gain information would be through individual releases by the parties involved (see Tuchinsky v. Selective Service System, supra) This would permit proper control over one's personal life, allow substantial disclosure of information which serves the public interest, and thereby reduce litigation. As a last resort, if the affected individuals refused voluntary disclosure, court action either by the requester seeking access or the individual with privacy at stake seeking to enjoin disclosure could be the last recourse. Id. at 82-83. This bill endorses this recognition of the primacy of individual privacy among the other considerations weighed in the passage of exemption 6. If court action, as a last recourse, is necessary to protect individual privacy, the committee would endorse procedures similar to those created allowing court access for submitters of confidential business information in sections 5 and 6 of S. 730.

Other courts have not been as sensitive to the basic thrust of (b)(6), applying extremely narrow interpretations of the "similar files" language. In *Robles* v. *Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973), the plaintiff sought information gathered by the EPA on homes where uranium tailings had been used for fill. The court ordered disclosure based on the premise that such information would not be sufficiently similar to medical and personnel data, a view the committee finds to be a misconstruance of congressional intent. In the first place, this assumes Congress meant to supply a limit on privacy protection with the "similar" language—a reading never suggested at any stage of congressional debate. On the contrary, Congress picked the vague and general term "similar" to insure a broad coverage for privacy regardless of the kind of file in question.

[10] See *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Katz* v. *United States*, 389 U.S. 347 (1967); *Myer* v. *Nebraska*, 262 U.S. 390 (1923).

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Otherwise, as I have already noted, "this formalistic file limitation * * * may permit disclosure of 'clearly unwarranted invasions' of privacy simply because the invasion is found in the wrong kind of file." A reading more consistent with congressional intent would consider Congress overriding respect for privacy and consider any file similar to medical or personnel records if disclosure could be expected to reveal sensitive or intimate personal information. The test for exemption should focus on privacy, not file labels.

Moreover, the 4th Circuit in Robles set guidelines which rejected any balancing test whatsoever, claiming that the right to disclosure under FOIA is not to be resolved by (a) balance of equities or weighing need or even benefit. Id. at 848. In other words, the court attempted to invoke the "any person" rule of FOIA which states that any information given to one requester must be open to any other requester regardless of the purpose or motivations for the requests to limit a balancing of privacy against disclosure considerations. Proper protection for privacy should always invoke such balancing which necessitates an inquiry into the purposes, and potential disclosure impacts of requests. (See *Department of Air Force* v. *Rose, supra; Alliance* v. *Department of Agriculture, supra; Campbell* v. *U.S. Civil Service Commission,* 539 F.2d 58 (10th Cir. 1976); *Aug.* v. *National R.R. Passenger Corp.,* 425 F. Supp. 946 (D.D.C. 1976); *Tuchinsky* v. *Selective System, supra.*) The alternative view dangerously disregards Congress concern for privacy by innovatively asserting that disclosure was never to depend upon the interest or lack of interest of the party seeking disclosure (see *Outlaw* v. *Schultt,* 517 F.2d 168 (D.C. Cir. 1975) and Davis, supra. Section 3A.4 at 120). Such restrictive readings fail to appreciate sufficiently the importance of fundamental privacy rights.[10]

In *Board of Trade* v. *Commodity Futures Trading Commission,* 627 F.2d 392 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia Circuit went against the method it employed to decide Getman, and its broad interpretation of the similar files test in Rural Housing. In this case, the Trading Commission refused to divulge some of its trade sources. Although disclosure may have constituted a clearly unwarranted invasion of privacy, the court held that trade sources cannot be classified as a "similar file" and therefore must be divulged. Thus, rather than considering the second half of exemption 6, that is, whether disclosure was a clearly unwarranted invasion of privacy, the court based its decision solely on an extremely legalistic interpretation of the similar files threshold test.

On the other hand, the Court of Appeals for the 5th Circuit in *Pacific Molasses Co* v. *NLRB,* 577 F.2d 1172 (5th Cir. 1978), rendered a more realistic interpretation of the similar files test. In this case, an employer at a nonunion company petitioned the NLRB for the names of his employees who carried union cards. Clearly the mere disclosure that certain employees possessed union cards did not meet the threshold test requirement that the information be similar to personnel and medical records. The fifth circuit rules, however, that union card information was highly personal in this case and thereby met the similar files requirements. This reading "similar files" properly focuses on privacy rather than "similarity."

The next two cases represent the most significant examples of the dangers that can result from an interpretation of the similar files test that is too narrow. In *Simpson* v. *Department of State,* 648 F.2d 10 (D.C. Cir. 1980), diplomatic historians and scholarly organizations sought biographical data on foreign service personnel employed by the Department of State. Four years earlier the Department had begun classifying such information because of the threat this disclosure imposed on Americans employed in U.S. Embassies. The Department feared that disclosure would increase the probability that terrorists, using biographical information as a justification for violence, would attack foreign service personnel with imperialist, capitalist, or similar backgrounds. The U.S. District Court for the District of Columbia upheld the State Department contention on grounds that the biographical data fell within the "similar files" category and that disclosure would constitute a "clearly unwarranted invasion of personal privacy." The Court of Appeals for the District of Columbia Circuit, however, by virtue of a narrow construction of "similar files" following Board of Trade, ruled that information contained in files other than personnel and medical records must contain data that is as intimate and highly personal as that found in personnel and medical files. Despite the fact that public release of foreign service personnel biographies are far greater potential for harm than similar data about other U.S. citizens, the court found that such information could not be classified as a similar file. It refused, thereby, to consider the probability that disclosure would be a clearly unwarranted invasion of privacy that threatened the lives of those involved.

This contradictory doctrine should be put to rest by a recent Supreme Court ruling, *Department of State* v. *The Washington Post Co.,* No. 81-535 (— U.S. — May 17, 1982). In his opinion, released 1 day before S. 1730, the 97th Congress version of S. 774, was reported from full committee and months after subcommittee approval, the court significantly broadened the interpretation of the threshold requirement. The Federal question arose when the Washington Post requested any documents from the State Department which would verify whether two members of the Iranian revolutionary government were citizens of the United States or had applied for citizenship. The State Department denied the request because the conditions in Iran at the time were such that anyone in the revolutionary government "who is reputed to be an American citizen would "be in physical danger from some of the revolutionary groups that are prone to violence." Affidavit of Harold Saunders, January 14, 1980, app. 17. The D.C. Circuit, applying its narrow "similar files" rule from Board of Trade held that exemption 6 was unavailable.

On a grant of certiorari to the Supreme Court, the Court ruled in favor of the State Department, noting that Congress intended "a broad rather than a narrow meaning" of the term "similar files." Moreover, the Court wrote that "had the words 'similar files' been intended to be only a narrow addition to 'personnel and medical files,' there would seem to be no reason for concern about the exemption's being 'held within bounds'" by the balancing test, "and there surely would be clear suggestions in the legislative history that such a narrow meaning was intended. We have found none." Id. at 5. The Court made clear in its decision that potentially harmful information should not be released solely because of a failure to fall under the correct filing label. The Court wrote that "an individual should not lose the protection of exemption 6 merely because it is stored by an agency in records other than 'personnel' or 'medical' files." Id. at 6. This decision does maintain the threshold test, but it properly recognizes that this test should not frustrate the substantive content of the sixth exemption.

After reviewing the judicial history of exemption 6, it becomes obvious that the original intent of Congress has been obscured in a myriad of contradictory opinions. While some courts have probed the House and Senate reports of exemption 6 for an understanding of its meaning, other courts, in applying their own varied philosophies on personal privacy, have rendered narrow and often impractical interpretations of the exemption. Erroneous interpretations of the threshold requirement, for instance, have often precluded exemption of records that are intimate enough to cause a "clearly unwarranted invasion of personal privacy."

S. 774 will remedy this inequity and make certain that the threshold "similar files" standard, even after Post, will never again frustrate privacy protection by eradicating the threshold

[10] A more responsible reading of FOIA's "any person may request disclosure, but subject to the limitations of the exemptions. This may require, for example inquiry into the requester's status, motivations, purposes, and potential uses for the requested record.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

test altogether. The new language of the bill states that all "records or information concerning individuals" are exempt from disclosure if the requirements of the balancing test are met. As a result, the decision to grant a request for information directly rests upon the proper balance between the public interest and the individual's right to privacy. There is no need for a threshold test—filing level distinctions are eliminated.

Although some court rulings recognize Congress primary concern for privacy—see, for example, Department of State against The Washington Post Co., supra; Wine Hobby against Bureau of Alcohol, Tobacco and Firearms, supra, other courts have construed the balancing test to tilt in favor of disclosure. In other words, if the arguments favoring disclosure are approximately equal to those in favor of exemption, the courts have sometimes permitted disclosure. This construction of the balancing requirement does not comport, however, with the efforts of Congress to protect individual rights through passage of the Privacy Act (5 U.S.C. 552a), and the Right to Financial Privacy Act (12 U.S.C. 3401). Indeed, by definition, a test which purports to balance the public interest with personal privacy interests should not tilt in favor of either side.

S. 774 will provide a proper balance by specifying that records be protected if their release "could reasonably be expected to consitute a clearly unwarranted invasion of personal privacy". This change in the language of the balancing test operates in two ways to rectify past misunderstandings of the exemption. First, it solves the temporal problem. The addition of the phrase "could reasonably be expected" reduces the burden of having to demonstrate beyond doubt that a future disclosure would consitute a clearly unwarranted invasion of privacy. The reasonable expectation that such an invasion could possibly occur, rather than absolute certainty of its future occurrence, is all that should be necessary to protect precious privacy interests and it is all that will be necessary for exemption. Second, this change is intended to relax any rigid applications of the balancing test.

The Judiciary Committee bill also contains two new exemptions to protect technical data at—NASA predominantly national security information—that may not be lawfully exported without a license and to protect Secret Service records.

10. SECTION 11: ADDITIONAL EXEMPTIONS

TECHNICAL DATA

Section 12 of the bill adds a new exemption (b)(10) to the Freedom of Information Act to exempt from mandatory disclosure, technical data that may not be exported lawfully outside of the United States except in compliance with the Arms Export Control Act, 22 U.S.C. 2751, *et seq.*. and the Export Administration Act of 1979, 50 U.S.C. App. 2404.

Testimony from the Justice Department and the Department of Defense has made the committee aware that technical data in the form of blueprints, manuals, production, and logistics information formulas, designs, drawings, and other research data in the possession of agencies may be subject to release under the Freedom of Information Act. Much of this data was either developed by the Government or more typically submitted to the Government in conjunction with research and development or procurement contracts. An example of the type of problem not contemplated by Congress during formulation of the FOIA exemptions in 1966 is the request from a foreign national seeking 70 documents totaling more than 9,000 pages which deal with the internationally sensitive area of satellites and their use by military organizations. An expense of over $4,000 in U.S. taxes would be required by the Department of Air Force in addition to more than 1,000 mid-level management manhours, on a nonreimbursable basis, just to prepare the material for review. Moreover, a substantial portion of this sensitive, defense information is technical material on the critical military technologies list which is subject to Federal export laws. In other instances, agencies such as the National Security Agency have been subjected to court battles which require the submission of lengthy and detailed affidavits justifying the withholding of cryptological information. Ann Caracristi, Deputy Director of the National Security Agency, testified before the Constitution Subcommittee that these affidavits "become even more sensitive than the requested information itself because of the need to place it in context and explain its significance." FOIA hearings, supra.

This new exemption would insure that Congress intent to control the dissemination of sensitive technology could not be frustrated by a Freedom of Information Act request for information regarding technology subject to export control under these statutes. It would make clear that agencies such as the Department of Defense have the authority to refuse to disclose such information in response to a Freedom of Information Act request when the information is subject to export restrictions. This change would help effect Congress desire to limit and control the dissemination of critical technology. In the same vein, however, exemption 10 does not address the issue of restricting the flow of research information to, from or within the scientific community or society in general. Moreover, the proposed exemption has nothing to do with technical information developed within the academic community. On the contrary, this exemption merely gives the Federal Government the discretion not to disclose pursuant to a FOIA request defense-related technical information which is in the possession of the Federal Government, usually pursuant to research and development of procurement contracts. The submitter of such technical data is not precluded from disseminating it to the scientific community or elsewhere.

It is the intent of this bill that exemption 10 encompass data covered by both general licenses and specific licenses, much as a significant amount of important technical data may be exported under general licenses or exemptions. Even though the term "general license" is used, such licenses often limit export authority to specific persons or specific destinations. Nonetheless, such a limited general license for the export of certain data would subject such data to unlimited release under the FOIA if exemption 10 did not cover general licenses. Thus, without such coverage it would be possible for a requester to circumvent the export laws through the FOIA.

It is anomalous to restrict export of data important to the United States on one hand, while allowing its public release under the FOIA on the other. Exemption (b)(10) will redress that anomaly.

SECRET SERVICE INFORMATION

Exemption 11 will protect the Secret Service from the release of information that "could reasonably be expected to adversely affect" its ability to carry out its protective mission. Following the assassination of President Kennedy, the Secret Service was asked by the Warren Commission to redouble its efforts to identify and guard against persons who threaten the safety of the President. Since that time, the Service has sought and obtained substantial amounts of information from State and local law enforcement agencies as well as from foreign sources. In 1975, for instance, the Service had access to data from nearly 1,100 informants via the FBI. Since the revised Freedom of Information Act took effect at the end of 1974, however, the quality and quantity of informant cooperation with the Service has diminished dramatically. Robert R. Burke, Assistant Director for Investigations at the Secret Service, testified before the Constitution Subcommittee that his agency has approximately 75 percent less informant information than it had before passage of the FOIA: Mr. Stewart Knight, Director of the Service, testified in 1977 that he had recommended that President Jimmy Carter refrain from traveling to two cities within the United States because the Service did not have adequate information to guarantee his safety. Mr. Burke's 1981 testimony noted that conditions have deteriorated even further since Mr. Knight's statement. Burke testified that the Freedom of Information Act has contributed to establishing a climate which has adversely affected our ability to perform our protective and

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criminal investigative missions. * * * Informants are increasingly reluctant to come forward because they are fearful their identities will be revealed. FOIA hearings, supra.

The problem is not restricted to domestic sources of information. Director Knight has been told by several senior foreign law enforcement officials that there is serious doubt abroad as to the Secret Service's ability to protect confidential information. Id. In specific terms, Burke cited evidence of convicted felons and others currently involved in criminal activities who make FOIA requests to several agencies, sift carefully through the responses, and then "discern the very information sources that the law enforcement agencies wish to protect." Id.

Despite a dramatic decline in data available to the Secret Service, Assistant Director Burke made clear in his testimony that:

> Intelligence information on individuals and groups is absolutely necessary for us to perform our protective role. The decrease in the quality and quantity of this information has forced us into a more reactive posture than we would like. Without adequate information on individuals and groups, we are less able to predict where to apply our limited resources. We, therefore, have to use more agents, more State and local police officers, and more equipment without the focus on what may be the real danger areas." Id.

Exemption 11 insures that the Secret Service will receive the cooperation and confidentiality necessary for its mission. As a result, the ability of the Secret Service to safeguard the President and other important individuals as well as informants who provide vital information, will not be compromised. The exemption specifically enables the Secret Service to better fulfill its functions in two ways. First, the Service will not be compelled to disclose significant security information already on file. Second, the Secret Service's information gathering capacity will be enhanced by the message conveyed to potential informants that any sensitive information that they provide will be protected.

The hearings also noted the need to reconsider the factors governing current determinations of types of information that may be released because they are reasonably segregable from classified or exempt portions of certain sensitive record. Another item covered was the propriety or requests from certain classes of requesters, including aliens, imprisoned felons, or parties in litigation with the Government who have access to information via the alternative route of discovery under the Federal Rules of Civil Procedure. Finally compiling a list of statutes which trigger withholding under exemption 3 also emerged as an important aspect of FOIA reform. These matters each became an element of the bill approved by the Judiciary Committee unanimously.

12. SECTION 13: PROPER REQUESTS

Section 13 of the bill would amend the provisions of subsection (a)(3) of the act to address several areas of use or abuse of the act not intended by Congress, and which undermine important govermental interests without serving the legitimate interests of the Freedom of Information Act.

REQUESTS LIMITED TO "UNITED STATES PERSONS"

Under carry law, an agency is required to comply with any request for records covered by 5 U.S.C. section 552(a)(3) made by "any person." Section 14 of the bill would amend the act to require the agency to make information available only to a requester who is a "United States person." The bill would add a definition of the term "United States person" in a new subsection (e)(4) of 5 U.S.C. section 552, to include a U.S. citizen, an alien lawfully admitted for permanent residence, and certain corporations and unincorporated associations. The definition of "United States person" follows the definition set forth in section 101(i) of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 180(i), with certain exceptions.

Restricting the right to make requests to United States persons would reverse the present rule that "any person," including foreign nationals and governments can use the Freedom of Information Act to secure information.[40] This proposed amendment is consistent with the purpose of the Freedom of Information Act to inform the American public of Government actions. It would also prevent the use of the Freedom of Information Act by foreign nationals and governments for purposes which may be contrary to the national interest.

FREEDOM OF INFORMATION ACT NOT A DISCOVERY DEVICE

The bill would also amend the act to prevent a party to a pending judicial proceeding or administrative adjudication, or any requester acting for such a party, from using the Freedom of Information Act for any records which may be sought through discovery in the proceeding. Most Government agencies report significant numbers of such requests, whose purpose is to avoid applicable rules of discovery and sometimes, where the Government is a party, to harass and burden Government agencies. The prohibition would apply in either civil or criminal proceedings whenever a party files a request relating to the subject matter of a pending proceeding where existing discovery rights allow access.

The Supreme Court has recognized that the "FOIA was not intended to function as a private discovery tool." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Notwithstanding the fact that the Freedom of Information Act was not intended as a discovery device, a requester's rights under present law "are neither increased nor decreased" because of his status as a litigant. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975). As a result, the Freedom of Information Act has been widely used to discover Government documents for use in judicial proceedings.

In civil cases, parties openly use the Freedom of Information Act to circumvent the judicial discovery requirements that they show a need for the requested information, that the information is relevant to the case, and that compliance with the request would not be unreasonably harassing, oppressive or burdensome. *See* Fed. R. Civ. P. 26. Government attorneys working on a case are often forced to divert their attention from preparing the case to complying with a Freedom of Information Act request filed by a party opponent. The resulting diversion of resources to respond to such requests substantially impairs the Government's capacity to prepare and successfully carry forward to a conclusion many of its cases.

Similarly, in criminal cases a defendant seeking discovery information must ordinarily demonstrate not only the relevance of the information sought, but also that the request is reasonable and within the scope of criminal discovery. See Fed. R. Crim. P. 16(a). In addition, a criminal defendant's request for discovery may trigger a Government right to reciprocal discovery. Fed. R. Crim. P. 16(b). In practice, however, criminal defendants have made frequent use of Freedom of Information Act requests, often close to scheduled trial dates, to disrupt the prosecutor's case preparation or delay the trial while disputes over the Freedom of Information Act request are resolved by the courts.

Some courts have ruled that the use of the Freedom of Information Act to supplant ordinary criminal discovery is improper.[41] However, courts have ruled that related Freedom of Information Act requests are acceptable during a criminal trial and that issues respecting such requests in the pending criminal action.[42] This ability to make requests before and during criminal trials disrupts trial proceedings and upsets the discovery scheme established under the Federal Rules of Criminal Procedure. This proposed provision seeks to limit such abuses of the Freedom of Information Act. This bill provides that no request be permitted to be maintained during the pendancy of related proceedings in which discovery rights for the requested information exist. It will be up to

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[40] E.g., *Stone* v. *Export-Import Bank of the United States*, 552 F.2d 132, 136-37 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978): *Neal-Cooper Grain Co.* v. *Kissinger*, 385 F. Supp. 769 (D.D.C. 1974).

[41] *See United States* v. *Murdock*, 548 F.2d 599 (5th Cir. 1977; *Murphy* v. *Federal Bureau of Investigation, 490 F. Supp. 1138 (D.D.C. 1980); see also United States* v. *Layton*, No. CR 80-0416 (N.D. Cal. August 6, 1981).

[42] *See United States* v. *Brown*, 562 F.2d 1144, (9th Cir. 1978; *United States* v. *Wahhr*, 384 F. Supp. 43, 47 (W.D. Wis. 1974).

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

the requester to demonstrate, when requested to do so in accordance with agency regulations, that his request is not banned by this prohibition.

FELONS

Recent statistics indicate that over 40 percent of the requests received by the Drug Enforcement Administration are from persons in prison, and at least another 20 percent come from persons not in prison but known to be connected with criminal drug activities. An estimated 11 percent of the requests received by the FBI come from persons in prisons, and numerous others from persons with criminal records. Many of these FOIA requesters bring suit in Federal courts. These persons use—or actually misuse—the act to attempt to discover the identity of informants and other sensitive law enforcement information held by the Government. The large number of requests, including repeated requests numbering in the hundreds by some individuals, is clear testimony that there is something for criminals to gain through the use of the act.

Given that the FBI and DEA spent over $13.5 million in 1980 to comply with FOIA requests, and that review of requests from prisoners frequently requires extended review to protect law enforcement information, these two agencies alone spend 20 to 40 times more than Congress estimated the 1974 amendments would cost for the whole Government—just to respond to felons.

The bill would authorize the Attorney General to promulgate regulations to restrict the circumstances in which records shall be made available to felons or to persons acting on their behalf. The purpose of this provision is to prevent the use of the act from undermining legitimate law enforcement interests while respecting the proper public information purposes of the act and it is left to the sole discretion of the Attorney General to determine the most appropriate course in this particular area.

MANUALS AND EXAM MATERIALS

The changes provided by the act are long overdue with regard to exemption 2 which governs manuals and examination data. The proposed amendment would expressly protect confidential information in manuals and instruction to investigators, inspectors, auditors, and negotiators. This change would also complement the amendments to exemption 7(E) relating to guidelines or priorities for law enforcement investigations or prosecutions.

Negotiators are included in this list in recognition of the fact that the Government has a legitimate need to maintain the confidentiality of its instructions to staff in contexts other than law enforcement. Thus, the term "negotiators" is not limited to law enforcement personnel who are called upon to negotiate the settlement of pending and impending litigation, but applies as well to agency staff who conduct negotiations for the procurement of goods and services, and acquisition of lands, the resolution of labor-management disputes, the release of hostages, or any other negotiations conducted in the course of carrying out a legitimate Government function where the release of such instructions or manuals may jeopardize the success of any aspect of the negotiations.

Proposed subparagraph (B) is added to exemption 2 to exempt testing or examination materials used to determine individual qualifications for employment, promotion, and licensing. This amendment is intended to protect from disclosure material that would compromise the objectivity or fairness of the testing, examination or licensing process within various agencies. Such a provision exists now in the Privacy Act of 1974, 5 U.S.C. § 522a(k)(6), and inclusion of this paragraph in the Freedom of Information Act would promote consistency between the two statutes.

In short, section 8 of the bill would add two clarifying provisions to exemption 2, to make clear that materials whose confidentiality is necessary to effective law enforcement and other vital Government functions are exempt from disclosure. Such materials include manuals and instructions to investigators, inspectors, auditors, and negotiators, and testing materials used solely for employment, promotion, or licensing. Although materials of this nature are arguably protected under present law, the confusion engendered by judicial attempts to reconcile purported inconsistencies in the legislative history make the extent of the protection afforded by exemption 2 uncertain.

JUDICIAL REVIEW

Section 5 of the bill would make several procedural and substantive revisions to the judicial review provisions of 5 U.S.C. § 552(a)(4). First, the bill would amend subsection (a)(4)(B) to include a statute of limitations, and to provide equivalent jurisdiction in the district courts for suits by submitters of information to enjoin an agency's disclosure of information and requesters of information to compel disclosure.

Second, this section permits suits for injunctive relief against nonindexing of records covered by subsection (a)(1) or (a)(2).

Third, the bill would amend the attorney fees provisions of redesignated subsection (a)(4)(H) (currently subsection (a)(4)(E)) to allow requesters who substantially prevail to recover attorney fees from a submitter participating in litigation.

STATUTE OF LIMITATIONS

The present act contains no time limit for a requester to initiate a judicial action after and agency's final denial of a request. This bill would amend subsection (A)(4)(B) to require that suits by requesters must be brought within 180 days of the agency's final administrative action. This is the same period as that set forth in title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(e), 16(c); the Age Discrimination in Employment Act, 29 U.S.C. § 633(d); and the Fair Housing Act of 1968, 42 U.S.C. § 3613(a). The bill would not set a specific limitations period for actions by submitters. However, it would establish as an express prerequisite to district court jurisdiction that the submitter must file a complaint before the disclosure of the information.

This provision should promote judicial economy and ease administrative burdens without prejudice to requesters of information. Agency personnel would be able to close files instead of holding a requester's file indefinitely in anticipation of a lawsuit to compel disclosure at any time in the future. Requesters could simply file an identical request to reinitiate the process. This would initiate anew the request and give them a fresh cause of action if the new request is denied.

SUBJECT MATTER JURISDICTION

The bill would amend subsection (a)(4)(B) to vest the district courts with jurisdiction to enjoin an agency from any disclosure of trade secrets, or commercial, research, financial business information which was objected to by a submitter under subsection (a)(7)(A)(iii) (or which would have been objected to had the submitter received the required notice from the agency pursuant to subsection (a)(7)(ii)). Under the amended provision, the submitter may file a complaint at any time prior to disclosure of the information by the agency.

This provision would create a right of action for submitters within the structure of the Freedom of Information Act. Under present law, submitters have no such right of action, but must resort to section 10 of the Administrative Procedure Act, 5 U.S.C. § 706, in order to safeguard confidential business information from disclosure by the Government in possible violation of the Trade Secrets Act, 18 U.S.C. § 1905. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 285, 317-18 (1979). The rights of submitters as outlined by the Supreme Court in Chrysler are inadequate to protect against the disclosure of submitted information which should properly be kept confidential. For that reason, this bill would establish procedural rights in the Freedom of Information Act itself.

This section changes the judicial review provisions of the current Freedom of Information Act to establish equivalent causes of action for requesters and submitters. The bill intends that the courts will receive the judicial review requests of both requesters and submitters with equally adequate treatment.

Submitter actions to enjoin disclosure must be brought prior to release of the documents, and usually will be commenced within 10 days after the final agency decision. If the submitter has not been given notification but

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

learns of the pending disclosure, suit may be brought upon that disclosure in the same manner as if such notice had been given.

This subsection also, for the first time, permits suits for injunctive relief against nonpublication or nonindexing of records covered by subsection (a)(1) or (a)(2) of this section. The bill intends that agencies may be required to index records within a reasonable time if they have not done so already under existing requirements, but that reasonable latitude be given in this difficult area.

PERSONAL JURISDICTION

Proposed subsection (a)(4)(C) would provide the district courts with personal jurisdiction, in any suit filed under the act, over all requesters and submitters of information. If a requester filed a complaint to compel disclosure of certain information, the district court in which the complaint was filed would have jurisdiction over any submitter of the information.[2]

Similarly, in a suit by a submitter, the court would have jurisdiction over any requester of the information. These proposed provisions would insure that an adverse party receives notice of the complaint, has the right to intervene, and will be bound by the court's decision.

While this provision allows a district court to consolidate submitter and requester causes of action into a single suit, it does not alter current law with regard to venue. In a consolidated suit, venue would be determined in accordance with the current standards of the Federal rules of civil procedure, 28 U.S.C. 1591.

The court to which the action is properly brought has jurisdiction over the necessary parties regardless of their physical location. This will permit intervention and impleading as necessary to effectively resolve all issues in the litigation. The committee considered but did not adopt a provision altering normal rules of venue and transfer, so usual venue and transfer provisions continue unaffected.

When the agency is served with a copy of the complaint filed by either requester or submitter, it must promptly give notice of the action to the opposite party or to multiple submitters or requesters, as the situation may warrant. This is already the practice of the better agencies, and it is endorsed.

NOTICE OF LITIGATION

Proposed subsection (a)(4)(D) would require agencies to notify requesters and submitters whenever a suit is brought concerning a particular request or submission. If a person who requested confidential business information exempt under exemption 4 filed a complaint to compel disclosure, the agency would be required to notify each submitter of that information that the complaint had been filed. Similarly, if a submitter filed a complaint to enjoin disclosure of such information, the agency would be required to notify each requester.

Subsection (a)(4)(E) provides equal treatment for requesters and submitters in the action, by requiring that cases brought by each party shall be determined de novo by the court. The judicial determinations made de novo under current law have operated to enhance the credibility of the decisions made about disclosure by agencies, since an impartial judge will consider the full merits of the case for disclosure unconfined by the agency's record. The same impartiality and thus the same credibility will be brought to cases seeking the nondisclosure of private information upon complaint of the private submitter. A great many submitter cases under current law have been reviewed de novo, and this codifies that practice.

Burdens of proof rest with the agency in a withholding case and with the submitter in a case seeking to enjoin disclosure.

ATTORNEY FEES

Subsection (3) of section 5 of the bill deals with attorney fees. It provides that the court may in its discretion award attorney fees and costs against a submitter who is a party to the litigation, in favor of the requester. This does not change the existing case law which permits such recoveries against the agencies themselves. But it would, for example, allow a requester of valuable private information who substantially prevails to receive both the submitter's information and the submitter's funding of the requester's legal fees in obtaining that information. Submitter interests objected to the amendment during its consideration because of the shifting of the equivalent of a double loss to the submitting person. A court retains discretion to award no fees or to award such fees only against the agency.

PUBLIC RECORD REQUESTS

Due to the flood of requests for information, Federal agencies spend enormous amounts of time and money retrieving, duplicating, and mailing records. Though much of the time and cost necessary to comply with these requests fulfills a legitimate responsibility of Government to its constituency, in many instances records are more readily available in the public domain. Public libraries, for example, have a wealth of newspapers and magazines on file which are easily retrievable and available to the public. Requests that agencies provide documents, on the other hand, often require employees to duplicate hundreds of pages of newspaper and magazine articles while sorting them out from exempt information. Indeed, as Antonin Scalia, professor of law at the University of Chicago, observed, Federal agencies have been compelled to act as "the world's largest library reference system." The FBI, for instance, employs 300 specialists to work with FOIA requests only. According to Attorney General William French Smith, those who request information pay less than 4 percent of the retrieval cost. As a result, the Senate Subcommittee on Criminal Laws and Procedures recommended in 1978 that:

> Where public record items such as newspaper clippings and court records are incorporated in the file, the agency should not be required to Xerox these for the requester, but should, instead simply be required to identify these items by date and source.

Senate Report No. 51, 95th Congress, 2d session 71 (1978).

The new language of section 6 is designed to remedy these problems. The revised section specifically allows agencies to offer a choice of an index identifying the date and source of public records, or copies of the documents for a fee. If the first option is selected, the FOIA workload of agency employees will in many cases be reduced. In no event, however, should a Federal agency be compelled to produce an index not already in existence at the time of the request. If requesters choose the second option, the authorization to collect processing fees in addition to search and duplication fees will insure that users of FOIA are not subsidized by taxpayers. Thus, public access to Government documents will be maintained at current levels while the overall cost and burden to Federal agencies and the taxpayer is reduced.

CLARIFY EXEMPTIONS

Section 7 of the bill is intended merely to clarify the effect of the exemptions listed in the paragraphs of section 552(b). In place of the current language stating that "This section (552) does not apply" to matters covered by the enumerated exemptions, the bill would make clear that "The compulsory disclosure requirements of this section (552) do not apply to matters so exempted.

REASONABLY SEGREGABLE

In 1974 Congress attached the "reasonably segregable" clause to subsection (b) of the Freedom of Information Act. The purpose of this clause was to require Government agencies to release any meaningful portion of a requested record that can be separated from portions that are specifically exempt from disclosure. The courts have often strictly enforced this policy. While much useful and nonconfidential information has been released under this clause, both the courts and the agencies have expressed concern that some "reasonably segregable" information may actually prove threatening to national security, law enforcement, and confidential Government informants when pieced together with other seemingly nonexempt information or information obtained independent of FOIA. It is this threat that the new proposal

[2] Such "nation wide" jurisdiction and service of process of a district court by the court itself is already provided for by statute in other contexts. See. e.g., Interpleader Procedure Statute, 28, U.S.C. § 2361; Sherman Antitrust Act, section 5, 15 U.S.C. § 5.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

seeks to alleviate by allowing the agency to consider whether releasing portions of sensitive records could cause the harm that exemptions (b)(1) and (b)(7) are intended to avoid.

The extent of judicial review of an agency's nondisclosure or limited release of information is a hotly debated issue. In 1971, Congresswoman Patsy Mink requested copies of conflicting recommendations made to President Nixon on the advisability of an underground nuclear test to be performed that fall. After the request was denied, Congresswoman Mink and 32 other Members of the House initiated a FOIA suit to compel disclosure. The district court granted summary judgment in favor of the Environmental Protection Agency on the basis of an affidavit filed by EPA which claimed generally that certain reports were exempt from disclosure under exemption (b)(1). On appeal, the decision was reversed and the case remanded to the district court with instructions to release all information that could be disclosed. The Supreme Court reversed the decision of the court of appeals after finding that areas of national security were better left to the executive branch.

In a well reasoned opinion, the Supreme Court found that Congress clearly intended to place the burden of determining what was exempt under subsection (b)(1) on the President and that the FOIA "in no way affect[ed] categories of information which the President * * * has determined must be classified to protect the national defense or to advance foreign policy." 112 CONGRESSIONAL RECORD 13659. Therefore, after receiving an affidavit which generally but fully justified the withholding of the reports under (b)(1) exemption and the applicable Executive order, the Court declined to submit the reports to in camera inspection.

Though the Court found that an affidavit filed by the agency could generally allege exemption without specifically detailing each portion of the document, other courts refused to allow the Government the latitude the Supreme Court had found so necessary. In Vaughn against Rosen, in which a law professor requested copies of personnel policy reports prepared by the Bureau of Personnel Management, the Court of Appeals for the District of Columbia circuit defined a strict indexing and affidavit procedure which soon became a basic step in FOIA cases.

The amendment is not intended to prevent or limit the courts or agencies from considering the jigsaw puzzle effect before releasing information that is segregable from information exempted under one or more of subsection (b) exemptions. This bill recognizes that responsible application of this principle is essential to proper interpretation of the scope of the exemptions. The purpose of the amendment is to especially insure that this principle is considered in (b)(1) and (b)(7) cases because of the nature of the information exempted in those sections and the potential harm that could occur should highly confidential information be released.

This might raise the question of whether it would be wiser to alter the statutory requirement for de novo review in FOIA cases where sensitive information is at stake. This idea has won support for its advantages in terms of judicial policy as well. The distinguished Judge Carl McGowan, until recently Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, has sharply questioned the appropriateness of de novo review for any cases under the Act:

> The fact is that in the Freedom Information Act the Congress has dumped on the Federal Courts what is essentially an administrative function. Our District Courts are deluged with tasks which under any sensible allocation of Government resources should be performed at the administrative level. Any judicial review of the results should be confined to the administrative record and by reference to the arbitrary and capricious standard . . . You might as well put a sign out in front of the courthouse (saying) we're the agency administering the Freedom of Information Act, Access Reports, 141, 150 (Jan. 6, 1982).

In sum, the adoption of this provision will grant agencies added discretion to mitigate the potential harmful effect of segregating information out of sensitive records that can supply the pieces to complete a mosaic picture.

This bill enjoys broad bipartisan support and reflects the accumulated wisdom of many diverse interests, including media representatives, public interest groups, the Reagan administration, members of the business community, and law enforcement agencies. The FOIA Reform Act has been widely hailed as a reasonable and worthwhile compromise by these diverse and often divergent interests because it achieves the dual goals we set when embarking upon improving the act. Namely, the bill eliminates many of the current problems of the act without weakening its effectiveness as a valuable means of keeping the public informed about Government activities. As the Washington Post accurately noted:

> It is quintessentially American to believe that the people control the Government and that they have a right to know what the Government is doing. The Judiciary Committee bill preserves that right (Washington Post, May 25, 1982, page A16.)

Indeed, this right is preserved, and concomitantly the public is better served by the enhancements to the act which are included in this bill.

No one questions the obviously virtues of an open government; nor should anyone question the Government's obligation to protect the identities of confidential informants. No one questions the value of an informed citizenry; nor should anyone question the Government's obligation to respect the privacy of those same citizens. No one questions the merits of a free information policy; nor should anyone question the need to protect defense technical data.

S. 744 is a substantial step toward restoring the balance between public access to Government information and efficient execution of necessary, and occasionally confidential, Government functions. This bill achieves this balance in a manner that preserves both goals of the act: A more informed citizenry and a responsible and effective Government.

The brief summary of the actions of the Senate Judiciary Committee should provide some insight into the way the committee approached many of the same issues raised by the report under consideration by this body.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 2746) was agreed to.

Mr. QUAYLE. Mr. President, S. 774, the latest in a series of bills to amend the Freedom of Information Act (FOIA), has had a long journey down a narrow path. Any amendments to the FOIA must balance the act's basic premise that the American people have the right to know the workings of their Government, with the necessity of having some information in the hands of the Government exempt from disclosure.

I speak today to address several concerns raised by representatives of the press. I became familiar with these concerns through my own experience as a publisher and newspaperman. It is a special honor for me to speak to the concerns of these groups because my grandfather, Eugene C. Pulliam, was a founder of Sigma Delta Chi back in 1909 at DePauw University in Greencastle, Ind.

Let me begin, Mr. President, by reiterating that the FOIA is an invaluable law in assisting journalists to fulfill their mandate to keep the American people informed about their Government. There are two sets of problems with S. 774. The first centers on needed improvements to the FOIA that are missing from S. 774. The second concerns provisions which, if enacted, could harm the flow of information about the Government to the public.

Let me begin by addressing several needed improvements to the FOIA that S. 774, does not address. Perhaps the most serious omission is the absence of a provision mandating that all fees and processing charges be waived for requested information that benefits the general public. While S. 774's report language is helpful, it is clearly not being heeded by the Justice Department whose January 1983 guidelines have discouraged the granting of fee waivers. Any package of amendments to the FOIA must address this problem; S. 774 does not.

Approved For Release 2009/03/27 : CIA-RDP89B00236R000200240024-0

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S. 774 also fails to provide sanctions against agencies guilty of delays in complying with FOIA requests. The press experience is that often these inexplicable delays are so lengthy that they are tantamount to denial of the information. If the FOIA is to be as effective as its founders intended, this must be rectified.

Omission of amendments correcting these weaknesses means that an excellent opportunity to improve the FOIA is being wasted. But several provisions of S. 774, if enacted, could seriously weaken the FOIA.

Perhaps the most troublesome of these would permit the Government to collect the advanced payment of fees in some cases. This provision can effectively limit use of the FOIA to the wealthy and restrict the ability of the American citizen with average means from using the FOIA.

S. 774 would also add an exemption to the FOIA for technical data. Such an exemption could well spawn a de facto classification system for scientific data. Rather than adding needless exemptions to the FOIA, the Government should use its standard classification system to safeguard this information.

The expanded exemptions for law enforcement agencies are also of concern to the press, especially since the justification for such sweeping exemptions has not been bolstered by facts and specifics. Similarly, the new exemption for organized crime investigations granting the Attorney General the authority to prevent scrutiny of files for 8 years is too broad and not needed in light of the current law's exemption for enforcement proceedings.

In closing, Mr. President, we must remember, as we consider S. 774, that Congress created the FOIA for one very clear and distinct reason—to keep the American people aware of the workings of their Government. We need to be certain that we reinforce that purpose, not weaken it.

Mr. THURMOND. Mr. President, I support S. 774, the Freedom of Information Reform Act, of which I am a cosponsor, along with the distinguished chairman of the subcommittee (Mr. HATCH). This measure received wide, bipartisan support in the Committee on the Judiciary, following extensive efforts to develop a compromise proposal.

The purpose of S. 774 is to distinguish more precisely those permanent records which ought to be subject to public disclosure under the act from the small, but extremely important, class of records which ought to be protected from disclosure. Such a distinction is difficult to make precisely, but I believe that this has been achieved in this bill.

S. 774 is a complex and comprehensive bill designed to eliminate several abuses that are permitted under the present law. First, S. 774 would broaden the protection that law enforcement agencies can provide to those persons who supply confidential information. Under present law, a law enforcement agency can only exempt information on an informant if that information would conclusively disclose the identity of a confidential source. S. 774 would broaden the information protected by dropping the conclusive identity requirement and replacing it with a new test that the information could reasonably be expected to disclose the identity of an informant.

Current law provides that information is only eligible to be protected if it is contained in an investigatory file. This formalistic requirement would be removed under S. 774 through language which only refers to "records or information compiled for law enforcement purposes."

Furthermore, this bill, if enacted, would enlarge the scope of data that could be appropriately withheld from disclosure. In connection with the personal privacy exemption, it removes the requirement that the personal data be contained in a personnel or medical file. The Secret Service would receive additional protection under this measure, since it would not have to reveal data which could reasonably be expected to adversely affect its protective functions.

Finally, Government agencies would receive a tremendous benefit from the revised definition of a proper party for making a FOIA request. Under S. 774, a proper request could only be made by a "United States person," which would exclude nonresident aliens.

This proposed bill is responsive to needs expressed by a wide variety of agencies and organizations—national security agencies, journalism societies, law enforcement, and private individuals. I believe that S. 774 is legislation worthy of the support of Senators on both sides of the aisle and I urge its prompt passage.

Mr. GRASSLEY. Mr. President, I am pleased to support S. 774, the Freedom of Information Reform Act, which will have the effect if passed into law of clarifying and improving our Nation's information policy. This bill is the result of extensive input from, among others, representatives of business, media, law enforcement, and public interest groups. Their views, expressed publicly to Congress in 9 days of hearings, have enabled us to fashion a bill that contains improvements targeted to the interests of each of these groups.

I wish to especially commend Senator HATCH and his staff for their thorough research and earnest efforts in resolving the difficult issues involved in this act. It was the willingness of Senators HATCH and LEAHY to work together on these controversies, along with the aid of myself and Senators THURMOND and DECONCINI, that produced the compromise bill S. 1730, which garnered the unanimous support of the Judiciary Committee last Congress. S. 774, which is almost identical to the earlier compromise, has again gained the Judiciary Committee's support, and I anticipate the support of the full Senate will be voiced today.

When Congress first enacted the Freedom of Information Act in 1966, it was to assure our citizenry that as a democratic Government we should and will operate in the open. The express purpose then, and one that continues to hold today, is that facilitating an informed public is our best safeguard against ill-conceived Government policies.

Statutory guidance of the Government's disclosure policy is not a simple procedure though. A balance must be maintained between allowing public access to Government information and yet protecting the release of documents which may jeopardize lives of witnesses or informants, privacy of individuals, national security, or confidentiality of valid business concerns.

The Freedom of Information Act is very specific on these points, but is not specific on how these protections should be administered.

In tightening the exemptions for documents used in connection with legal investigations, this bill takes an important step in not only increasing the effectiveness of our law enforcement procedure, but also in protecting witnesses and informants from threat of identity disclosure.

Hearing testimony also indicated a need for fine-tuning of the trade secrets exemptions for businesses. While drafters of the current law intended to protect confidentiality of private enterprise information, commerical gatherers have discovered loopholes enabling them to obtain information which could compromise or endanger competition. S. 774 allows submitters prior notification when information which could be confidential is being requested. Both requester and submitter have an opportunity to set forth their reasons for release or nondisclosure.

Opening Government's doors to the public has not come without a price. As the volume of FOIA requests has increased, so has the cost and the time involved in filling the requests. This bill authorizes OMB to establish a uniform fee schedule that seeks to fairly charge those requesting materials for commercial purposes and waive the costs of those requesters representing the media or a public interest.

Receiving information in a timely manner is naturally one of the media's main concerns. While proper screening can delay the disclosure process, this bill further defines when delay is allowable and binds agencies to a final 60-day deadline for all processing, including appeals. This time limit protects requesters from the possibility of an indefinite waiting period.

As I stated at the outset, we have come a long way in forming a bill that is acceptable to verying interests. I believe this compromise is a fair and sen-

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sible response to requests for legislative change to provide an effective yet responsible policy of Government access.

Mr. LEAHY. Mr. President, the Freedom of Information Act is the vital link between the people of the United States and their government. It was specifically designed to deter the evolution of a government by secrecy. In reporting the Freedom of Information Act in 1965, Senator EDWARD LONG of Missouri so correctly stated:

> A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operations. It breeds mistrust, dampens the fervor of its citizens and mocks their loyalty.

The conflicts between government confidentiality, public oversight of government activities and privacy rights of individual citizens have been age-old, complex and persistent. They occur in every generation in every democratic nation of the world. The policy debates which arose during the formulation of the bill we are considering today focused on striking the appropriate balance between openness and secrecy and searching for the best ways to implement common objectives.

The Freedom of Information Act has generally been a success. In most cases, the nine exemptions in the act, when properly construed, protect the information that should be protected while still allowing the public to gain access to information imperative for an informed public.

Since the act was passed in 1966 and amended in 1974, there has been long and useful experience in applying the provisions of FOIA, and as a result, numerous ideas for improving the law have emerged.

Since its adoption, FOIA had proven to be an invaluable tool for disclosing Government waste and wrongdoing, and keeping the public informed on such wide-ranging areas as health, safety, the environment, respect for personal liberties, and efficiency in carrying out mandated Federal programs of all kinds. Through FOIA we have learned about discrimination in the administration of Federal contracts, major medicare fraud by private health organizations involving millions of dollars of public funding, defective and unsafe consumer products, and ineffective or harmful drugs and medical devices.

But FOIA is more than the sum of its specific achievements. It puts a mammoth government on the same plane as any citizen it serves. It makes available to that citizen the information to deal with the complexity of government and to understand its actions and purposes. The act is one of the most stabilizing forces in our democracy. It is not to be tampered with casually.

The history of S. 774, like the history of the Freedom of Information Act since 1966, is the history of careful compromise. Working with FOIA has taught those inside of Government and both submitters and requesters outside of Government much about how it works and how it can be made to work better.

That experience was the wellspring for the intensive debate and negotiations that transformed a repressive administration bill into the moderate and useful version now before us. The President's bill sought to hack away at the reach of FOIA and particularly the 1974 amendments. The present bill recognizes the legitimate complaints of some agencies and submitters, while maintaining FOIA's major premises and all of its principal features.

The battle over the scope of this legislation began 3 years ago when the principal spokesman for the Reagan administration declared in testimony before the Constitution Subcommittee that the Freedom of Information Act is a highly overrated instrument.

At the time, that statement shocked many of us who had seen FOIA turn the term open government from a catchphrase to a reality. After 3 years of experience, no one could any longer be surprised by the views of this administration towards open government.

From its earliest days, the administration has put the public on notice that it would dispense information only on a need to know basis.

This administration rewrote the Executive Order on Classification sweeping away a trend of nearly three decades aimed at better informing the public on defense and foreign policy issues.

This administration attempted to force over 100,000 Government employees with access to classified information to give up their first amendment rights and sign lifetime agreements to let the Government censor their writings or statements.

This administration, in the name of military security, barred all journalists from accompanying the invasion force on Grenada. No other administration in modern times has attempted to impose this kind of censorship on war correspondents.

This administration has barred the entry into the country of foreign speakers from both sides of the political spectrum whose views might be regarded as controversial or unfriendly to American interests.

This administration singled out and stigmatized with a propaganda label Canadian films dealing with acid rain and nuclear war, because the views expressed in those films differed from those of the administration.

This administration has tried to interfere with the free flow of unclassified scientific and technological information by threatening universities and individuals with dire consequences if they went ahead and published this unclassified information.

This administration has made it clear that, if left unrestrained by Congress, it will force its loyalty and secrecy directives through extensive use of the polygraph, although the results are doubtful and the intrusion into the lives of Government employees is severe.

This administration, through its grant regulations, has tried to gag nonprofit organizations and prevent them from communicating with Government at all levels.

This administration undertook a policy to restrict the release of industry data that would help expose pesticide threats to workers and consumers, after the House and Senate Agriculture Committees rejected a similar proposal.

This administration has stopped releasing information about underground nuclear weapons testing which routinely had been given out in previous administrations because it was too burdensome to keep the public fully informed.

Most importantly from the perspective of today's debate, this administration consistently has posed barriers to the fruitful use of the FOIA. Delays are longer. Fees are used to discourage requesters. Fee waivers are given out grudgingly. The Privacy Act is being interpreted in a way which deprives individuals of any access to files compiled about them by Federal law enforcement or intelligence agencies.

These assaults on the free flow of information are assaults on the viability of the first amendment. That is why I have fought so hard against the Reagan administration's policies and why I have devoted so much time to the fight to preserve the FOIA.

The Reagan administration's original proposals would have gutted the act. These proposals generated a long, vigorous, sometimes heated debate. Ultimately, a consensus emerged in the form of the bill now before the Senate.

S. 774 concedes the need for change to improve the operation of the act and to insure fairness between competing interests where there have been instances of unfairness in the past. But the consensus bill consists overwhelmingly of fine-tuning changes and not a wholesale departure from FOIA's presumption that openness should reign.

Perhaps no area was more difficult to resolve than how the act should handle law enforcement records. When the administration first sent its proposals forward in the last Congress, it proposed two new exemptions. First, it created a new exemption for any open investigatory file. This open file provision, which was contained in the 1966 act, was what led Congress to amend the law enforcement exemption in 1974. The administration proposal applied not only to FBI files but also to investigations of product and drug safety, such as the Pinto gas tank, the Firestone 500 tire, and the Pertussis vaccine, the dangers of which all came into the public view as a result of FOIA requests.

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The other major new exemption the administration sought was a blanket exemption for files concerning organized crime, terrorism, and foreign counterintelligence. When I took a hard look at this new exemption, I discovered that it was not only overly broad, but it did not even solve most of the problems the FBI stated that it had as a result of FOIA. The basic case the administration had been making is that a sophisticated user could ferret out information about FBI investigations simply by making requests to which the FBI was required to respond that it had records but they were exempt. Without going into further detail on the techniques involved, I would just point out that creating a new exemption in no way solves that problem.

In addition, foreign counterintelligence was included in the law enforcement exemption, which might have had the ironic effect of narrowing the exempt status which these documents already receive under the broader national security exemption.

After literally months of work, Senator HATCH and I agreed to a number of changes which were carefully crafted and aimed at problems for which the FBI had made a case.

These changes make a positive contribution to the needs of both Government and the public in the handling of law enforcement records under FOIA. The protection of informants' identities is strengthened, and an 8-year moratorium is created for records relating to investigations of organized crime, an area where moratorium is appropriate. FBI training manuals will have added protection and the agency will have expanded time limits in which to meet FOIA requests. The agency will be able to protect from disclosure the fact that it has certain documents in its possession where the very fact would jeopardize an informer. These changes will make the work of the FBI easier and more secure. More importantly, these changes are narrowly aimed so that they will not interfere with the public's right to know where law enforcement is not seriously jeopardized.

This spirit of narrow change based on demonstrated need guided our negotiations over all points in the bill. As a result, many other needed technical changes in FOIA are contained in S. 774.

For example, there are procedures to allow submitters of information a reasonable opportunity to object to release of data.

Commercial users, who account for two-thirds of the cost to the Government for processing FOIA requests will bear their fair share of the cost for access.

Agency time limits under FOIA are made more realistic, with the Congress' firm expectation that they will be enforced more vigorously.

A new, carefully-tailored exemption for Secret Service records generated in the course of the Service's protective functions is created.

A new procedural section is adopted which will prevent FOIA requests from interfering with ongoing judicial proceedings or administrative adjudications without eliminating litigants' rights to use the FOIA. Finally, the bill for the first time gives the public and Congress a complete picture of the recent growth of special legislative exemptions to the FOIA that could, in time, leave the act applying to nothing.

I had hoped that the bill would adjust several other major problems which requesters are having in obtaining information under FOIA. These include problems created by President Reagan's Executive order on classification which are addressed in legislation introduced by Senator DURENBERGER and myself, problems created by the administration's policy which interprets the Privacy Act as a withholding statute for FOIA purposes, which are addressed by legislation introduced in the House by Congressmen ENGLISH and ERLENBORN, and finally, problems created by the Department of Justice's 1983 policy guidelines on fees and fee waivers.

While the Judiciary Committee report on S. 774 repudiates the Justice Department's interpretation of the current and proposed fee waiver language, I think it would have been appropriate to go further and provide for greater judicial scrutiny of individual fee waiver decisions.

Because I think we have come so far in hammering out a compromise on this legislation, I am content to leave these issues to consideration by the Senate in the future. I am also confident that Congressman ENGLISH in the House Government Operations Committee will pay particular attention to these matters when they begin hearings on this legislation.

In that regard, I know that the House will examine all of the work we have done in developing S. 774, but I hope it pays particular attention to one area where an agreement has recently been struck, but where the Senate has not had the benefit of full hearings. The amendment we offer today deletes the word royalties from the provision which permits the Government to charge fair value fees for certain kinds of technical data. After the hearing process on S. 774 was completed, it came to the committee's attention that the original formulation of this provision might be at odds with the longstanding provision in the law which prohibits the U.S. Government from holding copyrights in most circumstances. Our amendment attempts to eliminate this conflict, but I think the issue deserves further hearing in the House.

But this one reservation should not obscure a large list of the bill's accomplishments. S. 774, building on nearly two decades of experience with the act, updates and tightens it, and yet maintains all of its essential features.

A great deal of the credit for reaching this sound compromise goes to Senator HATCH, chairman of the Constitution Subcommittee. The Senate is in his debt for his diligence in pursuing this goal and for his hard work and patience in talking through substantial differences between proponents and critics of current law.

Senator HATCH's dedication to the process of refining this important legislation is again demonstrated in the amendment he and I are offering today. This amendment drops the proposed new exemption for technical data. The original formulation of this exemption was quite broad and applied governmentwide. At the time the Judiciary Committee considered S. 774, I stated that while I thought the exemption was aimed at a real problem, especially in the defense area, I thought the language of the amendment was overly broad. The bulk of the problem presented to the committee was addressed by an amendment offered to the Department of Defense authorization bill by Senators THURMOND and JACKSON last August. It now appears that the unrestricted release of Government-generated technical data poses a problem for both the Government and American industry and only one other agency, NASA. I am pleased that Senator HATCH joins me in the view that this problem is best addressed by the NASA authorizing committees. We will both urge the Senate Subcommittee on Science, Technology and Space to closely examine this problem with an eye toward a narrow solution such as that incorporated into the Defense Department authorization.

If recent history provides any guidance, I am sure that the administration will view Senate passage of S. 774 as a vindication of its restrictive information policies and its call to radically alter the Freedom of Information Act. But if the President is suggesting that past disclosures under FOIA would have been sharply narrowed if S. 774 had been the law, he is in clear disagreement with the testimony of his own Justice Department.

In his testimony before the Judiciary Committee, former Assistant Attorney General Jonathan Rose discussed a book entitled "Former Secrets," which cites over 500 significant examples of information released through FOIA. In Rose's opinion, only four may have been affected by S. 774, and in two of those cases, release might have been delayed, but not prevented.

The President's agenda on a broad spectrum of issues is the narrowing of access to Government information. The agenda of this body in S. 774 is to make the Freedom of Information Act fairer and more workable. The bill before us is evidence that Congress can successfully deal with the issue of

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the public and Government information—an issue on which there is a wide philosophical divergence—and still come up with a result that preserves the presumption of openness.

We have answered the legitimate complaints of Government about the mechanics of the FOIA process. We must continue, through legislation and oversight, to fight to open the doors of Government and stand up for the people's right to know.

It is worth remembering the most often-sighted expression in the legislative history of the FOIA, which is an excerpt from a letter by James Madison to W. T. Berry, dated August 4, 1922. Madison reminds us that—

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

In closing, and at the risk of leaving someone off the list, I would like to give special thanks to a number of organizations which have provided me enormous help during our consideration of the Freedom of Information Reform Act. These include the Society of Professional Journalists, Sigma Delta Chi, the American Newspaper Publishers Association, the National Newspaper Publishers Association, the Radio and Television News Directors Association, the Newspaper Guild, the Public Citizen Litigation Group, Common Cause, the American Civil Liberties Union, the Reporters Committee for the Freedom of the Press, the American Society of Newspaper Editors, the National Association of Broadcasters, and the National Coordinating Committee for the Promotion of History. The American public owes these groups and many others a great debt of gratitude for their interest in preserving the mechanics which make the first amendment a reality.

I also want to thank my Judiciary Committee staff, John Podesta, Ben Scotch, and Joyce Saadi for the literally thousands of hours of fine work which they have put in this effort. This is one piece of legislation where it is an understatement to say their professionalism and dedication was essential. Without them we would not be passing it today.

Mr. BINGAMAN. Mr. President, I am aware and appreciative of the great quantity of thoughtful work accomplished by my distinguished colleagues from Utah and Vermont, and others, on this bill; I am sure we are all grateful for their efforts. I do have one concern, however, which I would commend to the attention of my colleagues. This is in reference to section (4)(A)(i)(c) which deals with imposing fair value fees or royalties on information considered "commercially available technological information." These fees would be in addition to those imposed for normal search and duplication expenses.

It is clear that, if the Government imposes such fees on requestors of information under the Freedom of Information Act, the result could well be, in practice, to reduce the flow of information which the act is designed and intended to facilitate.

Government agencies would be required to determine the value of the information in question and will then be in the position of negotiating or assigning fees and royalties. This would undoubtedly create a new complex and cumbersome bureaucracy. Indeed, while large publishing concerns would be able to pay such fees, small publisher would be hindered by high fees and lengthy negotiations.

Although the Government is permitted by law and encouraged by the President to own patents, U.S. copyright law holds that "copyright protection * * * is not available for any work of the United States Government. * * *" While not directly contradicting this restriction, my feeling is that this provision would come close to circumventing the principle that work generated by Government efforts should be available for use by the public without limitations such as economic restrictions.

It is true that on at least one occasion, Government-funded work was made available to a friendly, foreign country, which may have had military as well as commercial significance. However, current rules and proposed rules on the restriction on the transmission of technical data, if properly applied, would be capable of preventing such incidents. It is preferable to leave FOIA clear of such restrictions, in my opinion.

Mr. President, in such matters as this, there is always a conflict between the security and economic well-being of the Nation, and the right of the American people to information which is produced by their own tax moneys. Here, my feeling is that ample legal restrictions already exist to protect our national interests and, therefore, the FOIA should not be burdened by an unnecessary limitation which may violate the intent of copyright law. Such an unnecessary restriction would also add an incentive for Government officials to become recalcitrant in responding to public requests for information, and would be virtually impossible to enforce and implement in an equitable way. I would encourage my colleagues to join me in opposing this provision of S. 774, which deserves further review and perfection before it becomes law.

Thank you, Mr. President.

The PRESIDING OFFICER. Are there further amendments? If there be no further amendments, the bill is ordered to be engrossed for a third reading.

The bill (S. 774) was ordered to be engrossed for a third reading, was read the third time, and passed.

Mr. BAKER. I move to reconsider the vote by which the bill was passed.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

EXECUTIVE CALENDAR

Mr. BAKER. Mr. President, may I say to the minority leader that on this side, I have cleared for action by unanimous consent certain nominations on the Executive Calendar. I refer specifically to Calendar Nos. 463, 464, 465, 466, and 467, and ask if the minority leader is prepared to consider all of or part of those nominations.

Mr. BYRD. Mr. President, the minority is prepared to proceed to any or all nominations on the Executive Calendar.

EXECUTIVE SESSION

Mr. BAKER. Mr. President, I ask unanimous consent that the Senate now go into executive session for the purpose of considering nominations on the Executive Calendar numbered 463 through 467.

There being no objection, the Senate proceeded to the consideration of executive business.

The PRESIDING OFFICER. The nominations will be stated.

THE JUDICIARY

The assistant legislative clerk read the nomination of Pauline Newman, of Pennsylvania, to be U.S. District Judge for the Federal Circuit.

The PRESIDING OFFICER. The nomination is considered and confirmed.

DEPARTMENT OF JUSTICE

The assistant legislative clerk read the nominations of Robert C. Bonner, of California to be U.S. Attorney for the central district of California and of Errol Lee Wood, of North Dakota, to be U.S. Marshal for the district of North Dakota.

The PRESIDING OFFICER. The nominations are considered and confirmed.

DEPARTMENT OF STATE

The assistant legislative clerk read the nomination of Robert F. Kane, of California, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Ireland.

The PRESIDING OFFICER. The nomination is considered and confirmed.

U.S. INFORMATION AGENCY

The assistant legislative clerk read the nomination of Woodward Kingman, of California, to be an Associate Director of the U.S. Information Agency.

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