SECTION 6: PUBLIC RECORD REQUESTS

Section 6 of S. 774 would amend subsection 552(a) of the FOIA so that in cases where a potion of the records requested "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."

The Committee believes that the administrative burden of compliance with FOIA could be alleviated to a significant degree, without any consequent loss of public accountability, if agencies were not required to provide requesters with copies of records in agency files that are also 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. Yet, requests under FOIA often require agency employees to duplicate hundreds of pages of materials that are public records or are otherwise available in public records.

The proposed amendment intends to accommodate this concern—as well as the concern that some public records (e.g. court records and even some newspapers and magazines) are not readily accessible except through the government due to the manner, place, and time in which they are created, used and stored—by specifically permitting the agency to offer the requester a choice between an index identifying requested items that are public records by date and source (if such an index exists), or copies of the documents for ordinary duplication costs. The first option, where it is available and appropriate, should contribute to reduction of the processing burden. In no event, however, should an agency be compelled to produce an index not already in existence at the time of the request. If no index exists, and the agency is unwilling to create one, the requester must be afforded access to copies of the records.

While the agency may charge search and copying fees notwithstanding the waiver requirements of the Act, the agency may, in its discretion, provide the requester with copies of the records at no charge.

SECTION 7: 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.

SECTION 8: MANUALS AND EXAMINATION MATERIALS

Section 8 of S. 774 would amend subsection (b)(2) of the FOIA to make it clear that certain materials are protected from disclosure

as matters that are "related solely to the internal personnel rules and practices of an agency." Materials included under subparagraph (A) are "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". This provision is intended to establish a uniform standard for withholding internal law enforcement manuals and instructions.

Since exemption 2 was first enacted in 1966, the case law has generally evolved to hold that such materials are protected under the exemption if disclosure would harm law enforcement efforts. See discussion of caselaw in *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051 (D.C. Cir. 1981) (en banc). However, the decisions have not been uniform as to the degree of harm an agency must demonstrate to justify its withholding.

Under subparagraph (A), to withhold internal law enforcement manuals and instructions an agency must demonstrate that disclosure "could reasonably be expected to jeopardize" the investigations, inspections, or audits of the agency. The use of the word "jeopardize" is intended to require the agency to show that the effectiveness of investigations, inspections, or audits is likely to be imperiled if the document is disclosed. Likewise, instructions to negotiators are exempt if disclosure could reasonably be expected to jeopardize an agency's negotiations with a private party. Although the Committee believes that such internal deliberative communications among agency personnel are already protected under exemption 5 of the Act as inter-agency memorandums, these materials are included here to make it clear that they are protected as matters related solely to internal personnel practices. Subparagraph (A) is not intended to exempt internal agency guidelines which allow members of the public to conform their actions to an agency's understanding of the law, or "secret law", which the Committee emphasizes is antithetical to the act's fundamental principle of open government.

Materials included under subparagraph (B) are "examination materials used solely to determine individual qualifications for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process." This provision is included to bring the exemption into conformity with a similar exemption for such examination materials under the Privacy Act, 5 U.S.C. § 552a(k).

SECTION 9: PERSONAL PRIVACY

Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals. Exemption 6 of the Act was designed to give weight to both interests, by providing an exemption for "personnel and medical and similar files," if disclosure would result in a "clearly unwarranted invasion of personal privacy." The Supreme Court has described this balancing standard as "a workable compromise between individual rights 'and the preser-

vation of public rights to Government information.'" *Department of the Air Force* v. *Rose,* 425 U.S. 352, 381 (1976).

The Committee does intend to confirm in statutory form the Supreme Court's 1982 decision in *The Washington Post Company* v. *Department of State,* 456 U.S. 595 (1982), reversing a line of court decisions that interpreted the threshold "personnel, medical and similar files" language in an overly formalistic way. *See Board of Trade* v. *Commodity Futures Trading Commission,* 627 F. 2d 392 (D.C. Cir. 1980); *Simpson* v. *Vance,* 648 F. 2d 10 (D.C. Cir. 1980); *The Washington Post Company* v. *Department of State,* 647 F.2d 197 (D.C. Cir. 1981), *rev'd,* 456 U.S. 595 (1982).

The Washington Post case confirmed that information about "any particular individual" should not lose the protection of Exemption 6 "merely because it is stored by an agency in records other than 'personal' or 'medical' files." The bill makes it clear that when information concerning particular individuals is sought from government files, the protections granted under the exemption apply.

In addition, the bill makes two further changes which address the Committee's concern that the protection of the privacy interest be practical in its application. First, while the bill retains the "clearly unwarranted" balancing standard, information would now be exempt under this test if disclosure "could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy." The substitution of the "could reasonably be expected" language for the word "would" in the original Act is designed to make it clear that courts should apply a common sense approach to this balancing test. This change will eliminate any possibility of an overly literal interpretation of the use of the word "would" in the Act's original language and ensure that necessary privacy protection is provided.

Finally, the amendment makes it clear that lists of names and addresses which "could be used for solicitation purposes" are subject to the exemption, if disclosure could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy under the balancing test. By requiring the courts to balance the interest in disclosure of such lists against the interest in privacy, the Committee recognizes that disclosure may be appropriate in some circumstances. *See Disabled Officers Association* v. *Rumsfeld,* 428 F. Supp. 454 (D.D.C. 1977) (list of disabled retired military personnel disclosed to nonprofit organization established to assist members in pursuing benefits and advocating their interest nationally).

SECTION 10: LAW ENFORCEMENT RECORDS

Section 10 of S. 774 would amend paragraph (b)(7) of the FOIA to modify the scope of the exemption for law enforcement records, codify certain explanatory caselaw, and clarify Congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure.

Under current law, an agency may invoke the (b)(7) exemption to withhold "investigatory records compiled for law enforcement purposes" to the extent that disclosure of such records would interfere with enforcement proceedings; deprive a person of a right to a fair

trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identiy of a confidential source or, in certain cases, information provided only by a confidential source; disclose investigative techniques and procedures; or, endanger the life or physical safety of law enforcement personnel.

The Committee finds, based upon testimony of the FBI and other federal law enforcement agencies, that this exemption, in practice, has created problems with respect to the disclosure of sensitive non-investigative law enforcement materials, premature disclosure of investigative activities, and the protection of confidential sources. Although Exemption 7 currently attempts to protect confidential informants and investigations, this protection can be compromised when small pieces of information, insignificant by themselves, are released and then pieced together with other previously released information and the requester's own personal knowledge to complete a whole and accurate picture of information that should be confidential and protected, such as an informant's identity.

S. 774 would make the following changes in Exemption (b)(7) to address these problems:

Substitute "records or information" for "investigatory records" as the threshold qualification for the exemption: This amendment would broaden the scope of the exemption to include "records or information compiled for law enforcement purposes," regardless of whether they may be investigatory or noninvestigatory. It is intended to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which the record is maintained. *Cf. FBI* v. *Abramson,* 456 U.S. 615 (1982). It should also resolve any doubt that law enforcement manuals and other non-investigatory materials can be withheld under (b)(7) if they were compiled for law enforcement purposes and their disclosure would result in one of the six recognized harms to law enforcement interests set forth in the subparagraphs of the exemption. See *contra, Sladek* v. *Bensinger,* 605 F.2d 899 (5th Cir. 1979) (Exemption 7 is not applicable to DEA agents Manual because manual "was not compiled in the course of a specific investigation"), *Cox* v. *Department of Justice,* 576 F.2d 1302 (8th Cir. 1978) (Exemption 7 does not apply to DEA manual that "contains no information compiled in the course of an investigation.") The Committee amendment, however, does not affect the threshold question of whether "records or information" withheld under (b)(7) were "compiled for law enforcement purposes." This standard would still have to be satisfied in order to claim the protection of the (b)(7) exemption. See, e.g., *FBI* v. *Abramson, supra.*

Substitute "could reasonably be expected to" for "would" as a standard for the risk of harm with respect to (b)(7)(A) interference with enforcement proceedings, (b)(7)(C) unwarranted invasions of personal privacy, (b)(7)(D) disclosure of the identity of a confidential source, and (b)(7)(F) endanger the life or physical safety of any natural person: This amendment is intended to clarify the degree of risk of harm from disclosure which must be shown to justify withholding records under any of these subparagraphs. The FBI and other law enforcement agencies have testified that the current "would" language in the exemption places undue strictures on agency at-

tempts to protect against the harms specified in Exemption 7's subparts.

This burden of proof is troubling to some agencies in the context of showing that a particular disclosure "would" interfere with an enforcement proceeding. Moreover, as the FBI has testified, it is particularly vexing with respect to whether production of requested records "would" disclose the identity of a confidential source, substantially contributing to the asserted "perception" problem of sources doubting the FBI's ability to protect their identities from disclosure through FOIA. The "could reasonably be expected to" standard has been effectively used in the protection of national security sources under provisions of the National Security Act of 1947, 50 U.S.C. § 403(d)(3). It recognizes the lack of certainty in attempting to predict harm, but requires a standard of reasonableness in that process, based on an objective test.

Including State, local, and foreign agencies or authorities and private institutions within the meaning of "confidential source": This amendment is intended to codify the caselaw in which the weight of judicial interpretation has held that "confidential source" protection under (b)(7)(D) is applicable to entities, as well as natural persons, that furnished information to an agency on a confidential basis. *See, e.g., Lesar* v. *Dept. of Justice,* 636 F.2d 472 (D.C. Cir. 1980); *Church of Scientology* v. *Dept. of Justice,* 612 F.2d 417 (9th Cir. 1979); *Nix* v. *U.S.,* 572 F.2d 998 (4th Cir. 1978); *Keeney* v. *FBI,* 630 F.2d 114 (2d Cir. 1980).

Delete "only" from the second clause of (b)(7)(D): Courts interpreting the second clause of (b)(7)(D) have occasionally stumbled over the meaning of the word "only" in the context of deciding whether confidential information furnished by a confidential source in a criminal investigation or a lawful national security intelligence investigation may be withheld. *Compare, e.g., Radowich* v. *U.S. Attorney, District of Maryland,* 501 F. Supp. 284 (D. Md. 1980), *rev'd,* 658 F.2d 957 (4th Cir. 1981) (Winter, C.J., dissenting) with *Nix* v. *United States,* 572 F.2d 998 (4th Cir. 1978). A literal reading of the provision would appear to indicate that confidential information is exempt only if it has been "furnished" to the agency "only by the confidential source;" which is to say, apparently, that the confidential information would not be exempt if it has also been furnished to the agency by some other source or means.

By deleting the word "only", the Committee intends to make clear that, 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 by a confidential source is exempt, regardless of whether it might also have been obtained from another source.

Delete "investigative" and add "guidelines" to (b)(7)(E): This amendment, like the deletion of "investigatory" from the exemption's threshhold language, is intended to facilitate the protection of non-investigatory materials under the exemption. In this case, it is intended to make clear that "techniques and procedures for law enforcement investigations and prosecutions" can be protected, regardless of whether they are "investigative" or non-investigative. The Committee, however, reemphasizes the intention of the confer-

ees on the 1974 amendments which first created (b)(7)(E) that the subparagraph does not authorize withholding of routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly-known techniques and procedures. See H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974). The amendment also expands (b)(7)(E) to permit withholding of "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." This is intended to address some confusion created by the D.C. Circuit's en banc holding in *Jordan* v. *U.S. Dept. of Justice,* 591 F.2d 753 (D.C. Cir. 1978), denying protection for prosecutorial discretion guidelines under the (b)(2) exemption. The Committee intends that agencies and courts will consider the danger of creating "secret law" together with the potential for aiding lawbreakers to avoid detection or prosecution. In so doing, the Committee was guided by the "circumvention of the law" standard that the D.C. Circuit established in its en banc decision in *Crooker* v. *BATF,* 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2).

Informant records exclusion

Section 10 of S. 774 would amend the FOIA by adding a new subsection which would make the FOIA inapplicable to "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."

Although subparagraph (b)(7)(D) of the FOIA permits law enforcement agencies to deny public access to records where release "would disclose the identity of a confidential source," the Committee finds that the necessity of asserting this exemption to deny disclosure may in itself compromise informant confidentiality when the request is for an informant's records and the requester is a third party who has requested the records by the informant's name or personal identifier. Denying access to John Doe's records on the grounds that release "would disclose the identity of a confidential source" could be tantamount to confirming that John Doe is a confidential source.

S. 774 would exclude from the requirements of the FOIA informant records maintained by a law enforcement agency under an informant's name or personal identifier, but only in cases where the requester is a third party seeking access according to the informant's name or personal identifier. This provision operates as an exclusion. In such cases, the agency would have no obligation to acknowledge the existence of such records in response to such request. Where the requester is the informant himself, or a third party who describes the responsive records without reference to the informant's name or personal identifier, the records are subject to ordinary consideration under the provisions of the FOIA.

SECTION 11: ADDITIONAL EXEMPTIONS

Technical data

Section 11 of the bill would amend the FOIA by adding a new Exemption (b)(10) 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 formulae, designs, drawings, and other similar materials 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.

This new exemption would ensure that Congress intent to control the export of significant technology will not be frustrated by a Freedom of Information Act request for information regarding technology that is 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 "may not be exported lawfully outside the United States without an approval, authorization or a license under the Federal Export laws unless regulations promulgated under such laws authorize the export of such data without restriction to any person and any destination."

Exemption 10, however, is not intended to restrict the flow in research information from or within the scientific community or society in general. Moreover, the proposed exemption has nothing to do with technical information developed and maintained within the academic community. On the contrary, this exemption merely gives the federal government the discretion not to disclose certain technical information in its possession, usually pursuant to research and development or procurement contracts, in response to an FOIA request. The submitter of such technical data is *not* in any way precluded from disseminating it to the scientific community or elsewhere, under the exemption.

It is the intent of the Committee that Exemption 10 encompass technical data in the forms above if such data is covered by either general licenses or specific licenses, inasmuch as a significant amount of important technical data may be exported under restricted general licenses or exemptions. Even though the term "general license" is used, such licenses often limit export authority to specific persons or specific destinations. Thus, a limited general license for the export of certain data could still subject such data to unlimited release under the FOIA if Exemption 10 did not cover general licenses.

It is anomalous to restrict the 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

Section 11 of S. 774 would amend the FOIA to create a new Exemption (b)(11) for "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."

Although the courts have recognized the need to protect certain Secret Service records from disclosure under the FOIA, *Moorefield* v. *U.S. Secret Service,* 611 F.2d 1021 (5th Cir. 1980) (individual who was twice convicted for threatening the life of the President was denied access to his Service file under Exemption (7)(A)), the Committee believes that a specific exemption which directly focuses on the specific consequences of disclosure in the context of the protective responsibilities of the Service is more appropriate than reliance upon the more general law enforcement records exemption.

The Committee received comments from several press groups expressing concern that the proposed Secret Service exemption could permit the Service to refuse to disclose the basis for denying White House press credentials to a bona fide journalist. The Committee recognizes that important First Amendment rights are implicated by any refusal to grant White House press passes to bona fide journalists, and that journalists may not be denied such passes without due process of law, including notice of the factual basis for denial with an opportunity to rebut them. *Sherrill* v. *Knight,* 569 F.2d 124, 130–131 (D.C. Cir. 1977).

The Committee intends the proposed exemption to be interpreted in a manner consistent with this right.

SECTION 12: REASONABLY SEGREGABLE

This amendment is simply intended to take notice of the principle that, in the case of the 1st and 7th exemptions in subsection 552(b), in deciding whether the release of particular information would be harmful, the agency may take account of other information which it knows or reasonably believes to be available to the requester. This principle is established in case law. For example, in *Halperin* v. *Central Intelligence Agency,* 629 F.2d 144 (D.C. Cir. 1980), the court states:

> The Agency's general rationale for refusing to disclose rates and total fees paid to attorneys is that such information could give leads to information about covert activities that constitute intelligence methods. For example, if a large legal bill is incurred in a covert operation, a trained intelligence analyst could reason from the size of the legal bill to the size and nature of the operation. This scenario raises a reasonable possibility of harm to the covert activity following from disclosure of the size of legal fees. We note that the CIA's showing of potential harm here is not so great as its showing concerning attorney names. We must take into account, however, that *each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of in-*

formation even when the individual piece is not of obvious importance in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction. Viewed in this light, the Agency's statements offer sufficient plausible detail for a court to accord substantial weight to the statements and accept the Agency's expert judgment on the potential effects of disclosing legal fees.

Id. at 150, footnotes omitted and emphasis added.

SECTION 13: PROPER REQUESTS

Section 13 of S. 774 would amend 552 (a)(3) to prohibit FOIA requests by foreign nationals; authorize the Attorney General to prescribe limitations or conditions on use of the FOIA by incarcerated felons; and toll time requirements for agency response to requests from parties to adjudicatory proceedings in which the Government is also a party and may be requested to produce the records sought.

Under current FOIA law, an agency is required to comply with any request for records covered by the statute made by "any person". This absence of exclusion permits foreign nationals and governments, including those who are hostile to the interests of the United States, to freely utilize a statutory right-of-access scheme that was created primarily to inform the American public about government activities. At the same time, it permits incarcerated felons to file extensive FOIA requests for the purpose of harassing government officials or determining the identities of confidential law enforcement sources and prying into investigatory records. It also permits parties opposing the Government in judicial or administrative adjudicatory proceedings to duplicate existing discovery rights, to circumvent discovery requirements and to conduct extensive documentary "fishing-expeditions" that harass government attorneys and avoid triggering reciprocal discovery requirements.

The Committee views each of these uses of the FOIA to be outside the purview of Congress primary intent in enacting the statute. Although some salutary considerations may justify current practice in particular circumstances, the Committee finds that its essential concern for facilitating the use of FOIA in ways that contribute to an informed public and an accountable Government warrants certain limitations on requesters in the types of situations identified above.

Requests limited to "United States persons".—This would amend the FOIA to require agencies to make information available only to a requester who is a "United States person" as that term would be defined in Section 17 of the bill. This definition, would limit the use of the FOIA to United States citizens, permanent resident aliens, and certain corporations and unincorporated associations, as defined by section 17 of the bill. It would prohibit use of FOIA by any other person or entity. The Committee intends that any requester denied access pursuant to this limitation shall be given an opportunity to present proof that such requester is a "United States person" within the meaning of the provision.

FOIA limited as a discovery device.—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). According to the Court's interpretation of the act and its legislative history, a requester's rights "are neither increased nor decreased" because of the requester's status as a litigant. *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 143, n. 10 (1975).

In civil cases, parties often openly use the FOIA to bypass discovery procedures or to circumvent discovery requirements that they show a need for the requested information, the relevance of the information to the case, and that compliance with the request would not be unreasonably harassing, oppressive or burdensome. See Fed. R. Civ. P.26. Similarly in criminal cases, a defendant seeking discovery must 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 may trigger a government right to reciprocal discovery. See Fed. R. Crim. P. 16(b). In practice, some criminal defendants make frequent use of the FOIA close to scheduled trial dates to disrupt the prosecutor's case preparation or delay the trial while disputes over the FOIA request are resolved by the courts.

This provision remedies these concerns, not by declaring that a person's right to use the FOIA is eliminated because of his party status, but by requiring the tolling of time limits for government response "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."

The Committee intends that the agency's obligation to respond to the request within the statutory time requirements is simply postponed until the proceeding itself is no longer pending. The amendment does not bar a request for records which are not related to the subject matter of the pending proceeding, nor would it bar a request for records which have been denied during the course of a judicial or administrative proceeding that is no longer pending.

Authority for the Attorney General to Limit Requests by Felons.— Testimony by various federal law enforcement agencies, complaining of the tremendous administrative burden and risk of harm to law enforcement interests that flows from the extensive number of FOIA requests made by incarcerated felons, has convinced the Committee to approve authority for the Attorney General to promulgate regulations prescribing "limitations or conditions on the extent to which and on the circumstances or manner in which" requested records would 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."

The proposed amendment directs the Attorney General to prescribe such limitations or conditions "as he finds to be (i) appropriate in the interests of law enforcement, or foreign relations and national defense, or of the efficient administration of" the FOIA, "and (ii) not in derogation of the public information purposes of" the FOIA. The Committee intends this guidance to assure the Attorney General of his authority to propose that requests from incarcerated felons, or from anyone reasonably believed to be acting

on their behalf, be treated differently from those of other requesters. For example these limitations can be fashioned to limit the number or extent of FOIA requests, to discourage duplicative or harassing requests, or to give the responding agencies greater flexibility in the mode and timing of their replies. Such limitations or conditions shall be prescribed through rulemaking.

SECTION 14: ORGANIZED CRIME RECORDS EXCLUSION

Section 14 of S. 774 would amend the FOIA by adding a new subsection (c) that would make the FOIA inapplicable to documents which were generated or acquired by a criminal law enforcement authority in the course of a lawful organized crime investigation within five years of the date of request.

Current law, as established by the 1974 amendments to the FOIA, permits agency withholding of law enforcement records under one or more of the subparagraphs of Exemption 7. It does not provide for any categorical treatment of records compiled in investigations of organized crime.

Testimony presented before the Constitution Subcommittee by FBI Director William Webster depicted a credible concern that the FOIA in its current form is systematically exploited by organized crime figures attempting to learn whether they are targets of investigative law enforcement activities. Both in public hearings and an executive session before the Subcommittee, Judge Webster presented examples of the use of the FOIA by organized crime figures in concerted efforts to identify informants and discover the scope and progress of particular investigations.

The Committee understands the skepticism of the press and other critics of the case presented by the FBI, for the Bureau's claims of abuse are not convincingly substantiated on the public record. The Committee, however, has viewed more substantial evidence in special executive presentations supporting the FBI's arguments, and understands the FBI's concern that the details of this evidence would have to be highly diluted or eliminated altogether to avoid aggravating the problem in any public presentation.

The Committee believes that special treatment of records compiled in current and recent organized crime investigations is essential. The FBI's showing of systematic exploitation of the FOIA by organized crime, together with the threat that such exploitation will increase in the future, carries sufficient weight to urge an adjustment in the FOIA when combined with reasonable assumptions concerning the motivations and resources of organized crime.

S. 774 proposes to exclude from the provisions of the FOIA, under specified circumstances, any record which was generated or acquired within five years of the date of the FOIA request by a criminal law enforcement agency conducting a lawful organized crime investigation. Under the amendment, the FBI would have no obligation to acknowledge the existence of organized crime records if: (1) the requested records were compiled in any lawful investigation of "organized crime" as defined in section 18 of S. 774; (2) such investigation is or was conducted by a criminal law enforcement authority for law enforcement purposes; (3) such investigation was designated by the Attorney General for the purposes of this subsec-

tion; and, (4) the requested records were first generated or acquired by the law enforcement agency within five years of the date of the request. Exceptions to the basic exclusion timeframe would be appropriate when 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.

The proposed amendment also provides that no document subject to this exclusion provision may be destroyed or otherwise disposed of until the document is available for disclosure, subject only to the ordinary FOIA exemptions, for a period of not less than ten years. This means that, unless an extension of no more than three years is ordered, organized crime investigation documents would ordinarily be subject to exclusion from FOIA only for a period of five years after generation or acquisition by the agency. Documents subject to exclusion may not be destroyed or disposed of during the exclusion period, or for a period of not less than ten years after the end of the exclusion period. When the exclusion period is completed, the documents would become subject to the requirements of the FOIA and may be withheld from a requester only pursuant to a proper assertion of one or more of the nine FOIA exemptions.

SECTION 15: REPORTING UNIFORMITY

Under current 5 U.S.C. § 552(d), each agency is required to submit to the Congress by March 1 of each year a report on its Freedom of Information Act activities during the preceding calendar year. Section 15 of the bill would amend the reporting requirement to provide for a report to be filed on December 1 of each year covering the preceding fiscal, rather than calendar year. Most agencies maintain their records on a fiscal year basis and must convert them to an annual year basis in order to comply with existing law. The amendment would remedy this problem by conforming the reporting requirement to data collection practices.

SECTION 16: TECHNICAL DATA PROCEDURES

The Committee wishes to stress that nothing in Exemption (b)(10) is intended to limit the Government's ability or duty to provide access to information necessary to U.S. companies interested in investigating or bidding on procurement contracts with the Government. The Committee recognizes that prospective contractors, especially small businesses, need access to what is referred to as "production engineering and logistics information". Such availability may serve to increase competition, particularly by small businesses, and thereby reduce prices.

The Committee intends this section to apply to technical data owned by the Federal Government. Since this information is outside the protections of (b)(4), the combination of (b)(10) for protection and section 560 for qualified access should apply.

Section 560 is not to be construed as part of the Freedom of Information Act and none of the special administrative or judicial provisions of the FOIA apply to requests under Section 560. Releases under Section 560 may be conditioned on reasonable restrictions on redissemination, *e.g.,* requiring subsequent parties receiv-

ing the information to be properly registered or in appropriate cases, precluding redissemination. Agencies operating under Section 560 can investigate and enforce these agreements and failure by companies to comply with non-disclosure agreements may be grounds for appropriate civil, criminal or administrative sanctions.

Section 560 authorizes agencies to establish reasonable procedures to provide access to technical data to qualified concerns. The "production engineering and logistics data" referred to above includes such formulae, designs, drawings and research data as may be associated therewith, which are developed for or generated by the Government and which the Government has an unrestricted right to use and disclose.

It is expected that agency heads shall promulgate regulations setting forth procedures, standards and criteria for the certification and registration of United States citizens and business concerns as authorized recipients of such technical data. The Committee expects that in certifying data recipients, the agency will consider good faith intent to compete and ability of a concern and its subcontractors and suppliers to perform U.S. contracts.

It is also intended that an agency head may promulgate regulations which shall charge any person receiving information under Section 560 the actual cost of searching for and duplicating such information. In addition, if recoupment of research and development costs is required by law or regulations, recoupment shall be paid by the requester in accordance therewith.

It is further the intent of the Committee that nothing in Section 560 shall require the disclosure of material classified pursuant to executive order. Moreover, nothing in Section 560 requires the disclosure of material protected from disclosure under subsection (b)(4) of the Act.

SECTION 17: DEFINITIONS

"Submitter"

The term "submitter" is intended to include those persons who have a commercial or proprietary interest in information which is within the commercial, research, financial or trade secret categories discussed in the Committee's analysis of section 4 of the bill, supra. The person is a submitter even if the agency obtained access without a direct submission, e.g., by inspection or audit or recordation or photographing the private person's information. Two exclusions exist. Personal financial information is covered by the terms of Exemption (b)(6), see *Rural Housing Alliance* v. *U.S. Department of Agriculture,* 498 F.2d 73 (D.C. Cir., 1974). Intelligence information is protected under specific exempting statutes, recognized by exemption (b)(3), or by terms of exemption (b)(1). This latter exception is intended to shift protection to another exemption and is not intended to exclude exempt status for such information in the rare and exceptional instances in which commercial data would be given to an intelligence agency.

"Requester"

Section 17 of the bill defines the term "requester" as "a person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a)."

In part, this definition is intended as a mere drafting change in substitution for cumbersome phrases in the present Act, such as "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" and "such person making such request" (subsection (a)(4)(C)). However, this definition includes not only the person who makes the request but also any person who causes a request to be made or on whose behalf a requester is made.

"United States person"

Section 17 of the bill defines the term "United States person," which is discussed in connection with the analysis of section 13 of the bill.

"Working days"

Section 17 of the bill defines the term "working days" to mean "every day excluding Saturdays, Sundays, and federal legal holidays." This definition is essentially the same as the language of the present Act, and is intended to place conveniently in one provision of the Act the standard rule for calculating time periods under the Act. This defintion is not intended to be a substantive change.

"Organized crime"

Section 17 of the bill defines the term "organized crime," which is discussed in connection with the analysis of section 14 of the bill.

SECTION 18: PUBLICATION OF EXEMPTION 3 STATUTES

Exemption (b)(3) excludes from the mandatory disclosure requirement information "specifically exempted from disclosure by statute." There has never been a compilation of such statutory non-disclosure provisions. Thus, neither the Congress nor the American people know for sure how many (b)(3) exemptions exist or what their scope is. The absence of information creates a dilemma: If the aims of the FOIA are being weakened, Congress has little guide to how to shape a consistent policy that can cure the excesses, if they exist.

The chief commodity for a cure is complete information, and so the Committee's approach to solving this problem is based on disclosure. Within 270 days of enactment, agencies that want to rely on specific statutory exemptions will have to publish a list of them in the Federal Register. The Department of Justice is specifically included as an agency required to so publish. No legal rights are affected by the section, except those of the agency failing the effect the required publication. That agency will lose the right to rely on the undisclosed statutory exemption.

As a result of this provision, for the first time the Congress and the public will have a comprehensive guide to what is on the statute books within the ambit of section (b)(3). The public and the

Congress, thus, will be able to evaluate the effect of the (b)(3) exemption on the FOIA.

Regulatory Impact

In compliance with subsection 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that the business confidentiality procedures of S. 1730 will substantially improve the protection of trade secrets and other valuable commercial information submitted to the Government by regulated businesses. This should enhance the economic position of businesses and individuals who have in the past or might have possibly in the future lost such trade secrets or proprietary information to a competitor or some other requester pursuant to an FOIA request. The Committee also finds that S. 1730 will improve personal privacy protections for every individual about whom the Government maintains information. Finally, the Committee finds that no additional paperwork will be required of regulated businesses or individuals, but that the bill improves protections for personal privacy and commercial information.

Cost Estimate

In accordance with paragraph 11(a), rule XXVI of the Standing Rules of the Senate, the committee offers the following report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 11, 1983.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 774, the Freedom of Information Reform Act, as ordered reported by the Senate Committee on the Judiciary, June 16, 1983.

The bill requires the Office of Management and Budget (OMB) to establish a uniform fee structure to cover certain costs to the federal government resulting from the Freedom of Information Act (FOIA). Federal agencies are to use the OMB fee guidelines in constructing regulations governing the processing of requests for information. The fees collected under the bill are to be adequate to cover the costs of processing the requests. In addition, the bill requires federal agencies to provide documents free of charge when the cost of collecting a fee exceeds the amount that would be collected. Federal agencies are also allowed to reduce or waive the fee in cases where releasing the information will primarily benefit the public rather than the private or commercial interests of the party making the request. The bill also allows agencies to collect fees covering many of the costs of processing an application. Confidential information provided to the government by business concerns is afforded increased protection under the bill. The bill also increases the federal government's right to withhold certain information

from the public, including certain technical data and many Secret Service records.

The cost of administering the Freedom of Information Act are highly uncertain, and no comprehensive data are available. Based on information provided by the Justice Department, it appears that the direct cost of administering the act is at lest $60 million a year. Assuming this level of costs, the bill is expected to save the federal government at least $10 million a year—through the establishment of a uniform fee schedule, recovery of a portion of the cost of processing an application, various applicant exclusions, and an anticipated decline in the use of FOIA resulting from higher fees. However, in view of the uncertain costs of FOIA and the lack of information on the fee guidelines OMB will eventually propose, the savings resulting from this bill could be significantly greater.

Enactment of this bill would not affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

NANCY M. GORDON
(For Alice M. Rivlin, Director).

CHANGES IN EXISTING LAW

In compliance with subsection (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 774 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

* * * * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated

after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by a order published in the Federal Register that the publication would be unnecessary and impracticable in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy interpretation or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

[(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonable describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.]

(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.

[(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comments, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.]

(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 commercial purpose, and will deprive the Government of its commercial value, may provide for the charging of a fair value fee or royalties, or both, 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.

(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.

[(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.]

(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)(ii) 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).

(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 requester 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.

[(C)**]** *(F)* Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint's made, unless the court otherwise directs for good cause shown.

[(D)**]** *(G)* Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

[(E)**]** *(H)* The court may assess against the United States *or any submitter who is a party to the litigation* reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the **[**complainant**]** *requester* has substantially prevailed.

[(F)**]** *(I)* Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acting arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warrented against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency con-

cerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

[(G)] *(J)* In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

[(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

[(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

[(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

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

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

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

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

[(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the

agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.]

(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 practical 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 administration 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.

(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 the 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.

(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.

(9) Nothing in this section shall be deemed applicable in anyway 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.

[(b) This section does not apply to matters that are—]

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

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency[;], *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 investi-*

gations, inspections, audits, or negotiations, and (B) examination material used solely to determine individual qualifications for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process;

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

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

[(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;]

(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;

[(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;]

(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;

(8) contained or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(10) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license under Federal export laws, unless regulation promulgated under such laws authorize the export of such data without restriction to any person and any destination; or

(11) 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.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. *In determining which portions are reasonably segregable in the case of records containing material covered by paragraphs (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.*

(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.

[(c)] *(d)* This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

[(d)] *(e)* On or before [March] *December* 1 of each calendar year, each agency shall submit a report covering the preceding [calendar] *fiscal* year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determinations;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)[(F)]*(I)*, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before [March] *December* 1 of each calendar year which shall include for the prior [calendar] *fiscal* year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4) [(E), (F), and (G)] *(H), (I), and (J)*. Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

[(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.]

(f) For purposes of this section—

(1) "agency" means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

(2) "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 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 structures 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 delaying in drugs, gambling, loansharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.

(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.

§ 560. Technical Data Procedures

Each Federal agency maintaining technical data exempt under subsection (b)(10) of section 552 of this title shall promulgate regulations establishing registration (including certification) procedures and criteria under which qualified United States individuals and business concerns may obtain copies of such Government-owned technical data for purposes of bidding on Government contracts. No data under such procedures may be redisseminated or exported except as provided by law.

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