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U.S. information law isn't free, critics say

By George Archibald
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The Better Government Association used it to expose a multi-million dollar scam by Navy contractors who were bilking the government on shipbuilding work.

A family under the gun from the Internal Revenue Service used it to force the tax agency to disclose its auditing procedures and secret instruction manuals.

And Carl Stern of NBC News used it to obtain the late J. Edgar Hoover's secret FBI directives for his G-men to infiltrate, disrupt and expose left-wing groups during the 1960s.

The tool they and thousands of others used is the Freedom of Information Act. It is considered one of

the most effective ways for government outsiders to ride shotgun on waste, fraud and abuse in tax-funded programs — and it is constantly under attack from those who believe that it makes government action, particularly in the realm of foreign policy and intelligence, extremely difficult.

Since its passage in 1966, businesses, individuals, public interest groups, journalists and even representatives of foreign governments have unearthed mountains of data through the FOIA. Last year alone, the government's eight largest departments received 247,968 FOIA requests, of which 207,978 were

granted in full and 92 percent were partially granted.

But the mass of material belies the general unfriendliness in key departments to the idea of opening government files to the public, according to Rep. Glenn English, D-Okla., chairman of the House Government Operations subcommittee that monitors compliance with the law.

The State Department, which is exempt from disclosing classified foreign documents, granted in full only 29 percent of last year's requests. Still, even the State Department released 103,000 pages of documents in full and 42,601 partial pages.

As the FOIA approaches its 20th anniversary, some government agencies are trying to restrict the information flow while some mem-

bers of Congress are trying to make it more accessible. Buoyed by the success of the CIA in obtaining information act concessions, the FBI is seeking changes in the law so it can withhold for at least five years information gathered on organized crime and prohibit third-party requests for informant records.

"We have learned that some clever requesters have used or could use the FOIA to identify confidential sources," FBI Director William H. Webster told Congress last year.

The administration is also seeking legislation to expand FOIA's disclosure exemptions, charge higher fees for providing government information to the public and give federal agencies more time to find and provide requested records. In response to the administration's efforts, Reps. Gerald D. Kleczka, D-Wis., and English, with the help of the Society of Professional Journalists, Sigma Delta Chi, have introduced a bill to make it more difficult for federal officials to withhold information from the public.

The FOIA has always been unpopular with government officials. The American Civil Liberties Union, the American Bar Association and some

legal scholars contend that federal agencies apply the law inconsistently and use its disclosure exemptions broadly to block access to their files, even more so since Ronald Reagan took office.

Critics of the FOIA complain that businesses seeking trade secrets and criminals tend to use the law more than do the news media and public interest groups, who could provide information of public benefit.

To law enforcement and intelligence agencies with massive information-gathering capabilities and a stock-in-trade in secrecy, the FOIA has been a particularly bad development. When FBI Director Webster testified before Congress last year, he cited the release of more than 12,000 pages of documents to members of a known organized crime family in Detroit.

A seemingly innocuous reference in an FBI document to "a green sedan," a person's sex or the number of people attending a meeting would identify an informant to a mobster

obtaining the document under the FOIA, Mr. Webster explained. "He would know" by a process of elimination. "Our 300 employees who process FOIA requests do not know the person who is requesting the information. They do not know what is significant about a green sedan. So they are supposed to leave it in under the statute."

Congressional sources say the FBI has failed to make a convincing case for its proposed FOIA changes. The agency's reputation for heavily "sanitizing" or censoring documents also has caused members of Congress to look askance at the proposals.

Rep. English cites incredible FBI censorship of former Director Hoover's public testimony at a 1947 congressional hearing, before the bureau released copies of the printed hearing record to a Marquette University historian in 1981. The complete record was in the Library of Congress and other libraries throughout the country for anyone to read.

Jon Wiener also can attest to FBI stonewalling. In 1983, he filed suit against the FBI after the agency

withheld records about the late John Lennon, a member of the famed Beatles rock-and-roll group who was shot to death in December 1980.

"By their accounting, they withheld about two-thirds of the pages," says Mr. Wiener, a professor of history at the University of California at Irvine. What the FBI did provide contained "pretty extensive deletions as well." The FBI cited national security as the reason. Files about "a dead rock star would endanger the national security: We thought that was an absurd claim to make."

Despite the deletions from the 26 pounds of documents Mr. Wiener obtained, his book, published last year by Random House, detailed efforts to harass and deport Mr. Lennon for his activities in the United States against the U.S. effort in Vietnam. But the book, he says, left unanswered some central questions, such as White House involvement, because of the censored material.

Critics contend another method agencies use to block access is delay. Mr. Wiener waited 1½ years for his documents. The law requires a

response within 10 days and no later than 20 days in "unusual circumstances" where government officials run into problems processing a request.

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"Courts have been reluctant to compel agencies to meet the deadline. It's basically how quickly you can get around to it," says Elaine English, director of the FOI Service Center of The Reporters Committee for Freedom of the Press.

In the past five years, there has been "a quantum leap in complaints about delays," says Sam Archibald, a journalism professor at the University of Colorado. "Delay is one of the ways to ensure secrecy," says Mr. Archibald, who was staff director of the House Government Operations subcommittee that drafted the FOIA in 1966.

In a 1983 review, the General Accounting Office reported that Justice Department offices took an average of 122 days to process FOIA and Privacy Act requests and the FBI took an average of 139 days.

The problem is illustrated by the State Department. At the end of last

year, it had a backlog almost equal to the 3,617 FOIA requests it processed in 1984, Rep. English says. Busy senior officials involved with international crises must clear information before it can be released, agency personnel counter. The result is that requests related to high-interest foreign policy matters languish while those of less pressing matters get processed more quickly.

As a result, journalists generally employ other methods to obtain files. "A lot of reporters just use it [the FOIA] as a last resort," says a congressional staffer.

Not all agencies are uncooperative. The Defense Department "follows the law successfully," says Mr. Archibald. Sources also give credit to the Department of Health and Human Services. The pair granted more than 95 percent of their FOIA requests without deleting any information — an indication that the law "works and it works well," says Rep. English.

As the law is written, government officials can refuse to disclose nine categories of information, including: defense and foreign policy secrets, pre-decisional documents and working papers, personnel and medical files, investigatory files compiled for law enforcement, proprietary business information and records exempted from disclosure by other statutes.

Career bureaucrats have added an unwritten 10th exemption to the FOIA: "I don't want to give it to you," Mary Hargrove, a reporter for The Tulsa Tribune told the Associated Press Managing Editors' last annual meeting.

William M. McDonald, who runs the Pentagon's FOIA office, says there is no intent to evade the law. "It is difficult for people to understand why they have to staff for this. It's additional work beyond their regular full-time jobs."

The English and Kleczka bill includes tougher sanctions against government agencies that abuse the disclosure law — particularly by violating its time limits or misusing its disclosure exemptions. For example, the government could withhold only properly classified information that "could reasonably

be expected to cause identifiable damage" to national defense or foreign policy interests and only if "the need to protect the information outweighs the public interest in disclosure."

Mr. Wiener, who received help from the American Civil Liberties Union of Southern California, believes the law can be improved. "It's extremely time-consuming. The individual trying to use the act is virtually powerless if he or she faces deletions. The only recourse you have is if you have some big institution to support you."

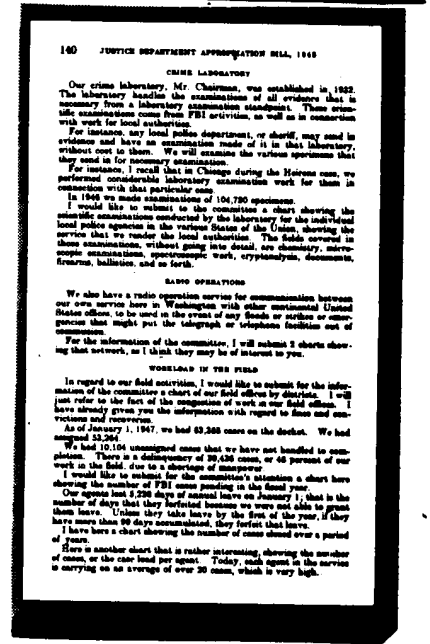
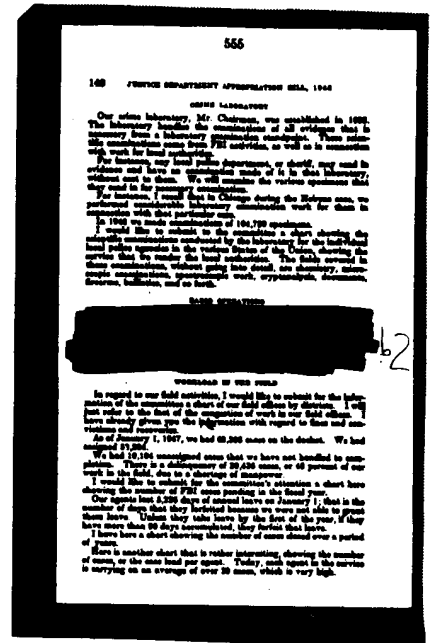
The legislation also would require the government to establish a uniform fee schedule for processing requests. Agencies charge as little as \$3 an hour if a clerical worker does the search or as much as \$18 an hour for professionals conducting the search. The government can currently charge fees to recoup its search and copying costs, but not for the manhours devoted to the reviewing process. As a result, FOIA fees now pay only about 5 percent of the yearly cost of FOIA, conservatively estimated by the General Accounting Office to be \$61 million.

The law also provides for fee waivers when disclosure primarily benefits the general public, says the FOI Service Center's Elaine English. As an established historian and writer, Mr. Wiener had his fees waived. He nonetheless had to file an appeal for one FBI file that would have cost him "in the hundreds of dollars."

The bill also would transfer governmentwide authority to administer FOIA from the Justice Department to the newly created office of the U.S. archivist. Justice, says Rep. Kleczka, has exercised "poor, almost nonexistent oversight."

Congress has not refused all administration requests. Last year, the CIA convinced Congress to exempt its operational files from public disclosure with the unlikely of allies — the ACLU. The ACLU's support was not without a price — a guarantee from the CIA to speed up its notoriously slow response to FOIA requests.

Staff writer Karen Diegmüller contributed to this report.



Comparisons of a page of public testimony given 28 years ago by then-FBI Director J. Edgar Hoover and the same document censored by the FBI in 1981 when responding to an FOI request.