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Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
UNITED STATES SENATE

CONCERNING

THE FREEDOM OF INFORMATION ACT

AUGUST 2, 1988

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Mr. Chairman and Members of the Subcommittee:

I am pleased to be here this morning to address the Department of Justice's administration of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1982 & Supp. IV 1986), the principal statute governing public access to federal information from the Executive Branch. This Act has become an essential part of our democratic system of government.

As you know, the Department of Justice exercises government-wide policy responsibility to encourage agency compliance with the Freedom of Information Act, in accordance with 5 U.S.C. § 552(e), and this responsibility is discharged by the Department's Office of Legal Policy and its subordinate Office of Information and Privacy. However, within the Department of Justice, each component bears the responsibility of responding in the first instance to FOIA requests for its own records.

The Department of Justice works hard to fulfill its responsibilities under the FOIA. In 1987, the Department acted on 60,610 requests. This was an increase of more than 4,000 from 1986, which itself was an increase of more than 4,000 from 1985. In 1987, the Department also acted on over 2,100 administrative appeals. The processing of last year's requests and appeals required the dedication of over 600 employee years. This

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commitment -- just for administrative processing, not for litigation -- amounts to almost one percent of the entire personnel resources of the Department.

At the Department of Justice, responding to FOIA requests is a growth industry. Not only are the numbers of requests growing, but their complexity and magnitude seem also to be increasing. The experience of the FBI readily illustrates the massive nature of this activity: Last year the FBI alone released over 3/4 of a million pages under the FOIA, and the Bureau now has pending or is presently processing 149 "project" requests -- each involving over 3,000 pages -- encompassing a total of over 900,000 pages.[1] Unfortunately, this is one growth industry in which we have few economies of scale. Processing records for FOIA disclosure is a highly labor-intensive activity. It begins with the search for responsive documents, often through many sets of files. Then, after consultations with program personnel familiar with the sensitivity of the records, the FOIA analyst conducts a line-by-line, page-by-page review, making excisions where necessary. It requires the utmost care, whether the subject of the records is national security, law enforcement, trade secrets or personal privacy.

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[1] One well-known example of an FBI "project" case is the request by the children of atomic bomb spies Ethel and Julius Rosenberg, which encompassed approximately 450,000 pages of records. See <u>Meeropol v. Meese</u>, 790 F.2d 942, 949 (D.C. Cir. 1986).

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My prepared statement contains a detailed discussion for the record of several aspects of the Department's activities with respect to the FOIA, including the 1986 amendments to the FOIA and their implementation. Part II summarizes the background of the FOIA, the 1974 amendments to the FOIA, and the experience of the federal government in meeting the requirements of the Act. It then addresses the genesis of the more recent reform proposals, which began during the Carter Administration and culminated in the enactment of the Freedom of Information Reform Act of 1986,[2] as well as the Department's efforts to implement the law enforcement and fee and fee waiver revisions made by the 1986 FOIA amendments.

Part III then describes the Department of Justice's numerous activities guiding the government-wide implementation of the Act in recent years. This discussion demonstrates the vast increase in the quantity and quality of the Department's FOIA guidance and training efforts since the beginning of the present Administration, when the Office of Information and Privacy was created.

But before getting into the discussion of the specific amendments to the FOIA and the Department's efforts to encourage agency compliance with its requirements, I would like to take this opportunity today to discuss some of this Administration's

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[2] Pub. L. No. 99-570, 100 Stat. 3207, 3207-48, §§ 1801-1804 (Oct. 27, 1986).

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policy perspectives on the Freedom of Information Act, to provide some context concerning the important public policy issues that are embodied within it. For many years now, these basic policy issues have undergirded the public debate over the subject of FOIA reform, the background and legislative results of which I subsequently review. Part I of my testimony thus states some general themes and considerations that I believe should be borne in mind in considering the subject of the FOIA and its implementation.

I. POLICY PERSPECTIVES

When President Lyndon Johnson signed the Freedom of Information Act into law on July 4, 1966, his bill-signing statement articulated the delicate public policy balance that the FOIA was intended to strike for our Federal Government:

> A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

Since then, the FOIA has had a profound effect on the operation of the Federal Government, though not always in the areas and in the manner anticipated, and it has sometimes been seen as "out of balance" in several respects.

When it was enacted, the FOIA rode on high hopes. Journalists and scholars, public interest groups and private citizens all hailed the Act as ushering in a new era of

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accountability in government. Dissatisfaction with the original provisions of the Act led to the 1974 amendments, and dissatisfaction with those changes led to the 1986 revisions. Yet, even after more than two decades of agency experience, litigation and legislative revision, it is still difficult to appraise the extent to which expectations for the FOIA have been met and whether a proper balance under the Act has been realized.

First, it must be said that there can be no quarrel with the overall goal of the Freedom of Information Act. An informed electorate is the cornerstone of a healthy democracy, and any mechanism that effectively serves this end is of great societal value. Surely all would agree that the FOIA has contributed to this end and that its worthy public policy goal has often been achieved.

Indeed, where this goal has been achieved, the acknowledged accomplishments of the Act have been well publicized. The FOIA undeniably fosters a general public perception of government openness and accountability. Certainly, FOIA disclosures have provided the basis for numerous news stories and books and much public discussion on a very broad array of important topics. In addition, it is self-evident that by making many agency records publicly available, the FOIA facilitates a kind of public oversight, discouraging unprincipled and arbitrary agency actions by virtue of the mere prospect of compelled disclosure.

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At the same time, more than two decades of experience with the Act suggest that it provides these benefits at a far greater cost in other respects than was originally anticipated -- a cost which should not be ignored and which in at least some situations may be too high a price to pay.

Evaluation of the Freedom of Information Act's effectiveness often is hampered by an excessive focus on only one aspect of the "public interest" -- that is, by considering only how many documents are disclosed, how many requests are denied, and what the "batting average" is for various federal agencies or requesters.[3] Contrary to such a simplistic analysis, the overall "public interest" sought to be served by the FOIA incorporates a multiplicity of discrete, sometime conflicting, "public interests" -- each of which figures into the mix which constitutes the broadest "public interest" of good government.

In addition to the "public interest" in disclosing information for government oversight, as already mentioned, there are three other principal "public interests" that I believe to be essential to a balanced approach to, and understanding of, the Freedom of Information Act.

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3 For the record, the Department's "batting average" is rather high. Of its substantive determinations in 1987, the Department made complete grants to 59% of the requests and partial grants to 33% of the requests, while only 8% were denied in full.

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The first and most obvious such "public interest" under the FOIA is that some classes of sensitive records should not be required to be disclosed to the public at all. The FOIA, of course, provides nine express exemptions. In the case of records implicating the vital interests protected in these exemptions, those interests are preserved by withholding the records from FOIA disclosure. Thus, the FOIA expressly contemplates that a "public interest" is sometimes served by maintaining the confidentiality of agency records, in order to protect our personal privacy, for example, or to preserve the effectiveness of law enforcement investigations.

A second "public interest" is the public's interest in a smoothly operating and efficient Federal Government. Whatever disagreements there may be over particular functions of the government, there presumably is a "public interest" in maintaining the effectiveness of government operations, i.e., ensuring that a government agency is able to perform the public mission for which it was created.[4] Certainly, to the extent that government agency operations and activities are affected -- or sometimes disrupted -- by the FOIA, the "public interest" is

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[4] I note that the Chairman of this Subcommittee deserves special credit for seeking to extend the coverage of certain laws, including the FOIA, to the Congress. That would be an admirable achievement, because I suspect that it would give the Congress a much closer appreciation for the costs and burdens that result from the FOIA's implementation.

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necessarily affected.[5] Of course, in many cases where the Act requires such intrusions, the value of requested information being made available to the public may weigh in favor of such an accommodation. However, as I will discuss in this testimony, there are too many situations in which that is not the case.

A third "public interest" necessarily inherent in the Freedom of Information Act is the public interest in using scarce taxpayer resources in a responsible and productive manner. This means that it is proper for the taxpayer to underwrite the cost of administering the Act only when the public directly benefits from its use. Especially in these times of budgetary restraints, the setting of such a priority for the expenditure of taxpayer funds is a matter of basic fiscal responsibility.

However, several categories of FOIA users -- for example, those who have no intent or desire to benefit the public with the information they receive -- have been able to take inappropriate advantage of its structure to serve their own private interests at the taxpayer's expense and often to the detriment of more deserving requesters who are forced to wait in line behind them before their requests are processed. Surely, far beyond the simple dollar numbers, the greater cost -- some would say waste -- is in the siphoning off of the public

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[5] In fact, some operations and activities are affected insofar as officials have become reluctant to commit their ideas to paper, fearing that these records may some time in the future be disclosed under the FOIA.

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servant's time and attention from matters of legitimate public interest to the service of purely private concerns. Who would say that a prisoner seeking revenge, a company anxious to obtain a competitor's data, or even an individual who is merely curious about some esoteric topic should be given virtually unlimited license to monopolize government time and resources for purely private usages?

It is this public interest that was at the heart of then-University of Chicago Law Professor (now-United States Supreme Court Justice) Antonin Scalia's criticism of the Freedom of Information Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored."[6] Justice Scalia surveyed some of the Act's more glaring inequities and weaknesses before concluding:

> They are foolish extravagances only because we do not have an unlimited amount of federal money to spend, an unlimited number of agency employees to assign, an unlimited number of judges to hear and decide cases. We must, alas, set some priorities -- and unless the world is mad the usual Freedom of Information Act request should not be high on the list.[7]

His rather colorful rhetoric notwithstanding, Justice Scalia's thesis, with which I agree, is actually quite simple: Though intended to enable the public to learn more about their government, the reality is that the FOIA too often has been

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[6] Scalia, The Freedom of Information Act Has No Clothes, Regulation, Mar./Apr. 1982, at 15.

[7] *Id*. at 17-18.

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transformed into a vehicle serving purely private interests, to the detriment of its intended public interest.

Today, a typical FOIA scenario is not, as envisioned by the Congress, the journalist who seeks information about the development of public policy which he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who it was who informed against him; the drug trafficker trying to evade the law;[8] the foreign requester seeking a benefit that our citizens cannot obtain from his country; or the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not. And as if these uses do not diverge enough from the Act's original purpose, it is the public -- the intended beneficiary of the whole scheme -- who bears nearly the entire financial burden of honoring those requests while often reaping virtually none of the benefits from them.

The 1986 FOIA amendments partially accommodated this concern by providing for the assessment of review charges for the processing of requests made for commercial purposes, while at the same time granting special fee consideration to journalists,

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[8] As the D.C. Circuit has stated, "Congress granted the scholar and the scoundrel equal rights of access to agency records." Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986), vacated on other grounds, 108 S. Ct. 2010 (1988).

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scholars and those others who seek information primarily to inform the electorate. See pp. 45-46 infra.

Removing unintended subsidies for commercial requesters was manifestly a good idea. But it seems to me that other groups just as easily identifiable -- prisoners, litigants attempting to supplement civil or criminal discovery, and foreign entities -- continue to receive disproportionate benefits of the FOIA though they also are unlikely to benefit the general public with the fruits of their requests. The benefits of the FOIA should be more carefully tailored to prefer those whose requests further the laudable goal of drawing the public closer to the workings of its government for the purpose of improving its quality.

Prisoners. At the Department of Justice, for example, prisoners are the most persistent FOIA users. Their requests, appeals and litigation flood the criminal law enforcement agencies. Some individuals file hundreds of requests and dozens of lawsuits.[9] They clog the administrative system. A Drug Enforcement Administration study showed that approximately 60 percent of those who request DEA records were behind bars at the time, and half of the remainder were under investigation if not

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[9] See, e.g., Crooker v. United States Marshals Service, 641 F. Supp. 1141, 1142-43 (D.D.C. 1986) (finding that prisoner's sixty FOIA lawsuits in eight years "have been [filed] for purposes of harassment").

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yet already indicted.[10] It is not difficult to imagine what it is they sought: information that would abet their efforts to learn details of an investigation so that they may thwart it, or that would identify government informants or agents. All too often in such criminal enforcement contexts, there is the related cost that valuable investigators in the field will have to be pulled off the case temporarily to advise on the FOIA response. Each time this is done, a promising lead may vanish, an additional drug shipment may be delivered undetected or at very least, an agent's attention to a case will be diverted. It takes little imagination to realize how this dissipation of limited law enforcement resources can be accomplished on a systematic basis by particularly sophisticated requesters, such as those in organized crime, or by particularly persistent requesters.[11]

Foreign requesters. The FOIA gives the same rights to foreigners as to United States citizens -- even permitting lawsuits in our courts. For example, a Canadian news service which reports to its Canadian readership has not only been held

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10 Freedom of Information Act: Hearings before the Subcomm. on the Constitution, Senate Comm. on the Judiciary, on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751, 97th Cong., 1st Sess. [hereinafter "1981 Senate Hearings"], Vol. 1, at 1052 (1981) (DEA report entitled "The Effect of the Freedom of Information Act on DEA Investigations").

11 As expressed by a rather exasperated Circuit Court Judge Richard A. Posner of the Seventh Circuit Court of Appeals, in the context of a $39.20 FOIA fee waiver suit, "How much more money shall the taxpayer be forced to spend to relieve the monotony of [the plaintiff's] incarceration?" Savage v. CIA, 826 F.2d 561, 563 (7th Cir. 1987).

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to qualify as a "media representative," but also to qualify for a fee waiver for the dissemination of the requested information in Canada.[12] Yet Canada, as well as other countries, provides no such reciprocal access to our citizens -- let alone at any discount -- under their public information laws. Even the Ayatollah Khomeini can invoke the benefits of the FOIA; his government filed a FOIA request in 1981 seeking access to CIA information on the then-exiled Shah of Iran. And as if that were not enough, even under the 1986 FOIA amendments the CIA would not have been able to charge processing costs for the time required to review the responsive records.

Civil Discovery. Another large and troublesome group of requesters consists of those who use the Act to short-circuit the rules of civil discovery, often in cases involving the government. Indeed, for the knowledgeable attorney the FOIA can be a gold mine which yields access to a variety of types of information essential to the litigant's efforts. Agencies uniformly acknowledge that a substantial percentage of the requests they receive are directly related to ongoing litigation discovery. The Defense Department has reported that half of the FOIA requests it receives come from business interests wishing to supplement formal discovery in defense contract litigation.[13]

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[12] Southam News v. INS, 674 F. Supp. 881, 892-93 (D.D.C. 1987).

[13] Ehlke & Relyea, Congress' Look at FOIA Changes Stirs Controversy, Legal Times, Jan. 3, 1983, at 11.

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The Food and Drug Administration, Securities Exchange Commission and Federal Communications Commission have reported similar experiences.[14] The Department's Land and Natural Resources Division advises that requests this year are being filed at rate almost twice that of last year; the vast majority are from targets of the government's environmental investigations or from those preparing to litigate with those targets.

Despite the United States Supreme Court's repeated admonitions that "[t]he primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery,"[15] private litigants can and all too frequently do avail themselves of the Act to pursue their own economic interests.[16]

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[14] Koch & Rubin, A Proposal for a Comprehensive Restructuring of the Public Information System, 1979 Duke L.J. 1, 17-19.

[15] Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); see also United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02 (1984) ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented [by a FOIA request]."); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (the FOIA was "not intended to function as a private discovery tool"); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) ("The [Freedom of Information] Act is fundamentally designed to inform the public about agency action and not to benefit private litigants."); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of the [FOIA]."). Similarly, it has been noted that the FOIA was not "intended to serve as a substitute for criminal discovery." United States v. United States Dist. Court, 717 F.2d 478, 481 (9th Cir. 1983).

[16] However, the mere fact that a party is in litigation will have no effect on the merits of the party's FOIA request. See NLRB v. Sears, Roebuck & Co., 421 U.S. at 143 n.10
(continued...)

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Increasingly, legal newspapers, newsletters and looseleaf services which report on the FOIA offer matter-of-fact advice on how lawyers can manipulate the Act for the commercial benefit of their private clients. For example, one author recently published very specific instructions and advice encouraging readers to use the FOIA to secure government documents to facilitate private litigation against both competitors and the government alike, maintaining that it will "increase your and your clients's chances in litigation."[17] That advice included a comprehensive review of the advantages of using the FOIA as a supplement to civil discovery and counseled attorneys to file administrative appeals from agency denials of all FOIA requests and, "If still denied, file suit."

From the requester's viewpoint, whether litigation has been initiated or is only contemplated, there are distinct advantages to using the FOIA to supplement formal discovery. First and foremost is that the FOIA provides a mechanism for obtaining the release of agency records prior to the filing of a

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[16](...continued) (requesting party's rights under FOIA "are neither increased nor decreased by reason of the fact that it claims an interest in [requested information] greater than that shared by the average member of the public"); see also Columbia Packing Co. v. Department of Agriculture, 563 F.2d 495, 500 (1st Cir. 1977); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1134-35 (4th Cir. 1977).

[17] Gay, Litigator's Guide to Using Governmental Sources and the Freedom of Information Act, The Brief 52, 55 (Fall 1985).

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lawsuit. Thus, law firms and potential litigants can maintain their own files of agency records and have a head start on the agency if litigation does occur. That one-way transfer of information also may give the requester a substantial advantage in any settlement negotiations which might occur prior to litigation. The agency's attorneys are required to lay their cards face-up on the table while their opponents may play their hands close to the vest. There is also the risk that over-broad FOIA requests can be used to distract and disrupt preparation of the government's case by forcing the government to "divert its attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records."[18]

Business requesters. Unfortunately, agencies all too often are required to devote substantial FOIA staff resources to the processing of requests from business entities which seek information solely for the purpose of gaining a commercial advantage over a competitor. These requesters, usually with no pretext of benefiting the public whatsoever, often vigorously

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[18] Tomlinson, Use of the Freedom of Information Act for Discovery Purposes, 43 Md. L. Rev. 119, 128 (1984). As examples of the type of burden that may be placed upon an agency as a party seeks to use the FOIA to circumvent civil discovery, see, e.g., Carter v. Department of Commerce, Civil No. 85-0975, slip op. at 2 (D.D.C. July 23, 1986) (FOIA request regarding agency disciplinary proceeding resulted in release of 15,000 pages of records covering all such proceedings for past 15 years); Brinderson Constructors, Inc. v. Corps of Engineers, Civil No. 85-0905, slip op. at 5 (D.D.C. June 11, 1986) (FOIA request stemming from contract litigation resulted in over 100,000 pages of records being made available).

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pursue the "potential windfall for competitors to whom valuable information is released under the FOIA."[19] Two rather typical recent examples include an aircraft spare parts manufacturer seeking its competitor's "commercially valuable" technical design drawings "without having to pay for them"[20] and the attorney for a hydraulic turbine manufacturer seeking its competitor's technical and pricing proposals which would permit it to "easily estimate and undercut [its competitor's] bids, thereby causing harm to the corporation's competitive position."[21] In addition to the drain on scarce FOIA personnel resources caused by the processing of such requests, such potential windfalls "could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government."[22]

Another example of a commercial use of the FOIA for purposes not in the public interest is the recently decided case of Tax Analysts, Inc. v. Department of Justice.[23] There, a commercial tax reporting service requested copies, on a weekly basis, of all federal district court tax opinions from the

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[19] Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 51 (D.C. Cir. 1981).

[20] Pacific Sky Supply, Inc. v. Department of the Air Force, Civil No. 86-2044, slip op. at 9-10 (D.D.C. Sept. 29, 1987).

[21] Landfair v. Department of the Army, 645 F. Supp. 325, 329 (D.D.C. 1986).

[22] Worthington Compressors, Inc. v. Costle, 662 F.2d at 51.

[23] 845 F.2d 1060 (D.C. Cir. 1988), reh'g en banc denied, No. 86-5625 (D.C. Cir. July 15, 1988).

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Department's Tax Division, because the company did not want to expend the resources to go to the various district courts around the country to acquire a copy of the opinions, as did its competitor tax services. The District of Columbia Circuit rejected the Department's defenses, though it did admit that securing "already publicly available material for a commercial publication is certainly not a commonly perceived purpose of the FOIA."[24] While the Court acknowledged that the Department could charge its statutory fees for search and duplication (which for search fees alone were estimated to be nearly $75,000 per year), it suggested that the agency could minimize this cost by creating a special file whereby a copy of each tax opinion would be deposited and held for the company as it arrived at the Justice Department's Tax Division.

In this case, the FOIA serves only to save one company the expense required of its competitors to compile publicly available sources for inclusion in its publication, with much of its direct costs being shouldered by the American taxpayers.

This case, further, has disturbing implications for all federal agencies, with the potential for imposing massive financial and administrative burdens on federal agencies to serve as public "storehouses" of information. For example, the Department of Justice could be required to establish a "national

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[24] 845 F.2d at 1066.

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court library" whose holdings would be subject to the FOIA.[25] Similarly, the Environmental Protection Agency could be required to establish a specialized library of all court cases relating to our natural resources. Mr. Chairman, the Congress created the National Archives, the Library of Congress, and the federal depository library system for such purposes. Other federal agencies should not be pressed into service as libraries for materials publicly available elsewhere.

These kinds of experiences show the FOIA to be imposing significant costs, both in budgetary outlays and in its dysfunctional impact upon agency effectiveness. The direct costs of federal agency compliance with the FOIA to process the nearly 350,000 requests for records received each year through the administrative appeal stage now exceed $70 million.[26] Some

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[25] In 1987, a total of 797,648 cases were terminated in the federal circuit, district and bankruptcy courts, and the United States was a party to 115,314 cases begun in the district courts. Annual Report of the Director of the Administrative Office of the United States Courts, 1987, pp. 1-9.

[26] The most recent authoritative analysis of the costs of the Freedom of Information Act was conducted in 1983. Using even the admittedly incomplete data collected in 1981, the General Accounting Office counted up more than $61 million in annual FOIA costs. Government Accounting Office Report GAO/GGD-83-71 (June 22, 1983). Surely, the study would have reflected far greater costs to the government if it would have been able to accurately capture figures understated or not at all included. Such items would include realistic litigation costs from the agency General Counsels, from the United States Attorneys, from the Justice Department's Civil and Tax Divisions, and from the agencies with their own litigation authority. They would also include the costs to the district and appellate courts. And, most significantly, they would have to include the cost of consultations with and reviews by non-FOIA program staff personnel.

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commentators have even estimated that the real cost of the FOIA may be as high as $250 million annually.[27] The demands of FOIA processing also siphon valuable personnel resources away from the agencies' primary missions. Litigation of cases arising from the denial of FOIA requests further burdens the agencies as well as the federal courts, prompting this incredulous reaction from one district court judge:

> It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which [the Freedom of Information Act] process necessarily entails.[28]

Unfortunately, specific figures are impossible to establish because of disparate agency accounting and statistical methods. Time and resources spent on FOIA matters by agency staff who are not part of an agency FOIA unit often are not identified specifically as a FOIA expense. In many cases the professional FOIA staff must consult with non-FOIA staff personnel, i.e., senior agency executives, contracting officers, program or area specialists, in order to determine the applicability of various exemptions. Thus, agency personnel who either created or worked on a document may have to review that document during both the initial request and administrative appeal stages, as well as possibly during any subsequent litigation. Similarly, agency personnel may be required to

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27 See Grunewald, Freedom of Information Dispute Resolution, 40 Admin. L. Rev. 1, 21 (1988).

28 Agee v. CIA, 517 F. Supp. 1335, 1341-42 (D.D.C. 1981) (Gesell, J.).

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review documents created by predecessors. These review efforts require intensive professional staff time, all at the expense of the staffers' primary duties. Most agencies have no means of allocating these costs to the FOIA portions of their budgets, assuming that such a portion even exists. Nor is there a way to quantify the loss of efficiency of agency staff distracted by FOIA duties from accomplishing primary agency functions.[29]

While the Department does not routinely compile data by requester category, the requests from those who do not benefit the public with the fruits of their requests -- the prisoners, the foreign parties, the commercial requesters and those seeking to shortcut established civil and criminal discovery procedures -- constitute a large proportion, probably approaching one half, of our total requests. These requesters threaten the balance of interests at the heart of the Freedom of Information Act. The public subsidizes the processing of their requests, but itself reaps no gain from their disclosures and, indeed, may suffer significant detriment from such disclosures. Equally as important, those requesters who are likely to benefit the public with the information disclosed -- the journalists, historians, public interest groups and concerned citizens -- have to wait in

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29 Likewise, there are no empirical analyses purporting to quantify the costs of FOIA litigation to the judiciary. However, based on a rough figure of $7,200 per case, which seems unrealistically low, it has been estimated that FOIA litigation costs the federal courts approximately $3.6 million per year in adjudicative and administrative costs. Grunewald, supra, at 24-25.

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line while the requests of the unintended beneficiaries, which have overloaded the administrative system, are satisfied.

For these reasons, Mr. Chairman, our policy perspective is that the Act's proper balance of interests in some respects is askew. The FOIA's original purpose -- that of informing the public about the activities of the Federal Government in order to better inform the electorate -- is increasingly being crowded out by other uses that do not serve the public interest. With the single recent exception of commercial requesters, the taxpayers are required to shoulder the bulk of the costs expended in providing these individualized user services. These considerations, of which federal agencies on a daily basis are only too painfully aware, necessarily shape this Administration's perspective on the Freedom of Information Act. Such considerations ought to be taken into account, Mr. Chairman, in any assessment of the Act's overall cost and effectiveness. A balanced consideration of the Freedom of Information Act requires that the multiplicity of "public interests" be considered. The undeniable public interest in the disclosure of records for government oversight must be balanced against the equally legitimate public interests in preserving the confidentiality of certain records, in maintaining the efficient operation of government, in promoting fiscal responsibility, in protecting the integrity of the law enforcement process, and in minimizing the employment of the FOIA in a way which serves only private interests.

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II. LEGISLATIVE REFORM EFFORTS

Indeed, since the outset, the major challenge presented under the Freedom of Information Act has been to achieve a proper balance between the important public policy interests that are counterpoised within it -- to best accommodate and reconcile these necessarily conflicting interests in both statutory terms and sound implementation policy.

A. Historical Background

The effort to strive for this balance began with the Freedom of Information Act's enactment in 1966. In enacting the FOIA, the Congress established an unprecedented mechanism for public access to the records of the Federal Executive Branch, completely reversing the pre-existing legal presumption under Section 2 of the Administrative Procedure Act that federal agency records would not be made publicly available unless good cause for their disclosure was shown.[30] Under the FOIA, for the first time, any member of the public -- "any person" -- could

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[30] Section 2 of the APA, 5 U.S.C. § 1002 (1964), the public disclosure section, afforded federal agencies such broad discretion to deny access requests that it had come to be looked upon by many as more a withholding statute than a disclosure mechanism. <u>See</u> S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

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request access to any federal agency record, without having to state a reason for seeking such disclosure.[31]

In establishing this unprecedented disclosure mechanism, the Congress specifically provided nine exemptions designed to preserve legitimate governmental interests in the face of this new general disclosure policy, to introduce some measure of balance into the Act as it were. For example, Exemption 7 as originally enacted categorically protected all "investigatory files" from compelled FOIA disclosure -- largely exempting federal law enforcement agencies from the ambit of the Act. The 1966 Act also afforded agencies much of the broad procedural latitude that they had enjoyed previously. Thus, during the early years of the FOIA's existence, as federal agencies adapted to its basic new public policy of compelled information disclosure, the impact of the Act was relatively limited by its design.

With the passage of time, though, perhaps inevitably, members of the public and groups most interested in information disclosure began to voice the view that the FOIA, in the form in which it was enacted, was too heavily weighted against disclosure in some substantive and procedural respects. It was suggested that the balance sought to be achieved through the FOIA had not

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[31] As discussed at pp. 12-13 <u>supra</u>, the Act grants foreigners the same rights as American citizens, so that even the Ayatollah Khomeini was able to make a FOIA request for CIA records in 1981 pertaining to the exiled Shah of Iran.

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been achieved under its original enactment and that the Act required major adjustments in order to make it a more viable mechanism of government information disclosure.

Consequently, and with the added strong impetus of the extraordinary public policy concerns arising from the "Watergate affair," the Congress in 1974 substantially broadened the disclosure obligations of the Act through a series of statutory modifications, both substantive and procedural. Generally speaking, the 1974 amendments made it easier for FOIA requesters to make requests and to challenge agency nondisclosure decisions in court. They also greatly increased the burden to be met by the government in properly withholding sensitive records or record portions, particularly as to information relating to law enforcement and national security matters. Most significantly, the protection for law enforcement files in Exemption 7 was drastically cut back by restructuring that exemption to require the determination that disclosure would cause one of six enumerated harms (subparts (A) through (F)) before an item of law enforcement information could properly be withheld.

As a result of the 1974 FOIA amendments -- which became effective in 1975 and were widely publicized as "opening up" many agency files -- the volume of activity under the Act increased enormously, at both the administrative and the litigation levels. During the ensuing years, federal agencies struggled with the ever-increasing demands that were placed upon them to process

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voluminous amounts of their records, both old and new, for requested public disclosure. This was particularly so at agencies holding law enforcement responsibilities, where the volume of FOIA requests literally skyrocketed overnight; at the FBI, for example, the annual number of FOIA requests received jumped from 447 to 13,875 within one year, an increase of more than 3,000 percent.[32] Most requests required the laborious making of specific harm determinations -- page by page and line by line -- under Exemption 7's demanding new structure.

Much significant information from law enforcement files and other agency files was publicly disclosed for the first time as a result of this greatly increased FOIA activity beginning in the mid-1970s. But it was not long before those most closely familiar with FOIA operations at federal agencies had a firm basis for concluding that the 1974 FOIA amendments, in some very critical respects, had actually overcorrected the course of our national disclosure policy and that the FOIA was, once again, out of balance. For example, both foreign and local law enforcement agencies repeatedly expressed great concern over our ability to protect the sensitive information that they had provided to federal law enforcement agencies, as well as to protect the very fact of their cooperation. Similarly, our law enforcement agencies found that many of their individual confidential sources had become reluctant or unwilling to continue to cooperate.

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[32] See Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976).

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Another problem resulting from the 1974 amendments was that in some cases the mere invocation of a law enforcement exemption -- particularly Exemption 7(A) -- served to "tip off" the requester to the fact of an ongoing investigation of him.

Corrective legislative reform of the Freedom of Information Act -- especially regarding the critical need to ensure adequate protection of the federal government's most sensitive law enforcement information -- was soon viewed as necessary by many observers. In fact, the FOIA reform movement to counterbalance certain aspects of the 1974 FOIA amendments began in the late 1970's, as agency FOIA officers developed a depth of experience in dealing with the amended Act and began to formulate specific reform proposals that could address their increasing concerns. These FOIA reform proposals were, in turn, carefully compiled by the Department of Justice in its capacity as the "lead" federal agency for FOIA matters and as the agency most heavily concerned with the critical law enforcement interests that were threatened by the FOIA in its amended form.

Based upon this active consultation with other federal agencies during 1979 and 1980, the Department put together a wide-ranging legislative package of FOIA reform proposals -- one which included strong new protections for law enforcement information among many other major substantive and procedural reforms. The final, comprehensive package of FOIA reform amendments was assembled during mid-1980 and then received

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approval at the highest levels within the Justice Department for submission as a formal legislative proposal. This proposal was not introduced during the Carter Administration only because there was a change of administrations.

However, the very fact that the Carter Administration undertook such extensive FOIA reform efforts illustrates well that the subject of FOIA reform -- of striving for the best possible balance in the Act -- is fundamentally a matter of sound public policy that transcends partisan political bounds.

In 1981, at the beginning of this Administration, under the leadership of former Assistant Attorney General for Legal Policy Jonathan C. Rose, the Department made it a high priority to continue these FOIA reform efforts and to bring them to fruition. The 1980 package of FOIA amendment proposals served as a firm foundation for these renewed efforts. The Department also again surveyed a wide range of other agencies to ensure that its amendment proposals would reflect their most recent experience in administering the 1974 amendments.

These efforts all led to the Department's formal submission of a FOIA reform legislative proposal in October 1981 (S. 1751, 97th Cong.), which soon was merged with a similar proposal (S. 1730, 97th Cong.) that originated within the subcommittee then having jurisdiction, the Subcommittee on the Constitution, chaired by Senator Orrin Hatch. This merged bill,

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S. 1730, was quickly marked up for full Senate Judiciary Committee consideration. The keystone of this FOIA amendment package was its law enforcement provisions, which were based upon the demonstrated concerns that the 1974 FOIA amendments had dangerously weakened the ability of federal law enforcement agencies to perform their vital missions.

In particular, former Federal Bureau of Investigation Director William H. Webster testified to the vulnerability of law enforcement agencies such as the FBI to use of the FOIA by sophisticated requesters who could analyze investigatory records released in expurgated form under the 1974 FOIA amendments for the purposes of gleaning sensitive law enforcement information.[33] Indeed, such FOIA requesters were widely known to scrutinize such records in intense efforts to discern the identities of informants; this very fact alone threatened to dry up the FBI's vital confidential source system, as increasing numbers of sources began to doubt the government's ability to protect them in the face of FOIA requests.[34]

It is noteworthy, Mr. Chairman, that the full Senate Judiciary Committee, in carefully considering the subject of FOIA reform during the early months of 1982, did so in a strongly

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33 See 1981 Senate Hearings, Vol. 1, at 847-65, 973-88 (testimony of FBI Director Webster). See also id. at 1041-1147 (testimony regarding impact upon Drug Enforcement Administration).

34 Id.

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bipartisan spirit that unified the entire Committee behind a comprehensive set of compromise amendment proposals. As Chief Counsel of the Subcommittee at the time, I recall well that it was through your leadership, together with that of Senators Hatch and DeConcini, that the Senate Judiciary Committee unanimously approved a broad, yet carefully tailored, FOIA reform bill in May 1982. That compromise FOIA reform bill, which passed the Senate unanimously in the following Congress (S. 774, 98th Cong.), became the basis for all further consideration of FOIA reform legislation to date.

Regrettably, these FOIA reform efforts -- which enjoyed such a strong start in the Senate, consistent with their bipartisan origins -- then became stalled during the following sessions of the Congress, primarily due to the markedly different reception accorded the subject in the House of Representatives.[35]

It was not until almost the end of the 99th Congress, during congressional consideration of the Anti-Drug Abuse Act of 1986, that it became possible to achieve any measure of legislative FOIA reform. And then, because these FOIA reform amendments were adopted by the Congress as a floor amendment to the omnibus anti-drug legislation near the close of a legislative session, they were enacted without the

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[35] See FOIA Update, Winter 1984, at 1, 6; FOIA Update, Summer 1984, at 1, 4; FOIA Update, Fall 1984, at 1; FOIA Update, Spring 1986, at 1.

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contemporaneous preparation of committee reports or equivalent statements of legislative consensus that ordinarily would accompany such legislation.

B. Enactment of the 1986 FOIA Amendments

The Freedom of Information Reform Act of 1986, enacted as §§ 1801-1804 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207-48 (Oct. 27, 1986), was the culmination of these longstanding FOIA reform efforts. While it was not possible to achieve the complete breadth of FOIA reform that had earlier been unanimously approved by the Senate, the 1986 FOIA amendments nevertheless constituted a major reform of the Act, counterbalancing much of the troubling effects of the 1974 FOIA amendments, particularly regarding the protection of law enforcement information.[36]

The 1986 FOIA amendments consist of two distinct parts: the law enforcement amendments, contained in § 1802, which took effect immediately upon enactment on October 27, 1986; and the fee and fee waiver amendments, contained in § 1803, which took

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[36] One particular aspect of the previous FOIA reform bills ultimately was accomplished, in part, through an executive order issued in 1987 rather than by legislation. Executive Order No. 12600, issued on June 23, 1987, required agencies to implement most of the "business submitter notification procedures" contained in S. 774 to the extent permitted by law. However, that Order could not institute the "de novo" standard of judicial review that had been sought for "reverse" FOIA lawsuits brought to enjoin disclosure of such information. See FOIA Update, Summer 1987, at 1-3.

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effect only after a 180-day waiting period (ending April 25, 1987) and which required the issuance of implementing regulations to be fully effective. See Pub. L. No. 99-570, § 1804(a)-(b) (1986) (not codified).

1. The Law Enforcement Provisions of the 1986 Act

The law enforcement part of the 1986 FOIA amendments provided comprehensive new protection for the records of federal law enforcement agencies. These amendments consist of a series of statutory language modifications made throughout the Act's major law enforcement exemption, Exemption 7, plus three entirely new provisions in a new subsection (c) that establish special exclusions for the records of particularly sensitive law enforcement files.

The revisions to Exemption 7 made by the 1986 FOIA amendments are virtually identical to the law enforcement amendments first approved in the Senate several years earlier.[37] While preserving the basic structure of Exemption 7 established in 1974, these amendments addressed the concerns of law enforcement agencies by correcting its evident shortcomings. Both individually and collectively, they strengthen this critical

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[37] The only difference between the two is the immaterial substitution of the word "individual" in place of the words "natural person" at the end of Exemption 7(F). Compare 5 U.S.C. § 552(b)(7), as amended by Pub. L. No. 99-570, § 1802 (1986), with S. Rep. No. 221, 98th Cong., 1st Sess. 45-46 (1983) (containing pertinent portion of S. 774).

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exemption by broadening its applicability to law enforcement information.

First, the 1986 FOIA amendments substantially eased the threshold requirement of Exemption 7, which previously required that the records in question must be "investigatory records compiled for law enforcement purposes" in order for any of the six subparts of Exemption 7 even to apply. For example, law enforcement manuals formerly were held ineligible for Exemption 7 protection merely because they were not "investigatory" in character.[38] The 1986 amendments deleted the word "investigatory," and also made the exemption applicable to "information" as well as "records." As now formulated, the Exemption 7 threshold of "records or information compiled for law enforcement purposes" no longer would disqualify sensitive law enforcement information from receiving otherwise-applicable protection.

Second, the 1986 amendments made a fundamental change in Exemption 7 by reducing the agency's burden in establishing the risk of harm threatened by a requested disclosure. Previously, in order to withhold information under any of the exemption's six subparts, an agency was required to determine (and to show in court, if sued) that the disclosure "would" cause the particular law enforcement harm in question.

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38 See, e.g., Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (holding Exemption 7 inapplicable to DEA manual because it "was not compiled in the course of a specific investigation").

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As amended, Exemption 7 now requires a finding only that disclosure "could reasonably be expected to" cause the harm in question under its major subsections: Exemption 7(A) (ongoing investigations and enforcement proceedings); Exemption 7(C) (personal privacy); Exemption 7(D) (confidential sources); and Exemption 7(F) (life and physical safety).[39] Law enforcement agencies thus have greater latitude in safeguarding against the harms implicated in these exemptions, consistent with the "mosaic" principle of information analysis and protection.[40]

Third, the 1986 FOIA amendments also specifically broadened the protective scopes of several of Exemption 7's subparts. Exemption 7(D), as amended, now specifically protects nonfederal governmental entities and private institutions that confidentially share law enforcement information with federal agencies, thus ensuring that this vital system of confidentiality can be preserved. Similarly, the language of Exemption 7(D) was reworded to make clear that it protects all information furnished

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[39] 5 U.S.C. § 552(b)(7)(A), (C), (D), (F), as amended by Pub. L. No. 99-570, § 1802 (1986).

[40] The "mosaic" principle recognizes that, as one court has phrased it, a seemingly innocuous bit of information, "much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980).

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by a confidential source in connection with a criminal or lawful national security investigation.[41]

Fourth, the 1986 FOIA amendments completely revised Exemption 7(E), which previously protected only certain investigative law enforcement techniques and procedures. As revised, it now encompasses all law enforcement information the release of which "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."[42] Finally, Exemption 7(F) was broadened to permit the withholding of any law enforcement information the disclosure of which could threaten the life or physical safety of anyone, not just law enforcement officials as under previous law.[43]

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[41] Such complete protection under Exemption 7(D) is particularly important because any seemingly innocuous information provided by an informant could, potentially, identify him as such to a knowledgeable FOIA requester. FBI Director Webster described a classic example in which the mere mention of the phrase "green sedan" held such significance because, when released in context of a particular record and analyzed by a requester knowledgeable about the surrounding circumstances, it could identify an informant. See 1981 Senate Hearings, Vol. 1, at 856-57.

[42] 5 U.S.C. § 552(b)(7)(E), as amended by Pub. L. No. 99-570, § 1802 (1986).

[43] See 5 U.S.C. § 552(b)(7)(F), as amended by Pub. L. No. 99-570, § 1802 (1986).

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Beyond these measures strengthening Exemption 7, the 1986 FOIA amendments also established an entirely new form of protection -- the record "exclusion" -- for the records of certain especially sensitive law enforcement matters. The Congress took this special step recognizing the fact that in some situations an agency simply cannot adequately protect its law enforcement interests through the use of mere exemption protection, because the very invocation of a particular exemption tells a requester the sometimes sensitive fact that a certain law enforcement activity exists. New subsection (c) of the Act permits law enforcement agencies to "exclude" three categories of law enforcement records -- that is, to treat them, under narrowly specified circumstances, as simply not subject to the Act's requirements at all.

Under the "(c)(1) exclusion," federal law enforcement agencies now may exclude entirely from the Act's reach the records of its ongoing criminal investigations -- records that ordinarily would be withheld in their entireties under Exemption 7(A) anyway -- whenever an investigation's subject is unaware of its pendency and would receive a harmful "tipoff" to that fact if the agency were to specify Exemption 7(A) as the basis for its withholding of records. FBI Director Webster had testified that organized crime groups, for example, have been known to use the FOIA in attempts to learn whether certain of their activities have yet come under investigation.[44] Through this new exclusion,

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[44] <u>See</u> <u>1981 Senate Hearings</u>, Vol. 1, at 853-54, 977-80.

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agencies conducting sensitive criminal investigations, when pressed with carefully targeted FOIA requests, can avoid having to "tip off" investigative subjects to whether or not they are under investigation.

The "(c)(2) exclusion" is designed to cover the less common, but extremely perilous, situation in which a criminal organization attempts to use the FOIA to ferret out the identity of a confidential source or informant. It permits a criminal law enforcement agency to protect the identities of its informants and to preserve the integrity of Exemption 7(D) -- just as the (c)(1) exclusion preserves the integrity of Exemption 7(A) -- in those circumstances where the very invocation of Exemption 7(D) to withhold records on a named individual would be tantamount to identifying the individual as a confidential source.[45]

Finally, the "(c)(3) exclusion" provides special protection for certain national security-related records of the Federal Bureau of Investigation. Recognizing the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence and the battle against international terrorism -- as well as the fact that the classified records of these activities can be particularly

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[45] See 1981 Senate Hearings, Vol. 1, at 978.

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vulnerable to targeted FOIA requests[46] -- this exclusion authorizes the FBI to treat such records as not subject to the Act whenever the very existence of the records itself (and not just the information contained in them) is a classified fact.

2. Implementation of the 1986 Law Enforcement Amendments

The Department of Justice has taken a number of steps to implement these law enforcement amendments. As noted above, these amendments became effective on the date of their enactment (October 27, 1986), and also applied to any FOIA request or FOIA lawsuit pending on that date. See Pub. L. No. 99-570, § 1804(a) (not codified).

The Department's Office of Information and Privacy ("OIP") immediately notified all FOIA personnel in the federal government of this legislative development through its government-wide FOIA policy publication, FOIA Update, which described all of the FOIA reform amendments. See FOIA Update, Fall 1986, at 1-2. That issue also included a copy of the Act in its amended form, showing the exact changes made by the 1986 FOIA amendments. See id. at 3-6.

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[46] FBI Director Webster specifically testified to this vulnerability and to the fact that, in some such situations, "even acknowledging the absence of information in our files can be damaging." See 1981 Senate Hearings, Vol. 1, at 848. See also id. at 973 (referring to such testimony taken in executive session).

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Additionally, OIP specifically contacted the various law enforcement components of the Department of Justice, as well as those of the other major law federal agencies holding law enforcement responsibilities, to ensure that they were alert to the Act's new law enforcement provisions and understood their current applicability. Such contacts were also made through the Justice Department's Civil Division and Executive Office for United States Attorneys -- and with the few major federal regulatory agencies (the SEC, the NLRB, and the EEOC) that defend their own FOIA actions in court -- to ensure that the amendments would properly be taken into consideration in all pending FOIA litigation. In all such contacts, agency personnel were encouraged to bring to the Department's attention any question that might arise about the law enforcement amendments.

The Department also immediately began preparations to hold a special training session for federal law enforcement agencies, which would focus exclusively on the new law enforcement amendments. See FOIA Update, Fall 1986, at 8. The "Special FOIA Seminar for Law Enforcement Agencies" was conducted on February 4, 1987, and was attended by more than 300 representatives from virtually all federal agencies holding law enforcement responsibilities. This unprecedented, full-day session covered all aspects of the law enforcement provisions of the 1986 FOIA amendments, and it also served as a forum for the discussion of law enforcement issues arising under the Act. Particular attention was paid to the Act's new exclusion

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provisions and to the need for especially careful handling of any possible exclusion situation; all agencies were advised not to apply these new provisions without first consulting the Department's Office of Information and Privacy.

Subsequently, the Justice Department issued the "Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act" (December 1987), its most significant step to guide the implementation of the Act's new law enforcement provisions.[47] This publication is designed to serve as the principal reference guide to the 1986 FOIA amendments, containing all pertinent implementation guidance under a single cover.[48] It continues the longstanding tradition of issuing such Attorney General's memoranda to guide the implementation of the Act and its major amendments. The Attorney General issued such a

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[47] Much of this implementation guidance previously was provided in a more abbreviated form in the "Justice Department Guide to the Freedom of Information Act," which was published as part of the 1987 Freedom of Information Case List. The revised 1987 "Guide" included discussions of the Exemption 7 amendments and a new section addressing the exclusion provisions. See id. at 386-413, 414-20.

[48] Copies of this publication have been widely distributed by the Department to FOIA personnel throughout the Federal Government -- including through JURIS, the Department's automated legal research system -- as well as to interested congressional offices. Additionally, the Government Printing Office printed several thousand copies for sale to the public at the nominal price of $2.00 per copy and has disseminated copies to federal depository libraries nationwide.

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memorandum upon the FOIA's original enactment[49] and again to guide the implementation of the 1974 FOIA amendments.[50]

This publication contains a detailed, 30-page analysis of the various law enforcement amendments made in 1986, including an introductory discussion of the history of the 1986 FOIA amendments overall.[51] The memorandum notes that there is only limited and conflicting legislative history underlying the 1986 amendments, but observes that the earlier committee report prepared by the Senate Judiciary Committee on virtually the identical Exemption 7 amendments can be consulted authoritatively as to those amendments.[52] Beyond that, the memorandum analyzes the amendments according to their clear statutory terms and evident plain meaning.

Parts B through F of the memorandum discuss each of the Exemption 7 language modifications made by the 1986 FOIA

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[49] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967).

[50] Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Feb. 1975).

[51] _See_ Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), Part A.

[52] This committee report, Senate Report No. 98-221, was formally issued by the Senate Judiciary Committee during the 98th Congress when the Senate unanimously passed S. 774, the major predecessor FOIA reform bill to the Freedom of Information Reform Act of 1986. In addition to containing Exemption 7 amendments virtually identical to those ultimately enacted, that predecessor bill also contained a provision substantially the same as the enacted (c)(2) exclusion. _See_ S. Rep. No. 221, 98th Cong., 1st Sess. 44 (1983); _see also id._ at 25.

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amendments, with reference made wherever applicable to the early court decisions that consider the effects of the modifications. The memorandum thus gives federal agencies the best available guidance on the meaning and proper implementation of these amendments.

Of particularly great importance is the guidance given regarding the Act's new exclusion provisions, whereby certain law enforcement records can be treated as not subject to the Act at all. Each of these three new exclusions is discussed in detail in Parts G.1, G.2 and G.3 of the memorandum, with special emphasis on the specific circumstances that must be found to currently exist before each exclusion can properly be employed. Where the statute's special exclusion requirements and temporal limitations are not fully met, the memorandum stresses, the use or continued use of an exclusion simply is not warranted.[53]

The memorandum also explicitly recognizes the novelty of these new exclusions; a sound understanding of the fundamental nature of a record exclusion -- as opposed to the more familiar FOIA exemption -- is absolutely essential to its proper implementation. Thus, Part G.4 of the memorandum addresses the exact nature and operation of the exclusion mechanism, carefully distinguishing its use from the invocation

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53 See, e.g., Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), at 21-22, 24 n.43, 25 n.46.

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of a FOIA exemption -- and especially from the application of what is known as the "Glomarization" principle, by which an agency may simply refuse to confirm or deny the existence of any record responsive to a FOIA request on the basis of a specified FOIA exemption.[54] The exclusion technique affords a higher level of protection than even "Glomarization" -- because when properly employed in exceptional situations, it leaves the requester without any signal whatsoever as to the possible existence of records responsive to a specially targeted FOIA request.

Likewise, because of the extraordinary and unfamiliar nature of the new exclusion mechanism, the memorandum further addresses the foreseeable procedural considerations surrounding its implementation, including the special procedural aspects of handling exclusion matters both administratively and in court.[55]

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[54] The courts first recognized this principle in Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976), where the CIA, on national security grounds under FOIA Exemption 1, refused to confirm or deny the existence of certain records pertaining to the Glomar Explorer submarine-retrieval ship. Consequently, this "neither confirm nor deny" defense under the FOIA has come to be known colloquially by the term "Glomarization," see FOIA Update, Spring 1983, at 5, and it has been applied in connection with other specified exemptions as well, see FOIA Update, Spring 1986, at 2 (Exemption 6); FOIA Update, Winter 1986, at 3-4 (Exemption 7(C)).

[55] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), Part G.5. For example, special care is required at every stage of the administrative process to ensure that the agency's actions do not undermine the integrity of an exclusion action being taken (e.g., by inadvertently signalling to a requester that records are being excluded). See, e.g., id. at 28 n.49, 29 n.52. By the same token, agencies must ensure the proper maintenance of all excluded records, against the possibility that they will at some

(continued...)

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The memorandum sets forth a comprehensive litigation policy for the handling of possible cases in which exclusion issues arise, including those in which the requester alleges that records have been excluded but that is not in fact the case.[56] The Department's policy is to do everything it reasonably can to handle this special exclusion authority in the most responsible manner possible.[57]

Finally, the memorandum specifically cautions all federal law enforcement agencies to treat these special new exclusions with the utmost care and to consider their possible applicability only in close consultation with the Justice Department, on a case-by-case basis.[58]

Appended to the "Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act" are copies of the policy guidance statements of the Office of Management and Budget and the Department of Justice on the new fee and fee waiver provisions of the 1986 FOIA amendments, respectively, which are discussed below. Also included was a copy of the Act

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55 (...continued) point be required to be processed under the usual standards should the exclusion cease to apply. See id. at 28 n.51.

56 See id. at 29-30.

57 See, e.g., id. at 30 n.53.

58 See id. at 27 n.48.

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in its amended form, with interlineations showing the exact statutory modifications made.

3. <u>The Fee and Fee Waiver Provisions of the 1986 Act</u>

The second part of the 1986 FOIA amendments completely revised the statutory provisions governing the charging of fees to requesters for the expenses incurred by agencies in the handling of their FOIA requests, and the granting of fee waivers for requests found to be made in the public interest.

First, the amendments established an entirely new statutory fee structure, in subsection (a)(4)(A) of the Act, which now governs the making of fee determinations. Under this new fee structure, agencies not only can charge requesters for the costs of searching for and duplicating requested records, as under previous law, they also can charge certain requesters for the costs of reviewing the records for purposes of making disclosure determinations.[59] This new structure, however, distinguishes among three basic classes of FOIA requesters and limits the fees that can be assessed against them accordingly.

Under these provisions, all requesters who seek information for a "commercial use" now can be assessed the new record review fees as well as the usual costs of record search

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[59] *See* 5 U.S.C. § 552(a)(4)(A)(ii), (iv), *as enacted by* Pub. L. No. 99-570, § 1803 (1986).

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and duplication.[60] The ordinary FOIA requester, on the other hand, cannot be assessed such review fees but continues to be assessed fees for record search and duplication, as under prior law, except that certain minimum fee amounts may no longer be assessed.[61]

The fee provisions also created a third class of FOIA requesters: those requesters who seek information not for a "commercial use" and who are determined to be an "educational institution," a "noncommercial scientific institution," or a "representative of the news media."[62] Such requesters have the benefit of a specific fee limitation under the amended Act excluding them from the assessment of search fees. This is a categorical entitlement, one based solely upon the identity and nature of the requester, not upon the contents of the particular records sought.

In addition to these basic fee and fee-limitation provisions, the 1986 FOIA amendments also revised the Act's

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60 5 U.S.C. § 552(a)(4)(A)(ii)(I), as enacted by Pub. L. No. 99-570, § 1803 (1986).

61 Noncommercial requesters no longer may be assessed fees "for the first two hours of search time or for the first one hundred pages of duplication," and a requester cannot be required to pay any fee that does not exceed an agency's "costs of routine collection and processing" of it. 5 U.S.C. § 552(a)(4)(A)(iv)(I), (II), as enacted by Pub. L. No. 99-570, § 1803 (1986).

62 5 U.S.C. § 552(a)(4)(A)(ii)(II), as enacted by Pub. L. No. 99-570, § 1803 (1986).

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statutory standard governing the general waiver or reduction of fees on the basis of the "public interest" -- commonly referred to by the term "fee waiver."[63] All FOIA requesters are entitled to seek such a general waiver of the fees applicable to them, on the basis that the agency's disclosure of the particular records sought, to that requester, would be "in the public interest."[64]

This revised statutory "public interest" standard now more specifically defines that term than did the previous law: It provides for the waiver or reduction of fees wherever it is determined that disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[65]

Finally, as a procedural matter, the 1986 FOIA amendments for the first time required that all federal agencies promulgate individual agency regulations setting forth both

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[63] It is important to distinguish between such "public interest" FOIA fee waivers, on the one hand, and the new FOIA fee limitations that are provided for educational, scientific and news media requesters under the amended Act, on the other. The latter fee limitation is applicable categorically to such types of requesters but pertains only to search fees.

[64] 5 U.S.C. § 552(a)(4)(A)(iii), as enacted by Pub. L. No. 99-570, § 1803 (1986).

[65] Id. The 1986 FOIA amendments also altered the standard of judicial review for the adjudication of fee waiver issues in court, specifying that such issues shall be reviewed de novo, but that the scope of review is limited to the administrative record prepared before the agency. 5 U.S.C. § 552(a)(4)(A)(vii), as enacted by Pub. L. No. 99-570, § 1803 (1986).

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specific schedules of FOIA fees and also their procedures and standards for making fee waiver determinations.[66] Each agency's fee schedule must conform to uniform fee guidelines promulgated by the Office of Management and Budget ("OMB"). Thus, the amendments shifted to OMB the government-wide FOIA guidance responsibility regarding matters of FOIA fees, without affecting the Department of Justice's policy responsibility regarding FOIA fee waivers as well as all other issues arising under the FOIA.

4. Implementation of the Revised Fee Provisions

The implementation of the new fee provisions of the 1986 FOIA amendments proceeded in multiple steps, first at OMB and then at the individual agencies. Before long, the 180-day implementation period for these amendments proved to be highly unrealistic. Under the amendments, the preparation of each agency's implementing regulations had to await the issuance of the uniform fee guidelines by OMB. OMB's Office of Information and Regulatory Affairs moved as expeditiously as possible to prepare such government-wide fee guidelines and publish them for the required public notice and comment but, because of the complexity of this process, and that of the subject matter involved, OMB's Uniform Freedom of Information Act Fee Schedule and Guidelines were not published until March 27, 1987 (52 Fed. Reg. 10011). That was only 30 days before the end of the

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[66] See 5 U.S.C. § 552(a)(4)(A)(i), as enacted by Pub. L. No. 99-570, § 1803 (1986).

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statutory 180-day implementation period, so federal agencies were unable to prepare their new fee regulations and have them in place in time. Each set of individual agency regulations had to proceed through the same notice-and-comment process, which required that they could not take effect until 30 days after publication in final form.[67]

This process took most federal agencies well beyond the effective date of the fee amendments, leaving them in an extraordinary "interim period" between that date and the date upon which their regulations took final effect,[68] and the Department of Justice assisted OMB and other agencies regarding the novel concerns that were presented. Consistent with the Act's specific implementation provision for fee matters,[69] the Department afforded all FOIA requesters the maximum benefits of both the old and the new fee provisions during this "interim period." Further, on behalf of OMB, the Department formally communicated this same implementation policy to all federal agencies through FOIA Update (Winter/Spring 1987, at 1-2),

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[67] OMB specifically determined that this 30-day waiting period under 5 U.S.C. § 553(d) would be applicable to all implementing fee regulations issued by individual agencies.

[68] For example, the Department of Justice's implementing fee regulations were published in final form on September 2, 1987, 52 Fed. Reg. 33229, and took effect on October 2, 1987.

[69] See Pub. L. No. 99-570, § 1804(b)(2) (not codified) (specifying that the new review charges may not be imposed before final issuance of implementing regulations).

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together with a descriptive discussion of other implementation issues.

5. Implementation of the New Fee Waiver Standard

At the same time, the Department of Justice also issued a revised fee waiver policy guidance concerning the standards for the granting of fee waivers under the 1986 FOIA amendments. Those amendments specifically required federal agencies for the first time to adopt provisions addressing the subject of fee waivers, both substantively and procedurally, in their individual FOIA fee regulations.[70] As with all of its policy guidance in other areas (see pp. 68-89 *infra*) the Department prepared its revised fee waiver guidance in furtherance of its statutory responsibility to provide government-wide policy guidance and to assist all federal agencies in their implementation of the FOIA.[71]

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70 *See* 5 U.S.C. § 552(a)(4)(A)(i), *as enacted by* Pub. L. No. 99-570, § 1803 (1986).

71 There occasionally has been some question about whether the Department's fee waiver policy guidance is "binding" on other federal agencies. The simple answer is that it is not, because the Department of Justice has no direct authority to compel another federal agency to follow its FOIA policy guidance. This is equally as true for fee waiver policy matters as for any other FOIA matter in which the Department encourages uniform agency compliance with the Act in accordance with 5 U.S.C. § 552(e). However, where an agency has violated the requirements of the FOIA and is sued, the Department can decline to defend the suit, and has done so in some instances.

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This guidance memorandum, entitled "New Fee Waiver Policy Guidance," was distributed to the heads of all federal agencies on April 2, 1987, as well as to all federal agency FOIA personnel through the Department's FOIA Update publication (Winter/Spring 1987, at 3-10).

This fee waiver policy guidance provided advice to assist the agencies in incorporating the specific terms of the new statutory standard into their implementing regulations and, in turn, in applying the new standard in the often-difficult day-to-day process of making fee waiver determinations. Like previous such guidance issued by the Department,[72] it focused closely on the exact language of the fee waiver standard enacted by Congress and upon how it should most appropriately be applied by the agencies in deciding specific fee waiver requests.

The guidance identified six individual analytical factors to be considered in making fee determinations, so that those determinations can be made intelligently and even-handedly, on a case-by-case basis, in accordance with the Act's requirements. Each of the factors derives clearly and directly

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[72] The Department of Justice has long provided specific policy guidance on the subject of fee waivers, including through formal policy statements issued at the Assistant Attorney General level or higher. Former Assistant Attorney General for Legal Policy Jonathan C. Rose had issued fee waiver policy guidance in early 1983, FOIA Update, Jan. 1983, at 3-4, which I had supplemented through a specific fee waiver policy statement issued in 1986 regarding record-repository institutions, FOIA Update, Summer 1986, at 3.

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from the language of the revised statutory "public interest" standard, which establishes two basic requirements for the waiver or reduction of fees: first, that the disclosure in question "is likely to contribute significantly to public understanding of the operations or activities of the government," and second, that it "is not primarily in the commercial interest of the requester."[73]

To determine whether the first of these two basic fee waiver requirements is met in any given case, an agency should consider four factors, according to the statute's own terms: (1) the subject of the request -- i.e., whether the subject of the requested records concerns "the operations or activities of the government"; (2) the informative value of the information to be disclosed -- i.e., whether the disclosure is "likely to contribute" to an understanding of that subject; (3) the contribution likely to result from disclosure -- i.e., whether the requested disclosure will contribute to "public understanding"; and (4) the significance of the contribution to public understanding -- i.e., whether that contribution will be, as the statute requires, "significant."

To determine whether the second basic statutory requirement is met, an agency should consider two additional factors: (5) the existence and magnitude of a commercial interest -- i.e., whether the requester has a "commercial

[73] 5 U.S.C. § 552(a)(4)(A)(iii), as enacted by Pub. L. No. 99-570, § 1803 (1986).

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interest" that would be furthered by the requested disclosure and, if so, the extent of such interest; and (6) the primary interest in disclosure -- i.e., whether the magnitude of any commercial interest is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

Where it is determined that a public interest would be served by the requested disclosure, and is not outweighed by any commercial interest of the requester, a fee waiver or reduction "is compelled by the statute and should be granted freely and promptly by the agency."[74]

Consideration of these six analytical factors is plainly required by the terms of the specific statutory standard enacted to govern fee waiver decisionmaking. In setting them forth succinctly in this guidance memorandum -- with elaborated analysis and discussion of relevant case law under each -- the Department has provided sound, detailed guidance that adheres closely to the revised statutory terms and greatly assists all federal agencies in their implementation of this new provision.[75]

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[74] New Fee Waiver Policy Guidance (Apr. 2, 1987) at 3-4 (footnote omitted), reprinted in FOIA Update, Winter/Spring 1987, at 4-5.

[75] The guidance memorandum additionally addressed certain procedural matters pertaining to fee waiver determinations, expressly reaffirming the Department's 1983 guidance on such (continued...)

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I am aware that this guidance memorandum has been the subject of no small amount of dispute, Mr. Chairman, just as the predecessor fee waiver policy guidance issued by the Justice Department under the prior statutory fee waiver standard was likewise controversial in many quarters. To a certain extent, I recognize, this is inevitable: In such a policy area as government information disclosure -- particularly on issues of fees and fee policy, it seems -- there always will exist strongly conflicting interests which yield sharply differing points of view. Yet the controversy that has arisen on this particular subject has sometimes been misplaced.

For example, almost immediately after this guidance memorandum was issued, there were assertions that the Department somehow had improperly "ignored" the "legislative history" of the new fee waiver provision.[76] That simply is not true. While the available legislative history of the 1986 FOIA amendments is limited -- essentially consisting of floor statements placed in the record by individual Members of Congress without any

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[75](...continued) procedural matters (FOIA Update, Jan. 1983, at 4), and urged all agencies to contact the Department's Office of Information and Privacy regarding any fee waiver question that might arise. See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 12, reprinted in FOIA Update, Winter/Spring 1987, at 10.

[76] This was the position taken by the Chairman of the House Subcommittee on Government Information, Justice and Agriculture. However, the agencies overwhelmingly declined his suggestion that they not follow the Department's fee waiver guidance in their implementing regulations and fee waiver decisionmaking.

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committee deliberation -- it was fully evaluated and taken into consideration by the Department in the preparation of all of its implementation guidance.

However, just as with the law enforcement amendments already discussed,[77] the individual legislative statements made regarding the fee waiver revision were found to be quite conflicting, both among themselves and also, in some cases, with the plain language of the new statutory provision itself. For example, though one such legislative statement suggested that fee waivers should be granted where disclosure could contribute to public understanding in "any meaningful way,"[78] the specific language of the statute requires the contribution to be a "significant" one.[79] On this very point, a different legislative statement asserted that the word "significant" should "be given its common force and weight."[80]

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[77] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987) at 3-4 & n.5.

[78] 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986).

[79] The Department's fee waiver guidance memorandum does specifically admonish agencies to apply the "significant" requirement in as objective a fashion as possible: "This [requirement] does not permit a separate value judgment by the agency as to whether the information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is 'important' enough to be made public." New Fee Waiver Policy Guidance (Apr. 2, 1987) at 9, reprinted in FOIA Update, Winter/Spring 1987, at 8.

[80] 132 Cong. Rec. S16505 (daily ed. Oct. 15, 1986).

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Similarly, one legislative statement asserted that "public understanding" would be "enhanced every time that a single citizen uses the FOIA,"[81] thereby suggesting that a fee waiver should be granted under the revised standard every time even a single individual gains an understanding of the operations and activities of government through the disclosure sought. This suggestion for blanket fee waivers, however, is at odds with the express terms of the statutory standard, which provides for a fee waiver if the disclosure contributes significantly to the "public interest" in promoting "public" understanding. A conflicting legislative statement urged "that the qualifying word 'public' be applied so as to require a breadth of benefit beyond any particularly narrow interests that might be presented."[82]

In fact, on this particular point it should be noted that the Department of Justice receives numerous FOIA requests that are made by individuals, many of them prisoners, seeking access to records that pertain solely to themselves.[83] Many other federal agencies regularly receive numerous such requests as well. We see no basis in the language of the statutory standard enacted by the Congress that would require a public interest fee waiver for such an individual requester merely

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[81] 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986).

[82] 132 Cong. Rec. S16505 (daily ed. Oct. 15, 1986).

[83] Because many kinds of criminal law enforcement records, for example, are categorically exempt from access under the Privacy Act of 1974, 5 U.S.C. § 552a(j)(2), the subjects of those records could have access to those records only under the FOIA.

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because his own understanding of the operations or activities of the government would be "enhanced" by a FOIA disclosure of information to him -- without any showing of benefit to the public.[84] Some of the other legislative statements on the fee waiver issue similarly suggest results that cannot be squared with the plain language of the statutory standard enacted by the Congress.

Therefore, as with the law enforcement provisions of the 1986 FOIA amendments, the Department's policy guidance on the new fee waiver provision is based upon and quite faithfully adheres to the clear statutory language of the provision itself. This fully conforms with the well-established rule of statutory construction that the meaning of a statutory provision should ordinarily be determined according to the language of the statute itself and its plain meaning should be applied.[85]

Indeed, the Department's identification of the six fee waiver criteria as the proper ones to be considered under the revised standard has been supported by recent fee waiver case

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[84] A recent appellate court decision, in its preliminary consideration of the new statutory standard, emphasized that, for a waiver to be appropriate, it must be shown that "the primary benefit of turning over the documents sought would be to the general public rather than to the applicant." Savage v. CIA, 826 F.2d 561, 563 (7th Cir. 1987) (citation omitted).

[85] See, e.g., United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C. Cir. 1987).

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law as well. While judicial interpretation of the new fee waiver standard has as yet been somewhat sparse, it is significant that the government's fee waiver position has been upheld by both appellate decisions to apply the new standard and the Department of Justice's fee waiver criteria thus far.

The Ninth Circuit Court of Appeals in McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987), ruled that public interest group requesters are not presumptively entitled to fee waivers under the new standard and that, just like any other requester, they must satisfy the requisite statutory standard in each case in order to obtain documents without charge. The court specifically approved the defendant agency's implementing fee waiver criteria, which were essentially identical to those set forth in the Department's fee waiver guidance; based upon those criteria, it concluded that the disclosure in question would not make the significant contribution to public understanding required by the statutory standard. See 835 F.2d at 1286-87.

More recently, the D.C. Circuit, in Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988), held that, even where the subject matter of a FOIA request is clearly of interest to the general public, the revised statutory standard demands more than just "establishing a public interest in [that] subject matter." Specifically, it concluded that a requester must be able to demonstrate an ability "to disseminate the information to the

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public" before a fee waiver can be considered warranted; a requester's failure to demonstrate such an ability "alone is sufficient basis for denying [a] fee waiver request." Id. This construction of the terms of the statutory standard itself comports precisely with the Department's specific fee waiver guidance that a requester must show both an intention and an ability to disseminate the requested information to the general public, because absent such dissemination there can be no "significant contribution to public understanding" as required by the statute.[86]

6. The Question of Categorical Entitlement to Fee Waivers

The most controversial issue that has arisen since the issuance of the Department's new fee waiver guidance is whether certain types of FOIA requesters should be regarded as "categorically" entitled to a fee waiver simply on the basis of their status as a particular requester type. Some groups (certain media entities, public interest groups, and other organizations) have contended that they should have the benefit of an across-the-board legal presumption in their favor under the fee waiver standard -- in effect, that they should always receive a complete waiver of fees, regardless of what information is requested or actually disclosed, just because it is they who are doing the asking.

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86 See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 8, reprinted in FOIA Update, Winter/Spring 1987, at 7-8.

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The acceptance of such a position, of course, would forever relieve such requesters from any obligation to specifically identify a "public interest" to be served by the particular disclosure sought in their FOIA requests -- or, for that matter, to necessarily be careful to make only true "public interest" requests.

The Department of Justice firmly resists such claims of categorical entitlement to fee waivers as contrary to the statutory fee waiver standard, as well as sound public policy. First of all, such claims of categorical entitlement for any particular group of FOIA requesters cannot be squared with the Act's revised fee structure, which already provides a categorical limitation on fees for certain categories of requesters. Under this structure, educational and scientific institutions and bona fide representatives of the news media may be charged only duplication fees and are categorically entitled not to be charged search fees.[87] In light of this specific treatment for these categories of requesters, it would make no sense to conclude that they are also categorically entitled to a waiver of all duplication fees associated with their requests under the public interest fee waiver standard;[88] that interpretation would render

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[87] <u>See</u> 5 U.S.C. § 552(a)(4)(A)(ii)(II), <u>as enacted by</u> Pub. L. No. 99-570, § 1803 (1986).

[88] However, it <u>is</u> reasonable to presume that established media requesters, when engaged in traditional newsgathering (continued...)

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entirely superfluous the particular fee-limitation provision specifically crafted by the Congress for such requesters.

Thus, the decision by the Congress not to specify any category of FOIA requester that would be entitled to special treatment under the fee waiver provision compels the conclusion that no particular type of requester is categorically entitled to a fee waiver, automatically, in all cases.[89]

Moreover, establishing any such categorical entitlement to fee waivers would violate sound public policy, not to mention simple common sense, because not all requests from a certain category of requester will necessarily involve information the disclosure of which would significantly increase public understanding of government operations or activities.[90] Although

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[88](...continued) activities, should not be considered to be acting primarily in their commercial interest, notwithstanding the fundamentally commercial nature of their business. In almost all such instances, if any substantial public interest is found to exist, the connection between a FOIA disclosure and the commercial return realized by a news organization will be so attenuated and small as to presumptively be outweighed. The Department's fee waiver guidance memorandum explicitly articulates this presumption. See New Fee Waiver Policy Guidance (Apr. 2, 1987) at 11, reprinted in FOIA Update, Winter/Spring 1987, at 10.

[89] Cf. Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C. Cir.) (rejecting such categorical interpretation for indigents under previous fee waiver standard because Congress did not choose to create such favored category), cert. denied, 471 U.S. 1106 (1985).

[90] The Ninth Circuit in the McClellan decision, 835 F.2d at 1285-86, specifically rejected an attempt by the plaintiffs to establish such a presumption that all FOIA fees should be waived (continued...)

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certainly a representative of the news media or an established "public interest" group is more likely than most requesters to make a request that would readily satisfy the statutory standard,[91] this likelihood alone should not give rise to a categorical entitlement to a waiver for all such requesters in all cases. Providing such favored treatment could result in wide-ranging requests from such requesters running far afield of the requisites of the actual statutory standard. Surely that would not be within anyone's reasonable definition of the "public interest."[92] Rather, all fee waiver requests should be decided in an individual fashion, on their demonstrated merits, in

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[90](...continued) whenever a request is made by a "public interest" group. This decision comports with the remarks on this point in even the broadest of the individual legislative statements made on the subject of fee waivers, which observed that "public interest groups . . . will be able to qualify for fee waivers and thereby obtain documents without charge <u>if their requests meet the standard for waivers</u>." 132 Cong. Rec. H9463 (daily ed. Oct. 8, 1986) (emphasis added).

[91] Indeed, the Department's fee waiver guidance memorandum specifically recognizes that media representatives and other groups with established dissemination capabilities should readily be able to make a showing sufficient to satisfy the statutory standard in this critical respect. <u>See</u> New Fee Waiver Policy Guidance (Apr. 2, 1987) at 8, <u>reprinted in FOIA Update</u>, Winter/Spring 1987, at 8. The Department has long encouraged agencies to give such requesters the benefit of this recognition. <u>See FOIA Update</u>, Fall 1983, at 14 (specifically including this point under previous fee waiver guidance).

[92] One court considering a broad "public interest" fee waiver claim was moved to observe: "[T]he meaning of 'public interest' cannot become so broad and far-reaching that the public interest fee waiver is converted into the rule and not the exception." <u>Conklin v. United States</u>, 654 F. Supp. 1104, 1106 (D. Colo. 1987).

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proper satisfaction of the plain requirements of the specific "public interest" standard chosen by the Congress.

This issue of categorical fee waiver entitlement has been raised most pointedly under the new fee waiver standard by the National Security Archive. As the Subcommittee perhaps is aware, that organization's stated objective is to acquire, package and sell FOIA-requested government records, pursuant to a predetermined sales schedule, to subscribing libraries and other customers.[93] Essentially, it has set itself up as a broker of government information -- information that could be obtained by any requester directly from the government -- and it now claims a categorical entitlement to public interest fee waivers in connection with any type of FOIA request it chooses to make, deeming itself always to be acting in the "public interest" when making FOIA requests regardless of what kind of information it seeks.[94]

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93 See "A Development Grant Proposal For The National Security Archive" (revised Mar. 1, 1986), at 1-2 & n.1 In addition to its "archival" function, the Archive apparently plans to sell microform copies of specialized segments of its collections to its subscribing customers. See id.; see also FOIA Update, Winter 1986, at 1-2. In its efforts to establish its initial collection, the Archive has pursued enormous numbers of FOIA requests, many massive in scope, on a wide variety of subjects at many national security-related agencies.

94 See National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C.), Complaint, filed Dec. 17, 1986, at ¶ 41. In its own words, the Archive asserts that it "is therefore institutionally qualified for and presumptively entitled to fee waivers in all of its FOIA requests pending before [the agency]." Id.

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This very concern about potential misuse of the fee waiver provision by such record repositories is what prompted the issuance of my supplemental fee waiver policy guidance regarding such institutions in November 1986.[95] I was then, and continue to be, greatly concerned about the prospect of large-scale FOIA requests being filed by record-repository institutions who categorically seek fee waivers merely on the basis of their status as such. It is contrary to sound public policy to ask the taxpayers to unconditionally support such institutions, without regard to the specifics of what is being requested and how it will be used to benefit the general public. Unlike documents provided to <u>individuals</u> who satisfy the fee waiver standard because they are disseminated directly to the public in a way that serves the "public interest," a large proportion of documents provided to such <u>record repositories</u> may, for all that is known, never be used to serve the "public interest" in any way. The Department's policy guidance on this point therefore clearly specifies that their fee waiver requests, like those of any other requester, should be decided on a case-by-case basis.[96]

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95 <u>See</u> Supplemental Fee Waiver Guidance (Nov. 12, 1986), <u>reprinted in FOIA Update</u>, Summer 1986, at 3.

96 My 1986 guidance emphasized that fee waiver requests from such record-repository institutions should be analyzed in each case to determine whether any particular person will use and disseminate the requested information to the benefit of the public. <u>See id</u>. This guidance later was incorporated into the Department's revised, comprehensive fee waiver guidance. <u>See</u> New Fee Waiver Policy Guidance (Apr. 2, 1987) at 8-9, <u>reprinted in FOIA Update</u>, Winter/Spring 1987, at 8.

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No one should have illusions, though, that the price of such "categorical" folly would be borne only by the taxpayers (indirectly) and government administrators (more directly). It would be borne also by every other FOIA requester, each of whom necessarily would be disadvantaged by such an organizational requester's preferential treatment. All FOIA requesters, like it or not, unavoidably compete for a finite supply of agency time and taxpayer resources. The realization of a single FOIA requester's self-interest, to the degree contemplated here, can easily work to all other FOIA requesters' detriment.

Indeed, it seems that all the dispute and controversy over the Department's fee waiver policy guidance -- when stripped of its rhetoric and analyzed for what it really is -- essentially boils down to the objections of certain groups to what is for them the unacceptable idea that they are not categorically entitled to a fee waiver or taxpayer subsidy just by virtue of their asking. But there is no room for anything other than firm disagreement with such claims of entitlement -- that particular requesters should not be required to show their satisfaction of the statutory standard. The clear statutory command requires no less. As I have made plain, the Department simply cannot agree with the notion of categorical fee waiver entitlement and it has opposed it wherever it has been raised, including before the

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courts in pending litigation.[97] I suspect that this controversy will ultimately be put to rest only in that forum.

7. Other Issues Concerning the Fee Provisions

A related controversy in the general fee area merits a brief discussion concerning the amended Act's new fee limitation provisions -- which provide complete exemption from search fees for the three favored categories of requesters -- and their proper implementation by OMB and, in turn, by individual agencies. This particular controversy concerns the proper definitions of the terms "educational institution," "noncommercial scientific institution," and "representative of the news media" under these provisions. OMB holds policy responsibility under the 1986 amendments for all FOIA fee and fee-limitation matters. Because I understand that OMB is not being requested by the Subcommittee to testify as to the implementation of these amendments, or as to current FOIA fee practices, I have included a discussion of this issue in order to present a comprehensive overview of the government's implementation activities.

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97 See, e.g., National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C.), Answer, filed Jan. 30, 1987, at ¶ 41. This issue has been raised in another pending case, in which the Department has opposed a claim that historical researchers are presumptively entitled to public interest fee waivers. See Fitzgibbon v. Agency for Int'l Development, Civil No. 87-1548 (D.D.C.), Defendants' Memorandum In Opposition to Plaintiff's Cross-Motion For Summary Judgment, filed Feb. 5, 1988, at 3-4.

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One of the first issues to arise in litigation concerning the new fee structure was whether an agency's new fee regulations -- specifically, its definitions of these categories of favored requesters -- could be defended on the ground that they conformed to OMB's uniform fee guidelines. In the recent case of National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C. June 16, 1988) (appeal pending), the Archive argued that OMB's fee guidelines were not controlling with respect to agency definitions of these special categories of requesters and that the Department of Defense's definitions (identical to those set forth by OMB and deemed not to encompass the plaintiff Archive) should be struck down as contrary to the statutory language and underlying legislative intent.[98]

The district court firmly rejected this challenge. Without deciding whether OMB's fee guidelines are necessarily controlling, the court observed that the 1986 FOIA amendments expressly delegated to the agencies the responsibility of implementing the new fee structure. See slip op. at 3. The court squarely upheld the Department of Defense's definitions as a reasonable implementation of the statutory language. See id. at 9-13. It held, in short, that the Archive does not fall

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98 See National Security Archive v. Department of Defense, Civil No. 86-3454 (D.D.C.), Plaintiff's Second Motion For Summary Judgment, filed Nov. 20, 1987, at 31-33.

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within the reasonable definition of any of the three favored categories.

This first decision on this contentious issue carries great government-wide significance, because virtually all federal agencies' fee regulations contain category definitions identical to those challenged in this case. There doubtless will be further disputes over the precise contours of these special fee-limitation categories. As far as government-wide implementation policy in this area is concerned, the Department of Justice leaves such matters to OMB and the individual agencies for resolution.

III. OTHER GUIDANCE ACTIVITIES

Apart from the Department of Justice's guidance activities regarding the implementation of the 1986 FOIA amendments, it has for many years engaged in numerous government-wide activities designed to guide the proper interpretation and implementation of the Act overall. For the past seven years, these FOIA guidance responsibilities have been discharged through the Office of Information and Privacy, which is part of the Department's Office of Legal Policy.

OIP was created near the beginning of this Administration to serve as a central location for the handling of the Department's major FOIA responsibilities. Two predecessor

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offices were merged: the former Office of Privacy and Information Appeals, which primarily held responsibility for adjudicating all administrative appeals from FOIA access denials by Department components; and the former Office of Information Law and Policy, which discharged the Department's government-wide policy guidance responsibilities under the Act.

The consolidation of these two offices' functions and resources into OIP -- which is headed by two co-directors and has a combined attorney and paralegal staff of nearly thirty -- greatly strengthened the Department's functioning in this important area. This has been especially so with respect to OIP's ability to engage in government-wide FOIA policy guidance activities, under the supervision of the Assistant Attorney General for Legal Policy.

Over the course of the past several years, OIP has considerably enhanced the Department's capability to provide government-wide FOIA policy advice and guidance through its many publication, training and advisory activities. OIP has been able to achieve this, along with handling its other FOIA responsibilities (including the adjudication of a growing number of initial requests and administrative appeals), with no increase to its staff complement. Both the breadth and depth of these activities have far exceeded all previous such efforts, which has been necessary to meet the increasing demands for high-quality

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FOIA advice and guidance that have been made upon the Department.

A. FOIA Policy Initiatives

Most significantly, OIP has undertaken to examine a wide range of legal and policy issues arising under the Act, including some critical issues never before addressed, and to formulate cogent policy statements and initiatives for the guidance of all federal agencies. Major policy initiatives have been undertaken in such important areas as the protection of business information, the proper application of the attorney work-product privilege, the protection of sensitive settlement-negotiation data, the interaction of the FOIA and the Copyright Act, the protection of personal privacy interests, and the handling of congressional requests for access to agency records. OIP's policy guidance in these and other subject matter areas has become firmly established in both administrative practice and applicable FOIA case law.

In providing its detailed, written analyses on a range of both substantive and procedural FOIA issues -- all of which are disseminated through its FOIA Update publication -- OIP guides all agencies in their understanding of these issues and promotes their proper and uniform resolution throughout the Federal Government. Major highlights of the subjects addressed in FOIA Update during this Administration are:

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1981

-- The disclosure and protection of information regarding federal employees and job performance.[99]

-- The relationship between the FOIA and access through civil discovery.[100]

1982

-- The complex interrelationship of the FOIA and the Privacy Act with civil discovery rules and practices.[101]

-- The procedural protections to be afforded submitters of business information requested under the FOIA (guidance issued in coordination with the Presidential Task Force on Regulatory Relief).[102]

-- The status of "personal notes" under the FOIA.[103]

-- The proper "referral" of FOIA requests for records originating at other agencies.[104]

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[99] See FOIA Update, June 1981, at 4. See also FOIA Update, Sept. 1982, at 3 (follow-up guidance).

[100] See FOIA Update, Dec. 1981, at 10. See also FOIA Update, Summer 1985, at 5 (follow-up guidance).

[101] See FOIA Update, Mar. 1982, at 3. See also FOIA Update, Summer 1984, at 2 (follow-up guidance).

[102] See FOIA Update, June 1982, at 3. See also FOIA Update, Summer 1987, at 1-3 (follow-up guidance under Exec. Order No. 12600).

[103] See FOIA Update, June 1982, at 5. See also FOIA Update, Fall 1984, at 3-4 (follow-up guidance).

[104] See FOIA Update, June 1982, at 5. See also FOIA Update, Summer 1983, at 5 (follow-up guidance).

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-- The application of the threshold requirement of Exemption 5 in connection with "outside" recommendations received by agencies.[105]

-- The delineation under Exemption 6 of sensitive from nonsensitive personnel information and mailing-list data.[106]

-- The disclosure of personal information pertaining to deceased persons under the FOIA.[107]

-- The balancing of public interests against personal privacy interests under Exemptions 6 and 7(C).[108]

<u>1983</u>

-- The proper handling of procedural considerations surrounding the making of fee waiver determinations (procedural guidance issued together with previous fee waiver policy guidance).[109]

-- The protection of "draft" documents under Exemption 5.[110]

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105 See FOIA Update, June 1982, at 10.

106 See FOIA Update, Sept. 1982, at 3.

107 See FOIA Update, Sept. 1982, at 5.

108 See FOIA Update, Sept. 1982, at 6.

109 See FOIA Update, Jan. 1983, at 4.

110 See FOIA Update, Jan. 1983, at 6. See also FOIA Update, Spring 1986, at 2 (follow-up guidance).

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-- The interplay of the Privacy Act and Exemption 3.[111]

-- The circumstances under which an agency can be deemed to have waived its right to invoke a FOIA exemption.[112]

-- The legal and policy considerations according to which agencies should rule on requests for special expedited FOIA processing.[113]

-- The use of the attorney work-product privilege under Exemption 5.[114]

-- The handling of copyrighted materials under the FOIA, including the status of the Copyright Act under Exemption 3 and its interplay with Exemption 4.[115]

-- The treatment of unit prices under Exemption 4.[116]

-- The use of "cut-off" dates for determining records responsive to FOIA requests.[117]

-- The protection of commercial information under Exemption 5.[118]

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[111] See FOIA Update, Spring 1983, at 3. See also FOIA Update, Fall 1984, at 4 (follow-up guidance).

[112] See FOIA Update, Spring 1983, at 6.

[113] See FOIA Update, Summer 1983, at 3.

[114] See FOIA Update, Summer 1983, at 6. See also FOIA Update, Fall 1984, at 6 (follow-up guidance).

[115] See FOIA Update, Fall 1983, at 3-5.

[116] See FOIA Update, Fall 1983, at 10-11. See also FOIA Update, Fall 1984, at 4 (follow-up guidance).

[117] See FOIA Update, Fall 1983, at 14.

[118] See FOIA Update, Fall 1983, at 14.

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-- The lesser-known "third test" for the protection of sensitive commercial information under Exemption 4.[119]

1984

-- The handling of congressional requests for access to agency records and the significance under the FOIA of congressional disclosures.[120]

-- The unique "burden" protection afforded under Exemption 2.[121]

-- The "generic" protection available for law enforcement records under Exemption 7(A).[122]

-- The inability to regard another federal agency as a "confidential source" under Exemption 7(D).[123]

-- The delineation of "personal records" from "agency records" under the FOIA.[124]

-- The significance of the Federal Acquisition Regulation under Exemption 4.[125]

-- The protection of factual information in accordance

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119 See FOIA Update, Fall 1983, at 15.

120 See FOIA Update, Winter 1984, at 3-4.

121 See FOIA Update, Winter 1984, at 10-11.

122 See FOIA Update, Spring 1984, at 3-4.

123 See FOIA Update, Spring 1984, at 7.

124 See FOIA Update, Fall 1984, at 3-4.

125 See FOIA Update, Fall 1984, at 4. See also FOIA Update, Winter 1986, at 6 (follow-up guidance).

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with the full contours of the attorney work-product privilege under Exemption 5.[126]

1985

-- The protection of records having "intrinsic commercial value" under Exemption 4.[127]

-- The proper treatment of the identities of FOIA and Privacy Act requesters under the FOIA.[128]

-- The use of the attorney-client privilege under Exemption 5.[129]

-- The making of "automatic" disclosures under the Act.[130]

-- The status of "discretionary" disclosures under Exemption 4.[131]

-- The use of the FOIA for discovery purposes.[132]

-- The applicability of "preclusion" doctrines (res judicata and collateral estoppel) under the FOIA.[133]

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126 See FOIA Update, Fall 1984, at 6. See also FOIA Update, Summer 1987, at 4-5 (follow-up guidance).

127 See FOIA Update, Winter 1985, at 3-4.

128 See FOIA Update, Winter 1985, at 6.

129 See FOIA Update, Spring 1985, at 3-4.

130 See FOIA Update, Spring 1985, at 6.

131 See FOIA Update, Summer 1985, at 3.

132 See FOIA Update, Summer 1985, at 5.

133 See FOIA Update, Summer 1985, at 6.

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-- The necessary protection of settlement-negotiation records under Exemptions 4 and 5.[134]

1986

-- The application of the "Glomarization" (neither confirm nor deny) principle to protect personal privacy interests in law enforcement records under Exemption 7(C).[135]

-- The propriety of processing all first-party access requests under the FOIA even if they cite the Privacy Act and not the FOIA.[136]

-- The protection of the identities of persons who write letters to government officials, under Exemptions 6 and 7(C).[137]

-- The handling of a FOIA requester who breaches a commitment to pay properly assessed fees.[138]

-- The treatment of federal personnel mailing lists under Exemptions 2 and 6.[139]

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134 See FOIA Update, Fall 1985, at 3-4.

135 See FOIA Update, Winter 1986, at 3-4. See also FOIA Update, Spring 1986, at 2 (follow-up guidance).

136 See FOIA Update, Winter 1986, at 6 (declining to adopt contrary suggestion by OMB).

137 See FOIA Update, Winter 1986, at 6.

138 See FOIA Update, Spring 1986, at 2.

139 See FOIA Update, Summer 1986, at 3-4.

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-- The status of the Trade Secrets Act, 18 U.S.C. § 1905, under Exemption 3.[140]

-- The treatment of factual information under the deliberative process privilege and Exemption 5.[141]

1987

-- The proper handling of procedural considerations surrounding the Act's new fee and fee waiver provisions, particularly during the "interim period" before new agency regulations took effect.[142]

-- The procedural protections to be afforded submitters of business information through agency regulations implementing Executive Order No. 12600.[143]

-- The protection of witness statements in accordance with the attorney work-product privilege under Exemption 5, among other possible FOIA grounds.[144]

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140 See FOIA Update, Summer 1986, at 6.

141 See FOIA Update, Summer 1986, at 6.

142 See FOIA Update, Winter/Spring 1987, at 1-2 (issued in coordination with OMB).

143 See FOIA Update, Summer 1987, at 1. Executive Order No. 12600, which was prepared by the Executive Office of the President with the assistance of OIP, formally required all executive departments and agencies to promulgate regulations specifically providing certain "submitter-notice" protections for submitters of business information that could be requested under the FOIA. See 52 Fed. Reg. 23781 (June 23, 1987), reprinted in FOIA Update, Summer 1987, at 2-3. See also, e.g., 53 Fed. Reg. 27161 (July 19, 1988), to be codified at 28 C.F.R. § 16.7 (Justice Department "submitter-notice" regulation).

144 See FOIA Update, Summer 1987, at 4-5.

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B. FOIA Update

As has been noted, OIP's primary means of disseminating its formal FOIA advice and policy guidance is through FOIA Update, its quarterly policy publication. This publication was initiated by the Department in late 1979 for the general purpose of promoting the proper administration of the Act.[145] Since 1982, OIP has upgraded both the content and scope of FOIA Update and has employed it as a high-quality vehicle for the wide dissemination of policy guidance and FOIA-related information.[146]

The Department's major policy statements on FOIA issues are presented in FOIA Update as "OIP Guidance" or "FOIA Counselor" analyses. In 1982, OIP inaugurated an additional FOIA Update feature, the "FOIA Counselor Q & A," through which it can address many specific questions or policy issues in a concise and efficient manner. Since then, OIP has answered literally dozens of such questions through this "Q & A" format, most of which

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[145] See FOIA Update, Autumn 1979, at 1.

[146] More than 3,000 copies of FOIA Update are distributed to agency FOIA personnel throughout the Federal Government and to other interested governmental recipients without charge. FOIA Update is also sold through the Government Printing Office to nongovernmental subscribers at the nominal cost of $5.00 per year; in 1987, it had a paid circulation of 1,225.

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derive directly from the "FOIA Counselor" telephone inquiries that it receives.[147]

OIP also has devoted some entire issues of FOIA Update to a single theme or subject under the Act. One such issue addressed the protection of privacy interests under the FOIA's privacy exemptions.[148] Another addressed various issues surrounding the Act's treatment of business information.[149] A third such theme issue dealt with law enforcement records and the protections available for them under the Act.[150]

Other expanded features of FOIA Update have served to keep agency FOIA personnel advised of various aspects of FOIA administration and practice. Through its "On Agency Practice" feature, FOIA Update has surveyed and addressed agency practices in a variety of areas, such as privacy protection,[151] the assessment of fees,[152] business-information processing,[153] FOIA

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[147] As is described below, OIP's "FOIA Counselor" service constitutes a major part of its FOIA guidance activities. Its use has increased dramatically over the years, in no small part due to the fact that it has been widely publicized (with its special telephone number, 633-FOIA) through this FOIA Update feature.

[148] See FOIA Update, Sept. 1982.

[149] See FOIA Update, Fall 1983.

[150] See FOIA Update, Spring 1984.

[151] See FOIA Update, Sept. 1982, at 1-2.

[152] See FOIA Update, Jan. 1983, at 1-2.

(continued...)

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training,[154] national-security classification,[155] litigation procedures,[156] and the mechanics of FOIA processing.[157] Likewise, its expanded "Significant New Decisions" and "Supreme Court Update" features have kept agencies fully abreast of major FOIA judicial decisions, as have its many "Legislative Update" articles tracked the ups and downs of FOIA reform and other legislative developments as they have occurred.[158]

In sum, the Department has greatly improved its government-wide dissemination of FOIA advice and policy guidance in recent years through OIP's development of its FOIA Update publication. Any comparison of this publication since 1982 with its earlier editions will reveal the full measure of that quantitative and qualitative development.

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[153] (...continued)

[153] See FOIA Update, Fall 1983, at 1, 12. See also FOIA Update, June 1982, at 4-5.

[154] See FOIA Update, Winter 1984, at 1, 2, 6. See also FOIA Update, Summer 1986, at 1-2.

[155] See FOIA Update, Winter 1985, at 1-2.

[156] See FOIA Update, Summer 1985, at 1-2.

[157] See FOIA Update, Fall 1985, at 1-2.

[158] Other items of information regularly provided in FOIA Update include quarterly listings of FOIA training opportunities and detailed listings (updated every two years) of the principal FOIA legal and administrative contacts at all federal agencies. See, e.g., FOIA Update, Winter 1988, at i-iv (current FOIA contact list). Additionally, a cumulative index to FOIA Update through 1987 can be found in the Fall 1987 issue, at pp. i-viii.

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C. Case List and "Justice Department Guide to the FOIA"

A second publication by which OIP disseminates FOIA information and policy guidance is its annual Freedom of Information Case List, which now also includes the "Justice Department Guide to the Freedom of Information Act."

The Case List was begun by the Department many years ago in order to establish a useful compilation of all FOIA decisions of precedential significance, which could be updated annually. The September 1987 edition has grown to include more than 2,700 such FOIA decisions -- each of which is carefully indexed according to specific subject matter topics -- and also contains an indexed list of Privacy Act cases, various other specialized lists of access cases, a comprehensive list of related law review articles, and copies of all of the major federal access statutes. The 1988 version presently is in preparation.

The "Justice Department Guide to the Freedom of Information Act" has come to be perhaps the most vital part of this Case List publication. Originally known as the "Short Guide to the FOIA," it was originated by the Department in the late 1970's as a brief supplement to the Case List that provided a general overview of the Act's basic provisions.

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In 1982, OIP prepared a completely new "Short Guide" which more comprehensively discussed the issues arising under the Act with more detailed reference to applicable FOIA case law. Since then, as OIP has expanded and updated this document each year, it has grown to serve as the principal government reference guide to the Act's implementation.

Indeed, what is now known as the "Justice Department Guide to the FOIA" -- because it no longer is at all "short" -- is a highly detailed, 143-page discussion of the Act's major substantive and procedural aspects, presented with extensive references to the evolving FOIA case law that governs the proper interpretation and application of the Act's provisions.[159] It is widely used by federal agency FOIA personnel and also those outside the Federal Government as both an introductory overview of the Act as well as the most detailed, up-to-date analysis of even its finest points.[160] OIP's development of the former "Short Guide" into such a comprehensive FOIA treatise has immeasurably enhanced the understanding and proper application of

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[159] "Justice Department Guide to the Freedom of Information Act" (1987 edition), published in Freedom of Information Case List (Sept. 1987), pp. 315-457.

[160] As part of the Case List, the "Guide" is disseminated each year to thousands of recipients throughout the Federal Government (including by electronic access through the Department's JURIS System) and is distributed to the public directly through the Government Printing Office and also through federal depository libraries. Additionally, the "Guide" has also been reproduced, almost verbatim, as the major chapter of a privately published loose-leaf volume dealing with the FOIA. See J. Franklin & R. Bouchard, Guidebook to the Freedom of Information and Privacy Acts, pp. 1-9 through 1-156 (2d ed. 1986).

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the FOIA throughout the Federal Government and the entire FOIA community.[161]

D. FOIA Training Activities

Similarly, OIP has greatly expanded the Department's government-wide FOIA training activities during the past seven years. The careful training of all FOIA personnel throughout the federal government is essential to the Act's proper and uniform administration. Such instruction is particularly crucial due to the relatively high turnover of FOIA duty assignments at most federal agencies -- with new employees often thrust into this area with little relevant experience or preparation -- and the fact that many agency employees necessarily become involved in FOIA matters on a part-time or ancillary-duty basis.

In recognition of this, OIP has instituted a number of measures to increase both the range and depth of the FOIA training that is made available to all agency FOIA personnel. Prior to OIP's creation, the Department offered a single basic FOIA training course that served as the government's primary FOIA training program but covered the Privacy Act as well; it was offered, through the Department's Legal Education Institute

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[161] One measure of this development (and of the FOIA industry generally) is that the current "Justice Guide" is more than five times greater in length than the "Short Guide" that existed in 1980.

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("LEI"), three or four times per year and, as structured, did not fully meet the agencies' FOIA training needs.

In 1982, OIP redesigned this course with LEI to make it a two-day program of instruction devoted entirely to the FOIA that could be offered five or six times annually.[162] This restructured training program, entitled "The Freedom of Information Act for Attorneys and Access Professionals," soon became very heavily subscribed; even with its increased number of offerings, and with a maximum class size of nearly 100 for each session, the demand for it far exceeded its available training capacity.

OIP took several further steps to meet this high FOIA training demand. In 1982, it took a survey through <u>FOIA Update</u> of all federal agencies to determine the volume and range of their FOIA training needs.[163] Based upon the results of this survey, OIP developed a new training session, its "Advanced Seminar on the FOIA," which it inaugurated in 1983 to meet the

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162 In this reconfiguration, the Privacy Act instruction was broken out into a separate new seminar that was offered twice per year, beginning in 1983, in coordination with OMB, which holds government-wide policy responsibility for the Privacy Act. Though this Privacy Act seminar subsequently was discontinued for a period of time, it was reinstated in 1987 at OIP's urging.

163 <u>See</u> <u>FOIA Update</u>, Mar. 1982, at 8. <u>See also</u> <u>FOIA Update</u>, Sept. 1982, at 8.

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FOIA training needs of experienced FOIA personnel.[164] Toward this same end, it added another new FOIA course the following year, entitled "Introduction to the FOIA for Non-Specialists," which it designed to meet FOIA training needs at the other end of the spectrum, i.e., to provide a half-day of instruction to those agency employees whose involvement with the Act requires no more than introductory training.

Although OIP's presentation of each of these two new sessions twice each year as of 1984 helped to offset the increasing demand for FOIA training, that demand nevertheless continued to grow. In fact, during the next two years the demand for participation in the Department's basic, two-day FOIA course grew to the point at which it regularly received more than 200 applications for less than 100 available spaces in each program. This course was accordingly conducted for a record number of participants during 1984 and 1985, including through a special "double session" held in July 1984 to accommodate more than 200 students.

In 1986, OIP took an additional step in its efforts to

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164 This special FOIA seminar, which has been conducted by OIP twice annually since 1983, is limited to a selected group of only the most experienced agency FOIA personnel and is designed to cover matters not able to be addressed in the basic FOIA course. It regularly includes, for example, a guest presentation from a prominent member of the FOIA community on the topic of "FOIA From the Non-Governmental Perspective."

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meet this undiminishing demand.[165] Based upon the premise that many agency FOIA employees primarily require only a periodic training update on recent FOIA developments, OIP developed a new FOIA training seminar designed to satisfy that exact need. Entitled the "Annual Update Seminar on the FOIA," this new training session was offered for the first time in the fall of 1986 and drew nearly 250 attendees. It now is conducted by OIP during the first week of October each year immediately upon completion of the annual "Justice Department Guide to the FOIA," a special pre-publication copy of which is provided to all seminar participants.

In addition to its integral role in these FOIA training programs offered directly by the Department, OIP also has drawn extensively upon its professional staff to support other government-sponsored FOIA training programs -- principally those conducted by the Office of Personnel Management and the USDA Graduate School -- as well as such training sessions held by

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165 The Department's FOIA training courses have consistently been the most heavily subscribed LEI training programs over the past several years, with the highest attendance rates as well. As of 1986, the Department continued to receive between 225-275 agency applications for each offering of the basic, two-day course. Early in that year, though, LEI suffered severe budgetary constraints and related difficulties which limited its ability to maintain its role in FOIA training. _See_ _FOIA Update_, Winter 1986, at 8. To ensure the uninterrupted availability of high-quality FOIA training, however, OIP assumed LEI's organizational role and has continued to provide the full roster of FOIA training programs, partly under the auspices of the Department's Office of Legal Education, since that time. _See_ _FOIA Update_, Summer 1986, at 1-2.

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nongovernmental organizations.[166] Each year for the past several years, OIP representatives have made literally scores of presentations at a variety of FOIA training sessions, including many that are tailored by OIP to meet the particular needs of individual federal agencies.[167] Through its heavy devotion of attention and resources to the training of agency FOIA personnel throughout the Federal Government, we believe that OIP has considerably enhanced the Department's leadership role in this area.

E. FOIA Counseling

The final major component of the Department's government-wide FOIA guidance activities is its advice-giving function, which is undertaken primarily through OIP's "FOIA Counselor" service. The Department established the "FOIA Counselor" mechanism many years ago, as a means of encouraging agencies to raise their questions about the Act to the Department for its attention and resolution. Such questions can range from basic informational queries to requests for a dispositive

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[166] The availability of FOIA training is made widely known through the "FOIA Training Opportunities" feature which regularly appears in FOIA Update.

[167] See FOIA Update, Summer 1986, at 2; FOIA Update, Winter 1984, at 6. OIP's extensive training activities, as well as its other government-wide guidance activities, are regularly described in detail in the Department's Annual FOIA Report to Congress. See, e.g., "Description of Department of Justice Efforts to Encourage Agency Compliance with the Act" (contained in the Department's 1987 Annual FOIA Report), at 148-52.

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analysis of all legal issues necessarily involved in a specific FOIA determination.

Most such questions take the form of telephone inquiries about pending or contemplated FOIA actions,[168] but often such matters require more extensive consultations. In all instances, it is essential for any agency employee working on a FOIA matter to know that an experienced Justice Department attorney is available to address any question that might arise.

Since 1982, OIP has placed increased emphasis upon this vital service, which has resulted in large increases in the volume of its usage year after year. By promoting it through prominent mention in FOIA Update and in all of its training programs, and through the use of a special, readily remembered "hotline" number (633-FOIA), OIP has steadily increased agency reliance upon its "FOIA Counselor" service. It now receives more than 2,000 such inquiries annually -- a more than two-fold increase over pre-1982 "FOIA Counselor" activity. This service thus has become an integral part of the Act's government-wide implementation.

Additionally, OIP has continued the Department's related "ombudsman" role of responding to requests for assistance

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[168] The Justice Department's FOIA policy regulation specifically encourages any agency intending to deny a FOIA request raising a novel issue to consult with the Department before doing so. See 28 C.F.R. § 0.23a(b) (1987).

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received from dissatisfied FOIA requesters who believe that the federal agencies processing their requests are operating contrary to, or under a misunderstanding of, applicable legal requirements. In pursuing the relative handful of such assistance requests received each year, OIP attempts to ensure that there is an accurate understanding of the law and that the agency involved achieves full and proper compliance with its FOIA obligations.[169] Last year, FOIA Update specially highlighted the availability of this traditional Justice Department service to FOIA requesters.[170]

IV. CONCLUSION

In conclusion, Mr. Chairman, I would like to say that I very much appreciate this opportunity to set forth the Department of Justice's policy perspectives and accomplishments regarding the Freedom of Information Act. The Department is justifiably proud of its long tradition of government-wide guidance activities in this area -- including its most recent implementation activities under the 1986 FOIA amendments -- and it is particularly proud of the fact that these FOIA guidance activities have been expanded and upgraded considerably during

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169 While OIP does not interfere with an ongoing administrative appeal process, nor does it involve itself in this way in a matter that has proceeded to litigation, it is available to examine any specific allegations of agency noncompliance with the Act that are brought to its attention.

170 See FOIA Update, Fall 1987, at 2.

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the past seven years of the Administration and through the creation of the Office of Information and Privacy.

While I recognize that there always will be differences of opinion in so volatile a public policy area as government information disclosure, such differences should be placed in perspective and not be portrayed as broader than they actually are. There certainly has been a great deal of public debate and controversy over the particular subject of "public interest" fee waivers under the FOIA -- and, to a somewhat lesser extent, over the making of fee determinations generally -- but even that derives almost entirely from inevitably conflicting public and private interests. Moreover, the undeniable fact remains that there has been little if any basis or occasion for dispute over the wide range of policy initiatives and activities undertaken by the Department in all other FOIA subject matter areas.

It is not always an easy task to achieve a proper balance among the several "public interests" that uniquely coincide -- and often conflict -- under the Freedom of Information Act. Yet we all must continue to pursue that equilibrium. The strong public interest in fostering governmental accountability through the disclosure of records simply cannot be considered in a vacuum. Rather, it is incumbent upon us as government officials to recognize -- and to accommodate -- those other legitimate public interests in protecting sensitive records, promoting governmental efficiency

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and fiscal responsibility, and minimizing the use of taxpayer subsidies under FOIA for purely private interests.

The administration of the Freedom of Information Act, which promotes valuable citizenship participation in government, is a very important part of our federal system. It has benefited from your efforts, Mr. Chairman, in working towards a balanced approach under the Act. I can assure you that as the Department of Justice continues to work towards achieving this balance, it remains committed to the full and faithful implementation of the Act -- to consistently achieving, in the words of both the Supreme Court and the Senate Judiciary Committee, "the fullest responsible disclosure."[171]

I would be pleased to address any question that you or any other Member of the Subcommittee might have on this subject.

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171 Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)).

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