EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

July 31, 1984

LEGISLATIVE REFERRAL MEMORANDUM

Legislative Liaison Officer

TO:

SEE DISTRIBUTION LIST

SUBJECT: Draft Justice testimony on S. 774, the Freedom of Information Reform Act

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than Friday, 8/3/84
(NOTE: A hearing before the a subcommittee of the House Government Operation Committee is scheduled for 8/9/84.)
Direct your questions to me at (395-4870).

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: F. Fielding
C. Wirtz
R. Veeder
K. Wilson
S. Galebach

JUL 31 2 00 PM '84

DISTRIBUTION:

Department of Education
Department of Housing and Urban Development
Federal Emergency Management Agency
General Services Administration
National Aeronautics and Space Administration
Central Intelligence Agency
National Security Council
Office of Personnel Management
Department of Health and Human Services
Department of State
Department of the Treasury
Department of Energy
Environmental Protection Agency
Department of Agriculture
Department of Defense
Small Business Administration
Department of the Interior
Department of Transportation
Department of Commerce
Veterans Administration
United States Postal Service
Department of Labor

Declassified and Approved For Release 2013/09/13 : CIA-RDP92B01283R000100070004-5

D R A F T

STATEMENT OF

THE HONORABLE CAROL E. DINKINS

DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE

COMMITTEE ON GOVERNMENT OPERATIONS

UNITED STATES HOUSE OF REPRESENTATIVES

ON

S. 774

THE FREEDOM OF INFORMATION REFORM ACT

AUGUST 9, 1984

DRAFT FOIA TESTIMONY

D R A F T

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to testify in support of S. 774, a bill to amend the Freedom of Information Act. This bill sets forth a number of crucial and needed reforms in the provisions of that Act, while preserving entirely the salutary objectives of the FOIA in maintaining an informed citizenry. After careful consideration and refinement, this bill was unanimously approved by the Senate on February 27 of this year.

Former Assistant Attorney General Jonathan Rose appeared before this Subcommittee in July of 1981 to discuss proposed amendments to the FOIA then under consideration by the Administration. He told you then -- and I emphasize today -- that this Administration is firmly committed to the faithful implementation of the Freedom of Information Act by all federal agencies. We strongly support the basic purpose and philosophy of the Act: to inform the public as fully as possible of the conduct of its government in order to protect the integrity and effectiveness of the government itself. We are fully committed to carrying out the objectives and spirit of the Act.

We continue to strongly support this bill and we believe that it represents a successful compromise between the government's need to maintain the confidentiality of important law enforcement information and the public's right to know about the operations of their government. S. 774 also contains many needed

procedural reforms of the FOIA, including measures that would permit businesses that submit confidential information to the government to receive notice of its impending disclosure, allow the government to recoup a greater portion of the costs of processing many FOIA requests, and create more realistic time limits for the government to respond to FOIA requests.

I.

Previous witnesses before the Subcommittee have raised certain concerns over the administration of the Act, suggesting that any revision to the FOIA is too controversial to consider at this time. They have pointed to a few anecdotes of delays in receiving responses or instances of perceived resistance by some government personnel, and they have then suggested that no amendment to the Act be made.

I cannot doubt that in a few instances some persons have encountered difficulties in obtaining information under the Act that should not have been the case. I suspect that the perfect administrative mechanism has not been made and will never be achieved as long as it relies on large numbers of people for its implementation.

For our part, however, the Department of Justice is engaged in a multifaceted effort to improve both the propriety and the accuracy of agency actions under the Act. Of course, the Department has no direct binding authority over the actions of the other Executive agencies, and those agencies must be free to exercise the judgment and expertise in their own fields of responsibility. But the Department does engage in a number of

activities to fulfill its statutory mandate to encourage agencies to comply with the FOIA (see 5 U.S.C. § 552(d)). Expert Department employees conduct a comprehensive series of seminars and course instructions to train the personnel of other agencies on their proper responsibilities under the Act. We also publish an informative quarterly newsletter, FOIA Update, which is given wide circulation within the Executive Branch and sets forth the Department's guidance on a wide variety of issues, plus an inclusive FOIA Case List of judicial decisions and an analytical "Short Guide to the FOIA" describing the Act's substantive and procedural aspects. Our Office of Information and Privacy also responds to more than one thousand calls per year from agency personnel requesting advice on specific FOIA issues. We believe that these efforts contribute considerably to improving the administration of the FOIA by the various agencies.

Within the Department, we have taken efforts to monitor both the substantive decisions of the Department's various bureaus and divisions, and the timeliness of their responses. The Office of Information and Privacy is responsible for reviewing all appeals of denials by any component of the Department of Justice.

And the Department's ultimate control over all Executive agencies, where the Department of Justice represents them in court, is to review the agency's proposed position in litigation. In those relatively few instances where it is appropriate, the Department in fact has declined to defend the agency's actions and require a settlement of the case. This is as true in the defense of FOIA litigation, including fee waiver litigation, as

it is in all other areas of litigation conducted or supervised by the Department of Justice.

II.

The Department of Justice therefore welcomes these hearings and the opportunity to present for the benefit of the Subcommittee some of the facts about the administration of the FOIA. The agencies of the government, and the Department of Justice in particular, are in an excellent position to evaluate the effects of that Act. Persons who request information understandably can see only the delay in receiving a response, or the fact that some of the information they requested was withheld. Only those who take into consideration the perspective of the agency as well can fully understand why certain information is properly and necessarily withheld.

In considering the purposes of the FOIA, it is essential to keep in mind that the Act is not, and never could be, a statute with the single-minded purpose of disclosing government information. We all would agree, I am sure, that many kinds of information that the government has in its possession must be kept confidential, in order to protect important public interests. For example, agencies often must withhold information to protect the privacy of innocent third parties, to maintain the confidentiality of trade secrets, to avoid the disclosure of information affecting the security of the nation, or to prevent interference with pending criminal investigations and protect the identities of confidential sources who have penetrated criminal enterprises.

As important as the goal of openness may be, the countervailing interest in protecting such information from disclosure is often equally or much more important. Our government could not function effectively, for example, if the tax records or census responses of individuals were made public merely for the asking, if businesses could readily obtain the trade secrets of their competitors, or if the government were required to disclose the identities of its confidential informants.

The FOIA, then, reflects a balance between two sets of public and governmental goals. It is not a matter of a struggle of good against evil, but a balancing of two goods. Amendments to the Act, therefore, cannot reasonably be evaluated by the simplistic measure of whether they provide for more or less disclosure. The proper standard is whether the proposed amendments will bring about a better balance between the several purposes of the Act. And in that analysis, it is not a sufficient answer to a problem to say, "There already is an exemption that covers that." The pertinent inquiry is whether or not that existing exemption is in point of fact functioning the way Congress intended, to protect against the designated harm. In many respects, we submit that such a careful evaluation of the FOIA indicates that certain aspects of the Act are indeed not functioning as Congress intended and are instead disserving the public interest.

III.

Having discussed briefly the Department's general experience under the FOIA, and our efforts to encourage compliance by the

Department and by other agencies, let me turn now to a discussion of the specific legislative proposals that the Senate has unanimously approved. We candidly admit that these provisions would not solve all of the Department's concerns, particularly in the law enforcement area where the ingenuity of many criminals threatens the Department's ability to protect its essential investigatory information. We do believe, however, that these revisions would make an enormous improvement in those cases, such as organized crime, where the Department is most concerned about the adverse and unintended effects of the FOIA.

There is a long history of proposals to amend the FOIA. In the years following the substantial broadening of the Act in 1974, the Department of Justice and the government as a whole began to experience serious problems with some of the requirements and language of the FOIA. A study begun in 1979, following testimony before Congress, led former Attorney General Civiletti to prepare a comprehensive package of proposed amendments to the FOIA, recommending very substantial changes in the Act. I think it is important to remember that the Civiletti proposals were not so very different from the provisions of S. 774; indeed, in many respects they were more far-reaching. With your permission, Mr. Chairman, I would like to submit for the record a copy of former Attorney General Civiletti's recommended amendments.

When this Administration assumed office, the Department of Justice began an independent review of the problems that the FOIA has raised. We concluded that the FOIA has indeed created serious problems for the federal government; however, we also

found that -- as serious as these problems were -- the problems also tended to be specific ones that could be remedied without a wholesale revision of the FOIA. Accordingly, in October 1981, the Department testified before the Senate Subcommittee on the Constitution to present the Administration's proposed amendments to the FOIA. That proposal was introduced in the 97th Congress as S. 1751 and H.R. 4505.

The Senate's Subcommittee on the Constitution gave extensive consideration to the issues relating to amendments to the FOIA, holding numerous days of hearings on all aspects of the proposals, hearings which fully took into consideration all viewpoints.

As a result of this extensive consideration, many of the Administration's proposals were soon incorporated into existing FOIA reform legislation -- S. 1730 -- that Senator Hatch had introduced only one month before. Commendably, Senator Hatch and his colleagues, particularly Senator DeConcini and Senator Leahy, carefully engrafted our proposals onto the provisions of S. 1730, producing a compromise set of proposed amendments to the FOIA that were drawn as narrowly as possible. The central purpose of our common efforts was ensure that the changes made to correct the deficiencies of the FOIA should not inadvertently infringe upon the overriding purposes of the Act.

The final version of S. 1730 was an excellent example of carefully drafted remedial legislation. We at the Department of Justice found that the bill redressed most, although not all, of the serious problems we had encountered with the FOIA. For

example, Director Webster of the FBI described the compromise as "an 8 on a scale of 10." Similarly, the various interest groups that initially had opposed any amendments to the Act accepted the compromise bill as a responsible and even-handed approach to reform of the FOIA. For example, I attach for the record a selection of newspaper editorials and articles commenting favorably on that compromise set of amendments over the last two years.

The present bill, S. 774, is almost identical to the Hatch bill of the last Congress. Three changes in the text of the bill were made by the Senate Judiciary Committee: first, a somewhat technical amendment changing the language of Exemption 7(C) from "would" to "could reasonably be expected to" result in an unwarranted invasion of personal privacy; second, a provision preventing an agency from retaining any of the FOIA fees they collect if it is found not to be in "substantial compliance" with the time limit provisions of the Act; and third, a provision requiring agencies to list in the Federal Register the Exemption 3 statutes upon which they intend to rely. With these few changes, the bill again was approved unanimously by the Senate Committee on the Judiciary. On February 27, 1984, the full Senate approved the measure by voice vote, with only two other changes: striking the term "royalty" from section 2 of the bill, and deleting the proposed technological data exemption in light of the special protection for such data provided by Congress in the Defense Department's 1983 authorization bill, codified at 10 U.S.C. § 140c.

Before turning to a summary of the specifics of this bill, I note that the Senate Judiciary Committee has amassed a considerable amount of testimony and other evidence during the course of considering this bill. I have here, Mr. Chairman, the two volume set of hearings during the 97th Congress, and a second two volume set of hearings in this Congress. I will leave these volumes for the Committee's use, and ask that I be permitted to submit for the record an index of those hearings identifying the testimony and other information in support of this bill. I would encourage anyone who doubts that the Department has made a case for the reforms in S. 774 to read this index and the four volumes of Senate hearings carefully before making any such assertion.

Law enforcement. The FOIA has become a major problem to the government's law enforcement agencies. The FBI has found that 16% of the FOIA requests it receives are from known or suspected criminals. In the case of the Drug Enforcement Administration, this number is even higher: over 80% of the FOIA requests the DEA receives are from imprisoned or known drug traffickers. The frequency with which criminals use the FOIA is itself an indicator of its usefulness to them. However, there also is direct evidence of the harmful effects the FOIA has had upon law enforcement. In the course of the hearings held last Congress on S. 1730, the Department provided to the Senate Judiciary Committee a list of over 200 documented cases where the FOIA had a harmful impact on law enforcement activities. These are not isolated anecdotes, but rather are a stark reflection of the adverse effects of the Act in the specific area of criminal law

enforcement. Moreover, in an executive session of the Senate Subcommittee, Director Webster of the FBI provided many additional examples of the use of the FOIA by criminals, terrorist groups, and hostile foreign intelligence agencies. That information is available to this Subcommittee. In February 1982, the DEA released a study it had conducted that found that 14% of the DEA's investigations were aborted, narrowed, compromised, or significantly complicated by the FOIA. With your permission, Mr. Chairman, I will submit for the record today copies of both the list of cases where the FOIA has harmed law enforcement and the DEA study.

The problems the FOIA creates for law enforcement agencies become especially acute when organized crime uses the Act to discover what the government knows about it. Organized criminal groups engage in a wide range of illegal activities and often have a long institutional memory. As a consequence, otherwise innocuous information that the government discloses under the FOIA to a member of an organized crime family or a drug trafficking conspiracy often can be pieced together with information already known to the requester to form a "mosaic" that reveals the identities of the government's confidential informants or the scope of the government's investigation.

S. 774 has several types of provisions that address the concerns regarding law enforcement information. The provisions of Exemption 7 would be modified slightly, not revised wholesale as some generalized objections have asserted. The introductory language of the provision would be revised to include law

enforcement information other than that developed in the course of a specific investigation -- for example, manuals of procedure or statements of prosecutorial priorities. Several of the specific standards of harm in Exemption 7 would be revised to cover information that "could reasonably be expected to" cause the specific harm -- e.g., identify confidential informants -- rather than the present standard that disclosure would cause that harm. The government of course would continue to bear the burden of proof in all cases, but this restatement of the necessary showing would give more appropriate recognition to the uncertainties that all too often prevail in the course of criminal investigations. Requiring certainty that disclosure would identify a confidential informant is too high a standard; it should be sufficient that a reasonable person reasonably would expect that result.

The Department of Justice believes that the bill will go a long way towards closing this very critical gap in the government's ability to maintain the confidentiality of its law enforcement files.

However, Mr. Chairman, I would like to take note of a problem of increasing concern to the Department of Justice. Criminal suspects can (and do) use the FOIA to determine whether law enforcement agencies such as the FBI are conducting investigations on them. Although Exemption 7(A) authorizes withholding the contents of open investigative files, the very acknowledgment of the existence of such records being withheld on that basis may provide an alarming tip-off to the suspect. Conversely, a

response that investigative records do not exist can confirm that a suspect has escaped detection thus far. Although the organized crime exclusion in S. 774 would resolve this problem in that context, this issue has become one of increasing concern to the Department in other criminal law enforcement areas as well. We understand that you have expressed an interest in addressing this question, Mr. Chairman, and we would be pleased to work closely with you in that effort.

Secret Service files. In past testimony before Congress, the Secret Service has revealed that many local police departments no longer share information with them because they believe that the Service will not be able to protect the information from mandatory disclosure under the FOIA. By 1977, this problem had grown to such an extent that the Secret Service testified that it recommended against President Carter visiting two cities because of fears that the Service could not protect the President's personal safety. Moreover, in 1981 the Secret Service testified that its informant information had dropped by 75% since the passage of the 1974 amendments to the FOIA. We endorse S. 774's provisions granting broader protection to the files the Secret Service compiles in connection with its protective functions.

Commercial information. Every year, thousands of businesses submit to the government many of their most important and confidential trade secrets and business records. However, there is no requirement in the FOIA that the government must notify these companies when it intends to release this information to the public. The seriousness of this shortcoming was shown by the

first panel of witnesses before this Subcommittee at the hearing held this past May. Those witnesses pointed to the unfortunate experience of Polaroid Corporation in being unable to learn from the agencies to which it had provided sensitive business secrets how widely that information had been disseminated outside the government. They also recounted the unhappy experience of the Monsanto Corporation which, as required by law, had provided to the EPA the formula it had developed for one of its most successful herbicides, Roundup. Through an error of judgment, employees of the EPA disclosed the formula to another company under the FOIA, without even notifying Monsanto. Of course, the FOIA did not actually require the EPA to turn over Monsanto's secret formula to the requester. However, the fact that Monsanto never received notice of the impending disclosure prevented it from opposing the release either before the EPA or in court.

Instances such as this, and others presented to this Subcommittee, show the wisdom of the bill's provisions requiring government agencies to notify businesses in advance whenever the agency intends to publicly release trade secrets or sensitive commercial information under the FOIA. S. 774 would not create any new exemption for confidential business information, but would simply provide -- just as the Administrative Procedure Act provides in so many other areas -- that the government will give individuals notice and an opportunity to object before it takes action harming their interests.

Manuals and examination materials. As is explained more fully in the Department's legislative report on S. 774, the FOIA

often compels the government to release the internal manuals and instructions that government agencies give to their investigators, auditors, and negotiators. Frequently, these materials set forth the government's confidential investigatory techniques and guidelines. Public disclosure of these manuals significantly hampers the government's ability to enforce the law, detect fraud, or acquire goods and services at competitive prices, since subjects of investigations or government suppliers may learn in advance what the government intends to do. Because of the crucial role that manuals and guidelines play in the government's law enforcement and acquisition programs, we strongly believe that they deserve more complete protection.

Personal privacy. In the normal course of government operations, numerous government agencies collect and maintain many types of personal information about individuals -- whether for purposes of social insurance benefits, loan guarantees, taxation, law enforcement, federal employment, or many other reasons. One can point to many laws Congress has enacted -- notably the Privacy Act of 1974 -- that exemplify the importance all of us attach to the interest in protecting personal privacy.

Anomalously, however, the FOIA may often permit a complete stranger to obtain access to government files that contain personal information about us. Often a requester's purpose is chiefly commercial -- credit bureaus, employment agencies, and life insurance companies rank among the most common users of the FOIA for this purpose -- but disclosure of personal information about us is an invasion of privacy nonetheless. Any system

providing for the public disclosure of government records must necessarily provide that information the government compiles about its citizens should be protected from those who would use it to invade our personal privacy. Although the amendments S. 774 would make to the FOIA's privacy exemptions perhaps could go further, we strongly support this effort to give Americans greater protection of their personal privacy.

Fees. One of the unexpected developments from the 1974 amendments to the FOIA has been the great volume of requests and the expense of processing those requests. Congress estimated that implementation of the 1974 amendments would cost no more than $40,000 to $100,000 annually. The direct cost of compliance with the Act by all agencies rose, however, to at least $57 million by 1980, and it certainly is much higher today. Frequently, the cost to the government of search and review bears little correlation to the public interest in disclosure, yet only three to four percent of this cost is typically recovered from requesters. We strongly support the bill's goals of ending public financing of requests that do not benefit the general public and encouraging all requesters to make reasonable efforts to narrow excessively broad requests.

We also endorse the bill's provision permitting an agency to charge a fair value fee for records containing commercially valuable technological information that was generated or procured by the government at substantial cost to the public, when the requester is likely to use the information for a commercial purpose and would deprive the government of this commercial

value. We believe that the government should not subsidize the development of commercially valuable information for the financial benefit of private commercial enterprises. We would also note that, in many cases, requests for such information deprive not only the government, but also the private firm that supplied the information to the government, of the information's commercial value. As noted earlier, the Senate has deleted the term "royalty," which caused concern among some groups as to its meaning.

Finally, we note that the bill would retain the provision in the current law that requires an agency to waive or reduce existing fees whenever a requested disclosure would primarily benefit the general public. Such waivers are intended to ensure that persons such as representatives of the media, public interest groups, and scholars have relatively inexpensive access to government records where disclosure of information to them would in turn be of primary benefit to the general public. The bill also provides for a categorical waiver of all new processing fees for researchers, journalists, and public interest groups. We believe that the bill's fee provisions overall represent a fair compromise in this sensitive area.

Time limits. The FOIA's unrealistic time limits have caused serious problems for the government and FOIA requesters alike. The short (10-day) time limit imposed on agencies for responding to and processing requests often forces agencies to respond prematurely or hurriedly. FOIA requesters, too, are dissatisfied with the present time limitations, which often mean that agencies

are not in statutory compliance and occasionally have caused needless litigation. Moreover, the "first-in, first-out" system established by the FOIA requires agencies to place even small requests at the end of their backlog, preventing agencies from acting quickly even in cases where a timely response is necessary. Finally, there is currently no specific authority for agencies to extend the strict ten-day time limits in order to notify submitters of confidential business information that disclosure of their information has been requested. We endorse S. 774's approach to this problem, which establishes more realistic deadlines to guide agency conduct.

I would like to take special notice of a provision in S. 774 that, for some reason, has received little attention by the representatives of the press who testified earlier at these hearings. Several of those witnesses complained of delays experienced by journalists in obtaining information under the Act. Most often, such delays are simply the inevitable result of the large backlogs of requests pending at particular agencies, combined by the requirements of the courts that such backlogs be handled in a first-come, first-served manner. Although journalists generally make up a very small proportion of requests at most agencies, they are inevitably affected by the backlogs of requests by others, many of whom seek information for their own use, not for any public interest. To ease this crowding-out problem to some extent, S. 774 would provide for accelerated consideration of FOIA requests made by the news media, and others who can demonstrate a need for expedited access to government records. We believe that this measure should respond to the

concerns of the journalistic community without undermining the time limit provisions of S. 774 overall.

Proper requests. S. 774 also contains three other provisions that we think are particularly important. First, in a provision proposed by Senator Hatch, the bill would permit the Attorney General to issue regulations that impose limitations upon FOIA requests by imprisoned felons, where it is determined that the limitations are needed in the interests of law enforcement and would not contravene the purposes of the Act. Second, the bill would limit the use of the FOIA as a substitute for normal discovery rules by parties in litigation with the government. This would be accomplished by simply extending the rather rigid time limits of the Act with respect to requests from parties in litigation with the government who could just as easily use document discovery procedures to obtain the information. Third, S. 774 would limit the availability of the FOIA's public access provisions tc United States citizens and resident aliens. We believe that this change would eliminate a number of burdensome requests now made of the government by foreign citizens and corporations. However, it would not impinge in any sense upon the FOIA's central purpose of providing information to United States citizens about the operation of their government.

In a brief aside, Mr. Chairman, I would like to address your concern, expressed in a letter to the Attorney General after your hearings last year on the Privacy Act of 1974, about this provision limiting the strict obligations of the FOIA to those who are United States citizens or lawfully admitted resident aliens. Those hearings on the Privacy Act led you to the

conclusion that, because aliens do not have enforceable rights under the Privacy Act (see 5 U.S.C. § 552a(a)(2)), they need to have continued access to records under the FOIA. We must respectfully disagree -- that to cure a minor perceived shortcoming in one aspect of the Privacy Act, the FOIA must be left with an expansive, open-ended obligation to give foreigners the same complete access as citizens have to information on the United States government and to information held by our government on citizens and on domestic businesses. If access by aliens to information on themselves held by the government is a significant concern, then perhaps this Subcommittee could consider a specific amendment to resolve that concern. Let me make clear that the Department of Justice has not taken any position in favor of such a change.

That very specific concern should not, however, defeat an amendment to the FOIA intended to address a far larger and quite different concern. The amendment to the FOIA at issue would not forbid aliens from obtaining information from the United States government, but simply would provide that the full panoply of special procedural and substantive rights made available by the FOIA to American citizens -- strict time limits, narrow exemptions to disclosure, de novo judicial review, attorneys' fees, reduced fees, administrative sanctions for failure to disclose and, if S. 774 were adopted, reverse FOIA procedures to protect the confidential business information of foreign corporations -- need not be extended to aliens as a matter of statutory right in every case.

I hope that this summary of the important changes S. 774 would make is useful. However, I think that it also is useful to look at what S. 774 would not do. The bill would not change the substantive or procedural standards governing the protection the FOIA gives to information that has been classified in the interests of national defense or foreign policy. Similarly, S. 774 would not change the scope or nature of the protections that the FOIA currently provides for trade secrets and confidential commercial information; as I have stated, the bill would do no more than give submitters of such information the right to be told of an intended disclosure and an opportunity to object. Overall, S. 774's narrowly-drawn protections should assist greatly in ensuring that agencies can strike the proper balance between the public's right to know and the government's need to maintain the confidentiality of non-public information.

In this regard, I think that it is important to point out once again just how well the Senate Committee has succeeded in striking this balance. In a study released in 1982, long before Senate passage of S. 774, a group categorically opposing any amendment of the FOIA listed over 500 instances where requesters had used the FOIA to obtain the disclosure of important government information. 1/ The examples listed in the study covered the entire gamut of the information the government keeps, from

---

1/ Campaign for Political Rights, Former Secrets (1982 E. Hendricks ed.).

consumer product safety information to national security information to tax information.

In his Senate testimony over one year ago, former Assistant Attorney General Rose stated that the Department had compared this study and S. 774 to gauge just how seriously this bill would have affected these hundreds of disclosures had it been in effect at the time. That study concluded that, of the more than 500 examples listed in the study, there were only four instances where S. 774 might have prevented the disclosure of the information in question -- and in each case there were sound reasons why the information that was required to be released should have been withheld. 2/

---

2/ Former Secrets, supra, pp. 53 (first and last examples) and 62 (first example), and 193 (last example). The first two examples both involved the disclosure of law enforcement files on organized crime, although it is unclear whether the particular documents that were disclosed were less than five years old, as S. 774 would require before they could be withheld. The first case involved allegations of organized crime's involvement in the American coal industry, while the second pertained to the Department of Justice's investigation of various Teamster pension funds. Both of the remaining examples are cases where internal government audit manuals were disclosed under the FOIA. The example recited on page 62 of the study was a request for an internal HUD audit manual. The example on page 193 of the study involved the disclosure of what appears to have been a multi-volume manual detailing auditing procedures for IRS agents.

In addition, there were seven examples of disclosure listed in the study where a request had been made by foreign citizens -- in one case by the government of the Soviet Union and another by a suspected Palestinian terrorist. See pp. 32, 73, 101, 105, 141, 145 and 177. Under S. 774, all seven requests could have been denied because they were not made by United States citizens or resident aliens; however, the information could have continued to be available to any United States citizen or resident who made the same request.

Although the opponents of S. 774 have had ample time to judge the results for themselves, no one has disputed this conclusion. Many of the witnesses before this Subcommittee have simply given examples of their use of the FOIA and praised its availability, but have not addressed the specifics of S. 774. Other witnesses made broad, generalized assertions that the provisions of S. 774 would have unspecified adverse results, but they have not made any effort whatsoever to provide concrete examples of harm.

Contrary to those unsupported expressions of concern, we believe that the evidence presented to this Subcommittee and to the Senate Committee on the Judiciary provides more than an ample basis to conclude that the provisions of S. 774 would in fact provide for greater protection against unwarranted disclosures while at the same time preserving the goals of public access under the FOIA. S. 774 would have virtually no impact upon the truly important public disclosures under the FOIA, yet would respond to many of the more than 200 documented examples where the Act has harmed law enforcement. This bill is a well-written and much needed proposal for adjusting the balance between disclosure and confidentiality that the FOIA is meant to embody.

* * *

In conclusion, I would like to thank you, Mr. Chairman, and the members of the Subcommittee, for your consideration of the proposed amendments to the FOIA which have now been so resoundingly approved by the Senate. I fully understand and appreciate your abiding concern to preserve the letter and spirit of the

Freedom of Information Act, which this Subcommittee has authored and approved. I only ask that you give equal attention to the demonstrable harmful impact that the Act has had, in ways I am sure were not intended by this Subcommittee.

In our view, and in the view of the Senate, S. 774 will give the government very real assistance in preserving the necessary confidentiality of the important government files relating to law enforcement and other subjects, without infringing on the Act's goals. We can see no reason to perpetuate the unintended abuses of the FOIA that our experience has uncovered. This is particularly true when legislation is available which would significantly limit those abuses without affecting whatsoever the continued vitality of the FOIA to serve the purposes for which it was enacted: to ensure that informed citizens have the means to learn of the operations of their government and that government operate in an open and responsible manner.

We look forward to working with Congress to achieve the prompt passage of this legislation.